

## DEVELOPMENTS

# The European Court of Human Rights' Judgment in the Case of *Bosphorus Hava Yollari Turizm v. Ireland*

By Frank Schorkopf\*

### A. Introduction

#### I. Proceedings Before the Irish Courts and the ECJ

The European Court of Human Rights, on 30 June 2005, handed down its long awaited judgment in the case *Bosphorus Hava Yollari Turizm v. Ireland*. The case concerned the responsibility of contracting parties for legal measures induced by the European Community.<sup>1</sup>

The application was brought by *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi*, an airline charter company registered in Turkey (hereinafter “Bosphorus Airways”). In May 1993, Bosphorus Airways leased a Boeing 737-300 civil aircraft from Yugoslav Airlines (hereinafter “JAT”). The aircraft was seized by Irish authorities during a maintenance stop-over in Ireland from a State-owned aircraft maintenance company. The legal basis for the seizure was EC Council Regulation No. 990/93 concerning trade between the EC and the Federal Republic of Yugoslavia.<sup>2</sup> The regulation strengthened the already existing embargo of the

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<sup>1</sup> *Bosphorus Hava Yollari Turizm v. Ireland*, App. No. 45036/98 (Eur. Ct. H. R. 30 June 2005), available at <http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=3666597&skin=hudoc-en&action=request>.

<sup>2</sup> Council Regulation 990/93, Concerning Trade Between the European Economic Community and the Federal Republic of Yugoslavia (Serbia and Montenegro), 1993 O.J. (L 102) 14 (EEC).

Federal Republic of Yugoslavia (Serbia and Montenegro) established by two EC Council Regulations from 1992.<sup>3</sup>

The regulations implemented the United Nations sanctions regime against the Federal Republic of Yugoslavia. The Security Council had adopted, pursuant to Chapter VII of the UN Charter,<sup>4</sup> three resolutions that established a sanctions regime in order to dissuade the Republics of Serbia and Montenegro from violating the integrity and security of the Republic of Bosnia-Herzegovina and to induce the Bosnian Serb party to cooperate in the restoration of peace in this Republic.<sup>5</sup> Resolution 820 (1993) endeavored to strengthen the embargo. It provided that States should impound, *inter alia*, all aircraft in their territories “in which a majority or controlling interest is held by a person or undertaking in or operating” from the Former Republic of Yugoslavia.<sup>6</sup> The EC Regulation 990/93, which implemented Security Council Resolution 820 (1983) provided that:

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<sup>3</sup> Council Regulation 1432/92, Prohibiting Trade Between the European Economic Community and the Republics of Serbia and Montenegro, 1992 O.J. (L 151) 4 (EEC); Council Regulation 2656/92, Concerning Certain Technical Modalities in Connection with the Application of Regulation (EEC) No 1432/92 Prohibiting Trade Between the European Economic Community and the Republics of Serbia and Montenegro, 1992 O.J. (L 266) 27 (EEC).

<sup>4</sup> See U.N. Charter art. 39-51.

<sup>5</sup> S.C. Res. 713, U.N. Doc. S/RES/713 (Sept. 25, 1991); S.C. Res. 757, U.N. Doc. S/RES/757 (May 30, 1992); S.C. Res. 787, U.N. Doc. S/RES/787 (Nov. 16, 1992).

<sup>6</sup> S.C. Res. 820, ¶ 24, U.N. Doc S/RES/820 (April 17, 1993) (“Decides that all States shall impound all vessels, freight vehicles, rolling stock and aircraft in their territories in which a majority or controlling interest is held by a person or undertaking in or operating from the [FRY] and that these vessels, freight vehicles, rolling stock or aircraft may be forfeited to the seizing State upon a determination that they have been in violation of resolutions [...] 713 (1991), 757 (1992), 787 (1992) or the present resolution; ...”).

1. As and from 26 April 1993, the following shall be prohibited: [...]

(e) the provision of non-financial services to any person or body for purposes of any business carried out in the Republics of Serbia and Montenegro.

[...]

8. All vessels, freight vehicles, rolling stock and aircraft in which a majority or controlling interest is held by a person or undertaking in or operating from the [FRY] shall be impounded by the competent authorities of the Member States.

Expenses of impounding vessels, freight vehicles, rolling stock and aircraft may be charged to their owners.

9. All vessels, freight vehicles, rolling stock, aircraft and cargoes suspected of having violated, or being in violation of [EC Regulation 1432/92] or this Regulation shall be detained by the competent authorities of the Member States pending investigations.

10. Each Member State shall determine the sanctions to be imposed where the provisions of this [Regulation] are infringed.

Where it has been ascertained that vessels, freight vehicles, rolling stock, aircraft and cargoes have violated this Regulation, they may be forfeited to the Member State whose competent authorities have impounded or detained them.

Bosphorus Airways challenged the seizure of the aircraft before the Irish High Court. The legal action was successful, as the High Court held that EC Regulation 990/93 was not applicable to the aircraft in question.<sup>7</sup> However, on an appeal from

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<sup>7</sup> *Bosphorus Hava Yollari Turizm v. Ireland*, App. No. 45036/98 at paras. 35-36 (Eur. Ct. H. R. 30 June 2005), available at <http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=3666597&skin=hudoc-en&action=request>.

the Irish Government, the Supreme Court referred the matter to the European Court of Justice (ECJ) for a preliminary ruling.<sup>8</sup> The Supreme Court inquired whether EC Regulation No 990/93/EEC must be construed as applying to the seized aircraft. The ECJ answered in the affirmative, reasoning that it follows from the wording of Art. 8 of the regulation, from the context and aims of the regulation, and also from the text and the aim of the resolutions adopted by the Security Council, that the Regulation applies to any aircraft which is the property of a person or undertaking based in or operating from the Federal Republic of Yugoslavia, and that it is not necessary for that person or undertaking also to have actual control of the aircraft.<sup>9</sup> In respect of the violation of fundamental rights, such as the right to peaceful enjoyment of property and the freedom to pursue a commercial activity, the Court reasoned that those rights are not absolute and their exercise may be subject to restrictions justified by objectives of general interest pursued by the Community. In the present case, the ECJ concluded, the substantial restrictions were justified because the aims pursued were themselves of substantial importance.<sup>10</sup>

In its judgment of November 1996, the Supreme Court applied the decision of the ECJ and stated that it was bound by that decision; the Minister's appeal was allowed.<sup>11</sup> By that time, Bosphorus Airways' lease on the aircraft had already expired. Since the sanctions regime against the Federal Republic of Yugoslavia (Serbia and Montenegro) had also been relaxed by that date, the Irish authorities returned the aircraft directly to JAT. Bosphorus Airways consequently lost approximately three years of its four-year lease of the aircraft, which was the only one ever seized under the relevant EC and UN regulations.

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<sup>8</sup> Treaty Establishing the European Community, art. 234, Nov. 10, 1997, 1997 O.J. (C 340) [hereinafter EC Treaty].

<sup>9</sup> Case C-84/95, *Bosphorus Hava Yollari Turizm ve Ticaret AS*, 1996 E.C.R. I-3953, paras. 11-18.

<sup>10</sup> *Id.* at paras. 19-26.

<sup>11</sup> *Bosphorus Hava Yollari Turizm v. Ireland*, App. No. 45036/98 at para. 40 (Eur. Ct. H. R. 30 June 2005), available at <http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=3666597&skin=hudoc-en&action=request>.

*II. Proceedings Under the ECHR*

Bosphorus Airways lodged a complaint with the European Commission of Human Rights (ECommHR) on 25 March 1997. The application was transmitted to the European Court of Human Rights (ECtHR) on 1 November 1998. Following a hearing on the admissibility and merits, a Chamber of the Fourth Section declared the application admissible on 13 September 2001.<sup>12</sup> On 30 January 2004 the Chamber relinquished jurisdiction in favour of the Grand Chamber.<sup>13</sup> In a public hearing before the Grand Chamber on 29 September 2004 the Court not only received written submission from the Governments of Italy and the United Kingdom and from the European Commission, but also gave leave to a non-governmental organization to appear.<sup>14</sup> The European Commission also obtained leave to participate in the oral hearing.

The applicant complained that the manner in which Ireland implemented the sanctions regime to impound its aircraft was a reviewable exercise of discretion within the meaning of Art. 1 of the European Convention of Human Rights (ECHR)<sup>15</sup> and a violation of Art. 1 of Protocol No. 1 to the ECHR.<sup>16</sup> It argued that

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<sup>12</sup> *Id.* at para. 6.

<sup>13</sup> *Id.* at para. 7. See Convention for the Protection of Human Rights and Fundamental Freedoms, art. 30, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR]; Rule 72 of the Rules of Court of the European Court of Human Rights [hereinafter ECtHR Rules], available at <http://www.echr.coe.int/NR/ronlyres/94F95200-874C-4E83-9E76-689344E8A3C8/0/RulesOfCourtMarch2005.pdf>.

<sup>14</sup> The NGO, Institut de Formation en Droits de L'Homme Du Barreau de Paris, was given leave to appear by the President of the Court. See ECHR art. 36 § 2; Rule 44 § 2 ECtHR Rules.

<sup>15</sup> ECHR art. 1 (“The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”).

<sup>16</sup> Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1, March 20, 1952, 213 U.N.T.S. 262. Article 1 of Protocol 1 reads:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

the complaint had not been directed against acts of international organizations over the elaboration of which the Member State had no influence and in the execution of which the State had no discretion. The Irish State had been intimately involved in the adoption and application of EC Regulation 990/93 and had a real and reviewable discretion as to the means by which the result required by the EC Regulation could be achieved. In any event, the applicant argued that the Community did not offer “equivalent protection,” because the role of the ECJ under Art. 234 EC Treaty is limited.<sup>17</sup> The ECJ, it was argued, did not have inherent jurisdiction to consider whether matters such as the absence of compensation and discriminatory treatment of the applicant amounted to a breach of its property rights. The applicant maintained that the exercise of discretion by the Irish authorities as regards the impoundment of its aircraft should be reviewed by the ECtHR for its compatibility with the ECHR. The applicant considered that the Irish State had impounded the aircraft as a preventative step without a clear UN or EC obligation to do so.

## **B. Decision of the ECtHR**

The ECtHR found that the complaint was covered by the scope of the Convention but rejected the alleged violation of Art. 1 of Protocol No. 1.

### *I. Application of the ECHR to an Act of the EU?*

The ECtHR held that the complaint about that act fulfilled the jurisdictional prerequisites under the ECHR, including *ratione loci*, *personae* and *materiae*, and thus

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<sup>17</sup> The ECJ characterizes the preliminary ruling procedure as

an instrument of cooperation between the Court of Justice and national courts by means of which the former provides the latter with interpretation of such Community law as is necessary for them to give judgment in cases upon which they are called to adjudicate [...] In the context of that cooperation, it is for the national court seized of the dispute, which alone has direct knowledge of the facts giving rise to the dispute and must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling [...]

Case C-112/00, Eugen Schmidberger, 2003 E.C.R. I-5659, paras. 30-31.

the ECHR was implicated. The addressee of the impugned act, the ECtHR reasoned, fell within the “jurisdiction” of the Irish State. The text of Art. 1 of the Convention requires contracting parties to answer for any infringement of the rights and freedoms protected by the Convention committed against individuals placed under their “jurisdiction.” Since it was not disputed that the seizure of the aircraft, leased by the applicant for a period of time, was implemented by the authorities of the respondent State on its territory following a decision to impound issued by the Irish Minister for Transport, the question of jurisdiction was summarily by the Court in favor of the applicant.<sup>18</sup>

## *II. Substantive Violation of Article 1, Protocol No. 1*

### *1. Applicability*

In respect of Art. 1 of Protocol No 1, the ECtHR started its examination with the observation that, once adopted, EC Regulation 990/93 was “generally applicable” and “binding in its entirety” under Art. 249 EC Treaty. The ECtHR explained that the regulation applied to all EU Member States, none of which could lawfully depart from any of its provisions.<sup>19</sup> In addition, its “direct applicability” was not, and, in the ECtHR’s view, could not be, disputed. The Regulation became part of Irish domestic law with effect from 28 April 1993, when it was published in the Official Journal of the European Community, prior to the date of the impoundment and without the need for implementing legislation. The Court considered it entirely foreseeable that a national Minister for Transport would implement the impoundment powers contained in Art. 8 EC Regulation 990/93. The Irish authorities rightly considered themselves obliged to impound any departing aircraft to which they believed the provisions applied. Their decision that it did apply was later confirmed, among other things, by the ECJ.<sup>20</sup>

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<sup>18</sup> *Bosphorus Hava Yollari Turizm v. Ireland*, App. No. 45036/98 at para. 135-137 (Eur. Ct. H. R. 30 June 2005), available at <http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=3666597&skin=hudoc-en&action=request>.

<sup>19</sup> *Id.* at para. 154, with reference to *Matthews v. the United Kingdom*, 1999-I Eur. Ct. H. R. paras. 29 and 32-34; *Prince Hans-Adam II of Liechtenstein v. Germany*, 2001-VIII Eur. Ct. H. R. para 47.

<sup>20</sup> *Bosphorus Hava Yollari Turizm v. Ireland*, App. No. 45036/98 at para. 147 (Eur. Ct. H. R. 30 June 2005), available at <http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=3666597&skin=hudoc-en&action=request>.

The ECtHR also held that the Irish Supreme Court had no real discretion to exercise, either before or after its preliminary reference to the ECJ. The impugned interference was not the result of an exercise of discretion by the Irish authorities, either under EC or Irish law, but rather amounted to compliance by the Irish State with its legal obligations flowing from Art. 8 EC Regulation 990/93.<sup>21</sup>

## 2. Proportionality

With respect to justification,<sup>22</sup> the ECtHR asked if there existed a reasonable relationship of proportionality between the means employed and the aim sought to be realized. The ECtHR considered it evident that the general interest pursued by the impugned action was in furtherance of legal obligations flowing from the Irish State's membership in the European Community.<sup>23</sup>

Since the impugned act consisted solely of Ireland's compliance with its legal obligations flowing from EU membership, the ECtHR examined further whether a presumption arises that Ireland complied with its ECHR commitments in fulfilling such EU obligations and whether any such presumption has been rebutted in the circumstances of the present case. Such a presumption could be rebutted, the ECtHR reasoned, if, in a particular case, it was found that the protection of Convention rights was manifestly deficient.<sup>24</sup> In such cases, the interest of international co-operation would be outweighed by the Convention's role as a "constitutional instrument of European public order" in the field of human rights.<sup>25</sup> After having examined the EU legal regime for the protection of fundamental rights in the European Community, the ECtHR held that this protection can be considered to be, and to have been at the relevant time, "equivalent" to that of the Convention system.<sup>26</sup> The ECtHR concluded that, therefore, the presumption arose that Ireland did not depart from the obligations of the ECHR when it implemented legal obligations flowing from its EU membership. In the ECtHR's view, the protection of Bosphorus Airways' ECHR rights were not manifestly deficient. Consequently,

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<sup>21</sup> *Id.* at paras. 150, 157.

<sup>22</sup> *Id.* at para. 149.

<sup>23</sup> *Id.* at paras. 145-150.

<sup>24</sup> *Id.* at para. 156.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at paras. 161-165.

the relevant presumption of ECHR compliance by the respondent State had not been rebutted.<sup>27</sup>

### *III. Concurring Opinion of Judge Ress*

Judge Ress issued a concurring opinion and Judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky and Garlicki issued a joint separate opinion.

Judge Ress' opinion is of particular interest. He agreed in principle with the result that there was no violation of Art. 1, Protocol No. 1, concluding that the infringement of the use of the applicant's property did not go beyond the limits which any trading company must be prepared to accept in the light of the general interest of safeguarding the UN- and EC-sanctions regime. However, he argued, that the whole concept of presumed Convention compliance by international organisations, and in particular by the EC, might have been unnecessary and even dangerous for the future protection of human rights in the Contracting States when they transfer parts of their sovereign power to an international organisation. He urged that the judgment should not be seen as a step towards the creation of a double standard. The concept of a presumption of Convention compliance should not be interpreted as excluding a case by case review by ECtHR of whether there was really a breach of the Convention.

### **C. Conclusion**

The judgment in *Bosphorus Hava Yollari Turizm v. Ireland* is a major contribution to the protection of fundamental rights in the multi-level-structure of the European legal order. It draws attention to the fact that the question of how to protect fundamental rights in the European Union cannot be answered within the bipolar relationship between the EU and its Member States. Rather, it must be acknowledged that the answer has to be found within an institutional triangle under participation of the European Court of Human Rights. Remarkably, the ECtHR did not reject any systematic involvement in the legal order of the European Union, but restricted its own competence to review national measure in favor of the Community regime. Judge *Ress* pointed to a possible consequence of this approach, as the EU might have been discouraged acceding to the European Convention of Human Rights, a matter that has long been debated.<sup>28</sup>

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<sup>27</sup> *Id.* at para. 166.

<sup>28</sup> H. C. Krüger & J. Polaciewicz, *Proposals For a Coherent Human Rights Protection System in Europe*, 22 HUMAN RIGHTS LAW JOURNAL 1 (2001); S. WINKLER, DER BEITRITT DER EUROPÄISCHEN GEMEINSCHAFTEN

The chosen approach is reminiscent of similar rulings by the *Bundesverfassungsgericht* (BVerfG – Federal Constitutional Court). According to the reasoning in the *Solange II*- and *Banana Market*-decisions,<sup>29</sup> Community law is principally not controlled by the Constitutional Court as long as the level of protection of fundamental rights generally sinks below the level which is demanded by the Basic Law.<sup>30</sup> However, where the Federal Constitutional Court would declare respective constitutional complaints and references concerning EU actions *per se* inadmissible, the ECtHR provides for a case-by-case examination. The ECtHR reviews whether the presumption of ECHR compliance by the respondent State has been rebutted. Interestingly, the Federal Constitutional Court has adopted a similar approach in the *European Patent Office*-decision, in which a constitutional complaint of a German applicant against the decision of that organization's Board of Appeal was rejected.<sup>31</sup> The applicant failed the examination to become a professional representative before the Patent Office and challenged the decision within the internal review mechanism without success. The Federal Constitutional Court ruled that the constitutional complaint raised before it by the unsuccessful application was unfounded because the applicant did not sufficiently argue that the organization's review mechanism was substantially deficient in comparison to the level of protection under the Basic Law.<sup>32</sup> Perhaps this signals an alignment in the standard of review in the ECHR and German constitutional system of supranational acts and legislation.

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ZUR EUROPÄISCHEN MENSCHENRECHTSKONVENTION 153 (2000); Report by the Steering Committee for Human Rights (CDDH), Study of Technical and Legal Issues of a Possible EC/EU Accession to the European Convention on Human Rights, DG II(2002)006 of 28 June 2002; Opinion by J. Schoo, J.-C. Piris and M. Petite of 23 July 2003, Working Group II of the European Convention, Working Document No. 13 of 5 September 2002; hearing of *V Skouris* of 17 September 2002, Arbeitsgruppe II des Europäischen Konvents, Working Document No. 19 of 27 September 2002

<sup>29</sup> BVerfGE 73, 339 (378-381); BVerfGE 102, 147.

<sup>30</sup> See *Federal Constitutional Court Concedes Applicability of European Community Law in Banana Case*, 1 GERMAN LAW JOURNAL No. 2 (01 November 2000), at <http://www.germanlawjournal.com/article.php?id=9>.

<sup>31</sup> BVerfG, NEUE JURISTISCHE WOCHENSCHRIFT (NJW), 54 (2001), 2705.

<sup>32</sup> *Id.* at 2705, 2706.