

VIKING v INTERNATIONAL TRANSPORT WORKERS' FEDERATION C438/05

The above cited case was referred by the Court of Appeal, England and Wales, to the European Court of Justice (ECJ) in November 2005. The case is of fundamental importance to trade unions and their members across the European Union (EU). In effect, the ECJ has been asked to decide the relationship within the EU legal order of the European Community (EC) rules on free movement, as protected in Title III of the EC Treaty, and the fundamental rights of workers to take collective action, including industrial action and strike action, as protected in Title XI of the EC Treaty.

Pursuant to Article 23 of the Statute of the ECJ, all Member States, EEA States and the European Commission were entitled to submit observations to the Court (written and/or oral). These views were considered by the ECJ.

You may already be aware of the Laval/Vaxholm case involving the Swedish Building Workers' Union and the Swedish Electrician's Union. That case raises similar issues of EC law and has also been referred to the ECJ by the Swedish Labour Court.

1 What is this case about?

1.1 Viking Line Abp (Viking) is a Finnish passenger shipping company. It owns and operates the passenger and cargo ferry, *Rosella*. The *Rosella* is Finnish flag and has a predominantly Finnish crew who benefit from a collective agreement negotiated by the Finnish Seamen's Union (FSU). Since 17 August 2003, the *Rosella* has traded on the route between Helsinki in Finland and Tallinn in Estonia.

1.2 Finland has been a member of the EU since 1995. Estonia became a member of the EU in May 2004.

1.3 During 2003, Viking decided that the *Rosella* would be better able to compete with other operators on the Helsinki - Tallinn route if it was registered as an Estonian ship. The re-flagging would allow Viking to replace the predominantly Finnish crew with Estonian seafarers, and to negotiate cheaper terms and conditions of employment with an Estonian trade union.

1.4 In late 2003, Viking began cooperation proceedings with the FSU in relation to the possible transfer of the *Rosella* to a foreign ship register. The FSU requested that the ITF assist by informing its affiliates of the situation and by asking those affiliates to refrain from negotiating with Viking pursuant to the ITF Flags of Convenience (FOC) policy. Under the FOC policy, affiliates have agreed that the wages and conditions of employment of seafarers should be negotiated with the affiliate in the country where the ship is ultimately beneficially owned. In this case, the *Rosella* would remain owned by Viking, a Finnish company, even if re-flagged to Estonia. According to the FOC policy, therefore, the FSU would keep the negotiation rights for the *Rosella* after the re-flagging.

1.5 To support the FSU, on 6 November 2003, the ITF sent a letter to all affiliates organising Seafarers, Inspectors and Coordinators in the terms requested.

1.6 Negotiations between Viking and the FSU for a new collective agreement for the *Rosella* were unsuccessful and on 17 November 2003, Viking commenced proceedings before the Finnish Labour Court seeking a declaration that the then existing manning agreement covering the *Rosella* remained in force after 18 November 2003, even if no new agreement had been reached before then. The FSU gave notice in accordance with the Finnish Act on Mediation in Labour Disputes that it intended to commence industrial action measures in relation to the *Rosella* at 19:00 hours on 2 December 2003.

1.7 On 25 November 2003, Viking commenced proceedings in the Finnish District Court seeking an urgent interim injunction restraining the FSU from initiating the threatened industrial action against the *Rosella* (plus a fine). Further meetings then took place with the National Conciliator in Finland and on 2 December 2003, in accordance with the terms of a settlement agreement, the parties entered into a revised manning agreement for the *Rosella*. Viking claimed they were forced to capitulate because of the threat of strike action.

1.8 In August 2004, Viking commenced an application in the Commercial Court, England and Wales for an order to stop the ITF and the FSU from taking any action to prevent the re-flagging of the *Rosella*. Viking was able to start proceedings in England because the ITF has its headquarters in London.

1.9 The Commercial Court granted an order requiring the ITF and the FSU to refrain from taking any action to prevent the re-flagging, and further requiring the ITF to publish a notice withdrawing its letter to its affiliate trade unions. The judge considered that the actions of the ITF and the FSU were contrary to European law. The ITF and the FSU appealed the judgment to the Court of Appeal.

1.10 In a judgment given on 3 November 2005, the Court of Appeal decided that the case raised important and difficult questions of European law. Therefore it referred a series of questions to the ECJ. It also set aside the order granted by the Commercial Court against the ITF and the FSU. In the meantime, proceedings in London are on hold until the ECJ provides answers to the questions that the Court of Appeal has requested.

1.11 The parties to the case will now put their arguments before the ECJ. The ECJ will also look at any arguments submitted by the European Commission and the governments of the Member States and other EEA States (Iceland, Liechtenstein and Norway).

1.12 Once the ECJ answers the questions referred to it, the case will be returned to the Court of Appeal for a final decision. However, the judgment of the ECJ will become part of European law and will apply throughout the EC.

2 What are the important legal issues?

2.1 Viking argues that the actions of the ITF and the FSU were in breach of the free movement provisions guaranteed under the EC Treaty.

2.2 Article 2 of the EC Treaty provides that the Community has as its task the establishment of a common market. One of the activities of the Community listed in Article 3 of the EC Treaty is the creation of "an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital".

2.3 Title III of EC Treaty contains the rules relating to the free movement of persons, services and capital. In particular, Article 43 of the EC Treaty provides for freedom of establishment and Article 49 guarantees the freedom to provide services (Regulation 4055/86 applies the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries). Viking's case was that, by preventing the re-flagging, the ITF and the FSU were infringing Viking's right to establish in Estonia or, alternatively, to provide services between Estonia and Finland.

2.4 However Article 2 of the EC Treaty also contains the social objectives of the EC and includes the promotion throughout the community of "a high level of social protection", the "raising of the standard of living and quality of life" and the "economic and social cohesion and solidarity among member states".

2.5 Title XI of the EC Treaty contains the rules relating to the Community "Social Policy". In summary, these rules set out the essential social objectives of the EC, encourage collective bargaining and provide that the Community shall support the activities of Member States in working conditions, social protection of workers and representation and collective defences of the interests of workers. Following the principle of subsidiarity, social policy remains largely a matter for individual Member States. At the time of drafting the EC Treaty, social policy was considered to lie at the heart of national sovereignty.

2.6 The right to strike is protected in Finnish law by Article 13 of the Finnish Constitution. Article 13 enshrines the right to freedom of association and Finnish law has long regarded the right to take industrial action as an inseparable part of the freedom of association, and as such a fundamental right of Finnish law. Thus it was common ground between the parties, and accepted by the judge, that the FSU had a right under Article 13 of the Finnish Constitution to take strike action in the circumstances of this case, namely to protect its members jobs and in respect of vessels operating from Finnish ports to enforce a collective bargaining agreement to improve the terms and conditions of the new crew. ITF and FSU argue that Finnish law is consistent with the Community's social policy and that their right to collective action is recognised by the Community as a fundamental right and that this right comes clearly within the scope of Title XI EC Treaty.

3 What will the ECJ decide?

The essence of this case is concerned with what happens when there is a conflict between the economic agenda and the social agenda of the European Community. The Court of Appeal referred ten questions to the ECJ which are attached as an Annex 1.

Below is a short commentary on the questions. In particular, two of these questions (Q1 and Q2) are of fundamental importance.

Q1. Scope of the free movement provisions

This is the most important and central question. It raises a European Union constitutional issue because it is asking the ECJ whether the EC social policy which, as a matter of subsidiarity is mainly implemented by each Member State, takes

priority over, or at least has equal status with, the EC economic policy concerning free movement which is implemented centrally by the European Commission.

If social policy is subject to the economic freedoms of the EC Treaty, this may be viewed as diminishing national sovereignty and the freedom of a Member State to determine its own social policies.

In the "*Albany case*" referred to in the question, the issue was whether the competition rules in the EC Treaty applied to a collective agreement. The ECJ held that the collective agreement was outside the scope of the competition rules because to subject the collective agreement to the competition rules would seriously undermine the Community's social policy.

The ITF and the FSU argue that, in principle, collective action is simply not intended to be subject to the free movement Articles of the EC Treaty. If collective action, lawful in a Member State, restricts the ability of a business there to exercise its right to establish or provide services elsewhere in the EU, then in principle that collective action cannot be unlawful as a matter of European law. The ITF and the FSU accept that not all activities of trade unions fall within Title XI: for example, a clause in a collective bargaining agreement that required more pay for men than women would not meet the social objectives of Title XI and would not be protected. However, action taken to maintain Finnish wage levels would fall within Title XI as it complied with the social objectives of the Treaty even if the effect of such action was to make the reflagging of the *Rosella* pointless.

Q2. Horizontal direct effect

The Court of Appeal considered this also to be a most important question arising under the Treaty.

The ECJ has not itself extended Article 43 to trade unions or to purely private conduct. The ITF and FSU submit that Article 43 EC and/or Regulation 4055/86 do not have horizontal direct effect on them. The Articles apply to the Member States and seek to address regulatory measures which restrict the freedom of establishment and the freedom to provide services.

In the Court of Appeal's view, the key question is whether the free movement provisions provide employers with a remedy directly against trade unions. If the answer is "yes", then the implication is that all industrial action anywhere in the EC that has the effect of placing a restriction on free movement would have to be justified by individual trade unions ultimately before the ECJ rather than the national courts of each Member State. The Court of Appeal stated that "[i]t is difficult to think that it was contemplated that all industrial action which had the effect of placing a restriction on free movement would have to be justified by individual trade unions ultimately before the ECJ."

Qs 8 and 9. Objective justification

These two questions relate to balancing fundamental rights in the Community and economic freedoms enshrined in the EC Treaty. This requires a fair balance to be struck based on the specific facts of the case.

In the particular circumstances of this case, the right to strike, which has been challenged, is a fundamental constitutional right enshrined in the Finnish Constitution. However the right to strike in Finnish law is not absolute and unqualified: it is subject

to the normal constraints of Finnish labour law. Thus, the objective of Finnish jurisprudence is to establish a careful balance in industrial relations, weighing up the peace obligations of trade unions and the obligations of employers.

In this case, the actions taken by the ITF and the FSU were within the carefully delineated rules of industrial action under Finnish law and the ITF and FSU argue that this is the important issue when deciding where to strike a fair balance.

It has been argued that the test for whether any specific instance of collective action is proportionate (and thus how a fair balance is to be struck) is one that the Member State should decide and that Member States should be given a wide margin of discretion to apply their own legislation or established social dialogue to secure employment standards.

4 Next stages

This case deals with the constitutional balance to be struck between the economic and social factors within the now enlarged Internal Market. Therefore the issue is of great political importance for the development of the EU. The EU institutions have committed themselves to respect the rights in the EU Charter of Fundamental Rights proclaimed at Nice in December 2000. This includes the right to take collective action, including strike action. Observations by the Commission, and the attitude of the Council and the European Parliament in the Viking and Laval/Vaxholm cases, will reflect their approach to the Charter. It will also be a major test for the ECJ itself.

Further, the proposed Constitutional Treaty enshrined a fundamental right to collective action, including strike action, in Part II (the EU Charter). The positions taken by the Commission and Member States in the Viking and Laval/Vaxholm cases, and, in particular, their interventions before the ECJ, will influence debates around the future of the Constitutional Treaty.

This note is necessarily a short summary of complex issues.

ANNEX 1

QUESTIONS TO BE REFERRED TO THE ECJ

Scope of the free movement provisions

1) Where a trade union or association of trade unions takes collective action against a private undertaking so as to require that undertaking to enter into a collective bargaining agreement with a trade union in a particular Member State which has the effect of making it pointless for that undertaking to re-flag a vessel in another Member State, does that action fall outside the scope of Article 43 of the EC Treaty and/or Regulation 4055/86 by virtue of the EC's social policy including, inter alia, Title XI of the EC Treaty and, in particular, by analogy with the Court's reasoning in Case C-67/96 *Albany* [1996] ECR I-5751, paras 52-64?

Horizontal direct effect

2) Do Article 43 of the EC Treaty and/or Regulation 4055/86 have horizontal direct effect so as to confer rights on a private undertaking which may be relied on against another private party and, in particular, a trade union or association of trade unions in respect of collective action by that union or association of unions?

Existence of restrictions on free movement

3) Where a trade union or association of trade unions takes collective action against a private undertaking so as to require that undertaking to enter into a collective bargaining agreement with a trade union in a particular Member State, which has the effect of making it pointless for that undertaking to re-flag a vessel in another Member State, does that action constitute a restriction for the purposes of Article 43 of the EC Treaty and/or Regulation 4055/86?

4) Is a policy of an association of trade unions which provides that vessels should be flagged in the registry of the country in which the beneficial ownership and control of the vessel is situated so that the trade unions in the country of beneficial ownership of a vessel have the right to conclude collective bargaining agreements in respect of that vessel, a directly discriminatory, indirectly discriminatory or non-discriminatory restriction under Article 43 of the EC Treaty or Regulation 4055/86?

5) In determining whether collective action by a trade union or association of trade unions is a directly discriminatory, indirectly discriminatory or non-discriminatory restriction under Article 43 of the EC Treaty or Regulation 4055/86, is the subjective intention of the union taking the action relevant or must the national court determine the issue solely by reference to the objective effects of that action?

Establishment/ Services

6) Where a parent company is established in Member State A and intends to undertake an act of establishment by reflagging a vessel to Member State B to be operated by an existing wholly owned subsidiary in Member State B which is subject to the direction and

control of the parent company:

a) is threatened or actual collective action by a trade union or association of trade unions which would seek to render the above a pointless exercise capable of constituting a restriction on the parent company's right of establishment under Article 43, and

b) after reflagging of the vessel, is the subsidiary entitled to rely on Regulation 4055/86 in respect of the provision of services by it from Member State B to Member State A?

Justification

Direct discrimination

7) If collective action by a trade union or association of trade unions is a directly discriminatory restriction under Article 43 of the EC Treaty or Regulation 4055/86, can it, in principle, be justified on the basis of the public policy exception set out in Article 46 of the EC Treaty on the basis that:

- a) the taking of collective action (including strike action) is a fundamental right protected by Community law; and/or
- b) the protection of workers?

ITF policy: objective justification

8) Does the application of a policy of an association of trade unions which provides that vessels should be flagged in the registry of the country in which the beneficial ownership and control of the vessel is situated so that the trade unions in the country of beneficial ownership of a vessel have the right to conclude collective bargaining agreements in respect of that vessel, strike a fair balance between the fundamental social right to take collective action and the freedom to establish and provide services, and is it objectively justified, appropriate, proportionate and in conformity with the principle of mutual recognition?

FSU's actions: objective justification

9) Where:

- a parent company in Member State A owns a vessel flagged in Member State A and provides ferry services between Member State A and Member State B using that vessel;
- the parent company wishes to re-flag the vessel to Member State B to apply terms and conditions of employment which are lower than in Member State A;
- the parent company in Member State A wholly owns a subsidiary in Member State B and that subsidiary is subject to its direction and control;
- it is intended that the subsidiary will operate the vessel once it has been reflagged in Member State B with a crew recruited in Member State B covered by a collective bargaining agreement negotiated with an ITF affiliated trade union in Member State B;
- the vessel will remain beneficially owned by the parent company and be bareboat chartered to the subsidiary;
- the vessel will continue to provide ferry services between Member State A and Member State B on a daily basis;
- a trade union established in Member State A takes collective action so as to require the parent and/or subsidiary to enter into a collective bargaining agreement with it which will apply terms and conditions acceptable to the union in

Member State A to the crew of the vessel even after reflagging and which has the effect of making it pointless for the parent to re-flag the vessel to Member State B, does that collective action strike a fair balance between the fundamental social right to take collective action and the freedom to establish and provide services and is it objectively justified, appropriate, proportionate and in conformity with the principle of mutual recognition?

10) Would it make any difference to the answer to 9) if the parent company provided an undertaking to a court on behalf of itself and all the companies within the same group that they will not by reason of the reflagging terminate the employment of any person employed by them (which undertaking did not require the renewal of short term employment contracts or prevent the redeployment of any employee on equivalent terms and conditions)?