INNER HOUSE, COURT OF SESSION

[2019] CSIH 35
XA8/19

Lord Malcolm

OPINION OF

LORD MALCOLM

in the application for leave to appeal

under section 113 of the Courts Reform (Scotland) Act 2014

by

FERMIN ALDABE

Pursuer and Applicant

against

THE ADVOCATE GENERAL FOR SCOTLAND

Defender and Respondent

Appellant: Party
Respondent: Webster QC; Office of the Advocate General for Scotland

2 July 2019

[1] Fermin Aldabe (the pursuer) has applied for permission to appeal to the Court of Session against a decision of the Sheriff Appeal Court (SAC) dated 5 February 2019, all in terms of section 113 of the Courts Reform (Scotland) Act 2014. The SAC upheld a decision of the sheriff to dismiss the pursuer's claim for substantial damages (in excess of £2m) against the UK state, which is represented by the Advocate General for Scotland. The claim arises

from a decision of the Court of Appeal dated 3 October 2012, which occurred in the context of proceedings raised by the pursuer in the Central London Employment Tribunal. The pursuer had asked for permission to appeal against a decision of the Employment Appeal Tribunal. That was refused, thereby bringing those proceedings to an end. There had also been a request for a reference for a preliminary ruling on an issue of alleged discrimination contrary to EU law to the European Court of Justice (ECJ). The Court of Appeal did not make a reference, and this forms the basis for the current claim against the UK state in respect of an alleged breach of EU law. The proposition is that, in terms of article 267 of the Treaty on the Functioning of the European Union (TFEU), the court was obliged to make a reference.

The background circumstances

[2] The pursuer has dual Italian and Argentine nationality. In August 2008 he visited the UK from Argentina seeking employment. He was offered work with Standard Chartered Bank in Singapore. He travelled to Singapore to begin his employment with the bank. By then there were certain issues between the pursuer and the bank as to the terms of his employment. Matters came to a head on his first morning when the pursuer intimated that he was drafting a letter of resignation. Before it was completed the bank withdrew the offer of employment.

[3] The pursuer raised proceedings in the High Court of the Republic of Singapore claiming damages of about 1.54 million Singapore dollars (described by the judge as an "astronomical and outrageous sum") for breach of the contract of employment and for fraudulent misrepresentation. In a detailed judgment ([2010] 3 SLR 722) the judge upheld the wrongful dismissal claim and found the pursuer entitled to certain payments and other

benefits under the contract, including his salary from 17 November to 30 November 2008, plus one month's further salary. The case of fraudulent misrepresentation, upon which the bulk of the damages claim was founded, was rejected.

[4] Subsequently, Judge Wade made a ruling of no jurisdiction in respect of the London employment tribunal proceedings (which had been stayed pending the Singapore decision). The main claim was one of damages for unfair dismissal. There were three reasons for the ruling:

(1) Issue estoppel, based upon the Singapore decision that the pursuer was dismissed because of his threat to resign. It was not open to him to assert a different reason in the London proceedings.

(2) Abuse of process, given his attempt to put forward a different case from that presented by him under oath in the Singapore court.

(3) Lack of territorial jurisdiction – he was a local employee in Singapore, and the links with the UK were not sufficient to render his employer subject to the Employment Protection Act.

[5] The pursuer lodged an appeal with the Employment Appeal Tribunal. It was rejected on the papers under EAT rule 3(7) by Judge McMullen QC on 9 September 2011. The pursuer exercised his right to an oral hearing under rule 3(10). That hearing took place before Judge Peter Clark on 7 March 2012. The judge said that if issue estoppel was the only basis upon which jurisdiction had been declined, he would have allowed the appeal to proceed to a full hearing. Saying nothing about "abuse of process", he considered that the real issue for him was whether there was a reasonably arguable appeal on the question of extra-territorial jurisdiction – presumably upon the basis that if the answer was no, that was an end of the whole matter. On that question the decision was that there was no reasonably

arguable point of law and therefore the application under rule 3(10), and with it the underlying appeal, failed.

The proceedings in the Court of Appeal

[6] Permission was then sought for an appeal to the Court of Appeal. On 25 June 2012 this was refused on the papers by Lord Justice Buxton. Under reference to a passage in the judgment of Lady Hale in the case of *Duncombe* v *Secretary of State for Children, Schools and Families* (No 2) [2011] ICR 1312, and given that the place of work was Singapore, it was explained that this was not one of the "exceptional cases" in which the employment relationship was "overwhelmingly closer" to the United Kingdom than any other system of law. That conclusion was not discriminatory against the applicant on the grounds of nationality, nor on any other ground. The decision of the ET Judge flowed "from (the pursuer's) factual circumstances, not from his nationality." It was observed that his nationality of a member state of the EU gave him no right to have the domestic law of another member state applied to him in a way that would not be applied to nationals of that other state.

[7] An oral hearing then took place before Lord Justice Tomlinson, in which the pursuer sought to persuade the judge to grant permission to appeal. That was refused on 3 October 2012 ([2012] EWCA Civ 1393). Again the issue was focussed on the question of extra-territorial jurisdiction. It was noted that the employment tribunal judge directed herself in accordance with the law as it then stood in the light of authorities such as *Lawson* v *Serco* [2006] UKHL 3 and *Kuzel* v *Roche Products* [2008] EWCA Civ 380. It was recorded that the ET judge said:

"The tribunal has not taken a 'tick box' approach to its analysis, but there are a number of factors that were significant in coming to the conclusion:

(a) for example the claimant is not British and he is not a British resident. He has not been a British resident since July 2007. The HMRC definition is not helpful here since (in *Lawson*) Lord Hoffmann emphasised the importance of looking at the reality of the situation and not a tax or indeed a balance sheet definition.

(b) The claimant was recruited internationally and therefore it cannot be said that his contract was rooted and forged in Britain.

(c) The tribunal could not see any reason for looking to depart from the general rule that place of employment is decisive and the place of employment here was Singapore.

(d) The claimant has attempted to use technical definitions to say that he worked as an expatriate but the reality was that he was not.

(e) His business was only in Singapore as confirmed in the job description and contract. There was a good reason for that, which was not in any way a sham, as there were important business and regulatory reasons for the claimant being in Singapore.

(f) There was no expectation on the part of the employer that he would move around the world or for him to return 'to base' in London. The claimant had worked in so many places as a 'citizen of the world' and his links to Britain were not strong. The claimant was not part of the British workforce and he was working, and understood himself to be working, in local employment as opposed to expatriate employment.

(g) The respondent has not tried to deny the links that the claimant's job did have with the UK but it is no coincidence that the claimant was dismissed in Singapore because that is where he worked. If he had been dismissed in Britain, he would have been dismissed on a 'casual visit' and this decision would have been no different."

[8] Lord Justice Tomlinson described the broad thrust of the pursuer's proposed appeal as follows:

"Firstly, he suggests that the nature of his employment had features, which he has described to me, which should have been regarded as providing a sufficiently strong connection with Great Britain for it to be said that it is appropriate that the tribunal should deal with the claim. Secondly, he suggests that, in so far as the tribunals below have relied upon his lack of British nationality and his lack of British residence as relevant features, that is prohibited discrimination, in particular prohibited by

> articles 18 and 45 of the Treaty on the Functioning of the European Union. And, thirdly, he suggests that in any event the judge below was in error in failing to regard his case as analogous to that considered by HHJ Burke QC in *Financial Times* v *Bishop* [2003] UKEAT 0147."

[9] His Lordship continued by agreeing with the pursuer to the extent that, in so far as the employment judge referred to the circumstance that the applicant is not British, that was not a feature or a factor of any relevance.

> "The question of residence is, in my judgement, capable of being a relevant factor in so far as the question of residence has some bearing on the question of sufficient connection, and if the case had been determined against Mr Aldabe on the ground alone that he lacked British residence, then I would agree with him that he would have an arguable case that could amount to indirect discrimination, as explained by the European Court of Justice or Court of Justice in the European Community in *Ingrid Boukhalfa* v *Bundesrepublik Deutschland* [1996] EUECJ C-214/94. But in my judgement the exercise upon which the tribunals below were engaged was a far more wide-ranging consideration of all of the factors, in which the question of residence was by no means decisive but was simply one element which inevitably must come into account in an overall assessment of whether or not the claimant and his employment had a sufficiently strong connection with the United Kingdom. That is an exercise of fact-finding upon which an appellate court is unlikely to take a different view from that of the tribunal below, unless the tribunal can be said to have erred in its approach to the fact-finding exercise.
>
> 13. I do not consider that it is fairly arguable that there has been any such error of approach. Essentially the complaint of Mr Aldabe under this head is that there were elements of the employment to which greater weight should have been given in connecting the employment with Britain: such as, for example, that the trades which the applicant would have been overseeing would have been trades booked in the United Kingdom books of the bank, as it were, rather than in Singapore. That however as it seems to me, was essentially a matter for the judge below.
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> 14. I have already, I hope, sufficiently indicated that in my judgement there is here no question of grounds of discrimination on grounds of nationality, because it is plain to me that the decision reached by both Judge Wade and Judge Peter Clark in the EAT would have been precisely the same had the applicant been a person of British nationality, which is something that was pointed out by Sir Richard Buxton when he refused permission to appeal."

[10] Lord Justice Tomlinson then discussed the case of *Bishop* and Lord Hoffmann's speech in *Lawson*. He quoted Judge Clark's reasons for distinguishing the *Bishop* case. It was noted that at paragraph 36 in *Lawson* Lord Hoffman said:

> "The circumstances would have to be unusual for an employee who works and is based abroad to come within the scope of British labour legislation."

This demonstrated that the hurdle which Mr Aldabe had to overcome was "a very considerable one." The judges below had given their reasons for concluding that this was not a case in which Mr Aldabe had been posted abroad by a British employer for the purpose of a business carried on in Great Britain. Rather he accepted a job, or the offer of a job, which was based in Singapore and which had no element of an expatriate nature such as that described by Lord Hoffmann in paragraph 38 of his speech in *Lawson*. The decision was that Mr Aldabe had no reasonable prospect of persuading the court that there had been an error in principle or that the judges below had misunderstood Lord Hoffmann's guidance.

> "On the basis of the evidence, which was carefully considered in the tribunals below, those tribunals have come to the conclusion that the connection of Mr Aldabe and his employment with Great Britain was insufficiently strong to enable it to be said that Parliament would have intended that the British Employment Tribunal should entertain a claim for unfair dismissal. That was essentially a factual conclusion with which this court is most unlikely to wish to interfere." (paragraph 19)

Permission to appeal was refused. The pursuer had asked the court to refer the following question to the ECJ for a ruling:

> "If a British national has access to an employment tribunal then does any EU national employed in the same circumstances have equal access to that same tribunal?"

The view being taken that, in the circumstances of the case, no question of discrimination arose, no reference was made.

The proceedings in Scotland

[11] That was an end to the proceedings in the English tribunal and court system, and of Mr Aldabe's claim for unfair dismissal and related matters against his former employer. Matters then moved to the courts north of the border. Mr Aldabe raised the present action

in Edinburgh Sheriff Court against the Advocate General for Scotland as representing HM Courts and Tribunals Service and the Secretary of State for Justice. Damages are sought based upon the failure of the Court of Appeal to refer a question of EU law to the ECJ. After sundry procedure, including the rejection of the defender's plea of *forum non conveniens*, a debate took place before Sheriff McGowan. The result was that on 23 May 2018 the pursuer's motion for summary decree was refused, and the defender's motion for dismissal of the action was granted.

[12] The grounds for the sheriff's decision are set out in paragraphs 243-307 of his judgment. The main reasons can be summarised as follows. There was no obligation on the Court of Appeal to make a reference. The focus of the decision on extra-territorial jurisdiction was upon the closeness (or otherwise) of the employment relationship with this country, not that of the closeness (or otherwise) of Mr Aldabe's relationship with the UK. If correct, the pursuer's approach would give him a right to pursue a claim for unfair dismissal which would not be available to a British citizen who had been given the same job in Singapore. Neither nationality nor residence were determinative in the decision as to extra-territorial jurisdiction. Mr Aldabe had been employed to work abroad in a business based, not in Britain, but in Singapore. That was why the London tribunal did not enjoy jurisdiction. Sheriff McGowan observed (at paragraph 266):

> "... had the tribunal been considering a claim brought by a dismissed employee who was a British national and who had been resident in the UK but whose circumstances were otherwise identical to those of the pursuer, it would have come to the same conclusion: no jurisdiction. Thus the question as formulated by the pursuer was not one which gave rise to a question of discrimination contrary to EU law."

[13] On that ground alone the pursuer's claim was considered to be irrelevant. The sheriff added that, even if the Court of Appeal had erred, the test of manifest breach of the case law of the Court of Justice would not be met: see *Köbler* v *Austria* [2004] QB 848. There

was no authority that the jurisdiction of the employment tribunal extends to nationals working outside the EU where there is no material connection between the employment and any member state. Finally in this context, it can be noted that the sheriff rejected a submission that Tomlinson LJ did not give an adequate explanation as to why no question of EU Law arose for determination, the sheriff describing the reasoning as "succinct and sufficient."

[14] The sheriff held that in any event there were no relevant averments as to causation of loss. The pursuer proceeded on the basis that the outcome of any reference to the ECJ would have been in his favour and that he would have won his case before the tribunal, which would have ordered reinstatement or re-engagement, all of which would have been complied with by the bank. For the reasons given at paragraphs 282-295 the sheriff considered that this was a gross oversimplification of the position. The averments necessary to support the case on causation were either lacking in specification or simply absent. Amongst other things the sheriff noticed that the absence of extra-territorial jurisdiction was only one of three reasons for the decision not to entertain the claim. He observed, wrongly I think, that the EAT dealt with reasons 1 and 3 – in fact it dealt only with the third. The first was mentioned, but only in the context of it being suitable for a full appeal hearing; the merits of the appeal on the first issue were not addressed. The sheriff correctly noted that there was no mention of "abuse of process" – the explanation may be that Judge Clark regarded this as truly an aspect of issue estoppel. Ultimately the pursuer submitted that the question of causation of loss is a matter of EU law, and that the court should refer this issue to the ECJ. Unsurprisingly the sheriff disagreed with the premise upon which that request was based. He refused to make a reference on the question of how causation of loss fell to be proved.

[15] Mr Aldabe then appealed the sheriff's decision to the Sheriff Appeal Court. On 5 February 2019, with Sheriff Principal Pyle presiding along with Appeal Sheriffs McCulloch and McFadyen, the appeal was refused. The court agreed with the sheriff's judgment, and also with that of Tomlinson LJ. It rejected the submission that various decisions of the UK Supreme Court on the issue of territorial jurisdiction were restricted to their particular facts. It disagreed with the proposition that the domestic courts were disabled from interpreting EU law. The SAC observed that it was not necessary for the Court of Appeal to make a reference. It was not required to enable the domestic court to reach a judgment. This was "because the issue of nationality and residence were essentially irrelevant" (paragraph 4 of the SAC's decision). For the avoidance of doubt, the SAC confirmed that it was also of the view that if the Court of Appeal was in error, it was not a "manifest error" of the kind explained in the case of *Köbler*. The court also agreed with the sheriff's conclusions on the question of loss. "The correct basis for loss would be loss of opportunity, which the appellant has not pled."

The application for leave to appeal to the Court of Session

[16] On 6 February 2019 the SAC refused permission to appeal its judgment to the Court of Session. The pursuer now asks this court for the necessary permission, all in terms of section 113 of the Courts Reform (Scotland) Act 2014. He has also asked for a reference in respect of a large number of questions. During oral submissions, he indicated that a reference arises only if otherwise permission to appeal is to be refused.

The submissions for the pursuer

[17] In his grounds of appeal presented to the Court of Appeal, the pursuer asked – how can the general principle that UK legislation is territorial be reconciled with the non-discrimination provisions in articles 18 and 45 of the TFEU? It was asserted that Italian citizens should have the same rights as UK citizens to raise proceedings in the UK tribunal system. It was likely that an Italian would not be resident in the UK, would not relocate to foreign employment from the UK, and would not pay taxes to HMRC. The EAT asked questions which, in all probability, foreign EU nationals would be unable to satisfy. It was submitted that, in any event, there were sufficient links with the UK, and his case was a clear one of expatriate employment as discussed in *Lawson*. He was discriminated against on the grounds of his non-residence in the UK, which was, in effect, discrimination on the grounds of nationality.

[18] In his skeleton arguments to the Court of Appeal EU decisions on the illegality of discrimination, both overt and covert, were cited. The tribunal decisions were said to be full of references to the pursuer not being resident in Britain, and to his family living in Argentina. It was asserted that jurisdiction would have been accepted had he been British, or had he resided in Britain. Treaty provisions prevailed over UK Law, so there should be a reference to the ECJ. The court was urged to refer the following question:

> "If a British national has access to an employment tribunal then does any EU national employed in the same circumstances have equal access to that same tribunal?"

[19] So far as the material presented to the Scottish courts is concerned, the pursuer's case is not helped by his tendency to lodge extensive pleadings and similarly lengthy written submissions which are difficult to follow, and which serve only to obscure the points he wishes to make. (For example the pursuer sets out 340 proposed grounds of appeal, and

ground 314 has 51 sub-paragraphs.) He has no compunction about making outrageous and bizarre allegations, none of which I intend to record in this opinion.

[20] More helpfully, before the hearing on his application the pursuer lodged "skeleton arguments" which were more focused and manageable. The main points can be summarised as follows. Where there is a conflict between EU and UK law, the former takes precedence. The pursuer was protected by EU non-discrimination rules which the UK courts are obliged to follow. Under EU law the employment tribunal had jurisdiction to deal with the unfair dismissal claim. Only the ECJ can interpret EU law. The courts misapplied the test in *Köbler*. Reference was made to ECJ decisions including *C.I.L.F.I.T Srl and others* v *Minister of Health* [1983] 1 CMLR 472 and *O'Flynn* v *UK*, Case C-237/94. The breach was said to be clear, obvious and evident. The courts ignored paragraph 56 in *Köbler* and EU non-discrimination case law, including *Walrave* v *The Netherlands*, Case 36/74. UK law was placed above EU law. The court must refer the questions of EU law to the ECJ without further delay. EU citizens have a right to raise unfair dismissal claims in the UK employment tribunal system. The decision in *Lawson* did not apply. Unfair dismissal and causation of loss were sufficiently proved by the Singapore decision, so proof in the UK was unnecessary and fair notice was not required. It followed that the claim could not be dismissed.

[21] In his oral submissions to the court the pursuer stated that Buxton LJ addressed the question of alleged non-discrimination, so it cannot be dismissed as irrelevant. The residency issue was a covert form of discrimination. The *Lawson* test is inconsistent with European decisions such as *O'Flynn*. He and other foreign EU nationals were being treated differently from UK citizens. Under reference to paragraph 42 of *Juan Perez Garcia,* Case 225/10 it was submitted that only the ECJ can interpret EU law. The courts below

misinterpreted the term "manifest". There is a bias against foreign nationals. Parliament cannot lawfully pass laws which are in breach of Treaty provisions. Unfair dismissal claims in the UK tribunal system is a right available, not just to UK nationals and residents, but also to citizens of other EU states.

[22] It was submitted that the appeal raises a number of important points of principle or practice. Eighteen were mentioned in the application, including whether the domestic rules on territorial jurisdiction can be applied to EU nationals protected by the EU rules against non-discrimination. Certain reasons, said to be compelling reasons for granting leave to appeal were mentioned, including the usurpation by the SAC of powers belonging only to the ECJ, and the lack of a fair trial.

[23] In addition the pursuer asks the court to make a reference and suggests 24 questions, including several on the general theme of whether decisions such as *Lawson* breach EU non-discrimination law. Other topics concern the meaning of "manifest" in *Köbler* and decisions on the scope of EU non-discrimination law, including *Walrave* and *O'Flynn.*

The submissions for the Advocate General

[24] The Advocate General for Scotland noted that the pursuer is seeking in the region of £2.15m for an alleged failure of the Court of Appeal to ask the question set out earlier. Tomlinson LJ accepted that in the ascertainment of whether a UK statute has extra-territorial effect, discrimination on the grounds of the nationality of EU citizens, including indirect discrimination, is unlawful. There was no error as to the content of EU law. However, on the facts of the particular case, the pursuer's nationality (and non-residence in the UK) was not material to the decision as to whether the ET had jurisdiction. Thus no issue of EU law arose, far less one that required clarification by the CJEU. Reference was made to *CILFIT*

(cited earlier). Whether an issue of EU law is or is not relevant is a matter for the domestic court. In any event, if there was an error on the part of the Court of Appeal in failing to make a reference, it was not "manifest" in the sense discussed in *Köbler*, thus there is no state liability.

[25] For the Advocate General it was submitted that the courts below did not err in law. In any event established jurisprudence, both domestic and European, was applied to the facts of the case. The proposed appeal raises no important point of principle or practice justifying an appeal to the Court of Session. Furthermore the courts below correctly concluded that the averments of loss were inadequate, applying well-established legal principles. There was no unfairness in the proceedings. So far as the pursuer's complaints concerning caution are concerned, no appeals have been made regarding the awards, and there is no good reason to review them now. Again well settled law was applied, without any error of law.

Discussion

[26] The pursuer's main concerns fall into two parts:

1. The decisions of the ET, EAT and Court of Appeal were wrong in terms of UK law.
2. The failure to make a reference was a breach of EU law which triggered liability on the part of the UK state to pay damages for loss caused thereby.

This action does not afford a right of appeal against the merits of the Court of Appeal's decision, therefore only the second question arises. That said, it is difficult to address the second without some reference to the first. The decision was one of no jurisdiction because the pursuer was working, and understood himself to be working, in local employment in

Singapore. Parliament could not have intended the Employment Protection Act 1996 to apply to his employment relationship with the bank, and this for all the reasons explained by the ET and EAT. Those decisions were based on recent authoritative decisions of the House of Lords and the UK Supreme Court, culminating in *Ravat* v *Haliburton Manufacturing and Services Ltd* 2012 SC (UKSC) 265. Such links as there were with the UK did not overcome the application of the general rule that the place of employment is decisive. The pursuer asserted that he should be treated as an expatriate member of the British workforce, but it is clear from the facts of the case that this submission is unfounded. (The classic example is a foreign correspondent posted abroad to work for a UK newspaper.)

[27] Tomlinson LJ recognised that if the decision as to jurisdiction turned on issues of Mr Aldabe's place of residence, an arguable question of breach of EU non-discrimination law could arise. However, since the decision would have been the same had the pursuer been a British national living in Britain, this was not relevant to the outcome of the appeal against the EAT's decision. There is no obligation upon a court of final instance to refer a question of EU law under article 267 if it is not relevant, in the sense that, whatever the answer, it will make no difference to the outcome of the case – see *CILFIT*. It is for the national court to reach a decision as to whether a question of EU law is or is not relevant. The decision in *Lucio Aquino*, Case 3/16 affirmed that a court of final instance is not obliged to refer a question if it is not necessary to allow the court to give judgment (paragraphs 43/45).

[28] Even if the above analysis is incorrect, that would not be sufficient for liability in a *Francovich* damages claim. There must be a causal link between any proven harm suffered and a breach of the state's obligations under EU law; something to be determined in accordance with the member state's legal rules. In addition, the breach must demonstrate a

"manifest and grave disregard" by the state of its obligations. There must be a "sufficiently serious breach of EU law" – *Brasserie de Pecheur SA* (*Factortame*) [1996] QB 404 paragraphs 51/55.

[29] The courts below have decided that the pleadings do not demonstrate a basis for proof of the required causal link between the alleged infringement and the losses claimed. There is no good reason to disagree, and in any event issues as to the relevancy and specification of the pursuer's pleadings do not raise matters such as might pass the test for second appeals in section 113 of the 2014 Act. The pursuer claims that it is sufficient for him simply to point to the Singapore judge's decision, but that is plainly incorrect. Nor can this be categorised as a matter which itself requires a reference. In passing I note that the pursuer has not attempted to show that he could overcome the other reasons for the dismissal of his claim in the tribunal system, namely issue estoppel and abuse of process. Before the Court of Appeal he submitted that those issues had been decided in his favour in the EAT, but, as explained earlier, that is not the case.

[30] *Köbler* reaffirmed that a breach must be "sufficiently serious" and directly linked to the alleged loss. As to the first requirement:

> "State liability for an infringement of Community law by a national court adjudicating at final instance can be incurred only in the exceptional case where the court has manifestly infringed the applicable law." (paragraph 53)

Examples given included a deliberate infringement or an "inexcusable" error (paragraph 55). While normally matters for the judgement of the national court, the court had sufficient information before it to rule that the breach in that case did not give rise to state liability. The erroneous view that the issue in question was clear from settled case law of the Court of Justice was not of such a nature as to amount to a manifest and sufficiently serious infringement as would justify state liability (paragraphs 122/126). A similar decision

was taken in the somewhat complex circumstances considered in *Cooper* v *Attorney General* [2011] QB 976, where a directive had been misconstrued. The error was a matter of judgement, and a wrong judgement did not amount to a manifest infringement. Contrary to the pursuer's submission, it is clear that if Tomlinson LJ erred in not making a reference, it was not an error of the kind which can trigger state liability.

[31] The pursuer's submissions suggest a desire to mount a root and branch attack on the right of the UK (and presumably other member states) to have a general rule that its legislation is territorial in its application, and this because more British nationals will meet the criteria than foreign EU nationals. It is true that British nationals, unlike for example Italians, are more likely to be part of the British workforce working for a British business. Some of the judges below observed that the pursuer sought preferential treatment for foreign EU nationals over British nationals. Of course such would not be allowed in terms of EU non-discrimination law. The logical outcome would be that, contrary to the comity of nations, a state could not limit the territorial application of its laws by reference to factors such as a connection to its own legal system, or presumably at all. Thus an Italian company employing a French national (or a British national) in Germany could be subject to a claim based upon UK employment legislation in the UK employment tribunal, doubtless so long as there was personal jurisdiction against the employer. Leaving aside the question of how or why a foreign company operating in another country can legitimately be made subject to the duties imposed on employers by the UK legislature, it is plain that there is no EU law which prohibits rules as to territorial limits on the application and enforcement of a member state's law. (Indeed EU law has a similar principle, see for example *Boukhalfa* (cited earlier) paragraph 15, and the Advocate General's opinion at paragraphs 16,18 and 31.) What it does provide is that, unless objectively justified and proportionate, the rules must not

discriminate, directly or indirectly, on grounds of nationality. Tomlinson LJ recognised the potential for an arguable case of illegitimate indirect discrimination in respect of any decisive emphasis upon questions of residence, but concluded that this did not arise in the pursuer's case.

[32] It can be seen that the discussion becomes somewhat circular. Mr Aldabe was treated no differently from how a British national resident in the UK would have been dealt with in similar circumstances, and, in so far as he wanted to be treated differently and preferentially, that would be in breach of the EU laws upon which he relies. The most he was entitled to was not to be treated disadvantageously as compared with any British national who was offered the same employment by the bank. The issue of his nationality (and the related subject of residence) not being material to the decision on jurisdiction, no question of such discrimination arose in his case.

[33] A number of other matters were raised in the proposed grounds of appeal, including allegations of bias, lack of a fair trial, and a complaint about the pursuer being required to find caution. There is no merit in these, and certainly nothing as would support a second appeal to the Court of Session.

Decision

[34] There has been no arguable error of law on the part of the SAC in refusing the appeal from the decision of the sheriff. The test in section 113 of the 2014 Act is not satisfied. There remains the request for this court to make a reference for preliminary rulings under article 267 and rule of court 65. Twenty four questions have been suggested. It would appear that the pursuer has compiled a list of all the questions he can think of which might involve an issue of EU law. Many of them seem to spring from his erroneous belief that only

the European Court is permitted to interpret and apply EU law. He also, again wrongly, views this action as another opportunity to have the ECJ address his concerns as to the decisions of the ET and EAT. Those proceedings are over. This is a different and separate process, based on a claim for damages arising from the decision of the Court of Appeal not to make a reference. In the course of submissions, Mr Aldabe stated that if this court fails to make a reference, he intends to raise another action founding upon that failure, and so, as he put it, a "vicious circle" will continue unless and until he achieves his objective. All of this, it seems to me, amounts to an abuse of the court process.

[35] This decision, and those in the sheriff court and the SAC, have been based on obvious, clear and well-established legal rules, some of domestic, some of Community law origin. Regard has been had to the 24 questions proposed by the pursuer, and more generally as to the issues raised by this application. No doubtful or unclear issue of EU law requires to be addressed and resolved by the ECJ in order to allow the court to reach a decision. To put it another way, no relevant question of EU law arises. In such circumstances a reference is not required, even in a court of final instance – see *CILFIT* (cited earlier). In that decision it was also made clear that a question within the meaning of article 267 is not raised simply because it has been argued or proposed by a party.

[36] The overall result is that no reference will be made, and the application for leave to appeal to this court is refused. It was agreed at the hearing that expenses should follow success. Given that the application has failed, the defender will be entitled to an award of the expenses occasioned by the application against the pursuer.