Deprivation of Nationality and Citizenship – The Role of EU Law

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At a glance

This article examines the relationship between the possession of the nationality of a European Union (EU) member state and the additional legal status of EU citizenship that is conferred upon those who possess such a nationality. In particular, the article examines the extent to which EU citizenship operates so as to modify the way in which possession of a nationality is regulated in both national and international law. At the centre of this examination is the question of the extent to which the nationality laws of the EU member states are within the scope of EU law so that the modes of acquisition and loss (including deprivation) of nationality are regulated by EU law. One concern of this examination is to consider the extent to which EU law and EU citizenship operate to strengthen the principle of international law that statelessness is to be avoided. The conclusion is that, as regards the acts of a member state to deprive one of its own nationals of its nationality, EU law does not offer added protection against statelessness, *per se*, and offers only limited assistance against the loss of EU citizenship.

Introduction

The nationality of an EU member state, as with that of a non-member state, is commonly considered to be a matter for that state alone in the exercise of its sovereignty. Each state is free to define under its domestic law those natural persons whom it claims as its own nationals and to prescribe the rules for the acquisition and loss of its nationality. Subject to certain constraints discussed further below, as a matter of international law, other states recognise the nationality of those natural persons claimed by a state as its nationals. The creation within the EU legal order of EU citizenship as a status that derives from possession of the nationality of a member state, raises questions about the way in which possession of the nationality of a member state is regulated in national and international law. EU law is part of international law, the EU owes its existence to international treaties, yet the EU legal order, while open to international law, operates nonetheless as an autonomous legal order whose priorities are often given preference over existing principles of international law in the judgments of the Court of Justice of the European Union (CJEU). The treatment of nationality law by the CJEU is an illustration of this as will be seen below. The extent to which EU law operates to regulate the steps taken by a member state to deprive a person of its own nationality requires consideration of the role of EU law in avoiding statelessness and in arresting deprivation of nationality where the additional effect would be the loss of EU citizenship.

EU citizenship defined

EU citizenship is a creation of the Treaty of Maastricht in 1992 (the 1992 Treaty).[1] That treaty modified the institutional basis of the European communities so that there was both a European Community and an overarching structure in the form of the European Union (following the 2009 Treaty of Lisbon, the European Community is now absorbed into a restructured European Union).[2] In addition, the 1992 Treaty conferred upon the principal persons who were the subject of European law, the nationals of the member states, the complementary status of EU citizen by virtue of their possession of the nationality of a member state.

Following amendments made by the Treat of Lisbon, EU citizenship is provided for in two treaties. Article 9 of the Treaty on European Union (TEU) provides that 'Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship'. A further foundation for the status of EU citizen is found in art 20(1) of the Treaty on the Functioning of the European Union (TFEU) which provides, in slightly different terms, that 'Citizenship 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'. Thereafter art 20(2) of the TFEU provides that EU citizens enjoy the rights and are subject to the duties provided for in the Treaties and specifies a range of such rights, among others, that are to be enjoyed. Among those rights specified is the right to move and reside freely within the territory of the member states.

Janko Rottmann v Freistaat Bayern[3]

Following its introduction into EU law, the status of EU citizen has been the subject of controversy. Its application in cases where persons have to sought to rely on EU law in order to vindicate a claim or right has been the subject of dispute in the national courts of member states, in the CJEU, and in the legal academic literature. In its judgments concerning the free movement of nationals of EU member states, the CJEU has taken to mobilising the status of EU citizen, and the attached right to move and reside freely, when giving reasons for its interpretation of the scope of EU legislation on the free movement of persons and its applicability to decisions taken in member states; see, for example, *Baumbast and R v Secretary of State for the Home Department*.[4] However, absent the allocation, by way of Treaty provision, of specific competences to EU institutions to make policy for EU citizens, the full extent of the scope for reliance upon EU citizen status in furtherance of rights arising under EU law has been uncertain.

In *Janko Rottmann v Freistaat Bayern*, the CJEU took a great stride forward in demonstrating how EU citizenship may bear upon national laws notwithstanding the limited provision made for EU citizenship in the TEU and the TFEU.[5] The case concerned an Austrian national, Dr Rottmann, who was being investigated by Austrian authorities in connection with serious fraud. He moved from Austria to Germany as a result, exercising EU rights of free movement in order to do so. The Austrian authorities issued a warrant for his arrest. While in Germany Dr Rottmann applied to naturalise as a German citizen, failing to mention the proceedings against

1 Treaty on European Union, Maastricht, signed 7 February 1992; effective 1 November 1993.
2 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, Lisbon, signed 13 December 2007; effective 1 December 2009.
3 *Janko Rottmann v Freistaat Bayern* Case C-135/08 [2010] ECR I-01449.
4 *Baumbast and R v Secretary of State for the Home Department* Case C-413/99 [2002] ECR I-07091 [82]–[86], [90]–[95].
5 *Janko Rottmann v Freistaat Bayern* Case C-135/08 [2010] ECR I-01449.

him in Austria. As a result of acquiring German nationality, Dr Rottmann lost his Austrian nationality under the operation of Austrian law. When the German authorities learned of the Austrian proceedings, they took steps to withdraw his naturalisation with retroactive effect on the grounds that he had failed to disclose the fact of the Austrian proceedings and had obtained German nationality by deception in consequence.

At this point, were the steps to deprive Dr Rottmann of his German nationality to have been completed, he would have become stateless; furthermore, he would have lost his EU citizenship. Initially, Dr Rottmann was an EU citizen by virtue of being an Austrian national. Thereafter, he had retained EU citizenship by virtue of being a German national. However, loss of German nationality would have meant that he was no longer a national of any EU member state and, therefore, not only would he have been stateless but, further, his EU citizenship would have lapsed. The prospect of the loss of EU citizenship by virtue of a loss of a member state's nationality, and its impact on the international law regulating nationality law and the avoidance of statelessness, was revealed in the *Rottmann* judgment. Whether the CJEU took an approach that was consistent with international law is a question considered further below. However, consideration is first given to the framework of international law.

International law and loss of nationality

There is little international treaty law governing the loss of nationality by nationals of states in the European region. For those states that have ratified it, the 1930 Convention on Certain Questions Relating to the Conflict of Nationality Laws[6] (the 1930 Convention) provides in art 1 that:

> 'It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.'

The 1930 Convention makes it clear that it is for each state to determine who its nationals are under its own law (reflecting the position in customary international law). Thereafter, international law intrudes by providing that the nationality law of a state is to be recognised insofar as is consistent with international conventions, international custom and the principles of law generally recognised as bearing on nationality. Such a formulation raises many further questions but, for present purposes, what matters is that it does not prevent a state from depriving a person of its nationality on the grounds that such nationality had been obtained by fraud (as in Dr Rottmann's case), even where it leaves that person stateless.

A statement of principle prohibiting *arbitrary* deprivation of a person's nationality is found in art 15(2) of the 1948 United Nations Universal Declaration of Human Rights (the 1948 Declaration)[7]. However, deprivation of nationality on the grounds that it was fraudulently obtained would not by itself constitute arbitrary deprivation.

As regards treaty law, the 1961 UN Convention on the Reduction of Statelessness (the 1961 Convention) provides in art 8(1) that a 'Contracting State shall not deprive a person of its nationality if such deprivation would render him stateless'.[8] However, derogation is permitted

6 Convention on Certain Questions Relating to the Conflict of Nationality Laws, The Hague, 12 April 1930.
7 United Nations Universal Declaration of Human Rights, adopted by the UN General Assembly, 10 December 1948.
8 United Nations Convention on the Reductions of Statelessness, New York City, 30 August 1961.

from that comprehensive protection against statelessness by article 8(2) which provides that a person may be deprived of the nationality of a Contracting state where that nationality has been obtained by misrepresentation or fraud. Thus the 1961 Convention offered Dr Rottmann no effective protection against being rendered stateless through deprivation of his German nationality.

As regards deprivation of nationality on grounds of conduct, art 8(3) of the 1961 Convention permits a Contracting State to retain the right to deprive a person of his or her nationality if, at the time of ratification of the Convention, it specified its retention of the right to deprive a person of its nationality on the ground – existing in its national law – that the person has conducted himself or herself in a manner seriously prejudicial to the vital interests of the State. Thus a person suspected of activities commonly branded as terrorist would fall within the class of person who are liable to be deprived of nationality, notwithstanding that the person would be stateless as the result. In consequence, regardless of the general principle that statelessness is to be avoided, and regardless of any obligations owed by one state towards other states when depriving one of its own nationals of its nationality, there is no absolute prohibition to be found in international treaty law as regards deprivation of nationality where statelessness results.

Such a want of protection in universal treaty law is echoed in a regional setting in the Council of Europe 1997 European Convention on Nationality (the 1997 Convention).[9] Article 3 of the 1997 Convention covers the terrain traversed by art 1 of the 1930 Convention; art 4 of the 1997 Convention provides that the nationality rules of each State Party shall be based on principles that include the prohibition of arbitrary deprivation of nationality, echoing art 15 of the 1948 Declaration; and art 7 of the 1997 Convention provides that a State Party may not provide for the loss of its nationality except where, among other things, nationality was acquired by means of fraudulent conduct, false information or concealment of any relevant fact attributable to the applicant, there is conduct seriously prejudicial to the vital interests of the State Party, echoing art 8 of the 1961 Convention save that statelessness is prohibited in the result, solely where loss of nationality occurs in the case of fraudulent conduct, false information or concealment of any relevant fact attributable to the applicant. As a result, the 1997 Convention provides no absolute bar to deprivation of a nationality acquired by virtue of fraud, even where statelessness results. International treaty law contains provisions that assist in the avoidance of statelessness but do not provide comprehensive protection.

EU law and the nationality laws of EU Member States

The impact of EU law on the nationality laws of member states has been remarkable given the steps taken to preserve the freedom of action of each member state in relation to its nationality law. As the same time that EU citizenship was being legislated into existence by the Treaty of Maastricht, the member states issued a Declaration as to the relationship between their nationality laws and the European legal order. Declaration No 2 on nationality of a Member State, annexed by the member states to the final act of the Treaty of Maastricht provides that:

> 'The Conference declares that, wherever in the Treaty establishing the European Community reference is made to nationals of the Member States, the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned…'

9 Council of Europe European Convention on Nationality, Strasbourg, 6 November 1997.

Further, a decision of the Heads of State and Government, meeting within the European Council at Edinburgh on 11 and 12 December 1992, concerning certain problems raised by Denmark on the Treaty of European Union, states that:[10]

> 'The provisions of Part Two of the Treaty establishing the European Community relating to citizenship of the Union give nationals of the Member States additional rights and protection as specified in that Part. They do not in any way take the place of national citizenship. The question whether an individual possesses the nationality of a Member State will be settled solely by reference to the national law of the Member State concerned.'

Despite such statements, the impact of EU law was already intruding into the regulation of nationality law at member state level. For example, in the period between the signing of the Treaty of Maastricht on 7 February 1992 and the Edinburgh declaration in December of the same year, the Court of Justice handed down judgment in *Mario Vicente Micheletti and others v Delegacion del Gobierno en Cantabria*.[11] In that case, the Court considered a person, Mr Micheletti, who was a national of two countries, Italy (a member state) and Argentina (not a member state). He was residing in Spain (a member state). The latter had recognised Mr Micheletti's Argentinian qualification as a dentist. Mr Micheletti then sought to secure a residence card in Spain as a Community national (by virtue of his Italian nationality) in order to reside lawfully and to practice as a dentist. His application was refused. Spanish law catered for persons with dual nationality (where Spanish nationality was not held) by providing a rule of recognition to the effect that the nationality of the place of habitual residence prior to arrival in Spain took precedence over the other nationality. The effect of this provision, left unchallenged, would have been that his Italian nationality would not have been recognised and, in consequence, rights of free movement arising under Community law by virtue of possession of Italian nationality would not have been vindicated in Spain.

The provision made in Spanish law reflected the rules of recognition in international law in cases of a person with multiple nationalities where the effective nationality was with the state with whom the person had a genuine connection or the closest connection, see for example *Liechtenstein v Guatemala (Nottebohm)*.[12] The problem in *Micheletti* was that such an approach, were it to have been applied in Community law, would have deprived Mr Micheletti of the benefits of Community law because he was a dual national (where one nationality was not that of a member state) rather than solely an Italian national. In this circumstance, the Court of Justice (being the forerunner of the CJEU) stepped in and modified the approach taken in international law to cases of multiple nationality, in order to protect the effectiveness of the right of free movement in the Community legal order. The Court held:

> '10 Under international law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality. However, it is not permissible for the legislation of a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty.

10 OJ 1992 C 348, p 1.
11 *Mario Vicente Micheletti and others v Delegacion del Gobierno en Cantabria* Case C-369/90 [1992] ECR I-04239.
12 *Liechtenstein v Guatemala (Nottebohm)* 1955 ICJ Reports, p 4.

> 11 Consequently, it is not permissible to interpret Article 52 of the Treaty to the effect that, where a national of a Member State is also a national of a non-member country, the other Member States may make recognition of the status of Community national subject to a condition such as the habitual residence of the person concerned in the territory of the first Member State.'

The reference in paragraph 10 to each member state having 'due regard' to Community law when laying down the conditions for the acquisition and loss of its nationality did not bite upon the central issue in the case which concerned the priority given to one nationality over another. However, that statement of principle was to take on added significance in the subsequent case of *Rottmann* as will be seen below.

In the paragraphs from the judgment in *Micheletti* quoted above, it can be seen that the Court modified the approach taken in international law by holding that the privileging of the nationality of the state of former habitual residence (prior to migration to the host state) amounted to the impermissible introduction of an additional condition restricting the effectiveness of the possession of a Community state nationality and the attendant rights of free movement. In this way, the Court defended the effectiveness of the Community state nationality in issue (Italian nationality) and its role in the operation of Community law relating to free movement. That Italian nationality had been acquired by descent rather than by birth on the national territory did not require its effect to be suppressed in favour of Argentinian nationality. The Spanish law privileging the nationality of the state of former habitual residence had been consistent with the principle of international law that permitted a state to treat as the effective nationality, the nationality of the state with which the person had a genuine connection or the closest connection. The Court declined to follow such an approach within its own jurisdiction, asserting the value of simple possession of the nationality of a member state. This modification of the approach generally taken in international law was tailored to the specific requirements of the Community legal order.

Although, strictly, *Micheletti* did not concern the modes of acquisition and loss of Italian nationality, the protection of Italian nationality as a nationality lawfully acquired under Italian law demonstrated that Community law could be mobilised in support of the nationality law of a member state and that such mobilisation of Community law in the field of nationality law need not militate against the freedom of member states to determine their nationality laws. Such an approach to recognising the obligation of one member state to accept the freedom of another member state to set the terms for the acquisition of its nationality may be seen also in the judgment in *Chen v Secretary of State for the Home Department* Case C-200/02, where the Court of Justice recognised a right of free movement where Ireland's nationality law conferred Irish nationality on a child born in the United Kingdom (Northern Ireland), that is in another member state, by simple virtue of birth in that territory.[13]

By the time of the *Chen* case, rights of free movement by nationals of member states were exercised in the context of the right being conferred on them by virtue of their status as EU citizens; see what is presently art 21 TFEU and what was then art 18 of the Treaty establishing the European Community. However, the case did not concern the interrelationship between the nationality law of member states as regards its acquisition or loss on the one hand and EU citizenship on the other. Such judicial consideration of the relationship between the acquisition of member state nationality and EU citizenship as had been undertaken, for example in the case

13 *Chen v Secretary of State for the Home Department* Case C-200/02 [2004] ECR I-9925 [39]–[40].

of *The Queen v Secretary of State for the Home Department, ex parte Manjit Kaur* had re-enforced the freedom of a member state to set the terms for acquisition of its own nationality.[14] As regards judicial consideration of the relationship between the acquisition of member state nationality and EU citizenship where loss of nationality is a prospect, it is necessary to return to *Rottmann*.

Rottmann and the relationship between member state nationality and EU citizenship

The Opinion of Advocate General Poiares Maduro in *Rottmann* sets out a coherent approach to the relationship between the nationality of a member state and EU citizenship. The Advocate General states:

> '23…Union citizenship assumes nationality of a Member State but it is also a legal and political concept independent of that of nationality. Nationality of a Member State not only provides access to enjoyment of the rights conferred by Community law; it also makes us citizens of the Union…
>
> … Access to European citizenship is gained through nationality of a Member State, which is regulated by national law, but, like any form of citizenship, it forms the basis of a new political area from which rights and duties emerge, which are laid down by Community law and do not depend on the State. This, in turn, legitimises the autonomy and authority of the Community legal order…'

Possession of the nationality of a member state is a necessary condition to acquire EU citizenship but thereafter that citizenship is a legal concept independent of the nationality that gave birth to it. Further, from possession of EU citizenship, new rights and duties emerge for that citizen, which are dependent on EU law and not the law of a member state. EU citizenship is a legitimising aspect of, and exemplifies, both the authority and the autonomy of the EU legal order. The Advocate General went on to note:

> '…That is why, although it is true that nationality of a Member State is a precondition for access to Union citizenship, it is equally true that the body of rights and obligations associated with the latter cannot be limited in an unjustified manner by the former. In other words, it is not that the acquisition and loss of nationality (and, consequently, of Union citizenship) are in themselves governed by Community law, but that the conditions for the acquisition and loss of nationality must be compatible with the Community rules and respect the rights of the European citizen.'

It is the question of *compatibility* with EU law that was in issue in *Rottmann* notwithstanding that the modes of acquisition and loss of nationality (and therefore of EU citizenship) are not governed by EU law. Dr Rottmann stood to lose his German nationality, to lose his EU citizenship, and to become stateless if the deprivation proceedings were concluded adversely to him. However, for the CJEU the material question is whether such a step was compatible with EU law.

14 *The Queen v Secretary of State for the Home Department, ex p Manjit Kaur* Case C-192/99 [2001] ECR I-01237.

In its judgment in *Rottmann,* the CJEU held that, notwithstanding the fact that possession of nationality is a matter within the competence of member states, the situation of Dr Rottmann (who stood to lose the nationality of one member state, having already lost the nationality of another member state that he had originally possessed), was such that he stood to lose his EU citizenship and its attendant rights.[15] Therefore, the situation, by reason of its nature and consequences, fell within the *ambit* of EU law. This was not a judicial exercise in extending the competence of EU institutions but rather recognition of the direct impact (loss of EU citizenship) that a national measure (deprivation of nationality) would have on a status and on attendant rights subsisting in the EU legal order. By virtue of such an impact, EU law was engaged.

In this context, the CJEU re-iterated its holding in *Micheletti*, that when exercising its powers in the sphere of nationality, member states must have 'due regard' to EU law.[16] However, the use of this requirement, to have 'due regard' to EU law, was mobilised in a far more muscular manner than in *Micheletti*. The CJEU stated that, as the deprivation of nationality affected the rights conferred in the EU legal order, it was 'amenable to judicial review carried out in the light of European Union law'.[17] Whilst such a formulation may sound obscure, it is merely stating that the deprivation proceedings may be the subject of judicial scrutiny in order to ensure that they are compatible with the both the laws and the general principles of EU law.

In that context, the CJEU held that deprivation of nationality on the grounds that it was obtained by deception corresponded to a reason in the public interest and a legitimate step to take. The CJEU noted that provision for deprivation on such grounds could be found in both the 1961 Convention and in the 1997 Convention, even where the person would be left stateless.[18] At this point the CJEU fails to engage in any consideration of whether the principle of avoidance of statelessness ought to be extended in the operation of EU law to protect those who obtain nationality by deception. For the CJEU, the outer limits of the protection afforded by international treaty law (the 1961 Convention and the 1997 Convention) define the protection to be afforded against statelessness in the EU legal order. EU law, it appears, is not to be used to move the position on. Instead the CJEU merely observes that the legitimacy of withdrawing naturalisation obtained by deception resulting in statelessness remains valid, even where the consequence is the loss of EU citizenship.[19]

Were any consideration to have been given to whether there ought to have been an extension of the principle that statelessness is to be avoided, the CJEU would have been required to consider whether there was a material difference between a situation where a non-EU citizen naturalised in an EU member state using deception or whether the principle ought to be extended only so far as to protect those who were EU citizens prior to naturalising in an EU member state using deception. In all likelihood, given the concern about the abuse of EU citizenship acquired by non-EU citizens who were previously not nationals of a member state, any extension of the principle, were it to have been made, would have extended solely to the latter. However the CJEU does not enter into any consideration of whether to extend the principle that statelessness is to be avoided. In doing so it passed up the opportunity to prevent the emergence of statelessness on the territory of the EU member states where EU citizenship and the nationality of the first member state (Austria) had not been obtained by fraud. The

15 *Janko Rottmann v Freistaat Bayern* Case C-135/08 [2010] ECR I-01449, [42].
16 ibid [39], [45] and [47].
17 ibid [48].
18 ibid [51]–[52].
19 ibid [54].

stance of the CJEU went no further than the position in international treaty law between states, without further consideration of whether the development of the principle that statelessness is to be avoided might require fresh consideration within the EU legal order.

Such a stance is unsatisfactory. The avoidance of statelessness and the attribution of nationality to natural persons are aspects of a well-functioning international legal order. It is not simply the individual who suffers from his or her status as a stateless person but the international legal order itself that is harmed as, in a world divided up into territorial sovereign states, a stateless person is a natural person who is unattributed to any state and who therefore lacks a place to which he or she belongs and can return to as of right. The delinquency of such a situation provides the impetus for the further development of the principle that statelessness is to be avoided.

The CJEU, as a supranational judicial institution considering a situation where EU citizenship stood to be lost in circumstances where one member state nationality had already been exchanged for another, was well-placed to develop the principle that statelessness is to be avoided. First it was not bound by the 1961 Convention or the 1997 Convention. Second, it was open to it to mobilise the avoidance of statelessness as a general principle where the harm to be avoided was an injury not only to the prospectively stateless individual but also to the international legal order. Third, on the facts and as a motive for developing the law in this direction, deprivation of German nationality would have led not only to statelessness but also to a loss of EU citizenship. The loss of the latter was arguably more egregious as there is no suggestion that EU citizenship (as opposed to German nationality) was obtained by fraud; Dr Rottmann became an EU citizen by virtue of his original Austrian nationality not by fraudulent acquisition of German nationality.

In the result, the CJEU passed up an opportunity to develop the principle that statelessness is to be avoided and that, in the interests of the international legal order, deprivation of nationality where only one nationality is held ought only to take place once another nationality (whether of a non EU member state or, more radically, of a member state) has been secured or recovered. Such a principled stance would not have precluded Dr Rottmann being prosecuted under the criminal law for obtaining German nationality by deception nor would it have prevented him from being sent to Austria to face trial for fraud (thus he would not have escaped punishment) but it would have avoided his statelessness and thus harm to the international legal order. Although a limitation on the rights of states to bring deprivation proceedings where nationality is obtained by fraud may appear an unwarranted intrusion into the sovereign domain, such a limitation may be justifiable in order avoid the harm to the international legal order occasioned by statelessness, by reference to the availability of criminal sanction to punish the individual for his or her wrong-doing in using deception, and by reference to the need to protect those who were already EU citizens prior to using deception to acquire the nationality of another member state.

It has been noted that the CJEU failed to develop the principle that statelessness is to be avoided. A similar opportunity was missed as regards the development of the principle that loss of EU citizenship is to be avoided. Given that EU citizenship (as opposed to German nationality) had *not* been obtained by fraud, the CJEU passed up an opportunity to state a principle that EU citizenship itself should not be lost unless and until the nationality of another member state had been secured or recovered. The CJEU was clear that where nationality of a member state was acquired by deception, deprivation of the same was not precluded as a result of EU citizenship merely because the person had not recovered the nationality of his or her member state of origin.[20]

20 ibid [57].

The development of such a principled stance would not have prevented Dr Rottmann from being prosecuted in Germany (for deception in acquiring nationality) or in Austria (for fraud) but would have recognised that his EU citizenship had not been obtained by fraud. As was already mentioned in respect of the failure to develop the principle of the avoidance of statelessness, as regards the failure to develop a principle that loss of EU citizenship is to be avoided, had the development of such a principle been considered, the CJEU would have had to decide if it applied where a non-EU citizen acquired EU citizenship through naturalisation in an EU member state, or only to those who were EU citizens prior to naturalising in an EU member state using deception. Again, as mentioned earlier, concern about the abuse of EU citizenship acquired by non-EU citizens, means that it would in all likelihood have extended solely to the latter. However, the CJEU does not enter into any consideration of whether to develop a principle that loss of EU citizenship is to be avoided.

Instead of taking such a principled stance, the CJEU fell back on the application of the principle of proportionality, such principle providing a measure as much of procedural as of substantive protection. The CJEU held that it was for the national court to decide whether the decision to deprive Dr Rottmann of his nationality observed the principle of proportionality, as regards the consequences for Dr Rottmann's situation in the light of EU law and, where appropriate, national law.[21]

That the CJEU left it to the national court making the reference to adjudicate upon whether the deprivation proceedings were compatible with EU law is unsurprising, as the role of the CJEU in this case was to interpret EU law not to adjudicate upon the outcome. What is surprising is that the CJEU did not state the principle that EU citizenship itself should not be lost unless and until the nationality of another member state had been secured or recovered. Instead the CJEU laid out some factors to be followed when assessing the proportionality of the measure interfering with EU citizenship and therefore the lawfulness of the deprivation proceedings, turning the task into an essentially evaluative exercise of all the relevant circumstances:

> '56. Having regard to the importance which primary law attaches to the status of citizen of the Union, when examining a decision withdrawing naturalisation it is necessary, therefore, to take into account the consequences that the decision entails for the person concerned and, if relevant, for the members of his family with regard to the loss of the rights enjoyed by every citizen of the Union. In this respect it is necessary to establish, in particular, whether that loss is justified in relation to the gravity of the offence committed by that person, to the lapse of time between the naturalisation decision and the withdrawal decision and to whether it is possible for that person to recover his original nationality.'

The assessment of the proportionality of the act of deprivation of nationality where loss of of EU citizenship is also at stake is riddled with problems. How is a national court supposed to measure the consequence of deprivation proceedings for the person concerned and for his or her family members where loss of EU citizenship rights are at stake? In the ordinary run of things, deprivation of nationality and the loss of the right to reside in the territory of the EU member states as of right will have a severe impact on a person, with the potential for a loss of lawful residence in the member state concerned and/or expulsion from that state (and the EU as a whole). What is the 'tipping point' where deprivation of nationality and loss of EU citizenship becomes incompatible with EU law? What principles apply in attempting to assess

21 ibid [55].

the consequences of deprivation proceedings? How are these consequences to be measured against the gravity of the offence that prompted the taking of proceedings? In what way is the lapse of time significant and after what period of time is deprivation of nationality and loss of EU citizenship incompatible with EU law, absent special or exceptional circumstances? The effect of deprivation of nationality on the material circumstances of the person concerned and his or her family members would also need to considered for compatibility with fundamental human rights principles whether those rights are found in the Charter of Fundamental Rights of the European Union[22] or in the provision made in the national constitutional orders of member states. Even in cases where actual loss of EU citizenship is not in issue but loss of enjoyment of the attendant rights of EU citizenship is in issue, fundamental human rights require consideration.[23]

Further, whilst the CJEU went on to state that observance of the principle of proportionality requires the person to be afforded a reasonable time to try to recover the nationality of his member state of origin, there was no indication of the minimum period of time to be provided nor any indication of what is to be done if the member state of origin does not provide for simple recovery of nationality in its domestic law.[24] What happens next in the latter scenario?

Judges in the national courts of the member states are left alone to grapple with these questions in deprivation of nationality proceedings. Whilst they are able to refer questions of the interpretation of EU laws to the CJEU as being questions over which the CJEU has jurisdiction, it will be hard to frame as problems of interpretation questions that merely seek further guidance on the approach to evaluating all the circumstances at large when assessing the proportionality of the deprivation proceedings as a legitimate step in the public interest against their impact on the targeted individual and his or her family members. As a result, by avoiding statements of principle that provide protection against loss of EU citizenship and by devolving the question of compatibility with EU law to national courts by way of assessment in accordance with the principle of proportionality, the CJEU may have made it harder for the CJEU to engage in further development of the law surrounding loss of EU citizenship by virtue of loss of member state nationality.

Conclusion

Where nationality of a member state has been obtained by fraud and deprivation proceedings follow, EU law affords no substantive protection against statelessness and only modest protection against deprivation of nationality where loss of EU citizenship follows. Such protection as is afforded in respect of the latter involves an unstructured, evaluative assessment of the consequences of the decision, of whether that loss is justified in relation to the gravity of the offence, of the lapse of time between the naturalisation decision and the withdrawal decision, and of whether it is possible for that person to recover his original nationality. No further assistance or guidance is provided. The position is unsatisfactory as the judicial task is unclear and the evaluative exercise is liable to be approached differently by different judges, whether sitting in the national courts of the same member state or in the national courts of different member states. Once the variation has become apparent in member state national judicial decision-making in deprivation of nationality proceedings when considering loss of EU citizenship, it would be beneficial for the CJEU to have a further opportunity to consider

22 OJ 2010 C 83, p 389.
23 *Murat Dereci and Others v Bundesministerium für Inneres* Case C-256/11 [2011] ECR I-11315, [69]–[74].
24 ibid [58].

whether to provide the effective protection within its power so as to avoid statelessness and, separately, to consider whether it has provided effective protection against the loss of EU citizenship or whether a new approach is required.

While the concern of the CJEU is to ensure the compatibility of national measures with EU law, the latter is part of international law (being founded on international treaties). The CJEU can and does draw upon principles found in both international treaty law and customary international law when giving judgment on the requirements of EU law. The CJEU may apply the principle that statelessness is to be avoided when considering loss of EU citizenship because the delinquency occasioned by rendering EU citizens stateless through deprivation of nationality proceedings is a matter of harm to the international legal order of which EU law forms a part. Further the harm occurs on the territory of the EU member states and leads to the loss of enjoyment of EU rights enjoyed in that territory.

Where a person was an EU citizen (of another member state) *prior to* obtaining the nationality of a member state by deception, and now stands to lose the nationality of a second member state, to lose EU citizenship and to be rendered stateless as a result of deprivation proceedings, the principle that statelessness is to be avoided is engaged in a certain way. As loss of the nationality of the member state (and assuming that the nationality of a non-member state is not available) leads to statelessness, where possession of that nationality is a pre-requisite for EU citizenship, the scope and application of the principle that statelessness to be avoided requires consideration. There is no sensible way of divorcing the question of prospective statelessness from prospective loss of EU citizenship nor, given the intimate link between possession of the nationality of a member state and possession of EU citizenship, is there any public policy reason for attempting such a divorce. The intimate link between possession of the nationality of a member state and EU citizenship and can should act a spur the further development of the principle that statelessness is to be avoided in the EU legal order.

As regards the development of a principle that loss of EU citizenship is to be avoided, such a development is compelling in the situation of a person who was an EU citizen *prior to* naturalising as the national of another member state by deception, who now faces deprivation of nationality proceedings, and against whom there is no suggestion that EU citizenship itself was originally obtained by fraud. In such a circumstance, the loss of EU citizenship is a punishment out of all proportion to the harm caused by obtaining nationality by deception as it involves a loss of rights (obtained other than by fraud) to remain lawfully and as of right on the territory of the EU member states and to enjoy the attendant rights. Such an outcome can and should be avoided.

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