

SUMMARY

## **2018/18 Preliminary questions to ECJ about Brexit implications for UK citizens? (NL)**

***&lt;p&gt;Recently, the Court of Amsterdam decided to ask preliminary questions to the ECJ about EU citizens&rsquo; rights of British nationals, anticipating Brexit. However, two weeks later, it allowed an appeal against this decision. It is therefore unclear if and when these questions will be asked.&lt;/p&gt;***

***&lt;p&gt;&lt;em&gt;Note: just before this case report was sent to the printer, in a new decision, the Court of Appeal held that preliminary questions cannot be asked, as the claims cannot be accepted. The judgment of the Court of Appeal will be discussed in a forthcoming issue. Meanwhile, the judgment of the Court of Appeal (in Dutch) can be found on***

***<http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:GHAMS:2018:2009>.&lt;/em&gt;&lt;/p&gt;***

### **Facts**

Five UK citizens and two associations<sup>1</sup> which represent UK citizens fear that they will lose EU citizenship following the Brexit. In these proceedings, they essentially requested the State of the Netherlands and the City of Amsterdam to protect their rights, as well as those of their spouses, children and other UK citizens who are residing in the Netherlands. In short, they claimed that the State of the Netherlands and the City of Amsterdam must:

respect their fundamental freedoms following from the EU citizenship;

not agree to any (withdrawal) agreement in which these rights were infringed; or in the event that the claimants lose EU citizenship: ensure that the rights attached to that citizenship would not be restricted without an individual test to the principle of proportionality.

The claimants also encouraged the court to ask preliminary questions to the ECJ, given that its remit is to interpret and explain Article 20 TFEU. This article grants EU citizenship – and the fundamental freedoms belonging to it – to citizens of EU Member States.

At the time of the hearing in court, the most recent (official) development in the Brexit negotiations was the publication of the first Progress Report of 8 December 2017.<sup>2</sup> To the extent relevant here, the parties assumed that existing (EU) rights of UK citizens would lapse if no other arrangement were to be made.

## **Judgment**

Unfortunately, the judgment is not very clear on the specific statements of the parties. Nevertheless, it states that the claimants founded their claims on three (main) grounds:

the doctrine of acquired rights;  
EU citizenship (Article 20 TFEU) as an independent source of rights and obligations; and  
Article 8 of the ECHR (which was not discussed in the judgment).

In its defence, the State of the Netherlands and the City of Amsterdam *inter alia* argued that the proceedings constituted an undesirable infringement on the political negotiation process on Brexit. Moreover, the defendants argued that the claimants had concocted a notional dispute simply to get the case put forward to the ECJ. While it appears that the defendants also disputed the grounds of the claim, their arguments are not discussed specifically.

### *Political questions and notional dispute*

As regards the *political question* doctrine, the Court considered that the separation of powers (*trias politica*) in its Dutch form, assigned the courts with the task of offering legal protection at the individual level. Protection can be necessary against state organs as well, including in political issues. The claimants feared they will lose their fundamental freedoms to reside and work outside the UK – freedoms that they were actively using. Therefore, they were already suffering harm: the progress report made clear that the negotiating parties currently assume the existing rights of UK citizens will lapse unless the parties make other arrangements and the claimants needed to seriously consider the consequences of this. They needed to think

about whether to naturalise, which would not only be costly but might have consequences for their UK nationality and their ability to visit family and run their businesses. It is the job of the courts to protect people whose fundamental rights are infringed. The existence of a political process concerning these rights should be no obstacle to assessing the claims. For the same reason, the claims should not be considered merely notional: there was already an infringement of their rights and there was a very real threat of further infringement if the negotiations turned out not to deliver them any support.

#### *Vienna Convention on the Law of Treaties and Article 20 TFEU*

The Court established that the Vienna Convention on the Law of Treaties ('Vienna Convention') did not apply in this case. The Convention only applies between states and hence does not apply to the TEU and TFEU, which also create rights and obligations for citizens – a whole new legal order (*Van Gend & Loos*, 26/62). It was therefore established that EU law itself should govern the consequences of the UK's withdrawal from the TEU and the TFEU.

Article 20 TFEU implies there is a connection between EU citizenship and citizenship of an EU Member State. While it is arguable that termination of EU membership by a state implies that its citizens would lose their EU citizenship, this is not necessarily compelling, given the following:

#### *Acquired rights*

The Court summarised ECJ case law on acquired rights as follows. General principles such as the principle of legal certainty and the protection of legitimate expectations generally prevent acquired rights from being revoked by later decisions.<sup>3</sup> However, the ECJ very rarely considers rights to have been acquired: citizens cannot count on rights existing forever. Whether it is possible to take away acquired rights depends on what legitimate expectations citizens could have, in particular, how foreseeable it is that the rights might at some later point be removed. The less likely it is that their rights might be taken away, the stronger those rights become. Moreover, if removal of the right is justified, that may only affect future situations.<sup>4</sup>

Article 50 TEU explicitly provides for the possibility of withdrawal of a Member State from the EU. UK citizens had lived with the theoretical possibility of withdrawal ever since former Prime Minister Cameron announced the 2016 referendum some years ago. But even so, the claimants could not automatically have foreseen that this would lead to the loss of their right to live and work in other EU countries. Article 50 has never been invoked before. Only more recently, once the result of the referendum had become clear, did the claimants need to think about the UK's withdrawal from the EU and its consequences.

In these circumstances, the notion that the EU rights and freedoms of UK citizens qualify as acquired rights cannot be ruled out.

*A broad interpretation of EU citizenship and its rights*

According to the Court, the ECJ interprets both EU citizenship and derived rights broadly. The ECJ has held that EU citizenship is the primary status of nationals of EU Member States.<sup>5</sup> Once lawfully acquired, EU citizenship is an independent source of rights and obligations, which cannot be tampered with by national governments.<sup>6</sup> As regards the withdrawal of nationality of a citizen of an EU Member State, the proportionality principle must be observed. Whether this test can be applied in the abstract or must be done for each person individually is a question that is currently pending before the ECJ.<sup>7</sup>

Although the above case law simply concerns national measures leading to the loss of nationality and, consequently, EU citizenship, the Court believed it to be relevant to the case at hand.

*Protection of the minority against the majority*

The notification of withdrawal of the EU and the subsequent negotiations have occurred in response to the wishes of the majority of the participants in the Brexit referendum. While this is justifiable in itself, a democratic constitutional state must also protect the rights and interests of minorities. This applies also to the EU as a democratic society as a whole.

*Solidarity between EU citizens and between EU citizens and Member States*

Article 20 TFEU aims to unite the citizens of EU Member States and to increase solidarity by means of EU citizenship. It is therefore arguable that this solidarity should serve to prevent the claimants from being 'left out in the cold' when their rights are threatened.

*Complications for young children who are EU citizens*

It must also be considered that EU citizenship not only affects third-country nationals (as UK citizens would be after Brexit) but might also impact on the ongoing rights of EU citizens. This could occur if there were a relationship of dependency between an EU citizen and a third-country national. In such a case, not granting a right of residence to the third-country national would prevent the EU citizen from enjoying his or her rights. This could happen to a third-country national with children who are EU citizens: they may be obliged to leave the EU on the basis that their parent's right of residence has been withdrawn.<sup>8</sup> That being said, if the dependency relationship does not justify such derived right of residence, this cannot be claimed only because the unity of the family must be preserved to the extent possible.<sup>9</sup>

### *Conclusion and preliminary questions to the ECJ*

The Court found that there was reason to doubt that Article 20 TFEU must be interpreted as meaning that a state's loss of EU membership necessarily implied that its citizens would lose EU citizenship. It therefore found it necessary to ask some preliminary questions of the ECJ:

Does the withdrawal of the UK from the EU mean that British citizens automatically lose their EU citizenship, and all rights and freedoms derived from it, if the 27 EU Member States and the UK do not agree otherwise during the negotiations?

If not, must any conditions or restrictions be imposed on the preservation of the rights and freedoms that British citizens derive from EU citizenship?

### *Appeal allowed*

However, after the decision, the defendants asked for the right to appeal against the decision to ask preliminary questions. This is normally not possible against these types of decisions. Two weeks after its initial judgment, the Court decided to allow them to bring an appeal, provided they asked for it to be heard on an expedited basis. It therefore remains uncertain if and when preliminary questions will be asked to the ECJ.

### **Commentary**

This case has received considerable attention in the Netherlands and the UK. It could be relevant to 1.2 million UK citizens living outside the UK, but within the EU. The Court will put forward two main arguments. First, that it is unclear whether any of the rights of UK citizens have become acquired rights. Second, that it is uncertain whether it is possible to deprive someone of EU citizenship at all. While it appears that the Court may have jumped to certain conclusions about acquired rights there may be merit in what it says,<sup>10</sup> and it does seem right for it to ask the ECJ answer these.

But whether the ECJ should answer these very fundamental and largely unprecedented questions about EU law is a different matter. Its judgment would go to the very foundations of the EU project. McCrea doubts that this is right thing to do: *"It is very sad for UK citizens who feel the same attachment as many of their fellow EU citizens to their European citizenship. But the appropriate place for them to channel these feelings into action is in the political arena. Despite the progress made by the European integration project we are still largely in an era of national democracy and this means that UK citizens are bound by the decision of a majority of their fellow citizens. For the Court of Justice to intervene in the way that it has been asked to would be a major error."*<sup>11</sup> On the other hand, Arnall has argued that an ECJ interpretation of Article 20 TFEU

would be welcome, as it would enable the parties to negotiate based on a proper understanding of the law.<sup>12</sup> In that interpretation, the ECJ, rather than national courts, should be the one to answer this question.

On 20 February, in a follow-up judgment, the Court allowed the State and the City of Amsterdam to appeal the decision to ask preliminary questions to the Amsterdam Appellate Court. The decision to allow an appeal to be heard has been criticised from an EU perspective, as this decision would be at the Court's discretion, which should not be overruled by another court.<sup>13</sup> Therefore, it is not yet clear whether the Amsterdam Appellate Court will ask preliminary questions of the ECJ and, if it does so, whether they will be within time and relevant.

Meanwhile, on 19 March 2018, the EU published an updated draft withdrawal agreement describing the current state of negotiations as regards rights of residence.<sup>14</sup> Whilst generally speaking, rights of residence (up to and including movements during the transition period) will be maintained, significant limitations will be put on the freedom of movement, services and establishment. For the claimants, this can only add weight to their quest.

### **Comments from other jurisdictions**

*United Kingdom (Bethan Carney, Lewis Silkin LLP):* This case is of great interest in the UK. If the ECJ rules that British citizens have a right to retain their EU citizenship after Brexit, many British citizens living in Britain and all across the EU will demand this right is enforced. It may also encourage citizens of other EU countries currently living in the UK to make similar claims to the ECJ about the consequences of losing their rights when Britain leaves the EU. This will clearly be a politically fraught issue for the ECJ and it may wish to dodge the issue, perhaps by finding that it would be proportionate for British citizens to lose their EU citizenship following a democratic vote by British citizens to leave the EU.

**Subject:** Free movement, work and residence permit, other forms of free movement

**Parties:** [Claimants] – v – the State of the Netherlands and the City of Amsterdam

**Court:** Court of Amsterdam

**Date:** 7 February 2018

**Case Number:** ECLI:NL:RBAMS:2018:605 for the initial judgment and ECLI:NL:RBAMS:2018:933 for the admission of appeal.

**Internet Publication:** <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBAMS:2018:605> for the initial judgment and <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBAMS:2018:933> for the admission of appeal. A non-authorized translation of the initial judgment is available on: [https://www.bureaubrandeis.com/wp-content/uploads/2018/02/Ruling-District-Court-20180207\\_English-NEW.pdf](https://www.bureaubrandeis.com/wp-content/uploads/2018/02/Ruling-District-Court-20180207_English-NEW.pdf).

1 Part of the judgment concerned the possibilities for the two associations to initiate the legal action in question. The court held that one did meet the formal requirements, the other did not. This will not be discussed further in this case report.

2 TF50 (2017) 19.

3 Cases 3-7/56, 42 and 49/59, C-376/02).

4 Cases C-522/10, C-133/300 and 362/93, C-230/78.

5 Cases C-184/99, C-224/98, C-208/09, C-391/09.

6 A-G Maduro in his conclusion in C-135/08, pt. 23 and C-165/16.

7 ECLI:NL:RVS:2017:1098.

8 Cases C-34/09 and C-133/15.

9 Cases C-256/11, C-356 and 357/11 and C-87/12.

10 See for a detailed analysis: O. Garner, 'Does Member State Withdrawal from the European Union extinguish EU Citizenship?', European Law Blog (19 February 2018) (available at: <https://europeanlawblog.eu/>). In particular, Garner argues that the Court has cut a few corners regarding the acquired rights doctrine, although he considers the final decision understandable.

11 R. McCrea, 'Brexit EU Citizenship Rights of UK Nationals and the Court of Justice', U.K. Const. L. Blog (8th Feb. 2018) (available at <https://ukconstitutionallaw.org/>).

12 A. Arnall, 'UK nationals and EU citizenship: References to the European Court of Justice and the February 2018 decisions of the District Court, Amsterdam', European Law Analysis Blog (28 March 2018) (available at: <http://eulawanalysis.blogspot.com/>).

13 Arnall (2018).

14 TF50 (2018) 35.

**Creator:** Rechtbank sector kanton Amsterdam (Lower Court)

**Verdict at:** 2018-02-14

**Case number:** ECLI:NL:RBAMS:2018:605