CASE OF MATTHEWS v. THE UNITED KINGDOM

(Application no. 24833/94)

JUDGMENT

STRASBOURG

18 February 1999

In the case of Matthews v. the United Kingdom,

The European Court of Human Rights, sitting, in accordance with Article 27 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), as amended by Protocol No. 11[1], and the relevant provisions of the Rules of Court[2], as a Grand Chamber composed of the following judges:

Mr L. WILDHABER, *President*,
Mrs E. PALM,
Mr L. FERRARI BRAVO,
Mr GAUKUR JÖRUNDSSON,
Mr G. RESS,
Mr I. CABRAL BARRETO,
Mr J.-P. COSTA,
Mr W. FUHRMANN,
Mr K. JUNGWIERT,
Mr M. FISCHBACH,
Mrs N. VAJIĆ,
Mr J. HEDIGAN,
Mrs W. THOMASSEN,
Mrs M. TSATSA-NIKOLOVSKA,
Mr T. PANŢÎRU,
Mr K. TRAJA,
Sir John FREELAND, ad hoc *judge*,

and also of Mrs M. DE BOER-BUQUICCHIO, *Deputy Registrar*,

Having deliberated in private on 19 November 1998 and 20 and 21 January 1999,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court, as established under former Article 19 of the Convention[3], by the European Commission of Human Rights ("the Commission") on 26 January 1998, within the three-month period laid down by former Articles 32 § 1 and 47 of the Convention. It originated in an application (no. 24833/94) against the **United Kingdom** of Great Britain and Northern Ireland lodged with the Commission under former Article 25 by Ms Denise **Matthews** on 18 April 1994.

The Commission's request referred to former Articles 44 and 48 and to the declaration whereby the **United Kingdom** recognised the compulsory jurisdiction of the Court (former Article 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 3 of Protocol No. 1, taken alone or together with Article 14 of the Convention.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of former Rules of Court A[4], the applicant stated that she wished to take part in the proceedings and designated the lawyer who would represent her (former Rule 30).

3. As President of the Chamber which had originally been constituted (former Article 43 of the

Convention and former Rule 21) in order to deal, in particular, with procedural matters that might arise before the entry into force of Protocol No. 11, Mr R. Bernhardt, the President of the Court at the time, acting through the Registrar, consulted the Agent of the **United Kingdom** Government ("the Government"), the applicant's lawyer and the Delegate of the Commission on the organisation of the written procedure. Pursuant to the order made in consequence, the Registrar received the applicant's and the Government's memorials on 20 and 25 August 1998 respectively.

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

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

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

There appeared before the Court:

(a) *for the Government*
Mr M. EATON, Foreign and Commonwealth Office, *Agent*,
Mr D. ANDERSON, Barrister-at-Law, *Counsel*,
Ms D. COLLINS, Cabinet Office Legal Advisers,
Ms C. POWER, Foreign and Commonwealth Office, *Advisers*;

(b) *for the applicant*
Mr M. LLAMAS, Barrister-at-Law,
Mr L. BAGLIETTO, Barrister,
Mr F. PICARDO, Barrister, *Counsel*,
Mr R. BENZAQUEN, Legislation Support Unit, Gibraltar, *Adviser*;

(c) *for the Commission*
Mr J.-C. SOYER, *Delegate*,
Ms M.-T. SCHOEPFER, *Secretary to the Commission*.

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

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

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

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

II. RELEVANT LAW IN GIBRALTAR

A. GIBRALTAR AND THE UNITED KINGDOM

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

9. Executive authority in Gibraltar is vested in the Governor, who is the Queen's representative. Pursuant to a dispatch of 23 May 1969, certain "defined domestic matters" are allocated to the locally elected Chief Minister and his Ministers; other matters (external affairs, defence and internal security) are not "defined" and the Governor thus retains responsibility for them.

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

B. GIBRALTAR AND THE EUROPEAN COMMUNITY

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

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

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

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

C. THE EUROPEAN COMMUNITY AND THE EUROPEAN PARLIAMENT

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

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

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

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

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

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

The first paragraph of Article 189 provides:

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

Article 189b provides:

> "1. Where reference is made in the Treaty to this Article for the adoption of an act, the following procedure[5] shall apply.
>
> 2. The Commission shall submit a proposal to the European Parliament and the Council.
>
> The Council, acting by a qualified majority after obtaining the opinion of the European Parliament, shall adopt a common position. The common position shall be communicated to the European Parliament. The Council shall inform the European Parliament fully of the reasons which led it to adopt its common position. The Commission shall inform the European Parliament fully of its position.
>
> If, within three months of such communication, the European Parliament:
>
> (a) approves the common position, the Council shall definitively adopt the act in question in accordance with that common position;
>
> (b) has not taken a decision, the Council shall adopt the act in question in accordance with its common position;
>
> (c) indicates, by an absolute majority of its component Members, that it intends to reject the common position, it shall immediately inform the Council. The Council may convene a meeting of the Conciliation Committee referred to in paragraph 4 to explain further its position. The European Parliament shall thereafter either confirm, by an absolute majority of its component Members, its rejection of the common position, in which event the proposed act shall be deemed not to have been adopted, or propose amendments in accordance with subparagraph (d) of this paragraph;
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> (d) proposes amendments to the common position by an absolute majority of its component Members, the amended text shall be forwarded to the Council and to the Commission which shall deliver an opinion on those amendments.
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> 3. If, within three months of the matter being referred to it, the Council, acting by a qualified majority, approves all the amendments of the European Parliament, it shall amend its common position accordingly and adopt the act in question; however, the Council shall act unanimously on the amendments on which the Commission has delivered a negative opinion. If the Council does not approve the act in question, the President of the Council, in agreement with the President of the European Parliament, shall forthwith convene a meeting of the Conciliation Committee.
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> 4. The Conciliation Committee, which shall be composed of the members of the Council or their representatives and an equal number of representatives of the European Parliament, shall have the task of reaching agreement on a joint text, by a qualified majority of the members of the Council or their representatives and by a majority of the representatives of the European Parliament. The Commission shall take part in the Conciliation Committee's proceedings and shall take all the necessary initiatives with a view to reconciling the positions of the European Parliament and the Council.
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> 5. If, within six weeks of its being convened, the Conciliation Committee approves a joint text, the European Parliament, acting by an absolute majority of the votes cast, and the Council, acting by a qualified majority, shall have a period of six weeks from that approval in which to adopt the act in question in accordance with the joint text. If one of the two institutions fails to approve the proposed act, it shall be deemed not to have been adopted.

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

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

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

Article 189c provides:

"Where reference is made in this Treaty to this Article for the adoption of an act, the following procedure[6] shall apply:

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

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

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

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

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

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

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

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

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

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

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

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

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

D. ELECTIONS AND THE EUROPEAN PARLIAMENT

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

Steel Community Treaty and the European Atomic Energy Community Treaty.

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

E. THE APPLICATION OF THE CONVENTION TO GIBRALTAR

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

PROCEEDINGS BEFORE THE COMMISSION

20. Ms **Matthews** applied to the Commission on 18 April 1994. She alleged a violation of Article 3 of Protocol No. 1, taken alone or in conjunction with Article 14 of the Convention.

21. The Commission declared the application (no. 24833/94) admissible on 16 April 1996. In its report of 29 October 1997 (former Article 31 of the Convention), it expressed the opinion that there had been no violation of Article 3 of Protocol No. 1 (eleven votes to six) and that there had been no violation of Article 14 of the Convention (twelve votes to five). The full text of the Commission's opinion and of the five separate opinions contained in the report is reproduced as an annex to this judgment[7].

FINAL SUBMISSIONS TO THE COURT

22. The Government asked the Court to find that there had been no violation of the Convention.

23. The applicant, for her part, asked the Court to find a breach of her rights under Article 3 of Protocol No. 1, taken alone or in conjunction with Article 14 of the Convention. She also claimed an award of costs.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF PROTOCOL NO. 1

24. The applicant alleged a breach of Article 3 of Protocol No. 1, which provides:

> "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."

25. The Government maintained that, for three main reasons, Article 3 of Protocol No. 1 was

not applicable to the facts of the present case or, in the alternative, that there had been no violation of that provision.

A. WHETHER THE UNITED KINGDOM CAN BE HELD RESPONSIBLE UNDER THE CONVENTION FOR THE LACK OF ELECTIONS TO THE EUROPEAN PARLIAMENT IN GIBRALTAR

26. According to the Government, the applicant's real objection was to Council Decision 76/787 and to the 1976 Act concerning elections to the European Parliament (see paragraph 18 above). That Act, which had the status of a treaty, was adopted in the Community framework and could not be revoked or varied unilaterally by the **United Kingdom**. The Government underlined that the European Commission of Human Rights had refused on a number of occasions to subject measures falling within the Community legal order to scrutiny under the Convention. Whilst they accepted that there might be circumstances in which a Contracting Party might infringe its obligations under the Convention by entering into treaty obligations which were incompatible with the Convention, they considered that in the present case, which concerned texts adopted in the framework of the European Community, the position was not the same. Thus, acts adopted by the Community or consequent to its requirements could not be imputed to the member States, together or individually, particularly when those acts concerned elections to a constitutional organ of the Community itself. At the hearing, the Government suggested that to engage the responsibility of any State under the Convention, that State must have a power of effective control over the act complained of. In the case of the provisions relating to the elections to the European Parliament, the **United Kingdom** Government had no such control.

27. The applicant disagreed. For her, the Council Decision and 1976 Act constituted an international treaty, rather than an act of an institution whose decisions were not subject to Convention review. She thus considered that the Government remained responsible under the Convention for the effects of the Council Decision and 1976 Act. In the alternative – that is, if the Council Decision and 1976 Act were to be interpreted as involving a transfer of powers to the Community organs – the applicant argued, by reference to Commission case-law, that in the absence of any equivalent protection of her rights under Article 3 of Protocol No. 1, the Government in any event retained responsibility under the Convention.

28. The majority of the Commission took no stand on the point, although it was referred to in concurring and dissenting opinions.

29. Article 1 of the Convention requires the High Contracting Parties to "secure to everyone within their jurisdiction the rights and freedoms defined

in … [the] Convention". Article 1 makes no distinction as to the type of rule or measure concerned, and does not exclude any part of the member States' "jurisdiction" from scrutiny under the Convention (see the **United** Communist Party of Turkey and Others **v**. Turkey judgment of 30 January 1998, *Reports of Judgments and Decisions* 1998-I, pp. 17-18, § 29).

30. The Court notes that the parties do not dispute that Article 3 of Protocol No. 1 applies in Gibraltar. It recalls that the Convention was extended to the territory of Gibraltar by the **United Kingdom**'s declaration of 23 October 1953 (see paragraph 19 above), and Protocol No. 1 has been applicable in Gibraltar since 25 February 1988. There is therefore clearly territorial "jurisdiction" within the meaning of Article 1 of the Convention.

31. The Court must nevertheless consider whether, notwithstanding the nature of the elections to the European Parliament as an organ of the EC, the **United Kingdom** can be held responsible under Article 1 of the Convention for the absence of elections to the European Parliament in Gibraltar, that is, whether the **United Kingdom** is required to "secure" elections to the European Parliament notwithstanding the Community character of those elections.

32. The Court observes that acts of the EC as such cannot be challenged before the Court because the EC is not a Contracting Party. The Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be "secured". Member States' responsibility therefore continues even after such a transfer.

33. In the present case, the alleged violation of the Convention flows from an annex to the 1976 Act, entered into by the **United Kingdom**, together with the extension to the European Parliament's competences brought about by the Maastricht Treaty. The Council Decision and the 1976 Act (see paragraph 18 above), and the Maastricht Treaty, with its changes to the EEC Treaty, all constituted international instruments which were freely entered into by the **United Kingdom**. Indeed, the 1976 Act cannot be challenged before the European Court of Justice for the very reason that it is not a "normal" act of the Community, but is a treaty within the Community legal order. The Maastricht Treaty, too, is not an act of the Community, but a treaty by which a revision of the EEC Treaty was brought about. The **United Kingdom**, together with all the other parties to the Maastricht Treaty, is responsible *ratione materiae* under Article 1 of the Convention and, in particular, under Article 3 of Protocol No. 1, for the consequences of that Treaty.

34. In determining to what extent the **United Kingdom** is responsible for "securing" the rights in Article 3 of Protocol No. 1 in respect of elections to the European Parliament in Gibraltar, the Court recalls that the Convention is intended to guarantee rights that are not theoretical or illusory, but

practical and effective (see, for example, the above-mentioned **United** Communist Party of Turkey and Others judgment, pp. 18-19, § 33). It is uncontested that legislation emanating from the legislative process of the European Community affects the population of Gibraltar in the same way as legislation which enters the domestic legal order exclusively via the House of Assembly. To this extent, there is no difference between European and domestic legislation, and no reason why the **United Kingdom** should not be required to "secure" the rights in Article 3 of Protocol No. 1 in respect of European legislation, in the same way as those rights are required to be "secured" in respect of purely domestic legislation. In particular, the suggestion that the **United Kingdom** may not have effective control over the state of affairs complained of cannot affect the position, as the **United Kingdom**'s responsibility derives from its having entered into treaty commitments subsequent to the applicability of Article 3 of Protocol No. 1 to Gibraltar, namely the Maastricht Treaty taken together with its obligations under the Council Decision and the 1976 Act. Further, the Court notes that on acceding to the EC Treaty, the **United Kingdom** chose, by virtue of Article 227(4) of the Treaty, to have substantial areas of EC legislation applied to Gibraltar (see paragraphs 11 to 14 above).

35. It follows that the **United Kingdom** is responsible under Article 1 of the Convention for securing the rights guaranteed by Article 3 of Protocol No. 1 in Gibraltar regardless of whether the elections were purely domestic or European.

B. WHETHER ARTICLE 3 OF PROTOCOL NO. 1 IS APPLICABLE TO AN ORGAN SUCH AS THE EUROPEAN PARLIAMENT

36. The Government claimed that the undertaking in Article 3 of Protocol No. 1 was necessarily limited to matters falling within the power of the parties to the Convention, that is, sovereign States. They submitted that the "legislature" in Gibraltar was the House of Assembly, and that it was to that body that Article 3 of Protocol No. 1 applied in the context of Gibraltar. For the Government, there was no basis upon which the Convention could place obligations on Contracting Parties in relation to elections for the parliament of a distinct, supranational organisation, and they contended that this was particularly so when the member States of the European Community had limited their own sovereignty in respect of it and when both the European Parliament itself and its basic electoral procedures were provided for under its own legal system, rather than the legal systems of its member States.

37. The applicant referred to previous decisions of the European Commission of Human Rights in which complaints concerning the

European Parliament were dealt with on the merits, so that the Commission in effect assumed that Article 3 of Protocol No. 1 applied to elections to the European Parliament (see, for example, Lindsay **v**. the **United Kingdom**, application no. 8364/78, decision of 8 March 1979, Decisions and Reports (DR) 15, p. 247, and Tête **v**. France, application no. 11123/84, decision of 9 December 1987, DR 54, p. 52). She agreed with the dissenting members of the Commission who did not accept that because the European Parliament did not exist when Protocol No. 1 was drafted, it necessarily fell outside the ambit of Article 3 of that Protocol.

38. The majority of the Commission based its reasoning on this jurisdictional point. It considered that "to hold Article 3 of Protocol No. 1 to be applicable to supranational representative organs would be to extend the scope of Article 3 beyond what was intended by the drafters of the Convention and beyond the object and purpose of the provision. ...[T]he role of Article 3 is to ensure that elections take place at regular intervals to the national or local legislative assembly, that is, in the case of Gibraltar, to the House of Assembly" (see paragraph 63 of the Commission's report).

39. That the Convention is a living instrument which must be interpreted in the light of present-day conditions is firmly rooted in the Court's case-law (see, *inter alia*, the Loizidou **v**. Turkey judgment of 23 March 1995 (*preliminary objections*), Series A no. 310, pp. 26-27, § 71, with further reference). The mere fact that a body was not envisaged by the drafters of the Convention cannot prevent that body from falling within the scope of the Convention. To the extent that Contracting States organise common constitutional or parliamentary structures by international treaties, the Court must take these mutually agreed structural changes into account in interpreting the Convention and its Protocols.

The question remains whether an organ such as the European Parliament nevertheless falls outside the ambit of Article 3 of Protocol No. 1.

40. The Court recalls that the word "legislature" in Article 3 of Protocol No. 1 does not necessarily mean the national parliament: the word has to be interpreted in the light of the constitutional structure of the State in question. In the case of Mathieu-Mohin and Clerfayt **v**. Belgium, the 1980 constitutional reform had vested in the Flemish Council sufficient competence and powers to make it, alongside the French Community Council and the Walloon Regional Council, a constituent part of the Belgian "legislature", in addition to the House of Representatives and the Senate (see the Mathieu-Mohin and Clerfayt **v**. Belgium judgment of 2 March 1987, Series A no. 113, p. 23, § 53; see also the Commission's decisions on the application of Article 3 of Protocol No. 1 to regional parliaments in Austria (application no. 7008/75, decision of 12 July 1976, DR 6, p. 120)

and in Germany (application no. 27311/95, decision of 11 September 1995, DR 82-A, p. 158)).

41. According to the case-law of the European Court of Justice, it is an inherent aspect of EC law that such law sits alongside, and indeed has precedence over, domestic law (see, for example, Costa **v**. ENEL, 6/64 [1964] ECR 585, and Amministrazione delle Finanze dello Stato **v**. Simmenthal SpA, 106/77 [1978] ECR 629). In this regard, Gibraltar is in the same position as other parts of the European Union.

42. The Court reiterates that Article 3 of Protocol No. 1 enshrines a characteristic of an effective political democracy (see the above-mentioned Mathieu-Mohin and Clerfayt judgment, p. 22, § 47, and the above-mentioned **United** Communist Party of Turkey and Others judgment, pp. 21-22, § 45). In the present case, there has been no submission that there exist alternative means of providing for electoral representation of the population of Gibraltar in the European Parliament, and the Court finds no indication of any.

43. The Court thus considers that to accept the Government's contention that the sphere of activities of the European Parliament falls outside the scope of Article 3 of Protocol No. 1 would risk undermining one of the fundamental tools by which "effective political democracy" can be maintained.

44. It follows that no reason has been made out which could justify excluding the European Parliament from the ambit of the elections referred to in Article 3 of Protocol No. 1 on the ground that it is a supranational, rather than a purely domestic, representative organ.

C. WHETHER THE EUROPEAN PARLIAMENT, AT THE RELEVANT TIME, HAD THE CHARACTERISTICS OF A "LEGISLATURE" IN GIBRALTAR

45. The Government contended that the European Parliament continued to lack both of the most fundamental attributes of a legislature: the power to initiate legislation and the power to adopt it. They were of the opinion that the only change to the powers and functions of the European Parliament since the Commission last considered the issue in the above-mentioned Tête decision (see paragraph 37 above) – the procedure under Article 189b of the EC Treaty – offered less than even a power of co-decision with the Council, and in any event applied only to a tiny proportion of the Community's legislative output.

46. The applicant took as her starting-point in this respect that the European Commission of Human Rights had found that the entry into force of the Single European Act in 1986 did not furnish the European Parliament with the necessary powers and functions for it to be considered as a "legislature" (see the above-mentioned Tête decision). She contended that the Maastricht Treaty increased those powers to such an extent that the

European Parliament was now transformed from a mere advisory and supervisory organ to a body which assumed, or assumed at least in part, the powers and functions of legislative bodies within the meaning of Article 3 of Protocol No. 1. The High Contracting Parties had undertaken to hold free elections at reasonable intervals by secret ballot, under conditions which would ensure the free expression of the opinion of the people in the choice of the legislature. She described the powers of the European Parliament not solely in terms of the new matters added by the Maastricht Treaty, but also by reference to its pre-existing powers, in particular those which were added by the Single European Act in 1986.

47. The Commission did not examine this point, as it found Article 3 not to be applicable to supranational representative organs.

48. In determining whether the European Parliament falls to be considered as the "legislature", or part of it, in Gibraltar for the purposes of Article 3 of Protocol No. 1, the Court must bear in mind the *sui generis* nature of the European Community, which does not follow in every respect the pattern common in many States of a more or less strict division of powers between the executive and the legislature. Rather, the legislative process in the EC involves the participation of the European Parliament, the Council and the European Commission.

49. The Court must ensure that "effective political democracy" is properly served in the territories to which the Convention applies, and in this context, it must have regard not solely to the strictly legislative powers which a body has, but also to that body's role in the overall legislative process.

50. Since the Maastricht Treaty, the European Parliament's powers are no longer expressed to be "advisory and supervisory". The removal of these words must be taken as an indication that the European Parliament has moved away from being a purely consultative body, and has moved towards being a body with a decisive role to play in the legislative process of the European Community. The amendment to Article 137 of the EC Treaty cannot, however, be taken as any more than an indication as to the intentions of the drafters of the Maastricht Treaty. Only on examination of the European Parliament's actual powers in the context of the European Community legislative process as a whole can the Court determine whether the European Parliament acts as the "legislature", or part of it, in Gibraltar.

51. The European Parliament's role in the Community legislative process depends on the issues concerned (see paragraphs 15-16 above).

Where a regulation or directive is adopted by means of the consultation procedure (for example under Articles 99 or 100 of the EC Treaty) the European Parliament may, depending on the specific provision, have to be consulted. In such cases, the European Parliament's role is limited. Where the EC Treaty requires the procedure set out in Article 189c to be used, the

European Parliament's position on a matter can be overruled by a unanimous Council. Where the EC Treaty requires the Article 189b procedure to be followed, however, it is not open to the Council to pass measures against the will of the European Parliament. Finally, where the so-called "assent procedure" is used (as referred to in the first paragraph of Article 138b of the EC Treaty), in relation to matters such as the accession of new member States and the conclusion of certain types of international agreements, the consent of the European Parliament is needed before a measure can be passed.

In addition to this involvement in the passage of legislation, the European Parliament also has functions in relation to the appointment and removal of the European Commission. Thus, it has a power of censure over the European Commission, which can ultimately lead to the European Commission having to resign as a body (Article 144); its consent is necessary for the appointment of the European Commission (Article 158); its consent is necessary before the budget can be adopted (Article 203); and it gives a discharge to the European Commission in the implementation of the budget, and here has supervisory powers over the European Commission (Article 206).

Further, whilst the European Parliament has no formal right to initiate legislation, it has the right to request the European Commission to submit proposals on matters on which it considers that a Community act is required (Article 138b).

52. As to the context in which the European Parliament operates, the Court is of the view that the European Parliament represents the principal form of democratic, political accountability in the Community system. The Court considers that whatever its limitations, the European Parliament, which derives democratic legitimation from the direct elections by universal suffrage, must be seen as that part of the European Community structure which best reflects concerns as to "effective political democracy".

53. Even when due allowance is made for the fact that Gibraltar is excluded from certain areas of Community activity (see paragraph 12 above), there remain significant areas where Community activity has a direct impact in Gibraltar. Further, as the applicant points out, measures taken under Article 189b of the EC Treaty and which affect Gibraltar relate to important matters such as road safety, unfair contract terms and air pollution by emissions from motor vehicles and to all measures in relation to the completion of the internal market.

54. The Court thus finds that 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, and is

sufficiently involved in the general democratic supervision of the activities of the European Community, to constitute part of the "legislature" of Gibraltar for the purposes of Article 3 of Protocol No. 1.

D. THE APPLICATION OF ARTICLE 56 OF THE CONVENTION TO THE CASE

55. Article 56 §§ 1 and 3 of the Convention provide as follows:

> "1. Any State may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary General of the Council of Europe that the … Convention shall, subject to paragraph 4 of this Article, extend to all or any of the territories for whose international relations it is responsible.
>
> ...
>
> 3. The provisions of [the] Convention shall be applied in such territories with due regard, however, to local requirements."

56. The Government noted, without relying formally on the point, that two members of the Commission had emphasised the constitutional position of Gibraltar as a dependent territory in the context of Article 56 (formerly Article 63) of the Convention.

57. The applicant was of the view that the "local requirements" referred to in Article 56 § 3 of the Convention could not be interpreted so as to restrict the application of Article 3 of Protocol No. 1 in the case.

58. The Commission, which found Article 3 not to be applicable on other grounds, did not consider this point. Two members of the Commission, in separate concurring opinions, both found that Article 56 of the Convention had a role to play in the case.

59. The Court recalls that in the Tyrer **v**. the **United Kingdom** judgment (25 April 1978, Series A no. 26, pp. 18-19, § 38) it found that before the former Article 63 § 3 could apply, there would have to be "positive and conclusive proof of a requirement". Local requirements, if they refer to the specific legal status of a territory, must be of a compelling nature if they are to justify the application of Article 56 of the Convention. In the present case, the Government do not contend that the status of Gibraltar is such as to give rise to "local requirements" which could limit the application of the Convention, and the Court finds no indication that there are any such requirements.

E. WHETHER THE ABSENCE OF ELECTIONS TO THE EUROPEAN PARLIAMENT IN GIBRALTAR IN 1994 WAS COMPATIBLE WITH ARTICLE 3 OF PROTOCOL NO. 1

60. The Government submitted that, even if Article 3 of Protocol No. 1 could be said to apply to the European Parliament, the absence of elections in Gibraltar in 1994 did not give rise to a violation of that provision but instead fell within the State's margin of appreciation. They pointed out that in the 1994 elections the **United Kingdom** had used a single-member constituency, "first-past-the-post" system. It would have distorted the electoral process to constitute Gibraltar as a separate constituency, since its population of approximately 30,000 was less than 5% of the average population per European Parliament seat in the **United Kingdom**. The alternative of redrawing constituency boundaries so as to include Gibraltar within a new or existing constituency was no more feasible, as Gibraltar did not form part of the **United Kingdom** and had no strong

historical or other link with any particular **United Kingdom** constituency.

61. The applicant submitted that she had been completely deprived of the right to vote in the 1994 elections. She stated that the protection of fundamental rights could not depend on whether or not there were attractive alternatives to the current system.

62. The Commission, since it did not find Article 3 of Protocol No. 1 to be applicable, did not examine whether or not the absence of elections in Gibraltar was compatible with that provision.

63. The Court recalls that the rights set out in Article 3 of Protocol No. 1 are not absolute, but may be subject to limitations. The Contracting States enjoy a wide margin of appreciation in imposing conditions on the right to vote, but it is for the Court to determine in the last resort whether the requirements of Protocol No. 1 have been complied with. It has to satisfy itself that the conditions do not curtail the right to vote to such an extent as to impair its very essence and deprive it of effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate. In particular, such conditions must not thwart "the free expression of the people in the choice of the legislature" (see the above-mentioned Mathieu-Mohin and Clerfayt judgment, p. 23, § 52).

64. The Court makes it clear at the outset that the choice of electoral system by which the free expression of the opinion of the people in the choice of the legislature is ensured – whether it be based on proportional representation , the "first-past-the-post" system or some other arrangement – is a matter in which the State enjoys a wide margin of appreciation. However, in the present case 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. The position is not analogous to

that of persons who are unable to take part in elections because they live outside the jurisdiction, as such individuals have weakened the link between themselves and the jurisdiction. In the present case, as the Court has found (see paragraph 34 above), the legislation which emanates from the European Community forms part of the legislation in Gibraltar, and the applicant is directly affected by it.

65. In the circumstances of the present case, the very essence of the applicant's right to vote, as guaranteed by Article 3 of Protocol No. 1, was denied.

It follows that there has been a violation of that provision.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 3 OF PROTOCOL NO. 1

66. The applicant in addition alleged that, as a resident of Gibraltar, she had been the victim of discrimination contrary to Article 14 of the Convention, which provides:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

67. The Government did not address separately this complaint.

68. In view of its above conclusion that there has been a violation of Article 3 of Protocol No. 1 taken alone, the Court does not consider it necessary to consider the complaint under Article 14 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

69. Under Article 41 of the Convention,

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. COSTS AND EXPENSES

70. The applicant did not claim any damages under Article 41, but she did claim costs and expenses before the Court totalling 760,000 French francs (FRF) and 10,955 pounds sterling (GBP), made up as to FRF 760,000 of her representative's fees and expenses (750 hours at FRF 1,000 per hour)

and FRF 10,000 disbursements, and as to GBP 10,955 of fees and expenses incurred in instructing solicitors in Gibraltar. She also claimed FRF 6,976 and GBP 1,151.50 in respect of travel expenses.

The Government considered that the total number of hours claimed by the applicant's main representative should be reduced by about half, and that the Gibraltar advisers' claims should not have amounted to more than one-third of the sums actually claimed. They also challenged some of the travel expenses.

71. In the light of the criteria established in its case-law, the Court holds on an equitable basis that the applicant should be awarded the sum of GBP 45,000 from which should be deducted FRF 18,510 already paid by way of legal aid for fees and travel and subsistence expenses before the Court.

B. DEFAULT INTEREST

72. According to the information available to the Court, the statutory rate of interest applicable in the **United Kingdom** at the date of adoption of the present judgment is 7.5% per annum.

FOR THESE REASONS, THE COURT

1. *Holds* by fifteen votes to two that there has been a breach of Article 3 of Protocol No. 1;

2. *Holds* unanimously that it is not necessary to consider the complaint under Article 14 of the Convention taken together with Article 3 of Protocol No. 1;

3. *Holds* unanimously
   (a) that the respondent State is to pay the applicant, within three months, for costs and expenses, 45,000 (forty-five thousand) pounds sterling together with any value-added tax that may be chargeable, less 18,510 (eighteen thousand five hundred and ten) French francs to be converted into pounds sterling at the rate applicable on the date of delivery of the present judgment;
   (b) that simple interest at an annual rate of 7.5% shall be payable from the expiry of the above-mentioned three months until settlement;

4. *Dismisses* unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 18 February 1999.

Luzius WILDHABER
President

Maud DE BOER-BUQUICCHIO
Deputy Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint dissenting opinion of Sir John Freeland and Mr Jungwiert is annexed to this judgment.

L.W.

M.B.

JOINT DISSENTING OPINION OF JUDGES SIR JOHN FREELAND AND JUNGWIERT

1. We voted against the finding of a breach of Article 3 of Protocol No. 1, essentially for the following reasons.

2. In the first place, and as a general point, the view has throughout weighed heavily with us that a particular restraint should be required of the Court when it is invited, as it is here, to pronounce on acts of the European Community or consequent to its requirements, especially when those acts relate to a matter so intimately concerned with the operation of the Community as elections to one of its constitutional organs.

3. Secondly, as to the interpretation to be given to Article 3 of Protocol No. 1, we have considered that the view taken in the Commission, by the substantial majority of eleven votes to six, that "the role of Article 3 is to ensure that elections take place at regular intervals to the national or local legislative assembly" has much to commend it. It is, as reference to the *travaux préparatoires* confirms, a view squarely within the intention of the drafters (who, it should be recalled, were working at a time when about half the countries of Europe – including some in Western Europe – were deprived of free elections). Further, by confining the ambit of the provision to bodies within the domestic area and excluding any supranational representative organ, it avoids the uncertainty and invidiousness involved in analysis by an outside body of the characteristics of such an organ, which as experience has shown are likely to be neither straightforward nor static.

4. If, however, it is justifiable, on the familiar basis that "the Convention is a living instrument which must be interpreted in the light of present-day conditions", to include within the scope of Article 3 of Protocol No. 1 a body which was plainly not within the contemplation of the drafters, if only because no such body existed at the time, it becomes necessary to consider whether the body concerned is properly to be regarded as "*the* legislature" (emphasis supplied) within the meaning of the provision. That question may require, in turn, two others. First, is the body a legislature at all? And, secondly, if it is, is it the legislature for the State or territory in question – in this case, Gibraltar?

5. As to the first of these questions, it is in our view intrinsic to the notion of a "legislature" that the body concerned should have the power to initiate legislation and to adopt it (subject, in the case of some national Constitutions, to the requirement of the assent of the head of State). If this power is lacking, the fact that the body may have other powers often exercisable by national legislatures (for example, powers in relation to censure of the executive or to the budget) is not enough to remedy the deficiency. The existence of such other powers may enhance the body's entitlement to be styled as a parliament and its role in promoting an "effective political democracy". But the facts that it is so styled and has such a role are not to be regarded as requiring it to be treated as a "legislature" unless it has in itself the necessary legislative power.

6. With the vestigial and for present purposes insignificant exception of its power under Article 95(3) of the European Coal and Steel Community Treaty, the European Parliament has no power to initiate and adopt legislation. Even in the case of the so-called co-decision procedure (Article 189b) introduced by the Maastricht Treaty – a procedure to which much significance was attached on behalf of the applicant –, while the European Parliament has potential influence on the content of legislation and a power to block legislation to which it objects, it has neither the sole right to adopt legislation nor the power to force the Council to adopt legislation which the Council does not want. Nor does the procedure provide the Parliament with any opportunity to initiate legislation itself.

7. Thus, even if, as paragraph 50 of the judgment says, the Maastricht Treaty's removal of the words "advisory and supervisory" to describe the powers of the European Parliament "must be taken as an indication that the European Parliament has moved away from being a purely consultative body, and has moved towards being a body with a decisive role to play in the legislative process of the European Community", as matters stand (and stood at the time of the 1994 elections) that Parliament has not in our view reached a stage where it can of itself properly be regarded as constituting a legislature. To borrow the words of Professor Dashwood in his inaugural address at the University of Cambridge in November 1995, "the Community has no legislature, but a legislative process in which the different political institutions have different parts to play". In fact, of the institutions of the Community it is the Council of Ministers which performs the functions most closely related to those of a legislature at national level.

8. If it had become necessary to consider whether, on the hypothesis that it was in the true sense a legislature, the European Parliament qualified to be treated as "the legislature" for Gibraltar within the meaning of Article 3 of Protocol No. 1, so that Gibraltar elections were required to be held to it as well as to the local House of Assembly, we would have been influenced in the contrary direction by the exclusion of Gibraltar from substantial parts of the EC Treaty and the limited extent of the areas of Community competence in which the Parliament has, in any event, a significant role (as it does not in the areas of foreign and security policy, justice and home affairs, the implementation of the common commercial policy or the negotiation of trade agreements with other States or international organisations; or in the field of economic and monetary union). We would have been similarly influenced by the small number of measures adopted under the Article 189b procedure and applicable to Gibraltar. But, given the negative view which we have reached on the qualifications of the European Parliament to be regarded as a legislature, there is no need for us to proceed to a conclusion on the further question.

9. We would add only that, to put it no higher, we see a certain incongruity in the branding of the United Kingdom as a violator of obligations under Article 3 of Protocol No. 1 when the exclusion from the franchise effected multilaterally by the 1976 Decision and Act – in particular, Annex II – was at that time wholly consistent with those obligations (because on no view could the Assembly, as it was then known, be regarded as a legislature); when at no subsequent time has it been possible for the United Kingdom unilaterally to secure the modification of the position so as to include Gibraltar within the franchise; and when such a modification would require the agreement of all the member States (including a member State in dispute with the United Kingdom about sovereignty over Gibraltar).

Notes by the Registry

1-2. Protocol No. 11 and the Rules of Court came into force on 1 November 1998.

3. Since the entry into force of Protocol No. 11, which amended Article 19, the Court has functioned on a permanent basis.

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

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

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

1. *Note by the Registry*. For practical reasons this annex will appear only with the final printed version of the judgment (in the official reports of selected judgments and decisions of the Court), but a copy of the Commission's report is obtainable from the Registry.

MATTHEWS v. THE UNITED KINGDOM JUDGMENT

MATTHEWS v. THE UNITED KINGDOM JUDGMENT – JOINT DISSENTING OPINION OF JUDGES Sir John FREELAND AND JUNGWIERT

MATTHEWS v. THE UNITED KINGDOM JUDGMENT