

# VOTING RIGHTS AND ELIGIBILITY IN EUROPEAN PARLIAMENT ELECTIONS:

## THE COMPOSITE CONCEPT OF POLITICAL CITIZENSHIP IN EUROPE

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### Introduction

In the current state of European Union law, the definition of 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 European Union law.

In 2006, the extent of European electoral rights was examined in two cases that came before the Court of Justice, both of which arose in the context of various political debates within the Member States and have stood until the present day.

The decisions of the European Court of Justice on voting rights in Gibraltar and the Dutch Caribbean island of Aruba show the large extent to which the constitutional orders of the European Union and the Member States together form a mixture.

The mentioned judgments make it clear that it is the European Union principle of equal treatment which determines the manner in which Member States apply the European Court of Human Rights rights to vote and stand for election for the European Parliament.<sup>1</sup>

According to the European Court of Justice, Member State constitutional law determines the nature and scope of representation in the European Parliament, while European Union Law determines the scope of the relevant rights of the European Court of Human Rights and the freedom of Member States to determine electoral rights for the European Parliament.

The result is a composite concept of European citizenship, where the question of who can exercise democratic rights relating to European citizenship may depend both on the rules of each single Member State and on the European Union general principles, as explained in the following.

### THE JUDGEMENT OF THE EUROPEAN COURT OF JUSTICE DATED 12 SEPTEMBER 2006 IN CASES C-145/04 AND C-300/04

#### 1.1. Case C-145/04

##### 1.1.1. Brief summary

The judgment of the Court in case C-145/04 *Kingdom of Spain v United Kingdom* looked at whether a Member State is entitled to extend the right to vote in elections to the European Parliament to nationals of non-EU-member countries resident in Europe, in this case in Gibraltar.<sup>2</sup>

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<sup>1</sup> Besselink L.F.M., *Case C-145/04, Spain v. United Kingdom, judgment of the Grand Chamber of 12 September 2006; Case C-300/04, Eman and Sevinger, judgment of the Grand Chamber of 12 September 2006; ECtHR (Third Section), 6 Sept. 2007, Application Nos. 17173/07 and 17180/07 by Oslin Benito Sevinger and Michiel Godfried Eman against the Netherlands (Sevinger and Eman), in Common Market Law Review, 2008, pages 10 and following.*



In this case, it has been pointed out that: «*To enable the inhabitants of Gibraltar to participate in elections to the European Parliament, the United Kingdom established, in 2003, a new electoral region which combines Gibraltar with an existing electoral region in England and created a special electoral register. Thus, the right to vote at those elections was conferred on citizens of the Union and citizens of the Commonwealth satisfying certain criteria (qualifying Commonwealth citizens, 'QCCs') resident in Gibraltar*».<sup>3</sup>

According to Spain (the EU member state that brought the case against the UK), only citizens of the Union could be recognized as having the right to vote in elections to the European Parliament. In addition, Spain claimed that, by combining the territory of Gibraltar with an existing electoral region in England, the United Kingdom was in breach of Annex I to the act concerning the election of the representatives of the European Parliament by direct universal suffrage of 20 September 1976 (the "1976 Act") and of the relevant declaration of 18 February 2002<sup>4</sup>.

In its judgment, the Court recalled, at the outset, that it was to comply with a judgment of the European Court of Human Rights<sup>5</sup> that the United Kingdom adopted the legislation challenged by the Kingdom of Spain.

For reasons connected to its constitutional traditions, the United Kingdom chose to grant the right to vote and stand for election to QCCs satisfying conditions expressing a specific link with the area in respect of which the elections are held.

The Court held that neither the EC Treaty 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.

Therefore, in the current state of European Union law, the definition of the persons entitled to vote and stand as a candidate in elections to the European Parliament falls within the competence of each Member State in compliance with European Union law. The relevant articles of the EC Treaty 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.

In addition, so far as concerns the combination of the territory of Gibraltar with an existing electoral region in England, the Court noted that a Gibraltar elector is thus in a similar situation to that of a United Kingdom elector and should not be faced with difficulties connected to Gibraltar's status which makes it impossible for him to exercise that right to vote or dissuade him from doing so. It therefore rejected the Kingdom of Spain's argument in that regard.<sup>6</sup>

### 1.1.2. Pre-litigation procedure

Following an application lodged by a British citizen residing in Gibraltar, the European Court of Human Rights declared, by means of the decisions dated 18 February 1999 that, by failing to organize European Parliament elections in Gibraltar, the United Kingdom had infringed Article 3 of Human Rights and Fundamental Freedoms (ECHR) Protocol No 1<sup>7</sup>. The Art. 3 of ECHR obliges States to hold free and fair elections ensuring the free expression of people in the choice of the legislature.

The Strasbourg Court emphasized that, following the changes brought about by the Maastricht Treaty, the European Parliament «*is sufficiently involved in the specific legislative processes leading to the passage of legislation under Articles 189b and 189c of the EC Treaty [now Articles 251 EC and 252 EC] and is sufficiently involved in the general democratic supervision of the activities of the European Community*»<sup>8</sup> to constitute part of "legislature"<sup>9</sup> of territories such as Gibraltar, where the act of European Parliament has a "direct impact" on the local population, in the same way as measures passed by the local assemblies. The United Kingdom subsequently changed its legislation so as to grant inhabitants of Gibraltar the possibility to vote.

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<sup>2</sup> See the Press Release no. 70/06 of the Court of Justice, available at: [www.curia.europa.eu](http://www.curia.europa.eu).

<sup>3</sup> See the Press Release no. 70/06 of the Court of Justice, available at: [www.curia.europa.eu](http://www.curia.europa.eu).

<sup>4</sup> The Act concerning the election of the representatives of the European Parliament by direct universal suffrage, was annexed to Council Decision 76/787/ECSC, EEC, Euratom of 20 September 1976 (OJ 1976 L 278, p. 1), and amended by Council Decision 2002/772/EC, Euratom of 25 June 2002 and 23 September 2002 (OJ 2002 L 283, p. 1). 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'):

<sup>5</sup> *Matthews v United Kingdom*, 24833/94, ECHR 1999.

<sup>6</sup> See the Press Release no. 70/06 of the Court of Justice, available at: [www.curia.europa.eu](http://www.curia.europa.eu).

<sup>7</sup> 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 the legislature.

<sup>8</sup> Any reference to Community Law shall be interpreted as reference to European Union Law as well as any reference to the EC Treaty shall be construed as amended by the following treaties and renamed to Treaty on the Functioning of the European Union.

<sup>9</sup> Eur. Court. H.R. *Matthews* § 34 and 64.



On 8 May 2003, the UK proceeded to adopt the European Parliament (Representation) Act 2003 ("EPRA 2003"), which introduced an electoral constituency, including Gibraltar and an electoral district existing in England and Wales, an electoral register for Gibraltar and granted the right to vote in election for the European Parliament to UK citizens and Qualifying Common Wealth Citizens ("QCCs").

The Spanish Government decided to address the Commission, criticizing the EPRA 2003 under Article 227 EC in two respects. Spain argued that there had been a violation of Articles 17, 19, 189 and 190 EC and claimed that QCCs are not United Kingdom citizens and for that reason should not be permitted to vote in the European parliamentary elections.

Furthermore, it argued that the inclusion of Gibraltar into an existing electoral district of England and Wales was in violation of Annex II to the 1976 Act, which states that «*The United Kingdom will apply the provisions of this Act only in respect of the United Kingdom*», and in violation of the commitments given by the United Kingdom in its declaration of 18 February 2002<sup>10</sup>.

The Government of the United Kingdom explained that the status of QCCs is conferred on persons who are not nationals of the UK but do have the right to live in the UK and to vote for Parliament as well as for the European Parliament.

The United Kingdom also pointed out that the decision as to who is to be granted the voting rights in question is a matter left entirely to the Member States.

On this question, also the Commission, in support of the UK, argued that the concept of European citizenship is only affected when the extension of rights to non-EU-member State nationals infringes an EU citizen's rights and that this did not occur in this case. The Commission's press release states, among other things:

*«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».*<sup>11</sup>

Dissatisfied with the Commission's statement, by application to the Court of Justice, Spain started an enforcement action, claiming that the Court of Justice should declare:

*«by enacting the European Parliament (Representation) Act 2003, the United Kingdom has failed to fulfil its obligations under Article 189, 190, 17 and 19 EC and under Representatives of the European Parliament by Direct Universal Suffrage annexed to Decision 76/787/ECSC, EEC, Euratom of 10 September 1976 relating to the Act concerning the election of the representatives of the Assembly by direct universal suffrage».*

## 1.2. Case C-300/04

### 1.2.1. Brief summary

In the second case looked at here, a reference for a preliminary ruling in case C-300/04 *M.G. Eman and O.B. Sevinger v College van burgemeester en wethouders van Den Haag*, was made by the Dutch Raad van State (Council of State), who asked the Court, conversely, whether a Member State may exclude from the right to vote in European elections certain categories of its own nationals resident in an overseas territory associated to the Community (OCT), in this case Aruba.

The Kingdom of the Netherlands is composed of the Netherlands as well as the Islands of Aruba and the Dutch Antilles. For all the inhabitants of the Kingdom there is a single nationality, the Dutch nationality. Mr Eman and Mr Sevinger, both of Dutch nationality and residing in Oranjestad (Aruba), applied for enrolment on the register of electors for elections to the European Parliament. Their application was rejected on the ground that they are resident in Aruba.

The Dutch Raad van State asked whether the provisions of the EC Treaty relating to citizenship of the Union apply to persons who possess the nationality of a Member State and who are resident or living in an OCT.

After hearing the case, the Court of Justice declared that persons who possess the nationality of a Member State and who live or reside in a territory which is one of the OCTs may rely on the rights conferred on citizens of the Union, i.e. they should have the right to vote.

<sup>10</sup> In the opinion of Advocate General Tizzano, 6 April 2006, 34, it is pointed out that: «*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 United Kingdom 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 United Kingdom constituency, in order to ensure the fulfillment of the United Kingdom's obligation to implement the judgment of the European Court of Human Rights in the case of Matthews versus United Kingdom, consistent with European law*».

<sup>11</sup> Court of Justice, 12 September 2006, C-145/04 § 33.



Regarding the question of whether a citizen of the Union residing or living in an OCT is entitled to the right to vote and to stand as a candidate in elections to the European Parliament, the Court confirmed that the definition of the persons entitled to vote and stand as a candidate falls within the competence of each Member State in compliance with Community law. Having regard, in particular, to the case-law of the European Court of Human Rights, the criterion linked to residence does not appear to be appropriate to determine who is entitled to the right to vote and to stand as a candidate in elections to the European Parliament.

However, so far as concerns the principle of equal treatment, the relevant comparison is between a Dutch national resident in the Dutch Antilles or Aruba and another Dutch national residing in a non-EU-member country. They have in common that they are Dutch nationals who do not reside in the Netherlands. The Court found that there was nonetheless a difference in treatment between the two, the latter having the right to vote and to stand as a candidate in elections to the European Parliament held in the Netherlands whereas the former had no such right. Such a difference in treatment must be objectively justified.

In that regard, the Court held that the objective pursued by the Dutch legislature, consisting in the conferment of the right to vote and stand for election on Dutch nationals who have or have had links with the Netherlands, falls within that legislature's discretion as regards the holding of the election. However, the Dutch Government had not sufficiently demonstrated that the difference in treatment observed between Dutch nationals resident in a non-EU-member country and those resident in the Dutch Antilles or Aruba is objectively justified and does not therefore constitute an infringement of the principle of equal treatment.

### **1.2.2. Pre litigation procedure**

According to the Netherland Electoral Act, the *Kieswet*, every citizens over 18 years old, with the exception of nationals resident in the Dutch Antilles or Aruba, have the right to vote in elections for the Parliament of the Netherlands and the right to vote in elections for the European Parliament.

Consequently, in reason of those provisions, Messrs Eman and Sevenger, Dutch citizens residing in Aruba, that were not listed in the electoral registers and where therefore excluded from voting in the European elections of 2004, reported an unjustified discrimination and an infringement of their electoral rights under Article 3 of the First Protocol to the ECHR.

The Netherland Council of State (*Nederlandse Raad van State Afdeling bestuursrechtspraak*) decided to refer to the Court of Justice under article 234 EC the following five preliminary questions:

- (i) Does Part two of the Treaty apply to persons who possess the nationality of a Member State and who are resident or living in a territory belonging to the OCTs referred to in Article 299(3) EC and having special relations with that Member State?
- (ii) If the answer is no: are the Member States free, in the light of the second sentence of article 17(1) EC, to confer their nationality on persons who are resident or living in the OCTs referred to in Article 299(3) EC?
- (iii) Must Article 19(2) EC, read in conjunction with Articles 189 EC and 190(1) EC, be construed as meaning that – apart from the not unusual exceptions in national legal systems relating to, inter alia, deprivation of voting rights in connection with criminal convictions and legal incapacity – even in the case where the persons concerned are resident or living in the OCTs, the status of citizen of the Union automatically confers the right to vote and stand as a candidate in elections to the European Parliament?
- (iv) Do Articles 17 EC and 19(2), read together and considered in the lights of Article 3 of the Protocol, as interpreted by the European Court of Human Rights, preclude persons who are not citizens of the Union from having the right to vote and to stand as candidates in elections to the European Parliament?
- (v) Does community law impose requirements as to the nature of the legal redress to be provided in the case where the national courts – on the basis of, inter alia, the answer given by the Court of Justice of the European Communities to the above questions – conclude that persons resident or living in the Dutch Antilles and Aruba and having Dutch nationality were improperly refused registration for the election of June 2004?

### **1.3. The opinion of the Advocate General**

Advocate general Tizzano gave a single opinion for both cases described above. He took his starting point in a discussion of principle.

#### **1.3.1. Case C-145/04**

The Advocate general starts his opinion stressing the fact that an open and direct right to vote for EU citizens is not acknowledged and granted in any provision of Community Law.



However, as he argued, «even if we disregard the above and other possible references, it seems to me that the right to vote in European elections is enjoyed by citizens of the Union primarily by virtue of the principles of democracy on which the Union is based, and in particular, to use the words of the Strasbourg Court, the principle of universal suffrage which 'has become the basic principle' in modern democratic States and is also codified within the Community legal order in Article 190(1) EC and Article 1 of the 1976 Act, which specifically provide that the members of the European Parliament are to be elected by 'direct universal suffrage'. That rule militates in favour of recognition of a right to vote attaching to the largest possible number of people and therefore, at least in principle, to all citizens of a State»<sup>12</sup>.

That general guidance is also confirmed, according to the Advocate General, by the fact that the right to vote is one of the fundamental rights safeguarded by Article 3 of the First Protocol of the ECHR, without prejudice to any limitations usually and lawfully imposed. As a consequence, he focussed his opinion on the possibility of extending voting rights to citizens of non-EU-member countries.

Rejecting the Spanish argument, the Advocate general pointed out that the extension of that right to persons not having Union citizenship is not an «exceptional phenomenon which 'dismembers' the unicity of the concept of citizenship»<sup>13</sup>.

That extension, according to the Advocate General, appears to be consistent with the democratic principle of universal suffrage and is not, in any case, precluded by the general Treaty Rules.

Regarding the second criticism of Spain - that the inclusion of Gibraltar in an existing electoral district of England and Wales in violation of Annex II of the 1976 Act - he noted that, although the United Kingdom was required to introduce a derogation from the Annex II in order to guarantee voting rights for British citizens in Gibraltar within the judgement of the European Court of Human Rights, the extension of right to vote to QCC's, who are not citizens of the United Kingdom, involves a violation of Annex II to the 1976 Act, not justified by the need to guarantee a fundamental right.

The Advocate General, in his conclusion, therefore proposed that the Court of Justice reject the first criticism and uphold in part the second.

### 1.3.2. Case C-300/06

The Advocate General stated that, while Member States retain the power to determine the scope of their own citizenship and of the rights which flow from it, they must comply with European Union law in doing so.

The existence of domestic legislation is taken for granted by the European Union legal order and as such is assimilated by it for the purpose of defining entitlement to Union citizenship. The reference to the law of the Member States, however, concerns not only delimitation of the status of citizen of the Union but also the way in which the rights associated with that status are provided for, with the consequence that, when the legislation of a Member State places limitations on citizenship rights on the basis of objective criteria the European Union «legal order — without prejudice to observance of its fundamental principles - — accepts those limitations also for the purpose of determining the rights associated with citizenship of the Union»<sup>14</sup>.

As a matter of principle, therefore, «a Member State may establish a single citizenship for all those living in the State, but may also apportion the rights deriving from such citizenship according to the region of the State in which the citizens reside. That State can therefore, as the Kingdom of the Netherlands has done, confer the right to vote in European elections on its own citizens who are resident within the European territory of the State and to refuse such right to those citizens who are resident in another region of the State which is an associated overseas territory of the Community»<sup>15</sup>.

The Advocate General found, nevertheless, that the Dutch election law was at variance with the fundamental principle of equality.

The Dutch law in question confers the right to vote in elections to the European Parliament not only on Dutch citizens resident in the Netherlands but also to Dutch citizens who are resident in non-member countries, entirely denying that right only to those who are resident in Aruba and the Dutch Antilles.

The Dutch law thereby confers that right on Dutch citizens living in countries that are not part of the Netherlands or the Community but denies it to those resident in the islands just mentioned, even though they may be in the same situation

<sup>12</sup> Opinion of Advocate General Tizzano, 6 April 2006, § 69.

<sup>13</sup> Opinion of Advocate General Tizzano, 6 April 2006, § 92.

<sup>14</sup> Opinion of Advocate General Tizzano, 6 April 2006, § 151-153.

<sup>15</sup> See [http://europa.eu/rapid/press-release\\_CJE-06-34\\_en.htm](http://europa.eu/rapid/press-release_CJE-06-34_en.htm).





as the others and may actually claim to reside in territories which maintain special links with the Netherlands and the Community.<sup>16</sup>

According to the Advocate General, in conclusion, «Community law, and in particular the general principle of equal treatment, precludes a Member State which grants the right to vote in national elections and, consequently, in European election to its own citizens living within the European territory of the State and to those residing in non-Member States, from withholding – without objective justification – the right to vote in European parliament elections from its own citizens residing in another part of the State which constitutes an associated overseas territory of the Community».<sup>17</sup>

#### **1.4. The decision of the Court of Justice**

##### **1.4.1. Case C-145/04**

The Court of Justice began its judgement recalling that Spain's complaint was based on «a link between citizenship of the Union and the right to vote and to stand as a candidate for the European Parliament» and, according to Spain, in consequence of that link, «only citizens of the Union can have that right»<sup>18</sup>.

However, the Court explained that the adoption by the United Kingdom of legislation challenged by Spain was implemented to comply with the judgment of the European Court of Human Rights in *Matthews v the United Kingdom*.

At the outset, therefore, «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».

Afterwards, the Court started to analyze the alleged violations of United Kingdom in relation to the Articles of the Treaty.

According to the Court, neither Articles 189 and 190 of the Treaty, nor the 1976 Act on Direct Elections define «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».<sup>19</sup>

It is also not possible to derive from the Articles of the Treaty that "link", between citizenship and voting rights, suggested by Spain.

The Court pointed out that «No clear conclusion can be drawn in that regard from Articles 189 EC and 190 EC, relating to the European Parliament, which states 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».<sup>20</sup>

The court therefore asserted that the right to petition the European Parliament is not granted to EU citizens only, but to any natural or legal person residing or registered in a Member State.

In particular, Article 19 of the Treaty, raised by Spain in support of its arguments, according to the Court, cannot be interpreted to confirm 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».<sup>21</sup>

All these considerations led the Court to the conclusion that the Articles of the Treaty don't preclude Member States from granting the right to vote and to stand for election of the European Parliament to other defined categories of persons having close links with them.

The Court stated that «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

<sup>16</sup> Adapted from: [http://europa.eu/rapid/press-release\\_CJE-06-34\\_en.htm](http://europa.eu/rapid/press-release_CJE-06-34_en.htm).

<sup>17</sup> Opinion of Advocate General Tizzano, 6 April 2006, § V.

<sup>18</sup> Court of Justice, 12 September 2006, C-145/04 § 59.

<sup>19</sup> Court of Justice, 12 September 2006, C-145/04 § 70.

<sup>20</sup> Court of Justice, 12 September 2006, C-145/04 § 71.

<sup>21</sup> Court of Justice, 12 September 2006, C-145/04 § 76.



*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.* »<sup>22</sup>

On the basis of these considerations, the Court of Justice found that Spain had not proved the violations of the Treaty by the United Kingdom and, for this reason, judged the first plea in law as unfounded.

Also Spain's second plea in law has been judged unfounded by the Court, arguing that *«in the light of that case-law of the European Court of Human Rights and the fact that the 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.»*<sup>23</sup>

#### **1.4.2. Case C-300/ 04**

The judgment of the Court of Justice in case C-300/04 confirms that in the EC Treaty there are no rules that expressly define who has the right to vote and to stand as a candidate for the European Parliament.

Consequently, according to the Court, all the decisions about that right are within the competences of the Member State in compliance with the Community law.

About this specific case, it should be noted that the region of Aruba is one of the Overseas Countries and Territories (OCT's), which is a region with special links to Member States.

The OCT's, as stated by the Court, are subject to special association and, for that reason, the dispositions of the Treaty, when they do not expressly reference them, do not apply to them.

In the specific *Aruba* case, furthermore, the influence of Community law on the legislation of that region, was not to be regarded *«as affecting the population in the same way as the measures emanating from a local legislative assembly»*.<sup>24</sup>

The Court of Justice goes on to provide that the right to vote in the elections of the European Parliament in the Netherlands, is determined by the Dutch Electoral Law, as well as the right to vote to the national assembly, and, concerning this particular case, is not conferred to those residing in Aruba.

According to the Court, as previously observed, there is not a specific and unconditional right to vote and to stand as a candidate in elections to the European Parliament in any part of the EC Treaty.

Indeed, *«Article 19(2) EC, to which reference is made in the question referred, is confined to applying the principle of non-discrimination on grounds of nationality to that right to vote and stand for election, by stipulating 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. The first paragraph of Article 3 of Directive 93/109 provides under (b) that any citizen of the Union who is not a national of the Member State of residence, but satisfies the same conditions in respect of the right to vote and stand as a candidate as that State imposes by law on its own nationals, is to have the right to vote and stand as a candidate in the Member State of residence. Likewise, Article 5 of that directive is clearly based on the premise that a Member State may require a period of residence 'in the electoral territory' as a condition of the right to vote. It follows from that examination of Article 19(2) EC and of the provisions adopted for its implementation that that provision of the Treaty does not apply to a citizen of the Union residing in an OCT who wishes to exercise his right to vote in the Member State of which he is a national»*.<sup>25</sup>

In this context, according to the Court, in order to identify who should have the right to vote and to stand as a candidate for election, the criterion of residence may be used, as long as it is in compliance with Community law.

Here, however, it seems to violate the principle of equal treatment or non discrimination, which is one of the general principles of Community law.

In the present case, as stated by the Court, *«the relevant comparison is between a Netherlands national resident in the Netherlands Antilles or Aruba and one residing in a non-member country. They have in common that they are Netherlands nationals who do not reside in the Netherlands. Yet there is a difference in treatment between the two, the*

<sup>22</sup> Court of Justice, 12 September 2006, C-145/04 § 79.

<sup>23</sup> Court of Justice, 12 September 2006, C-145/04 § 95.

<sup>24</sup> Court of Justice, 12 September 2006, C-300/04 § 49.

<sup>25</sup> Court of Justice, 12 September 2006, C-300/04 § 53.



*latter having the right to vote and to stand as a candidate in elections to the European Parliament held in the Netherlands whereas the former has no such right. Such a difference in treatment must be objectively justified».*<sup>26</sup>

The Court concluded that the Netherlands was under an obligation to provide an objective justification for such difference in treatment and, in this particular case, it had failed to provide with such justification.

For these reasons, the Court pointed out that, while there are no dispositions of law precluding Member States to define the conditions of the right to vote by the criterion of residence, the principle of equal treatments, however, must be respected.

The final section of the judgement is a guidance to the Dutch national Court about the fifth question referred.

As mentioned before, the Raad van State asked whether Community law imposes requirements as to the nature of the legal redress to be provided in case citizens had been wrongly excluded from participating in the European Parliament elections.

In this frame, the Court ruled that it *«is for the national law of each Member State to determine the rules allowing legal redress for a person who, because of a national provision that is contrary to Community law, has not been entered on the electoral register for the election of the members of the European Parliament of 10 June 2004 and has therefore been excluded from participation in those elections. Those remedies, which may include compensation for the loss caused by the infringement of Community law for which the State may be held responsible, must comply with the principles of equivalence and effectiveness»*.<sup>27</sup>

## 2. SUBSTANTIVE REMARKS

Case C-145/04 was brought by Spain against the United Kingdom on the basis of Article 227 EC, regulating the territorial scope of the Treaty, a rare case of action based on such provision.

Case C-145/04 is also unusual because it is the sequel to a judgment of the European Court of Human Rights *Matthews v. United Kingdom* in which that Court found that the United Kingdom had failed to organize European Parliament elections in Gibraltar contrary to Article 3 of Protocol no. 1 to the European Convention on Human Rights.

To comply with that judgment, the United Kingdom Parliament passed the European Parliament (Representation) Act 2003 which contains a Section 9 combining Gibraltar with an existing electoral region in England and Wales to form a new electoral region. Therefore, voters in Gibraltar were represented in the European Parliament after 2004.

Notwithstanding that, Spain objected to the European Parliament (Representation) Act 2003 based on two grounds. First, because of Section 16, which extends the right to vote in European elections in Gibraltar to "qualifying Commonwealth citizens" who are not United Kingdom Citizens. Second, because the Act includes Gibraltar in an existing electoral district in England.

Advocate General Tizzano suggested that the Court should have proceeded against the United Kingdom and upheld Spain's claim about the extension of the right to vote in Gibraltar to "qualifying Commonwealth citizens" who are not United Kingdom citizens. But he suggests that the rest of Spain's claim should have been dismissed.

Case C-300/04 is a bit more straightforward.

The issue was that the Netherlands excluded its own citizens residing in Aruba from voting in European Elections there.

The Advocate General concluded that such an exclusion of the right to vote of its own citizens in Aruba without objective justification was contrary to EC law.<sup>28</sup>

As noticed, case C-145/04 and case C-300/04 were not joined, but they dealt with a similar issue, so that Advocate General Tizzano delivered a sole opinion referred to both the cases.

It has been noticed that *«there are some similarities as well as some striking differences in the European Court of Justice reasoning in these cases. The similarities include the failure to consider electoral rights as fundamental political rights within the terms of the EU Charter on Fundamental Rights, while among the differences there is the role which the*

<sup>26</sup> Court of Justice, 12 September 2006, C-300/04 § 56.

<sup>27</sup> Court of Justice, 12 September 2006, C-300/04 § 71.

<sup>28</sup> See reference at [http://eulaw.typepad.com/eulawblog/2006/04/right\\_to\\_vote\\_g.html](http://eulaw.typepad.com/eulawblog/2006/04/right_to_vote_g.html).





[European Court of Justice] attributes to the nature and role of European citizenship in the two cases. In both cases the ECJ apparently takes a broad interpretation of the franchise». <sup>29</sup>

These Court decisions show that democratic political rights to vote for the European Parliament may be exclusive in the sense of only pertaining to nationals, as is the case in some Member States such as France, whereas the right to vote is inclusive of non-nationals in some other Member States, as is the case with qualifying commonwealth citizens in UK and Gibraltar.

The fact of being a citizen of a Member State may grant the right to vote for the European Parliament although the citizen has never lived in a Member State or in Europe at all, such as under the electoral law of Netherlands, while European Union law allows the rights to vote for the European Parliament according to residence criteria.

In this respect, it has to be noticed that Article 39 of the Charter of fundamental rights of The European Union (the "Charter") - proclaimed in 2000, and which became legally binding on the European Union with the entry into force of the Treaty of Lisbon, in December 2009 – provides that «Every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State».

While the Charter, therefore, seems to confirm that political rights, under the European Union law, are granted based on residence criteria, the decisions discussed here, instead, seem to suggest that European citizenship could be dependent on national citizenship and on relevant national criteria, so that the question of who is to be considered a citizen enjoying the democratic political right to vote for the European Parliament could be answered differently from one Member State to another. <sup>30</sup>

Political citizenship, therefore, could be perceived as a composite concept, different from one Member State to another.

One important point, with reference to the cases discussed herein, is notable: «the willingness of both the Court of Justice and the Advocate General to extend the protection of the general principles of Community law to a group of citizens of the Union on a personal basis, notwithstanding they are not "connected" in any way to EU as single market and they are not residing in another Member State». <sup>31</sup>

This is an innovation of the cases, and it seems to be more significant for citizenship as a whole than it is for the question of the right to vote for the European Parliament.

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<sup>29</sup> Besselink L.F.M., Case C-145/04, *Spain v. United Kingdom*, judgment of the Grand Chamber of 12 September 2006; Case C-300/04, *Eman and Sevinger*, judgment of the Grand Chamber of 12 September 2006; ECtHR (Third Section), 6 Sept. 2007, Application Nos. 17173/07 and 17180/07 by Oslin Benito Sevinger and Michiel Godfried Eman against the Netherlands (*Sevinger and Eman*), in i, 2008.

<sup>30</sup> Besselink L.F.M., Case C-145/04, *Spain v. United Kingdom*, judgment of the Grand Chamber of 12 September 2006; Case C-300/04, *Eman and Sevinger*, judgment of the Grand Chamber of 12 September 2006; ECtHR (Third Section), 6 Sept. 2007, Application Nos. 17173/07 and 17180/07 by Oslin Benito Sevinger and Michiel Godfried Eman against the Netherlands (*Sevinger and Eman*), in i, 2008.

<sup>31</sup> Shaw J., *The transformation of citizenship in the European Union. Electoral rights and the restructuring of political space*, Edinburgh, 2007, 188.

