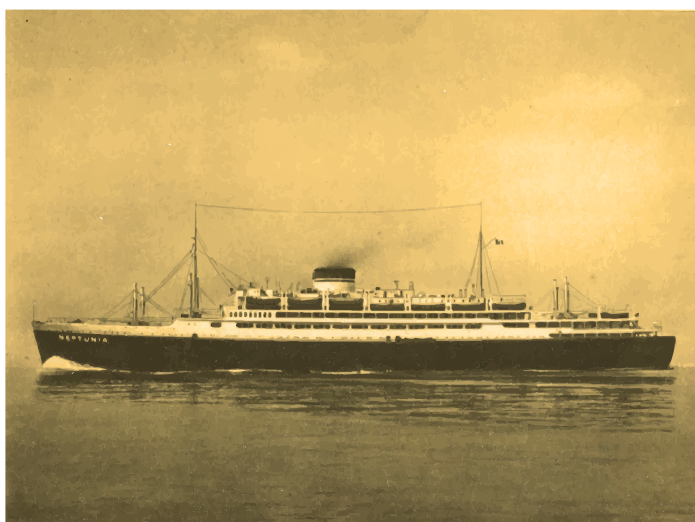


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THE LIMITS OF EU BORDER AND IMMIGRATION POLICY IN GIBRALTAR: EFFECTS ON THE LEGAL SITUATION OF MOROCCAN WORKERS

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I. INTRODUCTION TO THE LEGAL BACKGROUND: THE ISSUE OF GIBRALTAR – II. GIBRALTAR IN THE EU AREA OF FREEDOM, SECURITY AND JUSTICE – III. A SCHENGEN BORDER BETWEEN GIBRALTAR AND SPAIN? – IV. MOROCCAN IMMIGRATION TO GIBRALTAR – V. CONCLUDING REMARKS

ABSTRACT: In the European Area of Freedom, Security and Justice (AFSJ) is affected by multiple asymmetries arising from the need for flexibility in the integration strategy with respect to those matters connected with the hard core of State sovereignty. This “variable geometry” has a significant impact on the development of a coherent status for third country nationals through a genuine Common Immigration Policy. The particular situation of Gibraltar is very illustrative in this respect, because here, the specificities of its status both in relation to EU law and international law converge with a differentiated approach to the Schengen acquis, and with an opt-out to the Common Migration Policy.

This article discusses some of the disruptions caused by variable integration in the AFSJ, in light of the particular example of the situation of Moroccan workers in Gibraltar, in relation to which this amalgam of legal specificities has resulted in a situation of reduced mobility and isolation from some positive legal developments in the field of the Common Migration Policy.

KEYWORDS : Area of freedom, security and justice (AFSJ) ; Gibraltar ; Moroccan workers ; migrant workers; European migration policy; opt-out; Schengen acquis.

LOS LÍMITES DE LA POLÍTICA EUROPEA DE INMIGRACIÓN Y FRONTERAS DE LA UE EN GIBRALTAR: EFECTOS EN LA SITUACIÓN JURÍDICA DE LOS TRABAJADORES MARROQUÍES

RESUMEN: El Espacio de libertad, seguridad y justicia (ELSJ) está afectado por múltiples disimetrías que emanan de la necesidad de flexibilidad en la estrategia de integración con respecto a aquellas materias vinculadas al núcleo duro de la soberanía estatal. Esta situación de geometría variable tiene un impacto muy relevante en la elaboración de una aproximación coherente al estatuto de los nacionales de terceros estados a través de una auténtica política de inmigración común. Las particularidades de la situación de Gibraltar son muy ilustrativas a este respecto, ya que aquí, las especificidades de su estatuto tanto en relación con el derecho de la UE como con el derecho internacional convergen con una aproximación diferenciada al acervo de Schengen y con un opting-

¹ Court of Justice of the EU, Research and Documentation Direction. The opinions expressed in this document are the sole responsibility of the author. This research was carried out in Gibraltar and La Línea in March 2013, in the framework of the Research Project I+D “Cuestiones territoriales y cooperación transfronteriza en el Área del Estrecho”, DER2012-34577 (2012-2015).

out de la política migración común. Este artículo se centra en algunas de las disrupciones causadas por la integración diferenciada en el ELSJ, a la luz del ejemplo particular de la situación de los trabajadores marroquíes en Gibraltar, en relación a los cuales, esta amalgama de especificidades jurídicas ha resultado en una situación de movilidad reducida y de aislamiento de los desarrollos jurídicos favorables en el ámbito de la política de inmigración común.

PALABRAS CLAVE: Espacio de libertad, Seguridad y Justicia (ELSJ); Gibraltar; trabajadores migrantes; trabajadores marroquíes; política de inmigración de la Unión Europea; opt-out; acervo Schengen.

LES LIMITES DE LA POLITIQUE EUROPÉENNE D'IMMIGRATION ET DES FRONTIÈRES À GIBRALTAR: EFFETS SUR LA SITUATION JURIDIQUE DES TRAVAILLEURS MAROCAINS

RÉSUMÉ : L'espace de liberté, de sécurité et de justice (ELSJ) est affectée par des asymétries découlant de la nécessité de souplesse dans la stratégie d'intégration à l'égard des questions liées à la souveraineté de l'État. Cette géométrie variable a un impact significatif sur le développement d'un status cohérent pour les ressortissants d'États tiers par le biais d'une véritable politique commune d'immigration. La situation particulière de Gibraltar est très illustrative à cet égard, étant donné que la spécificité de sa situation par rapport au droit de l'Union et au droit international converge avec une approche différenciée vis-à-vis de l'acquis de Schengen et avec un opt-out concernant la politique d'immigration commune. Cet article vise certaines des perturbations causées par l'intégration différenciée dans l'ELSJ à la lumière de l'exemple particulier de la situation des travailleurs marocains à Gibraltar. En effet, cet amalgame de spécificités juridiques a abouti à une situation de mobilité réduite et à l'isolement des évolutions juridiques dans le domaine de la politique commune de l'immigration.

MOTS-CLÉS: Espace de liberté, de sécurité et de justice (ELSJ) ; Gibraltar ; travailleurs migrants ; travailleurs marocains ; politique d'immigration de l'Union européenne ; opt-out ; acquis de Schengen.

I. INTRODUCTION TO THE LEGAL BACKGROUND: THE ISSUE OF GIBRALTAR

Gibraltar is the object of a longstanding dispute between Spain and the United Kingdom that dates back to the 1704 British occupation and the subsequent cession of 1713 under Article X of the Treaty of Utrecht. The scope of this article does not leave room for comment on the different arguments of the parties and for exploring the intricacies of the territorial dispute². Nonetheless, it is worth recalling that this long standing dispute has evolved during the last three hundred years, and is divided into different periods in which the lines of interaction between Gibraltarians and the local Spanish population have also evolved, strongly affected

² See, i.a. DEL VALLE GALVEZ, A., "Gibraltar, su estatuto internacional y europeo, y la incidencia de la crisis de 2013-2014", *Revista catalana de dret públic*, Núm. 48 (2014), pp. 24-52.

by foreign policy strategies.

Against this framework, European integration has been of the greatest significance to this matter, first, with the decision of the UK to include Gibraltar in the territory of the then European Economic Community and, subsequently, with the accession of Spain to the EU. The very specific territorial location of Gibraltar makes it exceptional and provides a unique example; it does not fit within the specific categories of overseas countries and territories or outermost regions of the EU³. Indeed, Gibraltar is the only example of a “European territory for whose external relations a Member State is responsible”⁴. As a consequence, the status of Gibraltar within the European Union is fraught with specificities⁵. Here, we will concentrate in the particular features that affect the movement of persons and migration policy, for they account for many of the specificities that affect the situation of Moroccan workers in Gibraltar.

After the end of the Spanish dictatorship and the opening of the “fence”, the accession of Spain to the European Union was the major element towards the normalization of the relationship between the inhabitants of the two sides of the border. The right of free movement of persons, at the heart of the common market, guaranteed that situations of hostility and isolation would not happen again⁶. However, Gibraltar was not included in some very important developments that have deepened the evolution of EU law in the field of free movement of persons; the Schengen area, which makes possible the unimpeded transit of persons across internal borders, and the developments towards a truly common immigration policy.

The exceptional circumstances of Gibraltar in these areas are closely related to the opt-outs of the United Kingdom and to the Spanish reluctance to their full participation in the Schengen area. In the following sections, we will explore some

³ It has been described, together with French Guiana, as an “example of a continental territory where the application of EU law is profoundly atypical, even though, *sensu stricto*, it is located in Europe”, see KOCHENOV, D., “The EU and the Territories Associated with the Union and Territories *Sui Generis*” in KOCHENOV, D. (ed.), *European Union of the Overseas*, at, p. 11, n 29.

⁴ On article 355, paragraph 3, TFUE, and its limited scope of application, see MURRAY, F., *The European Union and Member State Territories: A New Legal Framework Under the EU Treaties*, Springer, 2012.

⁵ See IZQUIERDO SANS, C., *Gibraltar en la Unión Europea. Consecuencias sobre el Contencioso hispano-británico y el proceso de construcción y europea*, Tecnos 1996; ANTÓN GUARDIOLA, C., *Gibraltar: un desafío en la Unión Europea*, Tirant lo Blanch, 2011.

⁶ Indeed, measures such as the ones adopted by the Spanish Government between 1954 and 1982 would be contrary to EU law. See, IZQUIERDO SANS, C., *ibid.* at 210.

of the disruptions caused by this situation, taking as a reference the problems faced by foreign residents who are nationals of Morocco, a neighboring country deeply involved in the territorial intricacies around the Strait of Gibraltar.

II. GIBRALTAR IN THE EU AREA OF FREEDOM, SECURITY AND JUSTICE

From the point of view of UK constitutional law, Gibraltar is an Overseas Territory⁷, and more specifically, the only one that has joined the EU. Article 355 of the Treaty on the Functioning of the European Union (TFEU) is the provision that establishes the different levels of territorial application of EU law. It clearly states the applicability of EU law to the “outermost regions”⁸, and establishes the territories to which EU law does not apply⁹. Annex II to the Treaty enumerates the overseas countries and territories to which the special regime of Part IV TFEU applies and lists most of the UK, French and Dutch overseas possessions. Gibraltar is not mentioned amongst them. Article 355, paragraph 3, TFEU adds a new category entitled “European territories for whose external relations a Member State is responsible”, to which the provisions of the Treaties should apply. As stated above, this category covers only Gibraltar. This inclusion is also accompanied by a declaration by the UK and Spain stating that this “shall not imply changes in the respective positions of the Member States concerned”¹⁰, making therefore clear that the territorial dispute continues and is not to be affected by the specific status of Gibraltar within the EU.

The specificities of the Status of Gibraltar are regulated in Article 28 and Annex I (I) of the UK Act of accession, whose central provision states that “Gibraltar is in the same position with regard to the Community’s import liberalization system as it was before accession,” which leaves the territory outside the customs union¹¹. Other spheres of EU law that do not apply in this territory are the common agricultural and fisheries policies and turnover taxes (VAT).

⁷ See British Overseas Territories Act 2002.

⁸ Art 355 (1) – Guadeloupe, French Guiana, Martinique, Réunion, Saint-Barthélemy, Saint-Martin, the Azores, Madeira and the Canary Islands.

⁹ Faeroe Islands; UK Sovereign Bases in Cyprus; Channel Islands and the Isle of Man, only “to the extent necessary to ensure the implementation of the arrangements for those islands” set out in the UK Accession Treaty.

¹⁰ Declaration by the Kingdom of Spain and the United Kingdom of Great Britain and Northern Ireland.

¹¹ As confirmed in Case C-30/01 *Commission / UK* [2003] ECR I-9481.

Besides the special status of Gibraltar in the EU, when it comes to assessing the status of Gibraltar in the Area of Freedom, Security and Justice, the particular position of the UK adds considerable complexity to the situation. With regard to external borders, the controversy over Gibraltar accounts for much of the problems that made it necessary to resort to and hinder intergovernmental cooperation outside the Community in the first place. Indeed, maybe the most salient example¹² of the disruptive effects of the Gibraltar controversy in European integration was the blocking of the External Borders Convention, negotiated between 1989 and 1991¹³, due to the failure of the UK and Spain to reach a compromise on the issue of Gibraltar. The fact that the Convention contemplated the possibility to extend its application to the European territories for whose external relations a Member State is responsible, made this convention unacceptable for Spain, which would not even be satisfied by the elimination of the specific provision introduced to that effect¹⁴. Spain refused to include Gibraltar in the territorial limits of the EU external border, insisting that the external border should be located at La Linea¹⁵.

Today, Gibraltar (as the UK) does not form part of the Schengen area. Despite the UK's decision not to participate due to their overall position on border controls, the specificities of the situation of Gibraltar should not be underestimated. As we will comment in the next section, the participation of Spain in the Schengen area and the non-participation of the UK in that field of integration was and still is a major disruptive element in the Area of freedom, security and justice¹⁶. It has been often put forward that the particularities of Gibraltar have not specifically been taken into account in the negotiation of many EU instruments by the UK¹⁷.

¹² For other episodes in which EU secondary law or complementary agreements have been blocked because of the controversy over Gibraltar, see IZQUIERDO SANS, C., *op. cit.* at 215 and ff.

¹³ Convention on controls on Persons Crossing External Frontiers, (Amended proposal after the Treaty of Maastricht, based on Art K3), COM (93) 683 final, 10 December 1993. The Commission proposed to leave blank the article relating to the territorial extent of the Convention so that the solution would emerge from bilateral negotiations. The Convention was never approved.

¹⁴ On this issue see IZQUIERDO SANS, C., *op. cit.* at 250.

¹⁵ MILLER, V., *Gibraltar Research Paper* 95/80, International Affairs and Defense Section House of Commons Library 27 June 1995, at 30.

¹⁶ The UK has an opt-out regime with regard to the Schengen Acquis (see Protocol 19 on the Schengen acquis integrated into the framework of the European Union). Even if the UK and Ireland can opt in following the provisions of the Protocol, they can participate in developments of the Schengen acquis if they are also authorized by the Council to accept the instruments upon which the measure is based, C77/05 UK / Council [2007] ECR I-11459 and C-137/05 UK / Council [2007] ECR I- 11593.

¹⁷ See the Declarations of Mr Bossano in The Guardian 22 March 1993. Reproduced in Vaughne

However, even if separate solutions for the UK and Gibraltar with regard to their participation in the Schengen acquis are not excluded *per se*, they would possibly entail a reform of primary law which would make necessary the agreement of all Member States, and lengthy and cumbersome negotiations¹⁸. Moreover, the complete abolition of border controls would entail also a revision of the exclusion of Gibraltar from the customs union which, in its turn is at the heart of the economic specificities that ensure the economic model of Gibraltar, and which makes necessary the maintenance of borders and border control (since goods carried by persons are not exempted from control)¹⁹. Granted, the exclusion from the customs union is not an impediment for Ceuta and Melilla to be part of the Schengen area. However, these territories have only been enabled to maintain that specific regime due to a system of double checks in the autonomous cities and in mainland Spain²⁰.

Besides the specific issues that arise out of the non-participation of the UK in the Schengen Area, other important problems are posed with regard to the UK opt-out from the common migration policy. Therefore, the Area of Freedom, Security and Justice is particularly segmented here, as a consequence of the disaggregation of the temporal and territorial scopes of application. Therefore, we have a rather complex area in which free movement is applicable *ratione personae* (since Gibraltarians and Spaniards enjoy free movement alike), but where the territory is excluded from important parts of EU law, two of them being the cornerstones of the Area of freedom, security and justice (migration policy and Schengen).

III. A SCHENGEN BORDER BETWEEN GIBRALTAR AND SPAIN?

Due to past historical events and the political background, the participation of Spain in the Schengen acquis was regarded as highly problematic, raising fears that

Miller, Gibraltar Research Paper 95/80, International Affairs and Defense Section House of Commons Library 27 June 1995.

¹⁸ For the current debate in this regard see House of Commons, Foreign Affairs Committee, "Gibraltar: Time to get off the fence", Second Report of Session 2014–15, available at <<http://www.publications.parliament.uk>>, and the Government Response presented to Parliament by the Secretary of State for Foreign and Commonwealth Affairs by Command of Her Majesty, in September 2014, available at <<https://www.gov.uk/government/>>.

¹⁹ See IZQUIERDO SANS, C., *op. cit.* at 260.

²⁰ Ceuta and Melilla Art 115 of 1985 Act of Accession [1985] OJ 1 302 and Protocol no. 2 to the 1985 Act of accession (Canary Islands, Ceuta and Melilla).

the new legal framework would provide Spain with a new reason to resume and even strengthen border checks at the (officially non-recognized) border between Spain and Gibraltar. Complaints in this regard motivated an investigation by the European Commission that was finally closed without evidence that concluded that the controls at the border posts between Gibraltar and La Línea were disproportionate²¹. According to the doctrine that supports the Spanish position, the legal border would be at the limits of Gibraltar as recognized in the Treaty of Utrecht, and the borderline at the current gate would be a *de facto* or merely technical border²².

In fact, during the first years of implementation of the Schengen convention, the perceived situation was that delays at the border crossing had been motivated precisely by this new regulation²³. Indeed, at that time, Foreign Office Minister Davis pointed out that the implementation of the Schengen Convention by Spain had not been symmetrical at all border crossing points, and that Spain should have reinforced its resources at the border with Gibraltar to avoid delays. New episodes of delays at border crossing have taken place on different occasions²⁴, having even motivated fact finding missions of the European Commission in 2013²⁵. Even if in 2013 the Commission “did not find evidence to conclude that the checks on persons and goods as operated by the Spanish authorities at the crossing point of La Línea de la Concepción have infringed the relevant provisions of Union law,” another mission has been launched in 2014²⁶.

The accession of Spain to the Schengen agreement and the implementation

²¹ Commission response to written question (Bernd Lange) E-2283/02, *OJ C* 137 12.6.2003.

²² See IZQUIERDO SANS, C., *op. cit.*, at 248.

²³ As Miller puts it: “the requirements of Schengen was the reason given for a Spanish resumption of border checks by police systematically examining passports, vehicles and pedestrians entering and leaving Gibraltar. The result has been delays at the border crossing with Gibraltar” MILLER, V., *Gibraltar, the United Kingdom and Spain Research Paper 98/50*, International Affairs and Defense Section House of Commons Library, 22 April 1998, at p. 30. Mentions the words of FCO Minister David Davis: “Spain must provide adequate resources to carry out its checks without causing undue delays to European Union citizens. That has happened elsewhere in Spain, where there are no significant delays as a result of Schengen”. It is said that these impediments were probably caused by the British position during the turbot war.

²⁴ For example, in 1997, when Gibraltar started to issue identity cards, which were not recognized by Spain, *Ibid* at 11.

²⁵ See press release “Commission reports on the border situation in La Línea (Spain) and Gibraltar (UK), European Commission” - IP/13/1086, 15/11/2013.

²⁶ See press release “Gibraltar: European Commission sends another technical fact-finding mission European Commission”, MEMO/14/458, 02/07/2014.

convention should have entailed that the *de facto* border between Gibraltar and Spain became an external border, where Schengen border checks should be carried out. Indeed, the checkpoint at La Línea de la Concepción is listed among the land borders included in the “List of border crossing points referred to in Article 2, paragraph 8, of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders”²⁷. A footnote to this list establishes, nonetheless, that “[t]he customs post and police checkpoint at ‘La Línea de la Concepción’ does not correspond to the outline of the border as recognized by Spain in the Treaty of Utrecht.”

Therefore, as a consequence of the specificities that arise out of the territorial controversy, there are important challenges to the correct functioning of the Schengen acquis. Indeed, because the territory of the isthmus (where the airport has been built) was not included in the Treaty of cession of 1713, and is consequently one of the points of the territorial dispute, Spain does not formally recognize the existence of an international border. Therefore, Spain claims that this is not a border post, but a checkpoint²⁸. As a result of this particular situation, it seems that third country nationals that enter the Schengen Area through the checkpoint between Gibraltar and Spain do not get their passports properly stamped at the police control. This situation, if generalized, could prove problematic with regard to Article 10 of the Schengen Borders Code²⁹, that provides that “travel documents of third-country nationals shall be systematically stamped on entry and exist”. The importance of this obligation is highlighted in Article 10, paragraph 5, of the Code, that provides that “whenever possible, third country nationals shall be

²⁷ OJ 2006/C 247/04.

²⁸ Reply to a parliamentary question (Senate, 25.5.1995) “[I]n the south of Spain, the posts established for crossing external borders with respect to the Schengen area are: -Maritime borders, the seaports of Algeciras and Almería. -Land borders, the customs checkpoint and police control point at La Línea de la Concepción. This is not a border post strictly speaking, but rather a checkpoint, since it does not fit the description of a border as acknowledged by Spain according to the Treaty of Utrecht, and this has been noted in the decisions of the Schengen Executive Committee that affect the location of these posts”.

“Aerial borders are the airports of Málaga, Seville, Almería, Granada and Jerez de la Frontera” (BCG- Senado. I, V Leg., n 281, pp. 32-33) JIMENEZ PIERNAS, C. [et al.], “Spanish Diplomatic and Parliamentary Practice in Public International Law, 1995 and 1996” *Spanish Yearbook of International Law* 1995- 1996, p. 107-240, at 200.

²⁹ Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) OJ L 105, 13.4.2006, p. 1–32.

informed of the border guard's obligation to stamp their travel document (...)", and by the fact that, even if controls are relaxed according to Article 8 of the Schengen Borders Code, the obligation to stamp travel documents remains³⁰.

This has important consequences for foreign travelers, who, in absence of a Schengen stamp in their travel document are presumed to be irregularly staying in the Schengen Area, facing therefore the consequences that such irregularity entails under EU and national law. Third country nationals who have entered the Schengen Area through Gibraltar can risk to lose the benefit of the presumption of legal stay that Article 11 of the Schengen Borders Code attaches to stamped passports³¹, since in the absence of such stamp, the burden of proof is shifted to the traveler, who can rebut the presumption of illegality "by any means, credible evidence, such as transport tickets or proof of his or her presence outside the territory of the Member State, that he or she has respected the conditions relating to the duration of a short stay"³². Should that presumption not be rebutted, the third country national will face an expulsion decision³³.

Moreover, the particular political sensitivities attached to the territorial controversy have a direct impact on the procedure of refusal of entry. Circumstantial evidence suggests that the formal procedure of denial of entry is not systematically carried out at the checkpoint between Gibraltar and La Linea, which could, therefore, hinder the possibility to keep an official record of the number of persons denied entry. This situation would also be difficult to reconcile with Article 13 of the Schengen Borders Code, that provides that "entry may only be refused by a substantiated decision stating the precise reasons for the refusal"³⁴, and that "persons refused entry shall have the right to appeal"³⁵. Even if Member States can choose not to apply the Returns Directive to persons rejected at the borders, the guarantees provided for in Article 13 of the Schengen borders code should be granted.

³⁰ Art. 8, paragraph 3, Schengen Borders Code.

³¹ Article 11, paragraph 1 of the Schengen Borders Code establishes that: "[i]f the travel document of a third-country national does not bear an entry stamp, the competent national authorities may presume that the holder does not fulfil, or no longer fulfils, the conditions of duration of stay applicable within the Member State concerned."

³² Art. 11, paragraph 2, of the Schengen Borders Code.

³³ Art. 11, paragraph 2, of the Schengen Borders Code.

³⁴ Art. 13, paragraph 2, of the Schengen Borders Code.

³⁵ Art. 13, paragraph 3, of the Schengen Borders Code.

The consequences of the dissymmetry of the application of the Schengen acquis in this area are suffered by Moroccan workers who reside in Gibraltar. Indeed, given that both the UK and Gibraltar excluded from the EU visa policy, third country nationals legally residing in Gibraltar do not enjoy entry rights into the Schengen Area. This situation makes it very difficult for Moroccan workers, and other third country nationals, to access Spanish territory without a Schengen visa. In this regard, obtaining a Schengen visa is also a cumbersome procedure, since, due to the absence of a Spanish consulate in Gibraltar, this visa can only be obtained if they travel to the UK.

This situation was further aggravated after the opening of the gate, since the possibility to travel freely to Spain for Gibraltarians caused a decrease of the demand of ferry services from Gibraltar to Morocco (leaving the ferry departing from Algeciras as the only practical possibility). In practice, serious or emergency situations are solved on a case-by-case basis thanks to the cooperation between authorities, on the basis of the humanitarian exception allowed by the Schengen Borders Code³⁶. However, even though this may prove satisfactory for punctual situations suitable to trigger the application of the exception, it does not seem to be the most effective solution to tackle the situation of a population that is encapsulated in a small territory, where transfrontier relations are a basic component of day-to-day life for the local population³⁷.

IV. MOROCCAN IMMIGRATION TO GIBRALTAR

Migration is a non-negligible issue in Gibraltar, and has to be examined in the light of the specific ties within the Commonwealth.³⁸ During the 1950s and 1960s, the deterioration of the relationship between the UK and Spain strongly affected transfrontier workers; after the Spanish consul in Gibraltar was withdrawn in 1954 (as an act of protest against the visit of Queen Elizabeth), Spaniards could not visit the rock without a work permit, and the issuance of new work permits

³⁶ Art. 4, paragraphe 5, c) of the Schengen Borders Code.

³⁷ See ODA-ANGEL, F, "A Singular International Area: Border and Cultures in the Societies of the Strait of the Gibraltar", The Center for Comparative Immigration Studies University of California, San Diego *Working Paper* 23 June 2000.

³⁸ According to the UN Population Division, foreign born population represented 26.4 percent (7,364) of the total population of Gibraltar in 2005. UN Population Division. 2006. Trends in Total Migrant Stock: The 2005 Revision. POP/DB/MIG/Rev.2005.

was ceased³⁹. Subsequently, the opposition of the UK to enter into negotiations regarding decolonization (as requested by the Committee of the 24) was followed by severe reactions by Spain, such as the tightening the application of customs regulations, and the withdrawal of the exit permits of the 20.062 Spanish workers in Gibraltar⁴⁰. The 1969 Gibraltar Constitution Order (containing the Constitution in its Annex 1) granted by the UK had as a consequence the absolute severance of links with Spain. The border with Spain would only be partially reopened in 1982⁴¹.

As a consequence, the shortage of labour force became an important issue; the restrictions imposed on Spanish workers entailed the loss of an “experienced, hardworking, cheap and often exploited Spanish labor force”, which had reached an estimate of 13.000 to 15.000 persons during WWII⁴². It is said that in 1969, one third of Gibraltar’s labour force “disappeared overnight”⁴³.

The situation was remedied by the recruitment of 3.000 Moroccan nationals (which had temporarily reached 5.000, but subsequently decreased). In 1980, there were an estimate of 2663 Moroccan workers in Gibraltar (a quarter of the total labour force)⁴⁴. The census of 2001 recorded 961 Moroccan nationals⁴⁵. When Spain acceded the European Union, the position of Moroccans in Gibraltar was expected to be at risk, due to their possible substitution by Spanish workers⁴⁶. To what extent these fears have materialized is uncertain, despite the steady decrease of Moroccan migrants.

The issue of the living conditions of this population has frequently been the object of concern. Housing conditions have been particularly egregious due to the lack of space and the fact that public housing is limited to Gibraltarians, leading to the concentration and segregation of Moroccan population⁴⁷. A considerable

³⁹ NAYLON, J., “Gibraltar: a Siege Economy”, *Paralelo 37º, Revista de estudios geográficos*, n° 8/9, 1985, p. 373.

⁴⁰ *Ibid.*

⁴¹ *ibid.*

⁴² *ibid.*

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ COLLYER, M., “Steps to resolving the situation of Moroccans in Gibraltar” *Sussex Migration Briefing*, December 2004, n° 3.

⁴⁶ NAYLON, J., *op.cit.*, p. 382.

⁴⁷ The situation seems to have improved; a new hostel is under construction and a temporary ‘floating’ hotel has been put in place in the meantime <http://www.chronicle.gi/headlines_details.

portion of them have been living in hostels that have been the object of international attention because of their poor conditions⁴⁸. Family life has also been seriously disrupted, since the “guest worker” approach to migration prevented Moroccan workers to be joined by their families. The most comprehensive study of the situation of Moroccan workers has been carried out by the International Centre for Trade Union Rights⁴⁹, which immediately received a virulent response by the Gibraltar government⁵⁰.

Gibraltar has its own Immigration Law; the Immigration, Asylum and Refugee Act (IAR Act), that dates back to 1962 and has often been amended. Provisions regarding EU and EEA nationals are also contained in this instrument that transposes the corresponding directives of free movement. As Gibraltar (following the UK regime) does not participate in the Common Migration Policy, its immigration law and regulations strongly differ from the main lines of the EU approach (but also, due to the specific geographical and demographic situation, it also departs from the UK approach).

The most striking feature of the IAR Act is the lack of a comprehensive regime of permanent residency, of family reunification, the discretion of administrative authorities and the lack of judicial review. With regard to family reunification, the IAR Act contains the residence rights of family members of EEA Nationals as well as the rights of men and children of Gibraltar women. Also striking is the absence of a status of permanent residence or long-term residence (which is only regulated with regard to Gibraltar women⁵¹ and British subjects employed in Gibraltar⁵²). The degree of discretion in the award of residence permits –whose maximal duration is 5 years⁵³– is almost unlimited, being expressly provided that “no court shall question and no appeal shall lie to any court from any decision

php?id=26668>.

⁴⁸ JARECKA, K., *Report on immigrants housing and living conditions in Gibraltar*, The right to adequate housing of migrants factsheets N.7 Gibraltar, UK SSIIM UNESCO CHAIR on Social and Spatial Inclusion of International Migrants – Urban Policies and Practice, July 2010.

⁴⁹ BLACKBURN, D., EWING, K.D., JEFFRIES, J., “Human Rights Denied: 40 Years of the Moroccan Community in Gibraltar”, Report of an Inquiry Conducted by the International Centre for Trade Union Rights on behalf of the Gibraltar District Office of Unite the Union, 12 October 2009.

⁵⁰ Press Release no 59/2009 of 30th March 2009, ‘Non EU-Workers Rights in Gibraltar’, Government of Gibraltar Press Office.

⁵¹ Arts. 15 and 16 (men and children of Gibraltar women).

⁵² Art. 14, paragraph 1.

⁵³ Art. 18.

of the Principal Immigration Officer under this Act or from any decision of the Governor hereunder”⁵⁴. Only children of Gibraltar women, after having reached the age of 18, have an entitlement to permanent residence and such status of residence may be awarded as well – under the absolute discretion of the Governor - to persons whose country of origin is Great Britain and who are likely to be an asset to the community. Only those awarded (in the limited situations mentioned above) a certificate of permanent residence will have the right of family reunification with their spouse, male unmarried children under the age of eighteen and any unmarried female children (without age limit)⁵⁵. The Immigration Rules of 2010 introduced the possibility of issuing residence permits for “long term resident pensioners” and unemployed long-term residents⁵⁶. Access to citizenship could be considered as the more favorable path to remediate the solution of Moroccan workers. Some scholars have advocated for such a solution not from the viewpoint of finally granting Moroccans access to Gibraltar citizenship as an end in itself, but as a way to facilitate the acquisition of EU citizenship, what would most likely have as a consequence the relocation of such persons in Spain⁵⁷.

After a brief and cursory account, it is easy to recognize the additional rights and benefits that apply under the Common Migration Policy, and the harsh consequences of the UK opt out in Gibraltar with regard to the rights of third country nationals, provided by the different EU instruments concerning legal migration, but predominantly, by the long-term resident directive⁵⁸ and by the family reunification directive⁵⁹.

Nonetheless, the position of Gibraltar towards the European Common Migration Policy coincides with the position of the UK. In recent evidence provided by the Government of Gibraltar to the UK Government on this issue, it was stated that:

[I]t is to the advantage of the UK and Gibraltar to retain the ability to respond flexibly, promptly and with a targeted approach to their specific economic cycles and labour market

⁵⁴ Art. 23.

⁵⁵ Art 35 “subsidiary certificates”.

⁵⁶ LN. 2010/166.

⁵⁷ COLLYER, M., *loc. cit.*

⁵⁸ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, *OJ L* 16, 23.1.2004, p. 44–53.

⁵⁹ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, *OJ L* 251, 3.10.2003, p. 12–18.

needs, which are unlikely to coincide across the EU.

Individual Member States are better placed to make national assessments of economic needs and thus encourage or discourage economic migration on the basis of those assessments⁶⁰.

In this regard, the latest development in the amendments of the immigration regime introduces certain flexibility, but is only aimed at fostering tourism. Indeed, the Asylum and Refugee (Amendment) Act 2013 introduces the possibility of issuing entry permits to holders of multiple entry Schengen visas of selected countries (to be published in the Gazette), amounting therefore to a visa waiver for entry to Gibraltar⁶¹. This waiver is applied to Moroccan nationals, as the new measure has been enacted to enhance tourism from those Moroccan nationals already awarded Schengen visas by other EU countries⁶². In October 2013, this regime has been made also applicable to Chinese, Indian, Russian and Mongolian nationals who are holders of valid multiple entry Schengen visas⁶³. All these persons are authorized to enter and remain in Gibraltar for a period not exceeding 21 days.

From a legal viewpoint, this is an example of a “transnational administrative act”,⁶⁴ inasmuch as an administrative act issued by another Member State (a Schengen visa) produces its effects in the territory of Gibraltar. The striking elements of this measure is that the visa waiver does not apply either to those in possession of a residence permit in Spain, nor does it affect in any way Moroccan nationals already legally residing in Gibraltar, since it is only addressed to holders of Schengen visas. This is a clear example of how economic interests produce innovative and effective legal modifications, and strongly contrast with the rigidity that has characterized the approach towards the status of Moroccan residents.

⁶⁰ See the report “Review of the Balance of Competences between the United Kingdom and the European Union Asylum & non-EU Migration”, February 2014, available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/279096/BoC_AsylumImmigration.pdf>.

⁶¹ Immigration, Asylum and Refugee (Amendment) Act 2013 [No. 4 of 2013], First Supplement to the Gibraltar Gazette, No. 3985 of 28th February, 2013.

⁶² Gibraltar Chronicle, “Government eases visas for Moroccan visitors”, (8th March 2013), available at <http://www.chronicle.gi/headlines_details.php?id=28347>.

⁶³ Direction (No. 2) pursuant to section 11A (LN. 2013/150).

⁶⁴ See BAST, J., “Transnationale Verwaltung des Europäischen Migrationsraums”, *Der Staat*, 46 (2007) a, pp. 1-32; BECKER, J., “Der Transnationale Verwaltungsakt”, *Deutsches Verwaltungsblatt*, 116 (2001) 11, pp. 855-866.

V. CONCLUDING REMARKS

Whereas the UK opt-out from the Schengen acquis accounts for a major part of the inflexibility towards the possibility of inclusion of Gibraltar in the Schengen area, the UK opt-out from Title V TFEU is the major element isolating Gibraltar from the normative developments that are taking place in the framework of the common migration policy. In both cases, the opt-out, which was not designed keeping in mind the particular status of Gibraltar, has produced particularly negative effects for the immigrant population residing in Gibraltar. The possibilities for the incorporation of Gibraltar to the Schengen Area are being currently considered, after the Chief Minister of Gibraltar announced the beginning of a consultation process exploring the possibility of joining the Schengen Area and the Common Customs Union⁶⁵. Nonetheless, it does not seem that the same interest is placed with respect to participation in other measures of the Area of Freedom, Security and Justice, such as the ones appertaining to the sphere of the Common Migration Policy. In any case, the climate of diplomatic tension over Gibraltar is continues to spread its disruptive effects over the European Area of Freedom, Security and Justice, even threatening the participation of the UK in criminal cooperation measures and negatively influencing ongoing negotiations to “opt-back in”⁶⁶.

⁶⁵ See House of Commons, Foreign Affairs Committee, “Gibraltar: Time to get off the fence”, Second Report of Session 2014–15, available at <<http://www.publications.parliament.uk>>, and the Government Response presented to Parliament by the Secretary of State for Foreign and Commonwealth Affairs by Command of Her Majesty, in September 2014, available at <<https://www.gov.uk/government/>>.

⁶⁶ See “Spain Threatens U.K.’s Inclusion in EU Justice Cooperation”, *Wall Street Journal*, 9 October 2014, available at: <<http://online.wsj.com/articles/spain-threatens-u-k-s-inclusion-in-eu-justice-cooperation-1412881174>>.

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