

# Brexit: Citizens Fail Before European Court

Thomas Wahl



## News

On 26 November 2018, the General Court (GC) delivered its judgment in an action for annulment by way of which the applicants wanted to stop Brexit progress. In the case at issue, 13 British citizens residing in EU Member States other than the UK applied to the GC to annul the decision of the Council of the European Union authorising the opening of negotiations on Brexit. The case is referred to as "*Shindler and Others v. Council of the European Union*" (Case T-458/17).

The applicants argued that – as expatriated UK citizens – they were denied the right to vote in the referendum of 23 June 2016 because of the so-called "15 years rule." They underpinned their position with the following five arguments:

- The contested decision has a direct impact on the rights they derive from the Treaties, *inter alia* as regards their status as EU citizens and their right to vote in European and municipal elections; their right to respect for their private and family life; their freedom to move, reside and work; their right to own property; and their right to social security benefits;
- The contested decision is not only an interim measure, but implicitly acknowledged the UK's irreversible "exit" from the EU on 29 March 2019;
- The contested decision, particularly its negotiating directives, produce legal effects insofar as they will likely lead to the loss of their legal status of Union citizenship after Brexit;
- The withdrawal procedure is void in the absence of definite constitutional authorisation based on the votes of all UK citizens, who are also EU citizens;
- The action before the GC is their sole effective form of legal remedy before the inescapable loss of their status as EU citizens on 29 March 2019 as a consequence of the contested decision.

The GC, however, ruled that the action for annulment is inadmissible. It reiterated that the contested act must, at the very least, be of direct concern to the applicants (Art. 263(4) TFEU) and directly affect their legal situation. The GC argued that the decision of the Council authorising the opening of Brexit negotiations does not have a direct affect on the legal situation of the applicants. Although the status of the applicants as EU citizens may be affected by the UK's withdrawal, this potential effect does not result from the contested Council decision.

The contested decision is instead a mere preliminary act, which cannot prejudice the content of any final agreement, in particular as regards the scope of any provision on the protection of the status and rights of UK citizens in the remaining 27 EU Member States.

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As for the argument on the lack of constitutional authorisation, the GC observed that this is part of the merits of the case and is not an argument for or against admissibility of the action.

Regarding the lack of any effective remedy, the GC states that judicial review is not only ensured by the CJEU. In particular, the argument that expatriated UK citizens had no right to vote can be challenged before UK courts.

The judgment of the GC is subject to appeal on points of law before the Court of Justice. It must be brought within two months of notification of the decision.

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