MOROCCAN WORKERS ASSOCIATION v. ATTORNEY-GENERAL

SUPREME COURT (Harwood, A.J.): May 30th, 1995

Civil Procedure—originating motion—appropriateness of procedure—inappropriate where disputed issues of fact—may not be used if plaintiff's status or capacity likely to be challenged or nature of relief sought unclear

Administrative Law—judicial review—suitability of remedy—plaintiff alleging misuse of Government powers to apply for judicial review and not try to enforce individual public law rights by originating motion for declaratory relief—not to be allowed to evade time-limit and need to show sufficient interest in cause of action under Rules of Supreme Court, O.53

Employment—foreign workers—equality of treatment—Treaty of Rome, art. 48 and EC Council Regulation No. 1612/68, arts. 1–9 confer employment rights and equal access to employment in member states on EC nationals only—under EC-Moroccan Co-operation Agreement 1978, art. 40, Moroccan workers in Gibraltar entitled to comparable working conditions and remuneration only when in work

Social Security—foreign nationals—equality of treatment—no breach of EC Council Regulation No. 1408/71 or EC-Moroccan Co-operation Agreement 1978, art. 41 in discretionary allocation of benefits to permanent Gibraltar residents only under Social Allowance Scheme—social security risks listed in art. 4.1 covered by state benefits system

Immigration—temporary residence—foreign workers—no right of residence conferred on non-EC nationals and families seeking employment in Gibraltar by EC-Moroccan Co-operation Agreement 1978 or EC legislation

The plaintiffs sought declarations that under the legislation in force in Gibraltar and through failure properly to implement EC law and treaty obligations in respect of working conditions, remuneration, access to employment and social security, the government discriminated on the basis of nationality against Moroccan workers in the Colony.

The plaintiff organization, which claimed to represent the interests of all Moroccan workers in Gibraltar and in particular those of its members, commenced proceedings by notice of motion in 1993 and, after adjournments at its request, was granted leave to add the names of its president and secretary as plaintiffs, so that proceedings were brought on behalf of themselves and their members. At the hearing they relied on affidavit evidence of the organization's officers and members, detailing instances of alleged discrimination on grounds of nationality which they had suffered as individuals.

On the procedural issues, the plaintiffs submitted that (a) under the English Rules of the Supreme Court, they were at liberty to commence proceedings by way of notice of originating motion, since the issues to be considered were legal issues involving the construction of EC and domestic legislation; (b) whilst an application for judicial review was an alternative means of obtaining the declaratory relief sought, it was not obligatory and their failure to make such an application should not be used by the defendant to deny them a remedy; (c) the officers of the Gibraltar Moroccan Workers Association had been appointed to represent their members, who shared a common cause of complaint, and therefore had the capacity to bring a representative action under O.15, r.12 on behalf of the deponents, seeking declarations which would clarify the position of all other Moroccans living and working in Gibraltar.

On the substantive issues, they submitted that (d) the evidence of the deponents showed that persons of Moroccan origin had been discriminated against in their attempts to obtain employment in Gibraltar contrary to art. 40 of the 1978 Co-operation Agreement between the EEC and Morocco and in breach of their rights, as workers, to freedom of movement within the Community; (e) Moroccans did not cease to be "workers" for these purposes by reason only that they were not currently in employment, and had further rights, by analogy with the position of EC citizens under Council Regulation No. 1612/68, arts. 1–9, to equal treatment with Gibraltarians; (f) the Gibraltar Government had unlawfully replaced much of its social security benefits administration with a discretionary charitable scheme which provided benefits to Gibraltarians and certain other permanent residents of Gibraltar, and discriminated against Moroccans who were unable to obtain residence permits; (g) under art. 41 of the EC-Moroccan Co-operation Agreement 1978 the Gibraltar Government was obliged to provide Moroccan workers and their families with social security benefits including social assistance and family allowances without discrimination and was failing to do so in an impartial manner; (h) the rights, conferred by art. 48 of the Treaty of Rome, to reside in an EC member state during and following

employment, were working conditions within the meaning of art. 40 of the Co-operation Agreement and art. 7 of Council Regulation No. 1612/68 and were equally applicable to Moroccan nationals and EC nationals; and (i) even if the court did not consider that the affidavit evidence established that individual cases of discrimination had occurred, it should nevertheless make the declarations sought for the purposes of future guidance to persons seeking relief on their own behalf.

On the procedural issues, the defendant submitted that (a) the plaintiffs had commenced proceedings by an inappropriate method, since the Rules of the Supreme Court made it clear that a notice of motion should not be used if there were any substantial issue of fact to be decided, and the vague drafting of the summons itself gave rise to a number of factual questions for the court's determination; (b) the action should instead have been commenced as an application for judicial review, since the declarations sought by the plaintiffs concerned matters of public and administrative law for which that process was intended; (c) moreover, the plaintiffs had attempted to bypass the requirements of the Supreme Court Act 1981, s.31 and O.53 of the Rules of the Supreme Court by applying for purely declaratory relief under O.5, which did not require them to particularize their claim fully or give proper grounds for the relief sought, or to show that they had a sufficient interest in the matters to which their application related; (d) they had thereby also sought to evade the court's power under O.53, r.4 to refuse leave to apply for judicial review if unnecessary delay had occurred in bringing proceedings, as had happened in this case; (e) since the officers of the Moroccan Workers Association did not claim any infringement of their own rights under EC or domestic law, and since there was no evidence that either they or the organization itself represented the Moroccan population of Gibraltar, the plaintiffs could not properly begin representative proceedings under O.15, r.12; and (f) accordingly, the application should be dismissed as an abuse of the court's process.

On the substantive issues the defendant submitted that (g) the affidavit evidence adduced by the plaintiffs disclosed no breach of the EC-Moroccan Co-operation Agreement in respect of the working conditions or remuneration of the individual deponents whom they claimed to represent, since (i) the rights of Moroccans under arts. 40 and 41 of the Agreement subsisted only so long as the individual was in work and did not include a right of access to employment before or after work as was conferred on EC nationals under art. 48 of the Treaty of Rome, and (ii) under Council Regulation No. 1612/68 only EC nationals working in another member state were given rights relating to the opportunity to obtain work and equality of treatment with that State's nationals whilst in work; (h) no discrimination had been shown in the allocation of social security benefits, since Moroccan workers received the statutory entitlement of 13 weeks' unemployment benefit as required by EC law, and the Social Assistance Scheme, under which family allowances were distributed on a means-tested basis to lawful permanent residents

irrespective of nationality, was not of itself unlawful under art. 41 of the Co-operation Agreement; furthermore, no allegation of discriminatory allocation of benefits on an individual basis had been clearly pleaded; (i) Moroccan workers and their families were not entitled to social assistance and medical benefits on a par with Gibraltarians, since the state's only obligation was to provide those benefits properly defined as social security within art. 4, nor, as non-EC nationals, could they claim housing rights under art. 9 of Regulation No. 1612/68; (j) the right to reside in Gibraltar was not a "working condition" governed by art. 40 of the Co-operation Agreement and did not entail freedom to reside for the purpose of seeking employment. Whilst, under the Treaty of Rome, art. 48, Gibraltarians and other EC nationals were accorded rights to reside in member states during and after employment, the right of residence after employment was denied to non-EC nationals such as Moroccan workers; and (k) accordingly, since the plaintiffs had established no illegality in the treatment of Moroccan workers as a class and it was not possible in the present proceedings to determine whether any infringement of rights had occurred on an individual basis, declarations of a general nature would serve no useful purpose and should not be granted.

Held, dismissing the application:

(1) The plaintiffs' notice of motion for declaratory relief was an inappropriate procedure by which to commence the present proceedings since, under the Rules of the Supreme Court, that procedure was intended for use where issues of law alone fell to be considered. In the present case there were several factual issues to be resolved, not least the plaintiffs' own status as representatives of Moroccan workers in Gibraltar, and the exact relief which they sought. Moreover, since they alleged misuse of Government powers and non-compliance with EC law, their first recourse should be to the judicial review procedure under the Supreme Court Act 1981, s.31 and O.53. There was nothing exceptional about the plaintiffs' case to justify a departure from this practice and it would be wrong to allow them to evade the court's control over the way in which matters were pleaded, and the time within which an application for such relief had to be made (page 77, lines 14–37; page 78, lines 4–13; page 79, lines 17–37).

(2) By issuing a notice of motion, the plaintiffs had also avoided the need to demonstrate to the court that they had a sufficient interest in the subject-matter of the application. They had wrongly framed their action as representative proceedings under O.15, r.12, since they had neither shown that they had *locus standi* as individuals complaining of breaches of their public law rights, nor had they proved that, as officers of the Association, they represented others with a common grievance (page 83, lines 1–36; page 84, lines 26-40).

(3) The plaintiffs' complaints about access to employment disclosed no breaches of art. 40 of the EC-Morocco Co-operation Agreement 1978,

since the rights of Moroccan workers relating to remuneration and working conditions applied only to persons already in employment. Nor had there been any breach of other EC legislation, since art. 48 of the Treaty of Rome conferred rights of residence only on EC nationals living and working in another EC member state which did not include Moroccans. The same restriction applied to the rights relating to eligibility for employment and equality of treatment contained in arts. 1–9 of Council Regulation No. 1612/68 (page 85, line 16 – page 86, line 3; page 86, line 25 – page 87, line 9).

(4) Since the statutory entitlement of Moroccan workers to social security benefits was equal to that of Gibraltar nationals, the Gibraltar Government had discharged its obligations under EC law and the plaintiffs had failed to show discrimination in that field. The establishment of the discretionary Social Assistance Scheme partly replacing the previous system did not contravene art. 41 of the Co-operation Agreement, since the payments made out of it were not social security benefits within the meaning of that article, namely, payments without any individual assessment of need covering the social security risks listed in Council Regulation No. 1408/71, art. 4.1. Family allowances and other means-tested benefits were available under the scheme to lawful permanent residents as well as Gibraltar nationals. The tax and national insurance contributions which Moroccan workers were liable to pay did not form part of the funds out of which benefits under the Social Assistance Scheme were met (page 88, line 34 – page 89, line 34).

(5) Whilst equal treatment for Moroccan workers and their families in the fields of employment and social assistance within the meaning of art. 41 were undeniably related to status as a worker in Gibraltar, the immigration authorities were not in breach of EC law in denying the deponents rights of permanent residence in the circumstances alleged in their affidavits, since neither the Co-operation Agreement, nor any other EC legislation conferred a right on a non-EC national or his family to reside in an EC member state for the purpose of seeking employment (page 89, lines 35–40; page 90, line 32 – page 91, line 13).

(6) Since no breach of individual public law rights had been clearly pleaded and no unlawful discrimination against Moroccan workers as a whole proved, declaratory relief was unnecessary. Any relevant declaration would simply be a restatement of existing EC and Gibraltar legislation and would therefore serve no useful purpose (page 91, line 16 – page 92, line 4).

Cases cited:

(1) *Bedford (Duke)* v. *Ellis*, [1899] 1 Ch. 494; on appeal, [1901] A.C. 1, considered.

(2) *Begdoui* v. *R.*, [1992] LRC (Const) 394.

(3) *Germany* v. *Sagulo*, [1977] 2 C.M.L.R. 585; [1977] E.C.R. 1495, distinguished.
(4) *Hughes* v. *Chief Adjudication Officer (Belfast)*, [1992] 3 C.M.L.R. 490; [1993] 1 FLR 791, applied.
(5) *Markt & Co. Ltd.* v. *Knight S.S. Co. Ltd.*, [1910] 2 K.B. 1021, followed.
(6) *Office Nationale de L'Emploi* v. *Kziber*, [1991] E.C.R. I–199, applied.
(7) *O'Reilly* v. *Mackman*, [1983] 2 A.C. 237; [1982] 3 All E.R. 686; on appeal, [1983] 2 A.C. 237; [1982] 3 All E.R. 1124, *dicta* of Lord Denning, M.R. and Lord Diplock applied.
(8) *R.* v. *Darlington Borough Council, ex p. Darlington Taxi Owners Assn.*, [1994] C.O.D. 424.
(9) *R.* v. *Social Services Secy., ex p. Child Poverty Action Group*, [1990] 2 Q.B. 540.
(10) *Roy* v. *Kensington & Chelsea & Westminster Family Practitioner Cttee.,* [1992] 1 A.C. 624; [1992] 1 All E.R. 705, considered.
(11) *Yousfi* v. *Belgium*, [1994] E.C.R. I–1353, applied.

Legislation construed:

Immigration Control Ordinance (1984 Edition), s.12(1):

"Subject to the provisions of section 14, no non-Gibraltarian shall enter or remain in Gibraltar unless he is in possession of—

(*a*) a valid entry permit;
(*b*) permit of residence; or
(*c*) a valid certificate."

s.20: "(1) The Principal Immigration Officer may at any time cancel any permit issued under this Ordinance.

(2) The Governor may at any time cancel any permit issued under this Ordinance."

Rules of the Supreme Court, O.15, r.12(1):

"Where numerous persons have the same interest in any proceedings . . . the proceedings may be begun, and unless the Court otherwise orders, continued, by or against any one or more of them as representing all. . . ."

r.16: "No action or other proceedings shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed."

O.53, r.3(7): "The Court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates."

r.4(1): "An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made."

Co-operation Agreement between the European Community and the Kingdom of Morocco of September 26th, 1978 (annexed to Council Regulation (EEC) No. 2211/78), art. 1: The relevant terms of this article are set out at page 77, lines 1–6.

art. 40: The relevant terms of this article are set out at page 75, lines 21–25.

art. 41: The relevant terms of this article are set out at page 75, lines 26–39.

Council Regulation (EEC) No. 1612/68 of October 15th, 1968 on Freedom of Movement for Workers within the Community, art. 3.1:

"Under this Regulation, provisions laid down by law, regulation or administrative action or administrative practices of a Member State shall not apply:

—where they limit application for and offers of employment, or the right of foreign nationals to take up and pursue employment or subject these to conditions not applicable to their own nationals; or

—where, though applicable irrespective of nationality, their exclusive or principal aim or effect is to keep nationals of other Member States away from the employment offered . . . ."

art. 7: "1. A worker who is a national of Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement or re-employment;

2. He shall enjoy the same social and tax advantages as national workers."

art. 9.1: "A worker who is a national of a Member State and who is employed in the territory of another Member State shall enjoy all the rights and benefits accorded to national workers in matters of housing, including ownership of the housing he needs."

Council Regulation (EEC) No. 1408/71 of June 14th, 1971 on the Application of Social Security to Employed Persons and their Families moving within the Community, art. 4.1:

"This regulation shall apply to all legislation concerning the following branches of social security:

(*a*) sickness and maternity benefits;
(*b*) invalidity benefits, including those intended for the maintenance or improvement of earning capacity;
(*c*) old-age benefits;
(*d*) survivors' benefits;
(*e*) benefits in respect of accidents at work and occupational diseases;
(*f*) death grants;
(*g*) unemployment benefits;
(*h*) family benefits."

Treaty Establishing the European Community of March 25th, 1957, art. 48:

"3 [Freedom of Movement] shall entail the right, subject to limitations justified on grounds of public policy, public safety or public health:

. . .

(*c*) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by the law, regulation or administrative action;

(*d*) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.

4. The provisions of this Article shall not apply to employment in the public service."

C. Finch for the plaintiffs;
M.J. Beloff, Q.C., *Ms. H. Mountfield* and *J. Levy* for the defendant.

HARWOOD, A.J.: These proceedings were commenced by notice of motion dated February 17th, 1993 and filed on behalf of the Moroccan Workers Association ("the Association") and its President and the General Secretary. The hearing was originally set down for September 2nd, 1993 but adjourned at the plaintiffs' request. The hearing finally commenced on November 28th, 1994, when leave was granted at the outset on the application of the plaintiff to amend the title of the notice by the inclusion of the names of two officers of the Association to read "Mohamed Sarsri (President) and Azdin Mesloh (Secretary) for and on behalf of themselves and the Members of the Moroccan Workers Association (formerly Moroccan Workers in Gibraltar Club)," but without prejudice to Mr. Beloff's submission that neither they nor the Association have any representative capacity to bring the proceedings.

The following affidavits were relied upon: Mohamed Sarsri, sworn on February 10th, 1993; Ernest John Montado, sworn on August 17th, 1993; Haltout Mohammed, Laachiri Mohammed, Chefaoui Mohammed, Mohammed Mesbahi, Salah Rahmouni, Mohammed Baghor, Mohammed Alhattab, and Soubouti Ahmed, all sworn on October 18th, 1994; Mohammed Ezzireg and Amina Ouahabi Ezzireg, sworn on November 23rd, 1994; and Ernest George Montado, sworn on November 25th, 1994. An attempt to introduce a second affidavit of Mohamed Sarsri sworn on November 25th, 1994, filed out of time and served on that date was objected to by Mr. Beloff and was not pursued by Mr. Finch.

The Attorney-General for Gibraltar represents the Government of Gibraltar in his capacity as its legal representative in accordance with s.12 of the Crown Proceedings Ordinance. The Association and now its

President (Mohamed Sarsri) and its Secretary (Azdin Mesloh) seek five declarations as of right. In general terms, the underlying assertion of the applicants is that the Government operates legislation and practices to the detriment of the Moroccan workers in Gibraltar amounting to "discrimination based on nationality," that being an expression common to each of the declarations sought. I should remark that the legislation of Gibraltar, as appears from the title to the proceedings to be specifically impugned, is: (a) the Employment Ordinance; (b) various Social Security Ordinances; (c) the Medical and Health Ordinance; and (d) the Immigration Control Ordinance.

In the event, no particular provision of any of those Ordinances was criticized. The title also indicates that reliance is placed by the plaintiff upon the Treaty of Rome ("the Treaty"), upon the Co-operation Agreement between the EEC and the Kingdom of Morocco being EEC Council Regulation No. 2211/78 of September 26th, 1978 ("the Regulation"), and upon Convention No. 97 of the International Labour Organization, though submissions based on or concerning the latter were at no time pursued. The declarations sought appear to derive entirely from the text of arts. 40 and 41 of the Regulation which provide, *inter alia*, as follows:

"Article 40

The treatment accorded by each Member State to workers of Moroccan nationality employed in its territory shall be free from any discrimination based on nationality, as regards working conditions or remuneration, in relation to its own nationals . . . .

Article 41

1. Subject to the provisions of the following paragraphs, workers of Moroccan nationality and any members of their families living with them shall enjoy, in the field of social security, treatment free from any discrimination based on nationality in relation to nationals of the Member States in which they are employed.

2. All periods of insurance, employment or residence completed by such workers in the various Member States shall be added together for the purpose of pensions and annuities in respect of old age, invalidity and death and also for that of medical care for the workers and for members of their families resident in the Community.

3. The workers in question shall receive family allowances for members of their families who are resident in the Community . . . ."

The declarations sought are as follows:

(a) The treatment accorded by the Government of Gibraltar to workers of Moroccan nationality shall be free from any discrimination based on nationality as regards working conditions and remuneration as practised in relation to Gibraltar nationals or the nationals of the member states of the European Economic Community ("EEC").

(b) Workers of Moroccan nationality and any members of their family lawfully living with them in Gibraltar are entitled to enjoy in the field of social security and medical treatment all rights, privileges and legitimate expectations as are enjoyed by Gibraltar nationals or nationals of the member states of the EEC free from any discrimination based on nationality.

(c) Workers of Moroccan nationality are lawfully entitled to receive family allowances for members of their family lawfully living with them in Gibraltar free from any discrimination based on nationality.

(d) Lawful workers of Moroccan nationality who are either employed in Gibraltar or who are seeking employment in Gibraltar after a period of lawful employment in Gibraltar are entitled to be granted rights of residence in Gibraltar free from discrimination based on nationality by officers holding public office in Gibraltar in the discharge of any powers or duties arising from such public office or to confirm with express or implied obligations arising out of international agreements and accords applicable to Gibraltar.

(e) Subject to any legal requirements that a worker of Moroccan nationality shall be registered, and hold a valid permit to work and reside in Gibraltar, that such a worker has a right to take up any legitimate employment in Gibraltar, including self-employment, either in his own capacity or through the aegis of a firm or limited company, free from any discrimination based on nationality and is entitled to be treated in a manner similar to Gibraltar nationals or nationals of the member states of the EEC in this regard.

The key expressions used in those declarations and which indicate the areas of discontent are as follows: (a) "working conditions and remuneration"; (b) "social security and medical treatment"; (c) "family allowances"; (d) "rights of residence"; and (e) "right to work."

The background described by Mr. Finch is briefly as follows. Moroccan workers first came to Gibraltar in significant numbers in 1969 when the land frontier was closed by the Spanish Government. The closure caused the withdrawal of several thousand Spanish workers. Their replacement by Moroccan workers was perceived by the Governments of the United Kingdom and of Gibraltar as a solution to the shortage of labour. The Moroccans were given relatively short contracts of employment. It was never foreseen that the frontier would remain closed for as long as 16 years but, during the course of those years, the Moroccans are said to have become more or less recognized as part of the indigenous workforce. Many have remained here to this day, but not necessarily in employment.

In 1978, the Co-operation Agreement between the EEC and the Kingdom of Morocco was brought into being for the general reasons set forth in the Preamble thereto. Its object is stated in art. 1 as being—

> ". . . to promote overall co-operation between the Contracting Parties with a view to contributing to the economic and social development of Morocco and helping to strengthen relations between the Parties. To this end, provisions and measures will be adopted and implemented in the field of economic, technical and financial co-operation, and in the trade and social fields."

It was not, I believe, brought into being for any reason specifically connected with (for want of a better term) "the Gibraltar problem" described in the preceding paragraph.

Preliminary matters

Mr. Beloff made certain submissions that must be resolved concerning matters of practice and procedure. These arise out of the nature of the claim and the manner in which it has been brought before this court. Mr. Finch, in dealing with these submissions in his reply, described them as "small technical objections." That is a description with which I cannot agree. I consider them to be important. The plaintiff's claim was instituted by way of originating process under the Rules of the Supreme Court, O.5 and representative proceedings under O.15, r.12 for declarations in those general terms under the court's jurisdiction now contained in O.15, r.16. The permissive characteristics of these rules possibly explains the apparent paucity of supervision of the proceedings by the court up to the date of hearing and provides the reason why those submissions had to be made by Mr. Beloff at that late stage.

The institution of proceedings by notice of originating motion or summons is not appropriate in a case where issues of fact are likely to arise—yet certain issues of fact undoubtedly exist. It is a form of procedure that usually requires no pleadings or witnesses and in which the question(s) for decision ought to be evident from the summons itself, so that without the need for interlocutory proceedings both speed and simplicity can be achieved. There could scarcely have been any procedural objection had any Moroccan worker instituted by ordinary process a claim for the infringement of his own personal right—whether or not as a test case—or had advantage been taken of the relatively modern procedure for judicial review, for there is no dispute that the Regulation is binding in its entirety and is directly applicable in all member states of the EEC. However, the approach adopted by the plaintiff invokes none of the restrictions that attach to judicial review and the first point taken by the Attorney-General is that to impugn the laws of Gibraltar and the policy or practices of government by way of a claim for mere declarations is, in the circumstances of this case, an abuse of the court's process. It is contended that none of the declarations sought in these proceedings is a remedy that ought to be available to the plaintiff if proceedings for those declarations in judicial review would have been more appropriate and that since the complaints in this case are directed at

the alleged misuse by the Government of its powers under Gibraltar law and its non-compliance with EC law, judicial review is clearly the appropriate method of challenge.

Matters of public law and administration are matters that ordinarily now fall within the purview of s.31 of the English Supreme Court Act 1981 and the Rules of the Supreme Court, O.53. The remedies therein provided have been said by Lord Denning, M.R., in *O'Reilly* v. *Mackman* (7) ([1983] 2 A.C. at 256), to be such that judicial review "should be the normal recourse in all cases of public law where a private person is challenging the conduct of a public authority or a public body, or of anyone acting in the exercise of a public duty." This statement of the law was effectively confirmed in the House of Lords by Lord Diplock in the leading speech. It was there decided that neither s.31 nor O.53 could be taken to be the exclusive procedure available by which the remedy of a declaration or injunction may be obtained for infringement of rights that are entitled to protection under public law. However, he went on to say the following (*ibid*., at 284–285):

> "There is a great variation between individual cases that fall within Order 53 and the Rules Committee and subsequently the legislature were, I think, for this reason content to rely upon the express and the inherent power of the High Court, exercised upon a case to case basis, to prevent abuse of its process whatever might be the form taken by that abuse. Accordingly, I do not think that your Lordships would be wise to use this as an occasion to lay down categories of cases in which it would necessarily always be an abuse to seek in an action begun by writ or originating summons a remedy against infringement of rights of the individual that are entitled to protection in public law.
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> The position of applicants for judicial review has been drastically ameliorated by the new Order 53. It has removed all those disadvantages, particularly in relation to discovery, that were manifestly unfair to them and had, in many cases, made applications for prerogative orders an inadequate remedy if justice was to be done. This it was that justified the courts in not treating as an abuse of their powers resort to an alternative procedure by way of action for a declaration or injunction (not then obtainable on an application under Order 53), despite the fact that this procedure had the effect of depriving the defendants of the protection to statutory tribunals and public authorities for which for public policy reasons Order 53 provided.
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> Now that those disadvantages to applicants have been removed and all remedies for infringements of rights protected by public law can be obtained upon an application for judicial review, as can also remedies for infringements of rights under private law if such infringements should also be involved, it would in my view as a

general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Order 53 for the protection of such authorities.

My Lords, I have described this as a general rule; for though it may normally be appropriate to apply it by the summary process of striking out the action, there may be exceptions, particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law, or where none of the parties objects to the adoption of the procedure by writ or originating summons. Whether there should be other exceptions should, in my view, at this stage in the development of procedural public law, be left to be decided on a case to case basis . . . ."

It follows, in my judgment, that unless it can be regarded as exceptional, this claim by the Association ought to have been instituted by way of judicial review. It falls clearly within the category of cases exemplified by Lord Denning and Lord Diplock which ought *prima facie* to be so instituted. It has, for example, evaded the provisions of O.53, r.3(7) which require a plaintiff to establish that he has a sufficient interest in the matter to which the application relates and those of r.6, which require proper disclosure of the grounds upon which relief is being claimed, as well as those provisions of r.9 which give the court essential powers of supervision and control over matters connected with the hearing of an application for judicial review. Instead, these proceedings—commenced as long ago as February 1993 and originally set down for hearing in June 1993—are only now before this court seeking wide-ranging declarations based on largely unspecific grounds, such as those set out in the affidavit of Mohamed Sarsri sworn on February 10th, 1993.

Moreover, the late filing (a few days or, in some cases, a few weeks before the hearing) of the individual affidavits on behalf of the plaintiff, the subsequent amendment of the claiming parties, and the nebulous capacity of the Association to represent all Moroccan workers, are features that tend to hinder or obscure the true attainment of justice between the proper parties. Mr. Finch described this case as one of the most important to come before this court for years. That is a description the accuracy of which I cannot confirm or deny but it certainly is an important case for both parties. I have given careful thought to the question whether it is possible to treat it as an exception to the general rule propounded by Lord Diplock. A flexible approach was recommended in *Roy* v. *Kensington & Chelsea & Westminster Family Practitioner Cttee.* (10) by Lord Lowry, who concluded his speech by saying ([1992] 1 A.C. at 655) that—

> ". . . unless the procedure adopted by the moving party is ill-suited to dispose of the question at issue, there is much to be said in favour of the proposition that a Court having jurisdiction ought to let a case be heard rather than entertain a debate concerning the form of the proceedings." 5

But in my opinion the framing of this case, and the exclusive declaratory relief claimed, are such that it cannot properly be treated, and it has certainly not been shown by the plaintiff to be such as to justify its treatment, as an exception to the general rule. Nor is it possible—despite giving the widest interpretation to that flexible approach—to ignore or 10 overlook the unsatisfactory legal process adopted by the plaintiff here. The opportunities for bringing an action for purely declaratory relief as permitted by O.15, r.16 must now be regarded as circumscribed by the general rule in *O'Reilly's case* (7) as also the corresponding "innovation" introduced in 1883 by the former O.25, r.5, which was endorsed by 15 Lindley, M.R. in *Duke of Bedford* v. *Ellis* (1) ([1899] 1 Ch. at 515) and the court should be careful always to guard against improper procedures initiating proceedings.

The reasons (if any) for the delay in the institution of these proceedings and in its progression to a hearing have not been explained. In the context 20 of delay in bringing proceedings for judicial review, O.53, r.4 is explicit and the current practice is described in the notes to that rule in 1 *The Supreme Court Practice 1995*, para. 53/1–14/31, at 865–866. Mr. Beloff has also complained on behalf of the defendant that, by the deployment of the originating process for the purposes of this application, the 25 requirement for promptitude for which r.4 provides has been bypassed altogether by the plaintiff. He submitted (amongst other reasons) that a challenge to the Social Assistance Scheme which appears to have been in existence since 1988 ought to have, and could have, been made years ago, and that public authorities are entitled to know as soon as possible if their 30 laws or practices are being challenged as contrary to law. In connection with the need for promptness, and the desirability of instituting proceedings for judicial review as compared with an action for declaratory relief commenced by writ or originating summons, Lord Diplock, in *O'Reilly* v. *Mackman* (7), stated also ([1983] 2 A.C. at 281): 35

> "The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the 40 decision."

Later he added (*ibid.*, at 283–284):

> "So Order 53 since 1977 has provided a procedure by which every type of remedy for infringement of the rights of individuals that are entitled to protection in public law can be obtained in one and the 45

same proceeding by way of an application for judicial review, and whichever remedy is found to be the most appropriate in the light of what has emerged upon the hearing of the application, can be granted to him. If what should emerge is that his complaint is not of an infringement of any of his rights that are entitled to protection in public law, but may be an infringement of his rights in private law and thus not a proper subject for judicial review, the court has power under rule 9(5), instead of refusing the application, to order the proceedings to continue as if they had begun by writ. There is no such converse power under the R.S.C. to permit an action begun by writ to continue as if it were an application for judicial review; and I respectfully disagree with that part of the judgment of Lord Denning M.R. which suggests that such a power may exist; nor do I see the need to amend the rules in order to create one.

My Lords, at the outset of this speech, I drew attention to the fact that the remedy by way of declaration of nullity of the decisions of the board was discretionary—as are all the remedies available upon judicial review. Counsel for the plaintiffs accordingly conceded that the fact that by adopting the procedure of an action begun by writ or by originating summons instead of an application for judicial review under Order 53 (from which there have now been removed all those disadvantages to applicants that had previously led the courts to countenance actions for declarations and injunctions as an alternative procedure for obtaining a remedy for infringement of the rights of the individual that are entitled to protection in public law only) the plaintiffs had thereby been able to evade those protections against groundless, unmeritorious or tardy harassment that were afforded to statutory tribunals or decision-making public authorities by Order 53, and which might have resulted in the summary, and would in any event have resulted in the speedy disposition of the application, is among the matters fit to be taken into consideration by the judge in deciding whether to exercise his discretion by refusing to grant a declaration; but, it was contended, this he may only do at the conclusion of the trial.

So to delay the judge's decision as to how to exercise his discretion would defeat the public policy that underlies the grant of those protections: viz., the need, in the interests of good administration and of third parties who may be indirectly affected by the decision, for speedy certainty as to whether it has the effect of a decision that is valid in public law. An action for a declaration or injunction need not be commenced until the very end of the limitation period; if begun by writ, discovery and interlocutory proceedings may be prolonged and the plaintiffs are not required to support their allegations by evidence on oath until the actual trial. The period of uncertainty as to the validity of a decision that has

> been challenged upon allegations that may eventually turn out to be baseless and unsupported by evidence on oath, may thus be strung out for a very lengthy period, as the actions of the first three appellants in the instant appeals show. Unless such an action can be struck out summarily at the outset as an abuse of the process of the court the whole purpose of the public policy to which the change in Order 53 was directed would be defeated."

I am satisfied that the institution of these proceedings by notice of originating motion for purely declaratory relief in the terms sought therein, without explanation of the delay that occurred before their institution in February 1993, and brought for the purpose of challenging matters of public law and administration, was an inappropriate procedure, tardily adopted, which in consequence has embarrassed the defendant and makes it almost impossible for this court to identify and determine the real issues in dispute between the parties. For all the foregoing reasons and in the exercise of my discretion, I have no doubt that this application of the plaintiff ought not to be allowed by the court.

Mr. Beloff raised correlated objections to the proceedings under the headings of "*Locus standi*" and "Capacity." The question of *locus standi* goes to the jurisdiction of the court. It was an objection which I think Mr. Beloff had no alternative but to make having regard to the remarks of Woolf, L.J. which he cited from *R.* v. *Social Services Secy., ex p. Child Poverty Action Group* (9) ([1990] 2 Q.B. at 556). It seems to me likely that the late application to add Mohamed Sarsri and Azdin Mesloh as parties to the proceedings was intended to give the flavour of a more representative action. The courts have always reserved the right to be satisfied that an applicant had some genuine *locus standi* to appear before them. He had to be either, for example, a "person aggrieved" or having a particular grievance, a specific legal right or a "sufficient interest." It seems to me that these two individuals have every right, if so advised, to bring individual claims to enforce against the Government any directly effective rights they may have under the Regulation. But they have not been shown to have any sufficient interest in the relief being claimed either as individuals or in their capacity as officers of the Association.

The only evidence before me concerning the purpose and status of the Association is contained in the affidavit of Mohamed Sarsri who describes himself as "President of the Gibraltar Moroccan Workers Association c/o Victoria Stadium, Gibraltar" and states: "On behalf of the members of the plaintiff Association correspondence has been exchanged with the Government to try and negotiate a better standard of living and a brighter secure future for the Moroccan worker." In his affidavit in reply, Mr. Montado deposes: "Mr. Sarsri has not exhibited the documentation he refers to in his . . . affidavit and I make no comment in respect of the general statement he makes . . . ."

Had these proceedings been properly brought under O.53 by way of judicial review, it would have been essential at the outset to satisfy r.3(7) which precludes the court from granting leave to apply "unless it considers that the applicant has a sufficient interest in the matter to which the application relates." Therefore it would have been essential, in my judgment, to describe the status and define the purposes of the Association so as to show that it has "sufficient interest," and with regard to the individuals Mohamed Sarsri and Azdin Mesloh to demonstrate that they had been or were being directly affected by the policies and/or the administrative practices of the Government to the extent of discrimination of one or more of the kinds complained of. But it seems clear to me that no such "sufficient interest" on the part of the Association can be said to exist on the evidence before this court. As regards capacity, I see no reason to ignore the guidance provided by Auld, J., in *R.* v. *Darlington B.C.*, *ex p. Darlington Taxi Owners Assn.* (8).

So it has not been shown that the Association has the capacity to sue, and it seems to me that it lacks the necessary capacity to do so. As regards the President and the Secretary of the Association, it has not been alleged that they have been the victims of discrimination at the hands of the Government of Gibraltar. As to whether they have any general or public interest of sufficient quality or degree is still wholly unclear. I am left in considerable doubt that they have as much interest in the proceedings as the persons whom they claim to represent. I am not satisfied that they would ever have succeeded in establishing the necessary "sufficient interest" to enable a court to grant leave to apply for judicial review. I find myself unable even to conclude that their interest, or that of the Association, has been shown to be such as to qualify them to institute and continue proceedings in accordance with O.15, r.12, the critical words of which appear at the commencement of para. (1): "Where numerous persons have the same interest in any proceedings . . . ." These, I think, relate back to the decision of the House of Lords in *Duke of Bedford* v. *Ellis* (1), upon which Mr. Finch relied and in which it was said by Lord Macnaghten ([1901] A.C. at 8) that "given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent."

Those words were considered and approved as correctly describing the test some nine years later in *Markt & Co. Ltd.* v. *Knight Steamship Co. Ltd.* (5). That was a case where Markt & Co. and one other firm of merchants with cargo aboard the same vessel both instituted proceedings by writ for damages against the owners of the vessel arising from her sinking by a Russian warship. The plaintiffs' solicitors (who were the same in both actions) made it clear that their clients were claiming on behalf of themselves and on behalf of 44 other listed persons, firms and companies having cargo that had been aboard the vessel when she went

down. An application was made by the defendant to strike out so much of the writs as referred to parties other than the two plaintiffs themselves. The Court of Appeal, reversing the decisions of both the master and the judge in chambers, agreed that the writs should be set aside, notwithstanding that it was contended that to expect each owner or shipper of cargo to have brought separate actions would have been oppressive and unnecessarily expensive.

The decision in *Duke of Bedford* v. *Ellis* (1) was considered and distinguished on the facts and in principle by Vaughan Williams and Fletcher Moulton, L.JJ. No doubt the sinking of the vessel gave rise to the common grievance that the goods of the various persons listed had been lost but it was found that there was no common origin of the claims, no right common to all of them in contract (such as the common statutory right in *Ellis's case*) nor (by reference to the destination of the cargo, it seems) a common purpose. It was held that there was no sufficient bond or connection uniting them except that they all happened to be owners or shippers of cargo lost aboard the same vessel at the same time by the same wrongful act, and that those on whose behalf the proceedings were being brought were insufficiently defined and not properly on the record. Significantly, Fletcher Moulton, L.J. said ([1910] 2 K.B. at 1034–1035):

> "If such an action as this could possibly go to trial the case of each firm whose name appears in the list would have to be gone into in order to ascertain the facts relating to it, so that the Court might be able to pronounce whether and why its name should be included in such list. In other words, it would not be a representative action at all."

Similarly, it seems to me that these proceedings are, from the point of view of *locus standi*, inept to the extent that a body of persons, hitherto undefined, and two individuals, unaffected directly by the matters complained of, have seen fit to mount a wholesale challenge comprising a variety of complaints and to seek declarations in general terms of varying and dubious benefit to others concerning the applicability of EC law.

In other words, it would appear that the circumstances are even less appropriate than they were in the *Markt* case (5). In my judgment, having regard to the matters contained in the various affidavits and the variety of applicable principles alleged, the proper way to test the legality of the Government's stance in any one or more of the desired areas of concern would be the timely commencement of properly formulated proceedings for judicial review. But I was asked to include in my judgment a consideration of the merits of the application regardless of the outcome of the preliminary submissions. To this aspect I now turn.

The Regulation

As I have said, arts. 40 and 41 of Council Regulation No. 2211/78 of September 26th, 1978 concerning the conclusion of the Co-operation Agreement between the EEC and the Kingdom of Morocco lie at the root

of these proceedings and there is no dispute that the Regulation is binding in its entirety and directly applicable in Gibraltar and that it confers directly effective private law rights upon individuals. There is, therefore, nothing to prevent any individual Moroccan worker from coming to this court at any time to assert his private law rights under those articles. The principal assertion of the applicants appears to be that the Government has failed to comply with those articles by active discrimination against Moroccan workers in the manner described (as regards employment) in Mohamed Sarsri's affidavit and (as regards matters of social security and other benefits) as described in that affidavit and in the other individual affidavits recently filed on behalf of the plaintiff.

Employment/working conditions/remuneration

As for discrimination in the field of employment, there appears to be none alleged as regards the working conditions and remuneration of Moroccans whilst actually in work in Gibraltar. The way in which Mr. Finch formulated his argument suggested the existence of what I think are two fundamental misunderstandings. In the first place, it appears to have been overlooked that Gibraltarians are EC nationals, whereas Moroccans are not and that Moroccan workers in Gibraltar are, in certain fields, being treated differently not only from them but also from other workers in Gibraltar who are not EC nationals. So as regards different treatment it is not as if the Moroccan workers in Gibraltar are necessarily in a class of their own. That may well be how it appears to them but it is important to realize that art. 48 of the Treaty—which confers upon workers the right of free movement between member states—must be interpreted as having application only to workers who are nationals of the member states. This seems to be implicit in the preamble and following articles of Council Regulation No. 1612/68 of October 15th, 1968 on Freedom of Movement for Workers within the Community, albeit perhaps not entirely clear from art. 48 of the Treaty itself. Thus, a more favourable position in that respect is conferred by EC law upon Gibraltarians and any other EC nationals but not upon Moroccans.

Secondly, it seems to have been assumed that art. 48 confers at least rights of employment and residence upon Moroccan workers resident in Gibraltar who have at some time been, but are no longer, employed in Gibraltar. That is, again, how it may appear, until one examines the provisions of art. 48 of the Treaty and Council Regulation No. 1612/68 and concentrates attention upon the proper interpretation of art. 40 of the Co-operation Agreement. It was submitted by Mr. Finch that a Moroccan who has become unemployed does not cease to be a "worker" for the purposes of the Co-operation Agreement and that the Government of Gibraltar discriminates against Moroccan nationals and in favour of Gibraltarians when they are seeking employment. He supports that submission by certain of the individual affidavits recently filed.

Mr. Beloff, on the other hand, argued that neither art. 40 nor art. 41 gives any right of access to employment, but only to rights of equal treatment whilst employment subsists. It does seem to me that the respective references in those articles to "working conditions and remuneration" and "Member States in which they are employed" of themselves lend support to that argument. It would (as he says) give rise to a ridiculous situation if the construction were otherwise, for it would have the effect of opening the floodgates to all those many non-EC nationals who could claim a right of access to employment in Gibraltar under the similar Co-operation Agreements concluded between the Community and, *e.g.* countries such as Algeria and Tunisia. He points out, correctly in my view, that because those articles are not subject to any of the stated exceptions contained in arts. 48.3 or 48.4 of the Treaty or art. 3.1 of Council Regulation No. 1612/68, it is to be implied that the Co-operation Agreement is not intended to govern such access. In this respect also, it appears that a Gibraltarian can lawfully enjoy, as an EC national, a more favourable position.

I have considered art. 7 of Council Regulation No. 1612/68 in particular, which is roughly equivalent (in its application to EC nationals) to art. 40 of the Agreement but I conclude that, even if it were an analogous provision, art. 7 was not designed to ensure that a dismissed employee can claim re-employment or that—in the event of unemployment—even an EC worker can claim reinstatement or re-employment by anyone other than the same employer by whom he was previously employed. I am persuaded that none of the articles 1–12 inclusive of Council Regulation No. 1612/68 is applicable in the circumstances of these proceedings by the Association for the following reasons.

As regards arts. 1–6 which relate to eligibility for employment, there is nothing upon which the Moroccan worker can rely to his advantage, because he is not a national of a member state of the EC. Articles 7–9 relating to equality of treatment do not assist him either, since those articles relate specifically to workers who are nationals of a member state and who are employed in the territory of another member state. They make provision for equality with regard to workers' treatment only whilst employed. Article 7 cannot, in my judgment, be taken to have any bearing upon the opportunity to obtain work—it is restricted to a worker's rights once he has obtained work. Articles 10–12 concern the rights of workers' families but the rights are purely derivative and flow exclusively through the worker himself. There is, in fact, nothing specific by way of complaint regarding working conditions or remuneration in Mohamed Sarsri's affidavit and I can find nothing in the first affidavit of Ernest Montado that can be said to be in conflict with EC legislation.

Likewise, I can find nothing in the other affidavits to suggest that any policy or practice of the Government has been applied unlawfully or appears to be unlawful *per se* in its application to the various deponents.

To the extent that certain of them tend to support the allegation in Mohamed Sarsri's affidavit that public sector jobs are allocated to Moroccan workers only after prior consideration has been given to Gibraltar/EC nationals and that private sector jobs are "usually refused out of hand"—meaning, I think, that employment permit applications are refused by the immigration authority—the complaints relate to access to employment and not working conditions or remuneration.

Accordingly, those complaints do not exemplify any breach by the Government of Gibraltar of its legal obligations as previously outlined. To the extent that the complaints relate to denials of permission to reside in Gibraltar, it is the family of a Moroccan worker which has been affected, not the employed Moroccan worker himself, and it has not been shown to my satisfaction that there has been any such breach committed. There appears to be no case, at least in recent times, where it is alleged that children of Moroccan workers, both of whose parents are lawfully resident in Gibraltar, have been denied residence here.

Social security

In his opening submission to the court, Mr. Finch contended that there are some 2,500 Moroccan workers in Gibraltar of whom about 700 are unemployed and who—unlike Gibraltarians—are given no entitlement to social security benefits beyond 13 weeks of unemployment benefit. This is a complaint that appears in rather general terms in the affidavit of Mohamed Sarsri. It is accepted by the Government that social assistance benefits of various kinds are payable on a discretionary basis only to Gibraltarians and certain other permanent residents but discrimination is denied on the basis that payment of such benefits to Moroccan workers is not obligatory under EC legislation. It is accepted that Moroccan workers employed in the public sector pay the same income tax and social security contributions as do Gibraltarians similarly employed but it is denied that their *statutory* entitlement to benefits is any less. However, it does appear that Moroccan workers are not considered to be eligible as beneficiaries under the discretionary Social Assistance Scheme that is now operated under administrative arrangements by Gibraltar Community Care Ltd. (a registered charity).

The Government contends that the scheme is "designed to provide financial assistance on a means-tested basis to Gibraltarians and certain other persons permanently residing in Gibraltar," that awards are made "at the discretion of the administration on the basis of a case-by-case consideration of individual need" and that such a discretionary scheme does not fall within the scope of art. 41 of the Regulation or art. 4.1 of Council Regulation No. 1408/71. In other words, it is said that the Government is entitled to opt in favour of, and rely upon, a discretionary scheme of its own choosing provided that the scheme does not contravene the applicable provisions of either of those two regulations. As regards

the "field of social security" mentioned in art. 41 and the specific "branches of social security" mentioned in para. 1 of art. 4, the practice of any discrimination is denied, both as a matter of fact and of law. Different treatment only arises, it is said, in relation to matters outside that field and outside those branches listed. It was for the plaintiff to prove to the contrary if these proceedings were to have any prospect of success but argument on that topic and precise factual information to support it has not been forthcoming or is, at best, wholly obscure.

As regards the destiny of national insurance contributions mentioned by Mr. Sarsri in his affidavit without reference to any source for his conclusion, I am satisfied from Mr. Montado's affidavit that none of those contributions is paid to the Employment and Training Board. There appears to be no ground of complaint that any specific Gibraltar legislation in relation to any of the branches of social security listed in art. 4.1 is discriminatory of its very nature. The plaintiff's case appears to be concerned with the discriminatory allocation of sums by way of the payment of benefits listed under art. 4.1 and the fact that certain of the benefits so listed are now only available (on an allegedly discriminatory basis) under the discretionary Social Assistance Scheme.

The vagueness of the allegations of discriminatory practice in Mohamed Sarsri's affidavit is met, adequately in my judgment, by the general points made by Mr. Montado in his affidavit. Any such allegations (if specific) ought to be made the subject of individual proceedings. What has perplexed me particularly in this area of the case is the inferential allegation that Moroccan workers are now being denied certain previously established rights to benefits of social security by the discriminatory operation of the administrative scheme. It may well be that such a scheme would be objectionable if and to the extent that it could be proved that it covers aspects of social security which truly fall within the ambit of art. 41 of the Regulation or art. 4.1 of Regulation No. 1408/71 and it is to that aspect of the case that I now turn.

Social assistance/social advantage

I am satisfied that the expression "social security" should be construed as having the same meaning in both those articles. This is clear from the cases of *Office Nationale de l'Emploi* v. *Kziber* (6) and *Yousfi* v. *Belgium* (11). Therefore the branches of social security that Gibraltar is *prima facie* obliged by both those articles to provide are those branches listed in art. 4(l)(*a*)–(*h*) of Regulation No. 1408/71. But under art. 4.4 the items of "Social and Medical Assistance" are excluded from that obligation. It seems to me that for an item to be classified as social security, it is a qualifying condition that the item should be made available "without any individual and discretionary assessment of personal needs, to recipients on the basis of a legally defined position" and, of course, it must concern one of the risks so listed: see *Hughes* v. *Chief Adjudication Officer*

(Belfast) (4), a decision of the European Court of Justice. The plaintiffs have not produced evidence to suggest that the benefits provided by Gibraltar legislation are not properly and duly administered by the Government or that the scheme is intended to provide supplementary, substitute or ancillary cover against risks covered by any of those branches listed in art. 4.1(*a*)–(*h*) so as to render Council Regulation No. 1408/71 applicable by virtue of para. 2A.

In any event, the Moroccan workers, like any other non-national of a member state of the EC, cannot claim entitlement to social assistance on the basis of equality with citizens and permanent residents of Gibraltar, because that regulation is not applicable to them under the terms of art. 2.1 unless they are "stateless persons or refugees"—which they are not. Nor can they claim entitlement to the same "social advantages" under art. 7.2 of Regulation No. 1612/68, because para. 1 of that article applies only to workers who are nationals of a member state; nor entitlement to the same rights in matters of housing as are accorded to national workers under art. 9.1, because the application of that paragraph also is restricted to workers who are nationals of a member state.

Family allowances

It was submitted by Mr. Finch on the basis of *Germany* v. *Sagulo* (3), as I understand it, that since family allowances were, prior to 1988, governed by the Social Security (Family Allowances) Ordinance and Family Allowances (Qualifications) Regulations of 1959, under which Moroccan workers are said to have had rights of benefit, it was quite wrong of the Government in 1988 to repeal that legislation and replace it only with an administrative scheme under which, despite art. 41.3 of the Regulation, those workers have no similar entitlement at all. However, the *Sagulo* case was one in which the fundamental right of freedom of movement was in issue and in which the European Court was concerned to ensure that no member state should adopt measures of its own in an attempt to diminish the full exercise of that right, being a right "guaranteed to EEC Nationals by Community Law (*e.g.* the right to enter and reside in a Member State for purposes set out in the Treaty)."

In my judgment, the submission of Mr. Finch is, on that basis, too wide, for any right of a Moroccan worker to family allowance was, in Gibraltar, statutory only and not of Community origin, nor was it of a kind that has been shown to be included by definition within art. 4.1(*h*) of Regulation No. 1408/71. Certainly a right to family allowances does exist under art. 41.3 of the Regulation. The only available evidence of a denial of that right appears to be that of Mohammed Mesbahi in his affidavit sworn on October 18th, 1994. The same averment is made generally, and also possibly on his behalf, in the affidavit of Mohamed Sarsri.

It is not alleged that the original family allowance legislation was itself discriminatory. What seems to be alleged is that now the operation of that

aspect of the scheme is discriminatory and of no benefit to any Moroccan worker because he is prevented from attaining the qualifying condition that both he and his wife must reside and be employed in Gibraltar. Mr. Montado states that, since the repeal of the legislation, access to family support assistance has been available to "permanent residents of Gibraltar, irrespective of nationality . . . on a means-tested basis," which I take to mean that access is non-discriminatory but limited to families who are lawfully resident in Gibraltar, as art. 41.3 requires. So it seems to me that any cause of action must depend on whether or not the residence/employment qualification is itself lawful under Community law. If it is lawful, there can be no complaint. If it is unlawful, Mohammed Mesbahi and any other aggrieved individual *may* have a cause of action himself. This raises in its acutest form the question whether the Moroccan worker and his family have any, and if so what, rights of residence in Gibraltar under EC/Gibraltar legislation.

Residence

No criticism of the Immigration Control Ordinance has been made in this case, nor was it criticized in *Begdoui* v. *R.* (2), where questions arose concerning the exercise of the power to order the removal of three adult male Moroccans from Gibraltar under s.59. A Moroccan worker has no right of residence in Gibraltar without a permit of residence duly issued under s.12, and he has no entitlement to a permit as of right. A permit is never for permanent residence. It may be cancelled at any time under s.20. There is criticism of the manner in which immigration policy is applied in practice in relation to Moroccan workers and family members. It takes the form of very general allegations in the affidavit of Mohamed Sarsri and more specific allegations made by Salah Rahmouni. The Ordinance favours not only Gibraltarians but also British Dependent Territories citizens having some connection with Gibraltar and certain employed British subjects and family members.

By their fourth proposed declaration, the applicants seek rights of residence in Gibraltar for Moroccan workers whilst they are employed here or are seeking work thereafter. There is, of course, strength in the submission of Mr. Finch that a Moroccan worker should enjoy a right to reside in Gibraltar whilst lawfully in employment here, subject always to the provisions of the Ordinance. The Government does not dispute that right for the worker himself. However, the plaintiff has not produced, and I cannot find, any principle of law as applied in the EC or in Gibraltar that could be said to confer or imply a right of residence in favour of any Moroccan or other non-national of the EC simply because he has had and is seeking employment.

It follows, I think, that there is nothing legally repugnant to be found in the propositions contained in Mr. Montado's affidavit. Articles 40 and 41 of the Regulation do not purport to bestow any right of residence upon

any person whether as a "working condition" or otherwise, and there seems to me to be no justification at all to give to the expression "working conditions" a meaning which includes a right of residence for a Moroccan worker or his family when he is seeking re-employment in Gibraltar or is otherwise not employed here. Indeed I consider that a limitation should be given to the ordinary and natural meaning of the words "workers of Moroccan nationality employed" in art. 41 and I cannot see that any violence is done thereby to the objects or purpose of the Regulation. Nor do I think that there is any analogy to be drawn between art. 40 and, for example, art. 48 of the Treaty or art. 7 of Regulation No. 1612/68 with respect to rights of residence both of which are silent as regards workers from outside the Community and seek only to place on a basis of equality nationals of member states.

The relief claimed

With regard to the various declarations claimed by way of relief, it was submitted that the court, in the exercise of its discretion, should not grant declarations that serve no useful purpose. Mr. Finch, on the other hand, seemed to suggest that the grant of declarations would serve to assist Moroccan workers in future individual claims by establishing—in their favour—the interpretation of the Regulation, and that the court should feel free to vary the wording of those which are being sought to accord with its findings. Even if the applicable laws had been shown to support the case for the plaintiff, the text of the declarations as they stand are in such general terms and so unconnected with adequately particularized and specific facts that they are incapable of producing any meaningful result, and would be so even if appropriate variation by the court were possible—except, perhaps, for the first proposed declaration which seems merely to recite what is already enshrined in art. 40 of the Regulation and to advocate its observance by the Government of Gibraltar.

The remainder contain no more than abstract propositions of dubious accuracy or what have been described as "imprecise assertions about the scope of the law." None of them would be capable of giving a just or adequate remedy to any of the general allegations contained in the affidavit of Mohamed Sarsri or of reflecting a fair and proper determination by this court of any of the slightly more specific allegations contained in the other individual affidavits. There is no question that a Moroccan worker is entitled to be treated without discrimination based on nationality as regards the rights he has under art. 40 or the rights which he and his family living with him have under art. 41, but questions such as whether he is a worker, what those rights are, whether those rights have been disregarded and whether he or members of his family have been victims of such discrimination are questions that, in my judgment, can only be resolved after proper consideration by this court of the full circumstances of his individual claim. For these reasons, I would in any

event have declined to grant relief by way of declaration in the manner proposed. Mr. Beloff submitted that what has been done is that the whole issue has been thrown at the court without any material upon which it might arrive at any reasoned or proper decision and I agree with him.

Findings

For the reasons I have given I hold that: (a) these proceedings are an abuse of the process of the court; (b) the Association has not been shown to have the capacity, and neither the Association nor either of its named officers has been shown to have the *locus standi* to bring these proceedings; (c) the plaintiffs' claim falls short of satisfying me that there has been any infringement of rights under the Agreement or to which there otherwise might be entitlement in EC law; and (d) declaratory relief of the kind proposed in this case neither is nor would have been an appropriate remedy.

The application must be dismissed accordingly.

Costs

Mr. Beloff, on instructions, indicated to me that the Attorney-General would not be seeking an order for costs against either the Association or its named officers as plaintiffs unless these proceedings were found to be financed from some outside source. Mr Finch indicated that these proceedings have been funded entirely by the Association and undertook to notify the Attorney-General should finance for this purpose ever be forthcoming from any outside source. On that basis, therefore, I shall make no order for costs to be paid to the defendant by the plaintiffs or any of them.

Applications dismissed.