



The Status of Gibraltar under EU Law

Oliver Marre

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

+44 (0)207 242 2744

olivermarre@15oldsquare.co.uk



**Green J in *Gibraltar Betting & Gaming Association* [2014]
EWHC 3236 (Admin)**

“GBGA 1”

- “...*par excellence*, a question for the Court of Justice...”



Charles J in *R (GBGA) v HMRC & the Treasury* [2015] EWHC 1863 (Admin)

“GBGA 2”

“...Green J concluded that the constitutional issues are *par excellence* issues for the CJEU. I agree.”



GBGA 2

The question was whether Gibraltar betting companies can rely on the freedom to provide services in resisting a restrictive UK tax regime.

Three choices were identified:

- i) Gibraltar and the UK are parts of a single Member State for the purposes of EU law and so Article 56 does not apply, save to the extent that it can apply to an internal measure;
- ii) Gibraltar is to be treated as a Member State for the purposes of Article 56 or as a separate territory with the effect that trade between Gibraltar and the UK is to be treated as intra-EU trade between Member States;
- iii) Gibraltar is a third country or territory with the effect that EU law is only engaged in respect of trade between the two in circumstances where EU law has effect between a Member State and a non-Member State.



Some consequences of the decision

Impact on Gibraltar economy, including in particular (in respect of the current, controversial question) business with the UK/UK entities;

Review of Gibraltarian adoption of EU directives, including in particular granting relevant rights to UK nationals/companies;

Query UK/Spanish position



A brief history

Crown colony/ British Overseas Territory) since 1713.

Executive power exercised by a Governor and, in respect of defined domestic matters, by the Council of Ministers.

Legislative power is divided between the House of Assembly and the Governor.

Gibraltar has its own courts. Appeals may be brought before the Privy Council.



The Treaty

Article 355(3) TFEU [previously 229(4) TEC] applies the Treaty to:

“European territories for whose external relations a Member State is responsible.”

Exclusions:

Outside Common Agricultural and Fisheries Policies; outside Customs Union; outside scope of VAT. (The Act concerning the conditions of accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland and the adjustments to the Treaties (OJ 1972 L 73, p. 14)).



Gibraltar & the UK v European Commission T-211/04 & T-215/04

“[10]... Since the territory of Gibraltar is a European territory, within the meaning of Article 299(4) EC, for whose external relations the United Kingdom is responsible, the provisions of the Treaty apply to it...”

However, the court did not go on to decide whether Gibraltar is “part of the United Kingdom” for EU purposes (see para 115), as that was not necessary.



Spain v UK C-145/04

“[15] Gibraltar is currently a British Crown Colony. It does not form part of the United Kingdom.

...

[19] In Community law, Gibraltar is a European territory for whose external relations a Member State is responsible within the meaning of Article 299(4) EC and to which the provisions of the EC Treaty apply...”



Controversy

Matthews [GC] (1999) 28 EHRR 361: “part of the UK” for elections?

2 GBGA cases &

Fisher v HMRC [2014] UKFTT 804:

“part of UK” / wholly internal”?



Matthews v UK [GC] (1999) 28 EHRR 361

Gibraltar's exclusion from the franchise for elections to the European parliament.

EU Decision 76/787 & Act on Direct Elections 1976 provided:
"The UK will apply the provisions of this Act only in respect of the UK."



Matthews contd.

The UK government submitted: “As a matter of UK law, Gibraltar does not constitute part of the UK....”

The Treaty draws a distinction between the Member State and the European territories for whose external relations a Member State is responsible.”



Matthews contd.

“It is uncontested that legislation emanating from the legislative process of the European Community affects the population of Gibraltar... there is 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...the United Kingdom’s responsibility derives from its having entered into treaty commitments...the United Kingdom chose, by virtue of Article 227(4) of the Treaty, to have substantial areas of EC legislation applied to Gibraltar....”



GBGA 1

Not “necessary” for the UK High Court to decide.

Relevance of Isle of Man position: *DHSS v Barr* [1991] I-3497: “not wholly internal...for the IoM is not part of the United Kingdom.”

Relevance of Channel Islands: *Perreira Roque* [1998] ECR I-4636: C.I. not their own MS, but “nothing in the judgment...treats the CI and the UK as a single MS”.



GBGA 1 contd

Cf. *Jersey Potatoes* [2005] ECR I-9580: CI and UK regarded as a single MS “in the context of the express provisions of the Protocol” [on Customs Union].

Goods imported to Gibraltar not in free circulation in the UK: *Commission v UK* [2003] ECR I-9481: “the ruling was based upon Gibraltar being legally and politically separate from the UK...”



GBGA 1 contd

Prunus [2011] ECR I-3357:

Freedoms which apply to third countries apply to OCTs.

In summary:

Gibraltar not its own MS;

Gibraltar not part of the UK;

Therefore relations are “to be treated as relations between a MS and a third country...” & (i) some freedoms should anyway apply; (ii) the door is open to collateral effect arguments.



GBGA 2

“Necessary” for result of JR.

Referred to CJEU.

Reference made September 2015.



Fisher

FTT decision.

Appealed by both parties.

Hearing expected April 2016 subject to stay for GBGA 2. Not acte clair but no reference.

Decided the matter was “wholly internal”.

Did not consider in any detail collateral effects.



Final thoughts

General position governed by Article 355(3).

N.b. exclusions.

ECJ decision expected in roughly 18 months in respect of UK/Gibraltar position in GBGA 2.