England and Wales Court of Appeal (Civil Division) Decisions

Neutral Citation Number: [2015] EWCA Civ 331
Case No: C1/2014/0470

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
The Honourable Mr Justice Lewis
CO/9720/2013

Royal Courts of Justice
Strand, London, WC2A 2LL
1st April 2015

B e f o r e :

LORD JUSTICE UNDERHILL
LORD JUSTICE VOS
and
LORD JUSTICE BURNETT

Between:

SWISS INTERNATIONAL AIR LINES AG	**Appellant/ Claimant**
- and -	
(1) THE SECRETARY OF STATE FOR ENERGY AND CLIMATE CHANGE **(2) THE ENVIRONMENT AGENCY**	**Respondents/ Defendants**

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Mr Martin Chamberlain QC and Mr Daniel Piccinin (instructed by Hill Dickinson LLP) for the appellant
Mr Robert Palmer (instructed by the Treasury Solicitor) for the respondent
Hearing date: 24th March 2015

HTML VERSION OF JUDGMENT

Lord Justice Vos:

1. The appellant and claimant, Swiss International Air Lines AG ("Swiss"), challenges the validity of Decision 377/2013/EU of the European Parliament and of the Council of 24 April 2013 (the "Decision"). The Decision made provisions that derogated temporarily from Directive 2003/87/EC (the "Directive") of the European Parliament and of the Council of 13 October 2003 which had established a scheme for greenhouse gas emission allowance trading within the European Union ("EU") (as amended by the Directive 2008/101/EC (the "Aviation Directive") of the European Parliament and of the Council of 19 November 2008 so as to include aviation activities). The effect of these directives was extended to states in the European Economic Area ("EEA") by EEA Joint Committee Decisions 6/2011 and 43/2011.

2. Swiss is an air transport operator licensed in Switzerland. Switzerland is not a member of the EEA or the EU.

3. Rather than directly challenging the Decision, Swiss contends before this court for the invalidity of the regulations implementing the Decision in the UK, namely the Greenhouse Gas Emissions Trading Scheme (Amendment) Regulations 2013 (No. 1037) (the "Regulations"). Since the Regulations do no more than implement the Decision, Swiss seeks a reference to the Court of Justice of the European Union ("CJEU") under article 267 of the Treaty on the Functioning of the European Union ("TFEU"), which is the only court that has jurisdiction to declare an EU measure invalid.

4. In simple terms, the legislation to which I have referred created an emissions trading scheme ("ETS") which applied to aircraft operators in EEA states from 1st January 2012. Operators applied for a permit and allowances permitting them to emit certain amounts of carbon dioxide during a specified period. The allowances could be traded. Operators were required to surrender allowances equal to the total amount of their emissions each calendar year. If an operator had insufficient allowances available, it was required to pay a monetary penalty. The ETS applied originally to all operators flying within the EEA or between EEA countries and third countries. Several influential third countries objected to this as an infringement of their sovereignty. For political reasons, the EU decided retrospectively to suspend the operation of the ETS for 2012 in relation to certain third countries. But some countries that are particularly close to the EU were excluded from this suspension. Switzerland was excluded from the suspension with the other members of the European Free Trade Association ("EFTA"), Croatia as a candidate member state and dependencies of EU Member States. In fact, however, Switzerland was the only country actually excluded as a member of EFTA, because the other members were also EEA members and already excluded on that account. The overall effect of the partial suspension of the ETS is that it applies to flights within the EEA, and to flights from the EEA to certain third countries including Switzerland, but not to most other third countries. It was common ground that the motivation for the Decision was the desire to encourage agreement between members of the International Civil Aviation Organisation ("ICAO"), a United Nations agency on a global framework for the regulation of aviation emissions.

5. Swiss contends that it is peculiarly badly affected by this state of affairs, and says that the Decision is a breach of the EU law principle of equal treatment. HH Judge Pelling QC considered Swiss's application for permission to apply for judicial review on the papers, and Lewis J heard the renewed oral application. Both rejected the application on the grounds that the EU law principle of equal treatment did not apply to differential treatment by the EU towards third countries, and that, even if the principle did apply, there was no arguable case that it had been breached in this case. The issue before us on this appeal (for which Arden LJ gave permission on 8th May 2014) is, in a nutshell, whether the judges were right on these two points. If they were not, then it is common ground that a reference to the CJEU

would be appropriate at least as to the validity of the Decision. Swiss aims to recover the surrendered allowances or their monetary worth.

6. The reason why Swiss has brought these proceedings here in the UK is because the UK is Swiss's "administering Member State" under article 18a of the Directive, because Swiss's greatest estimated attributed aviation emissions in the relevant period were in relation to UK flights. The Environment Agency, the 2nd defendant and 2nd respondent, is the agency that undertakes that administration, although Mr Robert Palmer, counsel for the respondents before us, has been keen to emphasise that the 2nd respondent acts only as a conduit for the allowances to the Union Registry and it is, therefore, he submits, hard to imagine any circumstances in which the 2nd respondent itself might actually be liable to compensate Swiss. The 1st defendant and 1st respondent, the Secretary of State for Energy and Climate Change, has been joined because he was responsible for making the Regulations that are directly challenged.

Swiss's argument

7. Swiss bases its argument on the uncontested contention that the EU law principle of equal treatment has the character of a fundamental right, which places it at the top of the hierarchy of norms in EU law, such that even primary EU legislation must be struck down if it infringes the principle. Exceptions to this principle must, it says, be construed narrowly and precisely.

8. Swiss then analyses the three cases that are said to define what has been described as the "external relations" exception to the principle of equal treatment in order to show that it is limited to the exercise of agreement or treaty-making powers or EU commercial policy, and should not be extended. *Balkan-Import Export GmbH v. Hauptollamt Berlin-Packhof* (Case 55/75) [1976] ECR 19 (the "*Balkan* case") concerned a Community Regulation that required compensatory payments for the import of sheep's milk cheese from a then non-member country, Bulgaria, but not from Italy (a Member State) or Switzerland (another non-member country). At paragraph 14 of its judgment, the CJEU said that there existed "no general principle obliging the Community, in its external relations, to accord to third countries equal treatment in all respects and in any event traders do not have the right to rely on the existence of such a general principle". At paragraph 15, the CJEU considered the justifications for the distinction that had been made in terms of the level of disturbance which the import of the cheeses might cause to the EU trade in agricultural products. The general principle of EU preference justified a different assessment of the possibility of disturbance in relation to the treatment of Italian cheese imports. In the case of Swiss cheese imports, the lower price of the Bulgarian cheese caused the danger of such disturbance which the higher price for Swiss cheese did not. Accordingly, Swiss argues that the principle to be derived from the *Balkan* case is that discrimination between third countries may be permissible only if justified by reference to the different treaties or agreements with those third countries or by objective differences between the third countries concerned.

9. Swiss then relies on *Offene Handelsgesellschaft in Firma Werner Faust v. Commission of the European Communities* (case 52/81) [1982] ECR 3745 (the "*Faust* case"), and in particular on the opinion of Advocate General Slynn at pages 3772-3 and 3779 and the judgment of the CJEU at paragraph 25. In the *Faust* case, a German agent for a Taiwanese preserved mushroom exporter claimed damages from the Commission on the basis that imports to the EU from Taiwan were restricted, when imports from China were not similarly restricted in the context of the Community's external trade policy with China, and because China had agreed to restrict the volume of its mushroom exports to the Community. Advocate General Slynn indicated that any different treatment could only constitute wrongful discrimination between EU traders if the position of the countries concerned were "the same or comparable", but that they were not in that China had agreed to limit its exports and Taiwan had not. The CJEU held again that "there was no general principle obliging the Community, in its external relations, to accord to non-member countries equal treatment in all respects". It went on to say that if different treatment of non-member states is compatible with EU law, different treatment of EU traders as an automatic consequence of that different treatment of non-member states must also be compatible. Swiss draws from this the submission that the principle in the *Balkan* case is a narrow carve-out in the form of a non-justiciability rule applicable in cases where the discrimination in the EU's internal legislation flows automatically from an exercise of the EU's external relations competence. Swiss contends that the judge was wrong to suggest (as he did at paragraph 21 of his judgment) that the

CJEU was disagreeing with the opinion of the Advocate General.

10. The final case on which Swiss relies is *Germany v. Council* (case C-122/95) [1998] ECR 1-973 (the "*Germany* case"), where Germany challenged, as infringing the principle of equal treatment, the EU's ratification of the World Trade Organisation's Framework Agreement on bananas with a series of third countries in Central and South America introducing country specific quotas to protect banana producers in EU and other third country areas. Advocate General Elmer at paragraph 61 and the judgment of the CJEU at paragraph 57 made clear that Community law did not protect traders against the adverse effects of the Community's political relations with non-member countries. The matters of which Germany complained were the automatic consequences of differences in the treatment accorded to third countries.

11. Swiss submits on the basis of these three authorities that the external relations carve-out from the principle of equal treatment has only, thus far, been applied where the adverse consequences result from the discriminatory acts of the EU in making treaties with third countries. It submits that, since this case does not concern any treaty-making power, it is outside the existing principles and should anyway be referred for consideration to the CJEU.

12. Mr Martin Chamberlain QC, counsel for Swiss, stressed in oral argument that these cases cannot justify a blanket exclusion of the application of the principle of equal treatment. If it were otherwise, the EU legislature could have, as he put it, "singled out flights from any country for special treatment for any reason or none". That, he submits, cannot be right. He contends that the extent of the principle is that all exclusions from the principle of equal treatment must relate to the common commercial policy so that (i) the fact that the EU has entered into an agreement with one third country and not with another may mean that they are not in comparable positions, so that the principle is not engaged or the discrimination between them is justified, and (ii) a decision whether to enter into an agreement with one third country rather than another is not itself subject to the principle of equal treatment.

13. As to the question of justification of the discrimination if the principle of equal treatment applies, Swiss says that Switzerland's close connection with the EU mentioned in recital 9 of the Decision provides no adequate justification. If the equality principle is engaged, then a fully reasoned case is required which would no doubt be provided by the EU institutions if and when the matter goes to the CJEU.

The relevant provisions of the EU treaties

14. Both sides rely on the powers of the EU as contained in both the Treaty on European Union ("TEU") and the TFEU.

15. Swiss suggests that the starting point is article 5 of the TEU which provides that "[t]he limits of [EU] competences are governed by the principle of conferral", which simply means that any competence must be conferred by the treaties.

16. Articles 21 and 22 in Chapter 1 of Title 5 of the TEU contain "general provisions on the [EU's] external action". Article 21(1) of the TEU provides that the EU's actions on the international scene should be guided by principles including "equality and solidarity, and respect for the principles of the United Nations Charter and international law", and that the EU "shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles referred to in the first subparagraph [of Article 21(1) TEU]" and "shall promote multilateral solutions to common problems, in particular in the framework of the United Nations".

17. Article 21(2) of the TEU provides that the EU "shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: … (f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development".

18. Article 21(3) of the TEU provides that the Union shall "respect the principles and pursue the objectives set out in [articles 21(1) and (2)] in the development and implementation of the different areas of the [EU's] external action covered by [title 5 of the TEU and part 5 of the TFEU], and of the external aspects of its other policies".

19. Chapter 2 of title 5 of the TEU then encompasses detailed "specific provisions on the common foreign and security policy".

20. The TFEU operates, according to article 2(2), by providing that where treaties confer a competence on the EU shared with Member States, the Member States may only exercise their competence to the extent that the EU has not exercised its competence.

21. Title XX of the TFEU contains the EU's policy on the environment. Article 191(1) of the TFEU provides that EU policy on the environment shall contribute to the pursuit of the objective of "promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change". Article 191(4) of the TFEU provides that the EU "shall cooperate with third countries and with the competent international organisations. The arrangements for [EU] cooperation may be the subject of agreements between the [EU] and the third parties concerned", "without prejudice to Member States' competence to negotiate in international bodies and to conclude international agreements". Article 192(1) of the TFEU provides that the European Parliament and the Council may take action in order to achieve the objectives referred to in Article 191 of the TFEU.

The judge's decision

22. The nub of the judge's decision is in paragraphs 13-15 where he said, in summary, that:-

> i) The general principles of EU law do not oblige the EU to extend equal treatment to all third countries in relation to the conduct of external relations.
>
> ii) The conduct of the EU's external relations included decisions on suspending the application of ETS in relation to some or all third countries as part of a process of seeking a global or worldwide framework for greenhouse gas reductions.
>
> iii) The EU was entitled to decide that it would not extend the exemption to all third countries and was entitled to exclude one or more countries from that derogation.
>
> iv) The EU's actions in this case were in the field of external affairs. Article 21 of the TEU included general provisions in relation to the EU's external actions, and Article 21(2) provides for the EU to pursue common policies and actions in all fields of international relations in order to help develop international measures to improve the quality of the environment in the sustainable management of global natural resources in order to ensure sustainable development.
>
> v) The EU wished to do all it could to promote the agreement of a global framework on the reduction of emissions in the field of aviation. It brought forward the decision because it considered that disapplying the ETS to most third countries would promote that aim.
>
> vi) The principle of equal treatment does not apply to actions of that nature in the field of external affairs.
>
> vii) Moreover, the case law does not require an automatic link between action at the EU level and any necessary resulting discrimination between third parties before it can be said that the principle of equal treatment does not apply.

23. The judge also concluded that, even if the principle of equal treatment applied, there was no arguable case that it had been breached, for the reasons he gave at paragraphs 27-30 that may be summarised as follows:-

> i) The starting point was the recitals to the decision which gave the reasons for it. They note that progress was being made at the ICAO towards the adoption of a global treaty on carbon dioxide emissions in the field of aviation (recital 5), that in order to facilitate this progress and provide momentum, it was desirable to defer the enforcement of requirements arising before the next session of the assembly (recital 6), that, because the EU did not want the exemption to affect the environmental integrity and its overarching objective of achieving a reduction in emissions, it decided to defer the system for most

third countries, but did not choose to do so in relation to flights between Member States and aerodromes in certain closely connected or associated areas or countries outside the EU.

ii) These were political judgments within the EU as to where best to strike the balance in relation to progressing matters at the international level. It was not fair to say that the reasons for the place at which the EU drew the line were inadequate. It wished to apply the ETS to flights between third countries and the EEA. It recognised that there were considerable gains to be achieved by encouraging other countries to enter into an international treaty for that purpose. It weighed that aim against its aim of reducing the emissions within the EU. It drew a line that was well within its margin of political discretion.

The Respondents' arguments

24. The respondents' basic submission was that the EU had the competence to make a formal concession under the ETS to allow for a negotiated process in the ICAO. That, said Mr Palmer, was "front and centre dealing with the external relations of the EU". There was no basis for any narrow or formal interpretation of what were and what were not "external relations" with the EU. Articles 21(2)(f) and (3) of the TEU made it clear that the EU could pursue "external action" to help develop international measures to preserve the environment, and articles 191 and 192 of the TFEU included the competence for the EU to pursue measures at an international level to deal with environmental problems.

25. Mr Palmer relied on the fact that the principle of equal treatment itself is not unqualified. It only prevents discrimination between persons in comparable positions where that discrimination is not objectively justified. Thus, he submits that Mr Chamberlain's argument that the equal treatment principle is only disapplied where the EU has entered into an agreement with one third country and not with another, is just an application of the principle of equal treatment rather than a derogation from it. The two third countries are *a fortiori* not in comparable positions.

26. The respondents also made detailed submissions on the trilogy of cases to which I have already referred. They conceded that the position emanating from the *Balkan* case was equivocal, anyway up to a point, because paragraph 15 of the CJEU's judgment did go on to explain the justification for the discrimination in that case, and the statement of principle was qualified by the words "in all respects". The matter was, however, put beyond doubt by the *Faust* case, where the CJEU does not seek to justify the discrimination at all. The confusion was caused by the fact that Faust had argued (see paragraph 8 of the judgment of the CJEU) that the principle of equal treatment was "applicable even to the external relations of the [EU] and thus [obliged] the latter to accord to non-member countries equal treatment in all respects". That put the matter positively rather than negatively, and showed that when the CJEU rejected that submission in paragraph 25, it was not intending the words "in all respects" to detract from the generality of the exception that the EU was not required in its external relations to accord equal treatment to third countries. Moreover, Advocate General Slynn was concerned with Faust's reliance on article 40(3) of the TEU which provided that common organisations of agricultural markets should "exclude any discrimination between producers or consumers within the [EU]". As a result, when the CJEU re-stated the exception to the principle in paragraph 25, it made it clear that it was "thus not necessary to examine on what basis Faust might seek to rely upon the prohibition of discrimination between producers or consumers", because if different treatment between EU traders is an automatic consequence of different treatment of third countries, it must be compatible with EU law. In other words, no justification for the application of the exception was required.

27. As regards justification, the respondents contended that there was a raft of objective and reasonable grounds on which the EU legislature could have considered that Switzerland should be excluded from the derogation in the Decision. They included its geographical location entirely bordering EU or EEA states, Switzerland's status as a trading partner of the EU and the EEA, its membership of EFTA, and the use of Switzerland's airports to access the EU. It would be impossible for Swiss to show that the EU legislature had manifestly exceeded the bounds on its discretion as is the agreed test.

Was the judge right to say that the principle of equal treatment was inapplicable?

28. The extent of the argument on the proper principle to be drawn from the *Balkan* case and the *Faust*

case demonstrated at least that the matter is not straightforward. Moreover, those cases were decided many years ago in 1976 and 1981 respectively. Even the *Germany* case was decided in 1998, some 17 years ago. The EU landscape has certainly changed in many ways since the CJEU last had a chance to consider the scope of the "external relations" exception to the principle of equal treatment. None of that would matter if the judge were right to conclude that the principle was clearly inapplicable to the circumstances of this case. But it is common ground that the judge applied the right test when he said at paragraph 1 of his judgment that "[i]f a court has any doubts as the validity of [a] European Union decision, then it must refer the matter to the [CJEU]", and these matters may be relevant to the question of whether such doubts exist.

29. In my judgment, the starting point must be the oft-repeated statement of the exception namely that there exists "no general principle obliging the [EU], in its external relations, to accord to third countries equal treatment in all respects". That statement contains two qualifications: first it applies only to the external relations of the EU, and secondly what the EU is not obliged to accord is not equal treatment *simpliciter*, but "equal treatment in all respects". Whilst acknowledging the infelicity of the double-negative in that last formulation, it is necessitated by the fact that the "in all respects" qualifies "equal treatment" which is itself being excluded.

30. Mr Chamberlain pointed out that the "external relations" qualification ought to be regarded as significant, because if the exception were stated without it, it would seem to make perfect sense: there exists "no general principle obliging the [EU] […] to accord to third countries equal treatment in all respects". Whilst it would be inappropriate to seek to construe a CJEU judgment as a deed, the words "in its external relations" must be taken to mean something. Mr Chamberlain says they are pointing to the EU's dealing with third countries, not its internal legislative actions. This was, after all, what the trilogy of cases actually related to.

31. The meaning of the qualification "in all respects" is even more troubling, because, as Mr Palmer submitted, in the crucial *Faust* case, the submission was turned on its head when Faust submitted that the EU was obliged to accord third countries equal treatment in all respects. The qualification thereby became simply emphasis for the extent of equal treatment required. On one semantic construction of the language used by the EU, the words "in all respects" do simply emphasise that complete equal treatment is not required for third countries, and therefore they provide no real limitation on the extent of the exception. But I have to say that this approach does not seem to me to be free from doubt.

32. The proper extent of the principle is not, unfortunately, made any easier by an analysis of the *Balkan* and *Faust* cases. It is, in my judgment, at least arguable that the CJEU was in the *Balkan* case in some measure detracting from the full rigour of the exception that it had stated in paragraph 14 of its judgment, when it sought to explain in paragraph 15 why the different treatment of imports of Italian and Swiss, as opposed to Bulgarian, cheese was objectively justified by the assessment of the possibilities of disturbance to the EU market. Mr Palmer himself acknowledged that equivocality.

33. In the *Faust* case, the position is complicated by the fact that Advocate General Slynn appeared also to be considering the justification for the different treatment accorded to preserved mushroom imports from China and Taiwan. At page 3779, he said (a) that the positions of EU importers who have dealings with third countries who limit exports and those who do not, were not comparable, and (b) that different treatment was objectively justifiable, before commenting that, even if the failure to agree a limitation was arbitrary discrimination by the Commission, that still did not constitute unlawful discrimination as between importers "because the Commission is under no legal duty to accord equal treatment to third countries". Moreover at pages 3772-3, Advocate General Slynn seems to have opined that (a) Faust was trying to avoid the effect of the *Balkan* case exception by relying on article 40(3) to contend that the regulation unlawfully discriminated between "consumers within the [EU]", (b) it was doubtful whether an agent like Faust could claim to be a "producer or consumer" within the EU within article 40(3), (c) Faust could anyway rely on the principle of non-discrimination because article 40(3) was just a specific enunciation of the general principle of equality, (d) but that even if it breached the principle for unequal treatment of EU traders to result from unequal treatment of third countries, any different treatment of the EU traders would only constitute wrongful discrimination if the position of the third countries was the same or comparable (which it was not since China had self-limited exports), and if it was not objectively justifiable to restrict imports from Taiwan but not China (which it was).

34. As it seems to me, Advocate General Slynn was seeking to draw a distinction between equality between EU traders and equality between third countries. He thought that equal treatment between EU traders was required, but equal treatment between third countries was not. If unequal treatment of EU traders were caused by unequal treatment of third countries, it would not be unlawful. But that is where the clarity ends, because Advocate General Slynn does go on to consider the comparability between third countries and the justification for equal treatment at pages 3772-3. If I were required to say precisely what Advocate General Slynn had meant, I would have taken the view that he was not seeking to limit the ambit of the exception as it applied to third countries. What I think he was doing when he applied the principle of equal treatment to third countries was saying that a breach of the principle of equal treatment as regards EU traders would only amount to unlawful discrimination if the discrimination between third countries was itself unjustified. The problem, however, is that this reasoning is, on one analysis at least, illogical because if the exception is unqualified, then the consequences of discriminating between third countries cannot be unlawful whether or not the discrimination between third countries is justified.

35. Paragraph 25 of the judgment of the CJEU in the *Faust* case seems to me at least to endorse the Advocate General's view, because, having stated the exception in the same terms as in the *Balkan* case, it observes that if different treatment of third countries is compatible with EU law, then different treatment of EU traders must also be compatible with EU law because it is "merely an automatic consequence of the different treatment" accorded to third countries. Thus, the CJEU is echoing the distinction that the Advocate General repeatedly made between the applicability of the principle of equal treatment to EU traders and its application to third countries. If it were not for the word "if" (underlined above), I would have had little doubt that the CJEU was enunciating an unqualified exception to the equal treatment principle. But the word "if" injects doubt. The observation of the CJEU that it does not need, as a result of the exception it has stated, to consider on what basis Faust might seek to rely on article 40(3) does somewhat dispel that doubt, because if there were no absolute exception from the equal treatment principle for third countries, it would have been necessary to consider on what basis Faust could rely on article 40(3). It is only because the exception for third countries is absolute that its consequences on EU traders cannot amount to unlawful discrimination.

36. Having said all that, the extent of the exception still remains in doubt because the qualifications to which I have already referred have never been properly explained. The indications may point quite strongly towards the respondents being right as to the absolute nature of the exception, but, in my judgment, we cannot now decide that that is the case without asking for a preliminary ruling of the CJEU.

37. It would be logical to suppose that the qualification relating to the EU's external relations should apply as much to internal EU legislation affecting external relations as to agreements or treaties made directly with third countries. But there is no decision of the CJEU which directly decides that question. Moreover, it looks as if the words "in all respects" were not intended to inject some unspecific and free-ranging qualification to the exception, because if they were so intended, the exception itself would become too uncertain to be of much value. But neither of these positions is free from doubt. One can readily see how the CJEU might think it appropriate to construe the exception strictly and to confine it to situations in which the EU is dealing directly with third countries.

38. In these circumstances, whilst I see great force in the judge's approach, I am persuaded that it is not free from doubt and that a reference should be made to the CJEU unless the judge was right to hold that there was no arguable breach of the principle of equal treatment made out. I turn then to that question.

    Was the judge right to hold that the principle of equal treatment would not anyway have been breached in this case?

39. It is true, as I have said, that, in order to succeed in showing a breach of the principle of equal treatment, Swiss would have to show that the EU legislature manifestly exceeded the bounds of its discretion. I have no doubt that the EU had the power to legislate in relation to the ETS for the obvious political purpose of encouraging and facilitating the international negotiations within the ICAO. It obviously also had a wide discretion as to the form of that legislation. In this case, however, what is challenged is, in effect, the singling out of one third country because of its close connections with the

EU and the EEA. Swiss complains that Switzerland was almost unique in being treated differently from the many other third countries that were negotiating in the ICAO. Mr Chamberlain pointed also in this connection to the retrospective nature of the Decision, and to the fact that it applied only to 2012. In later years, the EU has legislated so as to exclude all non-EEA countries from the derogation.

40. On this question also, I am afraid that I am unable to share the judge's certainty. It seems to me that there is some force in the argument that the Commission and the EU legislature have not yet sought to justify Switzerland's exclusion. The reasons given in the recitals are exiguous and superficial. That is not a criticism, because the recitals cannot have been expected to explain the detailed reasoning for the exclusion of one specific third country. But all that said, it may not be a sufficient justification for discriminatory treatment just to say that Switzerland is a "closely connected or associated [country] outside the Union". I would also be the first to accept that Switzerland is in a very different position to many other third countries politically, economically and geographically. But that does not necessarily provide automatic justification for it having been singled out. It might be, as was suggested in argument, a justification to rely on the fact that EEA citizens and others regularly use airports in Switzerland to travel to and from the EEA. But that has not yet been put forward in any coherent way as a justification for the Decision.

41. There is much force in the judge's statement that "this was a political judgment within the broad margins of discretion on the part of the [EU] as to where best to strike the balance in relation to progressing matters at an international level", but for my part I cannot accept that this question either is free from doubt. In the absence of a reasoned explanation from the EU institutions, I regard it as at least arguable that, if the principle of equal treatment applies in this situation, the EU exceeded the bounds of its discretion by singling out Switzerland for special treatment. The word "manifestly" used in the test seems to me to add nothing of substance to the matter.

Remedies

42. Though the parties both agree that this application for judicial review is appropriate to resolve the question of the validity of the Regulations and hence the Decision, they do not agree about what should happen if that application were successful. In brief, the respondents submit, as I have said, that they could never be liable for Swiss's loss either under domestic law or by way of damages under *Francovich v. Italian Republic* (cases C-6/90 and C-9/90) [1991] ECR 1-5357. Instead, the respondents say that Swiss ought to have applied to the General Court of the European Union under article 340(2) of the TFEU for compensation. That article provides that "[i]n the case of non-contractual liability, the Union shall in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions …".

43. In my judgment, this court does need now to resolve this disagreement. Since the substantive question of the validity of the Decision is being referred to the CJEU, the parties now agree that a question can usefully be added concerning remedies. At the court's invitation, the parties have broadly agreed the terms of the questions that should be referred. They agree that the second question should ask, in short, whether the register of emission allowances should be rectified, whether Swiss would have a right to claim damages under article 340 of the TFEU against the European Parliament and the Council for its loss, and what, if any, other relief should be granted. They disagree, however, as to whether there should be a question as to what (if any) action the 2nd respondent should take to procure that the additional allowances surrendered are restored to Swiss.

44. In my judgment, it is prudent to include this last question. It is probably correct, as Mr Palmer has explained, that the 2nd respondent cannot itself do anything to return the surrendered allowances to Swiss, save to ask the relevant authorities for that to happen. And Swiss can, if it wins, certainly send copies of the relevant judgments and orders to the appropriate authorities quite as easily as the respondents can do so. But it seems to me that it would be appropriate to ask the CJEU whether a national body needs to take any action to avoid a situation in which the Registry subsequently takes the view that it cannot act to correct the register save on instructions from a competent national authority. The question will not prejudice the respondents and may avoid later delays and uncertainties.

Disposal

45. Accordingly, for the reasons I have given, I would allow the appeal and grant permission to Swiss to apply for judicial review of the decision to make the Regulations. I would refer the following questions to the CJEU for a preliminary ruling under article 267 of the TFEU:-

    i) Question 1: Does the Decision infringe the general EU principle of equal treatment insofar as it establishes a moratorium on the requirements to surrender emissions allowances imposed by the Directive (as amended) in respect of flights between EEA states and almost all non-EEA states, but does not extend that moratorium to flights between EEA states and Switzerland?

    ii) Question 2: If so, what remedy must be provided to a claimant in the position of Swiss, which has surrendered emissions allowances in respect of flights that took place during 2012 between EEA states and Switzerland, to restore that claimant to the position it would have been in, but for the exclusion from the moratorium of flights between EEA states and Switzerland? In particular:-

        a) Must the register be rectified to reflect the lesser number of allowances that such a claimant would have been required to surrender if flights to or from Switzerland had been included in the moratorium?

        b) If so, what (if any) action must the national competent authority and/or the national court take to procure that the additional allowances surrendered are returned to such a claimant?

        c) Does such a claimant have a right to claim damages under Article 340 of the TFEU against the European Parliament and the Council for any loss that it has suffered by reason of having surrendered additional allowances as a result of the Decision?

        d) Must the claimant be granted some other form of relief, and if so what relief?

46. I would direct that the parties should, within 21 days, draft and, so far as possible, agree the terms of the reference to the CJEU, for the consideration of this court.

Lord Justice Burnett:

47. I agree.

Lord Justice Underhill:

48. I also agree.
