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Edited by Elihu Lauterpacht, C. J. Greenwood and A. G. Oppenheimer

Excerpt

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Treaties — Interpretation — Human rights treaty — Interpretation as a living instrument—European Convention on Human Rights

MATTHEWS *v.* UNITED KINGDOM¹

(Application No 24833/94)

European Court of Human Rights (Grand Chamber). 18 February 1999

(Wildhaber, *President*; Palm, Ferrari Bravo, Jörundsson, Ress, Cabral Barreto, Costa, Fuhrmann, Jungwiert, Fischbach, Vajić, Hedigan, Thomassen, Tsatsa-Nikolovska, Panfīru and Traja, *Judges*; Sir John Freeland, *Judge ad hoc*)

SUMMARY: *The facts:*—The applicant was a resident of the British colony of Gibraltar. When the United Kingdom became a member of the European Community in 1973, it agreed that a large part of existing European Community law and future European Community legislation would apply to Gibraltar.

¹ A list of the parties' representatives appears at para. 6 of the judgment.

In 1976 provision was made by the European Community Member States for direct elections to the European Parliament. That was done by Council Decision (EEC) 76/787, which was adopted by unanimous decision of the Council on which all the Member States were represented and by the Act concerning the Election of the Representatives of the Assembly by Direct Universal Suffrage 1976.² The Act was an agreement between the Member States which had the status of a treaty and was attached to the Council Decision. Under the provisions of the Act, only residents of the mainland United Kingdom and not residents of Gibraltar were entitled to elect representatives to the Parliament. The powers of the Parliament in respect of European Community legislation were substantially increased by the Maastricht Treaty on European Union, 1992.

The applicant complained that the exclusion from the franchise of the residents of Gibraltar amounted to a violation by the United Kingdom of Article 3 of the First Protocol to the European Convention on Human Rights, which provided that:

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of legislature.

The United Kingdom maintained that the applicant's real objection was to acts of the European Community which the United Kingdom had no power to revoke or vary. It denied that acts of the Community could be imputed to the Member States. The United Kingdom also contended that Article 3 was not applicable to elections to the European Parliament. The European Commission of Human Rights held that there had been no breach by the United Kingdom and referred the case to the Court.

Held (by fifteen votes to two):—The United Kingdom had violated Article 3 of the First Protocol.

(1) While the acts of the European Community as such were not capable of challenge before the Court, the responsibilities of the Member States to secure the rights in the Convention and Protocols continued even after they transferred competence in a particular sphere to the Community. In the present case the alleged violation of Article 3 stemmed from three instruments—the Council Decision, the 1976 Act and the Maastricht Treaty—each of which was voluntarily entered into by the United Kingdom. The United Kingdom and all the other parties to the Maastricht Treaty were responsible *ratione materiae* under Article 1 of the Convention and Article 3 of the First Protocol for the consequences of that treaty. Since European legislation, over which the European Parliament had considerable power, affected the population of Gibraltar in the same way as domestic legislation, Article 3 of the First Protocol required the United Kingdom to secure the rights enshrined therein to the inhabitants of Gibraltar (paras. 26-35).

(2) The provisions of the Convention and its Protocols had to be interpreted as a living instrument. The fact that the European Parliament in its present form did not exist at the time the First Protocol was drawn up did not preclude

² The European Assembly was later renamed the European Parliament.

the application of Article 3 to the European Parliament. The term “legislature” in Article 3 was not confined to national parliaments (paras. 36-45).

(3) The European Parliament had the characteristics of a legislature in Gibraltar. Much European Community legislation was applicable in Gibraltar and the Parliament had extensive power over that legislation and over matters such as the appointment and removal of the European Commission (paras. 46-54).

(4) The status of Gibraltar as a dependent territory did not alter the obligations of the United Kingdom under Article 3. Although Article 56 of the Convention³ provided that the provisions of the Convention were to be applied to a dependent territory with due regard for local requirements, such requirements had to be of a compelling nature to justify a modified application of the Convention rights. There was no indication of such requirements in the present case (paras. 55-9).

(5) The rights set out in Article 3 were not absolute and States enjoyed a wide margin of appreciation. However, conditions imposed by a State should not thwart the free expression of the opinion of the people and the complete denial of the franchise to the population of Gibraltar, so far as the election of Members of the European Parliament was concerned, was a violation of Article 3 (paras. 60-5).

(6) Costs would be awarded to the applicant on an equitable basis (paras. 70-1).

Per Judge Jungwiert and Judge *ad hoc* Sir John Freeland (dissenting): A particular restraint was required of the Court when it was invited to pronounce on decisions of the European Community. The European Parliament was not a legislature in the sense of Article 3, since it had no power to initiate or adopt legislation. In addition, Gibraltar was excluded from the scope of much Community legislation (pp. 22-4).

The following is the text of the judgment of the Court:

PROCEDURE

1. The case was referred to the Court, as established under former Article 19 of the Convention,⁴ by the European Commission of Human Rights (“the Commission”) on 26 January 1998, within the three-month period laid down by former Articles 32(1) and 47 of the Convention. It originated in an application (No 24833/94) against the United Kingdom of Great Britain and Northern Ireland lodged with the Commission under former Article 25 by Ms Denise Matthews on 18 April 1994.

The Commission’s request referred to former Articles 44 and 48 and to the declaration whereby the United Kingdom recognized the

³ See para. 55 of the judgment.

⁴ *Note by the Registry.* Since the entry into force of Protocol No 11, which amended Article 19, the Court has functioned on a permanent basis. [Original footnotes have been renumbered for the purposes of the *International Law Reports*.]

compulsory jurisdiction of the Court (former Article 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 3 of Protocol No 1, taken alone or together with Article 14 of the Convention.

2. In response to the enquiry made in accordance with Rule 33(3)(d) of former Rules of Court A,³ the applicant stated that she wished to take part in the proceedings and designated the lawyer who would represent her (former Rule 30).

3. As President of the Chamber which had originally been constituted (former Article 43 of the Convention and former Rule 21) in order to deal, in particular, with procedural matters that might arise before the entry into force of Protocol No 11, Mr R. Bernhardt, the President of the Court at the time, acting through the Registrar, consulted the Agent of the United Kingdom Government (“the Government”), the applicant’s lawyer and the Delegate of the Commission on the organization of the written procedure. Pursuant to the order made in consequence, the Registrar received the applicant’s and the Government’s memorials on 20 and 25 August 1998 respectively.

4. After the entry into force of Protocol No 11 on 1 November 1998 and in accordance with the provisions of Article 5(5) thereof, the case was referred to the Grand Chamber of the Court. The Grand Chamber included *ex officio* Sir Nicolas Bratza, the judge elected in respect of the United Kingdom (Article 27(2) of the Convention and Rule 24(4) of the Rules of Court), Mr L. Wildhaber, the President of the Court, Mrs E. Palm, Vice-President of the Court, and Mr G. Ress, Mr J.-P. Costa and Mr M. Fischbach, Vice-Presidents of Sections (Article 27(3) of the Convention and Rule 24(3) and (5)(a)). The other members appointed to complete the Grand Chamber were Mr L. Ferrari Bravo, Mr Gaukur Jörundsson, Mr I. Cabral Barreto, Mr W. Fuhrmann, Mr K. Jungwiert, Mrs N. Vajić, Mr J. Hedigan, Mrs W. Thomassen, Mrs M. Tsatsa-Nikolovska, Mr T. Panțiru and Mr K. Traja (Rule 24(3) and Rule 100(4)). Subsequently Sir Nicolas Bratza, who had taken part in the Commission’s examination of the case, withdrew from sitting in the Grand Chamber (Rule 28). The Government accordingly appointed Sir John Freeland to sit as an *ad hoc* judge (Article 27(2) of the Convention and Rule 29(1)).

5. At the Court’s invitation (Rule 99), the Commission delegated one of its members, Mr J.-C. Soyer, to take part in the proceedings before the Grand Chamber.

6. In accordance with the President’s decision, a hearing took place in public in the Human Rights Building, Strasbourg, on 19 November 1998.

³ *Note by the Registry.* Rules of Court A applied to all cases referred to the Court before the entry into force of Protocol No 9 (1 October 1994) and from then until 31 October 1998 only to cases concerning States not bound by that Protocol.

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There appeared before the Court:

(a) *for the Government*

Mr M. EATON, Foreign and Commonwealth Office,	<i>Agent,</i>
Mr D. ANDERSON, Barrister-at-Law,	<i>Counsel,</i>
Ms D. COLLINS, Cabinet Office Legal Advisers,	
Ms C. POWER, Foreign and Commonwealth Office,	<i>Advisers;</i>

(b) *for the applicant*

Mr M. LLAMAS, Barrister-at-Law,	
Mr L. BAGLIETTO, Barrister,	
Mr F. PICARDO, Barrister,	<i>Counsel,</i>
Mr R. BENZAQUEN, Legislation Support Unit, Gibraltar,	<i>Adviser;</i>

(c) *for the Commission*

Mr J.-C. SOYER,	<i>Delegate,</i>
Ms M.-T. SCHOEPFER,	<i>Secretary to the Commission.</i>

The Court heard addresses by Mr Soyer, Mr Llamas and Mr Anderson.

THE FACTS

I. *The Circumstances of the Case*

7. On 12 April 1994 the applicant applied to the Electoral Registration Officer for Gibraltar to be registered as a voter at the elections to the European Parliament. The Electoral Registration Officer replied on 25 April 1994:

The provisions of Annex II of the EC Act on Direct Elections of 1976 limit the franchise for European parliamentary elections to the United Kingdom [see paragraph 18 below]. This Act was agreed by all member States and has treaty status. This means that Gibraltar will not be included in the franchise for the European parliamentary elections.

II. *Relevant Law in Gibraltar*A. *Gibraltar and the United Kingdom*

8. Gibraltar is a dependent territory of the United Kingdom. It forms part of Her Majesty the Queen's Dominions, but not part of the United Kingdom. The United Kingdom parliament has the ultimate authority to legislate for Gibraltar, but in practice exercises it rarely.

9. Executive authority in Gibraltar is vested in the Governor, who is the Queen's representative. Pursuant to a dispatch of 23 May 1969, certain "defined domestic matters" are allocated to the locally elected

Chief Minister and his Ministers; other matters (external affairs, defence and internal security) are not “defined” and the Governor thus retains responsibility for them.

10. The Chief Minister and the Government of Gibraltar are responsible to the Gibraltar electorate via general elections to the House of Assembly. The House of Assembly is the domestic legislature in Gibraltar. It has the right to make laws for Gibraltar on “defined domestic matters”, subject to, *inter alia*, a power in the Governor to refuse to assent to legislation.

B. *Gibraltar and the European Community*

11. The Treaty Establishing the European Community (“the EC Treaty”) applies to Gibraltar by virtue of its Article 227(4), which provides that it applies to the European territories for whose external relations a member State is responsible. The United Kingdom acceded to the precursor to the EC Treaty, the Treaty Establishing the European Economic Community of 25 March 1957 (“the EEC Treaty”), by a Treaty of Accession of 22 January 1972.

12. Gibraltar is excluded from certain parts of the EC Treaty by virtue of the Treaty of Accession. In particular, Gibraltar does not form part of the customs territory of the Community, with the result that the provisions on free movement of goods do not apply; it is treated as a third country for the purposes of the common commercial policy; it is excluded from the common market in agriculture and trade in agricultural products and from the Community rules on value-added tax and other turnover taxes, and it makes no contribution to the Community budget. European Community (“EC”) legislation concerning, *inter alia*, such matters as free movement of persons, services and capital, health, the environment and consumer protection applies in Gibraltar.

13. Relevant EC legislation becomes part of Gibraltar law in the same way as in other parts of the Union: regulations are directly applicable, and directives and other legal acts of the EC which call for domestic legislation are transposed by domestic primary or secondary legislation.

14. Although Gibraltar is not part of the United Kingdom in domestic terms, by virtue of a declaration made by the United Kingdom government at the time of the entry into force of the British Nationality Act 1981, the term “nationals” and derivatives used in the EC Treaty are to be understood as referring, *inter alia*, to British citizens and to British Dependent Territories citizens who acquire their citizenship from a connection with Gibraltar.

C. *The European Community and the European Parliament*

15. The powers of the European Community are divided amongst the institutions set up by the EC Treaty, including the European Parliament, the Council, the Commission (“the European Commission”) and the Court of Justice.

16. Before 1 November 1993, the date of the entry into force of the Maastricht Treaty on European Union of 7 February 1992 (“the Maastricht Treaty”), Article 137 of the EEC Treaty referred to the “advisory and supervisory powers” of the European Parliament. Since 1 November 1993, the words “advisory and supervisory powers” have been removed and the role of the European Parliament has been expressed by Article 137 to be to “exercise the powers conferred upon it by [the] Treaty”. The principal powers of the European Parliament under the EC Treaty may now be summarized as follows:

Article 138b provides that the European Parliament shall “participate in the process leading up to the adoption of Community acts by exercising its powers under the procedures laid down in Articles 189b and 189c and by giving its assent or delivering advisory opinions”. Further, the second paragraph of Article 138b empowers the European Parliament to request the European Commission to submit any appropriate proposal on matters on which it considers that a Community act is required for the purpose of implementing the Treaty.

The reference in the first paragraph of Article 138b to “assent” refers to a procedure whereby the EC Treaty (for example, in Articles 8a(2) and 130d) provides for adoption of provisions by the Council on a proposal from the European Commission and after obtaining the assent of the European Parliament. The procedure is called the “assent procedure”.

Article 144 provides for a motion of censure by the European Parliament over the European Commission whereby if a motion is carried by a two-thirds majority, representing a majority of the members, the members of the European Commission are required to resign as a body.

Article 158 provides that the European Parliament is to be consulted before the President of the European Commission is nominated, and the members of the European Commission, once nominated, are subject as a body to a vote of approval by the European Parliament.

The first paragraph of Article 189 provides:

In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions.

Article 189b provides:

1. Where reference is made in the Treaty to this Article for the adoption of an act, the following procedure⁶ shall apply.

2. The Commission shall submit a proposal to the European Parliament and the Council.

⁶ This procedure is required to be used, *inter alia*, in connection with Article 49 of the EC Treaty (measures for the free movement of workers), Article 54(2) (programme in connection with freedom of establishment), Article 57(2) (mutual recognition of diplomas in connection with the right of establishment), Article 66 (mutual recognition of diplomas in connection with the freedom to provide services), Article 100a(1) (approximation of provisions in connection with the internal market) and Article 130s(3) (action programmes in connection with the environment).

The Council, acting by a qualified majority after obtaining the opinion of the European Parliament, shall adopt a common position. The common position shall be communicated to the European Parliament. The Council shall inform the European Parliament fully of the reasons which led it to adopt its common position. The Commission shall inform the European Parliament fully of its position.

If, within three months of such communication, the European Parliament:

- (a) approves the common position, the Council shall definitively adopt the act in question in accordance with that common position;
- (b) has not taken a decision, the Council shall adopt the act in question in accordance with its common position;
- (c) indicates, by an absolute majority of its component Members, that it intends to reject the common position, it shall immediately inform the Council. The Council may convene a meeting of the Conciliation Committee referred to in paragraph 4 to explain further its position. The European Parliament shall thereafter either confirm, by an absolute majority of its component Members, its rejection of the common position, in which event the proposed act shall be deemed not to have been adopted, or propose amendments in accordance with subparagraph (d) of this paragraph;
- (d) proposes amendments to the common position by an absolute majority of its component Members, the amended text shall be forwarded to the Council and to the Commission which shall deliver an opinion on those amendments.

3. If, within three months of the matter being referred to it, the Council, acting by a qualified majority, approves all the amendments of the European Parliament, it shall amend its common position accordingly and adopt the act in question; however, the Council shall act unanimously on the amendments on which the Commission has delivered a negative opinion. If the Council does not approve the act in question, the President of the Council, in agreement with the President of the European Parliament, shall forthwith convene a meeting of the Conciliation Committee.

4. The Conciliation Committee, which shall be composed of the members of the Council or their representatives and an equal number of representatives of the European Parliament, shall have the task of reaching agreement on a joint text, by a qualified majority of the members of the Council or their representatives and by a majority of the representatives of the European Parliament. The Commission shall take part in the Conciliation Committee's proceedings and shall take all the necessary initiatives with a view to reconciling the positions of the European Parliament and the Council.

5. If, within six weeks of its being convened, the Conciliation Committee approves a joint text, the European Parliament, acting by an absolute majority of the votes cast, and the Council, acting by a qualified majority, shall have a period of six weeks from that approval in which to adopt the act in question in accordance with the joint text. If one of the two institutions fails to approve the proposed act, it shall be deemed not to have been adopted.

6. Where the Conciliation Committee does not approve a joint text, the proposed act shall be deemed not to have been adopted unless the Council, acting by a qualified majority within six weeks of expiry of the period granted to the Conciliation Committee, confirms the common position to which it agreed before the conciliation procedure was initiated, possibly with amendments proposed by the European Parliament. In this case, the act in question shall

be finally adopted unless the European Parliament, within six weeks of the date of confirmation by the Council, rejects the text by an absolute majority of its component Members, in which case the proposed act shall be deemed not to have been adopted.

7. The periods of three months and six weeks referred to in this Article may be extended by a maximum of one month and two weeks respectively by common accord of the European Parliament and the Council. The period of three months referred to in paragraph 2 shall be automatically extended by two months where paragraph 2(c) applies.

8. The scope of the procedure under this Article may be widened, in accordance with the procedure provided for in Article N(2) of the Treaty on European Union, on the basis of a report to be submitted to the Council by the Commission by 1996 at the latest.

Article 189c provides:

Where reference is made in this Treaty to this Article for the adoption of an act, the following procedure⁷ shall apply:

(a) The Council, acting by a qualified majority on a proposal from the Commission and after obtaining the opinion of the European Parliament, shall adopt a common position.

(b) The Council's common position shall be communicated to the European Parliament. The Council and the Commission shall inform the European Parliament fully of the reasons which led the Council to adopt its common position and also of the Commission's position.

If, within three months of such communication, the European Parliament approves this common position or has not taken a decision within that period, the Council shall definitively adopt the act in question in accordance with the common position.

(c) The European Parliament may, within the period of three months referred to in point (b), by an absolute majority of its component Members, propose amendments to the Council's common position. The European Parliament may also, by the same majority, reject the Council's common position. The result of the proceedings shall be transmitted to the Council and the Commission.

If the European Parliament has rejected the Council's common position, unanimity shall be required for the Council to act on a second reading.

(d) The Commission shall, within a period of one month, re-examine the proposal on the basis of which the Council adopted its common position, by taking into account the amendments proposed by the European Parliament.

The Commission shall forward to the Council, at the same time as its re-examined proposal, the amendments of the European Parliament which it has not accepted, and shall express its opinion on them. The Council may adopt these amendments unanimously.

(e) The Council, acting by a qualified majority, shall adopt the proposal as re-examined by the Commission.

Unanimity shall be required for the Council to amend the proposal as re-examined by the Commission.

⁷ This procedure is required to be used, *inter alia*, in connection with Article 6 (rules to prohibit discrimination on grounds of nationality), Article 75(1) (transport policy), Article 118a (social policy) and Articles 130I-130K (framework programmes in connection with the environment).

(f) In the cases referred to in points (c), (d) and (e), the Council shall be required to act within a period of three months. If no decision is taken within this period, the Commission proposal shall be deemed not to have been adopted.

(g) The periods referred to in points (b) and (f) may be extended by a maximum of one month by common accord between the Council and the European Parliament.

Article 203 makes provision for the budget of the Community. In particular, after the procedure for making modifications and amendments to the draft budget, it is open to the European Parliament to reject the draft budget and to ask for a new budget to be submitted (Article 203(8)).

Article 206 provides for parliamentary involvement in the process of discharging the European Commission in respect of the implementation of the budget. In particular, the European Parliament may ask to hear the European Commission give evidence on the execution of expenditure, and the European Commission is required to submit information to the European Parliament if so requested. Further, the European Commission is required to take all appropriate steps to act on the observations of the European Parliament in this connection.

D. Elections and the European Parliament

17. Article 138(3) of the EEC Treaty provided, in 1976, that the European Parliament was to draw up proposals for elections. The Council was required to “lay down the appropriate provisions, which it [was to] recommend to Member States for adoption in accordance with their respective constitutional requirements”. Identical provision was made in the European Coal and Steel Community Treaty and the European Atomic Energy Community Treaty.

18. In accordance with Article 138(3), Council Decision 76/787 (“the Council Decision”), signed by the President of the Council of the European Communities and the then member States’ foreign ministers, laid down such provisions. The specific provisions were set out in an Act Concerning the Election of the Representatives of the European Parliament by Direct Universal Suffrage of 20 September 1976 (“the 1976 Act”), signed by the respective foreign ministers, which was attached to the Council Decision. Article 15 of the 1976 Act provides that “Annexes I to III shall form an integral part of this Act”. Annex II to the 1976 Act states that “The United Kingdom will apply the provisions of this Act only in respect of the United Kingdom.”

E. The application of the Convention to Gibraltar

19. By a declaration dated 23 October 1953, the United Kingdom, pursuant to former Article 63 of the Convention, extended the Convention to Gibraltar. Protocol No 1 applies to Gibraltar by virtue of a declaration made under Article 4 of Protocol No 1 on 25 February 1988.