

**Anonymised version**

Translation

C-673/20 – 1

**Case C-673/20**

**Request for a preliminary ruling**

**Date lodged:**

9 December 2020

**Referring court:**

Tribunal judiciaire d’Auch (France)

**Date of the decision to refer:**

17 November 2020

**Applicant:**

EP

**Defendant:**

Préfet du Gers

Institut National de la Statistique et des Études Économiques

**TRIBUNAL JUDICIAIRE  
... 32000 AUCH ... (COURT OF  
... 32000 AUCH ... FRANCE)**

**JUDGMENT**

...  
...  
...  
...

**BETWEEN:**

**APPLICANT:  
EP  
La Bordevielle  
32430 THOUX**

...  
...

**AND**  
**DEFENDANTS:**  
**PREFET DU GERS**  
**(PREFECT OF GERS)**  
**... 32000 AUCH**  
...  
**INSTITUT NATIONAL DE LA STATISTIQUE**  
**ET DES ETUDES ECONOMIQUES**  
**(NATIONAL INSTITUTE FOR STATISTICS**  
**AND ECONOMIC STUDIES; ‘INSEE’)**  
**... 92120 MONTROUGE**  
...  
...

... [Or. 2]

### PROCEDURE

EP is married to a French citizen but she has not acquired French nationality by marriage because, as a former Foreign Office official, she took an oath of allegiance to the Queen of England. She has lived in France for many years, where she works as a farmer ...

Following the referendum held by the United Kingdom on 23 June 2016, the Council of the European Union approved, on 30 January 2020, the Agreement on the Withdrawal of the United Kingdom from the European Union, which was concluded by the European Union and the United Kingdom on 31 January 2020.

Article 131 of the Withdrawal Agreement provides that, during the transition period, the institutions of the European Union, which include, among others, the General Court of the European Union and the Court of Justice of the European Union, are to have the powers conferred upon them by EU law.

On 1 February 2020, pursuant to Article 50(3) of the [Treaty on European Union], all the EU Treaties and the Treaty establishing the European Atomic Energy Community ceased to apply to the United Kingdom.

EP was removed from the electoral roll with effect from 1 February 2020. She was therefore unable to participate in the municipal elections on 15 March 2020.

On 6 October 2020, EP filed an application to be re-registered on the electoral roll for non-French citizens of the European Union. This was refused on 7 October 2020 by the Mayor of the Commune of Thoux.

EP therefore referred the matter to the Electoral Commission of the commune pursuant to Article L 18 of the code électoral (Electoral Code).

By letter of 3 November 2020, she was informed that the Electoral Commission was not due to meet until March 2021, that is, about twenty days before the departmental elections.

As she considered that that response implicitly confirmed the mayor's refusal to re-register her, EP, pursuant to the provisions of Article L 20 of the Electoral Code, referred the matter to this court by application received on 9 November 2020 in order to contest the decision of the Mayor of Thoux.

...

### **BACKGROUND TO THE DISPUTE**

EP requests that the court:

- stay the proceedings and refer the questions to the Court of Justice of the European Union for a preliminary ruling on interpretation and validity (interpretation of Article 50 of the Treaty on European Union and of the Agreement on the Withdrawal of the United Kingdom; [Or. 3] the possibility for UK nationals to retain their rights to EU citizenship; infringement of the principle of proportionality; infringement of the right to freedom of movement);
- annul the decisions rejecting her application to be registered on the electoral roll of Thoux ...;

... In support of her claims, she points out that another UK citizen, HA, took the same action in May 2020 in order to be able to participate in the second round of the municipal elections of his commune. The tribunal judiciaire de Limoges (Court of Limoges, France) dismissed his action, and that decision was upheld by the Cour de cassation (Court of Cassation, France). Those two courts had found that the loss of EU citizenship did not disproportionately affect HA's civil and political rights because he had been able to vote in the Brexit Referendum and in the general election held in 2019 in the United Kingdom.

EP points out that her situation is different because she has been living in France for 36 years and that, unlike HA, she is the victim of the UK '15-year rule' which now prevents her from participating in English elections.

Second, EP maintains that EU citizenship cannot be automatically revoked, as is apparent from several decisions taken pursuant to Article 20 of the Treaty on the Functioning of the European Union. Furthermore, the principle of legal certainty precludes any form of automatic revocation of any status that is as fundamental as that of EU citizenship. If such revocation were possible, it would be tantamount, in so far as concerns EP's case, to preventing her from any participation in the democratic process, which would constitute an unacceptable interference with her right to be treated in the same way as any other citizen of a Member State, an infringement of her fundamental freedom and of her freedom of movement.

Third, EP submits that the automatic loss of EU citizenship would be a manifest infringement of the principle of proportionality under EU law.

&

The Mayor of the Commune of Thoux simply pointed out that the current statutory provisions did not enable him to register EP on the electoral roll.

&

The Prefect of Gers requests that all the claims raised by EP be rejected.

He argues that the ratification of the Withdrawal Agreement by the European Parliament and the UK Parliament immediately triggered the definitive departure of the United Kingdom from the European Union at midnight on 31 January 2020 and subsequently, for UK nationals in France, the loss of their right to vote and stand as candidates in municipal and European elections.

Article 127 of the Agreement on the Withdrawal of the United Kingdom states that the provisions of the Treaty on the Functioning of the European Union which establish the rights of EU citizens to vote and to stand as candidates in European and municipal elections are not to be applicable to the United Kingdom during the two-year transition period provided for by the agreement. **[Or. 4]**

Accordingly, Brexit led, on 1 February 2020, to the automatic removal, by INSEE, of UK citizens from the supplementary electoral roll pursuant to paragraph III of Article L16 of the code électoral (Electoral Code), which requires that body to remove from the single electoral register voters who no longer have the right to vote.

EP does not have dual nationality and therefore cannot be re-registered on the supplementary electoral roll of the commune of Thoux.

### **GROUNDS FOR THE DECISION**

#### **Request for a stay of proceedings**

It is apparent from French civil and administrative case-law that the purpose of the principle of proportionality is to limit the power of public authorities in order to safeguard the rights and autonomy of individuals and to prevent infringements which, because they are excessive or too radical, compromise the very substance of rights and freedoms.

Specifically, the State can limit the freedom of citizens only to the extent necessary to protect public interests and it must prioritise respect for fundamental rights. A measure which restricts rights and freedoms must therefore be both appropriate or fitting, necessary and proportionate.

The principle of proportionality, which is enshrined by the case-law of the European Court of Human Rights ('ECtHR'), is now a general principle of EU law recognised by Article 5(4) of the Treaty on European Union. It has the same aim: to restrict the power of public authorities by preventing infringements which, because they are excessive or radical, compromise the very substance of rights and freedoms. That principle must therefore be borne in mind by the institutions of the European Union and by the Member States when they apply the law.

In addition to the case-law of the Conseil d'État (Council of State, France), the proportionality criterion now also pervades constitutional law, which has affirmed the need for proportionality on the basis of the requirement that penalties be established only to the extent that they are necessary, as provided by Article 8 of the Declaration of the Rights of Man and of the Citizen.

In the present case, without it being necessary to reply to all the arguments put forward by EP, it will primarily be held that, since she has been resident in France since 29 April 1984, as attested by the evidence submitted in the case file, EP can no longer vote in any UK elections under the Representation of the People Act 1985.

With regard to that UK statutory regime, the ECtHR ruled on the case of Mr Shindler on 7 May 2013, holding that there had been no violation of Article 3 of Protocol No 1 of the Convention. In that case, the party concerned could still vote in European and municipal elections in 2013 at the time of the ECtHR's decision.

EP's case is different since, although she was registered on the electoral roll in Isère and then from October 2000 in Thoux 32, she lost the right to vote in European and municipal elections in 2020, under the provisions of Article 127 of the UK Withdrawal Agreement which states that the provisions of the Treaty on the Functioning of the European Union which establish the rights of EU citizens to vote and to stand as candidates in European and municipal elections shall not be applicable to the United Kingdom during the two-year transition period.

EP, a person over the age of majority with full legal capacity and no criminal convictions, finds herself in a situation in which she is completely deprived of the right to vote. [Or. 5]

However, as pointed out by the ECtHR, the right to vote, far from being a privilege, constitutes a right guaranteed by the Convention (*Albanese v Italy*, 23 March 2006). Moreover, a restriction on the right to vote must pursue a legitimate aim and cannot constitute an absolute bar (*Alajos Kiss v Hungary*, 20 May 2010).

It is not for this court to assess the relevance and reasons for the Agreement on the Withdrawal of the United Kingdom from the European Union on 31 January 2020.

On the other hand, this court finds that the application of the provisions of that agreement to the case of EP, who has also been deprived of the right to vote in the United Kingdom, constitutes a disproportionate infringement of her fundamental right to vote.

The reference for a preliminary ruling is lawful as regards procedural requirements inasmuch as EP has complied with the time limit for challenging the decision which is implicit in the refusal to re-register her on the electoral roll.

The reference for a preliminary ruling is lawful as regards the substance inasmuch as:

- the dispute falls within the scope of EU law and is neither hypothetical nor contrived;
- the question is new because the contested acts of EU law have not previously been declared to comply with EU law in a direct action or in preliminary ruling proceedings;
- the reasons in fact and in law for making a reference for a preliminary ruling have been presented;
- the national provisions which might be affected by the question referred for a preliminary ruling are: the decision of the National Institute for Statistics and Economic Studies to remove EP from the French electoral roll with effect from 1 February 2020, and the refusal of 7 October 2020 of the Mayor of Thoux 32430 to register EP on the electoral roll of her commune;

The request for a stay of proceedings will therefore be granted and this case will be the subject of questions referred to the Court of Justice of the European Union for a preliminary ruling on interpretation and validity as explained above, without the need to resort to the expedited procedure.

### **... ON THOSE GROUNDS**

The court, by final, *inter partes* judgment delivered in open court,

**Orders** that the proceedings be stayed in respect of all the claims made by EP,

**... Refers** the following questions to the Court of Justice of the European Union:

1. Must Article 50 of the Treaty on European Union and the Agreement on the Withdrawal of the United Kingdom from the European Union be interpreted as revoking the EU citizenship of UK nationals who, before the end of the transition period, have exercised their right [Or. 6] 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 UK 15-year rule, thus depriving them of any right to vote?

2. If so, is the combination of Articles 2, 3, 10, 12 and 127 of the Withdrawal Agreement, recital 6 of its Preamble, and Articles 18, 20 and 21 of the Treaty on the Functioning of the European Union to be regarded as having allowed those UK nationals to retain, without exception, the rights to EU citizenship which they enjoyed before the withdrawal of their country from the European Union?

3. If the answer to Question 2 is in the negative, is the Withdrawal Agreement not invalid in part in so far as it infringes the principles underlying EU identity, and, in particular, Articles 18, 20 and 21 of the Treaty on the Functioning of the European Union, and also Articles 39 and [40] of the Charter of Fundamental Rights of the European Union, and does it not infringe the principle of proportionality, in that it contains no provision permitting them to retain those rights without exception?

4. In any event, is Article 127(1)(b) of the Withdrawal Agreement not invalid in part in so far as it infringes Articles 18, 20 and 21 of the Treaty on the Functioning of the European Union, and also Articles 39 and 40 of the Charter of Fundamental Rights of the European Union, in that it deprives EU citizens who have exercised their right to freedom of movement and freedom to settle freely in the United Kingdom of the right to vote and to stand as candidates in municipal elections in that country and, if the General Court and the Court of Justice interpret them in the same way as the Conseil d'État (Council of State, France), does that infringement not extend to UK nationals who have exercised their freedom of movement and their freedom to settle freely in the territory of another Member State for more than 15 years and are subject to the UK 15-year rule, thus depriving them of any right to vote?

...

WORKING DRAFT