SUMMARY

2018/27 Citizen's rights after Brexit: no preliminary questions to the ECJ (NL)

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Facts

A group of UK citizens living in the Netherlands (and associations representing their interests) were concerned that the citizens might lose their EU-based fundamental freedoms after Brexit and claimed that the city of Amsterdam and the State of the Netherlands were required to safeguard those rights effectively. In short, they claimed that the State of the Netherlands and the City of Amsterdam must:

respect the fundamental freedoms arising from EU citizenship;
not agree to any withdrawal agreement in which these rights were infringed; or
in the event that the claimants should lose EU citizenship: ensure that the rights attached to their citizenship would not be restricted without an individual test based on 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 its fundamental freedoms – to citizens of EU Member States.

Court of First Instance

The judgment of the Court of First Instance was discussed extensively in EELC 2018/18. In short, the Court of First Instance held that it was not clear whether it follows from Article 20 TFEU that UK citizens would lose all EU-based rights after Brexit. Therefore, the Court of First Instance contemplated asking some preliminary questions to the ECJ, but not before the parties were heard as to the exact questions to be asked. In its reaction, the defendants asked to be allowed to appeal the decision. The Court of First Instance allowed this, stating that it also would be for the Court of Appeal to decide on the exact phrasing of the questions.

Court of Appeal

The Court of Appeal first of all held that it was possible to appeal the decision of the Court of First Instance. While it follows from the Cartesio judgment (C-210/06) that a decision as to whether to ask preliminary questions to the ECJ is, in principle, not open to appeal, the Court of First Instance had actually not decided to ask these questions. In fact, it had only got as far as to contemplate doing so, and had instead allowed the defendants to appeal. Moreover, the right of appeal was not limited to the questions to be asked, as the claimants had argued, but to the original claim in full.

As regards the claim , the Court of Appeal held that:

UK citizens outside the UK are rightly uncertain about the effect of Brexit on the rights they currently enjoy under Article 20 TFEU;
this question must be answered based on EU law; and
there is reasonable doubt as to whether UK citizens would lose their rights under Article 20 TFEU.

However, according to the Court of Appeal, this did not mean that preliminary questions were necessary. Article 267 TFEU stipulates that preliminary questions can only be asked if they are necessary to decide a case. While the claims in this case were designed in such a way that the Court should explain Article 20 TFEU, they were in fact too vague to be considered necessary.

According to the Court of Appeal the claimants had asked for protection of rights. They had set out certain rights by way of example (such as the right of free movement and the right of residence), but had not limited their claim to these rights. Therefore, the Court found their

claims were not sufficiently specific. In addition, the category of people who should be entitled to the rights – claimants, spouses, children and all UK citizens residing in NL – was so broad that it could not be described as specific. If the claims were awarded, it would have been entirely unclear to the defendants what they should do (or refrain from doing). This was equally true for a scenario in which UK citizens lost all rights after Brexit. According to the Court of Appeal, it was entirely unclear what the task of the City of Amsterdam should be in such a case, and on what basis a claim could be awarded against it.

The Court of Appeal therefore overturned the judgment of the Court of First Instance.

Commentary

For those involved in Brexit negotiations, this judgment must have come as welcome news, as it means that the process no longer risks being disturbed by judicial involvement. UK citizens living abroad will be less happy. The deadline for negotiations approaches quickly and there are many uncertainties for them.

The pros and cons have been discussed extensively in EELC 2018/18. The Court of Appeal chose to side-step the discussion, considering the claims too vague. While this could be said about parts of the claim, other parts did appear sufficiently concrete and seemed to merit preliminary questions. In my view, the Court could have allowed questions on the concrete parts but not the rest, if it had been so minded.

Comments from other jurisdictions

Belgium (Gautier Busschaert, Van Olmen & Wynant): There is no similar case yet in Belgium. However, with 25,000 UK nationals residing in Belgium an answer to the preliminary questions would have had important consequences for Belgium. Nonetheless, the Court of appeal rightly states, in my view, that the questions posed were too vague and broad. For this reason, they would be better tackled by means of the Brexit agreement between the UK and the EU, rather than by the ECJ. To take on this case on would also, I believe, have risked the court going beyond its competence. However, as a negotiated Brexit deal seems less and less likely, those UK nationals who can, have started applying for Belgian nationality. Commission President Jean-Claude Juncker has also asked Prime Minister Charles Michel to nationalise UK nationals residing in Belgium (as many of them work for EU Institutions).

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

EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

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