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Introductory Chapter

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This dissertation is based upon my book "EC law in the UK" which looked at the way in which individuals enforce Community law in the UK courts. The book presented a litigant's standpoint. By contrast, this dissertation will look at the same issues, but from the perspective of the UK courts.

It is now a well-established principle that Community law has to be applied as domestic law. By and large, national courts have accepted that they were ordinary Community courts, and that Community law was domestic law. As domestic law, it must be enforced by national courts in the same way as any other aspect of domestic law.

In practice however, Community law is not quite like domestic law. And while domestic courts are meant to be the natural forum for the application of Community law, they are somewhat ill-equipped to the task.

The European Court of Justice is, by virtue of Article 234 EC, required to assist national courts discharging their duties as Community courts. Yet, the relationship between national courts and the Community courts is based on collaboration and co-operation rather than on a hierarchical structure. As a result, the ECJ depends on the national courts' willingness to co-operate. In the present stage of development of Community law, it is imperative that the team-work approach envisaged by Article 234 EC works more efficiently.

Furthermore, it is now apparent that it can no longer be assumed that a Community law point arising in domestic litigation will be referred to Luxembourg. In fact, it is quite the reverse: the reality today is that domestic courts have to and will have to discharge their duties as Community courts largely on their own.

National courts have been called by the Commission, often referred to as the guardian of the Treaty, 'the first guardians of Community law'. The premise that national courts have a vital and pivotal role to play in the European Community judicial system presupposes that the duties they are charged with are transparent, comprehensible, and clear. Besides, the most common obstacles, hurdles and challenges which confront national courts when they are fulfilling their duties as Community courts need to be identified. This could help devise mechanisms both at Community and national level which could hopefully assist national courts whose task it is to apply the provisions of Community law in areas within their jurisdiction to ensure that rules of Community law take full effect.

The purpose of this research is to analyse the way the UK courts are discharging their duties as Community courts in the period 1973-2002. Few studies are devoted to the practical reality of the application of Community law, and little is done to explore what could be done to improve the day to day management of Community law through litigation in national courts.

This work is concerned with Community law in the UK courts and starts with a rapid description of the Community legal system. Different case law traditions and different approaches to interpretation are required by statute and common law on the one hand and Community legislation and the case law of the ECJ on the other hand. Chapter I highlights the specific features of the Community legal system.

In the same way that the EU is almost entirely dependent on the Member States and on their financial, legislative, executive, and administrative capacities, the Community legal system needs the judicial authorities in the Member States. But, if the main responsibility for ensuring that Community rules are enforced lies with national courts, their authority for carrying out this task comes from national rules and not from the EU¹. Accordingly Chapter II looks at the European Communities Act 1972. This Act lays down the rules enabling UK courts to recognise Community law. The framework within which the UK courts are bound to operate is relevant as it helps explain why in the UK the ECJ requirements are not always met.

It is now evident that all points of difficulty involving the interpretation of Community law which may arise in national courts will not be referred to the ECJ. Still, the possibility for dialogue between national courts and the ECJ exists and has been relied upon by the UK courts, in a rather expert manner. Chapter III discusses the role of the preliminary ruling procedure in the enforcement of Community law, and also considers the respective roles of the ECJ and of the referring court, and the practice in the UK courts. This Chapter unravels some of the problems with the procedure at both European and national court levels. It argues that while the main responsibility for the success of the procedure lies with the national courts, the ECJ must take the blame for some of the problems and it puts forward some suggestions so that the procedure can serve its purpose of overseeing the development of Community law in important principled cases.

Chapter IV examines the various mechanisms available to litigants to enforce their Community based claims in national courts. It brings to light the important role played by the UK courts in asking the ECJ some of the questions which in turn enabled the ECJ to lay down some of the leading cases in this field. The Chapter also considers the manner in which the range of devices developed by the ECJ to secure the proper application of Community law have been received and applied in the UK courts. It argues that giving effect to Community law contained in directives has become increasingly complex and that the time is ripe for a clarification of these issues. The Chapter suggests that this might be best done by reference to the duties of national courts. The possibility of enforcing Community law through national courts was invented not just to give individuals the possibility to reap the benefits that integration was meant to bring about, but also to ensure compliance with Community law. The concepts of direct effect, vertical and horizontal direct effect do little towards explaining to national courts what their duties may consist of. It is perhaps

better to consider characterising the various duties of national courts by reference to the types of obligations which Community rules embody.

In the absence of uniform Community rules, it is for the Member States to provide *remedies* and *procedures* for the protection of Community based claims. Still, the principle of 'national procedural autonomy' has had to be qualified rapidly following requests and pressure from national courts themselves. The European Court of Justice has charged national courts with the duty to provide Community based claims with effective judicial protection. At the simplest, this duty includes providing one general and one specific remedy. As a general rule, national courts are expected to set aside all national rules which might prevent Community rules from having full force and effect. In addition and, provided that certain conditions are fulfilled, the specific remedies of damages against the State must be provided. Additional guidance has also been given by the ECJ in connection with a number of specific remedies such as restitution, interim relief and compensation. The ECJ has also been asked by national courts to consider whether and to what extent Community law required modifications of rules of procedures governing a wide variety of classes of action. The Court of Justice case law in these areas is detailed in Chapters V and VI, whenever possible by reference to cases arising in the UK courts. These two Chapters will trace the comprehensive evolution away from the dictum in the *Butter Buying Cruise* case² where the ECJ declared that the Treaty "was not intended to create new remedies in the national courts to ensure the observance of Community law other than those already laid down by national law."

The national courts' contribution to the enforcement of Community law is not limited to securing the enforcement of Community law against the Member States or between private parties. National courts also have a role to play when Community law is breached by the Community institutions. Indeed natural and legal persons can challenge the legality of a national measure by reference to the invalidity of the Community measure of general application which it implements. Thus Chapter VII examines how references for preliminary rulings on the validity of a Community measure allow the legality of acts of the Community institutions to be reviewed through actions raised in domestic courts. It also outlines the powers and duties of national courts when national and Community administrations are jointly involved in actions resulting in damages caused to individuals, and suggests that much remains to be done to improve the articulation of the respective roles of the national and Community courts in this area.

The last chapter reviews the various problems linked with the absence of Community rules to enforce Community law. It also brings to light why it is highly unlikely that the making of such rules can truly become an item on the Community agenda. Given that the likelihood of this issue ever being successfully addressed by the Community legislature is very remote, the rest

of the Chapter explores what could be done at Community and national level to improve the work of national courts acting as Community courts.

Some comments on methodology

The UK legal structure is characterised by an unusual feature in a unitary state: a plurality of legal systems and therefore differences in current practice between England and Wales, Scotland, and Northern Ireland. Furthermore the UK is in a period of constitutional upheaval. This does impact on the ways in which Community law will be treated.

For reasons of convenience, this work will be phrased in terms of English law although where Scottish cases are discussed, Scottish terminology is used. However, these legal systems are not my own, and this work does not purport to offer a British view on the Community, but rather a view of the ways in which a particular Member State accommodates Community requirements.

In this work, the role of UK courts in applying Community law is focused upon. In spite of this focus, this work does not seek to argue that the judicial arena is the principal or the most desirable means of obtaining redress for all wrongs and grievances. Remedies through courts are not a cure for all problems. It is recognised that many other actors are involved in the application and enforcement of Community law, and that there are many 'out of court' solutions which are more attractive and advantageous. Thus, alternative non-judicial redress exists, such as parliamentary questions and petitions or complaints to the Ombudsman or Alternative Dispute Resolution (ADR) mechanisms. Other possibilities exist at national level for resolving infringements of Community law out of court, such as using a local, regional or national mediator. It is recognised that all of these can play an important part in securing protection against certain violations of Community law, but they will not be discussed here.

To enforce domestic based claims, national judges have a number of tools at their disposal which we may wish to call remedies. They can only use them providing that certain conditions are fulfilled, which we may wish to call procedure. The concept of 'national procedural autonomy' will be used although national remedial autonomy may be a more appropriate concept. Indeed, the Community influence on the workings of national courts encompasses a lot more than procedure *stricto sensu*. The principle of effective judicial protection has meant that all aspects concerning the judicial enforcement of EC law rights, including access to courts, the temporary protection of Community law based claims through interim measures as well as redress and sanctions for infringement of Community law are potentially subject to Community interference. "Remedies and procedures have not been distinguished *inter se* as being distinctive parts of a legal claim"⁴. Furthermore, on occasions the boundaries between procedure, remedies and the substance of a Community law based claim cannot be readily ascertained, as *Marshall* *It* demonstrates⁵.

In the Community legal system, individuals, lawyers and national courts are all conscripted into the task of enforcing Community law. Most of the time,

individuals rely on Community law before national courts in order to obtain a benefit for themselves. But national courts, at the instance of individuals, not only advance individuals' interests, they can also advance Community interests in so far as some of the cases they hear serve to identify breaches of Community law which the Community machinery could not detect. Enforcement in national courts also alleviates the task of the Commission in ensuring that the Member States comply with their Community obligations. As will be seen, Community law has been invoked in the UK in a variety of – very inventive – situations, which may be categorised into two subheadings: the sword and the shield. On the one hand, Community law is invoked against an individual, a company, or a public body to force them to comply with Community law in preference to national law. On the other hand, Community law is invoked to resist an application of national law allegedly incompatible with Community law. Of course individuals, lawyers and national courts will not be involved in the enforcement of Community law if they are not all well informed about its potential. All too often, Community law either suffers from legal racism or is perceived as the subject one may choose to specialise in or not, or as the *chasse-gardée* of big commercial law firms. But Community law is neither of these. It is not foreign law, but an integral part of the legal systems of all jurisdictions in the UK, and it can be made relevant to any area of legal practice as the discussion of the following cases exemplifies.

“Community law has the habit of emerging in unlikely corners”⁶

A brief overview of actions brought before or originating in the UK or actions involving UK nationals where Community law points were argued helps to illustrate the breadth of impact of Community law in the UK. The Community legal order is in constant evolution, and the dynamic extension of the aims and objectives of the Community is reflected in the far-reaching ambit of Community law. Community law arguments arise in all kinds of legal proceedings – commercial, administrative, financial, social – and in criminal cases. British advocates have displayed real inventiveness by bringing cases without any *prima facie* link with Community law, within the material scope of the Treaty. Establishing a connection with Community law does not always succeed. However, even where it does not, it may pay dividends. All throughout the Community, traders breaching rules limiting their commercial freedom have sought to defeat such national regulatory frameworks by – sometimes abusive⁷ – reliance on Community law. In this way, rules relating to Sunday trading⁸ were challenged in England and Wales. The argument that they breached Article 28 EC was far-fetched in the extreme; yet it won a partial victory from the ECJ⁹ before ultimately failing¹⁰, and in any event, from a purely commercial perspective, had the effect of permitting clients to continue trading on Sunday for a number of years pending the final outcome.

The Daily Mail newspaper sought to transfer its central management and control to the Netherlands for tax purposes and applied for judicial review of the

Treasury's refusal to acknowledge its right to change residence without consent. It sought a declaration that it would not be required to obtain Treasury consent¹¹, alleging that Articles 52 and 58 EEC precluded the Member State of origin from making the right to transfer its central management and control to another Member State subject to prior consent¹².

A decision by the Chief Constable of Sussex not to provide livestock exporters with full-time police protection against animal rights protesters, but to limit that protection to two days a week was challenged on the grounds *inter alia* that it violated Article 29 EC Treaty¹³. Article 29 EC Treaty, prohibits quantitative restrictions on exports and measures having equivalent effect, but Article 30 EC provides that such restrictions may be justified on grounds of public morality, public policy or public security. The Chief Constable therefore had to justify the extent of police protection, which he successfully achieved by demonstrating that his decision was based on the need to make the best use of available resources.

The Human Fertilisation and Embryology Authority's discretion to authorise the export of sperm must be exercised in conformity with Community law. The Authority cannot refuse to allow the export of sperm without proving that the breach of Article 49 EC which it would entail is justified. A recipient has the right to be treated in another Member State with her husband's sperm unless there are good public policy reasons for not allowing this to happen¹⁴.

A decision of the Secretary of State for the Environment designating the Medway Estuary and Marshes as a Special Protection Area for birds, but excluding part of the Lappel Bank, a decision based on the need to expand the industrial facilities of Sheerness and safeguard the future of the town as a port, was held to be unlawful. By virtue of Article 4(1) or (2) of Directive 79/409 a Member State may not when designating an SPA and defining its boundaries, take account of economic requirements as constituting a general interest superior to that represented by the ecological objective of the Directive¹⁵.

The establishment and operation of lotteries is an economic activity falling within the scope of Article 49 EC¹⁶. The seizure by HM Customs and Excise of advertisements and application forms for a lottery organized in Germany for the benefit of UK nationals was challenged as breaching *inter alia* Article 49. However the concerns of social policy and prevention of fraud pursued by the UK legislation on lotteries¹⁷, were accepted as valid justification.

Article 12 EC prohibits discrimination on grounds of nationality "within the scope of application of this Treaty". This notion is capable of encompassing a variety of issues. This provision is breached where British nationals possessing no residence or assets in Germany, having brought proceedings before a German civil court against a company established in Germany for payment of the purchase price of goods supplied, are required by the competent German court, on application by the defendant, to furnish security for costs pursuant to the German Code of Civil Procedure¹⁸. Indeed such a rule:

"falls within the scope of the Treaty within the meaning of the first paragraph of Article 6 and is subject to the general principle of non-discrimination laid down by that article in so far as it has an effect, even though indirect, on trade in goods and services between Member States. Such an effect is liable to arise in particular where security for costs is required where proceedings are brought to recover payment for the supply of goods".

Courts in Scotland too are now aware that they must decide issues of caution in a manner which is compatible with Community law. In one case, a Sheriff decided that the pursuer should find caution in respect of legal expenses solely on the basis that he lived in the Netherlands and was a French national. On appeal, the Sheriff-Principal did not suggest that the requirement of caution was of itself necessarily incompatible with Community law but found that the Sheriff's decision in that particular case had violated Article 12 EC which prohibits all forms of discrimination based on nationality¹⁹.

A number of tobacco companies sought an injunction from the High Court restraining the UK Government from adopting provisions transposing Directive 98/43 relating to the advertising and sponsorship of tobacco products pending a ruling of the Court of Justice on the validity of the Directive²⁰.

Purely internal matters can be covered

In a number of areas such as equal pay and equal treatment and working conditions, Community law touches matters which concern solely Britain and the people in it. Thus health and safety legislation can be enforced by a British employer against a British employee in a British firm.

A decision of the Royal Navy to discharge one of its servicemen in pursuance of the policy of the Armed Forces to discharge any person of homosexual orientation is not contrary to Article 2(1) of the Equal Treatment Directive²¹; although Article 5(1) of the same directive precluded dismissal of a transsexual for a reason related to "gender reassignment"²². An employer's refusal to allow travel concessions to a person of the same sex with whom an employee has a stable relationship, where such concessions are allowed to a worker's spouse or to the person of the opposite sex with whom a worker has a stable relationship outside marriage, does not constitute discrimination prohibited by Article 141 EC or the Equal Pay Directive.²³ The Treaty of Amsterdam provided for the insertion of a provision²⁴ conferring express legislative competence on the Community institutions to take appropriate action to eliminate various forms of discrimination, including discrimination based on race, ethnic origin, religion or belief, disability, age or sexual orientation. Given that the ECJ has unequivocally indicated that it is a matter for the Council – and *not* for the ECJ – to make this extension in Community rights²⁵, challenges of policy on such grounds in judicial review proceedings would be best brought under the Human Rights Act²⁶.

In other fields, 'activation of Community rights' is necessary. Such activation flows from the exercise of freedom of movement. Thus, where a married

woman who is a national of a Member State has exercised Treaty rights in another Member State by working there enters and remains in the Member State of which she is a national for the purposes of running a business with her husband, Community law entitles her spouse (who is not a Community national) to enter and remain in that Member State with his wife²⁷. However, a non-Community national who is married to a Community national does not enjoy any of the rights of free movement of the latter unless and until the latter has moved out of their home country into another Member State and has, as it were, 'activated' their Community status or there is some other factor connecting the family with a situation governed by Community law²⁸. It remains to be seen how the courts would deal with situations where it would be alleged that the "activation" has been triggered by an oblique motive

Criminal law

Community law has also reached the criminal law systems. In the UK, criminal practitioners have, on occasions, submitted that domestic rules were in conflict with Community law. Many EC law provisions have the potential to alter or nullify the criminal law of the Member States. In the UK, the most frequent points of contact have been in respect of free movement of goods²⁹ and persons³⁰, agriculture³¹, fisheries³² and road traffic cases³³.

Community law and immigration law

EC law imposes limits on the powers of criminal courts to make recommendations for the deportation of the beneficiaries of free movement provisions following criminal convictions. In this way, the extent of the Member State's discretion to implement those recommendations and to deport offenders on its own initiative may be circumscribed³⁴.

In *Boucherau*³⁵, the question whether a criminal conviction could be sufficient in itself to justify a recommendation for deportation was considered. It was held that Community law required national authorities to carry out a specific appraisal, from the point of view of the interests inherent in protecting the requirements of public policy. Such an appraisal might not necessarily coincide with the appraisal which formed the basis of a criminal conviction. The existence of a previous criminal conviction could only be taken into account in so far as the circumstances which gave rise to that conviction are evidence of *personal conduct* constituting a *present threat* to the requirement of public policy³⁶. Recourse by a national authority to the concept of public policy presupposes the existence of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society. When applying the preliminary ruling to the facts of the case, the Magistrates Court considered that the possession of a small amount of drugs by Mr Boucherau did not make him a sufficiently serious threat to the requirements of public policy. Accordingly, a recommendation for deportation was not made.

Persistent violence and disorder connected with football matches led the UK to adopt a series of increasingly severe measures designed to keep likely offenders away from matches. One such measure was the Football (Disorder) Act 2000, which *inter alia* enabled banning orders to be made against persons who had at any time caused or contributed to any violence or disorder in the UK or elsewhere. Litigants unsuccessfully challenged banning orders as breaching *inter alia* Community law. They argued that (i) the banning orders derogated from the positive rights on freedom of movement and freedom to leave their home country conferred on them by Directive 73/148 because it was not permissible to justify a banning order on public grounds, and alternatively that no such grounds were made out on the evidence; (ii) the 2000 Act was contrary to Community law and therefore inapplicable insofar as it imposed mandatory restrictions on free movement within the Community on criteria that were not provided for or permitted by Community legislation; (iii) it was contrary to the Community law principle of proportionality to ban an individual from travelling anywhere within the Community even if the relevant match or tournament was not taking place within the Community.

An all pervasive influence

Finally, Community law has an even more far-reaching, pervasive, incidental influence. First, given the requirement to make effective remedies available for breach of Community law, UK courts have been encouraged to make available the same remedies in a purely national context³⁷. In England³⁸, senior judges have pointed to divergence from EC law as a justification for changing domestic law both in matters of procedure³⁹ and on questions of substantive law⁴⁰. Second, general principles of Community law and methods of interpretation which domestic courts had to apply when giving effect to Community law, including those derived from the European Convention of Human Rights and Fundamental Freedoms⁴¹, have been discussed in the context of claims based on domestic law well before the entry into force of the Human Rights Act. This indirect reception of Community law into national law often takes the form of the importation of a principle or technique from one legal system through another, courtesy of the case law of the ECJ. So, the German principle of proportionality adopted and adapted by the ECJ as a means of controlling arbitrary actions by the Community institutions was then applied by national courts reviewing actions of national authorities in a Community law context, before being discussed in purely domestic situations. Some of the interpretation techniques adopted to conform with Community requirements, have been used in fields outside the reach of Community law. Thus the concept of objective justification applied in the context of indirect sex discrimination has percolated into the field of race discrimination law⁴².

The UK courts and Integration

It is almost trite to say that in the Community, legal integration is much more developed than political integration, and that a picture of the Community which places litigation at centre stage and concentrates on enforcement issues gives a rather distorted image of the reality of daily life in the Community. Certainly, for the UK, some of the troublesome years in its (ever) awkward relationship with the Community have also been the years where major legal battles were fought in the UK courts. Thus, not long after John Major trumpeted his Government's great achievement at Maastricht regarding opting-out of Community social policy, the House of Lords was reviewing the validity of primary UK legislation, namely the Employment Protection (Consolidation) Act 1978 against a superior Community law norm. Indeed the concepts of indirect discrimination as developed by the ECJ in relation to Article 141 EC and the Equal Pay and Equal Treatment Directives which had brought the precarious status of part-time workers⁴³ within the scope of Community law were recognised and applied by the House of Lords⁴⁴ well before the Community legislature took action. UK Courts were also persuaded to intervene in relation to pregnancy issues⁴⁵, even before the adoption of the Pregnancy Directive⁴⁶.

Yet, if this work gives the impression that Community law is a powerful weapon, the reality it describes is just the tip of an iceberg. Unfortunately, non compliance with the law of the Community by all those who are supposed to respect it remains all too frequent. Therefore the availability of national remedies forms an essential element in the proper application and enforcement of Community law and wherever possible the workings of national courts when they apply Community law should be improved. The national judicial landscape must therefore be mapped with greater precision.

Lastly, it should be explained why throughout this dissertation the term Community law will be used. The European Communities Act 1972 does not make any reference to EU law, but only to Community law. In the 1972 Act Community law is defined by reference to the Community Treaties⁴⁷.

Endnotes

- ¹ Laws LJ in *S. Thornburn v. Sunderland City Council* [2002] 3 WLR 247 declared that "the fundamental legal basis of the UK relationship with the EU rests with the domestic not the European legal powers" at para. 69.
- ² Case 158/80 *Rewe v. Hauptzollamt Kiel* [1981] ECR 1805, para. 44.
- ³ C. Kilpatrick, "The future of Remedies in Europe" in *Future of Remedies in Europe*, Kilpatrick, Novitz and Skidmore (eds), (Hart, Oxford, 2000) at p. 4.
- ⁴ Case C-271/91 *Marshall II* [1993] ECR I-4367.
- ⁵ C. Harlow, "A Common European Law of remedies?" in *Future of Remedies in Europe*, Kilpatrick, Novitz and Skidmore (eds), (Hart, Oxford, 2000) at pp. 72 & 73.
- ⁶ Lord Mackenzie Stuart, *The European Communities and the Rule of Law*, 29th Hamlyn Lectures (1977) 1.
- ⁷ Case C-267 & C-268/91 *Keck and Mithouard* [1993] ECR I-6097, para. 14. Cf. J. Steiner, "Drawing the line: Uses and Abuses of Article 30 EEC" (1992) 29 CMLRev 749.
- ⁸ Shops Act 1950.
- ⁹ Case 145/88 *Torfaen Borough Council v. B & Q plc* [1989] ECR 3851, in which the Court indicated that in some circumstances, a prohibition of Sunday trading might infringe Article 30 EC.
- ¹⁰ Case C-169/91 *Stoke-on-Trent City Council v. B & Q plc* [1992] ECR I-6635; and even then the non application of Article 30 EC to the Shops Act 1950 was decided not on the grounds that the matter fell outwith the scope of Community law, rather the Court found that the purpose of the Sunday trading rules was compatible with Community law.
- ¹¹ S. 482(1)(a) of the Income and Corporation Taxes Act 1970 prohibited companies resident for tax purposes in the U.K. from ceasing to be so resident without the consent of the Treasury.
- ¹² Case 81/87 *The Queen v. H.M. Treasury and Customs and Excise Commissioners*, ex parte *Daily Mail and General Trust* [1989] ECR 5483.
- ¹³ *R v. Chief Constable of Sussex*, ex parte *International Traders Ferry Ltd* [1997] 2 CMLR 164 (CA), confirmed in the House of Lords [1998] 3 WLR 1260.
- ¹⁴ *R. v. Human Fertilisation and Embryology Authority* ex parte *DB* [1997] 2 CMLR 591 (CA).
- ¹⁵ Case C-44/95 *R v. Secretary of State for the Environment*, ex parte *Royal Society for the protection of Birds* [1996] ECR I-3805.
- ¹⁶ Case C-275/92 *Her Majesty's Customs and Excise v. Gerhart Schindler and Jörg Schindler* [1994] ECR I-1039.
- ¹⁷ Section 1 (ii) of the Revenue Act 1898 in conjunction with section 2 of the Lotteries and Amusements Act 1976, before their amendment by the National Lottery etc. Act 1993.
- ¹⁸ Case C-323/95 *Hayes v. Kronenberger GmbH* [1997] ECR I-1711. For other challenges of measures of civil procedure involving overt or disguised discrimination on grounds of nationality, see Case 22/80 *Bous-sac* [1980] ECR 3427 and Case 20/92 *Hubbard v. Hamburger* [1993] ECR I-377.
- ¹⁹ *Nguyen v. Searchnet Associates Ltd.* [2000] SLT 83.
- ²⁰ Case C-491/01 *R. v. Secretary of State for Health and others*, ex parte *Imperial Tobacco Ltd and Others*, [2002] ECR I-11453.
- ²¹ *R v. Secretary of State for Defence* ex parte *Perkins* [1997] 3 CMLR 310.
- ²² Case C-13/94 *P and S and Cornwall County Council* [1996] ECR I-2143.
- ²³ Case C-249/93 *Lisa Grant and South west Trains Limited* [1998] 1 CMLR 1057.
- ²⁴ Article 13 EC.
- ²⁵ Case C-249/93 *Lisa Grant and South West Trains Limited*, [1998] 1 CMLR 1057 para. 48.

- ²⁶ *R v. Secretary of State for Defence ex parte Perkins* [1998] IRLR 508, per Lightman J considering *Smith* at p. 558C-H per Sir Thomas Bingham MR.
- ²⁷ Case C-370-90 *R v. Immigration Appeal Tribunal and Singh, ex parte Secretary of State for the Home Department* [1992] ECR I-4265.
- ²⁸ *R v. Secretary of State for Home Affairs ex parte Tombofa* [1988] 2 CMLR 609.
- ²⁹ Case 83/78 *Pigs Marketing Board v. Redmond* [1978] ECR 2347. Subsequent proceedings [1979] 3 CMLR 118, Case 34/79 *R. v. Henn and Darby* [1979] ECR 3795, Case 121/85 *Conegate v. HM Customs and Excise Commissioners* [1986] ECR 1007.
- ³⁰ Case 30/77 *Bouchereau*, [1977] ECR 1999, Case 175/78 *R v. Saunders* [1979] ECR 1129, Case 131/79 *R. v. Secretary of State for the Home Department ex parte Santillo*, [1980] ECR 1585, Case 157/79 *R. v. Pieck* [1980] ECR 2171.
- ³¹ In particular cases of frauds on Intervention Boards which make payments in accordance with the CAP.
- ³² Breach of TAC or size of mesh for fishing nets.
- ³³ Tachograph regulations or driver's hours regulations.
- ³⁴ C. Vincenzi, "Deportation in Disarray: The Case of EC Nationals", *Criminal Law Review* 1994 pp. 163-175.
- ³⁵ Case 30/77 *Bouchereau* [1977] ECR 1999.
- ³⁶ Para. 27 and 28.
- ³⁷ For two explicit references to EC law as the reason to adapt the remedy more generally: *WM. v. Home Office* [1994] AC 377; *Woolwich Equitable Building Society v. Inland Revenue Commissioners* [1993] AC 70.
- ³⁸ But not in Scotland see *McDonald v. Secretary of State for Scotland* [1994] SLT 692, although the decision might need reconsidered in the light of *Millar & Bryce Ltd v. Keeper of the Registers of Scotland* see Boch: Interim Remedies against the Crown Revisited [1997] SLT 165.
- ³⁹ *M v. Home Office*, [1992] Q.B. 270, 360G-307A (Lord Donaldson M.R.).
- ⁴⁰ *Woolwich Equitable Building Society v. I.R.C* [1992] 3 WLR 366, 395-396 (Lord Goff), *R v. Independent Television Commission ex parte TSW Broadcasting Ltd.*
- ⁴¹ *R v. Secretary of State for the Home Department ex parte Brind* [1991] 1 AC 697.
- ⁴² *Hampson v. Department of Education* [1990] 2 AllER 25 (CA); and see J. Shaw "European Community judicial method: its application to Sex Discrimination Law" (1990) 19 ILJ 228, and see Chapter 1.
- ⁴³ See *inter alia* Case 171/88 *Rinner-Kühn v. FWW Spezial-Gebäudereinigung* [1989] ECR 2743; Case C-33/89 *Kowalska v. Freie und Hansestadt Hamburg* [1990] ECR I-2591.
- ⁴⁴ *R v. Secretary of State for Employment, ex parte EOC* [1995] 1 AC 1.
- ⁴⁵ *Webb v. EMO Air Cargo Ltd* [1994] ECR I-3567.
- ⁴⁶ Directive 92/85 OJ 1992, L348/1.
- ⁴⁷ The European Communities Act 1972 (as amended) (the 'ECA') continues, post Nice, to draw a distinction between EC and EU law. Section 1 (2) only gives effect to the law contained and arising under the "Community Treaties", and therefore continues to exclude Title V and Title VI of the TEU, or as they are commonly known the second and third pillars. Accordingly the domestic effect of Title V TEU and anything done under it does not flow from the ECA, but is dependent on further specific enactment. In practice this does not exclude all provisions made under the third pillar since Article 61 EC communalises most measures which would be taken under Title VI TEU.