In the name of the King

Ruling

DISTRICT COURT OF AMSTERDAM

Private law division, civil law presiding judge
Case number/session number: C/13/640244/KG ZA 17-1327 FB/AA

Ruling in interlocutory proceedings of 7 February 2018

In the case of

1. **[plaintiff 1]**,

residing in [town],

2. **[plaintiff 2]**,

residing in [town],

3. **[plaintiff 3]**,

residing in [town],

4. **[plaintiff 4]**,

residing in [town],

5. **[plaintiff 5]**,

residing in [town],

6. the foundation

BREXPATS – HEAR OUR VOICE,

seated in Amsterdam,

7. the association

COMMERCIAL ANGLO DUTCH SOCIETY,

seated in Voorschoten,

plaintiffs,

legal representatives Mr. Chr. A. Alberdingk Thijm and Mr. E.H. Janssen of Amsterdam

versus

1. **THE STATE OF THE NETHERLANDS**

seated in The Hague,

2. the legal entity governed by public law

THE MUNICIPALITY OF AMSTERDAM,

seated in Amsterdam

Defendants,

Legal representatives Mr. E.H. Pijnacker Hordijk and Mr. G.A. Dictus of The Hague

The plaintiffs shall be referred to hereinafter respectively as plaintiffs 1 to 5, Brexpats and CADS. They shall be designated jointly as plaintiffs. The defendants shall be referred to hereinafter as the State and the Municipality, and also designated as defendants.

1 The proceedings

At the hearing of 17 January 2018, the plaintiffs submitted and claimed in accordance with the summons, a copy of which is attached to this ruling. The defendants submitted their defence, with conclusions relating to the claims submitted by Brexpats and CADS for declaration of inadmissibility and relating and relating to plaintiffs 1 to 5 for the rejection of the requested provisions.

Both parties submitted exhibits and pleading notes to the proceedings.

Plaintiffs 1, 2, 4 and 5 attended the hearing in person. The plaintiffs in section 1 appeared jointly on behalf of Brexpats and plaintiff 5 jointly on behalf of CADS. The plaintiffs were represented by Mr. Chr. A. Alberdingk Thijm, Mr. E.H. Janssen of Amsterdam and Mr. S.C. van Velze.

[name 1] and [name 2] attended on behalf of the State. [name 3] attended on behalf of the Municipality. The defendants were jointly represented by Mr. E.H. Pijnacker Hordijk and Mr. G.A. Dictus.

2 The Facts

2.1. On 23 June 2016, during the so-called Brexit referendum, the British population voted by a small majority for the United Kingdom to leave the European Union (hereinafter: EU). On 29 March 2017, the United Kingdom, in accordance with article 50, paragraph 2 of the Treaty on European Union (hereinafter: TEU), notified the European Council of its intention to leave the EU.

2.2. In accordance with article 50, paragraph 2 in association with article 218 of the Treaty on the Functioning of the European Union (hereinafter: TFEU), the European Council and the United Kingdom commenced negotiations on the conditions for the withdrawal of the United Kingdom from the EU on 19 June 2017. At this point in time, no comprehensive agreement has been reached between the negotiating parties. A progress report was however presented on 8 December 2017 whereby the first phase of the negotiations has been concluded. It is evident from that report that the negotiating parties have formulated a common principle concerning, amongst other things, the rights of British subjects residing in other EU member states, however subject to the condition that *"nothing is agreed until everything is agreed".*

2.3. According to the progress report, at the time the United Kingdom leaves the EU, the principle of reciprocity must be accepted regarding the protection of the rights of British subjects currently residing in other EU states on the one hand and the subjects of other EU states currently residing in the United Kingdom on the other hand. This protection must also extend to their family members, as defined in Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 concerning the right of free movement and residence on the territory of member states for the citizens of the Union and their family members (hereinafter: EU Citizenship Directive). The scope of the protection is described as follows in paragraphs 12, 13 and 14 of the progress report:

> 12. Irrespective of their nationality, the following categories of family members who were not residing in the host State on the specified date will be entitled to join a Union citizen or UK national right

holder after the specified date for the life time of the right holder, on the same conditions as under current Union law:

a. all family members as referred to in Article 2 of Directive 2004 38 EC, provided they were related to the right holder on the specified date and they continue to be so related at the point they wish to join the right holder; and
b. children born, or legally adopted, after the specified date, whether inside or outside the host State, where:
    i. the child is born to. or legally adopted by, parents who are both protected by the Withdrawal Agreement or where one parent is protected by the Withdrawal Agreement and the other is a national of the host State; or
    ii. the child is born to, or legally adopted by a parent who is protected by the Withdrawal Agreement and who has sole or joint custody of the child under the applicable family law of an EU27 Member State or the UK and without prejudging the normal operation of that law, in particular as regards the best interests of the child;

13. The UK and EU27 Member States will facilitate entry and residence of partners in a durable relationship (Article 3(2)(b) of Directive 2004 38EC) after the UK's withdrawal in accordance with national legislation if the partners did not reside in the host state on the specified date, the relationship existed and was durable on the specified date and continues to exist at the point they wish to join the right holder;

14. The right to be joined by family members not covered by paragraphs 12 and 13 after the specified date will be subject to national law (...).

Paragraph 15 states in conclusion that cross-border workers will also be covered by the scope of the protection of the withdrawal agreement.

2.4. Plaintiffs 1 to 5 are subjects of the United Kingdom. They are all residents of the Netherlands.

Brexpats is a foundation in Dutch law established on 13 September 2017. According to an extract from the Commercial Register which relates to it, the aim of Brexpats is to promote the interests of all citizens of the European Union of British nationality whose rights or interests will be affected by Brexit. At the time of the foundation of Brexpats and at the time of the issuing of the injunction, the plaintiff in section 1 was, according to the extract from the Commercial Register, the chairman, secretary and treasurer of its board and the advisory board consisted of one person, namely [name 4].

CADS is an Amsterdam network association of business owners with the aim of promoting English-Dutch trade relations. The board of CADS consists of the plaintiff in section 5 and four others. CADS has approximately a hundred members. These originate from the U.K., other countries of the Commonwealth and the Netherlands.

3 The dispute

3.1. The plaintiffs claim – in summary – the following:

Primary

I in the event that EU citizenship is retained following Brexit:

i. that the State and the Municipality respects, protects and guarantees the rights arising from EU citizenship of plaintiffs 1 to 5, their spouse and children and other British citizens remaining in the Netherlands;

ii. that the State and the Municipality refrain from any measures which lead to the situation in which the rights arising from EU citizenship of plaintiffs 1 to 5, their spouses and children and other British citizens remaining in the Netherlands are infringed, specifically that the State and Municipality do not agree to or implement, a withdrawal agreement or any other agreement in which the aforementioned rights cannot be guaranteed;

II in the event that the withdrawal of the United Kingdom leads to the citizens of the United Kingdom losing EU citizenship and the rights associated with it:

i. to order that the State does not restrict the rights arising from the EU citizenship of plaintiffs 1 to 5, their spouses and children and other British citizens remaining in the Netherlands, without an individual assessment of the proportionality principle first being carried out;

ii. in particular in respect of plaintiff 2, to prohibit the State from insisting that plaintiff 2 must relinquish her British nationality;

iii. to order the Municipality to respect the individual assessment referred to in section (i) and, insofar as it is bound, to implement it;

iv. to order the Municipality to insist to the State that multiple nationality be facilitated for a person who applies for Dutch nationality, within a term of two weeks following the issue of this ruling;

subsidiary

III to order the State and the Municipality to take such measures which the Presiding Judge considers to be judicially appropriate, in line with the above, to ensure that the rights associated with EU citizenship of British people remaining in the Netherlands are respected, protected and guaranteed;

primary and subsidiary

IV to order the defendants to pay the costs of the proceedings, plus subsequent costs.

The plaintiffs state that in their opinion, the assessment of these claims focuses on the interpretation article 20 of the TFEU. In consideration of this case, they have submitted prejudicial questions to the European Union Court of Justice (hereinafter: CJEU).

3.2. The State of the Netherlands et al have submitted a defence.

3.3. The statements by the parties will be examined, where relevant, in further detail.

4 The admissibility of Brexpats and CADs

4.1. The State and the Municipality contend that the Brexpats foundation and the CADS association must be declared inadmissible in the claims submitted by them. The basis of their claim is that Brexpats and CADS do not fulfil the conditions laid down in article 3:305a of the Dutch Civil Code for the submission of a collective claim.

Admissibility of Brexpats

4.2. Regarding Brexpats, the State and the Municipality argue that the interests of persons on behalf of whom the claim has been submitted are not sufficiently guaranteed. They refer to the fact that Brexpats does not comply with the Claimcode (nor even with its own articles of association) as the functions of chairman, secretary and treasurer are one and the same person, i.e. plaintiff no.1. Insufficient guarantees therefore exist that plaintiff 1 will not allow her own interests to prevail over the interests of the persons on behalf of whom Brexpats has submitted the claims.

4.3. In the assessment of defence of inadmissibility, the following is of interest. As it is disputed that a foundation as defined in article 3:305a of the Dutch Civil Code complies with condition that the interests of persons on behalf of whom the foundation has been established are insufficiently protected, the extent to which the parties concerned can benefit from the collective action in the event that the claim is awarded must be determined, and to what extent it may be relied upon that the claiming organisation possesses sufficient knowledge and expertise to carry out the proceedings. According to parliamentary history, it is also important what other activities the organisation has undertaken to apply itself to the interests of the disadvantaged parties, or whether the organisation has apparently been able to achieve its own objectives in the past, the number of disadvantaged parties affiliated to it or a member of the organisation, and the response to the question of to what extent the disadvantaged parties actually support the collective action. Whether the claiming organisation complies with the principles laid down in the Claimcode may also be significant. In the case of an ad hoc established foundation, whether it was established by existing organisations who have successfully represented the interests of those involved in the past may also be important (Parliamentary Papers II, 2011-2012, 33 126. No. 3 pp.12-13).

4.4. In the light of this, the inadmissibility defence is successful in relation to Brexpats. In the assessment of the admissibility of a legal claim submitted by a foundation established on the basis of article 3:305a of the Dutch Civil Code, whether it is evident, or sufficiently credible, that it (seriously) promotes the interests of those on behalf of whom it has been established, must be examined. Although the Claimcode and the benchmarks contained within it is not decisive in this respect, it is evident from the legislative history of article 3:305a of the Dutch Civil Code that legislator wishes to attribute certain weight to it (as a *soft law*). In the case of Brexpats, all of its board functions are united in one person and the advisory board is also composed solely of one person. The balanced composition of the board required by the Claimcode, which according to this code can be guaranteed in principle by the appointment of 3 board members, is therefore also inadequately guaranteed. The State and the Municipality have correctly argued that as a result, there is a risk that Brexpats has been established to solely or principally promote the interests of plaintiff 1. Even if the factual situation were to deviate from that which is evident from the Commercial Register in the meantime, it does not change the above situation, as the State and the Municipality must rely on the information published in that register and it is up to Brexpats to update the publication of its relevant details as and when necessary. It is also even less evident that Brexpats has sufficient support among its group of interested parties it says it represents, namely the British subjects currently staying or residing in another EU country.

The claims submitted by Brexpats cannot therefore be admissible.

Admissibility of CADS

4.5. In relation to CADS, the State and the Municipality argue that it has not fulfilled its obligation to furnish facts, in the sense that it has not adequately explained how and why it complies with the conditions laid down in

article 3:305a of the Dutch Civil Code. Insofar as that may not be the case, the defendants also argue that CADS has not fulfilled the condition of article 3:305a, section 2, of the Dutch Civil Code, that it must have adequately attempted to achieve the claim by the means of consultation. The defendants state that CADS only approached them with a request to provide cooperation to a prejudicial reference to the CJEU and not with the subject of the current claim.

4.6. This defence is rejected. CADS has adequately demonstrated by the means of the evidence it has submitted that it complies with the conditions laid down in article 3:305a of the Dutch Civil Code. It is evident from its website that its objective is to promote commercial and cultural relations between the Netherlands and the United Kingdom, it has been in existence since 1972 and was therefore not founded solely for the purpose of these proceedings and its membership and composition adequately represent the group of interested parties on behalf of whom it has submitted its current claims.

4.7. The fact that CADS has requested that the State and the Municipality to support it in its wish to submit prejudicial questions to the CJEU, does not mean that the condition laid down in section 4.5 has not been fulfilled. CADS still adopts the position that the submission of such prejudicial questions is necessary for the assessment of the jointly submitted claims. Partly in view of the essential cross-border nature of the current dispute and the (legal) position adopted by the State and the Municipality, central to which is that at this point in time they see no legal grounds or reason to offer the plaintiffs protection against the (threatened) harm to their rights they allege is embedded, any discussion under those circumstances is meaningless.

4.8. The claims jointly submitted on behalf of CADS can therefore be declared admissible.

5 The assessment

5.1. The plaintiffs put forward three grounds for their claims, namely i) the doctrine of acquired rights, ii) the EU citizenship of article 20 of the TFEU and iii) article 8 of the ECHR.

5.2. The State and the Municipality have put forward the most far-reaching defence that the proceedings constitute an undesirable breach of the political negotiation process on Brexit and that the plaintiffs have set up a fictional dispute which is exclusively intended to get the case put forward to the CJEU. These defences will now be examined.

Political question?

5.3. The first defence relates to the doctrine of the *political question* and concerns the distribution of tasks between the court and management and/or politics. In this doctrine, in answering the question of whether the court is authorised to rule on a dispute submitted to it, whether this concerns a subject that is constitutionally within the jurisdiction of another state power authority or sufficiently clear and objective criteria can be assigned to enable the dispute to be assessed in court, and/or a legal ruling would thwart the possibility for another competent state power to form a political opinion on the subject, is decisive.

5.4. In general, the assessment that a dispute is not suitable for assessment by the court is not made swiftly. The simple fact that proceedings are surrounded by political sensitivity, is insufficient in this context.

5.5. This is even more exceptional in the Dutch constitution. It contains a carefully calculated balance of power between the legislative, implementing and legal powers and there is no clear separation of competences. The mutual relationship between the organs of the *trias politica* [separation of powers] can in the Netherlands (to

a certain extent) be typified as a model based on partnership, whilst respecting each individual specific responsibility. Inherent to the task of the civil courts is the provision of legal protection at an individual level, if necessary against other state powers. This is not necessarily different in cases which also have a political dimension.

5.6. The current dispute concerns the question of whether citizens of the UK residing in the Netherlands will lose their fundamental freedoms – derived from the UK's membership of the EU – due to the single fact that the UK is leaving the EU. In this hearing, that question is tailored to their fundamental right to remain, to reside and to work in another EU member state and to be able to move freely throughout the countries of the EU. Plaintiffs 1 to 5, together with the interested parties represented by CADS, have made use of their fundamental freedom to reside and work in another EU member state. They have specifically stated that they not only fear that those rights and freedoms will be harmed in the event of a Brexit, but that they are already suffering harm from the uncertainty of their legal position in that case. This (threat of) harm has partly arisen because the progress report – cited previously in sections 2.2 and 2.3 – states that the negotiating states are currently operating on the assumption that the existing rights and freedoms of British people residing in other EU countries will cease to exist if the negotiating parties do not agree otherwise.

5.7. The consequent harm which currently exists consists of the fact that all of the plaintiffs (also including the interested parties bundled together under the representation by CADS), must, in organising their lives, take serious account of the fact that the State here will urge British people residing here following Brexit (once again: unless the negotiating parties do not agree otherwise) to leave its territories, without individual assessment, as third country nationals. This genuine threat means that, in view of the seriousness of this situation, they must already make the decision now to become a Dutch citizen. That potential nationalisation may have consequences for the retention of their British nationality and therefore for the possibilities for them to visit their home country and to maintain sustainable contacts with the family members there. Moreover, there are considerable costs associated with the acquisition of Dutch nationality. Furthermore, decisions must now already be taken concerning the legal position of partners residing in Amsterdam/The Netherlands, of whom one is a British subject and the other is a national of a third country. In addition, parents who themselves are British nationals, but have children who were born in the Netherlands, are now faced with difficult choices (more of which in section 5.24). Yet another plaintiff is now experiencing uncertainty as to whether he will be able to (continue to) do his job or profession as in order to do so it is essential that he be able to (continue to) travel freely throughout the countries of the EU.

5.8. The plaintiffs are seeking protection from the civil courts against these threats and partially against the infringement of their fundamental rights which in their opinion already exists at this point in time. The granting of such protection is a uniquely legal task. It is part of the existence of a democratic legal state that, at an individual level, those who belong to a social or political minority are entitled in law to a certain degree of protection against the will of the majority.

5.9. Against this background is the circumstance that the expiry or retention of these rights is also currently the subject of a political negotiation process (see above in sections 2.2. and 2.3). This not however a good reason not to rule on the claims submitted by the plaintiffs. The current defence is therefore rejected.

Fictional dispute?

5.10. The second defence involves the argument that this is a hypothetical or fictional dispute, which is only designed to obtain a reference to the CJEU. This defence fails on the grounds stated above in sections 5.6 to

5.8. There is no question of a hypothetical or fictional dispute. The plaintiffs have credibly demonstrated that the case relates in part to a very real threat and in part to exiting infringements of their fundamental rights and freedoms at an individual level. As already deliberated above in section 4.7, central to the (legal) position adopted by the State and the Municipality, is that at this point in time they see no legal grounds or reason to offer the plaintiffs protection against the (threatened) harm to their rights.

The Vienna convention on the law of treaties and article 20 of the TFEU

5.11. We now come to the assessment of the claims and the ground(s) on which they are based. These grounds lie in the core of the acquired rights and freedoms which the plaintiffs derive from their EU citizenship as defined in article 20 of the TFEU. Insofar as this is relevant to the current dispute, it concerns the right to the free movement of people and the right to continue to freely remain, reside and work in other EU member states. Article 20, paragraph 1 of the TFEU, grants these rights to citizens of the Union, that is to say, anyone who has the nationality of a member state, as is currently the case with the United Kingdom. The plaintiffs have actually exercised those rights and freedoms.

5.12. The consequences of the termination of international treaties is covered in general by the 1969 Vienna Convention on the Law of Treaties (Treaty Series 1985/79, hereinafter referred to as the Vienna Treaty Convention). Amongst other things, this treaty contains clauses on the establishment, interpretation, fulfilment and termination of treaties. If matters progress to the termination of a treaty, article 70 of the Vienna Treaty Convention stipulates the legal consequences of such a termination. The parties are then released from the obligation to continue to implement the treaty, but that termination does not affect any obligation whatsoever or any legal position whatsoever of the parties which arose due to (the implementation of) the treaty prior to its termination.

5.13. The Vienna Treaty Convention deals with the legal consequences which a treaty creates between states. The TEU and the TFEU differ from this to the extent that they not only create rights and obligations between states, they also create rights and obligations for the citizens of the Union. In contrast to other bilateral and multilateral treaties, the TEU and the TFEU create an individual, autonomous legal order, which is separate from national legal order and for the purpose of which the member states of the EU have limited their sovereignty (ECJ 5 February 1963, C-26/62, Jur. 1963, p.3, ECLI:EU:C:1963:1 (Van Gend & Loos)). The Vienna Treaty Convention however offers no definitive indication of the consequences of termination of the TEU and the TFEU. Correspondingly, the TEU gives its own rule for the procedure to be followed in the event that a member state notifies its wish to leave the EU.

It therefore follows on from the above that the question of the legal position of citizens of the UK residing in another member state, thereby having made use of their rights and freedoms derived from article 20 of the TFEU, following the withdrawal of the UK from the EU, must be answered on the basis of EU law itself.

5.14. Article 20 of the TFEU grants EU citizens the right to free movement and residence in other member states. The construction of this provision implies a link between the citizenship of a member state and EU citizenship. As a consequence, the acquisition of EU citizenship, with its associated rights and freedoms, is reserved for subjects of the member states of the EU. In this light, it is defensible that, as a downside of this, the loss of the status of a citizen of an EU member state leads to the loss of EU citizenship. In view of the following however, this conclusion is not necessarily compelling.

Acquired rights

5.15. The CJEU has already repeatedly ruled on the doctrine of acquired rights. Its jurisprudence can be summarised as follows. In principle, acquired rights cannot be withdrawn by subsequent decisions. This follows on specifically from the general legal principles which form the basis of EU law, such as the principle of legal certainty and the principle of protection of legitimate expectations. However, as the required legal basis was lacking at the time of the granting of those rights, seen objectively, the withdrawal of those rights may be implemented (ECJ 12 July 1957, C-3-7/56, Jur. 1957, p.87; ECJ 22 March 1961, C-42 and 49/59, Jur. 1961, p.103, para 10; ECJ 26 April 2005, C-376/02, Jur. 2005, p. 1-3445, para. 32).

5.16. In the above it is noted that the CJEU is very reserved in answering the question of whether an acquired right exists as defined above. Rights holders may still not rely on the fact that a particular situation is not liable to change and that they therefore possess an acquired, inalienable right. The answer to the question of whether rights from which EU citizens derive claims and which they actually exercise may be infringed and if so, to what extent (in brief), depends upon what legitimate expectations those citizens may foster in relation to (the continued existence of) those rights. The degree of predictability of the infringement of those rights plays a major role in this. The less probable it is that the right will be infringed, the interest (of the protection of rights) of the individual citizen in the event of continuity of his claim, gains greater weight compared to the general interest, even if that serves to infringe the right. And assuming that the infringement is justified, the effect of the new decree still only extends to future situations in such cases. (See CJEU 19 July 2012, C-522/10, ECLI:EU:C:2012:475 (Albert Reichel); ECJ 5 October 1994, C-133, 300 and 362/93, Jur. 1994, p-1-04863; ECJ 27 September 1979, C-230/78, Jur. 1979, p.2749.)

5.17. From an abstract point of view, the possibility of a member state to withdraw from the EU, as specifically regulated in article 50 of the TEU, however unlikely it might have initially appeared that use would ever be made of that possibility, means that subjects of an EU member state (and therefore those of the UK) would have had to take account of the fact that the member state of which they possess nationality, may leave the EU. From a definitive point of view, in recent years the plaintiffs would have had to increasingly take account of the - initially unlikely - realisation of that possibility as former Prime Minister Cameron had announced years earlier that a referendum on the UK's membership was to be held in 2016.

5.18. However, the above does not automatically mean that plaintiffs could also foresee that this could lead to the loss of, among other things, their right to live and work in other EU member states. Before the UK expressed its wish, no other Member State had made use of the possibility of withdrawing from the EU under Article 50 TEU. Only when this wish was made known, at least after the outcome of the referendum had become known, could the plaintiffs take into account the possibility that their rights and freedoms as nationals of an EU Member State as referred to in Article 20 TFEU, as the result of that exit, would be lost. That moment is only a short time ago. In these circumstances, it cannot be ruled out that the rights and freedoms that UK citizens living in another EU country derived from Article 20 TFEU should be regarded as acquired rights in the sense referred to above in 5.15 and 5.16.

Broad interpretation of EU citizenship and rights deriving therefrom

5.19. The CJEU has broadly interpreted both EU citizenship and the resulting rights. While Article 20 TFEU states that citizenship of the Union comes alongside national citizenship, the CJEU has ruled that citizenship of the Union should be the primary status of nationals of the EU Member States and that, on that basis, subject to explicit legal exceptions, are entitled to equal treatment in law. (See ECJ 20 September 2001, C-184/99, ECLI:

EU: C: 2001: 458 (Grzelczyk), ECJ 11 July 2002, C-224/98, ECLI: EU: C: 2002: 432 (D'Hoop), CJEU 22 December 2010, C-208/09, ECLI: EU: C: 2010: 806 (Wittgenstein), CJEU 12 May 2011, C-391/09, ECLI: EU: C: 2011: 291 (Runevič Vardyn and Wardyn)).

5.20. Once lawfully acquired, EU citizenship is an independent source of rights and obligations that cannot be simply reduced or affected by national government action (see AG Maduro's conclusion of 30 September 2009 in case C-135/08 (Rottman), under 23 and the recent judgment of the CJEU 14 November 2017, C-165/16, ECLI: EU: C: 2017: 862 (Toufik Lounes)). In the former procedure, the CJEU considered, with regard to the withdrawal of the nationality of a citizen of an EU Member State, that an assessment of the principle of proportionality should take place. Whether the proportionality test must always be carried out individually or can also take place in abstracto, as the basis for a statutory regulation, is the subject of a Dutch question currently pending before the CJEU (ABRvS 19 April 2017, ECLI: NL: RVS: 2017: 1098).

5.21. It is admitted that the cited case law of the CJEU relates to national measures that brought the loss of nationality of a Member State and thereby EU citizenship. Thus, that case-law does not automatically apply to the present case, in which a Member State intends to leave the EU, as a result of which all citizens of that Member State, including those who voted against that intention, are threatened with losing the status of EU citizen. Nevertheless, it is arguable that that case-law, and the principles on which it is based, applies in the same way to the present question, or at least influences the answer to that question.

Protection of the minority against the majority

5.22. The notification referred to in 2.1 above and the negotiations mentioned in 2.2 have taken place as a result of the wish of the majority of those who participated in the Brexit referendum referred to in 2.1. That is in itself entirely in accordance with the way in which a democratic constitutional state functions. But as considered in 5.8 above, the essence of a democratic constitutional state is that the rights and interests of minorities are protected as much as possible. The same applies to the functioning of the EU as a whole which forms a democratic community of (member) states governed by the rule of law.

Solidarity between EU citizens and between them and the Member States

5.23. In view of the case law mentioned above in 5.19, the EU citizenship acquired through the operation of Article 20 TFEU – a new, transnational form of citizenship – aims to unite the (citizens of the) EU Member States and increase their mutual solidarity. Taking into account what has been considered above in 5.21, it can then be argued that this solidarity means that (the citizens of) other EU Member States cannot leave the plaintiffs, who against their will are threatened with losing fundamental rights and freedoms that are derived from that EU citizenship, out in the cold.

Complications in the case of young children who are EU citizens

5.24. In the above it should be borne in mind that the status of EU citizen not only affects the fundamental rights of the relevant EU citizens, but is also important in some circumstances for the right of residence of third-country nationals, provided that is a dependency relationship between the EU citizen and the third-country national and the non-granting of a right of residence to the third-country national would effectively lead to the EU citizen not enjoying effective enjoyment of the rights conferred on him by Article 20 paragraph 2 of the TFEU. According to the CJEU, in any event, that is the case if a national of a third-country – such as the UK after Brexit, if the negotiating parties do not agree otherwise – is denied the right to reside in the Member

State in which are his/her young children who are EU citizens. The consequence of a refusal to grant a right of residence to a third-country national would then actually lead to the obligation that EU minor citizens would also be forced to leave the EU (CJEU 8 March 2011, C-34/09, ECLI).: EU: C: 2011: 124 (Ruiz Zambrano) and CJEU 10 May 2017, C-133/15, ECLI: EU: C: 2017: 354 (Chavez-Vilchez)). In addition, it should be noted that, where the dependency relationship does not force the acceptance of a derived right of residence, it cannot be claimed on the basis of the importance that the unity of the family must be preserved as much as possible, the CJEU has repeatedly ruled (see CJEU 15 November 2011, C-256/11, ECLI: EU: C: 2011: 734 (Dereci), CJEU 6 December 2012, C-356 and 357/11, ECLI: EU: C: 2012: 776 (O e.a.) and CJEU May 8, 2013, C-87/12, ECLI: EU: C: 2013: 291 (Ymeraga)).

Result

5.25. What has been considered above in 5.15-5.24 entails that there is reason to doubt the correctness of the interpretation of Article 20 TFEU that the loss of the status of citizen of an EU Member State leads to loss of EU citizenship as well (see for this in 5.14). The answer to the question which explanation is the right one is essential for the assessment of these claims.

Intention to submit prejudicial questions

5.26. On these grounds, prejudicial questions will be submitted to the CJEU. The plaintiffs have submitted a long list of very detailed questions. They will not be examined in further detail. Some of the questions are not relevant to the assessment of the current dispute. Furthermore, that detail may hamper the CJEU in approaching the current question (which in essence affects all the citizens of the UK living in another EU country at the time of Brexit) in the most meaningful way.

5.27. Against this background, the intention exists to submit the following questions to the CJEU:

1. Does the withdrawal of the United Kingdom from the EU lead to the automatic loss of EU-citizenship of the British nationals, thus resulting in the loss of the rights and freedoms deriving from EU citizenship, if and in so far as the European Council and the United Kingdom do not agree otherwise in the negotiations?

2. If the answer to the first question is in the negative, should conditions or restrictions be imposed on the retention of the rights and freedoms derived from EU citizenship?

5.28. The parties are granted the opportunity of a period of one week to express an opinion on these proposed prejudicial questions. The parties are not granted the opportunity to comment in any other way on this ruling or the intention to submit prejudicial questions.

The ruling

The presiding judge

Grants the parties the opportunity to respond to the proposed prejudicial questions outlined in section 5.27. above in writing by 14 February at the latest;

observes any further ruling.

This ruling is issued by Mr. F.B. Bakels, presiding judge, assisted by Mr. A.G.F. Ancery as clerk of the court, and has been declared publicly on 7 February 2018.

This case is being handled on behalf of the plaintiffs, Plaintiff 1 et al., by bureau Brandeis

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