

TALK TO ALBA

A1P1, EC LAW, THE RIGHT PURSUE A TRADE, BUSINESS OR PROFESSION

A. Introduction

1. The scope of protection offered by Article 1 Protocol 1 (“A1P1”), the right to peaceful enjoyment of property, has grown steadily. Cynics might ask why one would care. The further it is expanded out from core notions of property (homes, money, IP etc) into weaker or more abstract forms of property right (choices in action, legitimate expectations etc) the easier it becomes to justify interferences, even deprivations of the property in question. Given that it is notoriously hard to establish a breach of A1P1, at least outside a deprivation without fair compensation context, one may think such expanded scope is of no significance.
2. In fact scope questions are relevant for at least three reasons:
 - 2.1. First, the scope of A1P1 also determines the scope of parasitic provisions, most notably Article 14 (non-discrimination) and (lest it be forgotten) Article 13 (effective remedies) which, it should be remembered, operates wherever there is a plausible alleged violation of a Convention right.
 - 2.2. Secondly, the scope of A1P1 also affects the scope of “Strasbourg principles” or, taking the like EC protection of the right to property, of “Luxembourg” principles. Chief amongst these is everyone’s darling, proportionality and fair balance. But where they operate they displace domestic principles such as *Wednesbury* unreasonableness.
 - 2.3. Thirdly, such arguments they bring with them distinct remedial regimes and offer a basis to do what domestic administrative law does not permit, namely to attack primary legislation, whether directly (*EOC* declarations) or indirectly (purposive interpretation, declarations of incompatibility). So even if substantively the argument adds little to domestic law (e.g. because a wide margin of appreciation applies however one analyses the problem at hand), remedially it may have advantages.
3. What this (short) paper focuses upon is the different protection offered by domestic law, ECHR law and EC law at one particular edge of A1P1, namely the protection offered (if any) to the right to earn a living or pursue a particular trade, profession or line of business. As will be seen, the protection offered by A1P1 is uncertain (with domestic authority

seeking to row back A1P1) but may overlap with Article 8. EC law offers more assertive protection to the right to work and pursue a trade, that effectively analogises it to the weak protection offered to non-core property rights. If such protection is afforded it has considerable ramification for the amount of administrative and legislative instruments/decisions that are amenable to scrutiny using “European” administrative law, rather than domestic.

B. Article 1 Protocol 1 and goodwill / the right to earn a living

4. There is a distinction between existing possessions, which are protected by A1P1, and a future right to receive income or possessions, which as a general rule is not. However, the latter is subject to the qualification that a separate element of goodwill can amount to a possession (*Tre Traktörer Aktiebolag v Sweden* (1991) 13 EHRR 309) and the question therefore arises as to the boundaries of that qualification.

(i) Goodwill cases

5. Looking first at the Strasbourg cases in which professionals lost the right to practise through state action:

5.1. *Karni v Sweden* (1988) 55 DR 157 concerned a doctor who had the affiliation of his practice with the state social security system removed; his vested interest in that practice was held to be a possession.

5.2. *Van Marle v The Netherlands* (1986) 8 EHRR 483 concerned established accountants who were required by statute for the first time to register in order to continue to practise; their client base was held to be a possession. The ECtHR’s reasoning in *Van Marle* was as follows:

“41 ... the right relied upon by the applicants may be likened to the right of property embodied in article 1: by dint of their own work, the applicants had built up a clientele; this had in many respects the nature of a private right and constituted an asset and, hence, a possession within the meaning of the first sentence of article 1 ...

“42. The refusal to register the applicants as certified accountants radically affected the conditions of their professional activities and the scope of those activities was reduced. Their income fell, as did the value of their clientele and, more generally, their business. Consequently, there was interference with their right to the peaceful enjoyment of their possessions.”

5.3. A1P1 was also engaged in in *Wendenburg v Germany* (2003) 36 EHRR CD 154 in which the clientele of a law firm was held to be an asset.

- 5.4. In *Iatridis v Greece* (1999) 30 EHRR 97 it was held that the recurrent clientele of a cinema constituted goodwill protected by A1P1!
6. Domestically, a relatively restrictive approach was taken by the Court of Appeal in *R (Malik) v Waltham Forest Primary Care Trust* [2007] 1 WLR 2092 which concerned the suspension of Dr Malik, a GP, from the Trust's list of medical "performers". Although Dr Malik had a number of patients registered to him it was held that this had no economic value since pre-existing statutory restraints prevented him from selling any goodwill or patient lists to a third party. All that Dr Malik held was an intangible entitlement conferred by a licence to continue to follow an activity to his advantage and in the absence of some additional factor there was no possessory aspect to bring it within the ambit of A1P1. (Another powerful way to justify the result in *Malik* is surely that the state was Dr Malik's *customer* and a customer must always be entitled to withdraw its trade. That is not a direct attack on goodwill comparable to the state impeding a business's ability to trade with others).
7. The restrictive approach in *Malik* has been endorsed by Lord Bingham in *R (Countrywide Alliance) v Attorney General* [2008] 1 AC 719 at §21 at [35] where, in agreement with the Court of Appeal (see [114]) he held that the Strasbourg jurisprudence drew a distinction between goodwill and "future income, not yet earned and to which no enforceable claim exists". This is an uneasy and slender distinction, as the case of *Ian Edgar v UK* (Application 37683/97, Admissibility, 25 January 2000) which Lord Bingham cites for this proposition, demonstrates. *Edgar* concerned the handgun ban. How can it be seriously suggested that a handgun business had no "goodwill" (or cattle deboners whose A1P1 cases were dismissed on similar bases) and yet lawyers and cinemas do? They have repeat customers and repeat trade which no doubt they characterise in part as goodwill. It may be that future earnings overstates the value of the goodwill but it cannot be that there is no residual goodwill. Surely the question is whether or not there is a marketable business capable of reasonable valuation whose value is either removed or substantially affected by the intervention in question?
8. Lord Bingham went on to note that there had not actually been a finding in any of the Strasbourg cases in paragraph (i) above that the assets were saleable. Such reasoning is another way to explain *Malik* (as the goodwill was specifically not alienable under the scheme to which Dr Malik subscribed). However, Lord Bingham thought such "*may have been assumed*" in the Strasbourg cases, and although he did not find the jurisprudence to be clear, he considered that *Malik* had been correctly decided, based as it was on the

“convincing analysis” of Mr Kenneth Parker QC (as he then was) in *R(Nicholds) v Security Industry Authority* [2007] 1 WLR 2067 at §§70-76.

- 8.1. In *Nicholds* the Judge drew a distinction between goodwill as an asset with a monetary value (which would be protected by A1P1), and an expected stream of income which for organisational reasons either could not be or is not capitalised (which would not be protected).
 - 8.2. Turning to licences, the Judge in *Nicholds* found that where they could be marketed for consideration they would be assets, for example milk quotas or Ofcom spectrum licences which could permissibly be leased or sub-licensed.
 - 8.3. However, there would also be licences which were neither marketable nor obtained at a “market” price, and although they had a value to the holder (because without them he could not carry on licensable activities), they would not be assets in the sense required by A1P1. (Such analysis neatly explains that most difficult case *Tre Traktor* because liquor and premise licenses are typically marketable, even if a process has to be gone through for the new operator to show that they are “fit and proper”).
 - 8.4. *Nicholds* concerned door supervisors who were disqualified from working by a new licensing regime and was considered with four other cases by the Divisional Court in *Security Industry Authority v Stewart* [2009] 1 WLR 466 in which Laws LJ also observed at §45 that the initial permission to work as a door supervisor which had effectively been removed by the new regime was extremely unlikely to qualify as a possession for A1P1 purposes.
9. Taken in the round such case-law is thus curiously incoherent. It suggests that any business asset or collection of assets that is alienable and capable of valuation, including goodwill, is protected by A1P1, even if projected future income streams (insofar as they are not valued by goodwill) are not. In turn such reasoning suggests that to the extent that statal measures directly interfere with a business’ realisable market value it engages A1P1, yet in cases such as *Edgar* (where the ban on handguns rendered valueless successful handgun dealerships) the ECtHR has specifically resisted coming to this conclusion.
- (ii) Licence cases
10. Equally, this case-law shows that whether the goodwill and future earnings of a business or practice has protected A1P1 elements is intimately connected with the separate but

related question of whether licences or permissions that is has are protected. Again the case law is not altogether easy to parse. Road transport licences illustrate the point well.

11. First in Crompton t/a David Crompton Haulage v Department of Transport, North Western Area [2003] EWCA Civ 64 it was held that a road haulage operator's licence was a possession for the purposes of A1P1 but there seemed to be little argument of the point. Auld LJ declined to follow Crompton because of the lack of argument on the point, and because it was clear that the goodwill in the business was a protected asset in any event (so that the distinction was academic): see [45].
12. Similar questions also arose in R (Royden) v Wirral Metropolitan Borough Council [2002] EWHC 2484 in which Sir Christopher Bellamy QC held that for three reasons the hackney carriage licence at issue was not a protection which fell to be protected by A1P1.
 - 12.1. Firstly the Judge cited decisions of the European Commission on Human Rights in which it had been stated that the protection of A1P1 depended in part "*on whether the licence gives rise to a reasonable and legitimate expectation of continuing benefits from the exercise of the licensed activity*"; therefore if the licence was withdrawn in accordance with the law in force or because the conditions were not met, there would be no protection (see Pudas v Sweden (1988) 10 EHRR 380, Gudmundsson v Iceland 21 EHRR CD 89 and Zacher v Germany (1996) 22 EHRR CD).
 - 12.2. Secondly he applied by analogy the reasoning of the Irish High Court in Gorman v Minister for the Environment and Local Government [2001] 2 IR 414 in which although such a licence might be a valuable property right, it was also a right which was subject to the qualification that it was at all times subject to conditions created by law. Bellamy QC stated at §143 "*The "property" in the licence was, therefore, inherently subject to the possibility of [de-regulation or 'de-restriction'] occurring. On this view, there is no "interference" with the property, since the possibility of 'de-restriction' occurring was always intrinsic to the "property" itself.*" Such reasoning tends to create distinctions between "private licences" (e.g. a concession to mine some land) and "public licences" (e.g. a telecoms licence) that is both questionable and problematic, particularly where substantial sums have been paid for both.
 - 12.3. Finally, the Judge at §144 cited the fact that the premium value of the licences arose not from the efforts of the holders to build a reputation or establish a clientele, but an artificial value created solely by the previous policy of the

licensing authority. But again such argument *may* be circular. The business may have had to *pay* a premium to acquire the licence, precisely because of the policy of artificial scarcity.

13. These cases illustrate the nice distinctions that have been applied to the question of whether a licence can itself constitute a possession. Little is discernible from the wider case-law other than that licences constituting “public authority” may or may not constitute possessions depending upon the detail and conditions of the licensing scheme in question. In this respect there is some similarity to the somewhat instrumental approach taken to the classification (or not) of non-contributory benefits. The argument that in particular does not convince is the “de-restriction” or “possibility of reform” argument as a general answer to the creation of property rights. It is one thing to say that, upon the express terms of licence, it has ceased or been duly terminated without A1P1 consequences (on Wilson type argument). It is another to analogise to this general legislative change or a wide/unfettered power of discretionary amendment,

(iii) Self Employment

14. There has been some debate as to whether the livelihood of a self-employed person occupies some middle position between protected goodwill and unprotected future income. The Inner House of the Court of Session in Scotland in Adams v Scottish Ministers 2004 SC 665 held that it does, likening it at §97 to the licensing of the restaurant in Tre Traktörer and to the situations in Karni and Van Marle. Adams was the Scottish analogue to Countryside Alliance, that is a challenge on human rights grounds to hunting legislation introduced in Scotland. The Divisional Court in R (Countryside Alliance) v Attorney General [2005] EWHC 1677 (Admin) disagreed with the finding of the Inner House, and at §174 accepted the submissions of counsel for the defendants set out at §169:

“A self-employed person may or may not have marketable goodwill. If he does, it will be a possession. If the livelihood of a self-employed person is in truth no more than his (unmarketable) personal ability to earn future income, that is not a possession.”

The approach of the Divisional Court was expressly approved when the case reached the Court of Appeal ([2007] QB 305 at §114), which stated that “*future income does not qualify .. unless an enforceable claim to future income already exists*”. The House of Lords did not grapple with the issue. Lord Bingham observed that “*certain of the claimants have suffered loss of control over their possessions*” and went on to cite a number of examples. Where he referred to individuals who were self-employed it was either in the context of them being unable to use their possessions, such as the equipment

of a farrier, or those who owned their own businesses “*which have lost their marketable goodwill*” (emphasis added). Baroness Hall observed that “*All sorts of laws may ... affect the profits of the self-employed ... They do not in my view usually have to be justified under article 1 of the First Protocol, although that should not be difficult*”. Whilst their lordships differed as to whether there had been deprivation of possessions, all agreed there had been some limitation on control of possessions but concluded that such limitation was justified. It seems clear then that whether the income of self-employed people is protected will come down to the specific facts of any particular case, in particular whether they have a marketable business.

15. The question of loss of livelihood also arose in *Sidabras v Lithuania* (2006) 42 EHRR 6 which concerned two former KGB officers who as a result of their earlier occupation were debarred from a wide range of public and private sector employments. The ECtHR found (§§62-63) that there had been a breach of Article 14 taken in conjunction with Article 8, but did not consider it necessary to address whether there had been a violation of Article 8 taken on its own. Lord Bingham said that the claimants in *Countryside Alliance* could not be brought within the decision in *Sidabras* since it was “*a very extreme case on its facts*” and “*Effectively deprived of the ability to work, the applicants’ ability to function as social beings was blighted*” (§15). The position of the claimants in the *Countryside Alliance* case was “*not at all close*” since they were all still able to gain employment, albeit not in roles linked to the hunting industry. It seems likely that the circumstances in which *Sidabras* can be relied upon in the domestic courts are likely to be only extreme examples; Sullivan J in *R (Mehmet) v London Probation Board* [2007] EWHC 2223 (Admin) at §13 suggested that it would require a claimant being “*unable to find any work whatsoever*”.

(iii) Conclusion

16. This A1P1 and Article 8 case-law is not altogether happy, whether at the ECtHR level or domestically. It leads to some entirely unprincipled distinctions (some of them acutely remarked upon by Kenneth Parker QC in *Nicholds*). Depending upon the exigencies of the business and the manner in which it is regulated, factors that might be entirely adventitious, protection may or may not be afforded. So a solicitor’s practice will receive A1P1 protection because of alienable goodwill, as will a haulage company’s business, but a barrister’s practice and taxi cab driver’s will not because of the way those professions or livelihood’s are structured. And at time the distinctions drawn between goodwill and future earnings, between protected and unprotected licences, between business and self-employment do not seem to lead to principled results.

17. Moreover, distinctions may have to be made between extant businesses and start up businesses. To a degree this is understandable but is it not a matter that should be picked up in assessing the *extent* of any interference or a relevant right rather than whether there is something deserving of protection in the first place; in short, is it not more properly a factor for the proportionality balance? Such reasoning has produced (at times) unhappy distinctions in other branches of domestic law (e.g. in the old gambling licence cases and fair hearing rights). And it is ultimately unprincipled as there is no good reason to suppose that AIP1 would offer no protection to a party wishing to acquire property but who or which is precluded from doing so (the Nazi laws spring to mind as obvious examples) – a law preventing X from holding or acquiring property would surely at least engage AIP1.
18. All of these unhappy distinctions are removed should one recognise as allied or subsidiary economic rights the right to pursue a trade, business or profession/occupation. AIP1 may be an unhappy vehicle for such a development, not least because in some instances regulatory change will end businesses without there being a “taking” (more a “destruction” in the public interest) such that the general requirement for compensation seems implausible. “Interferences”, by contrast, are readily assimilable, a fact that may go some way to explaining why the *Edgar* type cases are kept outside AIP1’s scope but in other areas the logic of such cases is not followed.

C. ECJ jurisprudence and developments

(i) ECJ case-law

19. By contrast the right to pursue a trade, business or profession is well recognised as a fundamental freedom in EC law, very much as an ally or adjunct to the protection of property rights, but in a way unfettered by the “3 rules” from *Sporrong*. So:

“... both the right to property and the freedom to pursue a trade or profession form part of the general principles of Community law. However those principles do not constitute an unfettered prerogative, but must be viewed in the light of the social function of the activities protected thereunder. Consequently the right to property and the freedom to pursue a trade or profession may be restricted, particularly in the context of a common organization of the market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and that they do not constitute a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed” (Case 265/87 *Schröder v Hauptzollamt Gronau* [1989] ECR 2237 at §15. See also Case 5/88 *Wachauf* [1989] ECR 2609 §18 and Case C-177/90 *Kühn v Landwirtschaftskammer Weser-Ems* [1992] ECR I-35 §16).

20. Two recent cases typify this approach. First up is Case C-210/93 Swedish Match [2005] 1 CMLR 26, yet another public law case concerning oral snuff. At [72]-[74] the ECJ explained the operation of this right as follows:

“72 According to the case law of the Court, the freedom to pursue a trade or profession, like the right to property, is one of the general principles of Community law. Those principles are not absolute rights, however, but must be considered in relation to their social function. Consequently, restrictions may be imposed on the exercise of the freedom to pursue a trade or profession, as on the exercise of the right to property, provided that the restrictions in fact correspond to objectives of general interest and do not constitute, in relation to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed.

73 The prohibition on the marketing of tobacco products for oral use laid down in Art.8 of Directive 2001/37 is indeed capable of restricting the freedom of manufacturers of such products to pursue their trade or profession, assuming that they have envisaged such marketing in the geographical region concerned by that prohibition. However, the operators' right to property is not called into question by the introduction of such a measure. No economic operator can claim a right to property in a market share, even if he held it at a time before the introduction of a measure affecting that market, since such a market share constitutes only a momentary economic position exposed to the risks of changing circumstances. Nor can an economic operator claim an acquired right or even a legitimate expectation that an existing situation which is capable of being altered by decisions taken by the Community institutions within the limits of their discretionary power will be maintained.

74 As stated above, Directive 2001/37 pursues an objective in the general interest by ensuring a high level of protection of health in the context of the harmonisation of the provisions applicable to the placing on the market of tobacco products. It does not appear, as indicated at [58] above, that the prohibition laid down in Art.8 of that directive is inappropriate to that objective. In those circumstances, the obstacle to the freedom to pursue an economic activity constituted by a measure of such a kind cannot be regarded, in relation to the aim pursued, as a disproportionate interference with the exercise of that freedom or with the right to property. “

21. Similar reasoning was employed in Case C-154/04 R (Alliance for Natural Health et al) v SS for Health [2005] 2 CMLR 61 concerning the Directive banning certain health food supplements. A challenge based in part on the right to trade was rejected in these terms:

128 Nevertheless, their right to property is not called into question by the introduction of such a measure. No economic operator can claim a right to property in a market share, even if he held it at a time before the introduction of a measure affecting the market, since such a market share constitutes only a momentary economic position exposed to the risks of changing circumstances. Nor can an economic operator claim an acquired right or even a legitimate

expectation that an existing situation which is capable of being altered by measure taken by the Community institutions within the limits of their discretion will be maintained.

129 *As has been stated above, the prohibition arising from Arts 3, 4(1) and 15(b) of Directive 2002/46 is intended to protect human health, which is an objective of general interest. It is not evident that the prohibition is inappropriate in relation to that objective. In those circumstances, the obstacle to the freedom to pursue an economic activity which a measure of that kind represents cannot be found, in the light of the aim pursued, to constitute a disproportionate impairment of the right to exercise that freedom or to the right to property."*

22. This reasoning is not new. The ECJ has made clear that the right does not extend to “*the protection of mere commercial interests or prospects, the contingent character of which is inherent in the very essence of economic activity*” (Case C-4/73 *Firma J Nold KG v Commission* [1974] ECR 491 at §14). The changing nature of business success was also a factor in Case C-280/93 *Germany v Council* [1994] ECR I-4973 the source at [79] of the “*No economic operator can claim a right to property in a market share*” language in the *ANH* case. This principle of contingency or future circumstances is thus in line with the domestic jurisprudence considered above in which only vested interests attract A1P1 protection.

23. Such wide justificatory reasoning applies with equal if not greater vigour to Community instruments (subsidiarity notwithstanding). Thus:

23.1. In Case 116/82 *Commission v Germany* [1986] ECR 2519 the business of wine makers was threatened by rules relating to the processing of grapes. It was held that since the objective of the relevant legislation was in particular the policy of quality in wines, any interference with that fundamental freedom was justified.

23.2. Achievement of a Community objective was also held to be a justification in Joined Cases C-37/02 and C-38/02 *De Lenardo Adriano SRL v Ministero Del Commercio Con l'Estero* [2004] ECR-I 6911 which related to banana import quotas. In addition, at §85 the ECJ found it relevant that the applicable legislation did not go so far as to “*impair... the very substance of the right to freedom to pursue a trade or profession*” (emphasis added). This requirement for the interference to strike at the very heart of the right can be allied to the approach of the domestic courts when they have considered *Sidabras* as set out in paragraph 15 above; a mere impact on the ability to pursue a trade or profession does not appear to be sufficient.

24. Protection does not extend to profit which does not derive from the assets or occupational activity of the person concerned. Case C-44/89 *Von Deetzen v Hauptzollamt Oldenburg* [1991] ECR I-5119 concerned quotas conferred on farmers to enable them to recommence milk production having suspended it under a previous Community scheme. The fact that they were not allowed to transfer those quotas to purchasers or lessees of their holdings was not a breach of their right to property. The rule reflected the concern to prevent farmers receiving such allocations when they had no intention of resuming milk production but merely intended to make a profit from the quota; it was therefore justified by an aim which was in the general interest.

(ii) The Charter

25. The fundamental right was more recently incorporated into the Charter of Fundamental Rights of the European Union proclaimed at Nice on December 7, 2000 [2000] OJ C364/1 which contains the following relevant provisions:

Article 15
Freedom to choose an occupation and right to engage in work

1. Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.

2. Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.
3. Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union.

Article **16**
Freedom to conduct a business

The freedom to conduct a business in accordance with Community law and national laws and practices is recognised.

Article **17**
Right to property

1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law insofar as is necessary for the general interest.
2. Intellectual property shall be protected.

Although the charter is not legally binding on the ECJ, its principal aim:

“... as is apparent from its preamble, is to reaffirm ‘rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of Europe and the case law of the court ... and of the European Court of Human Rights’” (Case C-540/03 Parliament v Council [2006] ECR I-5769).

26. That said, as yet there do not appear to have been any cases that have referred substantively to the above articles of the Charter (though many others have been referred to, particularly in AG Opinions).

(iii) Practical significance of the EC rights

27. To return to the initial theme, what then is the practical significance of the general EC law right, if (a) it is not itself a Treaty right or directly effective right derived from a Directive; (b) is so very weak in the face of any public interest challenge; and (c) does not replicate one of the few “hard edges” of A1P1, namely the general right to compensation in cases of genuine deprivation of property?
28. The true answer is that whilst the scope of application of the right is probably wide (it takes little to find a “community dimension” sufficient to engage the directly effective general principles of law in a business context – pretty much any activity can be analysed

in a potential provision/receipt of services as *Countryside Alliance* amply demonstrates) its hard edges are few as against legislative or general measures of the kind considered above. In this respect the right to trade/pursue a business or occupation is no better or worse than A1P1.

29. But it would be wrong to write the right off entirely, particularly when dealing with discretionary administrative action. In my view it is reasonable to expect that:

29.1. The right will have utility in assessing questions of legality/legal certainty/authorisation. When fundamental rights are engaged the Courts do expect higher standards of precision and authorisation and may be more inclined to find/uphold legitimate expectations.

29.2. The right will provide a valuable gateway to and context for discrimination arguments where such can properly be mounted.

29.3. Most importantly, in those rare cases where egregiously disproportionate administrative action is taken that impacts upon a party's livelihood (*ex parte Hook* is a hoary old chestnut of an example), then such right may also provide a gateway to improved remedies, including financial remedies (a state liability claim under *Factortame* principles). Such may be of real concern and practical interest in regulatory or disciplinary context (e.g. Financial Services, GMC regulation, legal regulation, sports sanctions) all of which has a strong European/cross-border dimension. Were Dr Malik from France, or even an UK citizen that had worked in France, his case might have been susceptible of a very different analysis, precisely that that Auld LJ refused to countenance at [35] in *Malik*.

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