Note

"Appeal" to the High Court against House of Lords' Decisions on the Interpretation of Community Law—Damages for Judicial Error

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The Court of Justice of the European Communities (ECJ) has the final authority concerning the interpretation of the EC Treaty and other EU legislation (EC Treaty, Art.234). For this reason, national courts normally refer difficult Community law issues to the ECJ for an authoritative ruling. However, the application of EU law, like any domestic law, is for the national courts.

In the UK, and presumably in all other EU countries, where a claim has been resolved by final judgment, the judgment is conclusive once all possibility of appeal has been exhausted. Thus, a claim that has been disposed of by final judgment cannot be advanced again. This is particularly the case where an action has been fought all the way up to the court of last instance, which in the UK is the House of Lords. Put another way, after the House of Lords has disposed of a dispute in proceedings that were properly constituted and conducted, there simply is no further judicial instance that can consider the correctness of the House of Lords' decision.

This last proposition may, however, no longer be correct following the decision of the European Court of Justice in Case C–224/01, *Kobler v Republic of Austria* (September 30, 2003) at any rate as far as the enforcement of rights under EU law are concerned. It would appear that the UK Government has an obligation to establish a procedure by which those who have been denied a right under EU law as a result of an erroneous House of Lords' decision, or for that matter any other court, can seek compensation from the UK Government for any loss suffered as a result of such mistaken decision.

The *Kobler* case arose from an action brought by a university professor for a length of service increment. Under Austrian law, university professors are entitled to a special length of service increment after 15 years of service. The claimant applied for such an increment but was denied it on the grounds that the entitlement was conferred only on professors that have completed 15 years of service at Austrian universities. The claimant argued that, although he had

not completed 15 years' service at Austrian universities, he had completed the requisite length of service if the duration of his service in universities of other Member States of the European Community were taken into consideration. He contended that the condition of completion of 15 years' service solely in Austrian universities amounted to indirect discrimination unjustified under Community law. The Austrian court, the *Verwaltungsgerichtshof*, referred the question to the ECJ for a ruling. While this reference was pending, the ECJ gave a decision in Case C–15/96, *Schöning-Kougebetopoulou* [1998] E.C.R. I–47, which raised similar, though not identical, issues. The Austrian court concluded that this decision effectively resolved the issue before it and withdrew its reference to the ECJ. The Austrian court found that while the ECJ in *Schöning-Kougebetopoulou* held that discrimination on grounds of length of service in other EU countries was contrary to the EC Treaty, that case also decided that loyalty bonuses could be justified if they were in the public interest. The Austrian court then ruled that the increment in question was a loyalty bonus (rather than a length of service bonus) and that as such it was not contrary to EU law. The claimant did not accept court's interpretation of the ECJ decision and brought an action for damages against the Republic of Austria for reparation of the loss that he suffered as a result of the non-payment to him of a special length-of-service increment. He maintained that the judgment of the *Verwaltungsgerichtshof* infringed directly applicable provisions of Community law. The Austrian court in which the damages action was brought, the *Landesgericht für Zivilrechtssachen Wien*, decided to stay proceedings and to refer a number of questions to the ECJ.

The key issue before the court was whether the principle according to which Member States are obliged to make good damage caused to individuals by infringements of Community law for which they are responsible is also applicable where the alleged infringement stems from a decision of a court adjudicating at last instance and whether, if so, it is for the legal system of each Member State to designate a court competent to adjudicate on disputes relating to such reparation. A number of States, including the UK, resisted the notion that Member States can be held liable in damages for what is effectively a judicial error.

The UK Government pointed out that, save where a judicial act infringes a fundamental right protected by the European Convention for the Protection of Human Rights, no action in damages can be brought against the Crown in respect of judicial decisions. The UK Government submitted that inherent in the freedom given to national courts to decide matters of Community law for themselves is the acceptance that those courts will sometimes make errors that cannot be appealed or otherwise corrected. It argued that an action for damages of the kind brought in this case involves impugning a final decision of a domestic court and that to allow such actions would weaken the principles of finality of litigation and of *res judicata*, which the ECJ has recognised as being fundamental to the proper administration of civil justice. The UK Government further submitted that the authority and reputation of the judiciary would be diminished if a judicial mistake could in the future result in an action for

damages. Lastly, it argued that there would be serious difficulties in determining a court competent to adjudicate on such a case of State liability, particularly in the UK where there is a unitary court system and a strict doctrine of *stare decisis*.

The ECJ rejected these submissions. It proceeded from the principle imposing liability on Member States for damage caused to individuals as a result of breaches of Community law, and held that this principle extended to any case in which a Member State breaches Community law, whichever is the authority of the Member State whose act or omission was responsible for the breach (paras [30]–[31]). It stated (para.[33]):

> "In the light of the essential role played by the judiciary in the protection of the rights derived by individuals from Community rules, the full effectiveness of those rules would be called in question and the protection of those rights would be weakened if individuals were precluded from being able, under certain conditions, to obtain reparation when their rights are affected by an infringement of Community law attributable to a decision of a court of a Member State adjudicating at last instance."

It is difficult to accept this as a reason for interfering with a final court decision. The problem of how to deal with final decisions that may subsequently be shown to be mistaken is not unique to EU law. On the contrary, this is a universal and timeless problem faced by all legal systems since no system of justice can guarantee an error-free adjudicative process. This problem has an equally universal solution represented by rules of *res judicata*. Implicit in the principle of *res judicata* is the idea that there must be finality to litigation regardless of whether at some future date it may be shown that a court decision (especially of last instance) was founded on error. The ECJ itself pointed out that in order to ensure legal stability and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the relevant time-limits can no longer be called in question (para.[38]). It is therefore not the case that the effectiveness of rules is called into question simply because individuals are precluded from challenging a final court decision which wrongly applied the rules.

The ECJ sought to get round this obvious objection by decoupling its conclusion from the principle of *res judicata*. It reasoned that recognition of the principle of State liability for a decision of a court of last instance does not in itself call into question the *res judicata* effect of the court's decision, because a claim for damages against the State does not have the same purpose and does not necessarily involve the same parties as the proceedings resulting in the decision which has acquired the status of *res judicata*. It observed that the "applicant in an action to establish the liability of the State will, if successful, secure an order against it for reparation of the damage incurred but not necessarily a declaration invalidating the status of res judicata of the judicial decision which was responsible for the damage. In any event, the principle of State liability inherent in the Community legal order requires such reparation, but not revision of the judicial decision which was responsible for the damage"

(para.[39]). It therefore concluded that *res judicata* does not preclude recognition of the principle of State liability for the decision of a court adjudicating at last instance.

The distinction drawn between impugning the court's decision and claiming damages against the State is unconvincing, as the facts of this very case demonstrate. The original action for the payment of length of service increment was against the Austrian State, which was the employer of all university staff. The action for damages following the judicial error was also against the Austrian State. In both actions, the claimant sought the self-same remedy: recognition that he was entitled to a particular increment. It strains legal technicality to the point of farce to pretend that the second action is in some way different from the first and that a different judgment in the second does not impugn the judgment in the first. The effect of the ECJ ruling is to force the court to entertain questions of interpretation, which have already been finally determined, by the national courts. It places an obligation on national governments to defend the correctness of a judgment delivered by their court of last resort or pay damages. The ECJ would therefore have been better advised to assert boldly that which it implicitly decided: that the importance of enforcing rights protected by the EC Treaty outweighs considerations of finality of litigation and of good administration of justice.

However, as will be presently explained, the protection of Community law offered by this decision is far less complete than would appear. The ECJ was not taking it upon itself to adjudicate claims for damages. Rather, it held that it is for the Member States to establish an appropriate right of action for compensation and "to designate the competent courts and lay down the detailed procedural rules for legal proceedings intended fully to safeguard the rights which individuals derive from Community law" (para.[46]; see also para.[59]). This means that a litigant who claims that a court of last instance has erroneously denied him Community law rights must have a right of action against the UK Government capable of being pursued in the ordinary courts.

Devising a procedure for satisfying this right would not be easy. Suppose, for example, that a claimant has brought an action against a certain defendant claiming a remedy for infringement of rights protected under Community law. The interpretation of the applicable law is disputed and is finally resolved in favour of the defendant by the House of Lords, which has also found that the case raised no issue deserving a reference to the ECJ. The claimant must now be allowed to start a new action against the UK Government claiming compensation for the denial of his EU rights as a result of the House of Lords' decision. This new action cannot be commenced in the House of Lords, if only because the House of Lords has no jurisdiction to adjudicate as a court of first instance, nor a procedure for determining questions of fact, such as causation and the amount of damages, which would necessarily be involved in such an action.

Suppose now that the action against the UK Government is brought in the High Court. The implication of the ECJ decision is that the High Court

hearing the action against the State must not regard itself bound by the House of Lords' ruling in the original action concerning the interpretation of Community law. It follows that the High Court is duty-bound to approach the interpretation issue afresh. A number of scenarios may follow. If the High Court considers that the case raises a difficult question of Community law, it may well refer the issue to the ECJ. However, it is clear that the ECJ did not mean to hold that every time such action is brought in a national court, it must be referred to it for a preliminary ruling, for such a policy would flood it with references. Consequently, the High Court is free to conclude that there is no difficulty about the issue (*e.g.* because ECJ jurisprudence provides a clear answer or for some other reason) and no justification for a reference to the ECJ.

If the High Court decides the damages issue, the aggrieved party (be it the claimant or the government) would have the right to apply for leave to appeal. Leave to appeal need not be given, but it may well be given, especially if the High Court has placed a different interpretation on the disputed Community law. This means that the self-same issue could well reach the House of Lords once more and, if it does, a different panel would have to consider it. Suppose now that on considering the claim of damages against the government the House of Lords reaches the same conclusion as that which was reached by the House of Lords in the original claim. Should the claimant still have a right to complain before yet another court that his Community rights have been denied, or will the ECJ be now prepared to hold that the principle of finality must prevail? Given that any further proceedings against the government will involve (even on the ECJ's understanding of *res judicata*) the same action and the same parties, the ECJ will in all probability accept finality. But this only goes to expose the weakness of its decision in the case under consideration. For, if finality must prevail after the national court has heard the claim for damages against the government which, as already explained, will have involved the same issue of Community law as the issue that was determined in the original action, why should not the argument from finality have prevailed once the original action was determined by a court of last instance?

Furthermore, the ECJ decision does not offer as complete a protection of Community rights as the ECJ's ruling on the issue of *res judicata* might suggest. For, having opened the floodgates of re-litigation, the ECJ sought to shut them in part by placing restrictions on the possibility of bringing claims for damages. The Court ruled that three conditions must be satisfied for a Member State to be required to make reparation for loss caused to individuals as a result of breaches of Community law following an erroneous court ruling on the application of EU law. First, the rule of law infringed must be intended to confer rights on individuals. Secondly, the breach must be sufficiently serious. Thirdly, there must be a direct causal link between the breach of the obligation incumbent on the State and the loss or damage sustained.

The second condition is the most significant, at least from the present perspective. The court observed that State liability for an infringement of Community law by a decision of a national court adjudicating at last instance

could be incurred only in the exceptional case where the court has manifestly infringed the applicable law (para.[53]). Furthermore, in order to determine whether this condition is satisfied, the national court hearing a claim for reparation must take account of all the factors and, in particular, "the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, the position taken, where applicable, by a Community institution and non-compliance by the court in question with its obligation to make a reference for a preliminary ruling under the third paragraph of Article 234 EC" (para.[55]). An infringement will be sufficiently serious, the ECJ explained, where the decision concerned was made in manifest breach of the ECJ case law on the matter.

The ECJ ruled that while the Austrian court's decision denying the claimant a special length of service increment constituted an obstacle to freedom of movement and therefore violated Art.48 of the EC Treaty, the infringement was not manifest in character. The ECJ reached this conclusion because Community law did not specifically deal with the issue, because no direct decision on the matter had been made by the ECJ and, furthermore, because the question in dispute did not have an obvious answer. The ECJ found that the principal failing of the Austrian court in the original proceedings was to withdraw the reference of the issue to the ECJ. But this defect, the court ruled, was not of such a nature as to invalidate the ruling of the Austrian court in the original action. The ECJ concluded that in these circumstances the infringement could not be regarded as being manifest in nature and was therefore insufficiently serious to justify an order of damages against the Austrian State.

At first glance it makes no sense to employ a test of manifest mistake in order to decide a claim to compensation where it has already been established that a mistake had been made, resulting in an infringement of Community rights. For, once it is found that a right has been infringed, why should compensation be withheld simply because the denial of the right was not manifest? However, the puzzle is resolved if the test is seen not as a test for compensation but as a test for entertaining a claim to compensation. The ECJ, it must be stressed, was not itself ruling on the compensation claim but was only deciding what procedures national States must introduce for entertaining such claims.

Nevertheless, the end-result remains paradoxical. The ECJ's starting point was that "the full effectiveness of . . . [Community] rules would be called in question and the protection of . . . rights would be weakened if individuals were precluded from being able . . . to obtain reparation when their rights are affected by an infringement of Community law attributable to a decision of a court of a Member State . . . " (para.[33]). Yet, despite ruling that the claimant's Community right had been denied, the ECJ held that the Austrian court did not have to remedy the breach by ordering compensation. This means, as a distinguished judge pointed out, that the "full" protection of Community rights depends not on their content but on how far the national court is perceived by the ECJ to have blundered, in the sense of having made an obvious mistake.

One can understand the practical considerations that led the ECJ to accept that Member States are not bound to correct every error of Community law made by national courts; that they are only obliged to provide a procedure for correcting intentional or manifest errors. In so doing the ECJ was seeking to check the more glaring failures to observe Community law, without completely undermining the finality of decisions taken by State courts of last instance. But if this was the extent of its ambition, it is doubtful whether it was at all necessary to derogate from the principle of finality, and force Member States to erect a procedure for challenging the findings of courts of last instance. Put differently, given the restrictions that the ECJ imposed on actions for compensation, it is far from clear that Community rights will in future receive appreciably greater protection than they already do. What is, however, clear is that once procedures are established for challenging the interpretation of Community law by courts of last instance, they will be invoked with increasing frequency and that claimants will continually push against the limits of the jurisdiction in order to extend them as far as possible.