

COURT OF JUSTICE OF THE EUROPEAN UNION

CASE C-621/18 WIGHTMAN

ORAL SUBMISSIONS OF TOM BRAKE MP AND CHRIS LESLIE MP

– DELIVERED BY GERRY FACENNA QC, 27 NOVEMBER 2018

INTRODUCTION

My clients are two Members of the United Kingdom Parliament, from different political parties.

In the next few weeks they will be taking a decision that will have long-lasting consequences for the United Kingdom and for the European Union. No one yet knows what that decision will be.

My clients have come to this Court to seek a ruling on the law. They do so in good faith and with sincerity. Under national constitutional law, neither they, nor the Parliament they belong to, are constrained by the policy choices of the Executive. It is the Parliament that has the power to decide, and it is the Parliament that needs certainty about the legal framework.

My clients want to make the best possible choice for the citizens whom they represent. For them to do so, it is important that EU law, in so far as it applies to that decision, is clearly understood, and can therefore be properly observed.

ADMISSIBILITY

I will only say a brief word on the question of admissibility. You are going to be addressed at length on that issue by the advocate for the United Kingdom Government because, in the light of its own political position, that is the only point the Government is willing to address.

We deal with it in paragraphs 4 to 7 of our Written Observations and we say that the answer is clear by simple application of the Court's established case law.

The issue has been thoroughly argued and then considered very carefully by the Referring Court.

In the context of the cooperation inherent in the Article 267 procedure, there is no reason for this Court to second-guess the Referring Court's conclusion. It was very clear that there is a live and practical legal issue in this case, on which a ruling from this Court is necessary.

SUBSTANCE

No party argues that a notice under Article 50(2) is final and irrevocable. The dispute is between two interpretations:

- **Either EU law permits a Member State unilaterally to withdraw an Article 50 notice, provided it is acting in good faith; or**
- **as the Council and Commission argue, a notice can only be withdrawn *bilaterally*, with the unanimous consent of the European Council.**

The choice between those interpretations goes to the very heart of the relationship between the Member States and the Union. Undoubtedly, in the current circumstances, it is politically charged. But it is a question of law. And it is therefore to be addressed by applying the normal principles of interpretation of the European Treaties.

We have set out in our written observations a reasoned analysis inspired by the Court's case law, and specifically the judgment in *van Gend en Loos*. These are principles of interpretation which have been applicable in EU law from the very beginning.

The answer to this case, we say, can be found in the spirit, in the general scheme, and in the wording of the Treaties.

I will make my submissions under those three headings.

1) The Spirit

As to the “Spirit”, there are two key features of the Treaties that we rely on, set out in paragraph 10 of our Written Observations:

- **First, the European Union’s respect for democracy and individual rights, and for the constitutional identity of the Member States. Those are founding principles of EU law.**
- **Second, the fundamental premise of the Treaties. which is the process of European integration, inspired by the shared history, culture and values of the peoples of Europe.**

Consistent with that first principle of respect for democracy and national constitutional requirements, it is of course for the citizens of each Member State to decide, democratically, whether they wish to continue to participate in the process of European integration.

Article 50 refers to a Member State taking an autonomous decision ‘*in accordance with its own national constitutional requirements*’.

It follows that in order to accord proper respect to democratic principles, and to the right of each Member State to decide this issue for itself, Article 50 must allow a Member State also to *change* its intention and remain within the Union. A democratic decision to reverse course cannot be ignored only because it comes after a notice has been issued under Article 50.

This is also the only interpretation consistent with the goals of the Treaties: integration and deepening solidarity, based on a shared cultural and legal inheritance.

Any other interpretation – and in particular a requirement for multilateral decision-making on this issue – creates the possibility of a Member State and its citizens being forced to leave the Union contrary to their own democratic decision.

That is a prospect that is not only inconsistent with the purpose and wording of Article 50; it is totally at odds with the objectives of the Treaties and the basic founding principles of the EU legal order.

Those principles of: i) respect for democracy and citizens' rights; ii) respect for national constitutional requirements; and iii) the pursuit of a more united and politically integrated European society, are the constitutional values that must inform the Court's approach.

It is remarkable that these issues are not addressed at all in the written observations of the Council and Commission.

2) The General Scheme

That brings me to the “General Scheme”, which is addressed at paragraphs [16] and following of our Written Observations.

There are three important points.

- **First, the need for an interpretation that is consistent with effective protection of citizens' rights.**

- **Second**, the procedural character of Article 50 and its place within the Treaties.
- **Third**, the need to protect the interests of the Union.

Citizens' rights

Once again, despite the importance of individual rights in EU law, the Council and Commission have not addressed the question of citizens' rights at all.

The essential point, set out at paragraph 22 in our Observations, is that, until a Member State has actually left the Union, its citizens remain EU citizens, with all of the rights and privileges that entails.

That includes the right to equal treatment.

Yet, under the Council and Commission's approach, once Article 50 has been triggered, the citizens of the notifying Member State no longer enjoy the same rights as citizens of other Member States to determine, in accordance with their own democratic arrangements, whether they wish to remain within the Union.

Even if the citizens of a Member State reach a settled, democratic conclusion to remain in the Union, according to the Council and Commission that decision can be overruled by the European Council, indeed by a single Member State exercising a power of veto.

The Treaties contain no such power to expel a Member State.

But, more importantly, such an outcome would be a gross violation of the rights and status of EU citizens who are nationals of that Member State. It would strip them of their citizenship without any valid legal basis under the Treaties.

Article 50 certainly provides no basis for such a serious interference with citizenship rights, and does not justify the difference in treatment that the Council and Commission's argument implies.

The only interpretation consistent with the principles of EU citizenship is one which protects the rights of EU citizens to determine their own political destiny, democratically, in accordance with their own constitutional requirements and in accordance with their rights under the Treaties.

Citizens of the United Kingdom should be free to choose to continue to enjoy their full legal heritage as citizens of the Union, if that is their ultimate democratic decision.

Procedural role of Article 50 in the scheme of the Treaties

The Council and Commission argue that it is impossible for a notification under Article 50 to be unilaterally revoked because it triggers a bilateral process and gives rise to legal effects within the EU system.

Paragraphs 30 to 36 of the Council's Observations identify three such supposed legal effects arising from the UK's notification:

- (1) decisions by the Council and the European Council relating to the negotiations;**
- (2) practical arrangements for the Council and other bodies to sit without the UK when Brexit is being discussed; and**
- (3) transferring the seats of two EU agencies from the UK to other Member States.**

The fact that notification under Article 50 gives rise to such effects has no bearing on the legal question of whether the notification can be unilaterally revoked.

Obviously, a Member State withdrawing from the EU cannot participate in deliberations of the EU bodies with which it is negotiating. Obviously also, some transitional measures are going to be taken. These are not legal effects in the sense of altering legal rights and obligations. They are practical measures resulting from the fact of notification.

And, in any event, the effects the Council refers to are of minimal significance compared to the vast consequences for the Union and the Member State, and for citizens' rights, following a withdrawal.

A proper contextual analysis demands clarity about the role of Article 50 in the scheme of the Treaties. And that role is clear if one looks at where the Article appears.

It is almost at the very end of the Treaty, among other procedural provisions (just after Art 48 on the procedure for amending the Treaties and Art 49 on the procedure for accession).

It is clearly all about procedure, and that is confirmed by the *travaux préparatoires* – the key extracts are in paragraphs [17] and [18] of our Written Observations.

So, Article 50 provides a procedural framework for negotiations. But it does not alter the application of EU law or the legal position of the Member State: the Court has already confirmed this in its judgment in *RO* (Case 327/18).

The Council and Commission seek to transform an essentially procedural provision into a provision with substantive legal effects.

If that argument is correct, the requirement for a Member State to notify its intention under Article 50 ceases to be a procedural step, and becomes instead an irreversible legal act. An act which modifies the rights of the Member State and its citizens – indeed altogether removes the right to decide, unilaterally, whether or not to remain within the Union.

Such a profound change in the substantive legal situation is not compatible with the procedural character of Article 50 in the scheme of the Treaties. It is also directly contrary to the intention of the drafters, as recorded in the *travaux préparatoires*.

Interests of the Union [Written observations, para. 26]

The Council and Commission say that unanimous consent of the European Council is a necessary precondition: (i) in order to provide

legal certainty; (ii) to ensure that the Institutions remain in control, and (iii) to avoid the possibility of abuse.

These might be good arguments, so far as they relate to the extension of the negotiating period under Article 50(3). The two-year time limit was clearly intended to protect the Union's interests and to provide legal certainty. And it follows that any extension, which prolongs uncertainty, must be by mutual consent.

But those considerations do not apply to a Member State acting in good faith to stop the withdrawal process. That does not prolong legal uncertainty: it stops it. It provides clarity and finality for the Union, the Member State and for affected citizens.

The Institutions' "risk of abuse" argument is also very weak. The extreme example given by the Council and Commission is of a Member State that withdraws a notification and then immediately re-submits it, in order to circumvent the two-year time limit.

No one can suggest that the United Kingdom has a plan to engage in that kind of behaviour.

But in any event, that kind of abuse would not be a legitimate exercise of the right under Article 50.

Abuse of right is a recognised principle of European law.

Of course a decision to revoke a notification has made in good faith, and consistently with the principles of mutual respect and sincere

cooperation. The Court can make that clear in its answer to the question (see para 29 of our Observations).

That really is a complete answer to the Council and Commission's supposed concern.

The only "other reasons" given at paragraphs 38 to 40 of the Council's Observations, are, essentially, that the United Kingdom's actions have caused expense, including the need to make preparations, and to open discussions at the WTO.

Such financial and short-term practical considerations cannot take precedence over legal rights, or over the fundamental objectives of the Treaties. Such matters have never been accepted by this Court as a basis for overriding fundamental rights or freedoms.

Whatever the short-term consequences of revoking an Article 50 notification, withdrawal of a Member State involves much more negative and wide-ranging consequences, for the Union, for the Member States and for EU citizens.

Ultimately, the Union's interests lie in avoiding a withdrawal, if necessary by allowing a Member State to take a final decision, before it actually leaves.

Provided it acts in good faith, there is no valid constitutional or legal interest on the part of the Union that justifies forcing a Member State to leave if it no longer wishes to do so.

3) Wording

Lastly, there is the wording of Article 50 itself (paragraphs [30]-[34] of our Observations).

Contrast the word “decision” in Article 50(1) with the specific choice of the word “intention” in Article 50(2). An “intention” is not final: it can always be changed.

The Article also does not mention any conditions that apply if a Member State decides to change its intention.

While the Council and Commission accept that revocation of a notice is possible, they say that you need a unanimous decision of the European Council.

But that condition is nowhere to be seen. This part of the TEU contains very detailed procedural rules relating to Treaty amendment, accession, and so on. If there were conditions applicable to the revocation of an Article 50 notice, they would be set out; legal certainty requires that.

In relation to this point, the Council and Commission’s analogy with the need for unanimity to extend the negotiating period is a weak argument.

A decision to extend the negotiation period substantively alters the effect of the treaty provision in Article 50(3). It is quite understandable that that should require the consent of all of the contracting parties.

By contrast, a decision by one party to revoke a notification it has given under Article 50(1), does not involve any change to the effect of the

Treaty. It is a decision which brings and end to delay and uncertainty and reaffirms the effectiveness and continuity of EU law, in accordance with Article 13 TEU.

CONCLUSION

Fundamentally, the Council and Commission ignore the critical point that Article 50 only provides for *voluntary* withdrawal, and only for withdrawal in accordance with a Member State's own constitutional requirements.

Their interpretation puts all that at risk. It envisages the possibility of *involuntary* withdrawal, contrary to national constitutional decision-making. That is a concept that is not found anywhere in the Treaties.

In the end, the clearest objection to the Council's position lies in paragraph 26 of its own Observations. There it is said that "*The duration of the process of withdrawal ... cannot be subject to the discretion of a single Member State*".

Yet that would be precisely the effect of a requirement for unanimity within the European Council. Such a requirement would place the political and legal destiny of one Member State and all of its citizens in the hands of each of the 27 other governments, each one influenced by its own political priorities.

Ultimately, the Court only has to ask one question: is that outcome compatible with the principles that underpin EU law?

In a Treaty founded on democracy and integration, can it really be right that a decision of EU citizens about their own political future, taken in accordance with their own national constitutional arrangements, can be overruled by a political decision within the European Council.

There is no example in EU law of a single Member State having the power to destroy the rights of another Member State and its citizens.

This is why the Council and Commission's position is, ultimately, not consistent with the values which are the very essence of the European Project.

Whatever the current, short term, political circumstances, the United Kingdom shares in the same democratic, cultural, and legal inheritance of Europe that inspires the Treaties. The people of the United Kingdom may soon come once more to the realisation that, in the Union, there is an active community of interest in which they wish to continue to participate.

In dangerous times, and in a dangerous World, we invite this Court to uphold the basic principles of the Treaties, which allow for that possibility, for the benefit of the Union and all of its citizens.