

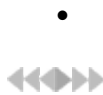


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Provisional text

OPINION OF ADVOCATE GENERAL

COLLINS

delivered on 24 February 2022⁽¹⁾

Case C-673/20

EP

v

Préfet du Gers and

Institut national de la statistique et des études économiques,

joined parties:

Maire de Thoux

(Request for a preliminary ruling from the Tribunal judiciaire d'Auch (Court of Auch, France))

(Reference for a preliminary ruling – Citizenship of the Union – Interpretation and validity 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 – National of the United Kingdom residing in a Member State of the European Union for more than 15 years and deprived of the right to vote in the United Kingdom – Removal from the electoral list in the Member State of residence)

I. Introduction

1. Can British nationals who enjoyed the benefits of Union citizenship retain those advantages following the United Kingdom's withdrawal from the European Union? This question lies at the heart of the four questions put by the Tribunal judiciaire d'Auch (Court of Auch, France) in the context of a dispute as to whether EP, a British national, continues to enjoy the rights to vote and to stand as a candidate in municipal elections in France. The first and second questions inquire as to whether British nationals, or a subset thereof, continue to be Union citizens and enjoy the benefits of that status. If that is not the case, the third and fourth questions to the Court of Justice ask that the validity of Council Decision (EU) 2020/135 of 30 January 2020 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 (2) be assessed, notably in the light of the principle of proportionality.

II. Relevant legal provisions

A. European Union law

1. *Union citizenship*

2. Article 9 TEU provides:

‘... Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.’

3. Article 20(1) TFEU, which establishes citizenship of the Union, is in almost identical terms.

4. Under Article 22(1) TFEU, every Union citizen residing in a Member State of which he or she is not a national shall have the right to vote and to stand as a candidate in municipal elections in the Member State in which he or she resides, under the same conditions as nationals of that State. Article 40 of the Charter of Fundamental Rights of the European Union (‘the Charter’) affirms that right.

2. *Withdrawal of the United Kingdom from the European Union*

5. Article 50 TEU provides:

‘1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.

2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

...’

6. Decision 2020/135 approved 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 (‘the Withdrawal Agreement’) (3) on behalf of the European Union.

7. In accordance with Article 185 thereof, the Withdrawal Agreement entered into force at midnight (CET) on 31 January 2020.

8. Article 126 of the Withdrawal Agreement provided for a transition or implementation period. This commenced on the date of its entry into force and ended on 31 December 2020.

9. The scope of the transition is defined in Article 127 of the Withdrawal Agreement, the first paragraph of which states that, unless otherwise provided therein, Union law was to apply ‘to and in the United Kingdom’ during the transition period. Amongst the Treaty provisions and acts adopted by the institutions, bodies, offices or agencies of the European Union that were not applicable to and in the United Kingdom during the transition period were Article 20(2)(b) and Article 22 TFEU, Article 40 of the Charter, and acts adopted on the basis of those provisions. Article 127(6) of the Withdrawal Agreement states that ‘unless otherwise provided in this Agreement, during the transition period, any reference to Member States in the Union law applicable pursuant to paragraph 1, including as implemented and applied by Member States, shall be understood as including the United Kingdom.’

B. French law

10. Article 88-3 of the Constitution of 4 October 1958, in the version resulting from the loi constitutionnelle n° 93-952 of 27 July 1993 (‘Constitutional Law No 93-952’), states:

‘Subject to reciprocity and in accordance with the arrangements laid down in the [TEU], the right to vote and to stand as a candidate in municipal elections may be granted only to Union citizens residing in France. Such citizens may not perform the duties of mayor or take part in the appointment of the senatorial electors or in the election of senators ...’

11. Article LO 227-1 of the code électoral issu de la loi organique n° 98-404 du 25 mai 1998 déterminant les conditions d'application de l'article 88-3 de la Constitution relatif à l'exercice par les citoyens de l'Union européenne résidant en France, autres que les ressortissants français, du droit de vote et d'éligibilité aux élections municipales, et portant transposition de la directive 94/80/CE du 19 décembre 1994 (JORF No°120 of 26 May 1998; Electoral Code resulting from Organic Law No 98-404 of 25 May 1998 laying down the conditions for the application of Article 88-3 of the Constitution concerning the exercise by citizens of the European Union residing in France, other than French nationals, of the right to vote and to stand as a candidate in municipal elections and transposing Directive 94/80/EC of 19 December 1994; 'the Electoral Code') provides:

'Citizens of the European Union residing in France, other than French citizens, may participate in the election of municipal councils on the same conditions as French electors, subject to the provisions of this Section.

The persons referred to in the first paragraph shall be treated as residing in France if they have their actual place of residence there or if their residence is continuous.

...'

12. Article LO 227-2 of the Electoral Code provides:

'In order to exercise their right to vote, persons referred to in Article LO 227-1 shall be registered, at their request, in a special electoral list.

They may apply for their registration if they enjoy their electoral capacity in their State of origin and if they satisfy the legal conditions, other than French nationality, to be electors and be registered on an electoral list in France.'

13. By virtue of Article L. 16(3), second subparagraph, of the Electoral Code, the National Institute of Statistics and Economic Studies (Institut national de la statistique et des études économiques (INSEE)) is responsible for striking the names of deceased electors and electors who are no longer entitled to vote from the electoral register.

III. The dispute in the main proceedings and the request for a preliminary ruling

14. EP has resided in France since 1984 and is married to a French citizen. The order for reference states that she has not acquired French nationality by marriage because, as a former official in the then Foreign and Commonwealth Office of the United Kingdom, she took an oath of allegiance to the Queen of England.

15. Upon the entry into force of the Withdrawal Agreement, the INSEE removed EP from the electoral list of the Commune of Thoux (France). She was thus unable to participate in the municipal elections held on 15 March and 28 June 2020.

16. On 6 October 2020, EP filed an application for re-registration on the electoral roll for non-French citizens of the European Union. On the following day, the Mayor of the Commune of Thoux rejected that application. EP then referred the matter to the Electoral Commission of the Commune of Thoux. Since that body responded by stating that it was not due to convene until March 2021, EP treated that reply as an implicit confirmation of the Mayor's decision of 7 October 2020. Accordingly, on 9 November 2020, EP brought an action to contest that decision before the Tribunal judiciaire d'Auch (Court of Auch).

17. By order of 17 November 2020, lodged at the Court Registry on 9 December 2020, the Tribunal judiciaire d'Auch (Court of Auch) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Must Article 50 of the Treaty on European Union and the [Withdrawal Agreement] be interpreted as revoking the [Union] citizenship of [British] 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 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 [British] nationals to retain, without exception, the rights to [Union] citizenship which they enjoyed before the withdrawal of their [State] 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], 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], in that it deprives Union 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 [State] 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 [British] 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?’

18. EP, the French and the Romanian Governments, the Council of the European Union and the European Commission submitted written observations to the Court.

IV. Assessment

General considerations

1. *Citizenship – a Member State competence*

19. The 10th recital of the preamble to the TEU declares the Member States’ resolve to establish a citizenship common to their nationals. Its 13th recital further resolves to create an ever closer union among the peoples of Europe.

20. The first paragraph of Article 1 TEU states that, by this Treaty, the High Contracting Parties establish among themselves a European Union, on which the Member States confer competences in order to attain common objectives. The second paragraph of that article describes the TEU as marking a new stage in the process of creating an ever closer union among the peoples of Europe.

21. It is in the specific context of those provisions that Article 9 TEU and Articles 20 to 24 TFEU establish Union citizenship, define its content and specify who can benefit therefrom.

22. Article 9 TEU and Article 20(1) TFEU provide that Union citizens must be nationals of a Member State. Union citizenship is additional to, and does not replace, nationality conferred by the Member States. In that context, it is important to acknowledge that the Member States could have decided to pool their competences and to confer on the European Union the power to determine who is entitled to become a Union citizen. That explicit choice by the Member States not only renders the European Union powerless to create Union citizenship independently from nationality as conferred by the Member States, but also raises a constitutional barrier to such a power being implied under Union law.

23. Given the lucidity of those provisions, it is no surprise that the case-law of the Court, notably the judgments in *Rottmann*, (4) in *Tjebbes* (5) and, most recently, in *Wiener Landesregierung*, (6) explicitly recognises that Member States retain the power to determine who is a national and, in consequence, who is a Union citizen. That division of competence is unaltered by the case-law of the Court, to the effect that, in situations covered by Union law, Member States must have due regard to Union law when they exercise powers such as those governing the acquisition and the loss of nationality. (7)

24. The judgment in *Rottmann* (8) concerned a situation where the loss of Member State nationality would have had the consequence of rendering the person concerned stateless. (9) The Court reiterated its established case-law according to which each Member State lays down the conditions for the acquisition and loss of nationality. (10) Nevertheless, the application of national rules in situations covered by Union law must have due regard to the latter. (11) Amongst the circumstances falling within the ambit of Union law are those where a Union citizen risks losing the status conferred by Article 20 TFEU and the rights attaching thereto by reason of a decision by the authorities of one Member State to withdraw his or her naturalisation after he or she has lost the nationality of another Member State. (12) The Court ruled that it is not contrary to Union law for a Member State to withdraw that State's nationality from a Union citizen where that nationality has been obtained by deception, even if that decision will cause him or her to lose the status conferred by Article 20 TFEU, provided that the decision taken observes the principle of proportionality. (13)

25. The judgment in *Tjebbes* (14) concerned the application of legislation whereby a dual national lost his Netherlands nationality where, after attaining his majority and while holding both nationalities, he had his principal residence for an uninterrupted period of 10 years outside of the territory of the Member States. Since the loss of Netherlands nationality had the consequence of depriving such persons of the status and benefits of Union citizenship, the Court again held that it came within the ambit of Union law, to which the Netherlands must have due regard. (15) In exercising their competence to lay down conditions for the acquisition and loss of nationality, Member States may legitimately require the existence of a genuine link with their nationals, and may thus prescribe that the absence, or the loss, of that link entails the loss of nationality. (16) In such circumstances, Union law does not prevent a Member State from deeming an individual to have lost his or her nationality, even where that entails the loss of Union citizenship. (17) However, before doing so, the Member State must carry out an individual examination of the situation of the person concerned and his or her family, in order to assess the consequences of the loss of the nationality in the light of the principle of proportionality. (18)

26. In the judgment in *Wiener Landesregierung*, (19) an Estonian national, JY, received assurances from the Austrian authorities that she would obtain the nationality of that Member State if she could show that, within two years, she had relinquished her Estonian nationality. (20) Arising

from her having committed certain administrative offences, the Austrian authorities revoked the decision to grant JY Austrian nationality. (21) The revocation of the decision to grant JY Austrian citizenship resulted in her becoming stateless, and therefore losing her status as a Union citizen. (22) The Court ruled that where, in the course of a naturalisation procedure, Union citizenship is temporarily lost because the Member State of origin has withdrawn the nationality of the person concerned before he or she acquires the nationality of another Member State, the obligation to ensure the effectiveness of Article 20 TFEU falls primarily on the latter. In those circumstances, a decision to revoke assurances previously given must be based on legitimate grounds and is subject to the principle of proportionality. (23)

2. *United Kingdom withdrawal from the European Union*

27. Article 50(1) TEU acknowledges that a Member State may exercise its sovereign choice to withdraw from the Union in accordance with its own constitutional requirements. (24) That provision also seeks to ensure the voluntary and unilateral nature of the withdrawal decision. (25) Once the European Council is notified of the decision to withdraw, the European Union negotiates with the State in question to agree arrangements to give effect thereto. Article 50(3) TEU places a time limit on the duration of those negotiations, providing that the Treaties cease to apply to the departing State from the date of entry into force of the withdrawal agreement or, failing that, two years after notification of the withdrawal decision, unless the European Council and the State concerned unanimously agree to extend that period. A failure to enter into the agreement envisaged by Article 50(2) TEU thus does not prevent the withdrawal from taking effect. (26)

28. Pursuant to Article 50(3) TEU, the Treaties cease to apply to a State that has notified its intention to withdraw from the European Union from the date of entry into force of the withdrawal agreement. In the case of the United Kingdom, the Withdrawal Agreement entered into force at midnight (CET) on 31 January 2020, at which point in time it ceased to be a Member State of the European Union. In consequence, the United Kingdom no longer resolved, inter alia, to establish a citizenship common to that of the nationals of EU Member States or to create an ever closer union among the peoples of Europe. Since the existence of Union citizenship depends upon the acquisition and possession of the nationality of a Member State, and the United Kingdom voluntarily abandoned that status in the manner prescribed by Union law, British nationals ceased to be Union citizens.

29. Article 126 of the Withdrawal Agreement established a transition period whereby Union law applied ‘to and in the United Kingdom’ until 31 December 2020. During that period, Article 127 of the Withdrawal Agreement expressly excluded the application ‘to and in the United Kingdom’ of Article 20(2)(b) TFEU, Article 22(1) TFEU and Article 40 of the Charter concerning the right of Union citizens to vote and to stand as a candidate in municipal elections of their Member State of residence. It follows that, as of the entry into force of the Withdrawal Agreement, a British national no longer enjoyed a right, as a Union citizen, to vote and to stand as a candidate in municipal elections in the Member State of his or her residence.

30. It follows that, upon the departure of the United Kingdom from the European Union, British nationals ceased to be Union citizens. Whilst the terms of the Withdrawal Agreement afforded them certain rights during the transition period, the right to vote and to stand as a candidate in municipal elections in their Member State of residence were not amongst them.

3. *EP’s case*

31. In her written observations, EP makes a number of arguments, which can be divided into two groups. The first is that, notwithstanding the United Kingdom's departure from the European Union, she continues to be a Union citizen. Second, and in the alternative, she contends that the Withdrawal Agreement could not lawfully deprive her of the benefit of the right to vote in municipal elections. Certain points taken in those written observations elicit the following response on my part.

32. The passage from the judgment of the International Court of Justice in *Nottebohm* (27) to which EP refers makes it clear that the acquisition of nationality depends upon the existence of a positive act by a State. The European Union has freely determined that acquisition of citizenship of a Member State is a condition precedent for the conferral of Union citizenship. That fact alone is sufficient to dismiss her argument that an individual's links to a State, even where those links were facilitated by her possessing a legal status that no longer exists, are in and of themselves capable of grounding a claim to that State's nationality.

33. EP appears to assert that the links that she forged with France at a time when she was a Member State national prevent her from being deprived of Union citizenship. However, it appears from the order for reference that, notwithstanding her long residence in France and her marriage to a French national, EP has chosen not to acquire French nationality. According to the French Government, EP could apply to do so as she is married to a French national. EP need thus do no more than make the requisite application to the French authorities to acquire French nationality, which would automatically confer Union citizenship upon her. It is, to say the least, paradoxical that whilst EP relies exclusively upon her links with France in order to sustain her claim that she is entitled to retain Union citizenship, she simultaneously declines to take the one step that could lead to her retaining her Union citizenship, namely the submission of an application for French nationality. Without her possession of the nationality of a Member State, France cannot recognise EP as a Union citizen.

34. The Court has held that rights conferred on a Union citizen by Article 21(1) TFEU are, *inter alia*, intended to promote his or her gradual integration into the society of the host Member State. (28) EP appears to contend that, having integrated herself into French society in her capacity as a Union citizen, she cannot now be deprived of that status and of the enjoyment of the rights appurtenant thereto. In addition to the objection that EP, like all other British nationals, ceased to meet the essential precondition for the enjoyment of the status and benefits of Union citizenship, namely Member State nationality, as a direct consequence of the United Kingdom's sovereign decision to withdraw from the European Union, it may further be observed that the integration of third-country nationals into the societies of the Member States is not among the goals furthered by Union citizenship.

35. To support an argument that Member State nationality is not a precondition to possess Union citizenship, EP also cites a sentence from point 23 of the Opinion of Advocate General Poiares Maduro in *Rottmann* (29) to the effect that 'Union citizenship assumes nationality of a Member State but it is also a legal and political concept independent of that of nationality'.

36. Also in point 23 of that Opinion, Advocate General Poiares Maduro indicates that Member State nationality provides access to the enjoyment of the rights conferred by the European Union and makes such persons Union citizens. He observed that Union citizenship is more than a body of rights that, in themselves, could be granted to those who do not possess it. It presupposes the existence of a political relationship between Union citizens, based on their mutual commitment to open their respective bodies politic to other Union citizens and to construct a new form of civic and political allegiance on a European scale. According to Advocate General Poiares Maduro, by

making nationality of a Member State a condition for being a Union citizen, the Member States intended to show that this new form of citizenship did not question an individual's primary allegiance to a national body politic. Union citizenship is thus obtained through the acquisition of the nationality of a Member State, access to which is regulated by national law. Like any form of citizenship, it forms the basis of a new political area from which emerge rights and duties laid down by Union law. It is not that the acquisition and loss of nationality (and, consequently, of Union citizenship) are governed by Union law, but that the conditions for the acquisition and loss of that nationality must be compatible with Union law and respect the rights of the Union citizen.

37. Thus, far from supporting the proposition advanced by EP, point 23 of the Opinion of Advocate General Poiares Maduro in *Rottmann* (30) entirely undermines it. It describes the rationale for Union citizenship being contingent upon holding the nationality of a Member State as the Member States' mutual commitment to construct a new form of civic and political allegiance on a European scale. By its sovereign decision to leave the European Union, the United Kingdom signalled its clear determination to repudiate that commitment. In the context of that act by a sovereign State, an individual cannot seek to rely upon his or her British nationality to assert a claim either to Union citizenship or to its benefits.

38. EP further contends that Article 127(1)(b) of the Withdrawal Agreement provides that since the provisions enumerated therein are declared inapplicable 'to and in the United Kingdom during the transition period', that inapplicability does not apply to Member States, including France. Article 127(6) of the Withdrawal Agreement does not alter the territorial scope of this limitation since it provides that Union law applies to all Member States, including the United Kingdom, during that period.

39. That reading of Article 127(6) of the Withdrawal Agreement appears to overlook the fact that that provision does not refer to Union law as such but instead to 'Union law applicable pursuant to paragraph 1'. Article 127(1)(b) of the Withdrawal Agreement has the effect of excluding the provisions to which it refers from the ambit of what is applicable Union law for the purposes of that provision. It follows that Article 127(6) of the Withdrawal Agreement has the effect of releasing the Member States from the obligation to apply the provisions set out in Article 127(1)(b) of the Withdrawal Agreement for the duration of the transition period. Article 127 of the Withdrawal Agreement thus imposed no requirement on France to retain EP on the electoral roll for local elections maintained in that Member State during that time.

40. EP also makes a number of complaints that the decision to strike her name from the electoral roll did not take account of her individual circumstances. Relying upon the Court's judgments in *Rottmann* (31) and in *Tjebbes*, (32) she claims that a decision that deprives her of the benefits of Union citizenship can be taken only after an assessment of her individual circumstances in the light of the principles of proportionality and legitimate expectations and after affording her fair procedures, including the right to be heard.

41. As described in points 23 to 25 above, the judgments in *Rottmann* (33) and in *Tjebbes* (34) arose in circumstances where a Member State withdrew its nationality from individual persons, thereby entailing the loss of their Union citizenship. It is in that context that the Court ruled that, as a matter of Union law and in accordance with the principle of proportionality, the Member State in question was required to carry out an individual examination of the consequences of that loss for the person concerned. (35)

42. To my mind, EP cannot rely upon the judgments in *Rottmann* (36) and in *Tjebbes* (37) by asserting that, had account been taken of her personal circumstances, such an assessment might

have led to a different outcome in her case. The principle of proportionality requires that a competent authority balance conflicting rights and norms before taking a decision affecting an individual. The circumstances of this case require no balancing by the deciding authority that would take account of EP's personal circumstances. As a direct result of the sovereign decision of the United Kingdom to withdraw from the European Union, a person in EP's position lost the right to vote and to stand as a candidate in municipal elections in France, her Member State of residence. It is that sovereign decision, not that of a Member State or any authority thereof, that caused EP to lose the benefit of those rights. In contrast to the situations that arose for consideration in both of the judgments in *Rottmann* (38) and in *Tjebbes*, (39) neither the decision-maker nor the referring court had or have any power to accede to EP's demands. No consideration of EP's individual circumstances could have led to another outcome consonant with Union law. For the same reasons, the recent judgment of the Court in *Wiener Landesregierung* (40) is of no avail to EP.

43. I would add that, in so far as EP seeks to assimilate her position to that of stateless persons, which formed part of the background to the judgments in *Rottmann* (41) and in *Wiener Landesregierung*, (42) it may be observed that she is a British national. She can address any issue that she may have concerning her status or rights as a British national to the United Kingdom authorities. France or the European Union are incapable of playing any role in such a dispute.

44. These observations apply equally to EP's attempts to rely upon legitimate expectations against the European Union and/or the French authorities. Any breach of legitimate expectations that EP may wish to ventilate concerning her status as a Union citizen is to be addressed to the United Kingdom, which has withdrawn from the European Union, and not to either the French authorities or to the European Union.

45. EP's contention that the French authorities stripped her of the right to vote and to stand as a candidate in municipal elections, thereby depriving her of the right to participate in the democratic process, is equally misguided. Any deprivation of her right to participate in the democratic process as a British national arises exclusively as a consequence of United Kingdom law.

46. EP further argues that depriving British nationals residing in the European Union of the right to vote and to stand as a candidate in municipal elections in their Member State of residence infringes the principle of non-discrimination on the grounds of nationality, enshrined in Article 18 TFEU.

47. The Court has indicated that a Union citizen residing in the United Kingdom could rely on the first paragraph of Article 18 TFEU during the transition period. (43) Similarly, EP can, in principle, rely on the prohibition of discrimination on grounds of nationality contained in Article 18 TFEU as against France during that period.

48. However, in accordance with settled case-law, the first paragraph of Article 18 TFEU applies independently to situations governed by Union law with respect to which the TFEU does not lay down specific rules on non-discrimination. (44)

49. For the purposes of this case, it suffices to recall that the principle of non-discrimination as regards the exercise of the right to vote and to stand as a candidate in municipal elections is expressly addressed in Article 20(2)(b) TFEU, which Article 127(1) of the Withdrawal Agreement expressly excluded from the rights that British nationals continued to enjoy in the European Union during the transition period.

50. Moreover, according to the settled case-law of the Court, the general principle of non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified. (45)

51. As regards the exercise of political rights within the European Union, by reason of their different legal status, third-country nationals, such as EP, are not in a comparable situation to Member State nationals. Differences in their treatment thus do not constitute unjustified discrimination on the grounds of nationality.

52. That last conclusion is, of course, without prejudice to the possibility for Member States to grant third-country nationals the right to participate in municipal elections in accordance with the requirements set out in their respective national laws. (46) In other words, although Union law does not oblige Member States to do so, it does not preclude them from conferring the right to vote in elections on third-country nationals under their respective national laws. That French law does not confer that right upon such persons is unobjectionable as a matter of Union law.

53. In the light of all of the foregoing considerations, I turn to the four questions submitted for preliminary ruling by the referring court with a view to providing it with a useful answer.

(a) *First question*

54. By its first question, the referring court asks whether Article 50 TEU and the Withdrawal Agreement are to be interpreted as revoking the Union citizenship of British nationals who, before the end of the transition period, exercised their right to freedom of movement and to settle freely in the territory of another Member State, in particular those who have lived in the territory of another Member State for more than 15 years and are subject to the United Kingdom's 15-year rule, thus depriving them of any right to vote.

55. For the reasons set out in detail in points 19 to 52 above, by virtue of the United Kingdom's decision to invoke the process under Article 50 TEU and of the Withdrawal Agreement made between the European Union and the United Kingdom as a consequence thereof, British nationals ceased to be nationals of a Member State of the European Union. They accordingly ceased to be Union citizens. Any legal consequences arising from EP's residence outside of the United Kingdom for the exercise of voting rights in that State's elections are a matter between her and the United Kingdom, a third State, and thus fall outside of the jurisdiction of this Court.

56. Accordingly, I propose that the Court respond to the referring court's first question that Article 50 TEU and the Withdrawal Agreement have the effect of terminating, as of midnight (CET) on 31 January 2020, the Union citizenship of British nationals, including those who had, before the end of the transition period, exercised their rights to freedom of movement and to settle freely in the territory of another Member State.

(b) *Second question*

57. By its second question, the referring court asks the Court to consider if 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 TFEU is to be regarded as having allowed those British nationals to retain, without exception, the rights to Union citizenship that they enjoyed prior to the withdrawal of the United Kingdom from the European Union.

58. This question appears to be posited on the basis that, even if British nationals ceased to be Union citizens as a consequence of the operation of Article 50 TEU and the Withdrawal Agreement, the combined effect of the aforesaid provisions protects British nationals who had already obtained Union citizenship from one of the consequences of the withdrawal of the United Kingdom from the European Union, namely the loss of Union citizenship by British nationals.

59. The thesis upon which this question is grounded encounters at least three insuperable obstacles.

60. First, as is clear from the suggested answer to the first question, Article 50 TEU and the Withdrawal Agreement do not contemplate any exception to the rule that, upon its withdrawal from the European Union, the United Kingdom ceased to be a Member State, with all of the consequences that follow for British nationals.

61. Second, since in order to be a Union citizen one must be a Member State national, prior to midnight (CET) on 31 January 2020 all British nationals were Union citizens, irrespective of whether they had exercised any of the rights conferred by the latter status. The exercise of rights conferred by Union law does not furnish any legal basis upon which an individual's status as a Union citizen falls to be determined.

62. Third, as discussed earlier, Article 127(1) of the Withdrawal Agreement expressly provides that Article 20(2)(b) and Article 22 TFEU, Article 40 of the Charter and any acts adopted on the basis of those provisions do not apply during the transition period.

63. For those reasons, I propose that the Court reply to the second question to the effect that the aforesaid provisions of the Withdrawal Agreement and the TFEU do not allow British nationals to retain, without exception, the rights to Union citizenship that they enjoyed prior to the withdrawal of the United Kingdom from the European Union on 31 January 2020.

(c) *Third and fourth questions*

64. The third and fourth questions are asked in the event that the Court gives a negative response to the first two. Since they raise the issue of the validity of the Withdrawal Agreement from a number of different, but similar, angles, it may be convenient to consider them together.

65. It is well established that the Court has jurisdiction, both in the context of an action for annulment and in that of a request for a preliminary ruling, to assess whether an international agreement concluded by the European Union is compatible with the Treaties and with the rules of international law that are binding on the European Union in accordance with the Treaties. (47)

66. Where, as here, the Court has received a request for a preliminary ruling concerning the validity of an international agreement concluded by the European Union, that request is to be understood as relating to the Union act approving the conclusion of that international agreement. The review of validity that the Court may carry out in that context may encompass the legality of that act in the light of the content of the relevant international agreement. (48)

67. As indicated in point 6 above, by Decision 2020/135 the European Union approved the conclusion of the Withdrawal Agreement.

68. In the light of those considerations, the third and fourth preliminary questions could be reformulated as asking, in essence, whether Decision 2020/135 on the conclusion of the Withdrawal

Agreement is invalid in so far as, having regard to the content of the Withdrawal Agreement, it does not confer the right to vote and to stand as a candidate in municipal elections to British nationals who reside in a Member State and who do not have the nationality of any Member State.

69. As indicated above, since midnight (CET) on 31 January 2020, the United Kingdom is no longer a Member State of the European Union. During the transition period, Union law applied to the United Kingdom and to its nationals under the derogation set out in Article 127 of the Withdrawal Agreement, which excludes in particular the right to vote and to stand as a candidate in municipal elections in the Member State of residence.

70. In my opinion, taking into account the status of the United Kingdom as a third country since its withdrawal from the European Union, Decision 2020/135 cannot be criticised for not affording British nationals the right to vote and to stand as a candidate in municipal elections in the Member State of their residence either during the transition period or thereafter. The loss of those rights is one of the consequences of the sovereign decision of the United Kingdom to withdraw from the European Union. That conclusion is unaffected by the fact that Decision 2020/135, in combination with the Withdrawal Agreement, provided that, by way of exception, certain parts of the *acquis* applied during the transition period in order to ensure the orderly withdrawal of the United Kingdom from the European Union which, according to its preamble, is the objective of the Withdrawal Agreement. For those reasons, I take the view that Decision 2020/135 is not contrary to Article 20(2)(b) and Article 22 TFEU or to Article 40 of the Charter as far as the right to vote and to stand as a candidate in municipal elections is concerned. A fortiori, for the same reasons, Decision 2020/135 is not contrary to Articles 18 and 21 TFEU for the purposes of the issue before the Court.

71. That conclusion is equally unaffected by the fact that certain British nationals, such as EP, had exercised Union citizenship rights prior to the United Kingdom's withdrawal, including the right to move to and reside in another Member State of the European Union. There is no basis in law to ground an assertion that Decision 2020/135 was unlawful because it did not afford Union citizenship to persons who were no longer Union citizens during the transition period or beyond, irrespective of their place of residence.

72. It should also be observed that the case-law acknowledges that the EU institutions enjoy a broad discretion in policy decisions adopted in the conduct of external relations. (49) In the exercise of their external policy prerogatives, the EU institutions may therefore legitimately enter into international agreements with their partners based on the principle of reciprocity and mutual advantages. (50)

73. The preamble of the Withdrawal Agreement recognises that it is necessary to provide reciprocal protection for Union citizens and for British nationals, as well as for their respective family members, in circumstances where they have exercised their right to freedom of movement. It is in that very context that the European Commission points, inter alia, to a negotiation document entitled 'The United Kingdom's Exit from the European Union – Safeguarding the Position of EU Citizens Living in the UK and UK Nationals Living in the EU' of June 2017. That document discloses that the United Kingdom did not seek to ensure that British nationals residing in the European Union enjoyed political rights after its withdrawal in exchange for the conferral of reciprocal rights upon Union citizens residing in the United Kingdom. (51)

74. There is thus no legal nor factual basis upon which to hold that the European Union exceeded the boundaries of its discretion in the conduct of external relations by not continuing to permit British nationals residing within the European Union to exercise the right to vote and to stand as a candidate in Member State municipal elections after the withdrawal of the United

Kingdom, either by way of a unilateral decision or the outcome of negotiations with the United Kingdom.

75. In so far as the third question specifically asks whether the Withdrawal Agreement infringes certain principles underlying EU identity and is disproportionate since it contains no exception to the rule that British nationals lose the rights attaching to Union citizenship, I would make the following brief observations. Since the United Kingdom's sovereign choice to leave the European Union amounts to a rejection of the principles underlying the European Union, and the Withdrawal Agreement is an agreement between the European Union and the United Kingdom to facilitate the latter's orderly withdrawal from the former, the European Union was in no position to insist that the United Kingdom fully adhere to any of the European Union's founding principles. Nor could the European Union secure rights that, in any event, it was not bound to assert on behalf of persons who are nationals of a State that has left the European Union and who are therefore no longer Union citizens. Finally, since Union citizenship depends upon the possession of Member State citizenship, no response other than the exclusion of British nationals from the definition of Union citizens was possible whilst remaining within the scope of the Treaties.

76. As for the fourth question, when it comes to the matter of the validity of Article 127(1)(b) of the Withdrawal Agreement, there is no legal basis for distinguishing between those British nationals who exercised their rights under Union law and those who did not. As a matter of law, all British nationals were Union citizens before the United Kingdom withdrew from the European Union, regardless of what use they may have made of that status. Any issue of legitimate expectations is a matter to be taken up with the State of which they are nationals, that is to say, the United Kingdom.

77. In view of the foregoing, I propose that the answer to the third and fourth preliminary questions be that Decision 2020/135 on the conclusion of the Withdrawal Agreement is not invalid in so far as it does not confer the right to vote and to stand as a candidate in municipal elections to British nationals who reside in a Member State and who do not have the nationality of any Member State.

V. Conclusion

78. In the light of the foregoing, I propose that the Court should answer the questions referred for a preliminary ruling by the Tribunal judiciaire d'Auch (Court of Auch, France) as follows:

(1) Article 50 TEU and Council Decision (EU) 2020/135 of 30 January 2020 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 have the effect of terminating, as of midnight (CET) on 31 January 2020, the Union citizenship of British nationals, including those who had, before the end of the transition period, exercised their rights to freedom of movement and to settle freely in the territory of another Member State.

(2) The provisions of Decision 2020/135 and of the Treaty on the Functioning of the European Union do not allow British nationals to retain, without exception, the rights to Union citizenship that they enjoyed prior to the withdrawal of the United Kingdom from the European Union on 31 January 2020.

(3) Decision 2020/135 is not invalid in so far as it does not confer the right to vote and to stand as a candidate in municipal elections to British nationals who reside in a Member State and who do not have the nationality of any Member State.

[1](#) Original language: English.

[2](#) OJ 2020 L 29, p. 1.

[3](#) OJ 2019 C 384 I, p. 1.

[4](#) Judgment of 2 March 2010, *Rottmann* (C-135/08, EU:C:2010:104).

[5](#) Judgment of 12 March 2019, *Tjebbes and Others* (C-221/17, EU:C:2019:189).

[6](#) Judgment of 18 January 2022, *Wiener Landesregierung and Others (Revocation of assurances to naturalise)* (C-118/20, EU:C:2022:34).

[7](#) Judgments of 2 March 2010, *Rottmann* (C-135/08, EU:C:2010:104, paragraphs 39 and 41), of 12 March 2019, *Tjebbes and Others* (C-221/17, EU:C:2019:189, paragraph 30), of 14 December 2021, *V.M.A.* (C-490/20, EU:C:2021:1008, paragraph 38), and of 18 January 2022, *Wiener Landesregierung and Others (Revocation of assurances to naturalise)* (C-118/20, EU:C:2022:34, paragraph 37).

[8](#) Judgment of 2 March 2010, *Rottmann* (C-135/08, EU:C:2010:104).

[9](#) *Ibid.*, paragraphs 26 to 29.

[10](#) *Ibid.*, paragraph 39.

[11](#) *Ibid.*, paragraph 41.

[12](#) Ibid., paragraph 42.

[13](#) Ibid., paragraphs 42 and 59.

[14](#) Judgment of 12 March 2019, *Tjebbes and Others* (C-221/17, EU:C:2019:189).

[15](#) Ibid., paragraph 32.

[16](#) Ibid., paragraph 35.

[17](#) Ibid., paragraph 39.

[18](#) Ibid., paragraphs 40 to 46.

[19](#) Judgment of 18 January 2022 (C-118/20, EU:C:2022:34).

[20](#) Ibid., paragraphs 13 and 14.

[21](#) Ibid., paragraphs 15 to 17.

[22](#) Ibid., paragraph 33.

[23](#) Ibid., paragraph 51.

[24](#) Judgment of 10 December 2018, *Wightman and Others* (C-621/18, EU:C:2018:999, paragraph 50).

[25](#) Ibid., paragraph 68.

[26](#) Order of 19 March 2019, *Shindler and Others v Council* (C-755/18 P, not published, EU:C:2019:221, paragraph 31).

[27](#) Judgment of the International Court of Justice of 6 April 1955, Nottebohm Case (Liechtenstein v. Guatemala), *Reports of Judgments, Advisory Opinions and Orders*, 1955, p. 4.

[28](#) Judgments of 14 November 2017, *Lounes* (C-165/16, EU:C:2017:862, paragraph 56), and of 18 January 2022, *Wiener Landesregierung and Others (Revocation of assurances to naturalise)* (C-118/20, EU:C:2022:34, paragraph 42).

[29](#) Opinion of Advocate General Poiares Maduro in *Rottmann* (C-135/08, EU:C:2009:588).

[30](#) Opinion of Advocate General Poiares Maduro in *Rottmann* (C-135/08, EU:C:2009:588).

[31](#) Judgment of 2 March 2010 (C-135/08, EU:C:2010:104).

[32](#) Judgment of 12 March 2019 (C-221/17, EU:C:2019:189).

[33](#) Judgment of 2 March 2010 (C-135/08, EU:C:2010:104).

[34](#) Judgment of 12 March 2019 (C-221/17, EU:C:2019:189).

[35](#) Judgments of 2 March 2010, *Rottmann* (C-135/08, EU:C:2010:104, paragraph 55), and of 12 March 2019, *Tjebbes and Others* (C-221/17, EU:C:2019:189, paragraph 41).

[36](#) Judgment of 2 March 2010 (C-135/08, EU:C:2010:104).

[37](#) Judgment of 12 March 2019 (C-221/17, EU:C:2019:189).

[38](#) Judgment of 2 March 2010 (C-135/08, EU:C:2010:104).

[39](#) Judgment of 12 March 2019 (C-221/17, EU:C:2019:189).

[40](#) Judgment of 18 January 2022, *Wiener Landesregierung and Others (Revocation of assurances to naturalise)* (C-118/20, EU:C:2022:34).

[41](#) Judgment of 2 March 2010 (C-135/08, EU:C:2010:104).

[42](#) Judgment of 18 January 2022, *Wiener Landesregierung and Others (Revocation of assurances to naturalise)* (C-118/20, EU:C:2022:34).

[43](#) See, to that effect, judgment of 15 July 2021, *The Department for Communities in Northern Ireland* (C-709/20, EU:C:2021:602, paragraph 64).

[44](#) *Ibid.*, paragraph 65.

[45](#) Judgment of 29 October 2020, *Veselības ministrija* (C-243/19, EU:C:2020:872, paragraph 37).

[46](#) According to the European Commission, a number of Member States grant this right under certain conditions.

[47](#) Judgment of 27 February 2018, *Western Sahara Campaign UK* (C-266/16, EU:C:2018:118, paragraph 48).

[48](#) Ibid., paragraphs 50 and 51.

[49](#) Judgment of 21 December 2016, *Swiss International Air Lines* (C-272/15, EU:C:2016:993, paragraph 24).

[50](#) See, to that effect, judgment of 23 November 1999, *Portugal v Council* (C-149/96, EU:C:1999:574, paragraph 45).

[51](#) This document is available online at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/621848/60093_Cm9464_NSS_SDR_Web.pdf.
