Post-BREXIT headaches – the CJEU's recent judgments on the withdrawal of EU citizenship from British expats

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BREXIT has left the headlines of the news. Only very rarely we remember it. For example, when planning our summer holiday to the island and realising last minute that we need a passport to enter and are not allowed to travel with our national ID cards anymore. However, every once in a while, a remain of the legal quarrels surrounding BREXIT surfaces when the CJEU digs through its immense case load, reminding us that there are still some unresolved problems surrounding the United Kingdom's grand exit.

Judgments of said category were passed by the CJEU at the beginning of June 2023 ruling on the loss of EU citizenship by UK nationals in the aftermath of BREXIT.[1] These judgments are interesting for two reasons, one the CJEUs reasoning regarding the admissibility of an action for annulment by a natural person and two the (indirect) confirmation of the accessory character of Union citizenship.

The judgements of the ECJ of 15th June 2023

Both cases concerned British nationals living abroad in an EU Member State, however never obtaining the nationality of their place of residence (in the following: the British expats). Following the entry into force of the Withdrawal Agreement between the United Kingdom and the EU, manifesting the UK's exit from the EU, the British citizens lost their Union citizenship and were subsequently particularly removed from the electoral roll for municipal elections ending the right to stand or vote in these elections which they had under Art. 22 (1) TFEU. The withdrawal agreement, however, secured their right to remain at their place of residence in the EU.[2] With their action for annulment according to Article 263 (4) TFEU the British expats sought the annulment of the EU Council decision agreeing to the Withdrawal Agreement[3] as it deprived them of their status as Union citizens and their rights arising therefrom. After an unsuccessful action before the General Court,[4] the British expats appealed to the ECJ. The ECJ found the action inadmissible. By recalling that

"the admissibility of an action for annulment brought by a natural or legal person against an act which is not addressed to them, in accordance with the fourth paragraph of Article 263 TFEU, is subject to the condition that they be accorded standing to bring proceedings, which arises in two situations. First, such proceedings may be instituted if the act is of direct and individual concern to them. Secondly, such persons may bring proceedings against a regulatory act not entailing implementing measures if that act is of

direct concern to them […]. In the second place, an action for annulment brought by a natural or legal person is admissible only in so far as that person has an interest in the annulment of the contested act. Such an interest presupposes that the annulment of the act is likely, in itself, to have legal consequences and that the action may thus, by its result, procure a benefit for the party that brought it."[5]

In the cases at hand the ECJ found that the applicants did not have an interest in bringing proceedings, because the decision to leave the EU lies with the Member State that wishes to leave (in this case the UK) alone and depends solely on its sovereign choice. The loss of the Union citizenship is an automatic consequence of this sovereign choice.[6] The applications directed against the Council decision agreeing to the Withdrawal Agreement are subsequently inadmissible as the loss of Union citizenship results solely from the UK's sovereign decision to leave the EU and not from said Agreement.

The case *EP v. Préfet du Gers, INSEE*

The ECJ was not able to hide behind admissibility considerations in the case *EP v. Préfet du Gers, INSEE*[7] which came to its attention through a request for a preliminary ruling under Art 267 TFEU.

The French tribunal judiciaire d'Auch refered *inter alia* the following question to the Court: *"Must Article 50 [TEU] and the [Withdrawal Agreement] be interpreted as revoking the [Union] citizenship of [United Kingdom] nationals who, before the end of the transition period, have exercised their right to freedom of movement and freedom to settle freely in the territory of another Member State, in particular for those who have lived in the territory of another Member State for more than 15 years and are subject to the [United Kingdom] 15-year rule, thus depriving them of any right to vote?"*[8]

In its answer the ECJ emphasised the accessory character of Union citizenship by holding that the
"possession of the nationality of a Member State is an essential condition for a person to be able to acquire and retain the status of citizen of the Union and to benefit fully from the rights attaching to that status. The loss of nationality of a Member State therefore entails, for the person concerned, the automatic loss of his or her status as a citizen of the Union."[9]

It consequently concluded that British nationals had lost their Union citizenship, and subsequently the right to vote and to stand as a candidate in municipal elections in their State of residence, following the withdrawal of the UK from the EU. The court emphasised that the fact that an individual had exercised its rights as a Union citizen by moving and residing freely within the Union, did not enable him or her to retain the Union citizenship and the rights attached after the state, whose nationality he or she possesses, left the EU.[10] Finally, the court stressed that the loss of Union citizenship "is the automatic result of a sovereign decision made by a former Member State, under Article 50 (1) TEU, to withdraw from the European Union and thus to become a third State with respect to the European Union."[11]

Interesting for two reasons

None of these judgments came as a surprise. On the contrary the GC and the ECJ have applied long standing principles of law in both jurisprudence and doctrine to decide the cases brought before them. However, the decisions are nevertheless interesting as they concern an entirely new set of facts: Instead of the loss of Union citizenship, because of the revocation of a Member State nationality in an individual case, the loss is caused by the withdrawal of the Member State as such and effects the entire population of the withdrawing state. Question of interest arise concerning both, the admissibility reasoning of the courts as well as regarding the pronouncement on the conception of Union citizenship.

Admissibility of the action of annulment

Regarding admissibility, the question whether the Withdrawal Agreement is an act which is of direct and individual concern to the British Expats arises. The GC emphasised that according to long-standing case-law of the ECJ, "in order to be regarded as individually concerned by a measure not addressed to that person, a natural or legal person must be affected by that measure by reason of certain attributes which are peculiar to them or by reason of factual circumstances which differentiate them from all other persons and thereby distinguish them individually in the same way as the person addressed by a decision."[12] The GC recalled further that "[w]here a measure affects a group of persons who were identified or identifiable when that measure was adopted by reason of criteria specific to the members of the group, those persons might be individually concerned by that measure inasmuch as they form part of a limited class of persons. That can be the case particularly when the measure alters rights acquired by those persons prior to its adoption."[13] Hence, the interesting question arises if former EU citizens who, subsequent to the withdrawal of their state of nationality from the EU, have lost their Union citizenship belong to such a specific group. The General Court answered in the negative. It found that the applicants were concerned by the Withdrawal Agreement only in the same way as all other United Kingdom nationals. Therefore, the 'closed group' on which they relied resulted from the very nature of the system established by the Withdrawal Agreement. It held that neither could the rights attached to the status as Union citizens be classified as 'specific' or 'exclusive' rights,[14] nor could any applicant demonstrate "that the loss of that status and of the rights attaching thereto has consequences for them that are so specific and so peculiar to them that they would distinguish them individually from all other persons, in the same way as addressees […]". [15] The ECJ remained silent on the matter, by circumventing the question in finding that the applicant had no interest in the annulment of the Council decision agreeing to the Withdrawal Agreement as his loss of Union citizenship was the result solely of the sovereign decision of the UK to leave the EU. The ECJ therefore left the door open to generally consider individual applications of UK nationals as a group which collectively lost their Union citizen rights. Nevertheless, the GC's order provides good reasons why this door could be closed in future cases if necessary.

Accessory character of EU citizenship

Regarding the merits of the case, the strict accessory character of Union citizenship upheld by the ECJ gives rise to some interesting reflections on the conception of Union citizenship.
First ventilated by the Draft Treaty Establishing the European Union proposed by the European Parliament in 1984,[16] the concept of Union citizenship has its current normative basis in Art. 20 TFEU that also contours the concept's content.

Paragraph 1 of Art. 20 TFEU reads as follows:
"Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship."

In this paragraph, the two key elements of Union citizenship become clear: Its accessory character and its complementary character.[17] Union citizenship is accessory to the nationality of a Member State. It cannot be granted or taken away separately. As a concept distinct from a European nationality, it is also complementary to Member State nationality and thus neither supersedes nor substitutes the latter (Art. 20 (1)(3) TFEU).
While at the outset Union citizenship was a mere accumulation of rights granted to the Union citizens to guarantee their participation in the common market, today it is described as the fundamental status of nationals of the Member States.[18] Art. 20 TFEU provides EU citizens with a subjective right, which is enforceable before the courts.[19]
Union citizenship of an individual is established by two links: First, the status of the State as a Member State of the Union and second, the nationality of the person of such a Member State. Therefore, there are, in principle, two ways to lose union citizenship. While the ECJ has already seen cases of EU citizens losing their national citizenship and consequently also their union citizenship,[20] BREXIT for the first time provides for a case in which an entire people is stripped of its union citizenship, because the first link breaks away. This ultimately triggers the question whether this automatic loss of citizenship is still in line with the concept of Union citizenship.

Union citizenship – a permanent and non-defeasible right?

The applicants claim that "the status of EU citizen is permanent and, in principle, non-defeasible and that it was conferred on them before the adoption of the contested decision."[21] They argue that having already exercised their right to free movement as one of the fundamental guarantees of their union citizenship, creates a genuine connection to the EU and affords special protection to their union citizenship, prohibiting a withdrawal in their case.

The ECJ, however, sustained that Union citizenship is strictly accessory to the nationality of an EU Member State and independent of the country of residence. From a teleological perspective the independence of the country of residence seems counter-intuitive as the rights granted by Union citizenship are actually intended to promote free movement to another Member State and the integration of Union citizens in the community of their place of residence. However, the ECJ argues that the withdrawal agreement assures that

British expats will not be expelled from their place of residence.[22] Furthermore, British expats (particularly after having resided abroad for a prolonged time) are free to acquire the nationality of their place of residence under the respective rules of naturalization.

Regarding the right to vote in municipal elections one may argue that decisive for awarding such right is not the citizenship of a member state of the EU but the particular link to the territorial community due to the residence in the respective administrative or municipal area, as opposed to elections to e.g. national parliaments, where the right to vote is limited to those persons connected to the people by the bond of citizenship. Consequently, withdrawing EU citizenship from British expats and subsequently stripping them of their right to vote in municipal elections, only because they are not citizens of an EU member state anymore, but nevertheless reside in the respective administrative area, would be at cross-purpose.

However, it is widely accepted that local suffrage has not to be opened to any foreigner, but only to Union citizens. The expansion of local suffrage has therefore two prerequisites: The particular link to the local community and the nationality of an EU Member State.

Most compelling is the argument that having already exercised their right to free movement, as one of the fundamental guarantees of their union citizenship, affords special protection to their Union citizenship. This reasoning aims at arguing for a special treatment of British expats in opposition to British nationals who have never exercised their rights flowing from Union citizenship. It is indeed worth a thought if, other than the ECJ held in *EP v. Préfet du Gers, INSEE*[23]*, t*he procedural guarantees (e.g. obligation to carry out an individual proportionality test), which the ECJ established to protect Union citizens from the withdrawal of their Union citizenship, apply not only in cases of individual revocation of citizenship by legislative or executive measures against the person concerned, but also to the British expats honouring the special legal position they have acquired through exercising their rights under Union citizenship. However, the prevailing opinion agrees with the Court that the grandfathering of the rights of British expats, who were already living in the EU before Brexit is conclusively regulated in the withdrawal agreement.[24] Furthermore, such a solution could undermine the sovereignty of the UK.

The sovereign decision of the UK as the main argument for both cases

Both in establishing inadmissibility in the context of the actions for annulment and in answering the first question referred for a preliminary ruling, the ECJ heavily relied on the argument that the United Kingdom had withdrawn from the EU as a result of a sovereign decision to become a third State with respect to the EU.

Especially in the *EP v. Préfet du Gers, INSEE* case the ECJ invoked the special circumstances of the Art 50 TEU-procedure to override existing case law regarding the withdrawal of Union citizenship. The procedural guarantees (e.g. obligation to carry out an individual proportionality test), which the ECJ established to protect Union citizens

from the withdrawal of their Union citizenship, apply only in cases of individual revocation of citizenship by legislative or executive measures against the person concerned.[25] The established case-law cannot be applied in a situation, where the Member State as a whole leaves the EU in accordance with Art. 50 TEU and the citizens of the respective Member State remain their nationality, but lose Union citizenship as an automatic consequence of the sovereign decision of the Member State.[26]

This result seems consistent. Although Union law can limit the ability of Member States to withdraw their citizenship, it has not limited the sovereign right of the Member States to withdraw from the Union – it has expressly granted it in Art. 50 TEU.

Compatibility with international law?

The accessory character of EU citizenship to the nationality of Member States rather than to the territory of residence is also in line with international law. International law generally grants states the freedom to determine who may acquire or lose citizenship as a core right of their sovereignty.[27] The only line it draws is the prevention of statelessness.[28] Particularly the 1961 UN Convention on the Reduction of Statelessness[29] sets rules for the conferral and non-withdrawal of citizenship to prevent statelessness. However, in the case at hand the British expats remain British citizens after the withdrawal of their Union citizenship and are not at risk to be stateless. The right to nationality, which is slowly being recognized in international human rights law aims at the same thing.[30] However, it does not provide for a right to seek a particular citizenship. Furthermore, it has been argued that Union citizenship as supranational citizenship[31] is not a State nationality.[32] This logically implies that international rules regarding nationality are not applicable to the concept of Union citizenship in the first place.

Compelling conclusion

In the end the Court chose the only possible solution: giving up strict accessory character of Union citizenship would not only run against the wording of Art. 20 (1)(2) TFEU, it would also cause unsurmountable dogmatic and practical problems. UK citizens would have the right to move freely in the EU, while Union citizens would not have the same rights in the UK. This would frankly undermine the principle of reciprocity. Furthermore, any other solution would trigger a mountain of unresolvable questions: Would British expats continue to enjoy EU fundamental rights, enforceable *vis à vis* other Member States or even *vis à vis* the UK? What would this relationship look like? What would happen in case of conflict between Union citizenship and UK citizenship, for example, if a UK national facing criminal proceeding in the UK would demand consular protection at the French embassy? Would British expats continue enjoying the right to elect the European Parliament under Art. 22 (2) TFEU? The entire concept of Union citizenship would be jeopardised. Hence, the Court came to the only possible and feasible conclusion, instead of opening Pandora's box.

Resignation and prophetic dreams

As much as it pains to “punish” those British citizens which probably never voted for BREXIT, it would undermine the system of EU law to detach Union citizenship from Member States nationality. Maybe one day, when Europeans are ready for a United States of Europe, we can talk about the idea. Until then, British expats must apply for passports and visas, or change their citizenship to vote in their hometown municipal elections. And EU citizens living in the UK will have to do the same. That’s reciprocity! However, standing in a queue to do so might give us all some time to think some more about a future version of the EU. Maybe something good will come of it!

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[1] ECJ, Judgement of 9.6.2023, C-673/20, and Judgements of 15.6.2023, C-499/21 P, C-501/21 P, C-502/21 P.

[2] Articles 13 (1) and 15 (1) of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, OJ CI 384, p. 1ff.

[3] Council Decision (EU) 2020/135 of 30.1.2020, OJ 2020 L 29, p. 1.

[4] GC, Order of 8.6.2021, T-252/20.

[5] ECJ, Judgement of 15.6.2023, C-499/21 P, para 39 et seq.

[6] Ibid. para. 45.

[7] ECJ, Judgement of 9.6.2023, EP v. Préfet du Gers, INSEE, C-673/20.

[8] Ibid. para. 37.

[9] Ibid. para 57.

[10] Ibid. para 52.

[11] Ibid. para 62.

[12] GC, Order of 8.6.2021, T-252/20, para. 38, citing ECJ judgment of 15 July 1963, Plaumann v Commission, 25/62, p. 107, and ECJ judgment of 13 March 2018, European Union Copper Task Force v Commission, C-384/16 P, para 93.

[13] Ibid. para 42.

[14] Ibid. para 60.

[15] Ibid. para 62.

[16] Draft Treaty Establishing the European Union (“Spinelli Draft”), of 14.2.1984 (available at: https://www.cvce.eu/content/publication/2002/5/6/0c1f92e8-db44-4408-b569-c464cc1e73c9/publishable_en.pdf; last accessed: 22.9.2023).

[17] See *von Bogdandy, Arndt*, European Citizenship (last updated January 2011), in *Peters/Wolfrum (eds.),* MPEPIL, para. 2 (available at: https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e615?rskey=exIHUU&result=1&prd=MPIL; last accessed: 22.9.2023).

[18] Ibid, para. 4; *Huber*, Unionsbürgerschaft, EuR 2013, 637 (641, 647).

[19] *Giegerich*, in: *Dürig/Herzog/Scholz (eds.)*, Grundgesetzkommentar, Art. 16 Abs. 1 Rn. 77.

[20] ECJ, judgment of 12.3.2019, *Tjebbes and Others*, C-221/17, EU:C:2019:189, judgment of 2.3.2010, *Rottmann*, C-135/08, EU:C:2010:104.

[21] GC, Order of 8.6.2021, T-252/20, para. 56.

[22] Art. 15 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (2019/C 384 I/01), OJ C 384I, 12.11.2019.

[23] ECJ, Judgement of 9.6.2023, C-673/20, para. 62.

[24] ECJ, Judgement of 9.6.2023, C-673/20, para. 64 et seq; The rights of British expats are regulated in Articles 9 et seq. of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, OJ CI 384, p. 1ff.

[25] ECJ, judgment of 12.3.2019, *Tjebbes and Others*, C-221/17, EU:C:2019:189, para. 48; judgment of 2.3.2010, *Rottmann*, C-135/08, EU:C:2010:104, para. 42.

[26] ECJ, Judgement of 9.6.2023, C-673/20, para. 62.

[27] *Göcke*, Stateless Persons (last updated August 2013), in *Peters/Wolfrum (eds.),* MPEPIL, para. 5 (available at: https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e878?rskey=attmPT&result=4&prd=MPIL; last accessed: 22.9.2023).

[28] Ibid. para. 19 et seq.

[29] Convention on the Reduction of Statelessness, New York, 30. August 1961, UN Treaty Series, vol. 989, p. 175.

[30] *Göcke*, Stateless Persons (last updated August 2013), in *Peters/Wolfrum (eds.),* MPEPIL, para. 13 et seq. (available at: https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e878?rskey=attmPT&result=4&prd=MPIL; last accessed: 22.9.2023).

[31] Terminology used by *Strumia*, Supranational Citizenship, in: *Shachar/Bauböck/Bloemraad/Vink (eds.),* Handbook of Citizenship, pp. 669 et seq.

[32] *Hoffmann*, Völkerrechtliche Vorgaben für die Verleihung der Staatsangehörigkeit, p. 48.

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