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Advocate General's Opinion in Cases C-145/04 and C-300/04

*Spain v United Kingdom, supported by the Commission of the European Communities
Eman and Sevinger v College van burgemeester en wethouders van Den Haag*

ADVOCATE GENERAL ANTONIO TIZZANO HAS DELIVERED HIS OPINION IN TWO CASES CONCERNING THE RIGHT TO VOTE IN ELECTIONS FOR THE EUROPEAN PARLIAMENT

The issue for decision in the **case brought by Spain** against the United Kingdom is **whether a Member State is entitled to extend voting rights in European Parliament elections to nationals of non-member countries resident in a European territory (i.e. Gibraltar)** (Case C-145/04).

In 2003 the United Kingdom enacted the European Parliament (Representation) Act 2003 (EPRA). In order to enable those living in Gibraltar to take part in European Parliament elections, that act established a new electoral constituency which includes Gibraltar and an existing constituency in England and Wales and set up an appropriate electoral register. The act also extended the right to vote to Commonwealth citizens resident in Gibraltar.

In opposing the EPRA, the Spanish Government submits (1) that the extension of voting rights in European Parliament elections to citizens of non-member countries resident in Gibraltar, who are not citizens of the United Kingdom, is contrary to the EC Treaty provisions on citizenship of the Union and elections to the European Parliament, and (2) that such extension and the inclusion of Gibraltar within an existing electoral constituency in the United Kingdom is contrary to Annex II to the 1976 Act concerning the election of representatives to the European Parliament¹.

¹ Decision 76/787/ECSC, EEC, Euratom of 20 September 1976 of the representatives of the Member States meeting in the Council relating to the Act concerning the election of the representatives of the Assembly by direct universal suffrage, as most recently amended by Council Decision 2002/772/EC, Euratom (OJ 2002 L 283, p. 1).

The Advocate General proposes that the Court **reject the first head of complaint in the action and uphold in part the second.**

According to the Advocate General, the possibility of extending the right to vote in elections to the European Parliament to citizens of non-member countries is not precluded by the general Treaty rules. Such an extension appears to be consistent with the democratic principle of universal suffrage, which argues in favour of recognising voting rights for the largest possible number of persons, and thus also extending such rights to non-nationals who are established in a particular Member State.

Member States are, however, under an obligation to comply with the general principles of the legal order, such as the principles of reasonableness, proportionality and non-discrimination, in addition to the specific Community provisions in the area under consideration (such as those imposed on the United Kingdom by Annex II to the 1976 Act).

The extension of voting rights to citizens of non-member countries, however, infringes Annex II to the 1976 Act. That Annex requires the United Kingdom to apply the provisions of the 1976 Act only in relation to the United Kingdom itself.

According to the Advocate General, the United Kingdom was required, as a result of the judgment delivered by the European Court of Human Rights in Strasbourg in the *Matthews* case², to introduce a derogation from Annex II in order to guarantee voting rights for British citizens resident in Gibraltar. The creation of a new electoral constituency, the carrying out of polling in Gibraltar and the establishment of the electoral register are legitimate measures inasmuch as they are necessary to guarantee the effectiveness of those citizens' right to vote.

By contrast, the extension of that right to persons resident in Gibraltar, but who are not citizens of the United Kingdom or of any other Member State of the European Union, is not required by the need to guarantee the exercise of a fundamental right and therefore does not justify a derogation from Annex II.

The Annex therefore retains its prohibitory scope in regard to citizens of non-member countries.

In the **reference for a preliminary ruling** in Case C-300/04, by contrast, the Nederlandse Raad van State (Netherlands Council of State) has asked **whether a Member State can exclude from the right to vote in European elections a number of categories of its own citizens resident in an overseas territory** which is associated with the Community (*in casu, Aruba*).

The Kingdom of the Netherlands consists of the Netherlands and the islands of Aruba and the Netherlands Antilles. One single nationality (Netherlands nationality) is shared by all citizens of the Kingdom.

In 2004 Mr Eman and Mr Sevinger, who are Netherlands citizens *de facto* resident in Aruba, requested that their names be entered on the electoral register in order to enable them to take part in the elections for the European Parliament. Their request was, however, turned down

² The *Matthews* judgment, which upheld the action brought by a British citizen resident in Gibraltar, established that the United Kingdom had breached the ECHR by failing to organise European Parliament elections in Gibraltar.

on the ground that Netherlands electoral law conferred the right to vote in parliamentary elections in the Netherlands and in elections to the European Parliament only on Netherlands citizens who were *de facto* resident in the European territory of the Kingdom.

The Advocate General states 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 Community law in doing so.

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.

That notwithstanding, in the view of the Advocate General, **the Netherlands law on elections is at variance** with Community law, in particular **with the fundamental principle of equality**.

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

The Netherlands law thereby confers that right on Netherlands 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 as the others (they are also Netherlands citizens resident outside the Netherlands) and may actually claim to reside in territories which maintain special links with the Netherlands and the Community.

IMPORTANT: The Advocate General's Opinion is not binding on the Court. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court of Justice are now beginning their deliberations in this case. Judgment will be given at a later date.

Unofficial document for media use, not binding on the Court of Justice.

Languages available: EN, ES, FR, DE, IT, NL, PL, SL

The full text of the Opinion may be found on the Court's internet site

*<http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-145/04>
<http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-300/04>*

It can usually be consulted after midday (CET) on the day of delivery.

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