

# EUROPEAN UNION CITIZENSHIP, NATIONAL SOVEREIGNTY AND STATELESSNESS

## THE GROWTH OF A EUROPEAN COMMON FRAMEWORK FOR INTEGRATION

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### Abstract

Although the European project started in the 1950s and although the introduction of a European form of citizenship with precisely defined rights and duties was considered as long ago as the 1960s, European citizenship became a reality only with the Maastricht Treaty in 1992. Since 1993 every citizen of an EU Member State is also considered a citizen of the Union i.e. an EU citizen. This citizenship is provided directly via the Treaty on the Functioning of the European Union and is something additional – EU citizenship does not replace national citizenship.

In general, national governments have the right to decide the process for gaining and losing the citizenship of their country. In the European Union however, this is complicated by the fact that each citizen of a member country also holds European Union citizenship. It was this difference that led to Mr. Rottmann bringing a case to the European Court of Justice, when he faced the possibility of losing his German citizenship.

This study analyses the ruling of the ECJ in the case *Rottmann v Freistaat Bayern* and its possible consequences for a European common framework for integration of national legislation with European law.

### Keywords

*European Union; EU Citizenship; naturalisation; nationality; national legislation; sovereignty; principle of proportionality.*

### Preamble

Union citizenship is derived and complementary in character in relation to nationality.

It follows from this principle, that, according to the European Union treaties, there is no autonomous way of acquiring and losing Union citizenship, which are dependent on the acquisition and loss of the nationality of a Member States.

In this context, Union citizenship presupposes nationality of a Member State.

Under European Union law, it is exclusive competence of Member States to establish the conditions for the acquisition and loss of nationality, and, therefore, Union citizenship.

Particular issues may arise when, from the application of national Member State's law, it could derive the total loss of relevant national citizenship by a citizen and, therefore, the loss of Union citizenship.

In 2008, the question of the extent of discretion available to the Member States to determine who their nationals are, came under scrutiny of the Court of Justice, which in 2010 stated that, in exercising its powers in the sphere of nationality, a Member State of the European Union may withdraw its nationality from a citizen of the Union, when that person has obtained it by deception.<sup>1</sup>

According to the decision of the Court of Justice discussed herein, Member States must, in exercising their power to lay down the conditions for the acquisition and loss of nationality, have due regard to European Union law and observe the principle of proportionality.

Many important issues arose from this case, concerning the Union citizenship and Member State nationality, considering, in particular, the opportunity for European Union law to challenge Member States' decisions and measures on the grounds they are disproportionate and the possible duties of the Member States to cooperate amongst themselves in

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<sup>1</sup> Court of Justice, decision dated 2 March 2010 in case C-135/08, Janco Rottmann v. Freistaat Bayern.



order to avoid situations where a person may become stateless, on a national point of view, and therefore deprived also of the Union citizenship.

For this purposes, it looks interesting to deal with these topics according to the judgement of the Court of Justice.

## **1. The judgement of the Court of Justice dated 2 march 2010 in case C-135/08**

### **1.1 Factual and legal background**

The applicant in the case C-135/08, Dr. Janko Rottmann is an Austrian and EU citizen by virtue of his birth within the territory of the State.

Investigated of fraud in his native Austria in 1995, Dr. Rottmann moved to Germany, where he successfully naturalised in 1999 and, consequently, lost his Austrian nationality.

Dr. Rottmann, however, in the form which he was required to complete to apply for the German naturalisation concealed his criminal prosecution in Austria and the fact that a national arrest warrant on his name had been issued in that Country.

Upon being informed of that fact, the German authorities withdrew his nationality on the ground that Dr. Rottmann had concealed that he was the subject of a judicial investigation in Austria and the naturalisation had been acquired by fraud.

In this context, Dr. Rottmann did not satisfy the conditions for the recovery of his previous nationality, and, for this reason, he remained essentially stateless.

Consequently, Dr. Rottmann brought an action for annulment against that decision, arguing that the withdrawal of nationality was contrary to international law, which prohibits statelessness and also contrary to European Union law, as it entails the loss of European Union citizenship.

The *Bundesverwaltungsgericht* (German Federal Administrative Court) decided to stay the proceedings and to ask the Court of Justice whether European Union law restricts the power of the Member State to regulate questions of nationality where a person finds himself deprived of the latter nationality fraudulently obtained and, in consequence, becomes stateless and loses Union citizenship.

In case of affirmative answer to this preliminary question, the *Bundesverwaltungsgericht* asked to the Court of Justice if the Member State which naturalised a citizen of the Union and now intends to withdraw that naturalisation obtained by deception is obliged to refuse that withdraw or, conversely, if it is duty of the Member State of the former nationality to interpret and adjust its national law so as to avoid the situation of statelessness.

### **1.2 The opinion of the Advocate General**

The opinion of the Advocate General Poiares Maduro on the “case Rottmann” seemed to be very conservative, considering that he pointed out that the withdrawal of the citizenship by Germany was not contrary to European Union law and also that, according European Union law, it was not requested the restoration of the Austrian nationality.

The opinion of the Advocate General moved from the general international principle according to which the conditions for the acquisition and loss of nationality, and Union citizenship, are exclusively competence of the Member States.

As confirmed by the Permanent International Court of Justice, according to the Advocate General, «international law leaves it to each State to settle by its own legislation the rules relating to the acquisition of its nationality».<sup>2</sup>

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<sup>2</sup> Opinion of Advocate General on Case C-135/08, delivered on 30 September 2009, § 18.



However, the Advocate General pointed out that, according to a principle of customary international law, if the situation comes within the scope of European Union law, it cannot be discretionary. In other words, none national competence in the Union is absolute: every situation is necessarily subject to the obligation to comply with the European Union rules.

In particular, according to the Advocate General, to settle this specific issue, it is necessary to understand the relationship between the nationality of Member State and Union citizenship.

As observed by the Advocate General Maduro, indeed, although it is true that «nationality of Member State is a precondition for access to Union citizenship», it is equally true that «the body of rights and obligation associated with the latter cannot be limited in an unjustified manner by the former»<sup>3</sup>.

This necessarily implied the possibility of European Union involvement in the sphere of nationality without, however, imposing to the Member State not to deprive a person of his nationality, when the consequence of this withdrawal is the loss of the Union citizenship.

In this particular case, as observed by the Advocate General, neither the international rules nor the European Union law had been broken.

In that context the Advocate General clarified that in this case, deprivation of nationality was «not linked to exercise of the rights of freedoms arising from the Treaty»<sup>4</sup> and that, on the contrary, for a State to withdraw its nationality obtained by fraud corresponds to a legitimate interest in satisfying itself as to the loyalty of its nationals.

As regards the restoration of Austrian nationality, the Advocate General observed that European Union law in matter is powerless because it is exclusively competence of the Austrian law to decide whether or not that reasoning should apply.

### **1.3 The judgment of the Court**

In its judgment the Court of Justice held that European Union law, and in particular Art. 17 of the European Community Treaty ("EC", which is currently transposed into Article 20 of the Treaty on the Functioning of the European Union) allows a member State to withdraw from a citizen of the Union the nationality of that State acquired by naturalisation when that nationality was obtained by deception, on condition that the decision to withdraw observes the principle of proportionality.

The Court first analysed the issue of withdrawal of naturalisation. In particular, if that issue concerned European Union law in any way or whether it was a purely internal, domestic matter.

Interestingly, the Court held that the fact that Dr Rottmann had exercised his right of free movement by moving from Austria to Germany was not enough to constitute a cross-border element capable of connecting the withdrawal of naturalisation with European Union law.

Consequently, the Court found as a connecting factor the consequence in European Union law of losing one's nationality.

It held that it is clear that the situation of a citizen of the Union who is faced with a decision withdrawing his naturalisation, adopted by the authorities of one member State, and placing him, after he has lost the nationality of another member State that he originally possessed, in a position capable of causing him to lose the status conferred by ex Article 17 EC and the rights attaching thereto falls, by reason of its nature and its consequences, within the scope of European Union law.

The Court recalled the important principle that it is for each member State, having due regard to European Union law, to lay down the conditions for the acquisition and loss of nationality (as already stated in Case C-369/90 Micheletti and

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<sup>3</sup> Opinion of Advocate General on Case C-135/08, delivered on 30 September 2009, § 23.

<sup>4</sup> Opinion of Advocate General on Case C-135/08, delivered on 30 September 2009, § 33



Others, Case C179/98 Mesbah and Case C200/02 Zhu and Chen) and thus, «the Member States must, when exercising their powers in the sphere of nationality, have due regard to European Union»<sup>5</sup>.

The Court duly proceeded to test the legitimacy of the revocation of nationality acquired by fraud in the light of international law.

To make a judgment on the validity of such a decision the principle of proportionality applied.

However, according to the Court of Justice, in such a case, only the National Court can determine whether the withdrawal decision at issue in the main proceedings observed that principle, so far as consequences that the loss of Union citizenship and the rights associated with this status entailed for the situation of the person concerned, as well as for his family members.

With regard to that last question, the National Court should have established «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».<sup>6</sup>

By way of conclusion, the main rule enshrined in the judgment of the Court is that when Member States nationality and Union citizenship is at stake, the national Court must apply the principle of proportionality.

About the second question, since the Austrian decision to re-naturalise or not Dr. Rottmann had not yet been adopted, the Court argued that it was not in the position to rule on the possible restoration of “original” nationality.

## **2. Substantive Remarks**

### **2.1 European Union citizenship and nationality sovereignty**

The judgement of the Court of Justice on the Rottmann case opened the way for further potential incursions by the European Union law in the sphere of nationality sovereignty.

According to the judgment, first of all, there is the definitive competence of the Court of Justice to exercise judicial review of the Member State's decisions about nationality.

Furthermore, it has been noticed that the judgment created «an overhaul of the legal construction of the wholly international situation»<sup>7</sup>, and that the legal status of European Union citizenship comes across as reinforced, since the Court admitted its autonomy, «potentially liberating its essence from the vestiges of derivative thinking: although acquired through Member States' nationalities»<sup>8</sup> and let understand that in the future the two status could be decoupled. While, in fact, «making it clear that the EU is not ready to take a stance against statelessness arising as a result of the lack of coordination between the Member States, Rottmann demonstrated with clarity that the Member States have to be more

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<sup>5</sup> Judgment of the Court of Justice, case C-135/08 § 45.

<sup>6</sup> Judgment of the Court of Justice, case C-135/08 § 56

<sup>7</sup> Kochenov D., Case C-135/08, Janko Rottmann v. Freistaat Bayern, judgment of 2 March 2010 (Grand Chamber), in *Common Market Law Review*, 2010, 47 and following (and available at <http://ssrn.com/abstract=1702474> too), where it is also noticed that: «After Rottmann the material scope of EU law is not the same and the romantically narrow vision of EU law based on the belief that EU citizenship is not there to enlarge its scope *ratione materiae* (irreconcilable as it is with the status and nature of EU citizenship) became even shakier».

<sup>8</sup> Kochenov D, *ibidem*, 47 and following.



serious in taking EU law into account when establishing and applying the national rules on the loss and acquisition of nationality»<sup>9</sup>.

In the case discussed herein the Court actually pointed out that Member States are obliged to take European Union law into account when decisions on nationality are taken.

The Member States' competence concerning nationality regulation cannot be exercised by Member States as a reserved domain, but it has to be carried out in the light of European Union law, which could therefore limit the exercise by Member States of their competences in this field.

## **2.2 European citizenship and human rights**

The Court stated that Dr. Rottmann fell within the scope of European Union Law by reason of its nature and its consequences, since it is clear that being a citizen is enough to fall within the scope of the law when the very status of citizenship is in question.

In practice this means that any decision on conferral or revocation of nationality taken by the Member States which is able to affect the European Union citizenship status of an individual falls within the scope *ratione materiae* of European Union law.<sup>10</sup>

Notwithstanding that the European Union seems unable to ultimately protect citizens against the problem of statelessness, against «the loss of their “right to have rights”, especially in the context where statelessness arises as a result of playing with the national regulation in the “ever closed Union”». <sup>11</sup>

The European Union plays an important role to improve the position of the European Union citizenship with respect to related human rights, and it should be able to formulate and enforce a strong ethical position against statelessness at least in those cases where European Union citizenship is at issue.

And this is particularly significant given that the problem at issue is partly of the EU's own making. As Advocate General Poiares Maduro observed in his Opinion, if not for free movement rights, Dr. Rottmann would not have been able to naturalise in Germany.

## **2.3 European Union citizenship and principle of proportionality**

In the Rottmann case the Court stated that the loss of the rights enjoyed by every citizen of the Union – which include the right to rely on the prohibition of all discrimination on ground of nationality – are justified and proportionate 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.

According to the Court, when nationality has been acquired by deception, European Union law does not require a Member State to refrain from withdrawing naturalisation merely because the person concerned has not recovered the nationality of his Member State of origin. It is, nevertheless, for the national court to determine whether, before such a decision withdrawing naturalisation takes effect, having regard to all the relevant circumstances, observance of the principle of proportionality requires the person concerned to be afforded a reasonable period of time in order to try to recover the nationality of his Member State of origin.

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<sup>9</sup> Kochenov D, *ibidem*, 47 and following.

<sup>10</sup> Kochenov D, *ibidem*, 47 and following.

<sup>11</sup> Kochenov D, *ibidem*, 47 and following.



The Rottmann case seems to offer «important guidance to national courts and legislative and administrative authorities as to what and EU standard of proportionality might demand in the domain of loss and – potentially – acquisition of citizenship».12

It has been noticed that the application of proportionality in the cases of statelessness does not seem to be appropriate, since «the application of this principle in the context when the very legal personhood of an individual is at stake seems unwarranted: balancing away ‘the right to have rights’ should not be possible».13

The approach embraced by the Court in the Rottmann case seems to be a departure from its previous case law on nationality, exemplified by the case of Micheletti tradition, where the Court took a principled stance, dismissing the international law rule on recognition of nationalities.14

In the Rottmann case however, «rightly underlining the importance of the proportionality principle in deciding cases, the Court left the actual application of proportionality to Member States, notwithstanding the fact that the case specifically concerned the loss of the EU-level legal status».15

In this context, it seems that European Union should take a stronger position in order to try to avoid the loss of any rights, any human rights, by any possible person.

## **2.4 Conclusive considerations**

By means of the Rottmann case the legitimacy of the European Union’s involvement in the matters related to the acquisition and loss of European Union citizenship is established beyond any doubt.

Therefore, the Member States’ regulation on nationality is affected and Member States have to comply with this scenario, by amending – inter alia - the provisions of their nationality laws which might be problematic in the light of European Union law.

The Rottmann case established the growth in importance of European Union citizenship reinforced with the Court of Justice’s powers to subject the field of nationality regulation to judicial review, coupled with the already observable influence of European Union citizenship on the nationalities of the Member States.

All those considerations allows posing the question of the possibility of a wished, forthcoming and fully autonomous status of European Union citizenship.

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12 Shaw J. (edited by), Had the European Court of Justice challenged Member State sovereignty in nationality law?, Firenze, 2011, 1 and following, available at [http://cadmus.eui.eu/bitstream/handle/1814/19654/RSCAS\\_2011\\_62.corr.pdf?sequence=3](http://cadmus.eui.eu/bitstream/handle/1814/19654/RSCAS_2011_62.corr.pdf?sequence=3).

13 Kochenov D, *ibidem*, 47 and following.

14 Judgment of the Court of Justice of 7 July 1992, Mario Vicente Micheletti and Others v. Delegation del Gobierno en Cantabria.

15 Shaw J. (edited by), *ibidem*, 1 and following.

