UK PARTICIPATION IN EUROPEAN LITIGATION :

JUDGMENTS AND DECISIONS, JULY-DECEMBER 1988

A. COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

B. EUROPEAN CONVENTION ON HUMAN RIGHTS

A.1. ACTION INITIATED BY THE UNITED KINGDOM

Case 114/86 (EDF consultancy quotas)

The Commission operated a quota system, based on nationality, in drawing up short lists of consultants to undertake Community-funded projects under the Lome Conventions. This practice we challenged as being discriminatory. In a disappointing judgment, the Court ruled the case inadmissible on the technical ground that there was no "act" of the Commission which the Court could review. This was in spite of the Advocate General's finding that the Commission's plea of inadmissibility be rejected and his view that the Commission's application of nationality quotas plainly contravenes the principle of non-discrimination. The Commission has indicated to us privately that they are reviewing their procedures in the light of the court case, but it remains to be seen whether this will in fact lead to any real improvement.

3. We have good procedures for checking that proposals for legislation are in conformity with our Community obligations and our human rights obligations. But they are effective only if they are used. I should like to remind colleagues of the importance of submitting proposals to our "Euro-proofing" procedures at the earliest possible stage, so that any problems may be quickly identified and resolved.

4. I am sending copies of this minute and its attachment to Members of the Cabinet, the Lord Advocate and to Sir Robin Butler.

23 February 1989

for acts of the BMG in Berlin. The Commission found that there was insufficient noise to raise issues under the Convention; it thus avoided having to decide the question of its jurisdiction in relation to BMG, Berlin.

Viraj Mendis : Deportation to Sri Lanka

The Commission declined to make a last-minute request that the Home Secretary delay deportation; it subsequently declared Mendis's application inadmissible.

Osman : Extradition to Hong Kong

Osman, who is vigorously contesting his extradition in the British courts, complained to the Commission that to return him to Hong Kong meant returning him to China itself, since he faces a long prison sentence which would extend beyond 1987. The application was declared inadmissible.

Channel 4 : ban on TV re-enactment of "Birmingham Six" appeal

The Commission declared inadmissible Channel 4's complaint that the Court of Appeal's temporary ban on the re-enactment of each day's proceedings infringed Article 10 (freedom of expression).

CND and Others : interception of communications (before and after the 1987 Act)

The case was struck off when the applicants indicated - for reasons unknown - that they did not wish to pursue it.

PRIME MINISTER

PARTICIPATION BY THE UNITED KINGDOM IN CASES BEFORE THE EUROPEAN COURTS

1. I attach my six monthly review of noteworthy judgments in Community cases in Luxembourg in which the UK has been involved, and of human rights decisions involving the UK in Strasbourg.

2. I have adopted the same format as previously:

Section A: The European Court of Justice (Luxembourg)

1) Actions initiated by the UK

2) Actions initiated by the Commission against the UK

3) Actions in which interventions by the UK have been made.

4) Cases referred to the Court of Justice by UK courts and tribunals.

5) Cases referred to the Court of Justice by Courts of other Member States, in which the UK submitted observations.

6) Other cases of note.

Section B: European Convention on Human Rights.

1) Cases before the European Court of Human Rights (Strasbourg).

2) Cases before the European Commission of Human Rights.

A2. ACTIONS INITIATED BY THE COMMISSION AGAINST THE UNITED KINGDOM

Case 60/86 (Dim-Dip)

The Commission challenged the provision in our Motor Vehicle Regulations requiring the fitting of "dim-dip" headlamp devices" on all new vehicles as from 1 April 1987. The Court upheld the challenge. When the proceedings began I had placed our chances of success at not more than 50:50. The case is interesting for its reminder to us all that the Court adopts what it regards as a purposive approach to the interpretation of Community law, as distinct from the very different textual interpretation to which we are much more accustomed in this country.

A.6 OTHER CASES OF NOTE

Case 302/87 : Parliament v Council

Although the UK was not before the Court in this case, it is important in that it was decided for the first time that whilst the Parliament may be able to intervene in cases before the Court or bring an action against another Community institution for failure to act, it does not have the right to bring an action for annulment of Community legislation.

Case 160/88 : Hormones (Fedesa v Council)

The case is interesting in the context of the ongoing dispute between the EC and the USA with regard to the EC's ban on hormones in meat. It concerned a challenge to the validity of the 1988 Hormones Directive by a group of manufacturers, producers and distributors of the hormonal substances essentially on the ground that there was no scientific evidence to support the ban. The Court rejected the application as inadmissible. However, Case no. 331/88 : R -v- Minister of Agriculture, Fisheries and Food and the Secretary of State for Health ex parte Fedesa, which started as a challenge in the Divisional Court to the United Kingdom's implementing legislation (and thus also the Directive) and which has been referred to the Court of Justice, is still live. The United Kingdom will shortly be submitting Observations to the Court.

B.1 EUROPEAN COURT OF HUMAN RIGHTS (STRASBOURG)

Brogan and others: Prevention of Terrorism (Temporary Provisions) Act 1984.

The Court's judgment of 29 November found that, although the purpose for which the applicants were detained was consistent with the Convention, there was a violation of Article 5(3) in that the applicants had not been brought "promptly" before a judicial officer. The Court also held that the UK was in breach of Article 5(5) of the Convention which concerns a right of compensation for those arrested or detained in contravention of Article 5. As you are aware, it has not yet been possible to devise for the whole of the Kingdom a suitable system of judicial supervision of detention under the Prevention of Terrorism Act. On 23 December 1988, therefore, the UK gave notice of derogation from the provisions of Article 5(3) in accordance with Article 15 of the Convention. We are continuing to examine possibilities of implementing the Convention, as now interpreted, without the necessity of derogating.

Weeks: Review of discretionary life sentence (Article 50: just satisfaction).

Weeks had been sentenced to life imprisonment for a relatively minor offence; his personality disorders made it desirable that his progress should be kept under review by the authorities.

In its judgment of 2 March 1987 the Court had held that the UK was in breach of Article 5(4) of the Convention, which concerns the entitlement to take proceedings to test the lawfulness of detention. In a second judgment of 5 October 1988 the Court awarded the applicant the sum of £8,000 damages.

A.5. CASES REFERRED TO THE COURT OF JUSTICE BY COURTS OF OTHER MEMBER STATES

Case 263/86 (Humbel : Educational enrolment fees)

This is the last of a short series of cases concerning education in Member States. The UK submitted observations because we were concerned by the argument raised by the defendant in the Belgian proceedings that state education was a service within the provisions of the Treaty. Had he succeeded it would have made it impossible for Member States to make different provision, for example as to fees, for nationals of other States. The Court confirmed its finding in earlier cases that education services provided by the State did not fall within the definition of services within the Treaty

very important

CBD.

A.3 INTERVENTIONS BY THE UNITED KINGDOM

Cases 114 and 125-129/85 (Woodpulp Cartel)

Various woodpulp producers located outside the Community sought to annul a Decision taken against them by the Commission, on the ground that the Commission had no jurisdiction over their activities. We intervened to support the Commission in respect of those of the producers who had implemented their pricing agreements by means of agents within the Community. We did however support the annulment of the Decision insofar as it concerned an association of producers which had not acted within the Community through any intermediary; we argued that the so called "effects doctrine" of jurisdiction (which is a source of dispute between us and the US) was no part of Community law. Our intervention was successful in as much as the Court declined to accept the effects doctrine; it annulled the Decision as regards the producers' association on the ground that the association had no separate role in implementing the pricing agreement. But in upholding the Decision of the Commission in relation to the producers themselves, the Court did not give clear guidance as to what the limits of Community jurisdiction might be and accordingly left the way open to future unwelcome developments. It held that the implementation of the pricing agreement within the Community was held sufficient to found jurisdiction, irrespective of whether the producers had agents or branches within the Community.

Case 302/86 (Danish Beverages)

The Commission contended that Danish laws which required beer and soft drinks to be sold only in re-usable containers, and which limited the amount sold annually in non-approved re-usable containers, were contrary to the provisions of the Treaty on free movement of goods. We intervened to support the Commission. Denmark attempted to justify the two requirements as being necessary for the protection of the environment. The Court upheld the first requirement as being proportionate to this aim; the second it struck down as being disproportionate.

A.4. CASES REFERRED TO THE COURT OF JUSTICE BY UNITED KINGDOM COURTS AND TRIBUNALS

Cases 138, 139/86 and 230/87 (VAT)

We submitted observations in these three cases, referred to the Court from the London VAT Tribunal, which concerned the interpretation of provisions in the Sixth VAT Directive. The Court upheld the views of HM Customs and Excise in the three cases.

Case 81/87 (Daily Mail)

The Daily Mail wanted to transfer its management to the Netherlands in order to change its tax residence, with a resulting reduction in its potential capital gains tax liability. The newspaper claimed that the then requirement in UK law (now repealed) that the consent of the Treasury be obtained if a company intends to transfer its residence to another country was contrary to the principles of freedom of establishment in the Treaty of Rome. In a judgment very satisfactory to us, the Court held that in the present state of Community law the Treaty does not confer any right on a company to transfer its central management and control to another country.

The Advocate General has proposed that the Court of Justice should reply to the questions as follows:

(i) a national rule such as that at issue is not covered by the prohibition laid down in Article 30 if it does not discriminate against imported goods or place them at an actual disadvantage compared with domestic goods and if it does not screen off the domestic market of the Member State in question or make access to that market substantially more difficult or unattractive for imported goods to which the rule applies;

(ii) alternatively, Articles 30 and 36 of the Treaty do not preclude a national rule such as that in question if the rule does not cause imported goods to be discriminated against or placed at an actual disadvantage compared with domestic goods and if any obstacles to intra Community trade which may be caused by the application of that prohibition are not greater than is necessary for encouraging non-working activities and social contacts on a specified day which is already devoted to those purposes by a large part of the population.

Category (5) : Cases referred to the Court of Justice by the Courts or Tribunals of other Member States in which the United Kingdom submitted observations.

Ahmed Saeed Flugreisen v Zentrale Fur Bekanpfung Unlauteren and Wettbewerbs (Case 66/86): (Airline price fixing).

This was an important ruling of the Court of Justice on a reference from the Bundesgerichtshof for a preliminary ruling relating to the interpretation of Articles 5, 85, 86, 88 and 90 of the Treaty. The ruling concerned the compatibility with those provisions of certain practices concerning the fixing of tariffs applicable to scheduled air passenger transport. The questions were raised in connection with a dispute between the German Registered Association for the Campaign against Unfair Competition and two travel agencies which had obtained, from airlines or travel agencies established in another state, air

tickets denominated in the currency of that other state. Those tickets referred to a place of embarkation situated in the latter state, but in fact passengers purchasing those tickets boarded the flight at a German airport at which the aircraft was making a stopover. By selling those tickets, the two German travel agencies were alleged to have infringed the German law on air navigation which prohibits the application, in German territory, of air tariffs which have not been approved by the Federal Ministry responsible. They were thus further alleged to have committed acts of unfair competition since the air tickets which they sold cost less than the approved tariffs applied by their competitors.

The Court held:

(a) that certain bilateral or multilateral agreements on the tariffs applicable to scheduled flights are automatically void under Article 85(2), for example, in the case of tariffs applicable to international flights between Community airports where no application to exempt the agreement under Article 85(1) has been submitted to the Commission under the relevant Community regulation or where such application has been made but the Commission "has reacted negatively" within 90 days;

(b) that the application of tariffs for scheduled flights arising out of bilateral or multilateral agreements may, in certain circumstances, constitute an abuse of a dominant position on the market concerned, in particular where an undertaking with a dominant position has succeeded in imposing on other transport undertakings the application of excessively high or discounted tariffs or the exclusive application of a single tariff on a particular route;

(c) that Articles 5 and 90 of the Treaty are to be interpreted to the effect that:

(i) they prohibit the national authorities from promoting the conclusion of tariff agreements contrary to Article 85(1) or, where appropriate, Article 86 of the Treaty;

which appears on the doctor's prescription.

The Court of Justice held that measures adopted by a professional body such as the Pharmaceutical Society of Great Britain, which lays down rules of ethics applicable to members of the profession and has a committee upon which national legislation has conferred disciplinary powers that could involve the removal from the register of persons authorised to exercise the profession, may constitute "measures" within the meaning of Article 30 of the Treaty.

Further, the Court held that a national rule of a Member State of the kind in question may be justified under Article 36 of the EEC Treaty on the grounds of the protection of public health, even where the effect of such a rule would be to prevent the pharmacist from dispensing a therapeutically equivalent product licensed by the competent national authorities and manufactured by the same company or group of companies or by a licensee of that company but bearing a trademark or proprietary name applied to it in another Member State which differs from the trademark or proprietary name appearing in the prescription in the United Kingdom.

Torfaen Borough Council v B & Q PLC (Case 145/88): (whether the Shops Act 1950 is compatible with Community Law) (Advocate General's Opinion).

In criminal proceedings, B & Q PLC were charged with having contravened sections 47 and 59 of the Shops Act 1950 by opening its retail premises in Cwmbran to the public on Sundays. It was common ground between the parties that B & Q had contravened those provisions of the 1950 Act and that the only possible defence for its conduct might be found in Article 30 of the EEC Treaty. Questions concerning the compatibility of the relevant provisions with Community Law were referred by the Magistrates' Court to the Court of Justice for its preliminary ruling.

It did not, in the Court's view, matter that Article 128 did not provide for the involvement of the European Parliament or for any specific requirements concerning the voting majority required in order for the Council to take the decision, whereas other provisions on the implementation of a common policy under the Treaty did. Nor did it matter, according to the Court, that decisions involving budgetary considerations were, under the Treaty, generally subject to more onerous procedural requirements than those in Article 128.

Category (7) : Actions initiated by the Commission against the United Kingdom;

Commission v United Kingdom (Case 93/87) ("Triangular Wheat"):

The United Kingdom (and in Case 92/87, France) were unsuccessfully accused by the Commission of failure to fulfil their obligations under the Treaty by not recovering or making available to the Commission, as own resources, monetary compensatory amounts payable under specific inward processing arrangements. The arrangements in question concern triangular arrangements involving the United Kingdom, France and Canada.

The Court of Justice held that the Commission had failed to demonstrate that the two Member States should have realised, at the relevant time, that the proposed operation involved a notional trade in wheat from France to the United Kingdom and the consequent levying of intra Community monetary compensatory accounts; and that they should therefore have foreseen that the authorisation sought should have been refused on the grounds that, by avoiding payment of these amounts, the traders concerned would gain an unjustified advantage.

The Court therefore decided that the fact that the UK did not recover the relevant sums or make them available to the Commission as own resources did not constitute a failure on the UK's part to fulfil its Treaty obligations.

Category (3) : Actions in which the United Kingdom has intervened.

Commission v Council (Case 242/87) (Erasmus): (Choice of Treaty base : Articles 128 and 235.

In this case, the Commission challenged the Council's inclusion of Article 235 as well as Article 128 in the legal basis for its decision 87/327/EEC adopting the European Community Action Scheme for the mobility of university students ("Erasmus").

The United Kingdom (with France and Germany) intervened in support of the Council. The case was heard with the Youth Training case referred to above and concerned identical issues.

The Court in fact dismissed the Commission's application on the sole ground that the Erasmus decision covered the field of scientific research as well as vocational training and held, therefore, that resort to Article 235 in the legal base was necessary. However, as in Youth Training, the Court rejected the arguments on the inappropriateness of using Article 128 (which requires simple majority voting) for establishing a detailed Community Action Programme involving significant, multi-annual Community expenditure.

Category (4) : Cases referred to the Court of Justice by United Kingdom Courts or Tribunals

Regina v Secretary of State for Social Services ex parte the Association of Pharmaceutical Importers (Cases 266 and 267/88): (Whether the rules of a professional body may constitute "measures" under Article 30 and, if so, whether they may be justified under Article 36)

These Article 177 proceedings concerned the compatibility with Article 30 of the EEC Treaty (Freedom of Movement of Goods) of rules applied by the Secretary of State governing the dispensing of proprietary pharmaceutical products. The rules, in the form of Regulations and a Code of Ethics, essentially preclude a pharmacist from dispensing anything which is different in any respect to that

(ii) they preclude the approval by such authorities of tariffs arising out of such agreements;

(iii) they do not preclude the effects of the rules on competition being limited insofar as this is essential for the performance of a task of general interest assigned to air carriers, provided that the nature of that task and its effects on the structures of tariffs are clearly established (an example of this might be a case where undertakings are entrusted with the operation of services which are not commercially viable but which, in the general interest, must be carried on).

2. EUROPEAN COMMISION OF HUMAN RIGHTS

The Commission adopted eight Reports giving its opinion on whether or not there was a violation of the Convention. These cases will go for final decision either to the European Court of Human Rights or to the Committee of Ministers.

Granger: Legal aid for criminal appeal in Scotland

In its Report of 12 December 1988 the Commission was of the unanimous opinion that the Goverment was in breach of Article 6 in that the applicant should have been granted legal aid for his appeal to the High Court of Justiciary. The case has been referred to the Court.

Powell and Rayner: remedies for airport noise complaints

In its Report of 19 January 1989 the Commission found a breach of Article 13 of the Convention (right to an effective remedy) in respect of one applicant's complaints about noise nuisance at Heathrow. (The substantive complaints about the noise had previously been found inadmissible.) The case has been referred to the Court.

Hewitt and Harman/Nimmo: Security Service surveillance and vetting.

In its Reports of 9 May 1989 the Commission found that the alleged collection and retention of information about the applicants were in breach of Article 8 (respect for private life) since they did not have a clear legal basis. While the Government did not at the time have a colourable defence to that charge, this has been remedied by the passage of the Security Service Act 1989. As a result the Commission has decided not to refer the cases to the Court - the best result we could have achieved.

Fox, Campbell and Hartley: detention of terrorist suspects under section 11 of the Northern Ireland (Emergency Provisions) Act.

In its Report of 4 May 1989 the Commission found various breaches of Article 5 of the Convention, in particular because section 11 of the Act allowed an arrest to be made on "suspicion" of an offence rather than requiring "reasonable suspicion". The case has been referred to the Court. The case may be seen as another propaganda victory for the IRA but it should not be of any lasting significance, since section 11 of the Act was repealed in 1987.

Cossey/Webb/James: position of trans-sexuals

In its Reports in Webb and James, the Commission followed the Court's judgment in the Rees case and found no violation of the Convention. In its Cossey Report, however, the Commission purported to distinguish Rees and found a violation of Article 12 (right to marry). The case has been referred to the Court.

McCallum: prisoner's correspondence and conditions in Scotland.

In its Report of 4 May 1989, the Commission found various violations of the Convention (Articles 8 and 13) in relation to interference with the applicant's correspondence, and a violation of Article 13 (right to an effective remedy) in relation to prison conditions.

A number of cases were declared inadmissible, of which the most important are listed below.

Gatow Range, Berlin : noise complaints

The applicants had complained that the noise caused by the Gatow Range, built in West Berlin under the authority of the British Military Government, put the UK in breach of Article 8. The Government's defence had been confined at the preliminary stage to denying that the UK was responsible under the Convention

Gaskin: Access to personal social services records.

Gaskin had been in the care of Liverpool City Council for almost the whole of his childhood. As an adult he sought to obtain access to his personal files kept by the local authority. Liverpool refused access to those records in respect of which the contributors of the information had not given their consent to its disclosure. The Court found that the Government was in breach of Article 8 (private and family life) but not in breach of Article 10 (right to impart and receive information).

Gaskin was awarded £5,000 by the Court for emotional distress and anxiety.

Whilst this was a case we might have hoped to win, the finding on Article 8 was welcome in that the Court did not hold that the Government was in breach by virtue of the local authority's refusal to grant complete access to the files, but merely by virtue of its failure to provide reasonable procedures by which access to files might be determined.

SECTION B

1. EUROPEAN COURT OF HUMAN RIGHTS (STRASBOURG)

Brogan and Others: Prevention of Terrorism (Temporary Provisions) Act 1984 (Article 50: "just satisfaction")

In its judgment of 29 November 1988, the Court found that the Government was in breach of Article 5 of the Convention in that the four applicants detained under the Act were not brought "promptly" before a judicial officer.

In its second judgment of 30 May 1989 the Court decided that no compensation and no costs should be paid to any of the applicants; they had not asked for costs; and the judgment was sufficient satisfaction in itself for the breach of Article 5.

As you know, following the first judgment of the Court the Government derogated under Article 15 of the Convention from the relevant provision of Article 5. The Home Secretary announced that the derogation was necessary while the Government considered whether a judicial system of review could be introduced - work is still going on to see whether the derogation can be lifted, at least for Great Britain.

Chappell: Execution of an Anton Piller order.

The applicant alleged that the Government was in breach of Article 8 of the Convention (right to respect for private life and the home). His premises were searched for illegal videos in a combined operation by police and solicitors. The latter had a court order (an "Anton Piller" order) allowing seizure of evidence for use in breach of copyright proceedings.

In its judgment of 30 March 1989 the Court held that there was no violation of Article 8. The shortcomings in the search procedure were not so serious as to be regarded as disproportionate to the purpose served by the search order.

Soering : The "death row" phenomenen and extradition to the USA

In its judgment of 7 July, the Court found unanimously that HMG would be in breach of Article 3 (inhuman or degrading treatment or punishment) if the Home Secretary extradited Soering to Virginia in the United States in the circumstances set out in the judgment. The Court held that the Convention did not prohibit the death penalty itself. But having regard to the very long period of time (probably six to eight years) which would be spent on "death row" under a special regime of imprisonment, taken with Soering's youth and his mental state at the time of the offence, his extradition would put him at real risk of exposure to inhuman or degrading treatment or punishment in the United States, contrary to Article 3. The Court also considered it relevant that the UK had available another means of ensuring Soering's prosecution (by sending him to the FRG) which would not involve the risk of intense and protracted suffering. The Court thus for the first time endorsed the Commission's caselaw to the effect that a party to the Convention may be responsible under Article 3 if it surrenders a person to another State where the Article 3 treatment actually occurs.

References in the judgment to Virginia's respect for the rule of law make it clear that the Court was at pains to avoid criticising the legal system in that State; there were also commendatory words for HMG's desire to abide by our Convention obligations, as evidenced by the staying of Soering's surrender to the US and by our reference of the case to the Court.

The Court found for the Government on Soering's complaint under Article 13, holding that judicial review of the Home Secretary's extradition decisions provided an effective remedy for the purpose of the Convention.

Case 197/86 (Steven Brown)

This is an important case in the development of the jurisprudence of the Court of Justice in relation to education and concerned the validity of our regulations on student grants. Questions of Government policy were directly in issue. The Court held that a Member State could not apply a test period (our regulations prescribe nine months) for a person to establish that he was truly a worker entitled under Community law to social benefits, such as grants. But the Court upheld our submission that, at the present stage of development of Community law, assistance given to students for maintenance falls in principle outside the scope of the Treaty so that the principle of non-discrimination cannot be pleaded in support of an unconditional right to maintenance grants.

A.5 CASES REFERRED TO THE COURT OF JUSTICE BY COURTS OF OTHER MEMBER STATES

Case 39/86 (Sylvie Lair)

In this case, referred by a German court, the issues raised and the Court's conclusions were similar to those in the case of Steven Brown mentioned above. We participated to bring to the Court's attention similar concerns as were raised in Brown.

Case 223/86 (Pesca Valentia)

This case, referred by the Irish High Court, concerned the common fisheries policy and in particular the issuing of licences for Irish fishing vessels which imposed a condition as to the nationality of the crew. By the time this case was referred, we had introduced licensing rules intended to maintain a link between the British flag (and therefore access to the UK fisheries quota) and the UK fishing industry, and our participation in the Irish reference was intended to safeguard the position, so far as possible, for our own rules. There are useful dicta in the Court's judgment which should assist in this respect.

Case 292/86 (Gullung)

A French court referred questions concerning the right of establishment and freedom to provide services provided by Articles 52 and 59 of the Treaty, in particular, the rights of lawyers and the restrictions which may be placed on those rights in the public interest. The case was of considerable interest to lawyers qualified in this country, a significant number of whom now practise in other parts of the Community. The Court held that a lawyer disbarred in one Member State may properly be

A.4 CASES REFERRED TO THE COURT OF JUSTICE BY UNITED KINGDOM COURTS AND TRIBUNALS

Cases 434/85 and 35/87 (Patents)

These two cases concern the degree of protection given to patents in UK law. The first concerned the power of our courts to restrain by injunction the importation of goods subject to a patent in respect of which, however, a domestic manufacturer could obtain a licence of right if he agreed to prescribed terms as to payment for such licence. The Court of Justice held that the restraint on imports was discriminatory and so Article 36/EEC (which provides for exceptions to the free movement of goods on grounds of protection of industrial property) could not be relied on. In the second case, the Court upheld patent protection, including a remedy by way of injunction, for a specification entitled to a patent under UK law even though it was not novel in an absolute sense. Although in these cases there was no Government interest directly at stake, it was clear that the questions referred to the Court of Justice would develop the Court's jurisprudence in this area of the law.

Case 102/86 (Apple and Pear Development Council

This was another case concerning the interpretation of the principal VAT Directive. It raised the question whether a levy on growers to fund the services of a development council constituted "consideration" for a supply of services. Customs and Excise considered that it did not and the Court upheld this view.

A.2 ACTIONS INITIATED BY THE COMMISSION AGAINST THE UNITED KINGDOM

Case 261/85 (Imports of Pasteurised Milk)

The Commission sought a declaration that our ban on imports of pasteurised milk and cream contravened Article 30/EEC. We defended the ban on grounds of protection of human health, under Article 36, but I advised at the outset that our case was no more than "just respectable". The Court found that, although safeguards on health grounds could in principle be justified, our ban was neither necessary nor proportionate to the health concerns. The UK has a good record in recent years of avoiding cases before the Court such as this, brought under Article 169 of the Treaty, but where proceedings are taken, we have yet to win a case. Indeed, it is rare for any Member State successfully to defend Article 169 proceedings. While this case illustrates that there are occasions when certain cases have to be fought even where the legal merits are against us, I am sure that our long-held view that the number of such cases must be kept to a minimum is right.

Cases 353/85 and 416/85 (VAT Zero-rating)

The Commission challenged our continued exemption and zero-rating of various supplies. The first, which I mentioned in my minute of 4th March, concerned supplies of goods by medical practictioners, and the second was about various supplies zero-rated on grounds of social policy, including housing and construction projects. The Commission succeeded in most of its submissions, although in the second case, the Court upheld our zero-rating of certain agricultural supplies and, most importantly, the construction of buildings intended for housing. The UK properly pleaded its interpretation of the principal VAT Directive in defence of important policy objectives. From the legal point of view the cases depended very much on the terms of that Directive and do not have wider implications.

A.3 INTERVENTIONS BY THE UNITED KINGDOM

Case 213/85 (Dutch Gas Prices)

The Commission issued a decision condemning as an illegal state aid the preferential tariff for supplies of natural gas granted to Dutch horticulture and brought an action against the Netherlands for failing to comply with that decision. The UK intervened, with Denmark, in support of the Commission whose principal submission was upheld by the Court. This is an illustration of the use which can be made of the power to intervene in proceedings where the UK is not a party in order to participate in the development of the Court's jurisprudence. We should no doubt exercise restraint when considering whether to participate in actions brought against Member States, but where we have additional matters to bring to the Court's attention and it is in our interests to support a party, it is proper to make an intervention.

Case 349/85 (Export Refunds)

Another disallowance case: we intervened in support of Denmark against the Commission because the outcome might have affected the operation of the relevant Community scheme (concerning export refunds) in this country. Denmark and the Commission took extreme views on the point at issue whereas we put forward an interpretation which amounted to a middle way. The Court upheld the Danish submission, but it is clear from the judgment that the Court considered our middle way appropriate. This was a fruitful intervention.

prevented from practising in that State even though qualified to practise in another State. The Court did not uphold a submission made by some bodies representing French lawyers whose effect would have been to permit the French Bars to require, for example, English solicitors in Paris to enrol at the Paris Bar.

EUROPOL participation in Cross border Europa Con

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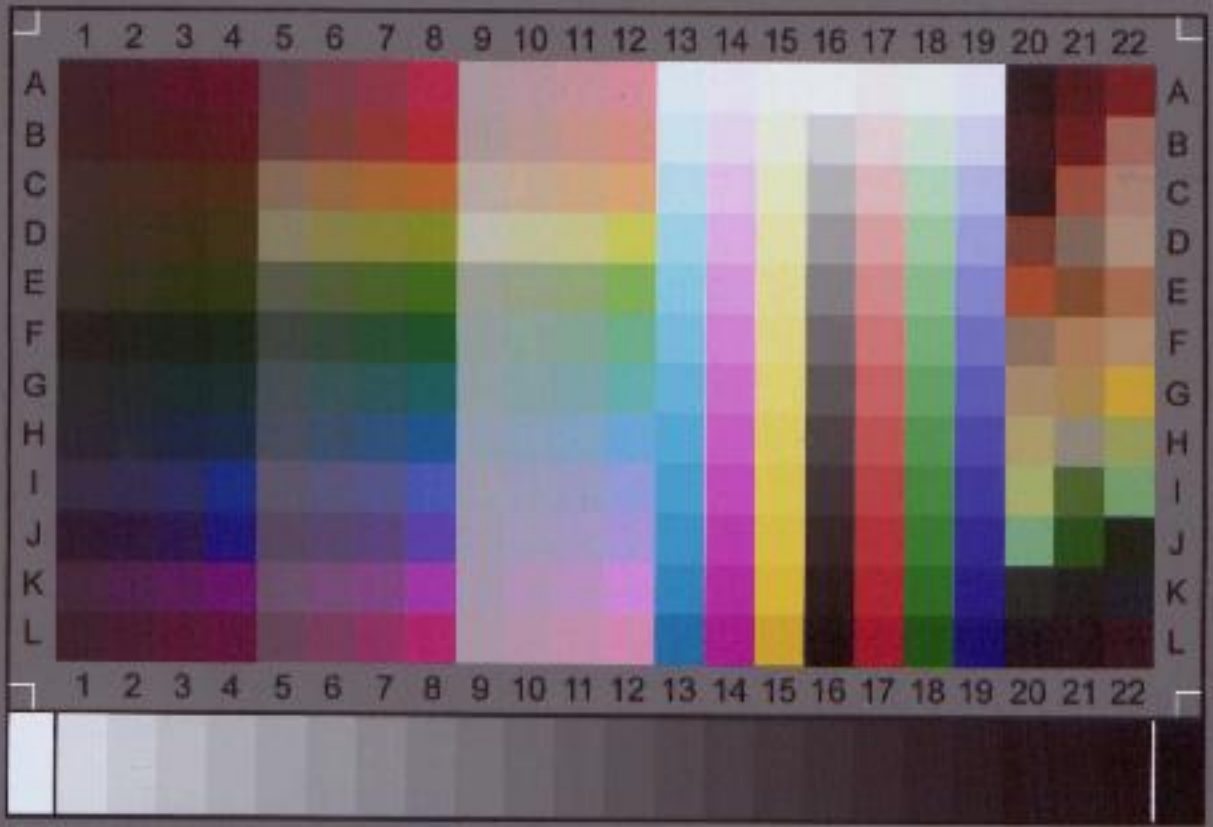
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Branton : Complaint by Grandparents about access to a child in care

Declared inadmissible on 9 March; the Commission found on the facts that there had been no interference into anyone's private rights.

Grant : Failed attempt to abandon Scottish appeal hearing and family life

Declared inadmissible on 8 March; the Commission held that although the deportation was prima facie an interference with rights protected under Article 8, it was necessary and justified.

Friendly Settlements were achieved in two child care cases (K and C) and 17 cases concerning corporal punishment in state schools were struck off the Commission's list. Each of these involved ex gratia payment by the Government, coupled with an undertaking by the Government to introduce legislation (in the child care cases) or a reference to legislation already passed (in the corporal punishment cases).

2.8.88

B.1 EUROPEAN COURT OF HUMAN RIGHTS

Boyle and Rice : Scottish Prison Rules and Procedures

The Court's judgment of 27th April found in favour of the Government, thus reversing the Commission, on the main issue in the case: namely, whether in respect of various complaints made by two Scottish prisoners about their treatment in prison, Article 13 required an effective remedy to be provided and, if so, whether such remedies existed. The judgment is important for the interpretation of Article 13, although it would have been more helpful for future cases had the Court seen fit to lay down general principles for the interpretation of the Article. It remains to be seen what approach the Commission will now adopt to Article 13 in the light of the judgment. (In respect of one of the complaints about treatment the Court found against the Government under Article 8 (right to respect for private life); this was a minor point on which the Government had conceded a breach, but it means that this case will go down in the statistics as a finding against the Government).

Cases of O, H, W, B and R (Article 50):
"Just satisfaction" in 5 child care cases

Following judgments on the merits in July 1987 (when the Court found against the Government on complaints concerning local authority and court procedures relating to children in care), the Court gave judgment on the question of "just satisfaction" on 9 June. It awarded amounts by way of damages against the Government ranging from £5,000 to £12,000. This is similar to what had been predicted (though a somewhat higher figure had been awarded in a Swedish case by the Court); the sums are substantial, and emphasise the need for early legislation on child care procedures.

B.2 EUROPEAN COMMISSION OF HUMAN RIGHTS

Three cases were declared admissible; unless a friendly settlement is reached the Commission will in due course adopt its formal Opinion on them, after which the cases will either be sent to the Court for adjudication or to the Committee of Ministers for final disposal.

Harman and Hewitt : Complaints of Interference with Private Life (Article 8) by the Security Service

Declared admissible in April.

Fox, Campbell and Hartley : Detention of Terrorist Suspects under Section 11 (now repealed) of the Northern Ireland (Emergency Provisions) Act 1978

Declared admissible in May.

Granger : Legal Aid for Scottish Criminal Appeals

Declared admissible in May.

Ginikanwa : Barrister disbarred without a public hearing

Declared inadmissible on 9 March; the Commission found on the facts of the case that the barrister had not asked for a public hearing and had therefore no cause of complaint.

10 DOWNING STREET
LONDON SW1A 2AA

From the Private Secretary 19 September 1988

PARTICIPATION BY THE UNITED KINGDOM IN CASES BEFORE THE EUROPEAN COURTS

The Prime Minister was grateful for the Attorney's minute of 2 August covering the report on notable judgments at Luxembourg and Strasbourg in which the United Kingdom has been involved. She found this most interesting

I am copying this letter to Trevor Woolley (Cabinet Office).

(C. D. POWELL)

Michael Saunders, Esq.,
Law Officers Department.

01-405 7641 Ext.

Communications on this subject should be addressed to
THE LEGAL SECRETARY
ATTORNEY GENERAL'S CHAMBERS

ATTORNEY GENERAL'S CHAMBERS,
LAW OFFICERS' DEPARTMENT,
ROYAL COURTS OF JUSTICE,
LONDON, W.C.2.

C. D. Powell Esq.,
Private Secretary to the
Prime Minister,
10 Downing Street,
London,
SW1.

11 August 1988

CF. pm subst. page

Does Ms. Powell. Hm pa

PM 13/V

PARTICIPATION BY THE UNITED KINGDOM
IN CASES BEFORE THE EUROPEAN COURTS

The Attorney General wrote to the Prime Minister on 2nd August enclosing a Report on decisions of the European Courts in the first half of this year.

I am afraid that there is an error in the final page of the Report: several lines are missing. I enclose, to repair the error, a fresh print of that page and would be grateful if you would substitute it for the original. My apologies for the trouble this will cause.

I am copying this letter to the Private Secretaries of the other recipients of the Attorney's Minute.

Yours sincerely,

Mike Thomas

M. P. THOMAS

Campbell (No.1): conditions of access to prisoner in hospital; handcuffing in court

This Scottish case was declared inadmissible in July after an oral hearing.

Price; Lawlor: two child care cases involving grandparents and right of access to grandchildren

Declared inadmissible on 14 July.

Monazah: deportation to Iran

Declared inadmissible on 7 September. The applicant was held to have failed to exhaust his domestic remedies in that he had not applied for judicial review of the Home Secretary's refusal of asylum.

B.2. EUROPEAN COMMISSION OF HUMAN RIGHTS

Four applications against the UK were declared admissible; one (Soering) has already been referred to the Court : see below. In respect of the others, unless a friendly settlement is reached the Commission will in due course adopt its formal opinion, after which the cases will either be sent to the Court for adjudication or to the Committee of Ministers for final disposal.

Soering: The 'death row phenomenon' and extradition to the USA

Soering, who is in prison in this country and is wanted for trial in the State of Virginia for murder of his girlfriend's parents, is claiming that if he was extradited to the US he would be subject to the death penalty and would be placed on "death row"; this, he claims, would put HMG in breach of Article 3 (inhuman and degrading treatment). The application was declared admissible in November. The Commission adopted its opinion in January 1989, in which it found by a majority of 6-5, that the Government was not in breach of Article 3. It found a violation of Article 13 (effective remedies). The case has now been referred to the Court by the Government, the Commission and the FRG. Soering is the son of a West German diplomat; hence the interest of the FRG, which has also requested Soering's extradition. I propose to conduct our case myself before the Court.

Chauhan: religious objections to the closed shop

The Applicant was employed at Fords, which operated a closed shop. He did not renew his union membership when it lapsed, and claimed that he had religious objections. Following a process of negotiations his employment was terminated; his claim of unfair dismissal before an industrial tribunal was dismissed. His application to the European Commission under Article 11 (freedom of association) was declared admissible in July.

Thynne and others: detention under life sentence

Declared admissible in September. These cases have been found by the Commission to raise issues similar to the Weeks case, where the Government was found by the Court to be in breach of Article 5(4).

Nimmo : official information issued in security clearance for employment

The Applicant alleged that he was refused employment with a Government contractor because of an unfavourable security clearance. He is alleging breach by the Government of Article 8 (respect for private life). The application was declared admissible in October. (The case is similar to the Hewitt and Harmon case (retention of information by the Security Services) already declared admissible.)

A number of cases were declared inadmissible, of which the more important are listed below.

Hilton: Vetting for BBC Scotland job; retention of files by the Security Service

Declared inadmissible on 6 July 1988. The Commission concluded that the Applicant had not shown that the Security Service had compiled and continued to retain personal information about her.

Branton : Complaint by Grandparents about access to a child in care

Declared inadmissible on 9 March; the Commission found on the facts that there had been no interference into anyone's private rights.

Grant : Failed attempt to abandon Scottish appeal hearing

Declared inadmissible on 8 March; the Commission found that the complaint under Article 6 had not been made out.

Kassim : Complaint that deportation interfered with private and family life

Declared inadmissible on 8 March; the Commission held that although the deportation was prima facie an interference with rights protected under Article 8, it was necessary and justified.

Friendly Settlements were achieved in two child care cases (K and C) and 17 cases concerning corporal punishment in state schools were struck off the Commission's list. Each of these involved ex gratia payment by the Government, coupled with an undertaking by the Government to introduce legislation (in the child care cases) or a reference to legislation already passed (in the corporal punishment cases).

UK PARTICIPATION IN EUROPEAN LITIGATION : JUDGMENTS AND DECISIONS, JANUARY-JUNE 1988

A. COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

B. EUROPEAN CONVENTION ON HUMAN RIGHTS

A.1 ACTIONS INITIATED BY THE UNITED KINGDOM

Cases 305/85, 61/86 and 142/86 (Sheepmeat)

These were three cases brought against the Commission which formed part of the larger "lamb war" episode concerning our exports of lamb in particular to France. We succeeded in all three cases. The legal points at issue relate to particular Regulations but the cases illustrate that the Commission has no monopoly of wisdom when it comes to construing Community legislation.

Cases 68/86 and 131/86 (Hormone Growth Promoters and Battery Hen Cages)

These were cases brought against the Council, in which we sought annulment of two Directives, principally on the grounds that their Treaty base was inadequate. The Court rejected that principal submission, though it annulled the Directives on other, procedural, grounds. I commented in some detail on these cases in my minute of 4th March and need not go over the ground here.

Case 347/85 (Milk Pricing)

The Commission disallowed (that is, refused to reimburse from Community funds) expenditure under Community schemes for the years 1980 and 1981, arguing that certain unlawful pricing practices of the Milk Marketing Boards had resulted in unwarranted expenditure. We challenged the disallowance but the Court held that the Commission was obliged to disallow additional expenditure due to an infringement of Community rules even though there may have been off-setting savings. While a lost case is never welcome, from the wider perspective of the UK's concern to impose budgetary discipline the Court's strict approach to disallowance can be welcomed.

2. Cases before the European Commission of Human Rights. I have commenced only on the more significant cases before the Commission.

3. I propose to copy these reports to colleagues, and I am therefore sending copies of this minute and the report to members of the Cabinet, the Lord Advocate and to Sir Robin Butler.

2.8.88

Euro Pd Participation in cost before ES
Aug 88

PRIME MINISTER

PARTICIPATION BY THE UNITED KINGDOM IN CASES BEFORE THE EUROPEAN COURTS

1. I propose to send you, perhaps twice a year, a report on notable judgments in Community cases at Luxembourg in which the UK has been involved - as a party, or as an intervener, or through having submitted observations. I shall also report on Human Rights cases at Strasbourg. I annex the first report to this minute.

2. The format is as follows:

A. The European Court of Justice (Luxembourg)

1. Actions initiated by the UK

2. Actions initiated by the Commission against the UK.

3. Actions in which interventions by the UK have been made.

4. Cases referred to the Court of Justice by UK Courts and Tribunals. In the period with which this report is concerned, judgment was given in eight cases in this category. We submitted Observations in all of them and I mention in the report four which raised points of importance.

5. Cases referred to the Court of Justice by Courts of other Member States. We submitted Observations in twelve cases in this category and I mention three worthy of particular note.

B. European Convention on Human Rights.

1. Cases before the European Court of Human Rights.(Strasbourg)

putative Community law rights having direct effect in national law. The Applicants in Judical Review proceedings alleged that Part II of the Merchant Shipping Act 1988 which introduced new more restrictive requirements for the registration of fishing vessels was incompatible with Community law. The Divisional Court referred the substantive issues to the European Court for a preliminary ruling under Article 177. It also made an interim order suspending the application of the UK legislation which was successfully challenged on appeal on the grounds that there is in national law (i) a presumption of validity of an Act of Parliament and (ii) no power to grant an injunction against the Crown. In answer to the House of Lords' question the European Court ruled that "a national court which, in a case before it concerning Community law, considers that the sole obstacle that precludes it from granting interim relief is a rule of national law must set aside that rule."

ECJ Case No. C262/88 : Barber v Guardian Royal Exchange Assurance Co. Ltd.

Background

Mr. Barber was made redundant at age 52. Under his employer's severance terms, men (aged 55) and women (aged 50) who were made redundant ten years before the scheme's normal retirement ages (65/60 respectively) would be treated as taking early retirement, thus qualifying for an immediate pension. As Mr Barber was only 52, he received a deferred pension and redundancy compensation. A woman of the same age would have received an immediate pension. Mr Barber appealed on the grounds of sex discrimination to an Industrial Tribunal and the Employment Appeal Tribunal. Both dismissed his claim. On appeal to the Court of Appeal the matter was referred to the ECJ.

Issues

The essential question was whether the benefits received in connection with compulsory redundancy in the circumstances of this case constituted "pay" within Article 119 of the EEC Treaty and accordingly whether they had to be equal for men and women. The UK Government argued that benefits paid from a pension scheme fell within Articles 117 and 118, not Article 119.

ECJ Judgment

The key points of the ruling are:-

i) The benefits paid by an employer to a worker in connection with redundancy fall within Article 119;
ii) Pensions paid under occupational pension schemes, including contracted out schemes, fall within Article 119;
iii) Equal treatment must apply to each component part of remuneration including components of pensions;
iv) Article 119 has direct effect; and
v) Article 119 does not apply to State social security benefits.

are unconditional and sufficiently precise in order to "defeat" a national provision which is incompatible with such Community provisions). The ECJ held that the equal treatment principle could be asserted against a body, whatever its legal form, which (a) has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and (b) has for that purpose special powers beyond those which result from the normal rules applicable between individuals,. The case has now been reinstated before the House of Lords (which referred the case to the ECJ).

ECJ Case No. C23/89 : Quietlynn Limited v Southend Borough Council

This was a reference for a preliminary ruling on whether national legislation prohibiting the sale of lawful sex articles from unlicensed sex establishments was compatible with the provisions of Articles 30 and 36 of the EEC Treaty. By its judgment of 11th July 1990, the ECJ held that in principle such legislation did not render the marketing of products imported from other Member States any more difficult than that of domestic products. The provisions were not intended to regulate trade in goods within the Community and were not of such a nature as to impede trade between Member States. Accordingly, the national provisions did not constitute measures having an effect equivalent to a quantitative restriction on imports.

ECJ Case No. C213/89 : R v Secretary of State for Transport Ex Parte Factortame Limited and Others

On 19th June the European Court delivered its Judgment on a reference from the House of Lords on whether a national court had power under Community Law to grant interim relief to protect

Category (3) : Cases referred to the Court of Justice by United Kingdom Courts or Tribunals

ECJ Case No: 126/88 : The Boots Company PLC v HM Commissioners of Customs and Excise

This case concerned the assessment of VAT payable by Boots on certain promotional sales. Under the promotion scheme, money-off coupons were printed on the packaging of certain goods entitling consumers to a price reduction on subsequent purchases (the redemption goods). In its gross takings, Boots included only the sums received from its suppliers in exchange for the surrendered coupons and not their full nominal value. The Commissioners considered that the taxable value of the redemption goods included the full nominal value of the coupons surrendered. In its judgment, the ECJ held that the coupons were not a consideration for the supply of the redemption goods but simply evidence of entitlement to a discount. Accordingly they should be excluded from the value of the supply.

Case 333/88 : P J K Tither v Commissioners of Inland Revenue

Mr. Tither, a European Commission official exempt from national tax on the emoluments from his employment with the Commission in accordance with Article 13 of the Protocol on the Privileges and immunities of the European Communities, sought relief under the MIRAS scheme for interest payments on a loan to carry out improvements to his house in Wales. The Inland Revenue refused relief on the grounds that Mr. Tither was not a qualifying borrower for the purposes of the MIRAS scheme (the term "qualifying borrower" excludes employees whose emoluments are not chargeable to national tax by virtue of a special exemption or immunity). Mr. Tither's taxable income in the United Kingdom was

insufficient to enable relief for the interest payments to be given.

The Court held that the MIRAS scheme was designed to alleviate the burden on borrowers arising from the payment of mortgage interest, in order to encourage the purchase or improvement of houses by private persons. In the case of non-taxpayers, the scheme had the effect of granting a direct subsidy to the borrower. Community law required that, whenever Community officials were subject to certain taxes, they should be able to enjoy any tax advantage normally available to taxable persons, so as to prevent them from being subject to a greater tax burden. But Community law did not prevent Member States which subsidised interest paid by individuals on loans to purchase or improve their homes from denying that advantage to Community employees whose taxable income was less than the interest paid. The MIRAS scheme did not impede the functioning of Community institutions, so that there was no breach of Article 5 of the Treaty. There was no discrimination on the grounds of nationality and consequently no breach of Article 7 of the Treaty.

ECJ Case No. C188/89 : Foster v British Gas Plc

The British Gas Corporation had operated a policy of compulsory retirement for men and women when they reached State pensionable age. In an earlier case (Marshall), the ECJ had held such a policy to be contrary to the 1976 Council Directive on the principle of equal treatment for men and women in employment. The key question raised by the present case was whether the Corporation was a body of a type against which the principle of the direct effect of directives could be asserted (under this principle an individual can rely in proceedings against the State (or an emanation of the State) on provisions of a directive which

Category (4): Cases referred to the Court of Justice by the Courts or Tribunals of other Member States in which the United Kingdom has submitted observations

No cases of particular note.

Category (2): Cases before the European Commission of Human Rights

The Commission declared the following cases admissible.

Fadele

This case concerned three British boys whose Nigerian mother was killed in a car crash in the UK. Their Nigerian father was refused permission to settle in the UK so that the children were obliged to join him in Nigeria in extremely poor conditions. The case was settled.

In three of these cases the Commission adopted its Report giving its opinion on whether or not there was a violation of the Convention.

Vilvarajah and others

This case stems from the removal of a number of Tamils to Sri Lanka in February 1988, who had been refused political asylum. Some of the applicants claimed to have been arrested and ill-treated on their return. The Commission's opinion concluded that there was no breach of Article 3 (prohibition on torture or inhuman or degrading treatment) but that the applicants had no effective domestic remedy, as required by Article 13.

The main issue in this case is whether there should be an in-country right of appeal for asylum seekers. A friendly settlement was not possible on this issue and the case will be heard in the Court next year.

Chester

In this case, which concerned a prisoner's correspondence, the Commission concluded that there was a violation in respect of one letter which was stopped. The Government had acknowledged that an error was made in this instance. The Commission concluded that there was no violation in respect of several other complaints and this case will not go to the Court.

Campbell

This case also concerned a prisoner's correspondence and the Commission concluded that there had been a number of violations. The case will probably go to the Court.

Times Newspapers and Neil
Observer and Guardian ("Spycatcher")

The Commission's Reports in these two cases concluded that there had been a violation of Article 10 (the right to freedom of expression) in respect of the temporary injunctions imposed on the applicant newspapers. The Commission concluded that there was no violation of Article 13 (right to an effective domestic remedy) or of Article 14 (non-discrimination).

These cases have now been referred to the Court.

Cossey

This case concerned Caroline Cossey, a male to female transsexual. She complained that her inability to have her birth certificate altered constituted a violation of her right to respect for private life (Article 8), and that her inability to marry someone of her previous sex constituted a violation of the right to marry (Article 12). The Court found no violation of the right to marry by a wide margin. It also found no violation of the right to respect for private life, though by a margin of only 10 to 8. These findings confirmed the Court's earlier judgment in the Rees case (1986).

Thynne, Wilson and Gunnell

This judgment of 25 October 1990 concerned three prisoners, each subject to a discretionary life sentence of imprisonment. The Court found, by 18 votes to 1, that there had been a violation of Article 5(4) of the Convention, which provides a right to have the lawfulness of a prisoner's detention reviewed. I had previously advised that our prospects for success in this case were very slight. The Court found that a prisoner on a discretionary life sentence (i.e. not a murderer) who had already served the "tariff" period - i.e the period required to satisfy the needs of retribution and deterrence - had the right to review of the remaining part of his sentence. Two of the applicants claimed damages, but the Court found that the finding of the violation was sufficient just satisfaction. This judgment will require legislation to be introduced by the Home Office.

SECTION B

EUROPEAN CONVENTION ON HUMAN RIGHTS

Category (1) : Cases before the European Court of Human Rights (Strasbourg)

There have been six judgments of the Court involving the United Kingdom in the period since my last review.

Powell and Rayner

In its judgment of 21 February 1990 the Court found no violation of Article 13 of the Convention, which provides a right to an effective domestic remedy for complaints under the Convention. The applicants complained of disturbance from aircraft noise from Heathrow Airport. The Court held that the applicants had no arguable substantive claim and accordingly they were not entitled to a remedy in respect of any such claim.

Granger

The Court's judgment of 28 March 1990 found a violation of Article 6 in respect of the Scottish Legal Aid Board's refusal to grant the applicant legal aid for his appeal against conviction on charges of perjury. At the hearing of his appeal, the applicant was unrepresented and the Crown represented by the Solicitor General for Scotland. The Court held that one of the applicant's grounds of appeal raised a complex and important issue and that the refusal of legal aid should have been reconsidered. The Court awarded the applicant his costs and £1,000 damages. The case turned on its own facts, and no changes in law or practice are required.

McCallum

The only point at issue in this case had been the alleged absence of an effective domestic remedy for the applicant's complaints about his prison conditions and restrictions on his correspondence. The applicant abandoned this complaint at the hearing. In practical terms this represents a victory. Nevertheless the Court's judgment of 30 August 1990 will be recorded as a violation against the Government because the Court found breaches of the Convention in relation to some restrictions on correspondence dating back to 1980 and 1982. These breaches had been admitted by the Government as far back as 1984 but the applicant had refused to settle.

Fox, Campbell and Hartley

This judgment of 30 August 1990 was about the arrest of suspected terrorists in Northern Ireland under Section 11 of the Northern Ireland (Emergency Provisions) Act 1978. The Court held that there had been a violation of Article 5(1) of the Convention because the legislation did not require 'reasonable suspicion' before making an arrest and the Government was unable, for security reasons, to prove that there were reasonable grounds for suspicion in the cases in question. Since the section in question has been repealed the case has no legislative implications. The Court found in the Government's favour on the more important issue of Article 5(2), the right to be informed promptly of the reasons for arrest. The applicants were told at the time of their arrest only that they were being arrested on suspicion of being terrorists. They were interrogated within a few hours and the reasons for their arrest were then made clear. The Court held that in the context of this case, these intervals of a few hours did not constitute a violation of Article 5(2).

cc PC.
(2) Pa

CBN

21/XI.

PRIME MINISTER

PARTICIPATION BY THE UNITED KINGDOM IN CASES BEFORE THE EUROPEAN COURTS

1. I attach my second review for 1990 of noteworthy judgments in Community cases in Luxembourg in which the UK has been involved, and of human rights decisions involving the UK in Strasbourg. The review covers the period until 31 October 1990.

2. For the sake of consistency I have adopted the same format as my last review, although there are no cases to note in respect of two of the four Community categories:

SECTION A : THE EUROPEAN COURT OF JUSTICE (LUXEMBOURG)

(1) Actions initiated by the Commission against the United Kingdom;

(2) Actions in which the United Kingdom has intervened;

(3) Cases referred to the Court of Justice by United Kingdom Courts or Tribunals;

(4) Cases referred to the Court of Justice by the Courts or Tribunals of other Member States in which the United Kingdom has submitted observations.

SECTION B : EUROPEAN CONVENTION ON HUMAN RIGHTS

(1) Cases before the European Court of Human Rights (Strasbourg);

(2) Cases before the European Commission of Human Rights.

3. This review gives me the opportunity to bring you and colleagues up to date with developments in the Factortame (Spanish quota-hopping) litigation. After the Court of Justice ruling on 19 June 1990 (summarised in section A(3)), the question whether interim relief pending the substantive hearing in Luxembourg ought to be granted in favour of the applicants was considered by the House of Lords at a hearing in early July. The House of Lords decided to grant some interim relief and reserved the reasons for its decision until the autumn. It has now given its reasons. The key elements as to the principles applicable where interim relief is sought in order to protect directly effective Community law rights are as follows:

- the party seeking interim relief must show that there is a serious case to be tried. If he does, he crosses the threshhold and the courts must then consider whether it is just or convenient to grant an injunction.

- (i) as to the question whether it is just or convenient to grant an injunction, the House of Lords has been careful not to restrict the matters which may need to be taken into

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Participation by the U.K. in Cases before the European Courts

EUROPEAN POLICY

August 1988

Referred to	Date	Referred to	Date	Referred to	Date	Referred to	Date
~~2.8.88~~							
~~29-8-88~~							
~~19.9.88~~							
July ~~1989~~							
~~6.3.90~~							
~~8.3.90~~							
11.12.90							

PREM 19/2985

consideration. However, it has made clear that one of the special factors to be taken into account in a case where a plaintiff seeks interim relief restraining the enforcement of the law against him (as in the Factortame case) is

> "the importance of upholding the law of the land, in the public interest, bearing in mind the need for stability in our society, and the duty placed on certain authorities to enforce the law in the public interest" (the speech of Lord Goff of Chieveley).

(ii) The House of Lords felt itself unable to say that there was a rule that a party challenging the validity of a law must, in order to obtain an interim injunction restraining the enforcement of the law against him, show a strong prima facie case that the law is invalid under Community law. Even so, Lord Goff said that:

> ".....the Court should not restrain a public authority by interim injunction from enforcing an apparently authentic law unless it is satisfied, having regard to all the circumstances, that the challenge to the validity of the law is, prima facie, so firmly based as to justify so exceptional a course being taken."

- The House of Lords, relying on the Court of Justice ruling in a recent case involving fish licensing conditions (Agegate) and on certain remarks of the President of the Court of Justice

ECJ Case No. C301/87 : Commission v France

France applied unsuccessfully for annulment of a Commission Decision which ruled that financial assistance given by France to the textile producer Compagnie Boussac Saint Freres constituted unlawful State aid. The United Kingdom intervened in support of the Commission.

The Court considered in some detail the powers of the Commission in cases where a Member State was in breach of the notification requirements in Article 93(3) of the Treaty. The Commission had argued that, since the aids had been granted without prior notification, they were illegal per se regardless of whether, on further enquiry, they might be shown to be compatible with the common market. The Court held that in such a case the Commission could take interim measures requiring a Member State to suspend the provision of aid and to provide the necessary information. Where a Member State complied with interim measures the Commission had to go on to examine the compatibility of the aid with the common market under Article 92(2). Where, after interim measures had been taken, the Member State failed to provide the Commission with the necessary information the Commission could conduct an examination on the basis of the material at its disposal and had the power to demand repayment. If the Member State failed to suspend the provision of aid the Commission could bring the matter directly before the Court.

ECJ Case No: C158/88 : Commission v Ireland

By virtue of domestic regulations made in 1987, Ireland had restricted the benefit of the exemptions from turnover tax and excise duty provided for in Council Directive No: 69/169 to persons arriving at its borders after a period of 48 hours outside its territory. The Commission, supported by the United Kingdom, took the view that that measure was contrary to the provisions of the directive which made no distinction between travellers and provided for no restrictions based on the period spent outside the jurisdiction of a Member State. Therefore, the Commission brought an action under Article 169.

The Court rejected the Irish Government's claim that the exemptions provided for in the directive were confined to what is called "genuine" travellers as opposed to so called "fiscal travellers" who crossed the frontier solely to take advantage of lower tax and duty rates. If it became necessary to adopt exceptional provisions making the grant of exemptions subject to a period of time spent outside national territory, such provisions might only be adopted by means of a derogating directive or by way of protective measures, when the conditions laid down in Articles 108 and 109 of the Treaty were satisfied. However, the Irish regulations had been adopted neither in pursuance of a Community directive nor protective measures provided for in the Treaty. The Court concluded therefore that Ireland had failed to fulfil its obligations under the EEC Treaty.

SECTION A

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

Category (1). Actions initiated by the Commission against the United Kingdom

No cases of particular note.

Category (2). Actions in which the United Kingdom has intervened

ECJ Case 70/88: European Parliament -v- Council

In this case the European Parliament brought an action against the Council alleging that the Treaty basis of Regulation 3954/87/Euratom (fixing maximum permissible levels of radioactive contamination for foodstuffs and feedingstuffs after the Chernobyl accident) should have been Article 100A of the EEC Treaty and not Article 31 of the European Atomic Energy Community Treaty. On a preliminary issue the Council applied for a ruling that the Parliament's action was inadmissible following the judgment of the European Court in Case 302/87 "Comitologie" (in that case, the Court had ruled that it was for the Commission to protect the prerogatives of the Parliament). In response, the Parliament argued that that case demonstrated that the Commission could not fulfil this responsibility where it had chosen a Treaty basis for a measure which was not considered appropriate by the European Parliament.

In its judgment, the Court of Justice ruled that proceedings taken by the Parliament for annulment of a measure taken by the Council or the Commission was admissible where the object of the proceedings was to safeguard the Parliament's own prerogatives.

in his interim measures ruling in case 246/89 Commission v United Kingdom (the case involving a challenge to the nationality requirements for registration of fishing vessels) held that, prima facie, the applicants' challenge was, in relation to the limited interim measures sought, a strong one. However, the House of Lords made it clear that it could express no opinion on the final outcome in this regard and that its remarks about the strength of the applicants' case were made for the purposes only of deciding whether to grant interim relief.

4. It remains to be seen how the United Kingdom Courts will apply the guidelines on the availability of interim relief in cases of this kind. But there is no doubt that the test is a stringent one.

5. You may also remember that certain comments were made at the time of the ruling by the Court of Justice in June about the loss of sovereignty said to have been occasioned by the Court's ruling. In this context, you and colleagues will be interested by the following remarks of Lord Bridge:

> "Some public comments on the decision of the European Court of Justice, affirming the jurisdiction of the courts of Member States to override national legislation if necessary to enable interim relief to be granted in protection of rights under Community law, have suggested that this was a novel and dangerous invasion by a Community institution of the sovereignty of the United Kingdom Parliament. But such comments are based on a misconception. If the supremacy within the European Community of Community law over the national law of Member States was not always inherent in the EEC Treaty.... it was certainly well established in the jurisprudence of the European

Court of Justice long before the United Kingdom jointed the Community. Thus, whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary. Under the terms of the Act of 1972 it has always been clear that it was the duty of a United Kingdom Court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law..... Thus there is nothing in any way novel in according supremacy to rules of Community law in those areas to which they apply and to insist that, in the protection of rights under Community law, national courts must not be inhibited by rules of national law from granting interim relief in appropriate cases is no more than a logical recognition of that supremacy."

Lord Bridge's remarks confirm the points which I made on 26 June in a Written Answer to a Parliamentary Question from Teddy Taylor in the wake of the Court of Justice ruling.

6. On a more general topic, I regret to have to say that requests for legal advice on Community legal issues are still being made too late. I must therefore reiterate the importance of submitting proposals under our "Euro-proofing" procedures at the earliest possible moment, and of timely use being made of the services of the Cabinet Office Secretariat and the Cabinet Office Legal Adviser in cases where the issues are of interdepartmental concern.

7. I am sending copies of this minute and its attachment to members of the Cabinet, the Lord Advocate, the Solicitor General, Sir Robin Butler and John Kerr.

P. M.

20 · 11 · 90.

French producers claimed that Articles 5 and 9 of Regulation 1837/80 were unlawful because they gave the United Kingdom alone the option of operating in Great Britain, alongside the annual ewe premium, either the variable slaughter premium or intervention. For the other Member States market support was by means of the annual ewe premium and intervention, with no option to operate the variable slaughter premium. It was claimed that this difference in treatment was contrary to the principles of equal treatment and free movement of goods.

The Court held that the principle of equal treatment required that comparable situations should not be treated differently unless different treatment could be objectively justified. However, in the light of the particular circumstances of the British sheepmeat market, it was within the discretion of the Community institutions, taking account of the structural and natural disparaties between the various agricultural regions (Article 39 (2) of the Treaty), to give to one Member State the option to grant variable premium in a specified region.

As regards free circulation, the Court held that the operation of the claw-back on exportation from Great Britain to other Member States enabled trade to take place without distorting the market. There was thus no breach of the principle of free circulation.

SECTION B

EUROPEAN CONVENTION ON HUMAN RIGHTS

Category (1) : Cases before the European Court of Human Rights (Strasbourg

EUROPEAN COURT OF HUMAN RIGHTS (STRASBOURG)

There were no judgments of the Court involving the United Kingdom during this six-month period (apart from the Soering and Gaskin judgments of 7 July which were dealt with in my last review).

Category (2) : Cases before the European Commission of Human Rights

EUROPEAN COMMISSION OF HUMAN RIGHTS

The Commission adopted one Report giving its opinion on whether or not there was a violation of the Convention.

Thynne and Others

In its Report of 7 September 1989 the Commission found that there had been a breach of Article 5(4) of the Convention in that the applicants, who had been sentenced to life imprisonment, were not able to have the lawfulness of their continued detention determined by a court at reasonable intervals. The case raises similar issues to those in Weeks, where the Court held that the Government was in breach of Article 5(4). In effect, the Commission's Report extends the scope of the Weeks judgment to all discretionary life sentences (i.e life sentences for crimes other than murder). The case has been referred to the Court.

The Commission declared two cases admissible:

- that the Commission Decision was not void on the ground that there had been a failure to provide sufficiently specific details about the subject matter and purpose of the investigation - the Decision contained, the Court held, the essential information necessary for the purposes of Regulation 17;

- that the essential procedural requirements requiring a fair hearing prior to the imposition of a final (financial) penalty on the undertaking had been fulfilled.

DOW CHEMICALS v COMMISSION (ECJ CASES 97, 98, and 99/87)

These proceedings also concerned challenges to Commission decisions in connection with Regulation 17 investigations. To the extent that the same arguments which had been advanced in Hoechst were advanced, the Court of Justice repeated, in broad terms, its ruling in the Hoechst case.

Dow also mounted a number of other arguments. Inter alia, they argued that the Commission decisions were invalid because Commission inspectors had allegedly not carried out their actions in accordance with Regulation 17 and with the contested Commission decisions. The Court of Justice held that, even if the conduct of the Commission's officials was not in accordance with their powers under the Regulation or the contested decisions, that fact would not render the decisions unlawful. Measures taken subsequently to the adoption of a decision could not affect its validity.

DESCHAMPS AND GAEC v OFIVAL (ECJ CASES 181, 182, and 218/88)

In these proceedings French courts requested the ECJ to rule on the validity of Articles 5 and 9 of Council Regulation (EEC) No. 1837/80 on the common organisation of the market in sheepmeat and goatmeat.

Secondly the Court held, insofar as the application of mobility and vocational training criteria to pay settlements systematically disadvantaged female employees, that they could be objectively justified provided that the employer could demonstrate that adaptability (in the case of mobility) and training (in the case of vocational training) were of importance for the performance of specific tasks assigned to the employee.

Thirdly, the employer would not need objectively to justify applying the criterion of seniority when determining a pay settlement.

CRIMINAL PROCEEDINGS AGAINST H. F. M. NIJMAN (ECJ CASE 125/88)

In criminal proceedings brought against Mr. Nijman for contravening a Dutch law on plant protection products, the Dutch Court sought a preliminary ruling as to whether its national law relating to plant protection products which prohibited the use of certain substances should be interpreted in conformity with a Community Directive to which effect had been given by the Dutch law, but which was narrower in its application than the Dutch law. The Court was also asked to rule on the question whether the Dutch law was compatible with Article 30 and 36 of the Treaty on the free-movement of goods.

The Court held that, as the Directive did not envisage total harmonisation, the national court did not have to interpret the national law in conformity with the Directive in its application to products not containing substances - such as the one at issue - enumerated in the annex to the Directive. In the absence of harmonisation, the Dutch law was compatible with Article 36 of the EEC Treaty even though it prohibited a wider range of substances than the Directive, because the Court found that its purpose was to protect the health of humans and animals, and the environment.

HOECHST A.G AND OTHERS v COMMISSION (ECJ CASES 46/87 and 227/88)

In these cases, Hoechst challenged Commission decisions taken in connection with investigations under Regulation 17/62, which provides for the specific rules enabling the Commission to enforce the competition rules in the EEC Treaty. The particular investigation in question concerned allegations that there existed agreements or concerted practices between certain producers and suppliers of pvc and polyethylene.

The first issue concerned the Commission's investigating powers under Regulation 17. The Commission argued that, under Regulation 17, they had wide-ranging powers to investigate, including the power to carry out searches without the help of national authorities and without having to observe the procedural safeguards provided for under national law. The Court of Justice did not agree. Equally, the Court did not uphold the Hoechst claim that the Commission's Decision was illegal on the ground that it amounted to an authority to search which required the mandate of a German judge.

The Court upheld the Commission Decision under challenge saying that it did no more than require the cooperation of the undertaking in the respects particularised in the Decision. If, on the other hand, the Commission had intended to search for information without the undertaking's cooperation, the Court held that it would have been a matter for the Member State to determine not only the circumstances in which national authorities would afford assistance to the Commission but also the procedural safeguards which would have had to be followed in the investigation.

The Court also held:

- that the Commission, by adopting a decision containing "search" powers, had not violated Article 8(1) of the European Convention on Human Rights (right to respect for private and family life, home and correspondence), since Article 8(1) was not concerned with commercial premises;

Spycatcher: interim injunctions.

An oral hearing took place on 5 October 1989 in the two applications brought by The Sunday Times and the Observer/Guardian challenging the conformity with Article 10 (freedom of expression) of the interim injunctions made during the English proceedings. Following the hearing, at which I appeared for the Government, the Commission declared the applications admissible, and will now proceed to draw up its Report in the light of further written submissions by the Government.

Campbell: Prisoners' correspondence (Scotland)

Following an oral hearing on 8 November, the Commission declared this case admissible. It concerns correspondence between an inmate and his solicitor, and between the inmate and the European Commission of Human Rights, and raises certain new points concerning such correspondence. Prisoners' correspondence has already been the subject of extensive case-law in Strasbourg leading to modifications of British prison rules.

A number of cases were declared inadmissible of which the most important was:

Birmingham Six: retrial before the Court of Appeal.

The Birmingham Six raised a number of complaints in respect of their retrial, but the Commission declared their application inadmissible without referring it to the Government for comment.

UK PARTICIPATION IN EUROPEAN LITIGATION :

JUDGMENTS AND DECISIONS, JANUARY-JUNE 1989

A. COURT OF JUSTICE OF THE EUROPEAN COMMUNITES

B. EUROPEAN CONVENTION ON HUMAN RIGHTS

SECTION A :

COURT OF JUSTICE OF THE EUROPEAN COMMUNITES

Category (I) : actions initiated by the United Kingdom

United Kingdom -v- Council (Youth Training) (Case 56/88) (Article 128 as a Sole Treaty Base)

In this case the United Kingdom challenged the adequacy of Article 128 of the EEC Treaty as a sole legal base for Council decision 87/569 concerning an action programme for the vocational training of young people and their preparation for adult and working life. The United Kingdom argued, in particular, that Article 128 (which authorises the Council to lay down general principles for supplementing the common vocational training policy) does not extend to the establishment of a detailed Community Action Programme involving significant Community expenditure over several years.

The Court of Justice dismissed the application and rejected the arguments advanced by the United Kingdom. The Court held:

- that the implementation of the general principles of the common vocational training policy was a task falling upon the Community institutions and the Member States working in cooperation;

- that Article 128 authorised the Council to adopt legal measures providing for Community action in the sphere of vocational training and imposing corresponding obligations of cooperation on the Member States;

- that the Youth Training Programme merely supported and supplemented through Community measures national policies and activities of Member States, which did not exceed the limits of the powers conferred by Article 128.

Section B : European Convention on Human Rights

(1) Cases before the European Court of Human Rights (Strasbourg);

(2) Cases before the European Commission of Human Rights.

3. In my last review, I reminded colleagues of the importance of submitting proposals under our "Euro-proofing" procedures at the earliest possible stage, so that any problem could quickly be identified and resolved. As a general rule, the procedures are working very well. However, in a few cases the request for legal advice on Community law issues has been received very late in the day. You will appreciate that, if considered advice is to be given on increasingly complex issues, it is vital to have as much time as is possible to consider those issues.

4. I am sending copies of this minute and its attachment to Members of the Cabinet, the Lord Advocate and to Sir Robin Butler.

PM

10 DOWNING STREET

Charles

I was ringing the A-G's office to ask whether, as there had been no reaction to recent Government reports, the PM was no longer interested. Having looked at the file I told him I thought the PM did still find them helpful and would want them continued. He to keep the A-G's spirits up perhaps we should send a brief "seen and noted" response to the next one, which is apparently due shortly.

PRCG 6/5

PRIME MINISTER

PARTICIPATION BY THE UNITED KINGDOM IN CASES BEFORE THE EUROPEAN COURTS

1. I attach my six monthly review of noteworthy judgments in Community cases in Luxembourg in which the UK has been involved, and of human rights decisions involving the UK in Strasbourg.

2. I have adopted the same format as I have previously done:

Section A : The European Court of Justice (Luxembourg)

(1) Actions initiated by the United Kingdom;

(2) Actions initiated by the Commission against the United Kingdom;

(3) Actions in which the United Kingdom has intervened;

(4) Cases referred to the Court of Justice by United Kingdom Courts or Tribunals;

(5) Cases referred to the Court of Justice by the Courts or Tribunals of other Member States in which the United Kingdom submitted observations.

of Community law and of the European Convention on Human Rights is increasingly important in the Government's decision making processes. It is therefore crucial that issues of European law should be identified early, and that requests for advice on such legal issues should be made in good time so that well considered and constructive advice may be given.

4. The range of ECJ cases which I have noted demonstrates the extent to which Community law can affect us. The direction which the developing jurisprudence of the Court takes can be of immense importance to us, and accordingly our submissions are prepared, as they need to be, with very great care. I am glad to be able to report that our efforts are highly respected by the Court, which makes it all the more important that our specialist teams of brickmakers are provided with their straw in plenty of time.

5. I am sending copies of this Minute and its attachment to members of the Cabinet, the Lord Advocate, Sir Robin Butler and Sir David Hannay.

SECTION A

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

Category (I) : Actions initiated by the Commission against the United Kingdom

COMMISSION v UNITED KINGDOM (ECJ CASE 246/89R)

This is one of the many cases before the Court of Justice arising from the Common Fisheries Policy. In August 1989, the European Commission launched Article 169 (infraction) proceedings against the United Kingdom, alleging that the nationality conditions in section 14 of the Merchant Shipping Act 1988 for registration of fishing vessels on the United Kingdom register were contrary to Community law. The Commission also applied, pending the hearing of the main application, for interim measures against the United Kingdom.

The President of the Court ordered the interim suspension, pending final judgment, of the British Citizenship requirements in section 14 insofar as they related to fishing vessels which had been fishing under the British flag until 31 March 1989 and insofar as they were owned by Community nationals. An Order in Council was made in October 1989 to give effect to the ruling.

It is important to note that the Court of Justice ruling did not affect the requirements as to residence and domicile in the United Kingdom contained in section 14 of the 1988 Act.

Prime Minister ②

You may wish me to minute our in your name, in support of the Attorney's strictures in para. 3 & 4 below. CDP 7/3

PRIME MINISTER

PARTICIPATION BY THE UNITED KINGDOM IN CASES BEFORE THE EUROPEAN COURTS

1. I attach my six monthly review of noteworthy judgments in Community cases in Luxembourg in which the UK has been involved, and of human rights decisions involving the UK in Strasbourg. The review covers the period until 31 December 1989.

2. I have adopted the following format:

Yes please

SECTION A : THE EUROPEAN COURT OF JUSTICE (LUXEMBOURG)

(1) Actions initiated by the Commission against the United Kingdom;

(2) Actions in which the United Kingdom has intervened;

(3) Cases referred to the Court of Justice by United Kingdom Courts or Tribunals;

(4) Cases referred to the Court of Justice by the Courts or Tribunals of other Member States in which the United Kingdom has submitted observations.

SECTION B : EUROPEAN CONVENTION ON HUMAN RIGHTS

(1) Cases before the European Court of Human Rights (Strasbourg);

(2) Cases before the European Commission of Human Rights.

3. In my last two reviews I have reminded colleagues of the importance of submitting proposals under our "Euro-proofing" procedures at the earliest possible stage, so that any problem may quickly be identified and resolved. It is disappointing to have to note that requests for legal advice on European legal issues have not always been made in good time. The impact

A number of cases were declared inadmissible of which the most important were:

Schreiber, which concerned the provision of a full kosher diet for strict orthodox Jewish prisoners.

Marsden, which concerned the length of child care proceedings.

Begum, in which the applicant was a divorced woman from Bangladesh who sought leave to remain in the UK to exercise access to her children.

file

PM

bc PC

10 DOWNING STREET

LONDON SW1A 2AA

From the Private Secretary

8 March 1990

Dear Juliet,

PARTICIPATION BY THE UNITED KINGDOM IN CASES BEFORE THE EUROPEAN COURTS

The Prime Minister was most grateful for the Attorney's recent minute summarising noteworthy judgments in Community cases in Luxembourg in which the UK has been involved, and of human rights decisions involving the UK in Strasbourg. She hopes that colleagues will note carefully the observations in paragraphs 3 and 4 of the Attorney's minute about the importance of seeking legal advice on European legal issues in good time.

I am copying this letter to the Private Secretaries to members of the Cabinet, Alan Maxwell (Lord Advocate's Department) and Sonia Phippard (Cabinet Office).

Yours sincerely,

C. D. POWELL

Miss Juliet Wheldon,
Law Officers' Department.

cc

Category (2) : Actions in which the United Kingdom has intervened

COMMISSION v COUNCIL (ECJ CASE 131/87)

The Commission applied for the annulment of Council Directive 87/64/EEC of 30 December 1986, which amended earlier Directives (76/461/EEC and 76/462/EEC) concerning health and veterinary inspection problems affecting intra-Community trade in fresh meat and importation of fresh meat into the Community. The Directive was adopted to facilitate the supply of glands and organs, including blood, for pharmaceutical manufacturing purposes. The United Kingdom intervened in support of the Council.

The case concerned the correct Treaty basis for the measure. The Commission had proposed Article 43 (common agricultural policy) as the legal basis for the Directive, but the Council had adopted it under Articles 100 (harmonisation of laws) and 113 (common commercial policy). The difference is not just one of form: whereas Articles 100 and 113 require unanimity on the part of the Member States, measures are adopted under Article 43 by a qualified majority.

The Court decided that the products covered by the Directive were agricultural products and that the Directive contributed to two of the objectives of the common agricultural policy set out in the Treaty, namely to assure the availability of supplies and to ensure that supplies reach consumers at reasonable prices. The Court held that those two objectives extended to supplying the demands of industry. Article 43 was therefore the appropriate legal basis. It was not necessary additionally to rely on Article 100 simply because the method of legislating involved the harmonisation of Member States' laws, or on Article 113 simply because the Directive affected importation of products.

Thus the Court held that the Directive had been adopted on the basis of inappropriate Treaty articles and was therefore void.

state of Community law that was a matter for the Member States.

The Court further held that it was necessary to ascertain whether the effects of such national rules exceeded 'the effects intrinsic to rules of that kind'. That was a question of fact, which fell to be determined by the national court.

This rather opaque concept is the only qualification to the Court's ruling that Article 30 does not outlaw national rules prohibiting retailers from opening their premises on Sunday.

Category (4) : Cases referred to the Court of Justice by the Courts or Tribunals of other Member States in which the United Kingdom has submitted observations

ENICHEM v COMMUNE DI CISINELLO BALSAMO (ECJ CASE 380/87)

This case concerned an Italian reference to the Court of Justice under Article 177 of the EEC Treaty seeking a ruling (a) on the intepretation of Directive (EEC) 75/442 on waste, (b) whether a failure to observe an obligation under Community law to notify the Commission in advance of measures of the kind at issue in the case gave rise to individual rights and (c) whether Community law required the national administration to pay compensation in respect of infringement by the administration of rights protected by Community law, even where national law did not provide for such compensation.

The Court held:

- that the Directive did not confer the right to sell or use plastic sacks or other non-biodegradable containers;

- that the Directive did impose an obligation on Member States to communicate to the Commission any proposed legislation on the relevant subject prior to its final adoption, but did not confer the kind of right that could be enforced before the national courts for failure to comply with such an obligation.

The Court did not, in the circumstances, need to answer the referring court's question on issue (c)(above). However, the Advocate General addressed the point (albeit without finding it necessary to reach any concluded view on the facts) in these terms:

> "It can be contended .... that where Community law confers rights on individuals, national courts must provide an appropriate and effective remedy in respect of infringement by the national authorities of those rights."

HANDELS - OG KONTORFUNKTIONAERERNES FORBUND I DANMARK -v- DANSK ARBEJDSGIVERFORENING (ECJ CASE C 109/88)

This case was a Danish reference under Article 177 of the Treaty. It concerned various issues arising from the application of the principle of equal pay in the context of the Equal Pay Directive.

The issues arose from the fact that, although wages in the relevant undertaking were the same for all employees within the same pay group, the employers could award pay supplements based on mobility, vocational training and seniority. But the pay system was totally lacking in transparency and so female employees were unable to identify the reasons for any differences which might exist between their wages and those of a male employee carrying out the same work. They were aware only of the amount in their wage packet.

The Court of Justice therefore first considered whether the Equal Pay Directive had to be interpreted in such a way that, where an undertaking applied a pay system totally lacking in transparency - and assuming that a female employee could first establish, in relation to a relatively large number of employees, that the average pay of female employees was less than that of comparable male employees - the employer was obliged to prove that his wage policy was not discriminatory. The Court of Justice held that the employer was under such an obligation.

- that, moreover, Spanish share-fishermen, being workers (and not self-employed as contended by the applicants in the case), fell within the scope of a derogation in the Spanish Act of Accession which excluded the applicability of Community provisions on free movement of workers to Spanish workers until 1 January 1993. Consistently with the principle of Community law that the scope of derogations must be restrictively construed, the Court of Justice went on to limit the scope of Member States to introduce more unfavourable conditions after the Spanish Act of Accession and to make protective provision in respect of Spanish workers already employed in the host Member State before the Act of Accession came into force.

TORFAEN BOROUGH COUNCIL v B & Q Plc (ECJ CASE 145/88)

This case was a reference from the Cwmbran Magistrates' Court arising out of the prosecution of B&Q Plc for trading on Sundays contrary to the Shops Act 1950. B&Q maintained that the relevant provisions of the Shops Act were incompatible with Article 30 of the Treaty, which prohibits quantitative restrictions on imports between Member States, since many of the goods sold in their shops were imported from other Member States.

The Court said that national rules prohibiting retailers from opening their premises on Sunday applied to imported and domestic products alike. In principle the marketing of products imported from other Member States was therefore not made more difficult than the marketing of domestic products. It was necessary in cases such as this to consider whether rules such as those in issue pursued an aim that was justified with regard to Community law. As far as that question was concerned the Court had previously held that national rules governing the hours of work, delivery and sale in the bread and confectionery industry constituted a legitimate part of economic and social policy consistent with the objectives of public interest pursued by the Treaty. The same consideration applied as regards national rules governing the opening hours of retail premises. Such rules reflected certain political and economic choices insofar as their purpose was to ensure that working and non-working hours are so arranged as to accord with national or regional socio-cultural characteristics. In the present

Category (3) : Cases referred to the Court of Justice by United Kingdom Courts or Tribunals

R v MINISTER OF AGRICULTURE, FISHERIES AND FOODS, EX PARTE JADEROW LIMITED (ECJ CASE - 3/87)

This was a reference from the High Court in England. It was concerned with the compatibility with Community law of conditions for the grant of a UK fishing licence to a company in respect of a fishing vessel owned by that company. The particular conditions at issue in this case (cf. the Agegate case noted below) were concerned with the operation of fishing-vessels.

The Court of Justice upheld the UK case that it was lawful to impose fish licensing conditions in order to ensure that there was a real economic link between vessels and the State against whose fishing quota the fish were landed, provided that that link was based upon relations between that vessel's fishing operations and the populations dependent on fisheries. In order to establish a real economic link, a Member State was entitled to provide that fishing vessels should operate habitually from a national port and, to that end, could require periodic presence in national ports provided that there was no obligation imposed to depart from a national port on each fishing trip. Alternatively, Member States could, to the same end, accept evidence of proportions of catches actually landed in national ports provided that no obligation, direct or indirect, was imposed to land catches in such ports or which hindered normal fishing operations.

R v MINISTER OF AGRICULTURE, FISHERIES AND FOODS EX PARTE AGEGATE LIMITED (ECJ CASE C - 3/87)

This was a reference from the High Court in England. It also concerned the compatibility with Community law (viz., the provisions on free-movement of workers) of conditions for the grant of a UK fishing licence to a company in respect of a fishing vessel owned by that company. The particular conditions at issue in this case (cf. the Jaderow case noted above) were concerned with the crew of such vessels.

The Court of Justice held:

- that it was lawful to require a certain proportion (75%) of the crew of fishing vessels of a Member State against whose quota fish were landed to be Community nationals;

- that it was unlawful to require that that proportion of the crew should be resident in the Member State in question;

- that, however, it was lawful (save where otherwise provided in a specified Community regulation) to require that the skipper and crew should make contributions to the social security scheme of the Member State concerned;