

GIBRALTAR AND THE EUROPEAN PARLIAMENT ELECTIONS BEFORE THE EUROPEAN COURT OF JUSTICE

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Abstract: *The judgment under study (ECJ - judgment of September 12, 2006, Spain/United Kingdom, C-145/04) concerns the controversy between Spain and the United Kingdom on the sovereignty of Gibraltar and affects the legal status of Gibraltar in the European Union. The point of departure for this study stems from the adoption by the United Kingdom of the European Parliament (Representation) Act –EPRA 2003, in order to comply with the judgment of the ECHR in the case of Matthews vs UK, 1999. Spain points out that its action covers solely elections as they are held in Gibraltar and not the United Kingdom's recognition of the right to the so-called Qualifying Commonwealth Citizens (QCCs) residing in its territory to vote for the European Parliament. The ECJ dismissed the action of Spain. In our opinion, a Spanish argument focused on the limitations of the annex I of the Act concerning the election of the representatives of the European Parliament by direct universal suffrage (1976) would have been able to direct the arguments of the parties and the foundations of the ECJ to a different ending.*

Key words: *European Parliament – Elections – Right to vote – Gibraltar – Citizenship of the Union, Commonwealth.*

I. Introduction

Gibraltar holds an unusual position within the European Community/European Union (EC/EU), being a non-autonomous territory that is dependent on a Member State, the United Kingdom. It is also well-known that a controversy has existed between Spain and the UK concerning Gibraltar as a territory that is under British sovereignty since the Treaty of Utrecht in 1713, and that nowadays it is the subject of negotiations between the two nations with respect to the United Nations decolonisation process.

The unusual idea of Gibraltar as a non-autonomous territory meant that the United Kingdom initially excluded

Gibraltar from the European elections, according to the terms of Appendix II of the Act relating to the election of Members of the European Parliament by direct universal suffrage [1] (hereafter, the 1976 Act).

Two judgments by European courts have examined this situation from different perspectives, leading to regulatory reforms that have changed this political and legal scene, while creating a regulatory framework that is the subject of judicial controversy. In fact, the judicial decisions made by these European courts have allowed Gibraltar to take part in the European Parliament (EP) elections in 2009.

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Thus, on the one hand we have the *Matthews* judgment of the European Court of Human Rights in Strasbourg [2]; and on the other hand, the *Spain/United Kingdom* judgment of the European Court of Justice (ECJ) in Luxembourg [3].

On the 4th June 2009 Gibraltar took part for the second time in the European Parliament elections, included in the region of South West England. This change follows the proceedings of the British legislator in compliance with the *Matthews* judgment of the European Court of Human Rights in 1999, as a result of the appeal made against the United Kingdom by Mrs Matthews, of British nationality residing in Gibraltar. In this judgment, the European Court of Human Rights declared that the United Kingdom had infringed article 3 of the first Protocol of the European Convention on Human Rights (ECHR), by not having organised European Parliament elections in Gibraltar [4].

Consequently, in order to guarantee compliance of the European Court of Human Rights' judgment in the *Matthews* case, and faced with Spain's refusal to withdraw annex II of the 1976 Act [5], the United Kingdom issued a Declaration in which it assured that it would make it possible for the Gibraltar electorate to vote in the European Parliament elections as part of a constituency of the United Kingdom [6]. This Declaration, on the 18th February 2002, included the agreement reached between Spain and the United Kingdom, of which the Council and the Commission took note [7].

On the 8th May 2003, the United Kingdom adopted the European Parliament (Representation) Act 2003 (hereafter EPRA 2003), with the aim of guaranteeing the right of the Gibraltarians to participate in the European elections.

This study aims to analyse the judgment pronounced by the European Court of Justice in 2006 with respect to an appeal

made by Spain against this British Act relating to the European Parliament elections in Gibraltar, determined by the Spanish-British agreements of the Declaration of 2002.

2. Appeal Made before the European Court of Justice by Spain against the United Kingdom Due to Failure to Comply with the Law

The Act relating to electoral representation for the European Parliament elections (EPRA 2003) formed a basis for the appeal made by Spain against the UK in March 2004, due to failure to comply with EU law [8], in accordance with article 227 of the Treaty of the European Community.

Focusing on the analysis of the judgment of the ECJ on the 12th September 2006, Spain considered that the EPRA 2003 violated the Treaty of the European Community and the 1976 Act, and that the United Kingdom had not respected the commitments it made in the Declaration of the 18th February 2002.

The declarations presented by Spain in the appeal against the United Kingdom focused on two specific aspects:

Firstly, on the way in which the United Kingdom has organised the European Parliament elections in Gibraltar [9], giving the right to vote to nationals from other countries that are not EU citizens. This is the case of Commonwealth citizens that fulfil certain requirements (known as *Qualifying Commonwealth Citizens* or QCC [10]) and that reside in Gibraltar. For Spain this is a violation of EU law, upholding that a clear relationship exists between EU citizenship and the right to active and passive suffrage in the European elections.

Secondly, on the incorporation of the territory of Gibraltar, and not the Gibraltarian electorate, in the constituency of South West England, violating,

according to Spain, the 1976 Act, whose Annex I (in the current version) obliges the United Kingdom to only apply the corresponding regulations within its own territory, consequently excluding Gibraltar. Spain likewise considers this to be a clear breach of the commitments made by the United Kingdom in its Declaration in 2002.

3. EU Citizenship and the Right to Vote in European Parliament Elections

If we focus on the first plea in law, the following arguments are those upon which the Spanish government based its appeal that the EPRA 2003 was contrary to EU law as a result of giving the QCCs resident in Gibraltar the right to vote in the European elections: Spain declares that articles 17, 19, 189 and 190 of the Treaty of the European Community, interpreted historically and methodically, only recognise the right to active and passive suffrage for EU citizens. Furthermore, Spain declares that due to the recognition of this right being a matter that depends on the EU, only EU law can make an amendment to its field of application *ratione personae* [11]. Likewise, Spain refuses the idea that rights that arise from EU citizenship can have different fields of application, as this would mean the breaking up of citizenry. The Spanish government supports its arguments with the Charter of Fundamental Rights of the European Union, in which article 39 refers to the citizens of the EU as holders of the right to vote and stand as a candidate at elections, understanding that this expression is not open to a country's own interpretation. The Spanish government also supports its argument through the Treaty establishing a Constitution for Europe, considering that the link between the right to vote in European Parliament elections and being a EU citizen is clearly stated in its articles.

For the United Kingdom, recognising the QCCs' right to vote is considered part of its constitutional tradition and, supported in this sense by the European Commission, it understands that the right to active and passive suffrage in the European elections may be extended to British nationals from other countries, since no EU law exists that opposes this idea [12]. Thus, the UK states that EU law does not have full control over the matters relating to the right to active and passive suffrage in the European elections, and that the 1976 Act does not define the categories of who holds this right, consequently understanding that this matter could be regulated by the EPRA 2003 [13]. Furthermore, the UK believes that not only EU citizens enjoy the rights conferred by the Treaty of the European Community [14], stating that the Treaty establishing a Constitution for Europe is established is not valid and that its regulations do not aim, at first sight, to exclude those nationals from other countries from the right to vote, nor to prescribe the way in which Member States must set the requirements for the right to vote.

According to the interpretation of the ECJ in this matter, in accordance with the law in force, the decision of who has the right to vote in the European elections is the responsibility of each Member State, while respecting EU law, adding later on that the articles of the Treaty referred to by Spain in its allegations are not opposed to the Member States recognising the right to active and passive suffrage of certain people that have a close tie to them and that are not actual nationals of the country in question or citizens of the EU that reside in their territory.

The European Court of Justice has stated that the idea behind the EU's statute of citizenship is to turn it into the fundamental statute of nationals of Member States, allowing those that find

themselves in the same situation to obtain, regardless of their nationality and without affecting the exceptions clearly anticipated to this respect, the same legal treatment; a statement that, for the Court itself, does not necessarily mean that the rights recognised by the Treaty are reserved only for EU citizens.

Finally, recognising that Britain's decision to concede the right of active and passive suffrage in the national elections and in those of the legislative assembly of Gibraltar to the QCCs that fulfil certain requirements is related to the constitutional tradition of the UK, the European Court of Justice understands that this country's decision to extrapolate to the European elections, organised in Gibraltar, the requirements established in its national regulations for being able to vote or be elected, in those other elections (national and for the legislative assembly of Gibraltar), does not go against EU law.

As a result, the European Court of Justice declares that Spain has not proved that the United Kingdom, by adopting the EPRA 2003, has infringed the aforementioned articles of the Treaty, and it considers that the first plea in law put forward by the Spanish government is unfounded.

4. The Creation of a Combined Constituency for the Territory of Gibraltar

We will now analyse the second plea in law put forward by the Spanish government, according to which the United Kingdom infringed the 1976 Act and the commitments made in the aforementioned Declaration of the 18th February 2002, by creating a combined constituency for the territory of Gibraltar.

As has been mentioned, in accordance with what is set out in Annex I of the 1976 Act, the United Kingdom cannot apply the regulations of this Act to Gibraltar [15].

Spain therefore considers that in order to ensure the *Matthews* judgment is complied with, as well as the terms of the Declaration of the 18th February 2002, the EPRA 2003 should have been limited to assigning the Gibraltar electorate to a British constituency. In other words, the United Kingdom should have included the Gibraltar electorate that are British nationals into an existing constituency, rather than the territory of Gibraltar as a whole, and to have done so without involving the authorities in the electoral proceedings [16].

However, the United Kingdom considers the contents of the EPRA 2003 to be in accordance with the 1976 Act, since the latter should be interpreted in accordance with the fundamental rights, as is recognised and guaranteed in the European Convention on Human Rights (ECHR) and interpreted by the European Court of Human Rights in the *Matthews* judgment. Furthermore, the UK declares that it has respected its commitment to ensure that the necessary alterations were introduced in order to allow the Gibraltar electorate to participate in the European Parliament elections under the same conditions as the electorate of any existing constituency in the United Kingdom, extrapolating its legislation to Gibraltar and adapting the requirements, *mutatis mutandis*, to the Gibraltar electorate [17].

Similarly, the ECJ considers the United Kingdom to have acted in line with the *Matthews* judgment, rejecting Spain's declaration. Furthermore, as regards the inclusion of Gibraltar in an existing constituency in England, the ECJ reminds us that by organising the voting in this way, the UK manages to place the Gibraltar electorate in a situation that is similar to that of a voter in the UK, without having to face obstacles arising from the legal system of Gibraltar that may not

allow them to use their right to vote, or that may dissuade them from doing so.

In relation to the second plea in law put forward by the Spanish government, the ECJ declares that this is also unfounded and does not provide sufficient reasoning[18].

Consequently, the ECJ decided to reject the appeal made by the Spanish government against the United Kingdom, while ordering Spain to pay the costs, and that the European Commission pays for its own costs.

5. Final Thoughts

In our opinion, the first plea in law set out by Spain in the appeal against the United Kingdom due to a breach of the law was not appropriately supported. Spain argues that by EPRA 2003 extending the right to vote to non-EU nationals residing in Gibraltar (like the QCCs), it has violated certain regulations of the Treaty of the European Community that, according to our government, link Union citizenship with the right to active and passive suffrage in the European Parliament elections.

However, we consider that if, by applying the *Matthews* judgment, Spain accepted the Gibraltarians' right (as Union citizens with British nationality) to vote in the European Parliament elections, perhaps the Spanish government should have based its first cause for appeal on the boundaries that can be applied to Annex I of the 1976 Act, one of them being the recognition of a fundamental right that the QCCs lack. Thus, the extension of the right to vote to non-EU nationals could not constitute an exception to the 1976 Act, since it would not have been imposed as a result of the need to guarantee the possibility of exercising a right of this nature.

Since the subject of the appeal is not the organisation of the European Parliament elections in the United Kingdom, but

rather the way in which the UK has organised the elections in Gibraltar, we understand that the legal basis upon which the accusation of violation of EU law should be based on Annex I of the 1976 Act. This Act excludes the territory of Gibraltar from the European elections, and not the violation of certain regulations of the Treaty that affect EU citizens.

The violation of Annex I of the 1976 Act would equally serve as a legal basis upon which the second plea in law could be based, meaning that the United Kingdom would have violated EU law by creating a combined constituency for the territory of Gibraltar, without taking into account the commitments it made in the Declaration of the 18th February 2002; a Declaration upon which the ECJ bases its justification of the extrapolation of the UK's regulations to the territory of Gibraltar, *mutatis mutandis*, and the recognition of the Gibraltar electorate's right to vote under the same terms as the electorate in the South West of England constituency.

Also in this case one could have argued that the unilateral declaration of a State cannot act as an exception to an original rule of law (Annex I of the 1976 Act).

However, the inclusion of the electorate and not the territory of Gibraltar (an idea upheld by the Spanish government), would have guaranteed the EU citizens' residing in Gibraltar right to vote in the European elections (whether they were British or nationals of other EU countries). Solutions do exist in order to ensure such a situation[19].

We must not forget that the exclusion of Gibraltar from the European Parliament elections complies with its international legal status. On a constitutional level, Gibraltar does not form part of the territory of the United Kingdom. It is a colony, and according to the Act relating to the terms of accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great

Britain and Northern Ireland, and to the adaptations of the Treaties, certain parts of the Treaty of the European Community do not apply to Gibraltar.

In summary, we believe that if the Spanish appeal before the European Court of Justice had focused more on the boundaries of Annex I of the 1976 Act, it would have led to other arguments before the ECJ, which may have given a different result to that of this judgment.

One must not forget that the judgment by the ECJ in 2006 has been that which, in short, has interpreted the specific electoral regulations established *ad hoc* for the European Parliament elections and the Declaration between Spain and the UK in 2002, thus allowing the British electoral law of 2003 to be applied. And by virtue of this British law, the Gibraltarians participated in the European elections on the 4th June 2009, the territory of Gibraltar having been included in the constituency of the South West of England.

Notes

1. Act annexed to Council Decision 76/787/CECA, CEE, EURATOM of the 20th September 1976. This annex was converted into annex I in the version modified by the Council Decision 2002/772/CE, EURATOM, of the 25th June 2002 and the 23rd September 2002 (*O.J.* L 283, p. 1), in effect since the 1st April 2004.
2. Judgment of the European Court of Human Rights on the 18th February 1999, *Recueil des arrêts et décisions* 1999-I.
3. Judgment (Grand Chamber), of the 12th September 2006, *Spain / United Kingdom*, *Rec.* p. I-7917. (Case C-145/04, European Parliament – Elections – Right to Vote – Commonwealth citizens residing in Gibraltar and not having citizenship of the Union). An analysis of this judgment has been published by the author in the journal *Revista de Derecho Comunitario Europeo*, Year 12. No. 29, Jan/April 2008, pp. 215-232.
4. This obliges the contracting parties to organise free elections at reasonable intervals by secret ballot, under conditions that will ensure the free expression of the opinion of the people in the choice of the legislature. The European Court of Human Rights pointed out in Section 64 of its judgment that the plaintiff, as a resident of Gibraltar, was deprived of any possibility to express their opinion on the election of Members of the European Parliament.
5. The 1976 Act could only be amended by unanimous agreement of the Member States gathered together in the Council, requiring subsequent ratification by each of them according to their respective constitutional regulations.
6. This Declaration was made in the Council session of the 18th February 2002, in which the Decision amending the 1976 Act was passed (Council Decision 2002/772, which renumbers the articles and annexes to the 1976 Act). Annex I was withdrawn, but Annex II (which is now Annex I) was maintained in its original terms: “The United Kingdom will apply regulations of this Act only with respect to the United Kingdom”.
7. This is a bilateral agreement, as stated by the United Kingdom in the Declaration of the 18th February 2002, reflected in the minutes of the Council meeting on the same date.
8. Appeal made on the 18th March 2004 against the United Kingdom of Great Britain and Northern Ireland by the Kingdom of Spain, *O.J.* C 106, on 30th

- April 2004. Case C-145/04.
9. In this sense, Spain emphasises that the only objective of its appeal is the way in which the elections are organised in Gibraltar and not the fact that the United Kingdom recognises the QCCs' (that are in the territory of the United Kingdom) right to vote for the European Parliament.
 10. According to article 16, section 5 of the EPRA 2003, QCCs are considered to be those people that: do not need, in accordance with Gibraltar law, to have any permit in order to enter or stay in Gibraltar or; that have a permit that authorises them to enter and stay in Gibraltar (or those that, according to Gibraltar law, would have the right to such a permit).
 11. Sections 38 and 39 of the judgment of the ECJ, case *Spain vs. United Kingdom*.
 12. Sections 48 and 49 of the ECJ judgment.
 13. Section 50 of the ECJ judgment.
 14. In this sense, supported by the Commission, it states that this Treaty grants certain rights to people that are not EU citizens, such as the right to make a request before the European Parliament or the right to turn to the European Ombudsman (articles 194 and 195 of the Treaty), and understands that the extension by Member States of certain rights to nationals of other countries (such as the right to protection of diplomatic and consular authorities or the right to participate in politics) will not lead to a "breaking up of EU citizenship" (Section 54 of the ECJ judgment).
 15. This responds to the colonial status of Gibraltar, as is defined in article X of the Treaty of Utrecht and in the resolution 2625 (XXV) of the General Assembly on the 24th October 1970, which states that the territory of a colony must have a status separate and distinct from the territory of the State administering it. Spain believes that Annex I of the 1976 Act is an implementation of this principle (section 83 of the ECJ judgment).
 16. The EPRA 2003 anticipated the existence of an electoral register in Gibraltar organised by a local government employee (articles 13 and 14), with anybody that is registered being able to vote in Gibraltar (article 15). In order to do so, such people must meet the following requirements (article 16, section 1): residing in Gibraltar; to not incur any cause of incapacity; to be at least 18 years old; and to be a citizen of the Commonwealth fulfilling certain specific requirements (QCC) or to be a citizen of the European Union. Gibraltar's local legal bodies must also be responsible for understanding the litigation regarding elections (section 84 of the ECJ judgment).
 17. According to the United Kingdom, the requirements necessary for voting are identical to those set out in the electoral law of the UK, namely, those of citizenry, residence and inscription in the electoral register, having adapted such requirements, *mutatis mutandis*, to the Gibraltar electorate.
 18. For the ECJ: "The extrapolation of the UK's regulations to the territory of Gibraltar, *mutatis mutandis*, is even less disputable if one takes into account that, according to what can be seen in section 59 of the *Matthews* judgment ..., the European Court of Human Rights did not see, in Gibraltar's legal system, any factor that expressed local needs that had to be taken into account, in line with article 56, section 3 of the ECHR, for the application of this agreement to a territory whose international relations

are the responsibility of a Contracting State” (section 96 of the judgment).

19. The following statement by Ruiz-Jarabo is of great interest: “... is it feasible that EU citizens residing in Gibraltar should vote for a parliament that does not represent their territory? Absolutely. Once more, a territorial matter should not be confused with a personal matter. Article 190 aims to ensure the representation of citizens, and not territories, in the Parliament... In fact, the votes of the Gibraltarians could be added to those of an English constituency, or even (and why not?) to a Spanish constituency. As regards the form of the vote, there would not

be great problems there either: one can vote by post, in a polling station set up in the colony... Not only are there numerous solutions - as highlighted by the judgment (referring to that of the ECHR in the *Matthews* case) when mentioning the States’ wide margin of interpretation for organising elections – but these have already been put into practice on other occasions with no great problems”. See P. RUIZ-JARABO, “Por una interpretación pacífica de *Matthews contra Reino Unido*. Colonialismo y Derechos Fundamentales en Gibraltar”, *ADI*, vol. XVIII (2002), pp. 229-252, specifically, pp. 250-251.