Chapter No 48

Law of Brexit: Case law of the CJEU on UK-EU Relations

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I. INTRODUCTION

It is well known that AG Sharpston became a litigant in her own Court. This chapter seeks to shed light on the wide variety of other litigants who have gone to the CJEU post-Brexit as to EU-UK / UK-EU relations. It describes a wide variety of litigation that has taken place, drawing attention to the "winners" and "losers"- and arguably justices and injustices.[1] As will be outlined, the "Law of Brexit" has already generated certain "repeat players" who have sought to litigate issues, with a public interest dimension in mind.[2] Others have already shown how – even before the actual legal event of formal exit the Brexit process has been characterised by hyper-litigation – an unprecedented level of strategic litigation brought to influence the process, substance and/or the politics of the UK's departure from the EU, with more than 50 instances of Brexit-related strategic litigation in the UK, EU, and other European courts, up until the date of the UK's departure from the EU on 31 January 2020.[3] The chapter thus sets out the array of EU-UK relations litigation that demonstrate a diversity of legal questions from many litigants taking place in a variety of forums that may cumulatively be referred to as 'The Law of Brexit'.

Many may legitimately ask broader and more probing questions as to the effects of Brexit on EU law, its constitutional significance, its array of legal provisions and so forth.[4] From a politics and political science perspective, it is an evident example of EU unity across the institutions.[5] However, from a legal perspective, the voluminous nature of the primary and secondary law applicable is itself a striking feature of Brexit, as a multi-subject exercise which traverses nearly 100 areas of EU law, never mind its resulting case law.[6] This is unsurprising given its intent to unwind several decades of membership and make provision at haste for a range of new legal relationships. Even if Brexit was supposed to cut the UK's relationship with the CJEU, the EU-UK Withdrawal Agreement (EU-UK WA) maintained its jurisdiction, which in practice extended beyond the transition period.[7]

The emerging case law demonstrates that the CJEU will maintain a crucial role. Much litigation has indeed transpired as to the key aspects of defining and understanding Brexit. This chapter accordingly attempts to take a relatively simple but still "birds-eye" view of the nature of the CJEU case law on Brexit emerging and its litigants, themselves indicative of histories, relationships, and an evolving context. On the one hand, many litigants have not benefited from a generous interpretation of the relevant provisions. On the other hand, some case law follows more conventional trends.

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[1] See T Ahmed and E Fahey (eds.), On *Brexit: Law, Justices and Injustices* (Cheltenham, Edward Elgar, 2019).

[2] See further below in Section IV.

[3] See Ch McCorkindale and A McHarg, 'Litigating Brexit' in O Doyle, A McHarg and J Murkens (eds), *The Brexit Challenge for Ireland and the United Kingdom: Constitutions Under Pressure* (Cambridge, Cambridge University Press, 2021).

[4] N Nic Shuibhne, 'Did Brexit Change EU Law?' (2021) 74 *Current Legal Problems* 195.

[5] Eg B Laffan and S Telle, *The EU's Response to Brexit: United and Effective* (Palgrave Macmillan, 2023).

[6] If one considers the official EU no-deal Brexit preparations, with over 90+ notices issued by the European Commission: See European Commission, 'Brexit preparedness: EU completes preparations for possible "no-deal" scenario on 12 April' (2019) <https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1813> accessed 30 June 2023.

[7]

The account intentionally offers a brief and descriptive selection of the case law, taking a deliberately broad-brush view of the definition of Brexit. It thus considers a range of case law linked to EU-UK relations arising before the CJEU. The chapter sets out a range of case law that is underpinned legally by the provisions of the EU-UK Withdrawal Agreement[8] and the EU-UK Trade and Cooperation Agreement.[9] It arguably reinforces the view that Brexit is understood to have restored the centrality of Union institutions and processes in the EU law-making that responds to exceptional situations yet also distorting or displacing some of the vital checks and balances that would normally apply.[10] This is evident from the fact that much key case law brought post-Brexit to the CJEU is broadly speaking unsuccessful for its litigants.[11] It supports the view that EU membership has created a constitutional legacy in the UK that will not be cancelled, 'a legal knot that cannot easily be cut'.[12]

Overall, the selection of topics is generally arbitrary and only a few main areas are selected for reasons of space. The chapter considers the EU institutions and Brexit in case law, the place of the UK in withdrawing, recent CJEU case law on "Brexit citizens" and considers generally the outcomes for the litigants in how the CJEU engages with Brexit law.

The analysis proceeds as follows. Section II begins on EU institutions, agencies, and Brexit, while Section III follows on the status of the UK as a withdrawing state. Section IV considers revocation of notification of withdrawal. Section V follows with citizenship, including the loss of citizenship, loss of rights, and loss of social benefits. Conclusions are offered at the very end of the chapter.

II. EU INSTITUTIONS, AGENCIES, AND BREXIT

We begin by examining what is known as 'l'affaire Sharpston'. Whilst Article 19(2) TEU states that the CJEU 'shall consist of one judge from each Member State', that stipulation does not apply to Advocates General (AGs). Rather, the CJEU is 'assisted by [AGs]', for which no link to Member States is made. AG Sharpston should have remained a member of the CJEU until the expiration of her six-year mandate, until October 2021. In September 2020, the Member States appointed an AG put forward by Greece, who was to enter into office on 7 September 2020, done in the ordinary way by 'common accord of the governments of the Member States' as set out in both Article 19 TEU and Article 253 TFEU – provisions that permit the Member State to act within the EU legal order.[13] As Kochenov and Butler aptly remark, '…the decision was, like Janus, a two-faced one: to appoint a new member, by dismissing a sitting member'. AG Sharpston then sought judicial protection from the GCEU, reviewing the attempt to replace her as a sitting member of the CJEU. The CJEU held curtly that since the Treaties ceased to be applicable in the UK pursuant to Article 50(3) TEU the ongoing mandates of the members of the institutions, bodies, offices, and agencies automatically came to an end on that date.'[14]

[8] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community 2019/C 384 I/01 (EU-UK Withdrawal Agreement) [2019] OJ C384I/1.

[9] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part (TCA) [2021] OJ L149/10.

[10] Nic Shuibhne (n 6); M Dougan, *The UK's Withdrawal from the EU: A Legal Analysis* (Oxford, Oxford University Press, 2021).

[11] For perspectives on success and failure, see Ahmed and Fahey (n 1).

[12] M Simoncini and G Martinico, 'A Knot Not to Be Cut? The Legacy of Brexit over the CJEU' (2021) 9 *Politics and Governance* 27.

[13] D Kochenov and G Butler, 'Independence of the Court of Justice of the European Union: Unchecked Member States power after the Sharpston Affair' (2021) *European Law Journal* 262.

[14] Case C-423/20 P(R) *Order of the Vice-President of the Court in Council v Sharpston* ECLI: EU:C:2020:700; Case C-424/20 P(R) *Order of the Vice-President of the Court in Council and Representatives of the Governments of the Member States v Sharpston* EU:ECLI:C:2020:705.

This decision has been described both an anathema of the rule of law at best and at worst a catastrophe for EU law and policy and indicates the gravity of the issues at stake in Brexit most acutely.[15] As Simoncini and Martinico state, there was no apparent legal basis for dismantling the guarantees that framed the functions of the British AG.[16]

It is also important to note that the CJEU, unusually, [17] also had a Brexit advisor from 2016-2019,- former EU Civil Service Tribunal judge Kieran Bradley.[18] Bradley has published what appears to be academic work on the *Sharpston* litigation but it is hard to find much else about an official position, other than an academic article critical of the position of the Court in *Sharpston*.[19] The multifaceted place of the judiciary in this period is perhaps another striking feature of the Brexit process itself.

Although the focus of this chapter is strictly upon CJEU case law, it is remarkable that EU agencies themselves that were the subject of litigation- in this instance before the UK courts. It is a contrasting example thus to the *Sharpston* litigation in some respects but also indicative of the far-reaching and systemic challenges resulting from Brexit. The UK formally left the European Union (EU) on 31 January 2020 and became a third country and during a transition period from 1 February to 31 December 2020. As a consequence of Brexit, in accordance with Regulation (EU) 2018/1718, governing its location and seat, the European Medicines Agency (EMA) relocated from London to Amsterdam in March 2019, along with their vast numbers of staff, their families, and lives[20]. The EMA argued before the High Court of England and Wales that the legal doctrine of frustration applied to bring the lease to an end. The agency relocated in the wake of the UK's EU referendum result, but its 25-year London lease, signed in 2014, did not contain a break clause. It argued Brexit would trigger a number of legal changes relating to its legal capacity to continue with the lease. It subsequently withdrew an appeal against a court ruling that Brexit would not stop it from carrying out its obligations under its lease for its former London headquarters. The English High Court dismissed the proceedings on the basis that the EMA would be able to continue to meet its obligations under the lease after Brexit, and that the Agency had entered into the lease without a break clause consciously.[21] Here, the proceedings did not reach the CJEU yet concerned an EU agency and demonstrate the manner entities were the collateral damage of Brexit with respect to its core functioning institutions, actors and staff, who resorted in many respects to law and courts unsuccessfully. The range of indirect consequences here is also of significance, given the dramatic consequences for many staff, families, support staff, local schools, small business and local authority areas affected by Brexit, if only tangentially. It is important to note, however, that the other key EU agency based in London, the European Banking Authority (EBA), moved in May 2019 after 8 years in London from its premises in the UK to Paris, France, without any litigation arising and demonstrating the broad range of consequences arising.

III. STATUS OF THE UK DURING THE WITHDRAWAL PROCESS

This section considers the status of the UK during withdrawal.

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[15] D Halberstam, 'Could there be a Rule of Law Problem at the EU Court of Justice?: The Puzzling Plan to let UK Advocate General Sharpston Go After Brexit' (*VerfassungsBlog,* 23 February 2020) <https://verfassungsblog.de/could-there-be-a-rule-of-law-problem-at-the-eu-court-of-justice/> accessed 30 June 2023; S Lashyn, 'The Unsuccessful Bid of the British Advocate-General to Remain on the Bench Despite Brexit' (2021) 84 *The Modern Law Review* 1414; Kochenov and Butler (n 13).

[16] Simoncini and Martinico (n 12).

[17] Although it is difficult to find anything more substantive on this function or role anywhere in formal legal terms, on the CJEU website or elsewhere.

[18] K Bradley, 'Appointment and Dis-Appointment at the CJEU: Part II – The Sharpston Litigation' (2022) 21 *The Law & Practice of International Courts and Tribunals* 1, 1.

[19] See (n 15).

[20] European Medicines Agency, 'Relocation to Amsterdam' (2017) <https://www.ema.europa.eu/en/about-us/history-ema/relocation-amsterdam> accessed 30 June 2023.

[21] The lease agreement allowed the EMA to sublet or assign space in the Canary Wharf offices, subject to landlord consent. The European Banking Agency (EBA) also moved out of London as a consequence of Brexit, relocating to Paris.

Overall, as is well known, the procedure for a withdrawing state to exit the EU is provided for in Article 50 TEU. It additionally makes certain provision for the status of a withdrawing country during this process, prior to the evolution of its status into a third country. One very practical question emerging in this period was the place of those in the UK the subject of criminal law procedures that had been covered by the application of EU law, in particular, the European Arrest Warrant and the impact of Brexit upon the concept of mutual trust.

Surrender of individuals under Framework Decision 584/2001/JHA on the European Arrest Warrant has replaced the principal mode of extradition in Europe.[22] The EAW FD has been operational since 2004 with a steady upturn in the amount of case law that is now understood to exponentially have increased.[23] While it has led to a considerable simplification and speeding up of handover procedures many point to a number of challenges in the issuance and execution of EAWs concerning judicial independence, the nature of mutual recognition and its relationship with international norms, primary EU law and values, including fundamental rights, constitutional principles, and further harmonisation.[24]

The EAW is an enormous evolution in the Area of Freedom, Security and Justice as to UK-Ireland relations. They have a shared history of the AFSJ opt in-opt out, the common law system and have a shared 'island' status, being surrounded by water borders. Following the negotiation of the EU-UK Trade and Cooperation Agreement, which entered provisional application from 1 January 2021, the European Arrest Warrant (EAW) system with the UK was replaced by the mechanism laid down in Articles EU-UK TCA which closely replicate the EAW FD and maintains a system of surrender following the issuing of arrest warrant, as opposed to a system of extradition.[25]

Another subsequent case concerned the question on whether a Member State could refuse to execute a European arrest warrant pending clarification on the law applicable after its withdrawal from the European Union.

The CJEU ruled in Case C-327/18 PPU *RO*, concerning the European Arrest Warrant,[26] that during the process of negotiating to leave the EU, the UK retained all rights and obligations of EU law.[27] RO was the subject of two European arrest warrants issued by the courts of the United Kingdom and sent to Ireland for crimes attracting life imprisonment. RO was arrested and remanded in custody in Ireland and remained on remand in custody within that Member State, by virtue of the two European arrest warrants. RO raised objections to his surrender to the United Kingdom on the basis of, *inter alia*, the withdrawal of that Member State from the European Union and Article 3 European Convention for the Protection of Human Rights ECHR), claiming that he could suffer inhuman and degrading treatment if he were to be imprisoned in Maghaberry prison in Northern Ireland. The CJEU held that Brexit did not have the consequence that, the executing Member State must refuse to execute that European arrest warrant, or postpone its execution, pending clarification as to the law that will be applicable in the issuing Member State after its withdrawal from the European Union. As Mancano states, while EU membership generates legacy, RO already signalled a recalibration of mutual trust.[28] Its endurance beyond membership was accompanied, by a lower

[22] 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States OJ L 190, 18.7.2002, p. 1–20.

[23] V Mitsilegas, EU Criminal Law after Lisbon. Rights, Trust and the Transformation of Justice in Europe (Hart Publishing 2016); V Mitsilegas, 'Cross-Border Criminal Cooperation after Brexit' in M Dougan (ed), The UK after Brexit. Legal and Policy Challenges (Intersentia 2017); A Weyembergh, Consequences of Brexit for European Union Criminal Law (2017) 8 NJECL 284.

[24] European Parliament Research Service, 'The implementation of the European Arrest Warrant and the surrender procedures between Member States 8.12.2020' (2019/2207(INI)).

[25] G Davies and P Arnell, 'Extradition Between the UK and Ireland After Brexit—Understanding the Past and Present to Prepare for the Future' (2021) 85 *The Journal of Criminal Law* 98.

[26] Case C-327/18 PPU *Minister for Justice and Equality v RO* ECLI:EU:C:2018:733 See L Mancano, '*Trust Thy Neighbour?* Compliance and Proximity to the EU through the Lens of Extradition' (2021) 40 *Yearbook of European Law* 475; C Saenz Perez, 'Minister for Justice and Equality v RO: Brexit means nothing has changed... yet' (2019) 44 *ELRev.* 548

[27] See Case C-661/17 *M.A. and Others v The International Protection Appeals Tribunal and Others* ECLI:EU:C:2019:53. This case concerned the Dublin asylum responsibility rules.

[28] Mancano (n 24).

standard of proof for rebutting the presumption of adequate protection.[29] The EAW has been particularly important in streamlining the extradition process between the Ireland and the UK in a complex area of AFSJ law. This phase of history and co-operation has come to an end after Brexit, with an even more complex schism underfoot. The extradition relationship between the two is therefore facing a considerable challenge.

Another case of note is Case C-479/21, concerned Mr Sn and Mr Sd following a reference from the Irish Supreme Court which was made on 3 August 2021.[30] The Irish Supreme Court referred questions as to whether the provisions of the EU-UK WA, which provide for the continuance of the European arrest warrant regime in respect of the UK, during the transition period provided for in that agreement, could be considered binding on Ireland having regard to its significant content regarding the area of freedom security and justice; and whether the provisions of the EU-UK TCA which provided for the continuance of the European arrest warrant regime in respect of the UK *after* the relevant transition period, be considered binding on Ireland having regard to its significant AFSJ content.[31] The CJEU answered similarly in the affirmative, somewhat curtly concluding that Article 50 TEU, Article 217 TFEU and Protocol (No 21) had to be interpreted as meaning that the Withdrawal Agreement provisions, read in conjunction with the fourth paragraph of Article 185 thereof, and Article 632 of the TCA were binding on Ireland.[32] The EAW did not thus fall within the scope of the Protocol. The CJEU appeared concerned as to the question of consistency and the application of EU law, perhaps with touch of irony, given the complex position of Ireland and the UK in respect of the AFSJ.

The next section considers key case law on the revocation of notification to leave the EU.

IV. REVOCATION OF NOTIFICATION TO LEAVE THE EU

One of the key cases of the CJEU on Brexit, arguably landmark constitutional litigation, is the *Wightman* case.[33] *Wightman* is understood to be a case of much constitutional significance and was delivered at a key point in the Brexit process.[34] On 19 December 2017, members of the Scottish Parliament, European

[29] Also in respect to the European Arrest Warrant, the Irish Supreme Court referred questions to the CJEU on the EAW and EU-UK WA in Case C-479/21 PPU *Governor of Cloverhill Prison and Others* ECLI:EU:C:2021:929.
[30] Opinion of AG Kokott in Case C-479/21 PPU *Governor of Cloverhill Prison and Others* ECLI:EU:C:2021:899.
[31] The Common Travel Area (CTA) relating to Ireland and the UK and the resulting Schengen Protocol has generated a vast range of jurisdictional, constitutional, technical and practical questions on the contours of the Area of Freedom, Security and Justice otherwise outside the scope of this piece. See Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 [2007] OJ C 306/1; Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts [1997] OJ C 340/1; Protocol integrating the Schengen acquis into the framework of the European Union art.4, art.5, Protocol on the application of certain aspects of article 14(7a) of the Treaty establishing the European Community to the United Kingdom and Ireland; Protocol on the position of the United Kingdom and Ireland in respect of the EC Treaty Title IV, Protocol on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice Elaine Fahey, 'Swimming in a Sea of Law: Reflections on Water Borders, Irish (British) Euro Relations and Opting-Out and Opting-In after the Treaty of Lisbon' (2010) 47(3) Common Market Law Review 673; Imelda Maher, 'Crossing the Irish Land Border after Brexit: The Common Travel Area and the Challenge of Trade' (2018) 11–12 *Irish Yearbook of International Law* 51.
[32] See para 70 of the Judgment in *Governor of Cloverhill Prison and Others*.
[33] Case C-621/18 *Wightman v Secretary of State for Exiting the European Union* ECLI:EU:C:2018:999. See Nic Shuibhne (n 5); D Azaria, 'Wightman et al. v. Secretary of State for Exiting the European Union' (2019) 113 *American Journal of International Law* 799.
[34] Nic Shuibhne (n 5); P Eeckhout, 'Brexit Sovereignty and its Dead Ends' (2022) 13 *Global Policy* 98; D Schiek, 'The ECJ's Wightman ruling, the "Brexit" process and the EU as a constitutional entity' (*Queen's Policy Engagement,* 11 January 2019) <http://qpol.qub.ac.uk/ecjs-wightman-ruling-brexit-process-eu-as-constitutional-entity/#:~:text=Summary%20of%20the%20case&text=While%20the%20admissibility%20of%20the,ratify%20the%20draft%20withdrawal%20agreement> accessed 30 June 2023; O Garner, 'Case C-621/18, Wightman v Secretary of State for Exiting the European Union: The European Court of Justice confirms that Article 50 notification can be unilaterally revoked' (*European Law Blog,* 11 December 2018) <https://europeanlawblog.eu/2018/12/11/case-c-621-18-wightman-v-secretary-of-state-for-exiting-the-european-union-the-european-court-of-justice-confirms-that-

Parliament, and member of the UK Parliament (MP), Joanna Cherry, and another lodged a petition for judicial review in the Court of Session (Scotland, UK) seeking a declaration that the withdrawal notification under Article 50 TEU could be unilaterally revoked, and asked that the question be referred to the CJEU for a preliminary ruling. The first instance judge dismissed the petition, while the Court of Session allowed the appeal and requested a preliminary ruling by the CJEU. It was argued that a unilateral right of revocation existed in EU law, by analogy with the right of withdrawal provided in Article 50(1) TEU.[35] The European Council and the European Commission argued that pursuant to Article 50 TEU revocation was only possible with the unanimous consent of the European Council.[36]

The CJEU held that the UK could withdraw the notification to leave unilaterally, up until the point when the withdrawal agreement entered into force or (taking account of extensions) the UK left the EU by virtue of the notification period running out.[37] It held that if the notification of the intention to withdraw were to lead inevitably to the withdrawal of the Member State, that Member State could be forced to leave the European Union despite its wish to reverse its decision to withdraw and, accordingly, to remain a Member of the European Union. It held that this much would be inconsistent with the aims and values thereof.

The outcome is arguably not of much of a surprise to see an ostensibly conservative view to be taken by the Court. As Schiek states, the Grand Chamber ruling is a remarkable piece of legal reasoning delivered in a very short time span where it had had to address a contradiction created with including Article 50 TEU in the Treaty of Lisbon, which had been the subject of extensive debate in the Convention on the Future of Europe.[38] However, it is worth bearing in mind Brexit litigation also related to the core questions of constitutional parameters within which to frame the very exercise of Brexit itself.[39] *Wightman* has spurned a vast literature which is difficult to do justice to within the confines of space given arguably its constitutional significance at national and EU level[40] The nature of the claimants also is of note, as to their representative status in a constitutional constellation where their electors did not vote for Brexit overall. *Wightman* disclosed the tensions between national sovereignty and EU membership and opened some potential issues in the exercise of national right to revocation of the withdrawal decision.[41] Such litigation again demonstrates perhaps little success but also the conservative nature of the jurisprudence emerging from the CJEU here for litigants.

The final section considers citizenship in CJEU case law.

V. CITIZENSHIP OF THE EUROPEAN UNION

A. Loss of citizenship

Historically, the CJEU ambitiously interpreted EU law to expand EU citizens' social and residence rights in host Member States.[42] EU citizens residing in the United Kingdom were not allowed to vote however

article-50-notification-can-be-unilaterally-revoked/> accessed 30 June 2023; D Sarmiento, 'Brexit and EU citizenship after Wightman; (12 December 2018, *Despite Our Differences Blog)* <https://despiteourdifferencesblog.wordpress.com/2018/12/12/brexit-and-eu-citizenship-after-wightman/> accessed 30 June 2023; A Cuyvers, 'Wightman, Brexit, and the Sovereign Right to Remain' (2019) 56 *CMLRev* 1303; J Vidmar, 'Unilateral Revocability in Wightman: Fixing Article 50 with Constitutional Tools' (2019) 15 *European Constitutional Law Review* 359.

[35] Para 37 of the Judgment in *Wightman v Secretary of State*.

[36] Ibid, paras 39–42. The UK government declined to take a position on the right of revocation (para 43).

[37] Ibid, para 75.

[38] Schiek (n 33).

[39] See, written prior to the outcome of Miller in the UK Supreme Court, EFrantziou and P Eeckhout, 'Brexit and Article 50 TEU: A constitutionalist reading' (2017) 54 *CMLRev*. 695.

[40] Simoncini and Martinico (n 12) 30.

[41] Simoncini and Martinico (n 12) 33.

[42] L Conant, 'Failing backward? EU citizenship, the Court of Justice, and Brexit' (2021) 28 *Journal of European Public Policy* 1592, 1599.

in the Brexit referendum. Furthermore, UK citizens residing abroad for over 15 years were automatically defranchised. Thus, those who would be most affected by the referendum, were not allowed to vote. In the case of the Brexit referendum, it is even plausible that full political rights for resident EU citizens would have prevented 'Leave's' victory and restrictive positions on political rights as to the Brexit were retained arguably to maintain a plausible victory politically. For a variety of important reasons, a whole range of case law has seen UK citizens litigate the parameters of losing/ retaining EU citizenship after Brexit.[43] Some of them have raised other issues, in particular challenging the validity of EU-UK WA on other grounds. These developments shine a spotlight upon the diversity of views on the manner in EU citizenship rights have been applied as to the EU-UK WA and extinguished otherwise.[44] Even prior to Brexit, however, the Court of Justice's influence upon the trajectory of case law is of note. For instance, the EU Settlement Scheme appeared to be heavily influenced by the CJEU decision in *Lounes*, delivered during EU-UK negotiations.[45] Part II of the EU-UK WA provided for the rights of UK/EU citizens resident in the EU/UK by the end of the transitional period. The stated aim of the negotiators was to ensure that no loss of rights would arise from Brexit for those citizens who had exercised their free movement rights; for this reason the EU-UK WA seeks to provide certainty of residence for the lifetime of those involved, as well as rights equivalent to those currently enjoyed by EU citizens residing in another Member State. The EU-UK WA has been alleged to leave some gaps in the protection afforded to Brexit citizens.[46]

One of the earliest disputes on EU citizenship, and its place post-Brexit, was in the Harry *Shindler* case. A key figure in post-Brexit-related litigation, Shindler was a veteran of WWII and the Liberation of Rome, and worked extensively on Anglo–Italian relations. He was honoured with an MBE presented to him by the British Ambassador in Rome. He died in Italy in 2021 where he lived. In the years prior to his death, he brought several key legal cases challenging Brexit, particularly as to EU citizenship and campaigned for voting rights of British citizens abroad. Shindler sued to annul the EU Council decision giving the EU Commission a mandate to negotiate a withdrawal agreement with the UK.[47] The EU General Court in Case T-458/17 found that the decision did not directly affect the position of the applicants, because Brexit was caused by the decision of the UK to leave, which was not subject to approval of the EU institutions.[48] It found that the applicants were wrong to claim that the contested decision comprises an implicit acceptance of the notification of intention to withdraw and that it acknowledged the 'exit' of the United Kingdom from the EU. The Court of Justice in Case C-755/18P rejected his appeal on 19 March 2019.[49]

In a subsequent case T-541/19 Mr Shindler argued that the date of European Parliament elections held in May 2019 should have been delayed on account of Brexit.[50] This action was also dismissed by the EU General Court, and an appeal against this ruling to the CJEU was dismissed thereafter as manifestly unfounded (Case C-158/20 P).[51]

In another Shindler case[52] it was argued that the Commission had a legal obligation to order Member States to establish a special status for resident UK citizens. The UK Supreme Court had ruled in 2016, in

[43] Various groups of cases have been brought before the national and EU courts, mainly lacking success on procedural/ standing grounds. See e.g .Case T-198/20 *Shindler and Others v Council*ECLI:EU:T:2021:348; Case T-231/20 *Price v Council* ECLI:EU:T:2021:349 and Case T-252/20 *Silver and Others v Council* ECLI:EU:T:2021:347.
[44] A Alemanno and D Kochenov, 'Mitigating Brexit through Bilateral Free-Movement of Persons' (*VerfassungsBlog*, 4 January 2021) <https://verfassungsblog.de/mitigating-brexit-through-bilateral-free-movement-of-persons/> accessed 30 June 2023.
[45] Case C-165/16 *Lounes v. Secretary of State for the Home Department* ECLI:EU:C:2017:862
[46] Eg E Spaventa, 'The rights of citizens under the Withdrawal Agreement: a critical analysis' (2020) 45 *ELRev* 193; C Barnard and Emilija Leinarte '*Brexit and citizens' rights*' (2019) *EJLS* 117-152; Barnard, C., Fraser Butlin, S., & Costello, F. 'The changing status of European Union nationals in the United Kingdom following Brexit: The lived experience of the European Union Settlement Scheme' (2022) 31(3) Social & Legal Studies 365-388.
[47] Case T-458/17 *Harry Shindler v Council of the European Union* ECLI: EU:T:2018:838
[48] Case T-458/17 *Harry Shindler v Council of the European Union* ECLI: EU:T:2018:838, para 32-34.
[49] Case C-755/18 P *Harry Shindler and Others v Council of the European Union* ECLI:EU:C:2019:221.
[50] Case T-541/19 *Harry Shindler and Others v Council of the European Union* ECLI:EU:T:2020:28.
[51] Case C-158/20 P *Whitehead and Evans v Council of the European Union* ECLI:EU:C:2020:773.
[52] Case T-627/19 *Shindler and Others v Commission* ECLI:EU:T:2020:335.

response to litigation initiated by Schindler, that UK citizens who have lived abroad for more than 15 years would not be allowed to vote in the EU referendum. By the same token the Supreme Court upheld earlier rulings of the High Court[53] and Court of Appeal[54] against Harry Shindler and others, who were challenging the law. It confirmed the decision that the UK's voting regulations did not unlawfully interfere with the right of freedom of movement within the European Union and that the UK government was entitled to set an arbitrary time limit on residence.

More recently, in C-499/21 *Silver and others v. Council*, the appellants appealed their status and entitlement to litigate Brexit related loss of rights, previously procedurally refused. The CJEU held that the appellants did not have an interest in bringing proceedings against the decision at issue and were not part of a 'limited class of persons', pursuant to Article 263 TFEU, and dismissed the action as inadmissible. They held the status deprivation was not provided for in the treaties in particular.[55]

B. Loss of Rights

Another set of citizenship case law relates to the specific loss of rights resulting from Brexit. In case C-673/20 *EP v Préfet du Gers*, the applicant a UK national, resided in France since 1984 and was married to a French citizen and had not applied for or obtained French nationality.[56] Following the entry into force of the EU-UK WAS on 1 February 2020, she had been removed from the electoral roll in France with effect from that date and was not authorised to participate in the municipal elections which took place on 15 March 2020. She argued that loss of the status of citizen of the Union, enshrined in Article 20 TFEU, could not be an automatic consequence of the United Kingdom's withdrawal from the European Union, constituting a discrimination between Union citizens and an infringement of her freedom of movement. AG Collins found that Article 50 TEU and the EU-UK WA had the effect of terminating, as of midnight (CET) on 31 January 2020, the Union citizenship of UK citizens. He concluded that the EU-UK WA and the TFEU did not allow British nationals to retain the rights to Union citizenship they enjoyed prior to Brexit. The CJEU followed with a judgment on 9 June 2022 and held that from 1 February 2020 UK nationals no longer held the nationality of a Member State, but that of a third State. This, therefore, entailed for the persons concerned the automatic loss of his or her status as citizens of the Union.[57]

The CJEU held that nationals of that State who exercised their right to reside in a Member State before the end of the transition period, no longer enjoyed the status of citizens of the Union. The Council could be criticised for having approved the EU-UK WA by Decision 2020/135, when that Agreement does not confer on United Kingdom nationals the right to vote and to stand as a candidate in municipal elections in their Member State of residence.[58] The decision of CJEU is an extremely rich analysis of statelessness, although itself a tragic and highly complex point to raise at this juncture in the EU-UK relationship unfolding.[59]

C. Social benefits

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[53] *Shindler v Chancellor of the Duchy of Lancaster* (Divisional Court) [2016] EWHC 957.

[54] *Shindler v Chancellor of the Duchy of Lancaster* Court of Appeal (Civil Division) [2016] EWCA Civ 469.

[55] Case C-499/21 P *Silver and others v Council* ECLI:EU:C:2023:479, para 28.

[56] Case C-673/20 *EP v Préfet du Gers* ECLI: EU:C:2022:449.

[57] Case C-673/20 *EP v Préfet du Gers* ECLI: EU:C:2022:449, para 57. See S Peers, 'Citizens of Somewhere Else? EU Citizenship and Loss of Member State Nationality' *(EU Law Analysis*, 27 March 2019) <http://eulawanalysis.blogspot.com/2019/03/citizens-of-somewhere-else-eu.html> accessed 30 June 2023; M van den Brink and D Kochenov, 'Against Associate EU Citizenship' (2019) 57 *Journal of Common Market Studies* 1366.

[58] *EP v Préfet du Gers* (n 50) para 88. See E Spaventa, 'The Impact of Brexit in Relation to the Right to Petition, and on the Competences, Responsibilities and Activities of the Committee on Petitions' (2017) Directorate General for Internal Policies - Policy Department C: Citizens' Rights and Constitutional Affairs: Petitions; Bocconi Legal Studies Research Paper No 3171413.

[59] N Nic Shuibhne, 'Protecting the legal heritage of former Union citizens: EP v. Préfet du Gers' (2023) 60 *CMLRev 475.*

Social benefits in other EU Member States, constitutes another complex and politically sensitive issue, which has been debated in EU law for decades. After some initially dynamic case law, the CJEU followed a more reserved approach in its *Dano* judgment that was handed down on 11 November 2014.[60] Some of the significant case law in the area in fact had taken place in the run up to Brexit, perhaps exposing David Cameron's complex political position on this issue, as the UK Prime Minister, in the run up to the Brexit referendum.[61] Its interpretation has, however, remained controversial, notably in view of specific facts, the selective discussion of EU secondary law, and the relationship to subsequent case-law.[62]

On the EU side, a CJEU judgment in case C-709/20 *CG*, rendered in July 2021, addressed the question of pre-settled EU citizens' access to EU benefits.[63] One might argue that in EU law, in general terms, challenges to discriminatory treatment have been understood to fit neofunctionalist expectations, with the CJEU extending social rights for EU citizens incrementally - rendering this an important area to be subject to a Brexit-related challenge.[64] In the case at hand, CG claimed that a provision of national law infringed Article 18 TFEU as it discriminated against EU citizens in the same position as UK nationals (paras 36-37). CG's dispute arose from her exclusion of access to the UK social assistance of Universal Credit by virtue of Article 9(2) of the 2016 Universal Credit Regulations (Northern Ireland), which limited access to those treated as "habitually resident" in the United Kingdom. CG had a temporary right to reside for five years through the Settlement Scheme contained in Appendix EU of the UK Immigration Rules, which was adopted in anticipation of the UK's obligations under Part 2 on citizens' rights of the EU-UK WA. The CJEU found that UK authorities were obliged to ensure that a Dutch-Croatian dual citizen in Northern Ireland and her children have necessary subsistence to live dignified lives.[65] National authorities were empowered to grant social assistance and were required to check that a refusal to grant such benefits based on that legislation does not expose that citizen, and the children for which he or she is responsible, to an actual and current risk of violation of their fundamental rights.[66]

Some have argued that the generous application of EU law to this specific case might, in fact, have been welcomed by the UK authorities in general, because if its reasoning on Directive 2004/38 on citizens' rights was applied *mutatis mutandis* to the relevant provisions of the EU-UK WA, it would strongly suggest that EU citizens with settled status in the UK would not be entitled to access social assistance on the same basis as UK nationals.[67] Nonetheless, there are few 'victors' generally arising from such case law in terms of procuring their desired outcome.

VI. CONCLUSIONS

[60] F Wollenschläger, 'An EU Fundamental Right to Social Assistance in the Host Member State? The CJEU's Ambivalent Approach to the Free Movement of Economically Inactive Union Citizens Post Dano: Reflections on case C-709/20, Judgment of 15 July 2021, CG v The Department for Communities in Northern Ireland, EU:C:2021:602' (2022) *European Journal of Migration and Law* 151.

[61] See infamously: European Council meeting (18 and 19 February 2016) – EUCO1/16 Conclusions http://docs.dpaq.de/10395-0216-euco-conclusions.pdf

[62] Wollenschläger (n 60).

[63] Case C-709/20 *CG v The Department for Communities in Northern Ireland* ECLI:EU:C:2021:602.

[64] See further Conant (n 42).

[65] *CG v The Department for Communities in Northern Ireland* (n 63) para 93.

[66] C O'Brien, 'Memo: Pre-settled Status and benefits: C-709/20 CG v the Department for Communities in Northern Ireland' (*EU Rights and Brexit Hub*, 23 September 2019) <https://www.eurightshub.york.ac.uk/blog/itzfizid6d8awrwaco1w6aggx1pfdi> accessed 30 June 2023; Garner (n 34); M Haag, 'Case C-709/20 CG – The Right to Equal Treatment of EU Citizens: Another Nail in the Coffin' (*European Law Blog*, 21 July 2021) <https://europeanlawblog.eu/2021/07/27/case-c-709-20-cg-the-right-to-equal-treatment-of-eu-citizens-another-nail-in-the-coffin/> accessed 30 June 2023; Wollenschläger (n 60); S Coutts, 'Comment: Brexit and the diverse functions of the Charter of Fundamental Rights' in F Casarosa and M Moraru (eds), *The Practice of Judicial Interaction in the Field of Fundamental Rights* (Cheltenham, Edward Elgar Publishing, 2022).

[67] Garner (n 34).

This chapter has provided a descriptive account of a range of key case law emerging on Brexit before the CJEU. An array of unsuccessful litigants generally emerges, although there are clearly a multitude of winners and losers therein. The case law before the Court of Justice, and also the General Court, along with the national courts, burgeons post-Brexit. This is unsurprising given the multitude of legal complexities arising from the unravelling relationship and the imperfect settlements reached generally. The CJEU has arguably demonstrated the fragility of its own constitutional role in the Brexit case law emerging. The span of litigants from judicial actors to a multiplicity of affected plaintiffs exposes well the extraordinary nature of Brexit. The Law of Brexit is accordingly a wide-range space of jurisprudence. It arguably mostly shows little interpretative creativity and a generally more conservative approach to the evolution of key legal provisions. As the subject and object of the Law of Brexit, the CJEU has shown a highly political engagement with law and politics and has naturally disappointed those seeking vigorous and robust checks and balances.

The chapter has demonstrated that while many of the outcomes may be complex to discern as to their place in the broader Brexit matrix, there is a lively range of case law, a wide commitment to uses legal processes and a growing corpus of autonomous jurisprudence generally. The likely long-term impacts of Brexit-related strategic litigation, and the potential for backlash against politically motivated litigation by both political actors and the courts themselves appear as very vivid concerns. The place of the UK and its courts in EU law over the years has been significant in the view of many with respect to the impact of common law on constitutional reasoning of the EU. Arguably the Law of Brexit is another instalment therein. The Law of Brexit, as it evolves at the CJEU, sadly suggests a very distinctive turn towards highly rushed, politicised, and reductionist reasoning in the resulting constitutional project. It remains to be seen how many other litigants can 'turn the corner' of these emerging trends, in the footsteps of others, including even members of the Court itself.