OPINION OF MR ADVOCATE GENERAL JACOBS
delivered on 10 January 1991 *

My Lords,

1. This case has been referred to the Court under Article 177 of the EEC Treaty by the Deputy High Bailiff's Court, Douglas, Isle of Man. The referring court seeks guidance on the compatibility with Community law of certain Isle of Man legislation and the case requires this Court to consider for the first time the effect of Community law in the island, which enjoys, together with the Channel Islands, a special regime under the Treaty. Before I turn to the issues raised by the questions which have been referred to the Court, it may be helpful if I say a few words about the Isle of Man's somewhat unusual relationship both with the United Kingdom and with the European Community.

The Isle of Man [1]

2. The Isle of Man is situated in the Irish sea and is roughly equidistant from England, Wales, Scotland, Northern Ireland and the Republic of Ireland. It covers an area of 227 square miles and has a population of approximately 68 000, nearly half of whom live in Douglas, the main town. The island's principal industries are light engineering, farming, fishing, tourism and financial services.

3. The Isle of Man first came under the English Crown in the fourteenth century, but the modern constitutional position dates from 1866, when the revenue of the island was separated from that of the United Kingdom and the island was given a limited measure of control over its own expenditure. Since that date, more and more control has been transferred into local hands.

4. Like the Channel Islands, the Isle of Man is not part of the United Kingdom, nor is it a colony. It is usually described as a dependency of the British Crown, although this term has no precise legal significance. The island has its own legislature, known as Tynwald, which consists of the House of Keys (lower house) and the Legislative Council (upper house). The representative of the Crown on the island, the Lieutenant-Governor, is a member of the Legislative Council.

5. Tynwald enjoys a substantial degree of autonomy in respect of matters which do not transcend the frontiers of the island. However, Acts of Tynwald, like Acts of the

* Original language: English.

1 — In preparing this section of my Opinion, I have derived particular assistance from the written observations submitted in these proceedings and from the following works: Simmonds, 'The British Islands and the Community; II — The Isle of Man' (1970) 7 CMLRev 454; the Report of the Royal Commission on the Constitution (1973), Cmnd. 5460, Vol. I; Horner, *The Isle of Man and the Channel Islands — A Study of their Status under Constitutional, International and European Law*, EUI Working Paper No 98 (1984); Plender, 'The Protocol, the Bailiwicks and the Jersey Cow' in Plender (ed.), *Legal History and Comparative Law* (1990), p. 193. See also the judgment of the European Court of Human Rights dated 25 April 1978 in *Tyrer* v *United Kingdom*, Series A, No 26.

United Kingdom Parliament, require the Royal Assent before they become law. Moreover, in contrast with the position in respect of United Kingdom legislation, there is no constitutional convention requiring the Sovereign to give the Royal Assent to Isle of Man legislation. The United Kingdom Home Secretary, who is the member of the United Kingdom Government with primary responsibility for relations with the island, may therefore advise the Sovereign to withhold the Royal Assent if the measure in question is unacceptable to the United Kingdom Government. Although it appears that the Royal Assent has only rarely been withheld, the result in practice is that the Home Office must approve all bills which come from the island.

6. The corollary of the jurisdiction of Tynwald to legislate on purely domestic matters is the practice of the United Kingdom Parliament at Westminster not to legislate without the agreement of the island's authorities on matters which only affect the island. However, the Royal Commission on the Constitution concluded that, as a matter of law, Parliament had unlimited power to legislate for the island without its consent.

7. The Isle of Man is not represented in the United Kingdom Parliament. Acts of Parliament do not extend to it automatically, but only where they expressly apply to the island or do so by necessary implication. When an Act of Parliament is intended to apply to the island, this is not usually done directly but by the inclusion in it of a section providing for its extension to the island by Order in Council (a type of subordinate legislation), along with such changes as may be specified in the Order. This device enables some account to be taken of the island's special needs.

8. The Isle of Man has its own administrative, fiscal and legal systems and its own courts of law. Final appeal from Manx courts lies to the Judicial Committee of the Privy Council, which sits in London. The membership of the Judicial Committee includes the Lord Chancellor and all Lords of Appeal in Ordinary, who normally sit in the House of Lords. However, when hearing appeals from the Isle of Man, the Judicial Committee sits as a Manx court, not as a United Kingdom court.

9. The United Kingdom Government is responsible for the international relations of the Isle of Man and for its defence. The former responsibility gave rise to concern in the island when the United Kingdom applied to join the Community. At the origin of that concern lay Article 227(4) of the EEC Treaty, which states: 'The provisions of this Treaty shall apply to the European territories for whose external relations a Member State is responsible'. Thus, in the absence of special arrangements, the EEC Treaty would have become applicable in its entirety to the island on the accession of the United Kingdom to the Community.

10. The islanders considered that the result would be to cause damage to the island's economy. Accordingly, special arrangements were negotiated by the United Kingdom to

take account of the special position of the Isle of Man. Those arrangements are embodied in Article 227(5)(c) of the EEC Treaty, which was added by the 1972 Act of Accession, and in Protocol No 3 to that Act. Article 227(5)(c) of the Treaty provides as follows:

'This Treaty shall apply to the Channel Islands and the Isle of Man only to the extent necessary to ensure the implementation of the arrangements for those islands set out in the Treaty concerning the accession of new Member States to the European Economic Community and to the European Atomic Energy Community signed on 22 January 1972.'

Similar provisions were inserted in the other treaties: see Articles 79(c) of the ECSC Treaty and 198(d) of the Euratom Treaty. The extent to which the EEC and Euratom Treaties are applicable in the Isle of Man is specified by Protocol No 3 to the 1972 Act of Accession. It is on the interpretation of that Protocol that the referring court seeks guidance in these proceedings.

The facts and the questions referred

11. In the main action, Christopher Stewart Barr and Montrose Holdings Limited are being prosecuted by the Department of Health and Social Security (Isle of Man) ('the DHSS') under section 2(1) of the Control of Employment Act 1975 (as amended), an Act of Tynwald. That subsection provides as follows:

'Subject to subsections (2) and (3) below, a person shall not —

(a) undertake, or become or be engaged in, any employment in the Island unless he is an Isle of Man worker; or

(b) employ any person in any employment in the Island unless the person employed is an Isle of Man worker,

except under and in accordance with the terms and conditions of a permit granted by the Department of Health and Social Security . . . '

Section 2(2) (which does not seem to be at issue in the main action) provides a defence to an employer who 'satisfies the court that he believed that the person he employed was an Isle of Man worker and that he took all reasonable steps to verify the accuracy of his belief'. The expression 'Isle of Man worker' is defined in section 1. Broadly speaking, it encompasses those who meet such conditions as birth on the island or long periods of continuous residence there. By virtue of section 2(3), the prohibition contained in section 2(1) does not apply to any of the employments specified in Schedule 1 to the Act.

12. Mr Barr is a British citizen. He is not an Isle of Man worker within the meaning of section 1 of the Control of Employment Act 1975 and he was employed in the island by Montrose Holdings Limited between 1 September 1988 and 1 January 1989. The DHSS had not issued a permit under the

1975 Act authorising his employment. Mr Barr would be liable on conviction to imprisonment for a term not exceeding three months or to a fine not exceeding UKL 1 000 or to both. Montrose Holdings Limited would be liable on conviction to a fine not exceeding UKL 1 000.

13. It appears from the order for reference that all the material facts are admitted by both defendants. Their only defence is that the 1975 Act is inconsistent with Protocol No 3, which is given legal force in the Isle of Man by the European Communities (Isle of Man) Act 1973, an Act of Tynwald. The following questions have therefore been referred to the Court for a preliminary ruling:

'A. Whether the Control of Employment Act, 1975, (as amended), an Act of Tynwald, contravenes the terms of Protocol No 3 to the Act annexed to the Treaty of Accession of 1972 on the true interpretation of the Protocol insofar as the said Act of Tynwald:

1. imposes controls or restrictions on employment in the Isle of Man of persons other than Isle of Man workers as defined in the said Act of Tynwald, as amended, which discriminate in terms of the controls or restrictions imposed by reference to trade, profession or type of employment?

2. applies treatment with regard to employment in the Isle of Man of natural and legal persons of the Community different from the rights which are enjoyed by Manxmen in the United Kingdom?

B. Whether Article 4 of the said Protocol No 3 on its true interpretation means no more than that the Isle of Man Authorities shall not discriminate between natural and legal persons of the Community on the ground of nationality?'

14. The Court clearly cannot answer the first question as framed, for it asks for a ruling on the compatibility with Community law of a specific piece of Isle of Man legislation. It is well established that the Court has no jurisdiction under Article 177 to give such a ruling. It is possible, however, to formulate an answer to both questions which should enable the referring court to give judgment.

The jurisdiction of the Court

15. Before the substance of the questions referred can be addressed, it is necessary to consider whether the Court has jurisdiction to entertain the reference. It is clear from Article 1(2) and (3) of the Treaty of Accession and from Article 158 of the Act of Accession that the Court has jurisdiction to give preliminary rulings on the interpretation of Protocol No 3 where it is asked to do so by a court or tribunal of a Member State. However, as I pointed out above, the Isle of Man is not part of the United Kingdom. The question therefore arises whether the referring court is to be

regarded as a 'court or tribunal of a Member State' within the meaning of Article 177.

16. There is no doubt that, at the time of the United Kingdom's accession to the Community, Tynwald took the view that this question was to be answered in the affirmative. Thus, section 2(1) of the European Communities (Isle of Man) Act 1973 provides in part that:

'... all such remedies and procedures from time to time provided for by or under the Treaties, as (having regard to the provisions of ... the Act annexed to the Treaty of Accession and to the provisions of the Protocol) in accordance with the Treaties are without further enactment to be given legal effect or used in the Isle of Man shall, in the Isle of Man, be recognized and available in law, and be enforced, allowed and followed accordingly ...'

Section 3(1) states:

'For the purposes of all legal proceedings, any question as to the meaning or effect of any of the provisions of the Treaties having effect in the Isle of Man, or as to the validity, meaning or effect of any Community instrument having effect in the Isle of Man, shall be treated as a question of law (and if not referred to the European Court, be for determination as such in accordance with the principles laid down by and any relevant decisions of the European Court ...)'.

These provisions make it clear that Tynwald envisaged that Manx courts and tribunals would, in suitable cases, be entitled to make use of the procedure established by Article 177.

17. I consider that the view taken by Tynwald was correct. It is supported by Article 227(5)(c) of the Treaty, according to which the Treaty applies to the Isle of Man 'to the extent necessary to ensure the implementation of the arrangements' set out in Protocol No 3. To that extent, therefore, Article 177 applies to the Isle of Man: it perhaps follows, for that reason alone, that courts and tribunals in the island enjoy the right to make use of the facility provided by Article 177.

18. In any event, in order to ensure that the Protocol is properly applied, it is in my view essential that courts and tribunals in the island should be entitled to ask this Court for guidance on its terms. As the DHSS and the United Kingdom Government, which have submitted joint observations, point out, if Manx courts and tribunals were denied the right to invoke Article 177, it would be difficult to ensure the uniform interpretation and application of the provisions of Community law which are, by virtue of Protocol No 3, applicable in the island. In view of the paramount need to ensure the achievement of that objective, I consider that the expression 'court or tribunal of a Member State' in Article 177 should be interpreted broadly as extending to judicial bodies situated in any territory to which the Treaty applies, even if only partially, by virtue of Article 227. Otherwise, courts or tribunals in such territories which are responsible for applying Community law would be deprived of any means of seeking

the guidance of this Court. Such a situation would pose a serious threat to the proper functioning of the Community legal order.

The substance

19. The Treaty rules on the free movement of workers, the right of establishment and the freedom to provide services do not apply to the Isle of Man. The only reference to those rules in Protocol No 3 is to be found in Article 2, which provides: 'The rights enjoyed by Channel Islanders or Manxmen in the United Kingdom shall not be affected by the Act of Accession. However, such persons shall not benefit from Community provisions relating to the free movement of persons and services.' (The term 'Manxman' means essentially any British citizen who has certain particularly close links with the island: see Article 6 of the Protocol and the declaration by the United Kingdom Government on the definition of the term 'nationals', Official Journal 1983 C 23, p. 1.) Thus, Manxmen retain their traditional rights of residence in the United Kingdom and of access to the job market there, but they have no rights of free movement in the rest of the Community. Nationals of the Member States, including nationals of the United Kingdom who are not Manxmen, have no rights under Community law to enter the island to seek or to take up employment, to establish themselves on a self-employed basis or to provide services.

20. For this reason, the defendants rightly do not seek to rely on the provisions of the Treaty relating to freedom of movement. Instead they invoke Article 4 of Protocol No 3, which provides simply: 'The authorities of these territories [namely the Channel Islands and the Isle of Man] shall apply the same treatment to all natural and legal persons of the Community'. The defendants argue that the statute under which they are being prosecuted, the Control of Employment Act 1975, is incompatible with Article 4 and cannot therefore be enforced.

21. Before examining this argument, I must consider whether the situation with which the referring court is confronted falls within the scope of Community law. In Case 175/78 *Saunders* [1979] ECR 1129, paragraph 11, the Court stated that the provisions of the Treaty on the free movement of workers did not apply 'to situations which are wholly internal to a Member State, in other words, where there is no factor connecting them to any of the situations envisaged by Community law' (see also Joined Cases 35/82 and 36/82 *Morson and Jhanjan* [1982] ECR 3723; Case 180/83 *Moser* [1984] ECR 2539; Joined Cases C-297/88 and C-197/89 *Dzodzi*, judgment of 18 October 1990). The same limitation applies to the Treaty provisions on the right of establishment and the freedom to provide services: see e.g. Case 115/78 *Knoors* [1979] ECR 399. The instant case does not concern the rules laid down in the Treaty on the free movement of persons for, as I have explained, those rules do not apply to the island. However, since it involves the right of a British national to take up employment in the Isle of Man, it might be thought that the provisions of Protocol No 3 are also excluded here by reason of the situation being wholly internal

to a Member State. Indeed the joint observations of the DHSS and the United Kingdom suggest that that may be so since the essential point at issue is the claim of a national of the United Kingdom to take employment in a territory for whose external relations the United Kingdom is responsible and in which the Community's rules relating to the free movement of workers do not apply.

22. I do not think that suggestion can be accepted. Circumstances such as those at issue in these proceedings are not 'wholly internal to a Member State', for, as I have explained, the Isle of Man is not part of the United Kingdom. Moreover, Article 4 of the Protocol, in requiring the Isle of Man authorities to apply the same treatment to all natural and legal persons of the Community, manifestly applies in relation to the nationals of all the Member States including the United Kingdom. It cannot therefore be said, as the Court said in *Saunders*, that there is no factor connecting this case to any of the situations envisaged by Community law. The effect of *Saunders* is that a national of the United Kingdom may enjoy fewer rights vis-à-vis the United Kingdom than nationals of other Member States. However, there is no suggestion in Protocol No 3 that nationals of the United Kingdom enjoy fewer rights under Community law vis-à-vis the Isle of Man than the nationals of other Member States. I conclude that the circumstances of this case are not to be regarded as 'wholly internal to a Member State' and that they therefore fall within the scope of Community law.

23. I therefore turn to the defendants' argument that the Control of Employment Act 1975 is incompatible with Article 4 of Protocol No 3. The gist of that argument is that some of the employments listed in Schedule 1 to the 1975 Act, which persons who are not Isle of Man workers may take up without permits, are in practice only open to nationals of the United Kingdom and Ireland. As is agreed by all those submitting observations, the effect of Article 4, where it applies, is to prohibit discrimination on the ground of nationality. The defendants conclude that the system of exempted employments is incompatible with Article 4 because it discriminates against nationals of Member States other than the United Kingdom and Ireland. They concede, however, that, if the 1975 Act affected United Kingdom nationals, other than Manxmen, and Irish nationals in the same way as nationals of the other Member States, it would be consistent with Article 4. In other words, they do not challenge the legality of the discrimination operated by the 1975 Act against persons who are not Isle of Man workers.

24. The defendants examine the contents of Schedule 1 to the 1975 Act in some detail, but in my view there are two reasons why it is not necessary for the Court to do so. The first is that Mr Barr is a British national. Whether or not the defendants are correct in their analysis of the exempted employments, he has not therefore been the victim of any discrimination on the basis of his nationality. The second reason is that, as counsel for the defendants explained at the hearing, Mr Barr was employed by Montrose Holdings Limited, whose main

activity is property development, as an in-house lawyer. There is no suggestion that Mr Barr's post constituted an exempted employment for the purposes of Schedule 1 to the 1975 Act. It follows from both these reasons that the provisions of the Act which are alleged to discriminate in favour of nationals of the United Kingdom and Ireland have no bearing on the question whether the defendants committed the offences with which they have been charged. The compatibility of those provisions with Protocol No 3 is consequently irrelevant. It is not therefore necessary to consider the scope of the prohibition on discrimination laid down in Article 4 of Protocol No 3 and in particular whether it applies in relation to the Treaty as a whole or only in relation to the provisions of Community law which are expressly made applicable in the Isle of Man.

25. I would therefore answer the questions referred to the Court by the Deputy High Bailiff as follows:

Article 4 of Protocol No 3 to the Act of Accession must be interpreted as meaning that the authorities of the Isle of Man shall not discriminate on grounds of nationality between nationals of the Member States of the Community. That provision does not prevent the application of domestic legislation in circumstances which do not give rise to discrimination on grounds of nationality.