Court of Justice of the European Union

Decision of 2 March 2010, Case C-315/08 *Janko Rottman* v. *Freistaat Bayern*

Case Note 1

Decoupling Nationality and Union Citizenship?

H.U. Jessurun d'Oliveira*

An arm-wrestling match between the EU and member states: nationality law

> This reference for a preliminary ruling raises for the first time the question of the extent of the discretion available to the Member States to determine who their nationals are. In so far as citizenship of the European Union, which depends, admittedly, on enjoyment of the status of national of a Member State, is established by the Treaty, can the powers of the Member States to lay down the conditions for the acquisition and loss of nationality still be exercised without any right of supervision for Community law? That is, in essence, the point at issue in this case. This case therefore calls for clarification of the relationship between the concepts of nationality of a Member State and of citizenship of the Union, a question which, it need hardly be emphasised, to a large extent determines the nature of the European Union.

It is with this acute description of a hot issue that the opinion by Advocate-General Poiares Maduro in the *Rottmann* case begins, a case in which the grand chamber of the European Court of Justice handed down its decision on 2 March 2010.[1] I must add that it is certainly not the first time that this matter was put to the Court, and that the case is not only of critical importance for the character of

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[1] The opinion is dated 30 September 2009.

European Constitutional Law Review, 7: 138–160, 2011
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doi:10.1017/S1574019611100073

the Union, but also of the member states. It is clear that the case is of great constitutional importance, as is illustrated by the fact that not only the Commission, but also eight member states intervened.

The Austrian Rottmann was interrogated as a suspect in 1995 in connection with a suspicion of serious professional fraud. It is probably as a result of this that he felt that Austria was becoming a bit too hot for comfort, and he moved to Germany. In 1997, the Austrian authorities issued a national arrest warrant against him. Meanwhile, in February 1998, Rottmann filed a petition for naturalisation in Germany, which was granted to him a year later. By voluntarily acquiring German nationality he lost his Austrian nationality. In filing his naturalisation petition, he had – hoping for the best – not revealed the fact that he was wanted in Austria as a suspect for a professional offence. When the Austrian authorities tipped off the German authorities about it, however, his naturalisation was revoked by administrative decision in 2000 because of his concealment of the criminal proceedings in Austria. His status thus changed dramatically: he became stateless, and lost his Union citizenship on top of it. The German *Bundesverwaltungsgericht* asked two preliminary questions. Does Community law preclude loss of Union citizenship due to the lawful – by internal law – revocation of the nationality of a member state with statelessness as a consequence? And if so, which state is required to readjust its nationality law: the naturalising state or the original one?

Behind these simple questions (which, of course, were formulated rather less directly) lurk important matters to be resolved. The operative part of the decision of the European Court of Justice is short, sweet, and in my opinion, incorrect. It says:

> It is not contrary to European Union law, in particular to Article 17 EC for 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.

There's a sting in the tail. The central matter to be resolved is the relationship between the Union and the member states: if the Union has a say in the nationality law of the member states, the sovereign statehood of the member states is limited. Is Union citizenship the crowbar that will break open the nationality law of the member states? Is the European Court heading for a collision with this line of reasoning, not only with the member states, but also with the European Commission and the European Council? Additionally, there is a matter of admissibility. Does the Court have anything to say about something that is viewed by many intervening states and the Commission as an internal case? Let us first devote our attention to that question.

The internal case

A German living in Germany stripped of German nationality in a German legal process: typically an internal case, a situation in which all of the elements are enclosed in one member state, which Union law has no say in, and which must lead to the inadmissibility of the preliminary questions. However, the Court and the A.G. are of a different opinion. The A.G. reasoned as follows. Not only was Rottmann born an Austrian in Austria, but he had already made use of his freedom of movement as an Austrian citizen by travelling to Germany and establishing himself there. This Union citizen had thereby made use of his right of freedom of movement, and thus this was no longer a strictly internal affair.

The definition of the internal case is by no means an innocent one. By establishing very strict criteria for the internal case – only absolutely purely internal affairs can be defined as such – the Court is significantly stretching the boundaries of admissibility and thereby its own authority as well. After all, it is one of the marvels of EU law that a distinction can ever be made between internal cases and EU cases when we read Article 2 of the EU Treaty, which guarantees its citizens 'an area of freedom, security and justice' 'without internal frontiers.'[2] The marvellousness of this internal contradiction can be accounted for as the ever-shifting result of the territorial struggle between the EU and its member states, not unlike the one between the states and the union in the United States.

It seems to me that the Court is taking a different tack than the 'internal case'. It determines (42):

> 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 Article 17 EC and the rights attaching thereto falls, by reason of its nature and its consequences, within the ambit of European Union law.

De Groot calls this 'an even more sensational construct' than the one the Attorney General uses.[3]

[2] *See*, in more depth, H.U. Jessurun d'Oliveira, 'The Community Case. Is Reverse Discrimination Still Admissible under the Single European Act?', in Th.M. de Boer et al. (eds.), *Forty Years on: The Evolution of Post-War Private International Law in Europe, Essays in Celebration of the 40th Anniversary of the Centre of Foreign Law and Private International Law, University of Amsterdam* (Amsterdam University Press 1990) p. 71-86.

[3] G.R. de Groot, 'Invloed van het Unierecht op het nationaliteitsrecht van de Lidstaten: Overwegingen over de Janko Rottmann-beslissing van het Europees Hof van Justitie' [Influence of Union Law on the Nationality Law of the Member States: Considerations on the Janko Rottmann Decision of the European Court of Justice], *Asiel & Migratierecht* (2010) p. 293-300.

And despite the fact that the Court takes the original nationality of another member state into consideration, and thereby allows the case to escape the bounds of the purely internal, the pretext/point of departure for its ruling is first and foremost Union citizenship and its threatened loss. The question immediately arises of how essential it is for the Court's reasoning to note the original nationality.[4] What if Rottmann had previously had the nationality of a third country, and thus had not been able to derive Union citizenship from it? What if he had lost the nationality of a member state without ever having had another nationality, for instance because he had been born stateless? What if someone voluntarily acquires the nationality of a third country and thereby loses the nationality of a member state? Does EU law come into play by way of (the loss of) Union citizenship in all of those cases?

By placing Union citizenship at the forefront and focusing on it, the Court causes it to lose its dependent position somewhat with regard to the underlying matter of nationality. The roles are reversed, as it were: the nationality law of the member states becomes dependent on the fortunes of Union citizenship. It should not be surprising, then, if the Court immediately follows this with the observation that citizenship of the Union is the fundamental status of those who possess the nationality of a member state (43). Fundamental, as well, with regard to the nationality of a member state?

Statelessness due to loss of nationality: public international law

According to public international law, may statelessness occur when loss of nationality is entailed by the occurrence of certain legal facts? Because statelessness is regarded as a severe exclusion from the system of states with their personal substrate, (treaty) rules have been developed in order to prevent that as much as possible. For instance, there is the Convention on the Reduction of Statelessness (New York, 1961), that generally attempts to drive back statelessness, and allows only a few exceptions.[5] Article 8 prohibits a state from 'depriv[ing] a person of its nationality if such deprivation would render him stateless,' but provides for an exception to this main principle (Article 8(2)(b)) 'where the nationality has been obtained by misrepresentation or fraud.'

Likewise, the European Convention on Nationality (ECN) of 1995 upholds the principle that 'statelessness shall be avoided', but does allow one exception to this. In Article 7 an exhaustive summary is given of cases in which a state may provide for loss of its nationality, either automatically, or at the initiative of that state, but none of those cases may lead to statelessness, except for one: in the case of 'acquisition of the nationality of the State Party by means of fraudulent conduct,

[4] Compare De Groot and Seling in their note hereafter.

[5] Germany and Austria are parties to this UN treaty, and with several reservations at that.

false information or concealment of any relevant fact attributable to the applicant' (Article 7(1)(b) in conjunction with Article 7(3)).

The European Court makes note of these treaty texts and concludes from them that states that make loss of their nationality binding upon the furnishing of fraud and false information during the naturalisation procedure are, in principle, acting in accordance with international law. They are therefore not acting 'arbitrarily' in the sense of Article 15(2) of the Universal Declaration of Human Rights and of Article 4 ECN. These considerations are valid 'in principle' and 'in theory', even if the person in question not only loses his nationality but also loses his Union citizenship (54). But all the same…

The preceding history

In contrast to what the A.G. claims in his introduction, cited above, this is not the first time that the question has been put before the Court of the member states' degree of latitude to organise their own laws concerning nationality as they see fit. He should know this quite well, for he refers to earlier decisions in which that question was at issue before the Court. It started in 1982 with Micheletti, the dual national Argentine-Italian dentist who wanted to practice in Spain. Spain found – in accordance with the Spanish *Código Civil* – that the Argentine nationality was his effective nationality, and therefore denied him the European rights of establishment and provision of service. The Court ruled[6] that the Spanish test of effectiveness came into conflict with European law and that the nominal Italian nationality of Micheletti was sufficient to allow him to enjoy the freedoms of the Treaty. It added, in an ominous *obiter dictum*: 'The definition of the conditions of acquisition and loss of nationality, is in conformity with international law, within the competence of each Member State, which competence must be exercised with due regard to community law.' This consideration was in fact superfluous, because it was not about the attribution or loss of the nationality of a member state, but rather about the question of whether Spain should or should not recognise the European legal consequences of the (in and of itself) uncontested possession of Italian nationality. It was therefore a warning shot across the bow, repeated by the Court at regular intervals, without any practical consequences ever being drawn from it.

[6] ECJ 7 July 1992, Case 369/90, ECR 1992 I-4258 (Mario Vincente Micheletti and others/ Delegación del Gobierno en Cantabria. *See*, on this, among many others G.R. de Groot, *Migrantenrecht* (1992) p. 105-110; H.U. Jessurun d'Oliveira, case note on *Micheletti, CMLR* 1993 [3] p. 623-637 and the authors named in G.R. de Groot, *Towards a European Nationality Law – Vers un droit européen de nationalité* (Maastricht UP 2004), n. 51.

For instance, in *Kaur*[7] the *Micheletti* formula was repeated verbatim. Ms. Kaur, of Asian origin, born in Kenya as a Citizen of the United Kingdom and Colonies, and later a British Overseas Citizen, wished to gain admittance to the United Kingdom and thus sought to forcibly acquire by way of Community law a right of abode that she did not possess according to British law. Along her way, she found declarations made by the United Kingdom at the time of the Accession Treaty in 1972 and at the time of the entry into force of the British Nationality Act of 1981, which gave a definition of what the United Kingdom understood under 'British national' for the purposes of the Treaty. Ms. Kaur was not covered by this definition. The Court accepted these statements as the basis for its interpretation of the concept 'member state national' in order to define the personal scope of the treaty. In my opinion it would have been called for, if one wants to accept that European law has something to say about a member state's authority to determine who its citizens are, to correct the essentially racist distinctions in the British Nationality Act and the related migration legislation as being a violation of the (European) ban on racial discrimination. *Kaur* was a missed opportunity, if the European Court had in fact wished to exercise influence on British nationality law and its conformity with the ban on discrimination included in Union law. The matter is comparable with, e.g., the *Zwangsausbürgerung* of German Jews by Nazi legislation, an unambiguous violation of international law. It is, however, unclear which consequences to draw from this violation[8]

In *Rottmann*, a practical elaboration of the repeated *obiter dicta*, which could be regarded as settled case-law has now been developed. It makes a difference, according to the Court, whether someone was already an Union citizen, such as Rottmann, or whether on the other hand someone like Ms. Kaur could not be deprived of her Union citizenship because she had never possessed that status, since she did not fulfil the definition of the member state national (49). Thus, according to the Court, Ms. Kaur is in the same position as the Dutch Member of Parliament Ayaan Hirsi Ali before her Dutch nationality, revoked by Minister of Alien Affairs and Integration Rita Verdonk, was restored.[9]

[7] ECJ, 20 Feb. 2001, Case C-192/99, annotated by H.U. Jessurun d'Oliveira in *Jurisprudentie Vreemdelingenrecht* (2001) no. 124.

[8] Cf .P. Weis, *Nationality and Statelessness in International Law* (Kluwer 1979), 2nd edn., p. 117 et seq.

[9] *See,* as to the vicissitudes of this naturalisation decree and its revocation which even led to the fall of the Dutch Cabinet, H.U. Jessurun d'Oliveira, 'Turmoil around a Naturalisation Decree, or: How the Dutch Cabinet Stumbled over a Pebble', in *Vers de nouveaux équilibres entre ordres juridiques, Liber amicorum Hélène Gaudemet-Tallon* (Dalloz-Sirey 2008) p. 319-333.

The two principles of proportionality

Which consequences does the Court now draw from the jurisprudential mantra that nationality law, to be sure, belongs to the sphere of competence of the member states according to both written and unwritten international law, but that this competence must be excercised with due regard to Union law? According to the Court (48), this is a matter of establishing the principles that the carrying-out of the member states' authority with regard to Union citizens, to the extent that it affects the rights that are provided and protected by the legal order of the Union, can be subjected to judicial review in light of European Union law.

And then the rabbit is pulled out of the hat:

> In such a case it is (…) for the national court to ascertain whether the withdrawal decision at issue in the main proceedings observes the principle of proportionality so far as concerns the consequences it entails for the situation of the person concerned in the light of European Union law, in addition, where appropriate, to examination of the proportionality of the decision in the light of national law (55).

The A.G. had not devoted a single word to the principle of proportionality. He was of the opinion that the revocation in this case was not a violation of any Community rule. It is the Court's own invention to colour in its long-held stipulation – the member states' 'reserved domain' in the area of nationality law – with the proportionality principle.

National authorities – the ministry, the court – who are considering the revocation of the nationality of a citizen in the situation of Rottmann therefore have to complete a *double* proportionality test. They must not solely adhere to this principle of proper administration in accordance with their own internal (administrative) law, where exclusively national points of view will be dealt with. Ultimately, as the Court also acknowledges (51), it is a matter of public interest, the protection of the special relationship of solidarity and good faith that form the essence of the bond of nationality. This necessarily implies that revocation of nationality due to fraud in the naturalisation procedure can be in conformity with Union law, even if that brings loss of Union citizenship with it; but then a second proportionality test must be applied regarding this loss of the fundamental status of Union citizen. That element can, of course, already be included in the proportionality test by national law, but to the extent that that is not the case, it must be examined separately.

For completing this Union law proportionality test, the Court provides a number of quite concrete instructions (56). First and foremost, the position of the family members must also be taken into consideration. Under certain circumstances, they can lose their dependent rights of residence. Additionally, the seriousness of the

fraud or false information can play a role, as well as the time elapsed between the naturalisation and the withdrawal decision, and also the question of whether the affected party can get his or her original nationality back. A state whose nationality was acquired by fraud does not have to allow itself to be discouraged from taking the decision to withdraw the affected party's nationality, merely because that person would not be able to recover his or her original nationality; however, a national court will nonetheless have to consider, under the circumstances of the case, whether the proportionality principle does not in fact mean that the person to be denaturalised should get a reasonable period of time to try to get back his original nationality (58). In practice, that will mean a period of a few years.[10] Finally, the Court notes that the principles elucidated in this decision do not only apply to the state whose nationality was acquired by fraud, but also for the member state of origin: the latter, as well, will have to turn the Union law principle of proportionality onto the question of whether the party affected can petition to re-acquire his or her nationality.

Commentary

The Court is persisting in its judicial error. The question of whether the European Union has authority over the organization of the member states' nationality law not only leads to divisions in the doctrine,[11] but also among the institutions of the Union. In its interventions in the cases submitted to the Court, and again in the *Rottmann* case, the Commission has systematically taken the point of view, despite the Court's case-law, that nationality law is a matter exclusively for the member states. In its answers to written questions from the European Parliament, as well, the Commission has always refused to make a substantial statement on member states' nationality law, because it claimed to lack the competence to do so.[12]

As far as the member states are concerned, one can point to the Declaration no. 2 attached to the Maastricht Treaty that does not leave anything up to the imagination and which conforms to international law:

[10] De Groot, *supra* n. 3 speaks of a period of three years for the Netherlands.

[11] *See* the debate that has been going on for decades now in the Netherlands between G.R. de Groot (e.g., in his *Towards a European Nationality Law, supra* n. 6, with the bibliography of many other publications in this debate) and H.U. Jessurun d'Oliveira (*see*, e.g., 'Nationality and the European Union After Amsterdam', in D. O'Keeffe and P. Twomey (eds.) *Legal Issues of the Amsterdam Treaty* (Hart 1999), ch. 23, and the publications on the theme mentioned there). My best wishes to De Groot on the success achieved with *Rottmann*!

[12] For instance, in the answer to question no. 1674/87: 'Since the Community has no competence with regard to the conditions for acquisition of nationality, the Commission is unable to supply the Honourable Member with the information requested, and it has no intention at present of taking any initiative in this field.' *See* for a series of similar answers d'Oliveira [CMLR 1993] *supra* n. 6 at p. 634.

> 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 the Member State shall be settled solely by reference to the national law of the Member State concerned. (…)[13]

This standpoint is repeated once more by the Council of Heads of State and Heads of Government at their meeting in Edinburgh on 11 and 12 December 1992:

> The provisions of Part Two of the Treaty establishing the European Community relating to the 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.[14]

The eight member states that appeared in the *Rottmann* case embrace this rule of international law, which was most recently codified in the ECN under Article 3(1): 'Each State shall determine under its own law who are its nationals.' The ECN adds that this right must be accepted by all other states, to the extent that it is in conformity with applicable international treaties, international customary law, and generally recognized principles with regard to nationality. There is no basis for the assertion that the European Union is not also bound by this duty.

The European Parliament, as well, has repeatedly revealed itself to see the organization of nationality law of the member states as the member states' reserved domain; although every once in a while it takes a different point of view in written questions from individual MEPs. In short: the Court is a dissident relative to three other institutions of the Union. (It is not known to me what the European Court of Auditors thinks about the question.)

Now, dissidents can in fact be right sometimes, but in my opinion this is not the case here. The above-cited statements of the Council and the member states are pushed aside by the Court as instruments for interpreting the Treaty, although these represent valid international law. That's all well and good, says the Court, but the circumstance that a certain matter belongs to the authority of the member states does not change the fact that the national rules have to orient themselves toward Union law if the situation is covered by Union law (41). The nettlesome word 'solely' in the member states' statements is apparently found to be irrelevant by the Court.

[13] *OJ* 1992 C 191, p. 98.
[14] *OJ* 1992 C 348, p. 1.

The other cases that the Court cites to back up its point of view are not relevant. They have to do with, among other things, name law for EU citizen (Case C-148/02 *Garcia Avello*), direct taxes (Case C-403/03 *Schlempp*), criminal law (process) (Case C-274/96, *Bickel and Franz*). In none of these cases is the existence of a member state nationality contested; they have exclusively to do with the implications and the scope of the existence of Union citizenship. In EU law, Union citizenship may well be the fundamental status of those who possess the nationality of a member state, but this fundamental status is and remains entirely derived from the possession of the nationality of a member state. Nationality of the member states is the premise for the existence of Union citizenship. The latter is therefore the dependent variable, and follows the changes in the nationality of the affected parties. The nationality law of the member states is not obliged to take into account what their effect on Union citizenship will be. If a Dutch national who has lived and worked in Greece and Germany moves to the United States and voluntarily becomes a naturalised US citizen and thereby loses his Union citizenship, EU law has nothing to say about it. The broadly formulated operative part of the judgment admits a development that will, so I surmise, also bring this type of cases under the spell of EU law.

In fact, what the Court is doing is reversing the relationship between the possession of a nationality of a member state and Union citizenship. Because Union citizenship is at stake when the nationality of a member state is lost or acquired nationality law has to take this consequence into account. That nationality law is thereby made dependent on Union law to a certain extent, while Union citizenship is precisely presented by the Treaty as being a dependent variable of the possession of the nationality of a member state. If one follows the Court's line of thought to its logical conclusion, then every member state has to take EU law into account at the time of acquisition or loss of its nationality, because Union citizenship systematically depends on it. One must take into consideration that rights connected to Union citizenship, such as the right of petition, can be exercised from the member state of which a person is a national without that person ever having made use of other, more spectacular rights such as that of freedom of movement. The concept of the 'internal case' has become very elusive if not illusionary.

The distinction that the Court makes between the member states' right to shape their own nationality law on the one hand, insofar as these are not bound to EU norms, and the application of that law, which must be done with regard to EU law, is an artificial one.[15] One cannot underscore member states' autonomy to

[15] *Contra* H. Oosterom-Staples, 'Het internationale recht als beschermengel van de exclusieve bevoegdheden van lidstaten inzake verlies van nationaliteit?' [International Law as the Guardian Angel of the Exclusive Competences of Member States Regarding Loss of Nationality?], *Nederlands Tijdschrift voor Europees Recht* (July 2010) p. 188 et seq., who constructs a stark distinction between nationality law on the one hand, and the execution of decisions based on that nationality law on the other. It is clear that if national legislation does not allow, e.g., a proportionality test, no execu-

organise their own nationality law and at the same time grant Union law influence or something like indirect influence on this reserved domain.[16] If, in a member state's legislation, loss of nationality is tied to the concealment of relevant information, and EU law blocks application of that rule in concrete cases based on, e.g., violation of the proportionality principle, then in fact the national rule of loss has been changed and the reserved domain has been made smaller.

Nationality law is not just any area of law. It is not for nothing that it has been regarded as belonging to the reserved domain of the state since time immemorial. Public international law does not leave any doubt about it. The power to determine who belongs to a particular state, to define a state's body of citizens, is essential to the existence and the identity of the state. By virtue of Article 4 TEU, the Union respects the member states' identity. A member state's citizens are an integrating and essential component of the sovereign statehood of the member state. Thus, other than A.G. Poiares Maduro, I am of the opinion that the nationality law of the member states occupies a privileged position with regard to delineating the powers of the EU and the member states, including in cases that cannot be seen as purely internal. The member states' obligation of loyalty, as stipulated by Article 4 TEU, is a separate matter. In order to be able to obey the text and spirit of the EU, the addressee of this norm must first have existence as a (member) state. Without exclusive autonomy in the definition of its citizens there is no state with its own identity, and without state no duty of loyalty.

As long as the member states have not expressly, in the Treaty, transferred their lawmaking powers in the area of nationality law, the EU, in my view, does not have any direct or indirect authority in this area.

According to Article 5 TEU, the EU does not have any competences if they are not transferred, and for that transfer, the principles of proportionality and subsidiarity apply. The establishment of a uniform or harmonised nationality law of the member states by the EU and its institutions is not necessary according to the principle of proportionality, and for a number of reasons violates the principle of subsidiarity. And in fact, that power still has not yet been transferred by the member states, on the contrary. There are numerous indications on the part of the member states that they wish to remain autonomous and sovereign in this area, and there are numerous indications on the part of the European institutions that they accept this reserved domain. Even if one judges the chance of treaty amendment to be small, and striving for this to be unrealistic, then an express limitation of the member states' autonomy in the area of nationality law is as yet a logical consequence of the structure of the Treaty and of Declaration No. 2 with the Treaty of Maastricht.

tion decision can survive the review of European criticism, and thus the legislation is substantially undermined.

[16] As De Groot has already been successfully arguing for decades. *See* De Groot, *supra* n. 3 at p. 300.

What now? First and foremost, it seems to me to be of essential importance that the member states take the first available opportunity to explicitly confirm in the Treaty that the organization of nationality law belongs to the exclusive competence of the member states. Now that the *obiter dicta* of the Court are starting to grow teeth, this is certainly called for. Or: the member states enter into a next phase and use the occasion of the next Treaty amendment to declare that nationality law must be seen as a mixed competence of the EU and the member states. That is then a step in the direction of a European federal state. But in any case, a creeping usurpation of competences by the Court with regard to nationality law of the member states must be clearly and loudly brought to a halt.

Second of all, further reflection is called for on the question of whether the tight one-to-one correspondence between member state nationality and Union citizenship in fact works adequately. The dependent variable of Union citizenship is evolving in the Court's case-law toward a position in which Union citizenship as an independent variable dictates whether loss (or acquisition) of nationality may occur. A looser connection between both concepts has been suggested numerous times. For instance, it has been frequently argued that not only citizens of member states should be equipped with Union citizenship, but also third-country nationals who have established themselves in the EU.[17] They, too, belong to the 'peoples of the Union.'

But additionally, and in conjunction with that, there is room for decoupling the concepts of nationality and Union citizenship: by maintaining Union citizenship in the case of loss of member state nationality under certain circumstances (to be determined). That has the great advantage that in order to emphasize the importance of Union citizenship, the EU would no longer need the (indirect) authority over the nationality law of the member states that the Court has accorded to it, and that can only serve to benefit the clarity of the relationship between the member states and the EU. If the EU sees Union citizenship as a fundamental status for the peoples of Europe, then that no longer needs to depend on the idiosyncrasies of the application of national nationality law, but rather the EU can determine that certain groups of people who lose their member state nationality will nonetheless remain Union citizens. The *Rottmann* case makes it relevant to think about decoupling them in this way.

[17] Among many: Álvaro Castro Oliveira, *Third Country Nationals and European Union Law* (diss. EUI 1996); D. O'Keeffe, 'Union Citizenship', in D. O'Keeffe and P. Twomey, *Legal Issues of the Maastricht Treaty* (Chancery 1994), ch. 6, p. 104 et seq.; U. Bernitz and H.L. Bernitz, 'Human Rights and European Identity: The Debate about European Citizenship', in P. Alston (ed.), *The EU and Human Rights* (Oxford UP 1999) p. 515; Oosterom-Staples, *supra* n. 15; S. O'Leary, *European Citizenship, The Options for Reform* (Institute for Public Policy Research 1996).

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Case Note 2

The Consequences of the *Rottmann* Judgment on Member State Autonomy – The European Court of Justice's Avant-Gardism in Nationality Matters*

Gerard René de Groot and Anja Seling**

Introductory remarks

In this contribution we want to welcome the judgment of the ECJ in *Rottmann* (C-135/08) as a *milestone* in the sphere of nationality law. For the facts of the *Rottmann* case we refer to the immediately preceding annotation by Jessurun d'Oliveira. It would be duplication if we were to repeat a summary of those facts.[1]

Certainly the approach followed by the ECJ is active and can even be characterised as judicial *avant-gardism,* but should absolutely not be seen as erroneous behaviour. It is clear that the ECJ is willing to challenge member states' autonomy in nationality matters. However, as has been rightly acknowledged by Davies[2] and

*An earlier, shorter version of this contribution was posted on 1 July 2010 on <http://eudo.citizenship.eu/citizenship-forum/254-has-the-european-court-of-justice-challenged-member-state-sovereignty-in-nationality-law?start=2>.

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[1] What should be remarked, though, is that the *Bundesverwaltungsgericht* held on 11 Nov. 2010 that it was in line with the principle of proportionality to revoke German nationality from Dr. Rottmann. Moreover, the court did not consider it necessary to give the applicant additional time in order for him to re-acquire his former Austrian nationality prior to losing his German nationality. *See* press release BVerwG 5 C, 12 November 2010. For the fate of Dr. Rottmann, it can only be hoped that the Austrians will decide to give him back his Austrian citizenship in order to prevent him from becoming stateless.

[2] Gareth Davies in his contribution 'The Entirely Conventional Supremacy of Union Citizenship and Rights' on <http://eudo-citizenship.eu/citizenship-forum/254-has-the-european-court-of-justice-challenged-member-state-sovereignty-in-nationality-law?start=2>.

Kochenov,[3] the judgment cannot be considered as very surprising, or as coming 'out of the blue' and based solely on the ECJ's creativity. No, this was certainly not the case in view of the Court's previous rulings, especially with regard to *Micheletti* (C-369/90), which has been described by some commentators as *impérialisme communautaire*.[4] Moreover, the active stance of the Court with regard to shaping the concept of Union citizenship was already clear in cases such as *Baumbast* (C-413/99), *Martínez-Sala* (C-85/96), *Grzelczyk* (C-184/99), *Garcia Avello* (C-148/02) *and Bidar* (C-209/03), to name but a few, to the extent that the Court declared the status of Union citizenship to be fundamental and thus endowed the formerly merely economically motivated concept with considerable strength. In so doing, it gave clear hints which no one could possibly neglect. Already in 1996 Hall argued that the introduction of Union citizenship places an important limit on the power of the member states to deprive an individual of his or her nationality.[5] Thus, the readiness of the Court to dare to take a further step in this 'holy' domain of the member states could easily have been foreseen.[6] The signs were clearly there; and therefore to speak of an outrageous or wrong approach[7]

[3] Dimitry Kochenov in his contribution 'Two Sovereign States vs. a Human Being: ECJ as a Guardian of Arbitrariness in Citizenship Matters' on <http://eudo-citizenship.eu/citizenship-forum/254-has-the-european-court-of-justice-challenged-member-state-sovereignty-in-nationality-law?start=2>; compare also D. Kochenov, 'Fraudulent Dr. Rottmann and the State of the Union in Europe', in J. Shaw (ed.), *Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?*, EUI Working Paper RSCAS, 2010.

[4] David Ruzié, 'Nationalité, Effectivité et Droit Communautaire', *Revue Générale de droit International Public* (1993) p.119.

[5] S. Hall, 'Loss of Union Citizenship in Breach of Fundamental Rights', *European Law Review* (1996) p. 488. Compare also S. Hall, *Nationality, Migration Rights and Citizenship of the Union* (Martinus Nijhoff 1995) and S. Hall, 'Determining the Scope *ratione personae* of European Citizenship: Customary International Law Prevails for Now', *Legal Issues of Economic Integration* (2001) p. 355-360.

[6] G-R. de Groot, 'The Relationship between the Nationality of the Member States of the European Union and European Citizenship', in M. La Torre (ed.), *European Citizenship: An Institutional Challenge* (Kluwer 1998) p. 115-147; G-R. de Groot, 'Zum Verhältnis der Unionsbürgerschaft zu den Staatsangehörigkeiten in der Europäischen Union', in P.C. Müller-Graf (ed.), *Europäisches Integrationsrecht im Querschnitt* (Nomos 2002) p. 67-86; G-R. de Groot, 'Towards a European Nationality Law/Vers un droit européen de nationalité' (inaugural lecture as visiting professor in Liège 2003)(Unigraphic 2004) (also published in *Electronic Journal of Comparative Law* (Oct. 2004) and in up-dated version, in H. Schneider (ed.), *Migration, Integration and Citizenship, A Challenge for Europe's Future*, Vol. I (Forum Maastricht 2005) p. 13-54.

[7] *See* criticism of Dimitry Kochenov, 'Two Sovereign States vs. a Human Being: ECJ as a Guardian of Arbitrariness in Citizenship Matters', on <http://eudo-citizenship.eu/citizenship-forum/254-has-the-european-court-of-justice-challenged-member-state-sovereignty-in-nationality-law?start=2>; *See also* Leskinen and Bulzomí, 'Recent Developments on the Free Movement of Persons in the European Union', Working Paper IE Law School; H.U. Jessurun d'Oliveira, 'Ontkoppeling van nationaliteit en Unieburgerschap? Opmerkingen over de Rottmann-zaak' [Decoupling of National-

taken by the Court cannot be supported. On the contrary, it has to be welcomed that the Court ruled as it did. First, the Court did not overstep its competences since it left it to the national courts to proceed further with the issue regarding the principle of proportionality; and, secondly, the attempt to help an individual not to become stateless is a legitimate aim.

What makes the case so special is that for the first time, the question was expressly raised as to the extent of discretion available to the member states to determine *who* their nationals are; and whether the powers of the member states to lay down the conditions for the *acquisition* and *loss* of nationality can still be exercised without any right of supervision by Community law (Opinion Maduro, paragraph 1). The indirect influence of Union law on the nationality laws of the member states was therefore directly addressed in *Rottmann*.

The questions which the judgment poses are multiple. First, since the Court has ruled that the issue at stake falls within the scope of European Union law, it needs to be clarified as to which situations within the sphere of nationality law the scope of Union law now applies, how far it reaches and with what kind of situations it engages . In addition, of course, the question of the relationship between Union citizenship and national citizenship has to be addressed. Does the judgment, as noted by Davies,[8] point to a re-ordering of this relationship in favour of Union citizenship? Does *Rottmann* indeed point in the direction of the abandonment of the hierarchy of the two concepts and is it time rather to speak of citizenship pluralism as he suggests? Moreover, the possible concrete consequences on nationality laws of the member states have to be analysed. It seems clear that some provisions in the Nationality Acts of several member states are not in line with the principle of proportionality and should therefore be urgently amended in order to avoid a 'tsunami' of case-law of the ECJ on nationality matters.

Scope of the ruling

The question as to precisely which situations fall within the scope of Union law after *Rottmann* is crucial. Do the statements of the Court in paragraphs 42 and 43 to the effect that Union citizenship must be regarded as a fundamental status and that certain national acts engaging Union citizenship fall by reason of their very nature within the ambit of EU law, mean that in consequence all situations which concern the *granting* or *loss* of nationality and which result consequently in the acquisition or loss of Union citizenship, fall within the scope of Union law? More bluntly, does this mean that member states are now obliged always to take

ity and Union Citizenship], *Nederlands Juristenblad* (2010) p. 1028-1032 [of which the preceding half of this double case note is an adaptation and translation – *EuConst*].

[8] *Supra* n. 3.

into account Union law in their decisions whether to grant or to revoke national citizenship, in case Union citizenship would be in danger of being lost? In this respect, it might be helpful to differentiate between different situations. The case at stake reflects a situation in which a citizen of a member state who possessed the nationality of another member state but lost the latter due to the acquisition of the new member state nationality. The loss of the newly acquired member state nationality consequently means loss of Union citizenship. The Court found that such a situation falls undoubtedly within the scope of Union law (paragraphs 42-43). Another situation would be that a citizen of a member state loses that nationality but still possesses the nationality of another member state and therefore does not lose Union citizenship. Does such a situation clearly not also touch upon EU law?[9]

Again a different situation arises with regard to a third-country national who becomes naturalised in a member state and therefore acquires Union citizenship. After his naturalisation he moves to another member state. He is then confronted with a procedure of deprivation of his member state nationality and accordingly of Union citizenship. The wording of paragraph 42 does not seem to cover such a situation. However, in *Metock* (C-127/08) the Court already found that the freedom of movement for Union citizens 'must be interpreted as the right to leave any member state, in particular the member state whose nationality the Union citizen possesses, in order to become established under the same conditions in any member state other than the member state whose nationality the Union citizen possesses' (paragraph 3 of the summary of the judgment). This may have, as a consequence, that third-country nationals naturalised in a member state of the European Union also fall within the scope of Union law when they are threatened with the loss of their previously acquired Union citizenship status, on condition that they have made use of the right to free movement.

Lastly, does a situation involving a third-country national who is naturalised in a member state and therefore also becomes a European citizen but who does not make use of his free movement rights, and who loses member state nationality and accordingly Union citizenship, fall within the scope of Union law too? Is such a situation covered by paragraph 42 of the judgment? Does the Court thereafter view Union citizenship as *by definition* not an internal matter or, as outlined by Maduro, is it not an internal matter only after use has been made of the Union citizen's free movement rights (paragraph 11)? The answer to this question is not very clear but, following *Metock,* it is most likely to be negative (*Metock*, C-127/08, paragraph 73).[10]

[9] For instance, according to Dimitry Kochenov in his case note on the *Rottmann* decision in *CMLR* (47) (2010) p. 1842 (footnote 47).

[10] Compare, however, the important opinion of A.G. Sharpston in the case *Ruiz Zambrano*, C-34/09 [decided on 8 March 2011, just before publication – EuConst]. *See also*, V. Kochenov, *CMLR* (2010) p. 1841, 1842.

What seems to be clear for us, however, is that the situation where unequal treatment between those Union citizens who made use of their free movement rights within the European Union and therefore enjoy stronger protection not to lose their nationality and those who stayed in their country of nationality or took up residence in a third country and thus enjoy less protection, should be avoided.[11] This would imply a distinction between 'average' citizens of a member state and those carrying little Union stars around their heads.[12]

In addition, the question arises whether only the loss of nationality falls within the scope of EU law, or whether this is also the case with the acquisition of the nationality of a member state. Even though the Court differentiated between the situation in *Rottmann* and that in *Kaur* (paragraph 49), it appears rather ill-founded to assume that situations in which the granting of Union citizenship is at stake do not fall within the scope of Union law.[13] In the contrary, in paragraph 62 the Court emphasizes 'that the principles stemming from this judgment with regard to the powers of the member states in the sphere of nationality, and also their duty to exercise those powers having due regard to European Union law, apply both to the member state of naturalisation and to the member state of the original nationality.' Therefore, Austria has to observe these principles when *Rottmann* applies for reacquisition of Austrian nationality. There is no reason to assume, that general principles of Union law would not be relevant for other cases of acquisition of nationality, based on the establishment of a family relationship with a national, birth on the territory of a State or based on continuous permanent legal residence (e.g., naturalisation or exercise of option rights). The proportionality principle which takes a central place in the *Rottmann* case could, e.g., prove to be relevant, if an application for naturalisation is rejected because of a minor delict committed by the applicant. But also other general principles of Union law could be of importance, e.g., the principle of equality addressed by Maduro in his Opinion (paragraph 34).

[11] *See* the contribution of O. Golynker, 'The correlation between the status of Union citizenship, the rights attached to it and nationality in Rottmann', on <http://eudo-citizenship.eu/citizenship-forum/254-has-the-european-court-of-justice-challenged-member-state-sovereignty-in-nationality-law?start=2>.

[12] *See* G-R. de Groot 'Invloed van het Unierecht op het nationaliteitsrecht van de Lidstaten: Overwegingen over de Janko Rottmann-beslissing van het Europees Hof van Justitie' [Influence of Union Law on the Nationality Law of the Member States: Considerations on the Janko Rottmann Decision of the European Court of Justice], *Asiel & Migratierecht* (2010) p. 293-300.

[13] *See* Davies, *supra* n. 3.

Possible consequences for the nationality law of the member states

So far, few comments on *Rottmann* have pointed out the potential consequences of the judgment for the nationality laws of the member states. The Court ruled that the loss of Union citizenship and of the rights attached to that status is amenable to judicial review carried out in the light of European Union law (paragraph 48). This will most certainly entail a scrutiny of the nationality laws of the member states.[14] In what follows some possible examples will be outlined.

It is clear, first of all, that the *Rottmann* judgment will have consequences for the regulation of deprivation of nationality because of the discovery of fraud. Let us illustrate this, with a description of problems arising with regard to Articles 14 and 15(1)(d) of the Netherlands Citizenship Act, which regulates the loss of Dutch nationality by deprivation. Generally, the principle of proportionality also applies in Dutch national law. In addition, however, following *Rottmann*, citizens need to have the chance, before their newly acquired member state nationality may be revoked, to apply for the re-acquisition of their old nationality. This rule does not exist in Dutch nationality law nor – as far as we could see – in the rules or practice in any other member state of the European Union.[15] Moreover, in the light of the *Rottmann* ruling, it is questionable whether the Court will accept that deprivation becomes effective immediately, before a decision of revocation becomes unchallengeable. According to Dutch law, after revocation of Dutch nationality by the Dutch minister of justice, the person immediately loses his/her Dutch passport even if the person concerned challenges this decision.[16] It is questionable whether this is in accordance with EU law and in particular with the principle of proportionality.[17] In addition, with regard to Article 15(1)(d) of the Netherlands Citizenship Act, it is doubtful whether deprivation of Dutch nationality because of failing to have made 'every effort to divest himself of his or her original nationality' can be accepted if a person, after losing Dutch nationality, can again be naturalised without making 'every effort to divest himself of his or her original nationality.'[18] It can be assumed that the Court will not accept such a situation as being compat-

[14] *See* also Kochenov, *CMLR* (2010) p. 1845, 1846.

[15] 22 Member states of the European Union have this ground for loss. Only in the Czech Republic, Italy, Poland, Slovenia and Slovakia is this possibility lacking. G-R. de Groot and M.P. Vink, 'Loss of Citizenship, Trends and Regulations in Europe', Oct. 2010, in particular, table 2, available on: <http://eudo-citizenship.eu/docs/Loss.pdf>.

[16] Judgment of the Council of State, 18 Aug. 2004, p. 403.

[17] From the facts in *Rottmann,* it seems to follow that this is different in Germany.

[18] This ground for loss exists in six member states of the European Union. *See* G-R. de Groot and M.P. Vink, 'Loss of Citizenship, Trends and Regulations in Europe', June 2010, table 2: <http://eudo-citizenship.eu/docs/Loss.pdf>.

ible with the principle of proportionality. In particular, decisions relating to deprivation of nationality where the person concerned had promised to renounce his or her old nationality, but then discovers that this act actually costs a lot of money, seem to stand very uneasily with the principle of proportionality. Until now, the Dutch Council of State has found it impossible to prevent the deprivation by using the argument of the high costs encountered.[19] After the loss of Dutch nationality, however, the person involved could apply again for naturalisation and ask for a waiver of the requirement of renunciation due to the high costs involved. It is unlikely that this contention could be sustained after *Rottmann.*

Special difficulties may arise with regard to cases of so-called 'identity fraud' (submission of false personal data, like a false name, age or place of birth) during the naturalisation procedure. If this type of fraud is discovered in the Netherlands and the naturalisation took place after 1 April 2003, Article 14 (1) is again applicable: deprivation of nationality is possible, but the principle of proportionality has to be observed. Problems actually arise with naturalisations which took place before 1 April 2003. According to a decision of the Supreme Court (*Hoge Raad*) of 30 June 2006,[20] it is then possible to conclude that a person never acquired Dutch nationality because of the identity fraud during the naturalisation procedure. Only in exceptional circumstances, in which it is clear that the person could be sufficiently identified even though incorrect personal data were provided to the authorities and these data did not constitute a real obstacle for the assessment of the application for naturalisation, would the grant of Dutch nationality nevertheless be valid. These rules, which are applicable to citizens who were naturalised before 1 April 2003, clearly cannot be said to meet the proportionality test. In addition, it is obvious that the principle of equality which Advocate-General Maduro mentioned in his Opinion (paragraph 34) is certainly not in line with this approach. The fact that there is unequal treatment between those who were naturalised before 1 April 2003 and those after 1 April 2003 clearly constitutes a breach of this principle.

But also other issues may be influenced by general principles of Union law. Jo Shaw[21] questions whether the German obligation to make a choice between the *iure soli* acquired German citizenship and the *iure sanguinis* acquired foreign nationality before they reach the age of 23, is in accordance with European Union law. Children who possess the nationality of another State next to a *iure sanguinis*

[19] Council of State, 25 Aug. 2004, p. 404.

[20] *Nederlandse Jurisprudentie* (2007) p. 501.

[21] J. Shaw in her contribution 'Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?', on: <http://eudo-citizenship.eu/citizenship-forum/254-has-the-european-court-of-justice-challenged-member-state-sovereignty-in-nationality-law>.

acquired German nationality do not have this obligation. Does this violate the principle of equality? Moreover, the children involved were born as *iure soli* German and therefore European citizens. If they continue to reside on the territory of the Union, loss of European citizenship because they did not give up their *iure sanguinis* acquired other citizenship may be disproportionate. To impose a fine may be acceptable, but the loss of their effective nationality linked to European citizenship could go too far. It should be noted that this extravagant ground for loss of nationality in Europe exists only in Germany and that this ground for loss is contrary to the standards set by Article 7 of the European Convention on Nationality.[22] It has to be admitted that at the time of becoming a State Party to this convention, Germany made a reservation in order to maintain this ground for loss.[23] But, clearly, this reservation does not affect the obligations which the ECJ may derive from the general principles of EU law for the member states in the field of nationality.

Jo Shaw also raises the question whether, after *Rottmann,* all decisions on acquisition and loss of nationality have to be reasoned in order not to conflict with European law. It seems to us that this question needs to be answered in the affirmative, which has important consequences for the practice in several member states of the Union. In several member states such an obligation does not exist.[24] It is also noteworthy that Bulgaria and Hungary made a reservation on Article 11 of the European Convention on Nationality, which prescribes: 'Each State Party shall ensure that decisions relating to the acquisition, retention, loss, recovery or certification of its nationality contain reasons in writing.' Furthermore, a consequence of *Rottmann* is that a decision on the nationality status of a person can be challenged. This is also prescribed by Article 12 of the European Convention on Nationality but, again, we can observe that some member states (Denmark and

[22] CETS 166, ratified by twenty states and signed by nine states. 12 Member states of the European Union ratified, and 7 other member states signed this convention.

[23] 'Germany declares that loss of German nationality *ex lege* may, on the basis of the 'option provision' under Section 29 of the Nationality Act [Staatsangehörigkeitsgesetz-StAG] (opting for either German or a foreign nationality upon coming of age), be effected in the case of a person having acquired German nationality by virtue of having been born within Germany (*jus soli*) in addition to a foreign nationality.'

[24] Belgium, Bulgaria, Cyprus, Denmark, Iceland, Ireland, Malta and Poland. The situation in Romania and Slovakia is also problematic. *See* S. Wallace Goodman, 'Naturalisation Policies in Europe: Exploring Patterns of Inclusion and Exclusion', Nov. 2010, EUDO Citizenship Observatory, Robert Schuman Centre for Advanced Studies/Edinburgh University Law School, Comparative Report, RSCAS/EUDO-CIT-Comp. 2010/7, table 5, available on <http://eudo-citizenship.eu/docs/7-Naturalisation%20Policies%20in%20Europe.pdf>.

Hungary) made a reservation on that point.[25] Moreover, it is known that this right is lacking in some other member states which have not yet ratified the European Convention on Nationality, e.g., Belgium. It has to be emphasised that it is highly questionable whether Belgium and Denmark can maintain that decisions on naturalisations happen by Act of Parliament, without, therefore, any possibility of challenging these decisions.[26]

Several member states have certain grounds for loss – other than deprivation of nationality because of fraud committed during a naturalisation procedure – which apply exclusively to nationals who did not acquire their nationality by birth.[27] This differential treatment of 'European citizen by birth' and 'European citizen by naturalisation' is certainly at odds with the European Union legal order.

Questionable distinctions regarding the acquisition of nationality by birth or by establishment of a family relationship could also prove to be contrary to the equality principle of European law. Some member states do not provide for a *ius sanguinis* acquisition of their nationality if a child is born (abroad) outside of wedlock, if only the father is a national; or they require, in the case of recognition of a foreign child, additional evidence of the biological truth before the child acquires the nationality.[28]

The principle of the protection of legitimate expectations, which Advocate General Maduro also potentially views as being capable of restricting the legislative power of the member states in the sphere of nationality (paragraph 31), cannot be disregarded by the national authorities either. Until now, e.g., the courts in The Netherlands repeatedly ruled that the protection of legitimate expectations is not a ground for acquisition of Dutch nationality.[29] It is likely that this view can no longer be maintained in the light of the principle of legal certainty. We expect that consequently all member states have to introduce a construction which protects

[25] No administrative or judicial review is possible in Belgium, Bulgaria, Denmark, Hungary, Iceland, Malta, Poland, Romania and Slovakia. *See* Goodman, *supra* n. 25.

[26] We would submit that rules on naturalisation by decision of parliament cannot be qualified as aspects of the '*national identities*, inherent in their fundamental structures, political and *constitutional*, inclusive of regional and local self-government' as referred to in Art. 4(2) TEU.

[27] *See*, e.g., Art. 23(1)(2) Belgian Nationality Act, Art. 24 Bulgarian Nationality Act, Art. 113(3) of the Cypriot rules on nationality, 28(1)(1) Estonian Nationality Act, 19(1)(e) Irish Nationality and Citizenship Act, 21(2) Lithuanian Nationality Act, 14(2) Maltese Nationality Act, 25 (1)(b) Spanish Civil Code.

[28] Art. 1(1) Danish Nationality Act, Art.1 and 2(1) Icelandic Nationality Act, Art.4 Netherlands Nationality Act. *See* M.P. Vink and G-R. de Groot, 'Birthright Citizenship, Trends and Regulations in Europe', July 2010, available on <http://eudo-citizenship.eu/docs/Acquisition.pdf>, in particular tables 1 and 2.

[29] Compare the critical remarks of H.U. Jessurun d'Oliveira in his comment on the decision of the *Hoge Raad*, 11 Oct. 1985, in *Ars Aequi* (1986) p. 225-229 and G-R. de Groot, *Nationaliteit en rechtszekerheid* [Nationality and Legal Certainty], (Boom Juridische uitgevers 2008) p. 44-55.

the possession of the nationality in good faith[30] or, to put it differently, the protection of legitimate expectations.[31, 32]

Above, we criticised in the light of the *Rottmann* judgment the fact that decisions on the nationality position of persons cannot be challenged in some member states. The question has to be raised whether an integration test, which in an increasing number of member states has to be successfully passed before qualifying for naturalisation, can be challenged in court. If we are correct, this is very often not the case. However, a general judicial protection against arbitrariness implies that it must be possible to argue in court that the answer given on the question was (also) correct, that the question was unclear or even that the question lacks any relevance in the context of the goal of the test: measuring the degree of integration of the applicant.[33] The fact that in some member states these tests are outsourced to agencies or other nongovernmental bodies is not relevant, because the result of the test is one of the determinants of the naturalisation authorities` reaction to any given application.

Finally

To disregard the general principles as mentioned above, like the principle of proportionality, the principle of equal treatment and the principle of the protection of legitimate expectations, will not be tolerated in Luxembourg. It can be concluded that *Rottmann* has potentially huge consequences and urgently requires amendments to be made with regard to several national rules governing the loss and the acquisition of nationality in order to prevent long court proceedings and preliminary ruling questions.

[30] Compare Art. 21-13 French Code Civil: 'Peuvent réclamer la nationalité française par déclaration souscrite conformément aux articles 26 et suivants, les personnes qui ont joui, d'une façon constante, de la possession d'état de Français, pendant les dix années précédant leur déclaration.'

[31] Compare Art. 3(2) German Nationality Act: 'Die Staatsangehörigkeit erwirbt auch, wer seit zwölf Jahren von deutschen Stellen als deutscher Staatsangehöriger behandelt worden ist und dies nicht zu vertreten hat. Als deutscher Staatsangehöriger wird ins besondere behandelt, wem ein Staatsangehörigkeitsausweis, Reisepass oder Personalausweis ausgestellt wurde. Der Erwerb der Staatsangehörigkeit wirkt auf den Zeitpunkt zurück, zu dem bei Behandlung als Staatsangehöriger der Erwerb der Staatsangehörigkeit angenommen wurde. Er erstreckt sich auf Abkömmlinge, die seither ihre Staatsangehörigkeit von dem nach Satz 1 Begünstigten ableiten.'

[32] *See also* Principle 18 of Recommendation 2009/13 of the Committee of Ministers of the Council of Europe on the Nationality of Children of 9 Dec. 2009: 'provide that children who were treated in good faith as their nationals for a specific period of time should not be declared as not having acquired their nationality.'

[33] *See*, for critical remarks on examples of unreasonable or even ridiculous questions: G-R. de Groot et al., 'Passing Citizenship Tests as a Requirement for Naturalisation: A Comparative Perspective', in E. Guild et al. (ed.), *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU* (Ashgate 2009) p. 51-77.

Overall, even though the judgment can be considered as *judicial activism,* with possible far-reaching consequences with regard to the relationship between Union citizenship and member state nationality as well as for national nationality rules, the judgment could have been foreseen following *Micheletti,* in that the ECJ is prepared to influence nationality laws in the case of a clear breach of Union law. Moreover, it shows the ECJ's important role of ensuring that the rights of the individual are protected when member states` rules lead to results undesirable in the context of Union law.

Whether the Court indeed has changed the roles of Union citizenship and member state nationality will become clearer in future cases. It should not, however, be feared that Union citizenship prevails over national citizenship, since Article 20 TFEU makes it very clear that Union citizenship shall only be additional to and not replace national citizenship. There is no present prospect, therefore, of decoupling Union citizenship from member state nationality.