

A Nightmare on Downing Street: Brexit Reaches the CJEU

Elif Mendos Kuşkonmaz*

Abstract

This article explores two recent referrals made by two different Member States' national courts to the Court of Justice of the European Union (CJEU) on the impact the United Kingdom (UK)'s withdrawal from the European Union (EU) has on EU citizenship and fundamental rights. The key concern in both referrals is that the terms of the re-arrangement of the UK's future relationship with the EU are unclear and variable depending on the way the withdrawal negotiations might ensue. As this article argues, the application of fundamental rights contained in the EU Charter of Fundamental Rights and the jurisdiction of the CJEU will be the most crucial and sensitive issues in such re-arrangement. Thus, the CJEU's involvement through the preliminary ruling procedure will provide a legal clarity on the matter.

Introduction

Since the UK's referendum on leaving the EU, the relationship of the UK with the EU has been swept into a political whirlpool. As the negotiations for disentangling the UK from the EU and for rearranging their future relationship progress in slow-motion, resentments over the destabilising impact of the UK's withdrawal from the EU (i.e. Brexit) has become louder. Key concern amongst others is that British nationals and EU citizens will be devoid of essential protection that they have enjoyed under the rubric of EU law.

The recent CJEU referrals by two Member States' national courts cast light on this concern in particular, and the legal uncertainties surrounding Brexit in general. One referral concerns a legal challenge by British nationals living in the Netherlands on the continuity of

* PhD student at Queen Mary University of London. The author is indebted to the reviewers for their valuable suggestions.

their EU citizenship rights despite Brexit.¹ Other referral relates to whether a Member State that has received a request for surrender of suspects and/or convicts by the UK under the specific EU surrender system must execute this request given that the CJEU jurisdiction and the EU fundamental rights architecture that underpin this system will lapse in the UK upon Brexit.² These referrals converge on the UK's treatment of the CJEU and the rights protection after Brexit, and thus require attention in relation to the existential question of the rights landscape of the UK post-Brexit. Whilst so far this question has been unravelled as a political matter, the CJEU's involvement is great opportunity to have a legal clarity in the field. This is of great importance for safeguarding individuals' rights despite the political ambiguity surrounding the Brexit negotiations. Moreover, the CJEU might be able to set out the legal matters upon which the negotiators must engage in Brexit.

In light of the foregoing information, this article discusses the respective CJEU referrals. It explores the implications of Brexit on EU citizenship rights and on EU extradition law, respectively. Each section considers the political discourse in the corresponding matter, the background to the referrals concerned, and the key concerns on fundamental rights protection.

On EU Citizenship Rights

Since it was first introduced in the Maastricht Treaty, anyone who is a citizen of an EU Member States has been considered as the citizen of the EU.³ Article 20(1) of the Treaty on

¹ECLI:NL:RBAMS:2018:605 <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2018:605>

[Accessed February 13, 2018]. For the unofficial English translation see; <https://cadsnewsletter.files.wordpress.com/2018/02/1802-amsterdam-district-court-ruling-translation1.pdf>

[Accessed February 13, 2018].

² *Minister for Justice v. O'Connor*, [2018] IESC 3.

³ Articles 8-8e, TEU.

the Functioning of the European Union (TFEU) reaffirms the legal construction of EU citizenship as follows; '[c]itizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.'⁴ Thus, EU citizens are entitled to enjoy the associated rights coupled with the EU citizenship including the right to move and reside freely within the EU⁵, the right to vote⁶, the right to petition the European Parliament⁷, and the right to call for new EU legislation.⁸

Article 20(1) of the TFEU is the key to understanding the Dutch District Court's referral to the CJEU, which is discussed further below. To date it has invoked different approaches to EU citizenship. One approach is that EU Member State citizenship is a prerequisite for EU citizenship, and thus depriving a person of the former means the termination of the latter.⁹ This approach is current in many reports on the consequences of Brexit on the EU citizenship rights of British nationals.¹⁰

⁴ Article 20(1), TFEU.

⁵ Articles 20(1)(a) and 21, *ibid.*

⁶ Articles 20(1)(b) and 21, *ibid.*

⁷ Articles 20(1)(d) and 24, *ibid.*

⁸ Articles 24, *ibid.*

⁹ Guayasén Marrero González, "'Brexit' Consequences for Citizenship of the Union and Residence Rights" (2016) 23 *Maastricht Journal of European and Comparative Law* 796, p. 798.

¹⁰ House of Lords, Select Committee on the European Union, *Brexit: acquired rights* (HL 2016-17, 82); Susie Alegre et al., "The Implications of the United Kingdom's withdrawal from the European Union for the Area of Freedom, Security and Justice" (December 2017), *LIBE Committee Study* [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596824/IPOL_STU\(2017\)596824_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596824/IPOL_STU(2017)596824_EN.pdf)

[Accessed February 13, 2018]; Richard Gordon and Rowena Moffatt, "Brexit: The Immediate Legal

Another approach to this statement is that Member State citizenship is a gateway to the EU citizenship, but the latter can be detached from the former.¹¹ This point is justified by the reading of the last statement as merely retaining Member States' responsibility of designating their citizens, and thus providing a distinction between two identities; Member State citizenship on the one hand, and the EU citizenship on the other, by allocating the former within the competence of EU Member States and the latter within the competence of the EU.¹² As discussed below, the second approach is now being tested before the CJEU through the Dutch Court's referral on the meaning of Article 20 of the Treaty post-Brexit.

The general assumption is that that once the UK leaves the EU, the EU citizenship of British nationals ceases to exist.¹³ Therefore, after Brexit, they will become third-country nationals under EU law because the UK will no longer be part of the Union. They will have to adhere to third-country national rules under EU law and national immigration laws of the EU Member State in areas which have not been harmonised. In this regard, EU measures on third-country nationals might be considered as a layer of protection for British nationals after Brexit when compared with more demanding UK immigration rules that the EU nationals must adhere to. (EU citizens in the UK will be subject to the UK immigration rules, whose requirements are

Consequences" (2016) *The Constitution Society* <https://www.consoc.org.uk/wp-content/uploads/2016/05/Brexit-PDF.pdf> [Accessed February 13, 2018].

¹¹ Mark Dawson and Daniel Augenstein, "After Brexit: Time for a further Decoupling of European and National Citizenship", (July 14, 2016) *Verfassungsblog* <https://verfassungsblog.de/brexit-decoupling-european-national-citizenship/> [Accessed February 13, 2018]. On possible forms in which detaching EU citizenship from national citizenship may be possible; Rainer Bauböck, "The Three Levels of Citizenship in the European Union" (2014) 15(5) *German Law Journal* 751.

¹² Dawson and Augenstein, "After Brexit: Time for a further Decoupling of European and National Citizenship", *op. cit.*

¹³ Gordon and Moffatt, "Brexit: The Immediate Legal Consequences" *op. cit.*, p. 44.

less generous than EU rules).¹⁴ Yet, even those measures will not provide as many rights as enjoyed by an EU citizen in any EU Member State.¹⁵ For example, those British nationals who have been living in an EU Member State more than five years will be able to apply for a long-term residency from that Member State under EU law, but even in this case they will enjoy fewer rights than they would have enjoyed as EU citizens with permanent residence.¹⁶ Consequently, the UK's withdrawal from the EU raises severe concerns for an array of British nationals such as those living in EU Member States, those who do not live in any EU Member State but who exercise their free movement rights, those who exercise their EU citizenship rights other than free movement, and those who moved from to the UK to an EU Member State and back. The uncertainty and legal vagueness surrounding the citizenship rights' dialogue might affect the life that they had planned in the UK or in an EU Member State.

This uncertain climate provided the impetus for the legal challenge before the Dutch Court, leading to a referral to the CJEU on the legal status of the British nationals post-Brexit. Before considering this referral, the following section gives a snapshot of the current

¹⁴ One example is the rules on the family reunification, whereby British nationals must meet the income threshold and their third-national family members must pass the language and integrations tests. Katya Ivanova and Georgiana Turculet, "Breaking up families is easy to do: family reunification post-Brexit", (June 13, 2017), *LSE Blog* <http://blogs.lse.ac.uk/brexit/2017/06/13/breaking-up-families-is-easy-to-do-family-reunification-post-brexit/> [Accessed February 13, 2018].

¹⁵ European Union Committee, "Brexit: acquired rights", *op. cit.*, para. 33.

¹⁶ House of Lords, Written Evidence: Brexit: acquired rights, (September 4, 2016), Select Committee on the European Union, Home Affairs Sub-Committee, (December 14, 2016), <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/brexit-acquired-rights/written/37921.html> [Accessed February 13, 2018].

negotiations (as of February 2018) on the status of citizenship rights post-Brexit because it tells the political side of the matter.

Political Discourse on the Status of EU Citizenship post-Brexit

The political tide of the impact of Brexit over the rights of EU citizens living in the UK and the British nationals living elsewhere in the EU has been incoming since June 2016 referendum. The first informal consensus over the issue materialised in December 2017 in a joint report to the European Council whereby the negotiators of the EU and the UK set forth a basis for a future withdrawal agreement.¹⁷ In general, the report freezes the rights of EU citizens living in the UK by the cut-off date (probably on 29 March 2019) and those of British nationals living elsewhere in the EU by the same date.¹⁸ It also preserves the rights associated with the EU citizenship of their family members as defined in the Citizenship Directive residing in the host state by that date.¹⁹ The corollary impact of the joint report's personal scope is that the EU citizens and British nationals who arrive in the UK or any EU Member States after the cut-off date, and certain right-holders under EU law such as family members as defined under the Free Movement of Workers Regulation²⁰ will not preserve the rights conferred them under EU laws.²¹ The status of the EU citizens or British nationals who arrive during the transitional

¹⁷ TF50 (2017) 19 – Commission to EU27 (hereinafter, “Joint Report”).

¹⁸ Joint Report *op. cit.*, para. 10.

¹⁹ *ibid.*

²⁰ Regulation 492/2011 on freedom of movement for workers within the Union, [2011] OJ L 141.

²¹ Steve Peers, “The Beginning of the End? Citizens’ rights in the Brexit ‘Sufficient Progress Deal’”, (December 9, 2017), *EU Law Analysis*, <http://eulawanalysis.blogspot.co.uk/2017/12/the-beginning-of-end-citizens-rights-in.html> [Accessed February 13, 2018]. The author is of the opinion that those rights holders under EU law will be covered in the later stages of the negotiations process because the joint technical note accompanied to the joint report mentions who moves according to the EU Treaties. TF50 (2017) 20 – Commission to EU 27.

period is still a controversy.²² Additionally, the status of British nationals working at the EU institutions (in Brussels, or wherever they are based) post-Brexit has not touched upon yet.²³

Equally important is how the Joint Report envisages the CJEU jurisdiction for citizens' right after Brexit. This is of particular relevance in relation to how the EU (Withdrawal) Bill deals with the same matter; details of which are discussed below under the section on the fundamental rights in the UK post-Brexit. In this regard, the UK courts maintain their option to resort to the CJEU for the interpretation of those rights for a period of eight years starting from the application of the citizens' rights provision (notice that not the withdrawal date, supposedly in the hope of referring to a transition period).²⁴ They must also pay 'due regard' to the decisions of CJEU, including those decided after Brexit for an unlimited time, whereas they *may* consider the post-Brexit decisions.²⁵

The joint report gives an initial insight into the possible direction towards which the Withdrawal Agreement might go. That said, its restricted personal scope comes as a set-back for those who would want to join their family members in the UK or in the EU. In this regard, spouses, registered partners, children, and dependent partners who reside outside either the EU or the UK may join the EU citizen in the UK or British national in the EU on the condition that

²² "No deal for EU citizens coming to UK during Brexit transition", (January 31, 2018) Guardian, <https://www.theguardian.com/politics/2018/jan/31/theresa-may-brexit-transition-no-deal-for-eu-citizens-coming-to-uk> [Accessed February 13, 2018].

²³ Bert Theeuwes and Frédéric Dopagne, "The Impact of Brexit on UK Staff Working for the EU Institutions", (January 17, 2017), *Lexology*, <https://www.lexology.com/library/detail.aspx?g=f776944b-9e1a-452e-aa87-1d4ffdfcd4b0> [Accessed February 13, 2018].

²⁴ Joint Report, *op. cit.*, para. 38.

²⁵ *ibid.*

they are related to them on the withdrawal date.²⁶ This means that those who are not related to an EU citizen or British national must jump the hoops of national laws in order to join their family members in either any EU Member State or the UK.²⁷

It still remains to be seen whether the informal deal on the citizenship rights as underlined in the joint report will be included in the Withdrawal Agreement because the proposed text of February 2018 is silent on this issue.²⁸ Therefore, it is yet to be seen how citizenship rights will be safeguarded under the Withdrawal Agreement. Moreover, it is uncertain whether the drafting of the Withdrawal Agreement will go smoothly, particularly in relation to the Northern Ireland borders and the financial settlement. Another point is that the UK Government might agree on a withdrawal insofar it is satisfied with any future arrangement it might make with the EU including the future relation of the UK-EU. Otherwise, it might leave the table without a deal (a so-called ‘Hard Brexit’ scenario). Amidst all these uncertainties, the legal character of EU citizenship under Article 20 TFEU was referred to the CJEU in the hope that the Court will provide at least a degree of legal certainty to this unchartered Brexit territory.

The Decision by the Dutch District Court

Five British nationals living in the Netherlands along with the Commercial Anglo Dutch Society and a lobby group, Brexpat's – Hear Our Voice, sought referral to the CJEU by the Dutch Court on the legal status of the EU citizenship after Brexit.²⁹ The crux of the matter

²⁶ *ibid*, para. 12(a).

²⁷ It is sufficient to note here that the Family Reunification Directive sets the minimum rules in family reunification except for UK, Ireland and Denmark, who opted out of this Directive.

²⁸ TF50 (2018) 30 – Commission to EU 27.

²⁹ECLI:NL:RBAMS:2018:605

<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2018:605> [Accessed February 13,

was that the joint report was of a political nature, and thus the claimants will be stripped of their EU citizenship rights, unless the EU and the UK negotiators agree on the terms for safeguarding those rights.³⁰ Therefore, they question the consequences of Brexit for their rights derived from Article 20 of TFEU. In considering the claimants' arguments, the Dutch Court made certain observations; (i) the political negotiation process does not make the legal intervention unnecessary³¹; (ii) the dispute was not fictional due to the real threats that the claimants might face with the UK's withdrawal from the EU³²; (iii) the Vienna Convention on Treaties was not the right legal basis to address the status of the EU citizenship rights as derived from the EU Treaties because whilst the latter covered the rights of citizens vis-à-vis the EU, the former concerned the obligations between states³³; and (iv) it needs to be determined whether the principle developed by the CJEU in constraining Member States measures that limit the enjoyment of the EU citizenship rights can be expanded to the peculiarity of the loss of those rights *en masse* due to a Member State's withdrawal from the EU.³⁴

Consequently, the Dutch Court referred two questions to the CJEU: (i) 'Does the withdrawal of the United Kingdom from the EU automatically lead to the loss of the EU citizenship of British nationals and thus to the elimination of the rights and freedoms deriving from EU citizenship, if and in so far as the negotiations between the European Council and the United Kingdom are not otherwise agreed?'; (ii) 'If the answer to the first question is in the

2018]. For the unofficial English translation see; <https://cadsnewsletter.files.wordpress.com/2018/02/1802-amsterdam-district-court-ruling-translation1.pdf> [Accessed February 13, 2018].

³⁰ *ibid*, para. 5.6.

³¹ *ibid*, para. 5.9.

³² *ibid*, paras. 5.10.

³³ *ibid*, paras. 5.12-5.14.

³⁴ *ibid*, paras. 5.19-5.21.

negative, should conditions or restrictions be imposed on the maintenance of the rights and freedoms to be derived from EU citizenship?’³⁵

What does the future hold for the EU citizenship?

The Dutch Court’s referral to the CJEU on the meaning of the EU citizenship, regardless of what is established under the Withdrawal Agreement resurges the idea of a European identity.³⁶ As mentioned earlier, there are two views on the matter. The first view considers that the EU citizenship is bound to the Member State citizenship by an umbilical cord. In this regard, the UK’s withdrawal from the EU means the removal of EU citizenship from the UK national as the UK will no longer be part of the EU.³⁷

The second view heavily relies on the argument that the Member State citizenship is a gateway, but not a condition for the EU citizenship.³⁸ Seen from this perspective, it is necessary to detach EU citizenship from EU Member State citizenship in a move towards finding a European community within the continent.³⁹ According to this view, the case-law of the CJEU

³⁵ *ibid.*

³⁶ Loic Azoulay, “The (Mis)Construction of the European Individual: Two Essays on Union Citizenship Law”, (2014), EUI Department of Law Research Paper No. 2014/14.

³⁷ Ronan McCrea, “Brexit EU Citizenship Rights of UK Nationals and the Court of Justice”, (February 8, 2018), *UK Constitutional Law* <https://ukconstitutionallaw.org/2018/02/08/ronan-mccrea-brexit-eu-citizenship-rights-of-uk-nationals-and-the-court-of-justice/> [Accessed February 13, 2018].

³⁸ Dawson and Augenstein, “After Brexit: Time for a further Decoupling of European and National Citizenship”, *op. cit.* On the different scopes of the EU citizenship and EU Member State citizenship see; Dimitry Kochenov, “Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship Between Status and Rights” (2009) 15 *The Columbia Journal of European Law* 171.

³⁹ Dawson and Augenstein, “After Brexit: Time for a further Decoupling of European and National Citizenship”, *op. cit.*

justifies dissociating EU citizenship from national citizenship in a series of cases where it has constrained the Member States' measures in depriving individuals of their citizenship rights in order to protect the EU citizenship.⁴⁰ For example, in *Rottmann*, a German citizen was faced with denaturalisation due to his failure when naturalising to provide information on the criminal investigations against him in Austria. He was originally an Austrian national at birth, but his naturalisation application in Germany caused him to lose his Austrian nationality under Austrian law.⁴¹ Thus, his loss of German citizenship meant that he would be wholly deprived of EU citizenship. The CJEU decided that state measures revoking a person's citizenship are subject to judicial review in light of EU law, and thus must not substantially affect the enjoyment of EU citizenship.⁴²

In fact, the Dutch Court's referral invokes the second view and questions whether the CJEU can maintain its stance towards the idea that the EU citizenship is 'destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality.'⁴³ Still, the question is then whether the observations in *Rottmann* can be expanded to the rights of the British nationals after Brexit. That said, the facts of *Rottmann* are rather different from those in Brexit. The latter does not concern the revocation of British nationality, but rather withdrawal from the EU as a result of which British nationals are stripped of their EU citizenship en masse. Still, this does not mean that the issues raised in the referral are redundant.

⁴⁰ *Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria*, (C-369/90) July 7, 1992; *Janko Rottman v Freistaat Bayern*, (C-135/08) March 2, 2010.

⁴¹ *Janko Rottman v Freistaat Bayern*, *op. cit.*, para. 26

⁴² *ibid*, para. 48

⁴³ *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, (C-184/99) September 20, 2001, para. 31.

Instead, the peculiarity of the case necessitates legal clarification by the CJEU; something that the negotiators have not provided to either British nationals or EU citizens.

There are other issues regarding the Dutch Court's referral that are worth mentioning here. The first issue is that, as mentioned earlier, Brexit will affect many British nationals who do not currently live in an EU Member State. As the facts of the referral relate only those who reside elsewhere in the EU, the question is whether the CJEU will deal with them and those who do live in the UK differently. A mere reading of the first question in the referrals, which is concerned with automatic loss of EU citizenship upon Brexit, might suggest that in theory the CJEU might not do so because the issue relates to the legal status of EU citizenship in EU Treaties. However, the second question adds some uncertainty to this anticipation because the unofficial English translation refers to the possibility of engaging upon a proportionality analysis of restrictions on the maintenance of the rights and freedoms to be derived from EU citizenship. This statement might be interpreted to support arguments that only British nationals who exercised their rights deriving from EU citizenship (for example, those who reside in the EU) can keep their EU citizenship rights after Brexit.

The second issue is that if the CJEU accepts the applicant's arguments and engages upon disentangling EU citizenship from national citizenship, this might undermine the reciprocity principle for the EU citizens living in the UK.⁴⁴ According to this scenario, British nationals will benefit more than EU citizens living in the UK from the outcome of the referral post-Brexit.

⁴⁴ For this view; McCrea, "Brexit EU Citizenship Rights of UK Nationals and the Court of Justice", *op. cit.*

Be that as it may, it is impossible to ignore the possible litigation against the Withdrawal Agreement itself before the CJEU if such an Agreement is to be reached by the EU and the UK negotiators. In this regard, the litigation against the Withdrawal Agreement can ensue in two ways. The first way is to rely on Article 263 of the TFEU, whereby the EU institutions' and bodies' actions are subjected to judicial review, in order to adjudicate the decisions on signature and approval of the Withdrawal Agreement.⁴⁵ The second way is that the European Parliament can ask the opinion of the CJEU on the Withdrawal Agreement under Article 218(11) of the TFEU before giving making a decision on its conclusion.⁴⁶ The European Parliament has previously showed its active involvement in the negotiations of international agreements, and thus it might show its political influence in finalisation of the Withdrawal Agreement.⁴⁷

⁴⁵ Adam Lazowski, "Withdrawal from the European Union and alternatives to membership" (2012) 37(5) *European Law Review* 523, p. 528.

⁴⁶ *ibid.* The Article 50 refers solely to the Article 218(3) as the procedure for the conclusion of the Withdrawal Agreement, which raises doubts as to whether the European Parliament can indeed invoke the opinion procedure under paragraph 11 of the same Article.

⁴⁷ The examples include the European Parliament's rejection of the agreement signed between the US and the EU on the transfer of financial information, its referral to the CJEU of the agreement signed between Canada and the EU, of the draft agreement for EU accession to the ECHR, and of the free trade agreement with Singapore. Jörg Monar, "The Rejection of the EU-US Swift Interim Agreement by the European Parliament: A Historic Vote and Its Implications" (2010) 15 *European Foreign Affairs Review* 143; European Parliament, "MEPs refer EU-Canada air passenger data to the EU Court of Justice", (November 25, 2014) *Press Release* <http://www.europarl.europa.eu/news/en/press-room/20141121IPR79818/meps-refer-eu-canada-air-passenger-data-deal-to-the-eu-court-of-justice> [Accessed February 13, 2018]; Opinion 2/15 (Grand Chamber) May 16, 2017; Opinion 2/13 (Grand Chamber) December 18, 2014.

EU Citizenship and Fundamental Rights

The consequences of the possible loss of British nationals' EU citizenship as a result of the UK's withdrawal from the EU is not limited to what that citizenship entails. This might also result in possible interferences with British nationals' human rights under the European Convention on Human Rights. Those rights are the right to privacy as safeguarded under Article 8 of the ECHR, the prohibition against discrimination under Article 14 of the ECHR, and the right to property under Article 1 of the First Protocol of the ECHR (A1P1 ECHR).

An interference with Article 8 of the ECHR (even if not a violation) might occur if the deportation of British nationals from the EU and EU citizens from the UK affects family unity.⁴⁸ Another situation that might give right to the application of Article 8 is where the loss of citizenship has an impact on the social identity of the individual, as was considered in the ECtHR's *Kurić* decision concerning citizens of the Former Yugoslavia being removed from the register.⁴⁹ The ECtHR considered that Article 8 protects individuals' right to establish and develop relationships with other human beings, and 'sometimes embrace aspects of an individual's social identity.'⁵⁰ Thus, 'it must be accepted that the totality of social ties between settled migrants and community in which they are living constitute part of the concept of private life within the meaning of Article 8.'⁵¹ On the basis of these observations, European Court of Human Rights found that Slovenia was in breach Article 8 rights by withdrawing the

⁴⁸ *Jeunesse v the Netherlands*, (2015) 60 E.H.R.R. 17; *Tuquabo-Tekle and others v the Netherlands*, (Appl. No. 60665/00), judgment of 1 March 2006.

⁴⁹ *Kurić and Others v Slovenia*, (2013) E.H.R.R. 20. For a comprehensive analysis of this case see; González, "'Brexit' Consequences for Citizenship of the Union and Residence Rights", *op. cit.*

⁵⁰ *Kurić and others v Slovenia*, *op. cit.*, para. 352. The Grand Chamber reiterated the Chamber's observations and found a violation of Article 8 right in its decision of March 2014.

⁵¹ *ibid.*

applicants' legally established residence rights in Slovenia under the then Socialist Federal Republic of Yugoslavia laws. Along the same lines, when giving evidence before the UK House of Lords EU Justice Sub-Committee, Alegre made reference to *Genovese* decision to justify this view.⁵² Accordingly, in this decision, European Court of Human Rights held that 'impact [of the denial of citizenship] on the applicant's social identity was such as to bring it within the general scope and ambit of [Article 8 of the ECHR].'⁵³ Although these examples relate either to residence status (i.e. *Kurić*), which can be settled under the Withdrawal Agreement, or to the withdrawal of national citizenship (i.e. *Genovese*), they indicate possible Article 8 breaches due to the loss of EU citizenship.

As regards the non-discrimination clause under Article 14 of the ECHR, the most compelling argument came from Alegre in her evidence before the UK House of Lords EU Justice Sub-Committee.⁵⁴ Accordingly, certain British nationals are able to acquire the citizenship of other EU Member States, and thus EU citizenship without having to reside there through national naturalisation rules which may be predicated on the nationality of the grandparents, nationality of the spouses, or financial investment.⁵⁵ This, in turn, taken together with Article 8 may breach the prohibition on discrimination on the ground of 'national or social origin, association with a national minority, property, birth or other status.'⁵⁶

⁵² *Genovese v Malta*, (2014) 58 E.H.R.R. 25.

⁵³ *ibid*, para. 33.

⁵⁴ House of Lords, Written Evidence: Brexit: acquired rights, (07 November 2016), Select Committee on the European Union, Home Affairs Sub-Committee, (November 14, 2016), <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/brexit-acquired-rights/written/42760.html> [Accessed February 13, 2018], para. 6.

⁵⁵ *ibid*.

⁵⁶ Article 14, ECHR.

Additionally, the right to property enshrined under Article 1 of A1P1 ECHR might be invoked to protect tangible and intangible property acquired in the EU including entitlements to non-contributory social security benefits.⁵⁷

The above claimed violations may be able to be invoked before the European Court of Human Rights by British nationals and EU citizens affected by Brexit if no satisfactory Withdrawal Agreement reached. As mentioned above, the CJEU has jurisdiction over the conclusion of that Agreement under certain articles of the TFEU. Thus, a challenge on the incompatibility of the Withdrawal Agreement with the fundamental rights as safeguarded under the EU Charter of Fundamental Rights (Charter) can be brought before the CJEU. The Court has already had the opportunity to reject an international agreement due to its incompatibility with the Charter.⁵⁸ Therefore, to the extent that Charter rights overlap with the ECHR rights mentioned above, the foregoing findings might be relevant for the CJEU's interpretation of the matter.⁵⁹ The UK side might gnash its teeth over the CJEU's adjudication on the Withdrawal Agreement itself because no matter how insistent it tries to be in ending the CJEU jurisdiction in the UK post-Brexit, the Court will retain an important role in the composition of the Agreement.⁶⁰

⁵⁷ European Union Committee, "Brexit: acquired rights", *op. cit.*, paras. 73-76.

⁵⁸ Opinion 1/15 (Grand Chamber) July 26, 2017.

⁵⁹ Article 52(3), the Charter.

⁶⁰ The UK Government's stance towards the CJEU jurisdiction is illustrated in the White Paper, which mentions the plans 'to bring an end to the jurisdiction in the UK of the Court of Justice of the European Union'. See; Department for Exiting the European Union, The United Kingdom's exit from and new partnership with the European Union White Paper https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/589191/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Web.pdf [Accessed February 13, 2018].

Certain other issues remain over the extent which British nationals can retain their rights accompanied with their EU citizenship status. The first issue relates to the fact that the EU citizenship includes certain rights that are not expressly recognised by the ECHR such as the right to work, right to retire, and access to the healthcare in the EU.⁶¹ The second issue concerns the UK Government's insistent redline in ending the jurisdiction of the CJEU in the UK, as mentioned earlier. The implications of this redline are dealt with in more detail below in the section on the consequences of Brexit for EU surrender procedures.

Consequently, a fundamental question in relation to the Dutch District Court's referral is whether and how the CJEU will answer the questions referred and ruffle feathers over the meaning of EU citizenship in the Brexit scene. Needless to say, the CJEU has shaped the EU policy-making process over the years through its decisions.⁶² Therefore, there are reasons to assume that whether or not it declares the existence of a European identity by detaching EU citizenship from national citizenship, if the CJEU accepts the referral, it will certainly make an interesting judicial contribution to the debate on the post-Brexit legal status of millions of British nationals.

On Extradition

The 2002 Framework Decision on European Arrest Warrant simplified the procedure for surrender of suspects or convicts of criminal offences amongst EU Member States by

⁶¹ "Brexit and Loss of EU Citizenship: Cases, Options, Perceptions" (December 2017), ECAS, <http://ecas.org/wp-content/uploads/2017/12/Brexit-and-Loss-of-EU-Citizenship-1.pdf> [Accessed February 13, 2018], p. 13.

⁶² For example see; Opinion 1/15, *op. cit.*; *Commission v Council*, (C-440/05) October 23, 2007; *Commission v Council*, (C-176/03) September 13, 2005.

introducing the European Arrest Warrant (EAW) system.⁶³ What makes this system different to extradition outside the EU is that Member State authority who receives surrender request under the EAW in principle must execute this request without litigation within sixty days or, in some exceptional cases, ninety days.⁶⁴ This could be done through the application of the principle of mutual recognition of judicial decisions, according to which Member States must enforce and execute decisions of each other's authorities despite procedural differences amongst each other.⁶⁵ In this regard, it creates a single area wherein Member States are banned from refusing to surrender their own nationals.⁶⁶ That said, facilitating simplified surrender procedure amongst Member States as such must not encroach upon fundamental rights of individuals. Therefore, the EAW is rooted in the assumption that Member States participating in the EAW adhere to the Charter, to general principles of EU law, and to the jurisdiction of the CJEU.⁶⁷ For this reason, Germany or Poland, whose constitutions provide ban on extraditing their own citizens, cannot refuse to surrender their citizens to other Member State, but can refuse to extradite them to other third countries.

⁶³ Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision, [2002] OJ L190/1 (hereinafter, "the EAW Framework Decision").

⁶⁴ Article 23(2)-(4), *ibid.*

⁶⁵ Valsamis Mitsilegas, *EU Criminal Law*, (Portland: Hart Publishing, 2009), pp. 115-159.

⁶⁶ EU Member States waived their rights to refuse extradition of their own citizens because neither Article 3 of the EAW Framework Decision on the mandatory grounds for non-execution nor Article 4 of the same Framework Decision on optional grounds for non-execution mentions such refusal.

⁶⁷ Article 1(3), the EAW Framework Decision.

The UK re-joined the EAW system in December 2014 following its block opt-out from pre-Lisbon criminal and policing measures in accordance with Protocol 36 of the TFEU.⁶⁸ It has praised the system in numerous occasions and has approached to the acceptance of the supervisions of the CJEU as a trade-off for the greater good of the system.⁶⁹ The figures on the surrender requests from and to the UK in the 2010-15 period shows that the UK surrendered around 1,000 people every year to other Member States and requested around 100 people from them.⁷⁰

Once the UK's membership to the EU ceases to exit, it will not be able resort to the EAW system. This means that in principle the extradition process between the UK and the remaining EU Member States will revert to being slower and more cumbersome when compared with the EAW system. In principle, the UK can conclude an agreement with the EU on extradition matters, but EU Member States can still refuse to extradite their own citizens. There might also be certain limitations for EU Member State wishing to extradite citizens of remaining EU Member States. As in *Petruhhin*, if a Member State bans extradition of its own citizens outside the EU, it has to ask remaining Member State whose citizenship the subject of extradition request holds, before extraditing him or her to third country.⁷¹

⁶⁸ House of Commons, Select Committee on European Scrutiny Committee, *The UK's 2014 Block Opt-Out Decision session 2013-14*, para. 1.

⁶⁹ European Union Committee, *'Brexit: judicial oversight of the European Arrest Warrant'*, (HL 2017-19 (6)), para. 12.

⁷⁰ National Crime Agency, *Historical European Arrest Warrant Statistics 2004 – May 2016 (Calendar and Fiscal year)* (May 2016) <http://www.nationalcrimeagency.gov.uk/publications/european-arrest-warrant-statistics/historical-eaw-statistics/693-historical-european-arrest-warrants-statistics-calendar-and-financial-year-totals-2004-may-2016> [Accessed February 13, 2018].

⁷¹ *Aleksei Petruhhin v Latvijas Republikas Ģenerālprokuratūra* (C-182/15) September 6, 2016.

These issues raised concerns from the UK side over the continuity of its co-operation with the EU in the fight against terrorism and serious crime.⁷² The number of extradition requests made by the EU Member States to the UK suggests that there is a mutual interest in unhindered extradition process which currently assists the timely administration of justice.⁷³ Lengthier and harder extradition procedures might also affect individuals' interests and pre-trial detention might be longer when compared with detention periods under the EAW.

Political Discourse on Extradition post-Brexit

The UK's departure from the EAW as a consequence of Brexit raises two fundamental questions: (i) how should the pending EAWs be treated and; (ii) how the extradition can be carried out after Brexit. The EU-side wants to address the issue on the ongoing operations in relation to the EAW in the Withdrawal Agreement.⁷⁴ Yet, it has so far played its cards close to its chest and has not mentioned its stance on the principles on which those operations should be built in to the Agreement. The future relationship between the UK and the EU on the extradition remains another mystery. The UK Government has been vocal in its insistence on the continuation of co-operation with the EU on this field post-Brexit.⁷⁵ Different scenarios for the future co-operation such as negotiating bilateral agreements with each remaining Member State, falling back to the Council of Europe's extradition mechanism (i.e. the 1957 European

⁷² "European Arrest Warrant 'absolutely essential', Amber Rudd confirms", (March 7, 2017), *Holyrood*, <https://www.holyrood.com/articles/news/european-arrest-warrant-absolutely-essential%E2%80%99-amber-rudd-confirms> [Accessed February 13, 2018].

⁷³ "Brexit & European Arrest Warrant: How Will Change Affect the Interest of Citizens", (November 20, 2017) ECAS <http://ecas.org/european-arrest-warrant-brexit/> [Accessed February 13, 2018], pp. 6-7.

⁷⁴ TF50 (2017) 8/2 – Commission to UK.

⁷⁵ European Union Committee, "*Brexit: future UK-EU security and police cooperation*", (HL 2016–17, 77), para.

Convention on Extradition), or negotiating an agreement with the EU mirroring the EAW system.⁷⁶ The prototype for the latter is the agreement signed between the EU and Norway/Iceland, which includes a modified version of the EAW system. However, there are reasons to argue that this solution will not be an easy one because it took over ten years to conclude this agreement and it is not yet in force. The Council of Europe's extradition mechanism might not be a good solution either, because it will be lengthier and more cumbersome when compared with the EAW system.⁷⁷

The UK Government's persistence rejection of CJEU jurisdiction and of the application of the Charter after Brexit sits at odds with its position to continue cooperation in extradition under an EAW-like arrangement. This is because judicial authorities in Member State are considered as equal and as fundamental-right compliant by virtue of the application of mutual recognition in criminal matters. Thus, the CJEU is the final arbiter through the preliminary ruling procedure if a dispute arises on the execution of an EAW. For this reason, discussions on judicial oversight of any possible UK-EU extradition arrangement have surfaced in the UK side, acknowledging the tension that the UK Government's redline of the CJEU jurisdiction post-Brexit creates for the continuity of an EAW-like extradition arrangements.⁷⁸ Moreover, cutting the ties with the Charter might be detrimental to fundamental rights protection in the

⁷⁶ European Union Committee, "Brexit: judicial oversight of the European Arrest Warrant", *op. cit.*; "Brexit Briefing No. 2 – The implications for extradition", (July 13, 2016), *6KBW College Hill*, <http://www.6kbw.com/wp-content/uploads/2016/07/6KBW-College-Hill-Brexit-Briefing-No.2.pdf> [Accessed February 13, 2018]; Steve Peers, "EU Referendum Brief 5: How would Brexit impact the UK's involvement in EU policing and criminal law", (June 21, 2016), *EU Law Analysis*, <http://eulawanalysis.blogspot.co.uk/2016/06/eu-referendum-brief-5-how-would-brexit.html> [Accessed February 13, 2018].

⁷⁷ European Union Committee, "Brexit: judicial oversight of the European Arrest Warrant", *op. cit.*, para. 71.

⁷⁸ *ibid*, para. 4.

UK post-Brexit for two reasons. The first reason is that, as mentioned earlier, it is the source for ensuring the rights of suspects and convicts under the EAW system. The second reason is that, as discussed below, the Charter potentially has a wider spectrum in comparison with the ECHR. Thus, this additional protection can only be enforced before the CJEU. In fact, this tension was the main reason for which the Irish Supreme Court's referred questions to the CJEU on Member States' possible refusal to execute the ongoing EAWs issued by the UK. So, the dispute is whether, and if so how the EU fundamental rights of an individual be guaranteed in the UK if the imprisonment will end at a time when the UK is no longer part of the EU.

The Decision by the Irish Supreme Court

Thomas O'Connor was convicted of tax fraud in the UK in 2001. He fled to Ireland while he was on bail. This led the UK to issue an EAW to Ireland for his surrender to serve his time and possibly to subject him to more charges in relation to his flight to Ireland.⁷⁹ The applicant argued that Ireland was asked to surrender an EU citizen to a country which might become a third country before he serves his time there. Therefore, depending on how the arrangements for the ongoing EAW procedures might evolve between the UK and the EU, he might not be able to enjoy his Charter rights.⁸⁰ This point was of particular relevance in deciding whether the time he spent in custody in Ireland could be deducted from his imprisonment time in the UK should the EAW is found to be invalid; a point that calls the application of EU law in question. However, if this point is raised before the UK courts after the withdrawal date, they might not be entitled to refer it to the CJEU.⁸¹ In this regard, the applicant argued that either his surrender to the UK was impossible or he can be extradited insofar as the UK's future arrangements with the EU on the extradition ensures EU rights that

⁷⁹ *Minister for Justice v. O'Connor*, [2018] IESC 3, para. 5.8.

⁸⁰ *ibid*, para. 5.9.

⁸¹ *ibid*, para. 5.14.

the applicant would have enjoyed if the UK had not withdrawn from the EU including the right to take complains before the CJEU.⁸²

Having acknowledged the uncertainty surrounding any arrangement and other similar twenty cases on EAWs issued by the UK to Ireland before it, the Irish Supreme Court referred the case to the CJEU and asked whether or not the receiving country can refuse to extradite the subject of an EAW.

Fundamental Rights in the UK post-Brexit

The referral by the Irish Supreme Court illustrates the controversy surrounding the UK Government's stance in ending the CJEU jurisdiction and the applicability of the Charter after Brexit. According to the EU (Withdrawal) Bill, the existing case-law stays binding upon UK courts under certain exceptions.⁸³ For example, the Supreme Court, Parliament, or the executive can depart from the CJEU precedent.⁸⁴ Upon Brexit, however, the CJEU jurisdiction in the UK comes to an end, and the UK courts will not have to consider the post-Brexit case-law of the CJEU.⁸⁵ Still, the UK courts have the option to take into account this case-law if they find it appropriate to do so.⁸⁶ This option, on the other hand, was not welcomed by the UK judges, who asked for more clarity on the extent of their discretion on the matter.⁸⁷

⁸² *ibid*, para. 5.17.

⁸³ Clause 6, EU (Withdrawal) Bill.

⁸⁴ Clause 6(4), *ibid*.

⁸⁵ Clause 6(1), *ibid*.

⁸⁶ Clause 6(2), *ibid*.

⁸⁷ "UK's new supreme court chief calls for clarity on ECJ after Brexit", (October 5, 2017), *Guardian*, <https://www.theguardian.com/law/2017/oct/05/uks-new-supreme-court-chief-calls-for-clarity-on-ecj-after-brexit>

[Accessed February 13, 2018].

Clearly, the state of the CJEU jurisdiction under the EU (Withdrawal) Bill is different from how it was envisaged in relation to EU citizenship rights under the joint report, according to which the UK courts can refer a case to the CJEU for a period of eight years starting from the application of the citizens' rights provision and can take 'due regard' to the CJEU case-law without a time limit.

As mentioned above, alternatives to the CJEU jurisdiction in order to keep an EAW-like partnership with the EU have been circulating in the UK side. Until an official consensus is reached on the matter, the CJEU jurisprudence will cease to apply in the UK upon Brexit, and EU citizens will not be able to enforce their rights under the Charter, as anticipated in the Irish Supreme Court's CJEU referral. This means that the general status of the fundamental rights protection in the UK might be at risk after Brexit.⁸⁸

Another source of EU law that the UK Government wants to eliminate is the Charter, and this cut-off is materialised in the EU (Withdrawal) Bill.⁸⁹ So, one out of the three current sources will be removed from the architecture of UK fundamental right protection (The other two sources are the common law, and the ECHR as brought into UK law through Human Rights Act 1998). What this means for rights protection in the UK is that individuals will not enjoy the wider protection that the Charter potentially offers in certain areas when compared with the ECHR. Particularly in the field of extradition, the Charter offers more detailed rights in the context of criminal matters than the ECHR.⁹⁰ For example, the European Court of Human

⁸⁸ Equality and Human Rights Commission, Opinion on EU (Withdrawal) Bill – EU Charter of Fundamental Rights, (January 5, 2018) <https://www.equalityhumanrights.com/sites/default/files/eu-withdrawal-bill-legal-advice-jason-coppel-qc.pdf> [Accessed February 13, 2018].

⁸⁹ Clause 5(5), EU (Withdrawal) Bill.

⁹⁰ Extradition procedure might rise possible interferences with the Charter's Article 47 on the right to an effective remedy and to a fair trial, Article 48 on the presumption of innocence and right of defence, Article 49 on the

Rights does not consider the extradition process as a criminal procedure, but rather an administrative procedure, and thus it does not afford the minimum fair trial rights listed in Article 6 of the ECHR unless the subject of an extradition request ‘has suffered or risks suffering a flagrant denial of a fair trial in the requesting country.’⁹¹

In light of the above, the EU (Withdrawal) Bill, as it stands, presents risks for the protection of rights in the UK after Brexit. The corollary impact of this risk for the subjects of ongoing surrender procedures under the EAW system is that they might be stripped of their fundamental rights if they are surrendered to and imprisoned in the UK after the UK’s withdrawal date. The legal framework for the transition period and the future arrangements between the EU and the UK on the matter *might* ensure the protection of their rights, but this is purely at the mercy of the political blinking game. Thus, the outcome of the referral might serve as a reminder on the importance of ensuring fundamental rights protection in the UK post-Brexit.

Conclusion

As of 29 March 2017, Brexit ship sailed into uncharted waters. There is a plethora of issues to be resolved - from security to business and to immigration. This article aims to touch upon the issue of the implications of Brexit for the UK’s fundamental rights landscape. It has looked at two recent CJEU referrals (as of February 2018); one on the implications of Brexit on the EU citizenship rights, and the other one on its implication on the ongoing extradition

legality and proportionality of criminal offences and penalties, and Article 50 on the right not to be tried or punished twice in criminal proceedings for the same criminal offence.

⁹¹ *Soering v the UK*, (1989) 11 E.H.R.R. 439, para. 113. See also; Peter Langford, “Extradition and fundamental rights: the perspective of the European Court of Human Rights” (2009) 13(4) *International Journal of Human Rights* 512, pp. 522-523.

procedures. The first referral raises questions about the legal nature of EU citizenship in the EU Treaties, and tests the possible detachment of that citizenship from national citizenship. In this sense, it can be seen as inviting a resurgence of the concept of EU citizen as a commitment to the EU community. The second referral relates to the possible effect on ongoing extradition requests by the UK. In this regard, it provokes a discussion as to the extent to which the fundamental rights protection in EU law can be guaranteed in the UK post-Brexit.

The themes of both referrals have been touched upon, to some extent, in the political arena. Still, the legal uncertainty in these themes persist, and thus this makes the CJEU referrals all the more fundamental. Both referrals converge on the status of the jurisdiction of the CJEU jurisdiction post-Brexit and the potential impact of the UK's withdrawal from the EU on fundamental rights. Ironically, it has now made it the CJEU's role to determine these Brexit issues from a legal point of view, which will inevitably have effect on how they will be built into the withdrawal arrangements. These referrals are a clear lesson that the UK's withdrawal from the EU necessitates not only a political but also a thorough and complex legal analysis.