

# Anonymised version

Translation

C-716/22– 1

Case C-716/22

## Request for a preliminary ruling

**Date lodged:**

23 November 2022

**Referring court:**

Tribunal judiciaire d’Auch (France)

**Date of the decision to refer:**

15 November 2022

**Applicant:**

EP

**Defendant:**

Préfet du Gers

Institut national de la statistique et des études économiques (INSEE)

---

**TRIBUNAL JUDICIAIRE**

[...]

**32000 AUCH**

[...]

[...]

[...]

[...]

**JUDGMENT**

Delivered [...] on 15 November 2022 [...]

**BETWEEN:**

**APPLICANT:**

EP

[...]

32430 THOUX

[...]

AND

[...]

**DEFENDANTS:**

PREFET DU GERS (PREFECT OF GERS)

[...]

32000 AUCH,

not entering an appearance

INSTITUT NATIONAL DE LA  
STATISTIQUE ET DES ETUDES  
ECONOMIQUES (NATIONAL INSTITUTE  
FOR STATISTICS AND ECONOMIC  
STUDIES)

[...]

92120 MONTROUGE,

not entering an appearance

[...]

**Other party:**

Commune de THOUX (32) (Municipality of  
Thoux)

[...]

32430 THOUX,

not entering an appearance

**SUMMARY OF THE DISPUTE**

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 Municipality of Thoux.

EP therefore referred the matter to the Electoral Commission of the municipality 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, thus about twenty days before the departmental elections.

As she considered that that response implicitly confirmed the mayor's refusal to re-register her, EP, on the basis 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.

By decision of 17 November 2020, this court:

- **Ordered** that the proceedings be stayed in respect of all the claims made by EP,
- **Ordered** that the entire file be forwarded [...] to the Registry of the Court of Justice [of the European Union] [...].

By judgment of 9 June 2022, [*Préfet du Gers and Institut national de la statistique et des études économiques* (C-673/20, EU:C:2022:449),] to which reference will be made for a fuller understanding of its reasoning, the Court of Justice held that United Kingdom nationals had all lost their Union citizenship and therefore their right to vote in municipal elections.

The case returned to the tribunal judiciaire d'Auch (Court of Auch, France) on 20 September 2022.

In the absence of the respondents, who were duly summoned, EP has requested a further stay of proceedings by referring to the Court of Justice of the European Union a question for a preliminary ruling on the validity of the Agreement on the Withdrawal of the United Kingdom from the European Union relating specifically to the European elections and on the substance she has requested that the court:

- **annul** the decisions rejecting the application submitted by EP to be re-registered on the electoral roll of Thoux (Gers);

[...] [claim in relation to costs]

She states that, although the loss of Union citizenship and the loss of the right to vote in municipal elections for Brexpatés are now established at the level of Community law by the judgment of 9 June 2022 in Case C-673/20, the Court of

Auch will admit that the Court of Justice of the European Union has not ruled on the question of the right of Brexpat to vote in European elections.

The Court of Justice intentionally did not rule on that question, which merits its own full investigation in the light of the precedent set by Gibraltar concerning the right of non-EU citizens to vote in European elections granted by the Court of Justice and the European Court of Human Rights.

The President of the Court of Justice has clearly invited EP to come back to the Court with a specific question for a preliminary ruling concerning European elections, which is why EP is referring a supplementary question for a preliminary ruling.

EP also wishes to point out to the Court of Auch that, although the loss without exception of Union citizenship and of the right to vote in municipal elections for Brexpat has been acknowledged at the level of Community law by the Court of Justice of the European Union, incidentally omitting EP's oath to the Queen of England, that position remains open to challenge at the level of the Convention for the Protection of Human Rights and Fundamental Freedoms in the light of the case-law of the European Court of Human Rights, and therefore EP's removal from the electoral roll is contrary to the convention.

Reference will be made to a reading of the judgment of the Court of Justice of 9 June 2022 for a fuller understanding of the questions referred to the Court of Justice for a preliminary ruling and the present dispute.

[...] [procedural detail]

### **GROUNDS FOR THE DECISION**

By removing EP from the electoral roll, the French administration has de facto deprived her not only of her right to vote in municipal elections but also in European elections.

Paradoxically, EP lost her right to vote in municipal elections precisely because she had been stripped of her Union citizenship.

While, in its judgment of 9 June 2022, the Court of Justice of the European Union restricted the answers, which were negative, only to EP's right to vote in municipal elections, it did not rule on the right of British citizens to vote in European elections.

The entire case is therefore still before the Court of Auch, even though, obviously, the loss of Union citizenship and the loss of the right to vote in municipal elections for Brexpat are now established at the level of Community law by the judgment of 9 June 2022 in Case C-673/20.

However, in its judgment of 18 February 1999, *Matthews v. the United Kingdom*, 24833/94, the European Court of Human Rights held in respect of the inhabitants of Gibraltar who are not European citizens that ‘*the Parliament was sufficiently involved both in the specific legislative processes leading to the passage of certain types of legislation and in the general democratic supervision of the activities of the European Community to constitute part of the legislature of Gibraltar for the purposes of Article 3 of Protocol No. 1*’.

In its judgment of 12 September 2006, *Spain v United Kingdom* (C-145/04[, EU:C:2006:543]), the Court of Justice of the European Union went on to hold that ‘*the Contracting States enjoy a wide margin of appreciation in imposing conditions on the right to vote. However, those conditions may not curtail the right to vote to such an extent as to impair its very essence and deprive it of effectiveness. They must pursue a legitimate aim and the means employed must not be disproportionate ...*’.

Thus, in short, the fixed, stable and undisturbed residence in the territory of the European Union would allow a resident to consider that he or she belongs to a legislature, in this case the European legislature. A State may regulate his or her right to vote with measures that are proportionate to the objective pursued but do not impair that right to the point of rendering it ineffective.

That is also the solution which appears to have emerged when the Court of Justice adopted reasoning for not excluding a non-European citizen in Gibraltar, as may be the case in accordance with criteria to be defined by the Court of Justice of the Union for former British EU citizens who still have close links with the Member States on account inter alia of their place of residence: ‘*In the current state of Community law, the definition of the persons entitled to vote and to stand as a candidate in elections to the European Parliament falls within the competence of each Member State in compliance with Community law. Articles 189 EC, 190 EC, 17 EC and 19 EC do not preclude the Member States from granting that right to vote and to stand as a candidate to certain persons who have close links to them, other than their own nationals or citizens of the Union resident in their territory.*

*Neither Articles 189 EC and 190 EC nor the Act concerning the election of the representatives of the European Parliament by direct universal suffrage expressly and precisely state who are to be entitled to the right to vote and to stand as a candidate for the European Parliament. As regards Articles 17 EC and 19 EC, relating to citizenship of the Union, only the latter deals specifically, in paragraph 2, with the right to vote for the European Parliament. That article is confined to applying the principle of non-discrimination on grounds of nationality to the exercise of that right.*

*Also, as regards the possible existence of a clear link between citizenship of the Union and the right to vote and stand for election which requires that that right be always limited to citizens of the Union, no clear conclusion can be drawn in that regard from Articles 189 EC and 190 EC, relating to the European Parliament,*

*which state that it is to consist of representatives of the peoples of the Member States. The term “peoples”, which is not defined, can have different meanings in the Member States and languages of the Union. As regards the Treaty’s articles relating to citizenship of the Union, no principle can be derived from them that citizens of the Union are the only persons entitled under all the other provisions of the Treaty, which would imply that Articles 189 EC and 190 EC apply to those citizens alone. In fact, while Article 17(2) EC provides that citizens of the Union are to enjoy the rights conferred by the Treaty and be subject to the duties imposed by it, the Treaty recognises rights which are linked neither to citizenship of the Union nor even to nationality of a Member State. As regards Article 19(2) EC, while it implies that nationals of a Member State have the right to vote and to stand as a candidate in their own country and requires the Member States to accord those rights to citizens of the Union residing in their territory, it does not follow that a Member State is prevented from granting the right to vote and to stand for election to certain persons who have a close link with it without however being nationals of that State or another Member State. In addition, since the number of representatives elected in each Member State is laid down by Article 190(2) EC and since, in the current state of Community law, elections to the European Parliament are held in each Member State for the representatives to be elected in that State, an extension by a Member State of the right to vote at those elections to persons other than its own nationals or other than citizens of the Union resident in its territory affects only the choice of the representatives elected in that Member State and has no effect either on the choice or on the number of representatives elected in the other Member States.*

*It follows that the United Kingdom did not infringe Articles 189 EC, 190 EC, 17 EC and 19 EC by adopting a law which provides, in relation to Gibraltar, that Commonwealth citizens resident in Gibraltar who are not Community nationals have the right to vote and to stand as a candidate in elections to the European Parliament.’*

Using those legal criteria, it is necessary to assess EP’s situation *in concreto*:

- EP has maintained close links with France, an EU Member State, but in addition, on account of her exclusion from the right to vote in British elections by reason of the 15 year rule under the law of the United Kingdom and the loss of her right to vote in municipal elections following Brexit in accordance with the judgment of the Court of Justice of 9 June 2022 in Case C-673/20, EP has been left with no voting rights,
- Her human dignity is significantly affected since, even though she remains a respected person who has never been convicted, she is deprived of the most basic right to freedom of expression, which seems entirely disproportionate to the primary objective of the treaty organising the withdrawal of the United Kingdom from the Treaties on the Functioning of the European Union,

– The harm to EP’s private and family life is clear since she is deprived of any right to vote in the British, French and European elections because the 15 year rule and the ratification of Brexit on 31 January 2020 are both applicable to her,

In conclusion, in the light of the case-law of the abovementioned European Courts, it would be conceivable for EP, a British national who has been resident in France for several decades and who has legitimately enjoyed the right to vote in municipal and European elections, to be able to continue to exercise peacefully her right to vote in European elections.

\*\*\*\*\*

Furthermore, as already mentioned in the interim decision of 17 November 2020, 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, EP, who has been resident in France since 29 April 1984, as attested by the evidence submitted in the case file, 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 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, therefore finds herself in a situation in which she is completely deprived of the right to vote.

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).

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.

\*\*\*\*\*

For all of those reasons, it is necessary to refer a supplementary question to the Court of Justice for a preliminary ruling, [as] set out below.

[...]

[...] [procedural detail]

### **ON THOSE GROUNDS**

The court, by *inter partes* judgment delivered in open court and at first instance,

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

[...] [procedural detail]

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

**1.**

Is Decision 2020/135 on the conclusion 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 partially invalid in that the Agreement on the Withdrawal of the United Kingdom from the European Union infringes Articles 1, 7, 11, 21, 39 and 41 of the Charter of Fundamental Rights of the European Union, Article 6(3) of the Treaty on European Union and the

principle of proportionality in Article 52 of that Charter in so far as it does not include a provision allowing the right to vote in European elections to be retained for British nationals who have exercised their freedom of movement and their freedom to settle freely in the territory of another Member State, whether or not dual nationality is permitted, in particular for those who have lived in the territory of another Member State for more than 15 years and who are subject to the United Kingdom's 15 year rule, thus aggravating the deprivation of any right to vote, for persons who have not had the right to vote against the loss of their Union citizenship and also for those who have sworn allegiance to the British Crown?

## 2.

Must Decision 2020/135, the Agreement on the Withdrawal of the United Kingdom from the European Union, Article 1 of the Act concerning the election of the members of the European Parliament annexed to Council Decision 76/787/ECSC, EEC, Euratom of 20 September 1976, the judgment of the Court of Justice of the European Union of 12 September 2006, *Spain v United Kingdom*, C-145/04, Articles 1, 7, 11, 21, 39 and 41 of the Charter of Fundamental Rights of the European Union, Article 6(3) of the Treaty on European Union and the judgment of the Court of Justice of the European Union of 9 June 2022, *Préfet du Gers*, C-673/20, be interpreted as depriving former Union citizens who have exercised their right to free movement and the freedom to settle freely in the territory of the European Union of the right to vote and to stand as a candidate in European elections in a Member State, as well as, in particular, former Union citizens who no longer have any right to vote because they have exercised their private and family life in the territory of the European Union for more than 15 years and who were unable to vote against the withdrawal of their Member State from the European Union which entailed the loss of their Union citizenship?

[...]

[...] [procedural detail]