Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

14 October 2014*

(Appeals — Common fisheries policy — Fishing quotas — Emergency measures adopted by the Commission — Non-contractual liability of the European Union — Second paragraph of Article 340 TFEU — Conditions — Actual and certain harm — Individual fishing rights)

In Case C-611/12 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 27 December 2012,

Jean-François Giordano, residing in Sète (France), represented by D. Rigeade and A. Scheuer, avocats,

appellant,

the other party to the proceedings being:

European Commission, represented by A. Bouquet and D. Nardi, acting as Agents,

defendant at first instance,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, A. Tizzano, R. Silva de Lapuerta, C. Vajda and S. Rodin, Presidents of Chambers, A. Rosas, M. E. Juhász, A. Borg Barthet, J. Malenovský, E. Levits (Rapporteur), J.L. da Cruz Vilaça and F. Biltgen, Judges,

Advocate General: P. Cruz Villalón,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 20 March 2014,

gives the following

Judgment

1 By his appeal, Mr Giordano asks the Court to set aside the judgment of the General Court of the European Union in *Giordano* v *Commission*, (T-114/11, EU:T:2012:585, 'the judgment under appeal'), by which that court dismissed his action seeking damages for the harm allegedly suffered on account

* Language of the case: French.

of the adoption of Commission Regulation (EC) No 530/2008 of 12 June 2008 establishing emergency measures as regards purse seiners fishing for bluefin tuna in the Atlantic Ocean, east of longitude 45 °W, and in the Mediterranean Sea (OJ 2008 L 155, p. 9).

Legal context

2 Council Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy (OJ 2002 L 358, p. 59), seeks to establish a multi-annual approach to fisheries management in order to ensure the long-term viability of that sector.

3 Article 7 of Regulation No 2371/2002, entitled 'Commission emergency measures', states:

'1. If there is evidence of a serious threat to the conservation of living aquatic resources, or to the marine eco-system resulting from fishing activities and requiring immediate action, the Commission, at the substantiated request of a Member State or on its own initiative, may decide on emergency measures which shall last not more than six months. The Commission may take a new decision to extend the emergency measures for no more than six months.

2. The Member State shall communicate the request simultaneously to the Commission, to the other Member States and to the Regional Advisory Councils concerned. The other Member States may submit their written comments to the Commission within five working days of receipt of the request.

The Commission shall take a decision within 15 working days of receipt of the request referred to in paragraph 1.

3. The emergency measures shall have immediate effect. They shall be notified to the Member States concerned, and published in the Official Journal.

4. The Member States concerned may refer the Commission decision to the Council within 10 working days of receipt of the notification.

5. The Council, acting by qualified majority, may take a different decision within one month of the date of receipt of the referral.'

4 Article 20 of Regulation 2371/2002, entitled 'Allocation of fishing opportunities' provides:

'1. The Council, acting by qualified majority on a proposal from the Commission, shall decide on catch and/or fishing effort limits and on the allocation of fishing opportunities among Member States as well as the conditions associated with those limits. Fishing opportunities shall be distributed among Member States in such a way as to assure each Member State relative stability of fishing activities for each stock or fishery.

2. When the Community establishes new fishing opportunities the Council shall decide on the allocation for those opportunities, taking into account the interests of each Member State.

3. Each Member State shall decide, for vessels flying its flag, on the method of allocating the fishing opportunities assigned to that Member State in accordance with Community law. It shall inform the Commission of the allocation method.

4. The Council shall establish the fishing opportunities available to third countries in Community waters and allocate those opportunities to each third country.

5. Member States may, after notifying the Commission, exchange all or part of the fishing opportunities allocated to them.'

5 It was in that context that Regulation (EC) No 40/2008 of 16 January 2008 fixing for 2008 the fishing opportunities and associated conditions for certain fish stocks and groups of fish stocks, applicable in Community waters and, for Community vessels, in waters where catch limitations are required (OJ 2008 L 19, p. 1) was adopted.

6 Those limitations and quantities were amended by Commission Regulation (EC) No 446/2008 of 22 May 2008 adapting certain bluefin tuna quotas in 2008 pursuant to Article 21(4) of Council Regulation (EEC) No 2847/93 establishing a control system applicable to the Common Fisheries Policy (OJ 2008 L 134, p. 11).

7 Pursuant to Article 7 of Regulation No 2371/2002, the Commission adopted, on 12 June 2008, Regulation No 530/2008.

8 Recital 6 in the preamble to Regulation No 530/2008 states:

'The data in its possession, as well as the information obtained by the Commission inspectors during their missions in the Member States concerned, show that the fishing opportunities for bluefin tuna in the Atlantic Ocean, east of longitude 45 °W, and the Mediterranean Sea allocated to purse seiners flying the flag of or registered in Greece, France, Italy, Cyprus and Malta will be deemed to be exhausted on 16 June 2008 and that the fishing opportunities for the same stock allocated to purse seiners flying the flag of or registered in Spain will be deemed to be exhausted on 23 June 2008.'

9 Article 1 of that regulation provides:

'Fishing for bluefin tuna in the Atlantic Ocean, east of longitude 45 °W, and the Mediterranean by purse seiners flying the flag of or registered in Greece, France, Italy, Cyprus and Malta shall be prohibited as from 16 June 2008.

It shall also be prohibited to retain on board, place in cages for fattening or farming, tranship, transfer or land such stock caught by those vessels as from that date.'

10 Article 2 of the regulation is worded as follows:

'Fishing for bluefin tuna in the Atlantic Ocean, east of longitude 45 °W, and the Mediterranean by purse seines flying the flag of or registered in Spain shall be prohibited as from 23 June 2008.

It shall also be prohibited to retain on board, place in cages for fattening or farming, tranship, transfer or land such stock caught by those vessels as from that date.'

11 Article 3 of Regulation No 530/2008 provides:

'1. Subject to paragraph 2, as from 16 June 2008, Community operators shall not accept landings, placing in cages for fattening or farming, or transhipments in Community waters or ports of bluefin tuna caught in the Atlantic Ocean, east of longitude 45 °W, and the Mediterranean Sea by purse seiners.

2. It shall be allowed to land, place in cages for fattening or farming and to tranship in Community waters or ports of bluefin tuna caught in the Atlantic Ocean, east of longitude 45 °W, and the Mediterranean Sea by purse seiners flying the flag of, or registered in Spain until 23 June 2008.'

Background to the dispute

12 Mr Giordano is the owner of the vessel *Janvier Giordano*, a purse seiner flying the French flag which carries out fishing activities in the Mediterranean Sea.

13 In accordance with EU legislation, the French Republic had 4 164 tonnes of bluefin tuna fishing quotas for 2008, of which 90% were allocated to purse seiners flying the French flag fishing in the Mediterranean Sea.

14 In that context, by decision of 16 April 2008, the French Minister for Agriculture and Fisheries granted the appellant a special fishing licence, authorising him to catch, retain, tranship, transfer, land, transport, store and sell bluefin tuna from the Mediterranean, within the limits of the fishing opportunities available to him in the form of an individual quota of 132.02 tonnes. The licence allowed fishing for the period from 1 April 2008 to 30 June 2008.

15 Following the adoption of Regulation No 530/2008, prohibiting fishing for bluefin tuna in the Mediterranean Sea, Mr Giordano's fishing season was brought to an end on 16 June 2008 and, therefore, his fishing licence was revoked by a decision of the Prefect of the Languedoc-Roussillon Region of 16 June 2008 implementing that regulation.

16 Mr Giordano brought an action in the French administrative courts seeking annulment of that decision. Both the tribunal administratif de Montpellier (Administrative Court of Montpellier) and the cour administrative d'appel de Marseille (Administrative Court of Appeal of Marseille) dismissed his action for annulment on the grounds that the prohibition at issue resulted from Regulation No 530/2008 rather than the decision of the Prefect of the Languedoc-Roussillon Region.

17 By its judgment in *AJD Tuna* (C-221/09, EU:C:2011:153), the Court held that Regulation No 530/2008 was invalid in so far as, having been adopted on the basis of Article 7(1) of Regulation No 2371/2002, the prohibitions it contained took effect from 23 June 2008 for purse seiners flying the flag of or registered in Spain and Community operators who had concluded contracts with them, whereas those prohibitions took effect from 16 June 2008 for purse seiners flying the flag of or registered in Greece, France, Italy, Cyprus and Malta and Community operators who had concluded contracts with them, without such difference in treatment being objectively justified.

The proceedings before the General Court and the judgment under appeal

18 By application lodged at the Registry of the General Court on 25 February 2011, Mr Giordano brought an action for a declaration of the European Union's non-contractual liability and seeking compensation for harm suffered as a result of the adoption of Regulation No 530/2008.

19 After recalling, in paragraph 12 of the judgment under appeal, the established case-law according to which a number of conditions must be satisfied in order for the European Union to incur non-contractual liability for unlawful conduct of its bodies, the General Court chose to consider, first of all, whether the appellant had demonstrated that the harm that he pleads had actually been sustained.

20 In so doing, the General Court held, in paragraph 18 of the judgment under appeal, that the quotas do not provide any guarantee to fishermen of being able to fish the entirety of the quota allocated to them, a quota being only a theoretical limit of a maximum catch which must not, in any case, be exceeded.

21 Therefore, the General Court held that, as the appellant had merely claimed that the prohibition on fishing laid down in Regulation No 530/2008 had not allowed him to carry out his activity during the period from 16 June to 30 June 2008, the harm which he pleaded had not actually been sustained.

22 Consequently, the General Court dismissed the appellant's action and ordered him to pay the costs.

Procedure before the Court and the forms of order sought

23 The appellant claims that the Court should:

— set aside the judgment under appeal;

— declare that the adoption of Regulation No 530/2008 caused him harm for which compensation can be awarded;

— order the Commission to pay him damages and interest in the amount of EUR 542 594; and

— order the Commission to bear the costs incurred in the appeal and those at first instance.

24 The Commission contends that the Court should:

— dismiss the appeal as being inadmissible;

— in the alternative, dismiss the appeal as being unfounded;

— in the further alternative, dismiss the action for damages; and

— order the appellant to bear the costs incurred in the appeal and those at first instance.

The appeal

Arguments of the parties

25 By its first ground of appeal, the appellant claims that the General Court erred in law by ruling, in paragraphs 17 to 22 of the judgment under appeal, that the European Union cannot incur non-contractual liability for an unlawful act, since the harm alleged was not actual and certain.

26 By the first part of that ground of appeal, the appellant claims that, in paragraphs 17 to 19 of the judgment under appeal, the General Court confused the certainty of harm with the determination of its amount.

27 It claims, first, that the actual and certain harm alleged by the appellant results from the fact that, by reason of the adoption of Regulation No 530/2008, he was forced to stop his fishing activity before the normal closing of the fishing season and, secondly, that establishing the amount of harm is necessarily carried out in a hypothetical context, since the quantity of fish which the appellant might have caught cannot be known.

28 By the second part of its first ground of appeal, the appellant claims that he suffered unusual and special harm. The unusual nature of the harm is related to the fact that it amounts to half of his expected turnover, whereas the harm is special in so far as it involves only a certain number of members of a group.

29 The Commission, in the first place, argues that the first ground of appeal must be rejected as being inadmissible, since the assessment of the existence of actual and certain damage is a finding of fact beyond the legal review carried out by the Court.

30 In the second place, the Commission considers that the first ground of appeal is unfounded.

Findings of the Court

Admissibility

31 The first part of the first ground of appeal is admissible to the extent that the Court is requested by the appellant to rule on the existence of an error of law committed by the General Court in the characterisation of harm alleged as actual and certain in the context of the European Union's non-contractual liability (see, to that effect, judgments in *Archer Daniels Midland* v *Commission*, C-510/06 P, EU:C:2009:166, paragraph 105, and in *Commission* v *Schneider Electric*, C-440/07 P, EU:C:2009:459, paragraph 191).

32 Therefore, with respect to that first part of the first ground of appeal, the plea of inadmissibility raised by the Commission must be rejected.

33 As regards the second part of the first ground of appeal, it is clear that it does not meet the admissibility requirements specific to an appeal since, by developing a series of arguments to submit that he has suffered unusual and special damage, the appellant requests, in essence, a simple re-examination of the application submitted to the General Court (see, to that effect, judgments in *Interporc* v *Commission*, C-41/00 P, EU:C:2003:125, paragraph 16, and *Reynolds Tobacco and Others* v *Commission*, C-131/03 P, EU:C:2006:541, paragraph 50).

34 That part of the first ground of appeal must therefore be dismissed as being inadmissible.

Substance

35 According to settled case-law, the European Union's non-contractual liability under the second paragraph of Article 340 TFEU is subject to the satisfaction of a number of conditions, namely the unlawfulness of the conduct alleged against the EU institution, the fact of damage and the existence of a causal link between the conduct of the institution and the damage complained of (judgment in *Agraz and Others* v *Commission*, C-243/05 P, EU:C:2006:708, paragraph 26 and case-law cited).

36 The condition relating to damage requires that the damage for which compensation is sought be actual and certain, which it is for the appellant to prove (judgment in *Agraz and Others* v *Commission*, C-243/05 P, EU:C:2006:708, paragraph 27 and case-law cited).

37 In the present case, the General Court held, in paragraphs 17 to 19 of the judgment under appeal, that the damage alleged by the appellant, consisting of the unfished and unsold part of its individual quota because of the prohibition on bluefin tuna fishing from 16 June 2008, reflected only a hypothetical situation and could not be regarded as actual and certain.

38 More specifically, the General Court held that the allocation of quotas gave the appellant no guarantee of being able to fish all of its individual quota, in so far as that quota was a theoretical limit of a maximum catch and, that in any event, it could not be excluded that even if the appellant had been able to fish until 30 June 2008, he would not have reached his quota for reasons beyond his control.

39 It is clear, however, that by doing so, the General Court erred in law.

40 In particular, as is clear from paragraph 18 of the judgment under appeal, by simply referring to the fallacy of the premiss that the appellant had a right to fish and would necessarily have exhausted his quota, the General Court erred in law in considering the condition relating to harm. The existence of a right conferred on individuals by a rule of law does not relate to the actual nature of the harm alleged but constitutes a condition for a finding of a sufficiently serious breach of such a rule by an EU institution, in order that the non-contractual liability of the European Union be incurred. Moreover, the rejection by the General Court of the appellant's argument that he would have exhausted his quota is solely relevant for assessing the extent of the harm alleged, but not the very existence of such harm, the certainty of which is not called into question by uncertainty as to its precise extent (see, to that effect, judgment in *Agraz and Others* v *Commission*, EU:C:2006:708, paragraph 36).

41 Therefore, the judgment under appeal must be set aside without the need to examine the other grounds of appeal.

The action before the General Court

42 Pursuant to the second sentence of the first paragraph of Article 61 of the Statute of the Court of Justice, if a judgment under appeal is quashed, the Court of Justice may give final judgment in the matter, where the state of the proceedings so permits.

43 In the present case, the Court considers that the action for damages brought by Mr Giordano before the General Court is in a state which permits judgment and that it should, therefore, give final judgment on it.

44 As noted in paragraph 35 of the present judgment, for the non-contractual liability of the European Union to arise, a number of conditions must be met. They include, where the unlawfulness of a legal measure is at issue, the existence of a sufficiently serious breach of a rule of law intended to confer rights on individuals (judgment in *Commission* v *Schneider Electric*, EU:C:2009:459, paragraph 160).

45 In the present case, Mr Giordano claims, in the first place, that the Commission infringed Article 7(1) of Regulation No 2371/2002 by adopting Regulation No 530/2008 when it had no evidence that the 2008 quota granted to ships flying the French flag had been exceeded.

46 In this regard, it should be noted that that argument rests on the premiss that the adoption of emergency measures by the Commission requires proof of a quota actually being exceeded. However, that premiss is incorrect. Indeed, according to the very wording of Article 7(1) of Regulation No 2371/2002, the Commission may adopt such measures as soon as there is evidence of a 'serious threat to the conservation of living aquatic resources or to the marine ecosystem resulting from fishing activities and requiring immediate intervention' without having to wait for an allocated quota to be exceeded. As noted by the Court in paragraphs 63 to 65 of the judgment in *AJD Tuna* (EU:C:2011:153), various recitals of Regulation No 530/2008 include indications, the accuracy of which Mr Giordano did not dispute, which adequately demonstrate that such a serious threat existed here.

47 In the second place, Mr Giordano claims that the adoption of Regulation No 530/2008 has led to a restriction of his activity, which is incompatible with his right to pursue and carry out his occupation, as guaranteed by Article 15 of the Charter of Fundamental Rights of the European Union ('the Charter'), and with his right to property, as guaranteed by the first paragraph of Article 17 of the Charter.

48 In that regard, it is necessary to point out that being a holder of a right to fish and of a quota allocated by the competent Member State for a fishing season cannot, contrary to what Mr Giordano claims, give him the right to be able, in all circumstances, to exhaust that quota.

49 It should also be noted that, as the Court has held, the freedom to pursue a trade or profession does not constitute an absolute prerogative, but must be viewed in relation to its function in society (see, to that effect, judgment in *FIAMM and Others* v *Council and Commission*, C-120/06 P and C-121/06 P, EU:C:2008:476, paragraph 183 and case-law cited). Accordingly, limitations may be imposed on the exercise of that freedom provided, in accordance with Article 52(1) of the Charter, that they are prescribed by law and that, in accordance with the principle of proportionality, they are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others (see, to that effect, judgment in *Digital Rights Ireland and Others*, C-293/12 and C-594/12, EU:C:2014:238, paragraph 38).

50 In the present case, Regulation No 530/2008 undeniably meets an objective of general interest pursued by the European Union, namely to avoid, pursuant to Article 7(1) of Regulation No 2371/2002, a serious threat to the conservation and recovery of bluefin tuna stock in the Eastern Atlantic and the Mediterranean Sea. Moreover, as is clear from paragraphs 77 to 85 of the judgment in *AJD Tuna* (EU:C:2011:153), the measures prohibiting fishing contained in Regulation No 530/2008 are not manifestly inappropriate in relation to what is necessary to attain that objective of general interest, and thus comply with the principle of proportionality.

51 In the third place, Mr Giordano claims that the adoption of Regulation No 530/2008 infringed the principles of legal certainty and legitimate expectations, since that regulation ended the fishing season for bluefin tuna as of 16 June 2008 although that fishing had, originally, been authorised in France until 30 June 2008.

52 However, as the Court has already noted, the possibility that measures may be taken that result in fishing seasons being ended before the normal date is provided for inter alia in Article 7(1) and Article 26(4) of Regulation No 2371/2002 (judgment in *AJD Tuna* EU:C:2011:153, paragraph 75). Community operators whose activity consists in fishing bluefin tuna cannot, therefore, rely on the principle of legal certainty or the protection of legitimate expectations since they are in a position to foresee that such measures may be taken (see, to that effect, judgment in *AJD Tuna* EU:C:2011:153, paragraph 75).

53 It follows from the foregoing considerations that Mr Giordano has not established the existence of a sufficiently serious breach of a rule of law intended to confer rights on individuals.

54 As one of the conditions for the European Union to incur liability is not satisfied, the action must be dismissed as being unfounded, without it being necessary to examine whether the other conditions are satisfied in the present case.

Costs

55 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs. Under Article 138(2) of those Rules, applicable to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

56 As Mr Giordano's appeal has been upheld but his action for damages has been dismissed, Mr Giordano and the Commission shall bear their own costs.

On those grounds, the Court (Grand Chamber) hereby:

1. **Sets aside the judgment of the General Court of the European Union in *Giordano* v *Commission* (T-114/11, EU:T:2012:585);**

2. **Dismisses the action for damages brought by Mr Jean-François Giordano in Case T-114/11;**

3. **Orders Mr Jean-François Giordano and the Commission to bear their own costs.**

[Signatures]