A new CJEU judgment on the loss of the nationality of a Member State

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Introduction: the precedents.

After a few years the Court of Justice of the European Union (CJEU) has issued its third judgment on the loss of the nationality of a Member State (CJEU, Grand Chamber, 18 January 2022, JY v Wiener Landesregierung, C-118/20, ECLI:EU:C:2022:34).

The first judgment dates back to 2010 in the *Rottmann* case (CJEU, Grand Chamber, 2 March 2010, Janko Rottmann v Freistaat Bayern, C-135/08, ECLI:EU:C:2010:104). It concerned the revocation of the nationality of a Member State which would deprive an individual of the citizenship of the Union. Mr Rottmann had acquired German nationality by naturalisation and had thus lost his Austrian nationality of origin. The German nationality was then revoked with retroactive effect on account of deception practised in that acquisition, thus leaving Mr Rottmann stateless. The CJEU declared that while "the Member States have the power to lay down the conditions for the acquisition and loss of nationality, […] the exercise of that power, in so far as it affects the rights conferred and protected by the legal order of the Union, […] is amenable to judicial review carried out in the light of European Union law." In particular, in order to comply with EU law, the revocation of nationality should respect the principle of proportionality and this principle applies to both the Member State of naturalisation and the Member State of the original nationality. In particular, "it is necessary 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 second judgment (CJEU, Grand Chamber, 12 March 2019 M.G. Tjebbes and Others v Minister van Buitenlandse Zaken C-221/17 ECLI:EU:C:2019:189) concerned four Dutch citizens, by birth or naturalisation, who possessed also the nationality of a third State (Canada, Switzerland, Iran) and had lost their Dutch nationality by operation of the law due to their residence abroad (and outside the EU) for more than ten years. Unlike Mr Rottmann, in this case the individuals had not become stateless upon the loss of the Dutch nationality, but they had lost the citizenship of the Union. Recalling *Rottmann*, the CJEU had declared that while a Member State retains the right to determine the conditions for the loss of its nationality, "it is for the competent national authorities and the national courts to determine whether the loss of the nationality of the Member State concerned, when it entails the loss of citizenship of the Union and the rights attaching thereto, has due regard to the principle of proportionality so far as concerns the consequences of that loss for the situation of the person concerned and, if relevant, for that of the members of his or her family, from the point of view of EU law." The CJEU has further provided some guidance on how to grant consistency with the principle of proportionality in the case at stake: the national authorities and courts "must be in a position to examine, as an ancillary issue, the consequences of the loss of that nationality and, where appropriate, to have the person concerned recover his or her nationality *ex tunc* in the context of an application by that

person for a travel document or any other document showing his or her nationality." Such examination should be made on a case-by-case basis, having regard to the normal development of the family and professional life of the persons involved and the loss must be consistent with the fundamental rights granted by the Charter of Fundamental Rights, and specifically with the right to respect for family life and to adequate consideration of the best interest of the child. In the cases at stake, the CJEU has underlined that the loss of the citizenship of the Union might, *inter alia*, prevent to retain genuine and regular links with members of their families or to pursue their professional activity and to enjoy consular protection under Article 20(2)(c) TFEU in the territory of a third country in which they might reside.

Facts

The facts in JY are the following.
Ms JY, an Estonian national resident in Austria, had applied for Austrian nationality in 2008. After a few years, in 2014 the competent Austrian authority assured JY that she would be granted Austrian nationality if she could prove, within two years, that she had relinquished her citizenship of Estonia, as provided by Paragraph 20 of the Austrian Law on Nationality. The applicant renounced her Estonian nationality and provided such confirmation in 2015, thus becoming stateless. In 2017, the newly Austrian competent authority revoked the decision issued in 2014 by the previously competent authority and rejected the application for nationality. This decision was justified by the fact that JY had committed, between 2014 and 2017, two serious administrative offences (failing to display a vehicle inspection disc and driving a motor vehicle while under the influence of alcohol) and eight administrative offences between 2007 and 2013. Thus, she no longer satisfied the conditions for grant of nationality. This decision was confirmed by the competent administrative court.

Upon the further appeal on a point of law, the Supreme Administrative Court of Austria took the view that such a situation did not fall within EU law since, unlike in *Rottmann* and *Tjebbes and Others*, JY had already voluntarily lost her Estonian nationality and the citizenship of the Union when the 2017 Austrian revocation of the assurance was issued. Nevertheless, it asked the CJEU whether this case fell under EU law and whether the competent national authorities and courts are requested to ascertain if the revocation of the assurance as to the grant of the nationality concerned, which prevents citizenship of the Union from being obtained again, is compatible with the principle of proportionality, having regard to the consequences of such a decision on the situation of the person concerned. The Supreme Administrative Court asked also whether the fact that JY had renounced her citizenship of the Union by voluntarily renouncing the Estonian nationality was decisive in that regard.

Judgment

The CJEU noted that the loss of the status of citizen of the Union by JY was a direct consequence of her request, but such request was made in the context of a naturalisation procedure to obtain Austrian nationality and was based on the assurance given to her that she would be granted the latter nationality. Thus, it was not correct to qualify JY's loss as the effect of voluntary renunciation of the citizenship of the Union. JY ended up finding herself in a situation in which it was impossible to continue to assert the rights arising from the status of citizen of the Union within a complex procedure that took place in two Member States. The CJEU further affirmed that the right to free movement within the EU

and the logic of gradual integration that informs that provision of the TFEU Treaty imply that the situation of a citizen of the Union such as JY falls within the scope of the Treaty provisions relating to citizenship of the Union.

While confirming the right of Member States to establish the national rules concerning the acquisition and loss of their nationality, including the legitimacy of the aim of avoiding multiple nationalities, the CJEU further stated that where, in the context of a naturalisation procedure initiated in a Member State, that State requires a citizen of the Union to renounce the nationality of his or her Member State of origin, Article 20 TFEU requires that that person should not at any time be liable to lose the fundamental status of citizen of the Union by the mere fact of the implementation of that procedure.

Further, the CJEU stated that both the host Member State and the Member State of the original nationality must comply with EU law: “the Member State of origin should not adopt, on the basis of an assurance given by that other Member State that the person concerned will be granted the nationality of that State, a final decision concerning the deprivation of nationality without ensuring that that decision enters into force only once the new nationality has actually been acquired.” On the other hand, the host Member State is under the obligation to ensure the effectiveness of Article 20 TFEU. In this respect, the decision to revoke the assurance previously given to that person as to the grant of nationality, that may have the effect of making the loss of the status of citizen of the Union permanent, can be made only on legitimate grounds and must respect the principle of proportionality.

Concerning the condition for granting Austrian nationality that the individual must guarantee that he/she has a positive attitude towards that State and should not represent a danger to law and order or public security or endanger any other public interest, the CJEU, recalling *Rottmann*, stated that the principle of proportionality requires that the national authorities and courts have to assess whether the decision to revoke the assurance “is justified in relation to the gravity of the offence committed by that person and to whether it is possible for that person to recover his or her original nationality”, taking into account the fundamental rights guaranteed by the Charter of Fundamental Rights of the European Union, and specifically the right to respect for family life and the best interests of the child.

The fact that the recovery of Estonian nationality was apparently impossible could not prevent Austria from revoking the assurance as to the grant of its nationality. Yet, the main issue concerned the gravity of the offences that JY was accused of having committed, that the Court examined thoroughly. It found that the eight administrative offences committed between 2007 and 2013 were known at the time when the assurance was issued, thus they could not be taken into consideration as a ground for revoking the assurance.
As regards the other two serious administrative offences (failing to display a vehicle inspection disc and driving a motor vehicle while under the influence of alcohol), committed between 2014 and 2017, that infringed laws enacted to protect public order and road safety, the CJEU confirmed its previous case law that the notions of ‘public policy’ and ‘public security’ must be interpreted strictly, so that their scope cannot be determined unilaterally by the Member States without being subject to control by the EU institutions (13 September 2016, *Rendón Marín*, C-165/14, EU:C:2016:675, para. 83). In the case at stake the Court held that JY did not appear to represent “a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society or a threat to public security” in Austria that might justify the permanent loss of her status of citizen of the Union since she was imposed minor fines and her driving license was not withdrawn.

In conclusion, the Court stated that the principle of proportionality in such a case is not respected where the decision to revoke the assurance to grant Austrian nationality is based on administrative traffic offences which give rise to a mere pecuniary penalty.

Comments

In *JY* the CJEU confirms its previous case law on the value of the status of citizen of the EU vis-à-vis national provisions of law concerning the nationality of a Member State, with regard, in particular to loss of nationality and it fixes the boundaries of the freedom of Member States to legislate in this area and to apply their laws to specific cases. It also confirms its power to check if recourse to “public policy” and “public security” by a Member State complies with EU law in general and in a given case, providing the conditions that the Member States involved have to satisfy. As a consequence, under this case law of the CJEU the discretionary powers of Member States in this area appear to shrink.

Indeed, while Member States have the power to establish the conditions for the loss of their nationality, the fact that the nationality of Member States constitutes the basis for the possession of the status of citizen of the EU entails that they must exercise that power having due regard to EU law, in particular to Article 20 TFEU, since the rights conferred and protected by the legal order of the Union are affected. It is irrelevant that the individual concerned has exercised his or her right to free movement under Article 21 TFUE, which the individuals involved in *Tjebbes* had not exercised (para 28). It is also irrelevant that the loss of the nationality of a Member State is accompanied by the acquisition of the nationality of another Member State, as it happened in *Rottmann* and *JY*: the individuals involved in *Tjebbes* possessed also the nationality of third countries, that were not touched by the loss of Dutch nationality. Finally, it is irrelevant that the loss the nationality of a Member State derives from a voluntary declaration of the individual, who renounced it explicitly (as in *Rottmann* and *JY*), or that it happened automatically by operation of the law (as in *Tjebbes a.O.).* What really matters, for the CJEU, is that the loss of the nationality of a Member State as a consequence of legitimate provisions of national law entails the loss of the status of EU citizen and is thus subject to judicial review according to EU law.

The CJEU is ready to confirm that the principles invoked by the Member States to justify the loss of their nationality are legitimate under international law: the will to reduce multiple nationalities mirrors the provisions of applicable international treaties and the view that nationality corresponds to a genuine link between the State and the individual is legitimate. It is also legitimate for a Member State to wish to protect the unity of nationality within the same family (*Tjebbes*, paras. 34-35). However, when applying their national law, the Member States have to check if they comply with the principle of proportionality. In particular, this principle entails two main consequences.

First, the national authorities and courts must carry out an individual examination of the consequences of the loss for the persons concerned from the point of view of EU law, in particular with the right to respect for family life as stated in Article 7 of the Charter of Fundamental Rights, to be read in conjunction with the obligation to take into consideration the best interest of the child, recognised in Article 24(2) of the Charter.

Second, the limitations to the right to move and reside freely within the territory of the EU, to which the individual would be exposed following the loss of EU citizenship, must be assessed. These limitations might make it difficult to travel to the EU in order to retain

genuine and regular links with members of his or her family, to pursue a professional activity or to undertake the necessary steps to pursue that activity, and make it impossible to enjoy consular protection under Article 20(2)(c) TFEU in the territory of the third country in which that person resides. If minors are involved, to which the loss of EU citizenship applies as an automatic consequence of the loss by their parent(s), the national authorities must also take into account possible circumstances from which it is apparent that the loss of the nationality of the Member State by the minor concerned fails to meet the child's best interests as enshrined in Article 24 of the Charter.

It is worth underlining that both in *Rottmann* and *JY* the instructions on how to proceed in order to avoid the loss of the status of EU citizen are addressed to both the State of origin and the host State. The former "should not adopt a final decision concerning the deprivation of nationality without ensuring that that decision enters into force only once the new nationality has actually been acquired"; the latter, before a decision withdrawing naturalisation takes effect, should grant the individual a reasonable period of time in order to try to recover the nationality of his Member State of origin. On the other hand, when only one Member State is involved, as in *Tjebbes*, the actual situation of the individual has to be assessed in depth in order to comply with the conditions set by the Court.

Finally, in *JY* and *Rottmann* the CJEU has examined the reasons for denying or withdrawing Member States' nationality. Deception is a legitimate reason to withdraw nationality since it corresponds to a reason relating to the public interest. This ground complies also with Article 8(2) of the Convention on the reduction of statelessness as with Article 7(1) and (3) of the European Convention on nationality (*Rottmann*, paras 51-52). On the contrary, minor administrative offences do not satisfy the principle of proportionality, even more so if "such offences would not, in themselves, lead to withdrawal of naturalisation" (*JY*, paras. 71-72).

Conclusion

The case law on the relationship between the nationality of Member States and the status of EU citizen is slowly growing and the position of the CJEU is very clear as far as loss of nationality is concerned. A few comments may be made.

First, the Member States can legitimately aim at reducing cases of multiple nationality and at maintaining a genuine bond between them and their citizens. However, the effective nationality does not prevail and actually it has never been mentioned in these judgments.

Secondly, is it possible to derive some general principles on statelessness and multiple nationalities for cases where private international law issues might arise? Let us consider, for example, a situation where in a case like *JY* the individual dies in the period between the renunciation of the nationality of origin and the granting the Austrian nationality. Can one infer that JY would still be considered an Estonian citizen since the Member State of origin should ensure that its decision to consent the renunciation enters into force only once the new nationality has actually been acquired? And what about the individuals in *Tjebbes*?

Thirdly, are the strict rules concerning reacquisition of nationality established in some Member States compliant with the principle of proportionality, in particular when the individual is relinquishing the nationality of a third country? Is a national rule that provides for the automatic loss of a Member States' nationality upon naturalisation in a third country compliant with the principle of proportionality?

Fourthly, the CJEU is slowly defining, step by step, case by case, the boundaries within which the Member States can invoke public policy, public security and the fundamental interests of society in this area of law. One may ask whether the principles that the Court is setting stretch to other areas of law. The national court will certainly offer new opportunities to the Court to address these issues.