

JUDGMENT OF THE COURT (Grand Chamber)

12 September 2006^{*}

In Case C-145/04,

ACTION under Article 227 EC for failure to fulfil obligations, brought on 18 March 2004,

Kingdom of Spain, represented by N. Díaz Abad, F. Díez Moreno and I. del Cuvillo Contreras, acting as Agents, with an address for service in Luxembourg,

applicant,

v

United Kingdom of Great Britain and Northern Ireland, represented by R. Caudwell, acting as Agent, and by Lord Goldsmith QC, D. Wyatt QC, D. Anderson QC, and M. Chamberlain, Barrister, with an address for service in Luxembourg,

defendant,

* Language of the case: English.

supported by:

Commission of the European Communities, represented by C. Ladenburger, acting as Agent, with an address for service in Luxembourg,

intervener,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas (Rapporteur), K. Schiemann and J. Makarczyk, Presidents of Chambers, J.-P. Puissechot, P. Küris, E. Juhász, E. Levits and A. Ó Caoimh, Judges,

Advocate General: A. Tizzano,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 5 July 2005,

after hearing the Opinion of the Advocate General at the sitting on 6 April 2006,

gives the following

Judgment

- ¹ By its action the Kingdom of Spain seeks a declaration that, by enacting the European Parliament (Representation) Act 2003 ('the EPRA 2003'), the United

Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under Articles 189 EC, 190 EC, 17 EC and 19 EC, and under the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annexed to Council Decision 76/787/ECSC, EEC, Euratom of 20 September 1976 (OJ 1976 L 278, p. 1), as amended by Council Decision 2002/772/EC, Euratom of 25 June 2002 and 23 September 2002 (OJ 2002 L 283, p. 1, 'the 1976 Act').

Legal context

Community law

2 Article 17 EC provides as follows:

'1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship.

2. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby.'

3 In order to apply Community law, the United Kingdom defined the term 'nationals' in a declaration annexed to the Final Act of the Treaty concerning the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and

Northern Ireland to the European Communities (OJ 1972 L 73, p. 196, 'the 1972 Declaration'). In view of the entry into force in the United Kingdom of new legislation on nationality, that declaration was replaced in 1982 by a further declaration (OJ 1983 C 23, p. 1, 'the 1982 Declaration'), which sets out the following categories:

- '(a) British citizens;

- (b) Persons who are British subjects by virtue of Part IV of the British Nationality Act 1981 and who have the right of abode in the United Kingdom and are therefore exempt from United Kingdom immigration control;

- (c) British Dependent Territories citizens who acquire their citizenship from a connection with Gibraltar.'

⁴ Article 19(2) EC provides:

'Without prejudice to Article 190(4) and to the provisions adopted for its implementation, every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.'

5 In accordance with that provision, the Council adopted Council Directive 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals (OJ 1993 L 329, p. 34).

6 The first paragraph of Article 189 EC reads as follows:

‘The European Parliament, which shall consist of representatives of the peoples of the States brought together in the Community, shall exercise the powers conferred upon it by this Treaty.’

7 Article 190 EC is worded as follows:

‘1. The representatives in the European Parliament of the peoples of the States brought together in the Community shall be elected by direct universal suffrage.

...

4. The European Parliament shall draw up a proposal for elections by direct universal suffrage in accordance with a uniform procedure in all Member States or in accordance with principles common to all Member States.

The Council shall, acting unanimously after obtaining the assent of the European Parliament, which shall act by a majority of its component members, lay down the appropriate provisions, which it shall recommend to Member States for adoption in accordance with their respective constitutional requirements.

...'

8 Article 8 of the 1976 Act provides:

'Subject to the provisions of this Act, the electoral procedure shall be governed in each Member State by its national provisions.

These national provisions, which may if appropriate take account of the specific situation in the Member States, shall not affect the essentially proportional nature of the voting system.'

9 The second paragraph of Article 15 of the 1976 Act is worded as follows:

'Annexes I and II shall form an integral part of this Act.'

10 Annex II to the 1976 Act, now Annex I by virtue of the new numbering set out in the Annex to Decision 2002/772 ('Annex I to the 1976 Act'), is worded as follows:

'The United Kingdom will apply the provisions of this Act only in respect to the United Kingdom.'

11 By judgment of 18 February 1999 in the case of *Matthews v the United Kingdom* [GC], no. 24833/94, ECHR 1999-I, the European Court of Human Rights decided that by failing to organise elections in Gibraltar for the European Parliament, the United Kingdom was in breach of Article 3 of Protocol No 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('Protocol No 1 to the Convention'), which imposes on the Contracting Parties the obligation 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 the legislature. In paragraph 64 of its judgment, that Court observed that the applicant, as a resident of Gibraltar, was completely denied any opportunity to express her opinion in the choice of the members of the European Parliament. At the request of the Court of Justice, the United Kingdom confirmed that, as appeared from the report of the Commission of Human Rights, Ms Matthews was a British citizen.

12 The original version of the 1976 Act was amended by Decision 2002/772, which entered into force on 1 April 2004. At the time of that amendment, the Kingdom of Spain opposed the revocation, suggested by the United Kingdom, of Annex I to the 1976 Act. However, the following declaration of the United Kingdom, reflecting a bilateral agreement concluded between that Member State and the Kingdom of Spain, was formally recorded in the minutes of the Council meeting of 18 February 2002 ('the Declaration of 18 February 2002'):

'Recalling Article 6(2) of the Treaty on European Union, which states that the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law, the UK will ensure that the necessary changes are made to enable the Gibraltar electorate to vote in elections to the EP as part of and on the same terms as the electorate of an existing UK constituency, in order to ensure the fulfilment of the UK's obligation to implement the judgment of the European Court of Human Rights in the case of *Matthews v UK*, consistent with the law of the European Union.'

13 Minuted likewise was the following declaration of the Council and the Commission:

‘The Council and the Commission take note of the statement made by the UK according to which, in order to ensure the fulfilment of the UK’s obligation to implement the judgment of the European Court of Human Rights in the case of *Matthews v the United Kingdom*, the UK will ensure that the necessary changes are made to enable the Gibraltar electorate to vote in elections to the European Parliament, as part of and on the same terms as the electorate of an existing UK constituency, consistent with the law of the European Union.’

The status of Gibraltar

- 14 Gibraltar was ceded by the King of Spain to the British Crown by the Treaty of Utrecht concluded between the former and the Queen of Great Britain on 13 July 1713, which was one of the treaties which put an end to the War of the Spanish Succession. The final sentence of Article X of that treaty stated that if it ever seemed meet to the British Crown to grant, sell or by any means to alienate the property of the town of Gibraltar, a right of pre-emption would be given to the Crown of Spain.
- 15 Gibraltar is currently a British Crown Colony. It does not form part of the United Kingdom.
- 16 Executive authority is vested in a Governor, who is appointed by the Queen, and, for certain domestic matters, in a Chief Minister and Ministers who are elected locally. They are responsible to the House of Assembly, elections for which are held every five years.

- 17 The House of Assembly has the right to make laws in defined domestic matters. The Governor, however, has power to refuse to assent to legislation. The United Kingdom Parliament and the Queen in Council also retain power to legislate for Gibraltar.
- 18 Gibraltar has its own courts. It is, however, possible to appeal against judgments of Gibraltar's highest court to the Judicial Committee of the Privy Council.
- 19 In Community law, Gibraltar is a European territory for whose external relations a Member State is responsible within the meaning of Article 299(4) EC and to which the provisions of the EC Treaty apply. The Act concerning the conditions of accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland and the adjustments to the Treaties (OJ 1972 L 73, p. 14) provides, however, that certain parts of the Treaty are not to apply to Gibraltar.

The EPRA 2003

- 20 On 8 May 2003 the United Kingdom enacted the EPRA 2003.
- 21 Section 9 of the EPRA 2003 provides that Gibraltar is to be combined with an existing electoral region in England and Wales to form a new electoral region. In accordance with that provision, the United Kingdom authorities combined Gibraltar with the South West region of England by the European Parliamentary Elections (Combined Region and Campaign Expenditure) (United Kingdom and Gibraltar) Order 2004.

- 22 Section 14 of the EPRA 2003 provides that, in Gibraltar, a register of European Parliamentary electors ('the Gibraltar register') is to be maintained by the Clerk of the House of Assembly of Gibraltar.
- 23 Section 15 of the EPRA 2003 provides that a person may vote at a European Parliamentary election in Gibraltar if, on the day of the poll, he is registered in the Gibraltar register.
- 24 Under Section 16(1) of the EPRA 2003, a person is entitled to be registered in the Gibraltar register if that person:
- is resident in Gibraltar;
 - is not subject to a legal incapacity to vote in Gibraltar at a European Parliamentary election (age apart);
 - is a qualifying Commonwealth citizen ('QCC') or a citizen of the European Union (other than a QCC); and
 - is at least 18 years of age.

- 25 Section 16(5) of the EPRA 2003 defines a QCC as a Commonwealth citizen who
- does not, under the law of Gibraltar, require a permit or certificate to enter or remain in Gibraltar; or
 - for the time being has (or is by virtue of any provision of the law of Gibraltar to be treated as having) a permit or certificate entitling him to enter or remain in Gibraltar.
- 26 Sections 17 and 18 of the EPRA 2003 provide that various detailed rules relating to the Gibraltar register and to the right to vote may be made by the Lord Chancellor by regulations. Such detailed rules were laid down by the Secretary of State for Constitutional Affairs, to whom certain functions of the Lord Chancellor have been transferred, by the European Parliamentary Elections Regulations 2004, and by the European Parliamentary Elections Ordinance 2004 adopted by the Gibraltar House of Assembly.
- 27 Section 21 of the EPRA 2003 amends, in order to insert a reference to Gibraltar, Section 10 of the European Parliamentary Elections Act 2002, under which a person is not deprived of the right to be elected a Member of the European Parliament by reason of not being a British citizen but a citizen of the Commonwealth.
- 28 Section 22 of the EPRA 2003 authorises the making of different provision for different electoral regions and, in particular, for the part of the combined region which is in England and Wales and for Gibraltar.

- 29 In accordance with Section 23 of the EPRA 2003, the courts of Gibraltar have jurisdiction to hear proceedings arising out of electoral matters.
- 30 Under Section 28(2) of the EPRA 2003, the act's geographical application extends to the United Kingdom and Gibraltar.

Pre-litigation procedure and proceedings before the Court

- 31 On 28 July 2003, following an exchange of correspondence, the Kingdom of Spain filed with the Commission a complaint pursuant to Article 227 EC against the United Kingdom with a view to the Commission bringing infringement proceedings against the United Kingdom before the Court of Justice because of the alleged incompatibility of the EPRA 2003 with Community law. The United Kingdom filed its observations in response to that complaint with the Commission on 11 September 2003. The Commission heard the representatives of the two Member States concerned on 1 October 2003. Following that hearing, the Commission granted those States leave to submit supplementary written observations, which they did on 3 October 2003.
- 32 On 29 October 2003, the Commission made this declaration:

‘The Commission considers, following an in-depth analysis of the Spanish complaint and an oral hearing held on 1 October, that the UK has organised the extension of voting rights to residents in Gibraltar within the margin of discretion presently given to Member States by EU law. However, given the sensitivity of the underlying bilateral issue, the Commission at this stage refrains from adopting a reasoned opinion within the meaning of Article 227 [EC] and invites the parties to find an amicable solution.’

33 The Commission's press release states, among other things:

'The EC Treaty grants the European Community competence to lay down a uniform procedure for the elections to the European Parliament. This uniform procedure can include rules defining the category of persons entitled to vote. However, the 1976 Act does not address the issue of franchise. Thus national provisions are applicable.

Even if the franchise in European parliamentary elections is covered by general principles relating to elections (i.e. elections have to be direct, universal, free and secret), there is no general principle of Community law according to which the electorate in European Parliament elections cannot be extended beyond citizens of the European Union.

As regards the question of electoral regions, the 1976 Act does not include provisions on [the] establishment [of] electoral constituencies, so it is for the Member States to lay down such provisions.

Annex [I] to the 1976 Act must be interpreted in the light of the European Convention for the Protection of Human Rights [and Fundamental Freedoms], which guarantees [the] holding of free elections in the choice of legislature, in order to respect the fundamental rights. It is therefore a provision that is sufficiently open to enable the UK to include [the] Gibraltar electorate in the UK's electorate in European parliamentary elections, according to its national electoral system.'

34 By order of the President of the Court of 8 September 2004, the Commission was granted leave to intervene in support of the form of order sought by the United Kingdom.

The action

35 The Kingdom of 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 of QCCs resident in its territory to vote for the European Parliament.

36 It raises two pleas in law in support of its action. By the first, it claims that the extension of the right to vote in European Parliament elections, as provided for by the EPRA 2003, to persons who are not United Kingdom nationals for the purposes of Community law infringes Articles 189 EC, 190 EC, 17 EC and 19 EC. By the second, it claims that the creation of a combined electoral region is contrary to the 1976 Act and to the commitments made by the United Kingdom Government in the Declaration of 18 February 2002.

The first plea in law: infringement of Articles 189 EC, 190 EC, 17 EC and 19 EC

37 The Kingdom of Spain claims that, by conferring the right to vote on QCCs who are not Community nationals, the United Kingdom is in breach of Articles 189 EC, 190 EC, 17 EC and 19 EC, which, interpreted historically and systematically, recognise the right to vote and to stand as candidates of citizens of the European Union alone.

38 It states that the United Kingdom has defined several categories of British citizens whom it has recognised as having rights which differ according to the nature of the ties connecting them to the United Kingdom. As the Court held in paragraph 24 of

its judgment in Case C-192/99 *Kaur* [2001] ECR I-1237, the United Kingdom Government's declarations in that regard must be taken into consideration for determining the scope of the EC Treaty *ratione personae*. It is not disputed that QCCs are not within the categories set out in the 1982 Declaration. Since Article 17(1) EC links citizenship of the Union to possession of the nationality of a Member State, QCCs are therefore not citizens of the Union.

39 According to the Kingdom of Spain, only citizens of the Union can be recognised as having the right to vote in elections to the European Parliament because of the direct link between citizenship of the Union and the nationality of a Member State, on the one hand, and the enjoyment of rights conferred by the Treaty, on the other. Article 19 EC, which recognises the right to vote and to stand as a candidate, and Article 17(2) EC, which states that citizens of the Union are to enjoy the right conferred by the Treaty, must be construed systematically. Any extension of those rights to other persons must be made expressly, either by the Treaty or by provisions of secondary legislation. Since recognition of the right to vote and to stand as a candidate thus comes within the powers of the Community, any change in the scope *ratione personae* of such rights can be effected only by Community law.

40 In that regard, the Kingdom of Spain does not deny that the 1976 Act did not make provision for a uniform electoral procedure and that the electoral procedure continues to be governed, in the Member States, by their national arrangements. It submits, however, that the determination of the persons entitled to vote is regulated by Articles 189 EC and 190 EC, in conjunction with Articles 17 EC and 19 EC, and that it is imposed on the Member States.

41 Article 19(2) EC, which confers on citizens of the Union the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which they reside, under the same conditions as nationals of that State, and Directive 93/109, which lays down the detailed arrangements for the exercise of that

right, illustrate the link which exists between nationality and the right to vote. The Kingdom of Spain observes in that regard that a QCC, within the meaning of the EPRA 2003, residing in another Member State cannot exercise his right to vote in that State under those provisions.

42 The Kingdom of Spain also relies, in support of its argument, on the similar provision set out in Article 39 of the Charter of Fundamental Rights of the European Union, proclaimed at Nice on 7 December 2000 (OJ 2000 C 364, p. 1), which uses the expression '[e]very citizen of the Union', and not the term 'everyone' or an expression referring to national law. It submits that, since the right to vote of a national of a non-Member State cannot be described as a 'human right' or a 'fundamental freedom', any reference to Article 53 of that Charter, which provides that it cannot be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised by Union law, is unfounded.

43 As regards the expression 'peoples of the States' in Article 189 EC, the Kingdom of Spain submits, first, that that provision does not regulate the right to vote in elections. In addition, the fact that the provision was in the EC Treaty before the concept of citizenship was introduced by the Treaty on European Union explains why there is no mention of that concept, no systematic review of the EC Treaty having taken place prior to the holding of the last intergovernmental conference. In any event, the expression 'peoples of the States' is a stylistic formula referring to persons sharing the same nationality and not all the persons residing in the territory. The use of the term 'people' as meaning 'nation' in several of the Member States' constitutions confirms that interpretation.

44 The Kingdom of Spain disputes the argument that the rights flowing from citizenship of the Union can have different fields of application, because that would mean dismembering that citizenship. In its submission, unity is one of the characteristics that define citizenship, in the sense that all those entitled to that

status should enjoy its rights and be subject to its obligations in their entirety. It observes in that regard that the extension of consular protection to third country nationals, given as an example by the United Kingdom, is outside the scope of Community law because it relates to national diplomatic protection.

45 The Kingdom of Spain cites, finally, the Treaty establishing a Constitution for Europe (OJ 2004 C 310, p. 1) in which, it submits, the link between the right to vote in elections to the European Parliament and citizenship of the Union is no longer merely understood, but explicit. Article I-10(2)(b) of that Treaty provides that '[c]itizens of the Union ... shall have ... the right to vote and to stand as candidates in elections to the European Parliament', Article I-20(2) states that '[t]he European Parliament shall be composed of representatives of the Union's citizens', and the first indent of Article I-46(2) provides that '[c]itizens are directly represented at Union level in the European Parliament'.

46 The United Kingdom sets out the historical reasons which explain why it decided to continue to accord the franchise to resident citizens of other Commonwealth countries. After the Second World War it was agreed at a conference in 1947 between the United Kingdom and the Dominions that each should recognise the others' freedom to devise their own nationality laws, but that all persons identified by such laws as citizens should continue, in addition, to hold the common status of 'British subject'. Ireland also took part in that conference and a special status was laid down for the benefit of its citizens. It emerges from a section of the final report of that conference, headed 'Position of a Citizen of a Commonwealth Country in another Commonwealth Country of which he is not a Citizen' that, in particular, 'in order to give body to the common status of British subjects citizens of one country of the Commonwealth who were resident in another such country should, within the limits of the new citizenship system and as far as local conditions allow, be given all the rights possessed by citizens of the country in which they are resident'. Thus, in

particular, QCCs, that is to say citizens of the Commonwealth who either do not require, or have, leave to enter and remain in the United Kingdom, have, subject to the requirement of residence, the right to vote in United Kingdom Parliamentary elections. The law provided, likewise, that QCCs residing in the United Kingdom have the right to vote in elections to the European Parliament. Thus, more than a million of them have taken part in each of those elections since 1978. That grant of the right to vote to QCCs is regarded as one of the constitutional traditions of the United Kingdom.

⁴⁷ Similar provisions have been adopted for Gibraltar and for QCCs resident in Gibraltar, the number of whom is reckoned at 200. To accept, in the context of this action relating to Gibraltar, the principle that QCCs may not vote in elections to the European Parliament would mean that the United Kingdom would have to deprive a large number of people, both in Gibraltar and in the United Kingdom, of their traditional right to vote.

⁴⁸ The United Kingdom, supported by the Commission, disputes the conclusion which the Kingdom of Spain draws from paragraph 24 of the judgment in *Kaur*. It submits that the scope *ratione personae* of the provisions of the EC Treaty varies according to the subject-matter concerned and that the *Kaur* case concerned only the provisions concerning the freedom of movement of persons and the rights consequent on citizenship in that regard. It emphasises the limited purpose of the 1982 Declaration and the fact that it was not intended to define the categories of persons entitled to vote in elections to the European Parliament. That declaration cannot therefore be used to determine who has the right to vote for the European Parliament, nor may it be understood as meaning that the United Kingdom there expressed an intention to withdraw the franchise from QCCs resident in the United Kingdom who have been entitled to it since the first direct elections to the European Parliament. In addition, the United Kingdom has not gone against its own declaration by extending the right to vote for the European Parliament to QCCs resident in Gibraltar.

- 49 The United Kingdom, supported in this respect by the Commission, considers that it was entitled to extend the right to vote and to stand for election to the European Parliament to nationals of non-Member States. No provision of Community law prohibits this.
- 50 First of all, Community law does not regulate the entirety of the right to vote and to stand for election to the European Parliament. The Community has exercised the power, conferred on it by Article 190(4) EC, to define a 'uniform procedure in all Member States' or one 'in accordance with principles common to all Member States' only by the 1976 Act, Article 8 of which refers, for matters not governed by that Act, to national provisions. Account must also be taken of the general principles of Community law. Since the 1976 Act does not define the categories of persons entitled to vote in elections to the European Parliament, it was compatible with that Act for the question to be regulated by the EPRA 2003.
- 51 Article 19(2) EC, which confers on citizens of the Union the right to vote in a Member State of which they are not nationals, and Directive 93/109, which lays down the detailed arrangements for the exercise of that right, do not preclude the grant of the right to vote to persons who are not citizens of the Union. The United Kingdom refers to the third recital in the preamble to Directive 93/109, which says that the right to vote and to stand as a candidate in elections to the European Parliament in the State of residence 'is an instance of the application of the principle of non-discrimination between nationals and non-nationals and a corollary of the right to move and reside freely'. Those provisions are intended, essentially, to remove the nationality requirement, but not to define the right to vote.
- 52 In addition, Articles 189 EC and 190 EC do not mention citizenship of the Union, but use the expression 'peoples of the States brought together in the Community',

which is not necessarily to be understood as being synonymous with ‘nationals of the Member States’, but can equally well define a much larger group of persons, such as those residing within a given territory. The United Kingdom points out that although those provisions could have been amended, particularly at the time of the adoption of the Treaty on European Union, the terms ‘nationals’ or ‘citizens of the Union’ were not used. A historical interpretation cannot therefore be relied upon, nor, on the basis of those provisions, can a link be established between Union citizenship and the right to vote in elections to the European Parliament.

53 The Commission submits that those articles cannot be interpreted in the restrictive sense as proposed by the Kingdom of Spain. A link does not exist, in all Member States, between the legitimacy of public power and nationality. It is appropriate to take account of different approaches, such as that resulting from the constitutional tradition of the United Kingdom.

54 As regards Article 17(2) EC, it does not provide that the rights conferred by the Treaty are to be enjoyed by citizens of the Union alone. The United Kingdom, supported by the Commission, points out in that regard that the Treaty confers certain rights on those who do not hold citizenship of the Union, such as the rights to petition the European Parliament and to apply to the Ombudsman. The United Kingdom also argues that some rights which under the Treaty are conferred only on citizens can be extended by Member States to such persons, such as the right to the protection of the diplomatic or consular authorities. It is likewise for the right to take part in political life, which can be accorded by a Member State to third country nationals. That does not entail ‘dismembering Union citizenship’.

55 The Commission submits in that regard that the concept of Union citizenship can be infringed only if citizens’ rights are infringed, be it by outright denial or by an obstacle to their exercise. However, the fact that a Member State, in view of its

history and constitutional traditions, extends the right to vote in elections to the European Parliament, under certain conditions, to nationals of third countries with which it has special historical links does not impair the right to vote of citizens of the Union. The United Kingdom states that the conferment of the right to vote on QCCs has no effect on the institutions of the Union or on other Member States and affects only the identity of the representatives returned to the European Parliament from the United Kingdom constituencies.

- 56 The United Kingdom, supported by the Commission, observes that Article 39(1) of the Charter of Fundamental Rights of the European Union — should the Court consider it relevant to the case — must be interpreted taking account of Article 53 of the Charter. The Commission also argues that the wording of Article 39 should not be regarded as, by itself, requiring the right to vote to be limited to Union citizens. Both the United Kingdom and the Commission interpret that provision as not permitting the right to vote currently conferred by a Member State on third country nationals to be impaired.

- 57 As regards the Treaty establishing a Constitution for Europe, the United Kingdom submits that it has not yet come into effect and that it is therefore irrelevant. In addition, neither Article I-20 nor Article I-46 of that Treaty, at first sight, purports to exclude third country nationals from the franchise or to prescribe the manner in which Member States set conditions for the franchise. Article III-330, which, like Article 190(4) EC, empowers the Council to adopt measures for the election of Members of the European Parliament, does not seek to limit the Council's discretion. In any event, the unilateral Declarations appended to the Constitution, in particular Declaration 48 of the United Kingdom on the right to vote at European Parliamentary elections, make clear that the Member States disagreed on the question of the right to vote of third country nationals.

- 58 The Commission submits, finally, that, although the concept of European citizenship is fundamental to the Union, the same applies to the Union's commitment to respect the national identities of its Member States. That principle is confirmed by Article 8 of the 1976 Act, since it provides that national provisions on the procedure for elections may if appropriate take account of the specific situation in the Member States.

Findings of the Court

- 59 By its first plea in law, the Kingdom of Spain claims that the United Kingdom infringed Articles 189 EC, 190 EC, 17 EC and 19 EC by conferring on QCCs resident in Gibraltar the right to vote and to be elected in elections to the European Parliament. That plea in law is based on the premiss that those provisions of the Treaty establish a link between citizenship of the Union and the right to vote and to stand as a candidate for the European Parliament, the consequence of that link being that only citizens of the Union can have that right.
- 60 At the outset, it must be recalled that it was to comply with the judgment of the European Court of Human Rights in *Matthews v the United Kingdom* that the United Kingdom adopted the legislation challenged by the Kingdom of Spain.
- 61 As is clear from the Declaration of 18 February 2002, the United Kingdom undertook to 'ensure that the necessary changes are made to enable the Gibraltar electorate to vote in elections to the European Parliament as part of and on the same terms as the electorate of an existing UK constituency'.

- 62 Having regard to that declaration, which the Kingdom of Spain does not dispute reflects an agreement reached between those two Member States, and breach of which the Kingdom of Spain moreover relies on in its second plea in law, the United Kingdom adopted for Gibraltar legislation laying down the same conditions in relation to the right to vote and stand for election as those laid down by the legislation applying to the United Kingdom. The expression 'Gibraltar electorate' must indeed be understood by reference to the meaning of 'electorate' as defined by the United Kingdom legislation.
- 63 For reasons connected to its constitutional traditions, the United Kingdom chose, both for United Kingdom national elections and for elections to the Gibraltar House of Assembly, to grant the right to vote and to stand for election to QCCs satisfying conditions expressing a specific link with the area in respect of which the elections are held.
- 64 It is important to note, in that regard, that because Ms Matthews, 'as a resident of Gibraltar, was completely denied any opportunity to express her opinion in the choice of the members of the European Parliament', the European Court of Human Rights declared the failure to hold elections in Gibraltar to the European Parliament to be contrary to Article 3 of Protocol No 1 to the Convention.
- 65 The Kingdom of Spain submits that the extension of the right to vote in elections to the European Parliament to persons who are not citizens of the Union infringes Articles 189 EC, 190 EC, 17 EC and 19 EC. However, Articles 189 EC and 190 EC do not expressly and precisely state who are to be entitled to the right to vote and to stand as a candidate for the European Parliament.

- 66 As regards Articles 17 EC and 19 EC, which are in Part Two of the Treaty, relating to citizenship of the Union, only the latter of those provisions deals, in paragraph 2, with the right to vote for the European Parliament. That article is confined to applying the principle of non-discrimination on grounds of nationality to the exercise of that right, by providing that every citizen of the Union residing in a Member State of which he is not a national is to have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State.
- 67 Article 190(4) EC refers to the procedure for those elections. It states that elections are to take place by direct universal suffrage in accordance with a uniform procedure in all Member States or in accordance with principles common to all Member States.
- 68 Article 1 of the 1976 Act provides that members of the European Parliament are to be elected on the basis of proportional representation and that elections are to be by direct universal suffrage and free and secret. Article 2 of the 1976 Act provides that Member States may, in accordance with their specific national situations, establish constituencies for elections to the European Parliament or subdivide their electoral areas in a different manner, without generally affecting the proportional nature of the voting system. Under Article 3 they may set a minimum threshold for the allocation of seats.
- 69 Article 8 of the 1976 Act states that, subject to the provisions of that Act, the electoral procedure is to be governed in each Member State by its national provisions but those provisions, which may if appropriate take account of the specific situation in the Member States, must not affect the essentially proportional nature of the voting system.

70 However, neither Article 190 EC nor the 1976 Act defines expressly and precisely who are to be entitled to the right to vote and to stand as a candidate in elections to the European Parliament. In themselves, those provisions do not exclude, therefore, a person who is not a citizen of the Union, such as a QCC resident in Gibraltar, from being entitled to the right to vote and stand for election. However, it must be ascertained whether there is, as the Kingdom of Spain submits, a clear link between citizenship of the Union and the right to vote and stand for election which requires that that right be always limited to citizens of the Union.

71 No clear conclusion can be drawn in that regard from Articles 189 EC and 190 EC, relating to the European Parliament, which state that it is to consist of representatives of the peoples of the Member States, since the term 'peoples', which is not defined, may have different meanings in the Member States and languages of the Union.

72 As regards the Treaty's articles relating to citizenship of the Union, no principle can be derived from them that citizens of the Union are the only persons entitled under all the other provisions of the Treaty, which would imply that Articles 189 EC and 190 EC apply to those citizens alone.

73 In fact, while Article 17(2) EC provides that citizens of the Union are to enjoy the rights conferred by the Treaty and be subject to the duties imposed by it, the Treaty recognises rights which are linked neither to citizenship of the Union nor even to nationality of a Member State. Thus, for example, Articles 194 EC and 195 EC stipulate that the rights to present a petition to the European Parliament or to make a complaint to the Ombudsman are not limited to citizens of the Union, but may be exercised by 'any natural or legal person residing or having its registered office in a Member State'.

- 74 Moreover, while citizenship of the Union is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to receive the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for (Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 31), that statement does not necessarily mean that the rights recognised by the Treaty are limited to citizens of the Union.
- 75 In that regard, in its judgment in *Kaur*, the Court, which noted the importance of the United Kingdom Government's Declaration on the meaning of the term 'nationals' for the other Contracting Parties to the Treaty concerning the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the European Communities, states, in paragraph 24 of that judgment, that that declaration delimits the scope *ratione personae* of the Community provisions which were the subject of that Treaty. Read in its context, more particularly in combination with paragraph 22 of the judgment, in which the Court states that, by means of the 1972 Declaration, the United Kingdom notified the other Contracting Parties of the categories of citizens to be regarded as its nationals for the purposes of Community law, that sentence refers to the scope of the provisions of the EC Treaty which refer to the concept of 'national', such as the provisions relating to the freedom of movement of persons, at issue in the main proceedings which gave rise to that judgment, and not to all the provisions of the Treaty, as the Kingdom of Spain submits.
- 76 As regards Article 19(2) EC, also relied on by the Kingdom of Spain in support of its argument that there is a link between citizenship of the Union and the right to vote and to stand as a candidate in elections to the European Parliament, it is confined, as pointed out in paragraph 66 above, to stating a rule of equal treatment between

citizens of the Union residing in a Member State so far as concerns that right to vote and stand for election. While that provision, like Article 19(1) EC relating to the right of Union citizens to vote and to stand as a candidate at municipal elections, implies that nationals of a Member State have the right to vote and to stand as a candidate in their own country and requires the Member States to accord those rights to citizens of the Union residing in their territory, it does not follow that a Member State in a position such as that of the United Kingdom is prevented from granting the right to vote and to stand for election to certain persons who have a close link with it without however being nationals of that State or another Member State.

77 In addition, since the number of representatives elected in each Member State is laid down by Article 190(2) EC and since, in the current state of Community law, elections to the European Parliament are held in each Member State for the representatives to be elected in that State, an extension by a Member State of the right to vote at those elections to persons other than its own nationals or other than citizens of the Union resident in its territory affects only the choice of the representatives elected in that Member State and has no effect either on the choice or on the number of representatives elected in the other Member States.

78 It follows from all of those considerations that, in the current state of Community law, the definition of the persons entitled to vote and to stand as a candidate in elections to the European Parliament falls within the competence of each Member State in compliance with Community law, and that Articles 189 EC, 190 EC, 17 EC and 19 EC do not preclude the Member States from granting that right to vote and to stand as a candidate to certain persons who have close links to them, other than their own nationals or citizens of the Union resident in their territory.

79 For reasons connected to its constitutional traditions, the United Kingdom chose to grant the right to vote and to stand for election to QCCs who satisfy conditions

expressing a specific link with the territory in respect of which the elections are held. In the absence in the Community treaties of provisions stating expressly and precisely which persons have the right to vote and to stand as a candidate in elections to the European Parliament, it does not appear that the United Kingdom's decision to apply to the elections to that Parliament held in Gibraltar the rules governing the franchise and eligibility for election laid down by its national legislation both for national elections in the United Kingdom and for elections to the Gibraltar House of Assembly is contrary to Community law.

- 80 For all of those reasons, it must be held that the Kingdom of Spain has not established that the United Kingdom has infringed Articles 189 EC, 190 EC, 17 EC and 19 EC by adopting the EPRA 2003 which provides, in relation to Gibraltar, that QCCs resident in Gibraltar who are not Community nationals have the right to vote and to stand as a candidate in elections to the European Parliament. Consequently, the first plea in law is unfounded.

The second plea in law: breach of the 1976 Act and of the commitments made by the United Kingdom Government in the Declaration of 18 February 2002

- 81 The Kingdom of Spain claims that, by not confining itself, in the EPRA 2003, to attaching the electors resident in Gibraltar to a United Kingdom electoral region in their capacity as persons who have United Kingdom nationality under the terms of the 1982 Declaration, but by providing for the combination of the territory of Gibraltar with an existing electoral region in England and Wales, the United Kingdom was in breach of Annex I to the 1976 Act and of the Declaration of 18 February 2002.
- 82 The Kingdom of Spain recalls the status of Gibraltar as defined by Article X of the Treaty of Utrecht and, in particular, the right of pre-emption granted to the

Kingdom of Spain by the last sentence of that article. It states that, in 1830, the United Kingdom raised Gibraltar to the rank of a Crown Colony and that, when the United Nations was founded in 1946, Gibraltar was registered as a 'non-self-governing territory' within the meaning of Chapter XI of the Charter of the United Nations. In addition, the Kingdom of Spain refers to the negotiations in progress between it and the United Kingdom on the subject of Gibraltar's decolonisation.

- 83 It submits that, under Resolution 2625 (XXV) of 24 October 1970, adopted by the General Assembly of the United Nations, the territory of a colony must have a status separate and distinct from the territory of the State administering it. Annex I to the 1976 Act is an application of that principle. It submits that the EPRA 2003 infringes the international status of Gibraltar and Annex I to the 1976 Act in that it contains legislation relating to the territory of Gibraltar. As the Kingdom of Spain's representative explained at the hearing, Gibraltar's situation is colonial and the recognition of a separate electoral district is a step towards independence which runs counter to the international rules which govern that colony.

- 84 According to the Kingdom of Spain, while Article 9 of the EPRA 2003 is not necessarily contrary to Annex I to the 1976 Act in that it provides for the combination of Gibraltar with an electoral region of England and Wales, that is not the case with the other provisions of that legislation, which refer solely to Gibraltar. Thus, Article 14 provides for the maintenance of a register of electors in Gibraltar, under the responsibility of the Clerk of the House of Assembly of Gibraltar, and not under the responsibility of an agent of the British Crown. Likewise, the right to be enrolled on the Gibraltar register is defined in relation to the territory of Gibraltar and the right to vote is provided for in Gibraltar. The local courts of Gibraltar have jurisdiction to hear proceedings in electoral matters. Finally, section 28(2) of the EPRA 2003 defines its geographical scope as being the United Kingdom and Gibraltar. There is therefore a territorial application of the provisions relating to elections to the European Parliament although Gibraltar is excluded from the 1976 Act.

- 85 In view of the inconsistency of the EPRA 2003 with Annex I to the 1976 Act, the Kingdom of Spain submits that the United Kingdom has disregarded its own Declaration of 18 February 2002, a unilateral declaration which created an obligation in international law on the part of the United Kingdom to the Kingdom of Spain, by which, in order to comply with the judgment in *Matthews v the United Kingdom*, it undertook to make the necessary changes to enable the Gibraltar electorate to vote in elections to the European Parliament as part of an existing United Kingdom constituency, in compliance with Community law. In the Kingdom of Spain's submission, it would have sufficed for the United Kingdom to incorporate the Gibraltar electorate in an electoral region of the United Kingdom, without referring to the territory of Gibraltar.
- 86 The United Kingdom, supported by the Commission, points out the necessity of interpreting Annex I to the 1976 Act so far as possible in the light of and in conformity with fundamental rights, in particular, the right to take part in elections recognised in Article 3 of Protocol No 1 to the Convention, as interpreted by the European Court of Human Rights in *Matthews v the United Kingdom*. In order to fulfil its obligations under the Convention, as interpreted in that judgment, and in view of the Kingdom of Spain's refusal to agree to the revocation of Annex I to the 1976 Act, the United Kingdom undertook, by the Declaration of 18 February 2002, to ensure that the necessary changes would be made to enable the Gibraltar electorate to vote in elections to the European Parliament on the same terms as the electorate of an existing United Kingdom constituency.
- 87 The United Kingdom submits that it has not broken its undertaking. Gibraltar was combined with the electoral region of South West England in accordance with a recommendation from the Electoral Commission following public consultation. The conditions to be satisfied to be an elector are the same as those laid down by the electoral law of the United Kingdom, namely the requirements of citizenship, residence and enrolment on the electoral register. Those conditions have simply been adapted, with the necessary changes, to the Gibraltar electorate.

- 88 In the United Kingdom's submission, the method used, in that it refers to the territory of Gibraltar particularly as regards the elector's place of residence, is inherent in the United Kingdom electoral system and does not result in treating Gibraltar as a part of the United Kingdom. As regards arrangements for elections or the maintenance of the electoral register, the United Kingdom points out that their being localised in Gibraltar is intended to enable electors in Gibraltar to exercise their rights under the same conditions as the other electors of the electoral region of the South West of England, that is to say, close to their place of residence.
- 89 The Commission submits, finally, that the discretion left to the Gibraltar authorities is narrow and that the EPRA 2003 provides for safeguards which ensure sufficient control by the United Kingdom's own authorities.

Findings of the Court

- 90 As pointed out in paragraph 60 above, it was to comply with the judgment of the European Court of Human Rights in *Matthews v the United Kingdom* that the United Kingdom adopted the legislation challenged by the Kingdom of Spain. The Kingdom of Spain does not dispute, in that regard, that the United Kingdom was bound to comply with that obligation, in spite of the continuation of Annex I to the 1976 Act. Moreover, as pointed out in paragraph 62 above, the Kingdom of Spain does not dispute that the United Kingdom's Declaration of 18 February 2002 reflects an agreement reached between those two Member States on the conditions under which the United Kingdom was to comply with that judgment. Likewise, as is apparent from paragraph 13 above, the Council and the Commission took formal note of that declaration.
- 91 In that declaration, the United Kingdom undertook to 'ensure that the necessary changes are made to enable the Gibraltar electorate to vote in elections to the European Parliament as part of and on the same terms as the electorate of an existing United Kingdom constituency'.

- 92 As the United Kingdom and the Commission correctly maintained, the expression 'on the same terms' cannot be understood as meaning that the United Kingdom legislation would apply without adaptation to the Gibraltar electorate by its assimilation to the electorate of the United Kingdom constituency with which it would be combined. If that were the case, this would imply that the right to vote and to stand for election would be defined in relation to the territory of the United Kingdom, that electors should travel to the United Kingdom to consult the electoral register, vote in the United Kingdom or by post, and bring proceedings in electoral matters before the courts of the United Kingdom.
- 93 It is, on the contrary, to comply with the requirements resulting from those 'same terms' that the United Kingdom transposed its legislation to Gibraltar and adapted it, with the necessary changes, to that territory. Thus a Gibraltar elector is in a similar situation to that of a United Kingdom elector, and need not be faced with difficulties connected to Gibraltar's status which make it impossible for him to exercise that right to vote or dissuade him from doing so.
- 94 In that context, it must be noted that, as is clear from paragraph 63 of the judgment in *Matthews v the United Kingdom*, the Contracting States enjoy a wide margin of appreciation in imposing conditions on the right to vote. However, those conditions may not curtail the right to vote to such an extent as to impair its very essence and deprive it of effectiveness. They must pursue a legitimate aim and the means employed must not be disproportionate (see also the judgments of the ECHR in *Mathieu-Mohin and Clerfayt v. Belgium*, judgment of 2 March 1987, Series A no. 113, p. 23, § 52, and *Melnichenko v Ukraine*, no. 17707/02, § 54, ECHR 2004-X).
- 95 In the light of that case-law of the European Court of Human Rights and the fact that that Court has declared the failure to hold elections to the European Parliament in Gibraltar to be contrary to Article 3 of Protocol No 1 to the Convention in that it

denied 'the applicant, as a resident of Gibraltar' any opportunity to express her opinion on the choice of the members of the European Parliament, the United Kingdom cannot be criticised for adopting the legislation necessary for the holding of such elections under conditions equivalent, with the necessary changes, to those laid down by the legislation applicable in the United Kingdom.

96 The transposition to the territory of Gibraltar, with the necessary changes, of the United Kingdom legislation is all the less open to challenge since, as is clear from paragraph 59 of the judgment in *Matthews v the United Kingdom*, the European Court of Human Rights found no indication in the status of Gibraltar of any local requirements which would have to be taken into account, under Article 56(3) of the Convention, for the application of that Convention to a territory for whose international relations a Contracting State is responsible.

97 For all of those reasons, it must be held that the Kingdom of Spain's second plea in law is also unfounded.

Costs

98 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the United Kingdom has applied for costs and the Kingdom of

Spain has been unsuccessful, the latter must be ordered to pay the costs. Under the first subparagraph of Article 69(4) of the Rules of Procedure, the Commission, which has intervened in the proceedings, is to bear its own costs.

On those grounds, the Court (Grand Chamber) hereby:

- 1. Dismisses the action;**
- 2. Orders the Kingdom of Spain to pay the costs;**
- 3. Orders the Commission of the European Communities to bear its own costs.**

[Signatures]