JUDGMENT OF THE COURT
17 November 1992 *

In Case C-279/89,

Commission of the European Communities, represented by Robert Fischer, Legal Adviser, and Peter Oliver, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Roberto Hayder, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

supported by

Kingdom of Spain, represented initially by Javier Conde de Saro, then by Alberto José Navarro Gonzalez, Director General for Community Legal and Institutional Coordination, and by Rosario Silva de Lapuerta, State Attorney in the Legal Department for Matters before the Court of Justice, acting as Agents, with an address for service in Luxembourg at the Spanish Embassy, 4-6 Boulevard Emmanuel Servais,

intervener,

v

United Kingdom of Great Britain and Northern Ireland, represented initially by Rosemary Caudwell, then by S. Cochrane, of the Treasury Solicitor's Department, acting as Agent, assisted by Christopher Bellamy QC and Christopher Vajda, Barrister, with an address for service in Luxembourg at the British Embassy, 14 Boulevard Roosevelt,

defendant,

APPLICATION for a declaration that, by imposing certain fishing licence conditions, the United Kingdom has failed to fulfil its obligations under Articles 34, 48,

* Language of the case: English.

52 and 59 of the EEC Treaty, under Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475), under Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EEC) No 2001/83 (OJ 1983 L 230, p. 8) and under Regulation (EEC) No 1251/70 of the Commission of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State (OJ, English Special Edition 1970 (II), p. 402),

THE COURT,

composed of: O. Due, President, C. N. Kakouris, G. C. Rodríguez Iglesias, M. Zuleeg and J. L. Murray, (Presidents of Chambers), G. F. Mancini, R. Joliet, F. A. Schockweiler, J. C. Moitinho de Almeida, F. Grévisse and D. A. O. Edward, Judges,

Advocate General: C. Gulmann,
Registrar: D. Triantafyllou, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 17 March 1992,

after hearing the Opinion of the Advocate General at the sitting on 12 May 1992,

gives the following

Judgment

1 By application lodged at the Court Registry on 11 September 1989, the Commission of the European Communities sought a declaration under Article 169 of the EEC Treaty that by imposing certain fishing licence conditions the United

Kingdom has failed to fulfil its obligations under Articles 34, 48, 52 and 59 of the EEC Treaty, under Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475), under Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EEC) No 2001/83 (OJ 1983 L 230, p. 8) and under Regulation (EEC) No 1251/70 of the Commission of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State (OJ, English Special Edition 1970 (II), p. 402).

2 By order of 6 December 1989 the Court granted leave to the Kingdom of Spain to intervene in support of the order sought by the Commission.

The contested national rules

3 It is apparent from the documents before the Court that under the terms of the Sea Fish (Conservation) Act 1967, as amended by the Fishery Limits Act 1976 and the Fisheries Act 1981, and of the Sea Fish Licensing Order 1983, fishing vessels registered in the United Kingdom must have a fishing licence.

4 Since 1 January 1986 the issue of licences for species covered by the United Kingdom quotas has been subject to certain conditions concerning, on the one hand, the operation of the vessel in respect of which the licence is granted and, on the other hand, its crew. Those conditions seek to ensure that fishing vessels have a 'real economic link' with the United Kingdom, and must at all times be satisfied concurrently, failing which the licences will be withdrawn.

5 The condition concerning the operation of the fishing vessel was until 31 December 1990 worded as follows:

'(i) The vessel must operate from the United Kingdom, Isle of Man or Channel Islands; without prejudice to the generality of this requirement a vessel will be deemed to have been so operating if for each six month period in each calendar year (i. e. January to June or July to December) either:

(a) 50% by weight of the vessel's landings or trans-shipments of stocks to which this or any other licence issued relates, have been landed and sold in the United Kingdom, Isle of Man or Channel Islands or trans-shipped by way of sale within British fishery limits; or

(b) other evidence is provided of the vessel's presence in a United Kingdom, Isle of Man or Channel Islands port on at least four occasions at intervals of at least 15 days.'

6 The requirements with respect to the crewing of the vessel included conditions relating respectively to nationality, residence and social security and worded as follows:

'(ii) At least 75% of the crew must be British citizens or EEC nationals (excluding ... until 1 January 1993 any Spanish or Portuguese nationals who are not the spouse or child under 21 of ... Spanish or Portuguese workers already installed in the United Kingdom in accordance with the transitional arrangements on the free movement of workers following the accession of ... Spain and Portugal to the European Communities as provided for in the relevant Accession Treaties) ordinarily resident in the United Kingdom, Isle of Man or Channel Islands.

(iii) The skipper and all the crew must be making contributions to United Kingdom national insurance, or equivalent Isle of Man or Channel Islands schemes: this would include Class 1, Special Mariners' Class 2 or Class 4 self-employed contributions.'

7 Since it considered those conditions to be contrary to Community law, the Commission initiated the procedure under Article 169 of the EEC Treaty against the United Kingdom.

8 At the time when the pre-litigation procedure took place and the present action was raised, there were pending before the Court references for a preliminary ruling on several questions which had arisen in two cases before the High Court of Justice in which the compatibility of those conditions with Community law was at issue. The Court replied to those questions in its judgments of 14 December 1989 in Case C-3/87 (*The Queen* v *Ministry of Agriculture, Fisheries and Food, ex parte Agegate Ltd* [1989] ECR 4459) and in Case C-216/87 *The Queen* v *Ministry of Agriculture, Fisheries and Food, ex parte Jaderow Ltd* [1989] ECR 4509.

9 Following the delivery of those judgments the Commission took the view that, properly construed, the social security condition was in conformity with Community law; it therefore abandoned its allegation concerning the compatibility of that condition with Council Regulation No 1408/71.

10 As regards the other conditions, it is clear from the documents before the Court that, with effect from 1 January 1991, the United Kingdom abolished the nationality and residence requirements for Spanish and Portuguese nationals and relaxed the operating condition. However, the Commission maintains that this aspect of its action is still relevant for the purpose of resolving certain points of law which, because of the nature of those proceedings, were left open in *Agegate* and *Jaderow*; furthermore, the conditions imposed by the United Kingdom authorities may be modified at any time, without public notice.

11 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the procedure, and the pleas in law and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The condition relating to the operation of the vessel

12 In its application the Commission maintains that the condition relating to the operation of the fishing vessel is incompatible with Article 34 of the EEC Treaty and with Council Regulation (EEC) No 3796/81 of 29 December 1981 on the common organization of the markets in fishery products (OJ 1981 L 379, p. 1). It submits that by complying either with the criterion relating to the landing of catches or with the criterion of periodic presence, a ship-owner may incur substantial financial losses, because he may thus be prevented from benefiting from the higher prices obtainable in other Member States.

13 On 14 December 1989, that is to say after the Commission had lodged its application, the Court delivered its judgment in Case C-216/87 (*Jaderow*, cited above). In that judgment, the Court ruled that Community law did not preclude a Member State, in authorizing one of its vessels to fish against national quotas, from laying down the condition that the vessel was to operate from national ports, if that condition did not involve an obligation for the vessel to depart from a national port on all its fishing trips (paragraph 2 of the operative part), or from accepting, as evidence of compliance with the condition that the vessel must operate from national ports, only the landing of a specified proportion of the vessel's catches or a specified periodic presence of the vessel in national ports, provided that the frequency with which the vessel was required to be present in those ports did not impose, directly or indirectly, an obligation to land the vessel's catches in national ports or hinder normal fishing operations (paragraph 4 of the operative part).

14 In its reply, lodged after the delivery of the judgment in *Jaderow*, the Commission, without abandoning the plea put forward in its application, submitted that the operating condition was contrary to Article 34 of the EEC Treaty, since it contained no exemption or derogation for fishing vessels whose normal operations were likely to be hindered.

15 The United Kingdom raises an objection of inadmissibility in regard to that plea; it maintains that it alters the subject-matter of the dispute because it is different from the plea put forward during the pre-litigation procedure and in the application. It raises new legal questions which can be understood and addressed only in the context of the *Jaderow* judgment, cited above. Consequently, regard being had to Article 169 of the Treaty and to Article 42(2) of the Rules of Procedure, that plea is inadmissible.

16 The Commission states in answer to the objection that its reply does not extend the object of the proceedings which is to obtain a declaration that the operating condition is contrary to Article 34 of the Treaty. In its reply, the Commission, whilst continuing to seek that form of order, put forward a new plea in support. That plea, based on the *Jaderow* judgment, which constituted a new matter of law, is, in the Commission's view, admissible under Article 42(2) of the Rules of Procedure.

17 The objection of inadmissibility must be upheld. The plea raised in the reply must be construed as alleging that the operating condition hinders normal fishing operations. This, however, constitutes a new complaint founded on a matter of fact which is based in law on the *Jaderow* judgment. Having regard to Article 169 of the EEC Treaty, it was therefore not open to the Commission to raise the complaint during the proceedings before the Court.

18 In view of that finding, there is no need to examine the second objection of inadmissibility raised by the United Kingdom and directed against the evidence relied on by the Commission in support of its new allegation.

19 As regards the Commission's complaint as formulated in its application, it should be pointed out that it follows from the *Jaderow* judgment (see paragraph 13 above), that, although the operating condition may, in certain factual situations, prove to be incompatible with Community law, it is not as such, and in a general way, contrary to the provisions of that law.

20 Accordingly, that complaint must be rejected.

The application of the nationality requirement to Spanish and Portuguese nationals

21 Under the terms of this requirement 75% of the crew of a fishing vessel must be British citizens or nationals of another Member State of the Community, excluding Spanish and Portuguese nationals until 1 January 1993.

22 The Commission submits that that exclusion is contrary (a) to Articles 52 or 59 of the EEC Treaty, according to whether a right of establishment or a provision of services is involved, where the nationals in question are self-employed fishermen; (b) to Article 48 of the EEC Treaty where they are employees; (c) to Article 11 of Regulation No 1612/68 of the Council, cited above, inasmuch as the Spanish and Portuguese relatives of nationals of other Member States who work in the United Kingdom in an employed or self-employed capacity are also excluded from the 75% of the crew, and (d) to Regulation No 1251/70 of the Commission, cited above, inasmuch as Spanish and Portuguese relatives of nationals of other Member States who fall under that regulation are excluded from the 75%.

Articles 52 and 59 of the Treaty

23 It is sufficient to point out in this connection that the contested requirement discriminates on grounds of nationality against Spanish and Portuguese nationals working as self-employed fishermen, which is prohibited by Article 52 or Article 59 of the EEC Treaty, as the case may be. This complaint must therefore be upheld.

Article 48 of the Treaty

24 The Commission considers the requirement at issue to be contrary to Article 48 of the Treaty, in that it constitutes discrimination against Spanish and Portuguese nationals working as employed fishermen. It adds that no justification for that discrimination can be found in Articles 56(1) and 216(1) of the Act of Accession

of 1985, since, although those provisions permit pre-accession restrictions to be maintained, they do not authorize Member States to impose new restrictions on Spanish and Portuguese workers.

25 It should be observed that a condition excluding the employment on board a fishing vessel flying the flag of a Member State of workers who are nationals of another Member State, specifically on the ground of their nationality, is contrary to Article 48 of the Treaty. Nevertheless, as regards Spanish and Portuguese workers, Articles 55, 56, 215 and 216 of the Act of Accession of 1985 provided, until 31 December 1992, a derogation in this respect.

26 In the *Agegate* judgment, cited above, the Court ruled that Articles 55 and 56 of the Act of Accession of 1985 did not preclude national legislation or a national practice whereby Spanish workers were excluded until 1 January 1993 from the 75% of the crew of those vessels, provided that such a restriction, introduced after the 1985 Act of Accession, did not in any circumstances make the position of Spanish workers more unfavourable and that the restriction did not concern Spanish nationals already employed at the time of accession as workers either on British territory or on board a British vessel where the employment relationship displayed a sufficiently close link with that territory.

27 Articles 215 and 216(1) of the 1985 Act of Accession contain, as regards Portuguese workers, provisions identical to those contained in Articles 55 and 56(1) of the same Act as regards Spanish workers.

28 Accordingly, it is necessary to determine whether the requirement at issue constitutes a restrictive measure bringing about a deterioration of the situation of Spanish and Portuguese workers and, if so, whether it was introduced at a time when the United Kingdom was no longer authorized to adopt such a measure.

29 As to the first question, it should be pointed that under the British Fishing Boats Act 1983 and the British Fishing Boats Order 1983 a British fishing boat was allowed to fish and trans-ship fish within British fishery limits or land fish in the United Kingdom only if at least 75% of the members of the crew were British citizens or nationals of another Member State. Since Spain and Portugal were not at that time members of the Community, Spanish and Portuguese nationals were excluded from the 75% of the crew. They could, however, work on board British vessels operating outside British fishery limits, since no condition was laid down in that respect by United Kingdom legislation.

30 The requirement at issue in part reproduces the 1983 requirement and imposes an additional restriction. The 1983 requirement applied: (a) to fishing for all species of fish, whether or not subject to the system of quotas, (b) within British fishery limits. In contrast, the requirement at issue relates to: (a) species subject to quotas, (b) in all the divisions of the ICES (International Council for the Exploration of the Sea) in which the United Kingdom has quotas, whether situated within British fishery limits or outside them. Consequently, the requirement at issue, in so far as it concerns fishing for species subject to United Kingdom quotas outside British fishery limits, brings about a deterioration of the situation of Spanish and Portuguese workers.

31 The United Kingdom denies that this is so, because British vessels carrying on their activities after 1983 outside British fishery limits were nevertheless subject, within Irish fishery limits, to a similar requirement which Ireland had imposed on them since 1983. Consequently, Spanish and Portuguese nationals were since that date excluded from the 75% of the crew of British vessels both within British fishery limits and within Irish fishery limits.

32 That argument cannot be upheld. The standstill provision contained in Articles 56(1) and 216(1) of the 1985 Act of Accession authorizes the United Kingdom

to maintain in force only its pre-existing national provisions. Consequently, restrictions imposed by other Member States cannot be taken into consideration when applying that provision.

33 With regard to the second question, suffice it to observe that the measure at issue entered into force on 1 January 1986, that is to say on the very day of the entry into force of the 1986 Act of Accession; it cannot therefore be regarded as pre-dating that Act.

34 It follows that the additional restriction introduced by the requirement at issue with respect to Spanish and Portuguese nationals cannot be justified on the basis of the transitional provisions of the 1985 Act of Accession.

35 On the other hand, in so far as the requirement at issue concerns quotas situated within British fishery limits, it must be regarded as maintaining in force a pre-existing restriction. In that respect, justification for the requirement is to be found in the transitional provisions of the Act of Accession. However, in accordance with the *Agegate* judgment, cited above, that pre-existing restriction may not be applied to Spanish nationals already employed at the time of accession as workers on United Kingdom territory or on board a British vessel where the employment relationship displays a sufficiently close link with that territory.

36 Consequently, in so far as it concerns fishing for species subject to British quotas outside British fishery limits, the exclusion of Spanish and Portuguese employed workers from the 75% of the crew of a British vessel is contrary to Article 48 of the Treaty.

Regulations Nos 1612/68 of the Council and 1251/70 of the Commission

37 It is important to remember that the rights enjoyed by the members of a worker's family under Article 11 of Regulation No 1612/68 of the Council and Regulation No 1251/70 of the Commission are derived from those conferred on the worker concerned.

38 It follows that, where a worker already employed in the United Kingdom before the accession of Spain and Portugal is a national of a State which was a member of the Community, any members of his family who are Spanish or Portuguese nationals possess rights which they derive from the abovementioned regulations, irrespective of the transitional provisions of the 1985 Act of Accession.

39 Accordingly, the exclusion of those Spanish and Portuguese nationals from the 75% of the crew of a British vessel is contrary to Article 11 of Regulation No 1612/68 of the Council and Regulation No 1251/70 of the Commission.

The residence requirement

40 Under this requirement, United Kingdom nationals or the nationals of another Member State constituting 75% of the crew of a fishing vessel must reside ashore in the United Kingdom, Isle of Man or Channel Islands.

41 The Commission argues that that requirement is contrary to Article 48 of the Treaty, as regards employed fishermen, and to Articles 52 and 59 of the Treaty, as regards self-employed fishermen.

42 Suffice it to observe that by imposing that condition the United Kingdom is indirectly excluding from the 75% of the crew of a fishing vessel the nationals of other Member States on account of their nationality. The great majority of United

Kingdom nationals reside ashore in the United Kingdom and thus automatically satisfy that condition, whereas the nationals of other Member States are obliged in most cases to move their residence to the United Kingdom in order to satisfy the same condition (see judgment in Case C-221/89 *Factortame* [1991] ECR I-3905, paragraph 32).

43 Consequently, the residence requirement is contrary to Articles 48, 52 and 59 of the EEC Treaty.

44 That conclusion is not altered by the fact that that requirement is laid down in fishing licences concerning United Kingdom quotas. In the *Agegate* judgment, cited above, the Court ruled that Community law precluded a Member State from requiring, as a condition for authorizing one of its vessels to fish against its quotas, that 75% of the crew of the vessel in question must reside ashore in that Member State (paragraph 2 of the operative part).

45 It follows from all the foregoing considerations that: the United Kingdom has failed to fulfil its obligations under Articles 48, 52 and 59 of the EEC Treaty, under Article 11 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community and under Regulation (EEC) No 1251/70 of the Commission of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State.

— by excluding from the 75% of the crew of a fishing vessel flying the British flag which must be composed of United Kingdom nationals or nationals of other Member States, (a) Spanish and Portuguese nationals who, as employed workers, fish for species subject to United Kingdom quotas outside British fishery limits, (b) Spanish and Portuguese nationals working as self-employed fishermen and (c) Spanish and Portuguese nationals who are members of the family of a national of a State which was a member of the Community prior to the accession of Spain and Portugal, and

— by requiring the nationals of other Member States who form part of that 75% of the crew to reside ashore in the United Kingdom, Isle of Man or Channel Islands,

46 The remainder of the application is dismissed.

Costs

47 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. However, the first subparagraph of Article 69(3) provides that the Court may order the parties to bear their own costs in whole or in part if each party succeeds on some and fails on other heads. Since the United Kingdom and the Commission failed in some of their pleas, the parties should be ordered to bear their own costs. The Kingdom of Spain, the intervener, must bear its own costs in accordance with Article 69(4) of the Rules of Procedure.

On those grounds,

THE COURT

hereby:

1. Declares that, by excluding from the 75% of the crew of a fishing vessel flying the British flag which must be composed of United Kingdom nationals or nationals of other Member States (a) Spanish and Portuguese nationals who, as employed workers, fish for species subject to United Kingdom quotas outside British fishery limits, (b) Spanish and Portuguese nationals working as self-employed fishermen and (c) Spanish and Portuguese nationals who are members of the family of a national of a State which was a member of the Community prior to the accession of Spain and Portugal,

and by requiring the nationals of other Member States who form part of that 75% of the crew to reside ashore in the United Kingdom, Isle of Man or Channel Islands, the United Kingdom has failed to fulfil its obligations under Articles 48, 52 and 59 of the EEC Treaty, under Article 11 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community and under Regulation (EEC) No 1251/70 of the Commission of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State;

2. Dismisses the remainder of the application;

3. Orders the parties, including the intervener, to bear their own costs.

Due Kakouris Rodríguez Iglesias

Zuleeg Murray Mancini

Joliet Schockweiler Moitinho de Almeida

Grévisse Edward

Delivered in open court in Luxembourg on 17 November 1992.

J.-G Giraud
Registrar

O. Due
President