Off the edge of state sovereignty?

Member States’ reaction to the Rottmann ruling of the CJEU

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Introduction
Legal context

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National legislation
Article 8 of 1961 Statelessness Convention

1. A Contracting State shall not deprive a person of its nationality if such deprivation would render him stateless.

2. Notwithstanding the provisions of paragraph 1 of this article, a person may be deprived of the nationality of a Contracting State: [...] (b) where the nationality has been obtained by misrepresentation or fraud. [...]  

4. A Contracting State shall not exercise a power of deprivation permitted by paragraphs 2 or 3 of this article except in accordance with law, which shall provide for the person concerned the right to a fair hearing by a court or other independent body.”
Article 7 ECN:

- “1. A State Party may not provide in its internal law for the loss of its nationality ex lege or at the initiative of the State Party except in the following cases: […]

- (b) acquisition of the nationality of the State Party by means of fraudulent conduct, false information or concealment of any relevant fact attributable to the applicant; […]

- 3. A State Party may not provide in its internal law for the loss of its nationality under paragraphs 1 and 2 of this article if the person concerned would thereby become stateless, with the exception of the cases mentioned in paragraph 1, sub-paragraph b, of this article.”
Legal context (3): Article 15 UDHR

Article 15 UDHR:

• “(1) Everyone has the right to a nationality.

• (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.”
Legal context (4): ECHR

Article 8 ECHR:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”
Genovese v. Malta (ECtHR 11 October 2011):

The Court [...] reiterates that the notion of “family life” in Article 8 is not confined solely to marriage-based relationships and may encompass other de facto “family” ties. The application of this principle has been found to extend equally to the relationship between natural fathers and their children born out of wedlock. Further, the Court considers that Article 8 cannot be interpreted as only protecting “family life” which has already been established but, where the circumstances warrant it, must extend to the potential relationship which may develop between a natural father and a child born out of wedlock. Relevant factors in this regard include the natural father’s interest in and engagement in the upbringing of the child and the nature of the relationship between the natural parents and the demonstrable interest in and commitment by the natural father to the child both before and after the birth (see Nylund v. Finland (dec.), no. 27110/95, ECHR 1999-VI).

The provisions of Article 8 do not, however, guarantee a right to acquire a particular nationality or citizenship. Nevertheless, the Court has previously stated that it cannot be ruled out that an arbitrary denial of citizenship might in certain circumstances raise an issue under Article 8 of the Convention because of the impact of such a denial on the private life of the individual [...]”

The prohibition of discrimination enshrined in Article 14 extends beyond the enjoyment of the rights and freedoms which the Convention and the Protocols thereto require each State to guarantee. It applies also to those additional rights, falling within the general scope of any Convention Article, for which the State has voluntarily decided to provide. This principle is well entrenched in the Court’s case-law (see Abdulaziz, Cabales and Balkandali, cited above, § 78; Stec and Others v. the United Kingdom (dec.) [GC], nos. 65731/01 and 65806/01, § 40, ECHR 2005-X; and E.B. v. France [GC], no. 43546/02, § 48, ECHR 2008-...).
Genovese v. Malta (ECtHR 11 October 2011):

- 33. The applicant argues that the denial of citizenship prevented him from spending an unlimited time in Malta, which he could have devoted to fostering a relationship with his biological father. However, the Court notes that there currently exists no family life between the applicant and his father, who has evinced no wish or intention to acknowledge his son or to build or maintain a relationship with him. The Court finds that in these circumstances, the denial of citizenship cannot be said to have acted as an impediment to establishing family life or otherwise to have had an impact on the applicant's right to respect for family life. However, as the Court has observed above, even in the absence of family life, the denial of citizenship may raise an issue under Article 8 because of its impact on the private life of an individual, which concept is wide enough to embrace aspects of a person's social identity.

“However, as the Court has observed above, even in the absence of family life, the denial of citizenship may raise an issue under Article 8 because of its impact on the private life of an individual, which concept is wide enough to embrace aspects of a person’s social identity. While the right to citizenship is not as such a Convention right and while its denial in the present case was not such as to give rise to a violation of Article 8, the Court considers that its impact on the applicant's social identity was such as to bring it within the general scope and ambit of that Article.”

- 34. Maltese legislation expressly granted the right to citizenship by descent and established a procedure to that end. Consequently, the State, which has gone beyond its obligations under Article 8 in creating such a right – a possibility open to it under Article 53 of the Convention – must ensure that the right is secured without discrimination within the meaning of Article 14 (see, E.B. v. France, cited above, § 49).
Mennesson v. France (26 June 2014):
• “97. Whilst Article 8 of the Convention does not guarantee a right to acquire a particular nationality, the fact remains that nationality is an element of a person’s identity […]”

Labassee v. France (26 June 2014):
• “76. Par ailleurs, même si l’article 8 de la Convention ne garantit pas un droit d’acquérir une nationalité particulière, il n’en reste pas moins que la nationalité est un élément de l’identité des personnes […]”
Legal context (5): EU Law

- **Article 20 (1) TFEU:**
  
  “Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.”
Legal context (5): EU Law

- **Janko Rottmann v. Freistaat Bayern (2 March 2010):**
Legal context (5): EU Law

Janko Rottmann v. Freistaat Bayern (2 March 2010):
• “39. It is to be borne in mind here that, according to established case-law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality […].

• 41. Nevertheless, the fact that a matter falls within the competence of the Member States does not alter the fact that, in situations covered by European Union law, the national rules concerned must have due regard to the latter […].”
• Janko Rottmann v. Freistaat Bayern (2 March 2010):
  • “42. It is clear that the situation of a citizen of the Union who, like the applicant in the main proceedings, 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.

  • 43. As the Court has several times stated, citizenship of the Union is intended to be the fundamental status of nationals of the Member States […]

  • 45. Thus, the Member States must, when exercising their powers in the sphere of nationality, have due regard to European Union law […].”
Janko Rottmann v. Freistaat Bayern (2 March 2010):
• “54. Those considerations on the legitimacy, in principle, of a decision withdrawing naturalisation on account of deception remain, in theory, valid when the consequence of that withdrawal is that the person in question loses, in addition to the nationality of the Member State of naturalisation, citizenship of the Union.

• 55. In such a case, it is, however, 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.”
Janko Rottmann v. Freistaat Bayern (2 March 2010):

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

58. 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.”
Scope of the *Rottmann*-ruling?

- **Ruiz Zambrano (C-34/09)**
  - “40. Article 20 TFEU confers the status of citizen of the Union on every person holding the nationality of a Member State […].

- 41. As the Court has stated several times, citizenship of the Union is intended to be the fundamental status of nationals of the Member States […].

- 42. In those circumstances, Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the *genuine enjoyment of the substance of the rights* conferred by virtue of their status as citizens of the Union (see, to that effect, *Rottmann*, paragraph 42).”

- Narrowing of scope of EU citizenship in *McCarthy* (C-439/09) and *Dereci* (C-256/11)
Belgium:
- Withdrawal of naturalisation obtained by fraud (BEL 23(1)(1))

France:
- Withdrawal of naturalisation obtained by fraud (FRA 27-2)

Netherlands:
- Nullification of naturalisation obtained by fraud (NET 14(1))
- Nullification (ab initio) of naturalisation obtained by identity fraud (< 1-4-2003)
- Withdrawal of nationality due to non-renunciation (NET 15(1)(d) & 15(1)(f))

Spain:
- Nullification of naturalisation obtained by fraud (SPA 25(2))
- Automatic loss of nationality due to non-renunciation (SPA 25(1)(a))

United Kingdom:
- Withdrawal of naturalisation obtained by fraud (UK 40(3) & 40(6))
- Nullification (ab initio) of naturalisation obtained by identity fraud
Reception of Rottmann (1)

- **France, Spain & UK:**
  - No relevant citation of *Rottmann* by legislature

- **Belgium, France & Spain:**
  - No relevant citation of *Rottmann* by judiciary
Answer of Minister E.M.H. Hirsch Ballin of 27 May 2010 to parliamentary questions in the framework of an amendment of the Dutch Nationality Act:

• “The fact that, in Europe, each country is competent to decide who its citizens are and how its nationality law will be arranged – within the limits of international treaties – can have consequences for European Union law. From the judgment of the Court of Justice of the European Union of 2 March 2010 (C-135/08), it results that the nationality law of the different countries may require coordination. [...]”

• The situation in the Rottmann-case is a long-standing problem. International treaties aim to prevent, as much as possible, cases of statelessness. [...]” (translation by NCL)
Answer of Minister E.M.H. Hirsch Ballin (cont’d):

- ‘Novel to the judgment of the Court of Justice is the coupling of the loss to the European Citizens’ rights. The Court of Justice considered that Member States cannot be prohibited from withdrawing their nationality, solely on the basis that the individual concerned does not reacquire his or her former nationality. Such a decision must, however, be in accordance with the principle of proportionality, as regards the consequences of [the loss] for the individual concerned – and in relevant cases for his or her family members – in light of European Union law. […] This judgment of the Court of Justice gives the competent authorities within the various countries indications of how to act in cases where the withdrawal [of nationality] due to fraud leads to the loss of the rights of European Citizens. The Kingdom [of the Netherlands] will take the ruling of the Court of Justice into consideration in decisions on withdrawal of the Dutch nationality, and the reacquisition thereof after the loss of another nationality. […]’

(translation by NCL)
Explanatory Memorandum of 14 March 2012 to an amendment of the Dutch Nationality Act:

• “Pursuant to international law, Member States are competent in matters of nationality law. This [principle] is also acknowledged by the Court of Justice of the European Union. […]”

• That the competence to decide on the conditions for the acquisition and the loss of the nationality rests with the Member States, has recently been reaffirmed by the Court of Justice in the recent decision in the Rottmann-case […]. The Rottmann-ruling relates to the loss of the Union Citizenship effectuated by the involuntary loss of nationality as a result of the withdrawal by a Member State on the grounds of fraud. […]

• [This amendment] bill does not have any consequences for the grounds of withdrawal of the Dutch nationality. The expansion of the grounds of loss of nationality will, however, more frequently lead to the loss of Union citizenship in cases of voluntary acquisition of the nationality of a country which is not a member of the European Union. However, this would not concern the withdrawal of the nationality, but instead of the automatic loss of the Dutch nationality as a result of the individual choice of the Dutch citizen who voluntarily accepted another nationality. Thus the bill does not relate to situations of withdrawal as in the Rottmann-case.” (translation by NCL)

N.C. Luk (CEPS / UM)
Reception of *Rottmann* (2) - Netherlands

- **Dutch judiciary: Marginalisation of the *Rottmann*-ruling**
  - *Rottmann* is limited to situations in which the individual *previously* possessed the nationality of one Member State, *subsequently* obtained the nationality of another MS by *naturalisation*, thereby *losing automatically* the former nationality, who is then confronted with the withdrawal of the *current* MS nationality, and *thus* faced with the *loss of the Union citizenship*
    - *Rottmann* thus not applicable if the individual did not *previously* possess Union citizenship
    - *Rottmann* is further limited to cases in which the MS nationality is lost as the result of *withdrawal* on the grounds of *fraud*
Reception of *Rottmann* (3) – UK

**G1 v. Secretary of State for the Home Department**  
(ECWA 4 July 2012, [2012] EWCA Civ 867)

- “37. I have with great respect found some difficulties with the reasoning in Rottmann. On the one hand there are passages which appear to suggest that national courts must "have due regard to European Union law" in adjudicating upon a question of deprivation of citizenship (because that entails the deprivation of EU citizenship) even where there is no cross-border element in the case: Mr Southey would I think emphasise in particular the terms of paragraphs 45 and 48. But there are also elements suggesting that the particular history – the applicant's having lost his Austrian nationality upon moving to Germany and seeking naturalisation there – informed the court's reasoning, notably paragraphs 42 ("...after he has lost the nationality of another Member State that he originally possessed...") and 56 ("whether it is possible for that person to recover his original nationality").”
38. Moreover this uncertainty as to the decision's scope betrays, to my mind, a deeper difficulty, which may be explained as follows. The distribution of national citizenship is not within the competence of the European Union. [...] Upon what principled basis, therefore, should the grant or withdrawal of State citizenship be qualified by an obligation to "have due regard" to the law of the European Union? It must somehow depend upon the fact that since the entry into force of the Maastricht Treaty in 1993 EU citizenship has been an incident of national citizenship, and "citizenship of the Union is intended to be the fundamental status of nationals of the Member States" (Rottmann paragraph 43 and cases there cited).

39. But this is surely problematic. EU citizenship has been attached by Treaty to citizenship of the Member State. It is wholly parasitic upon the latter. I do not see how this legislative circumstance can of itself allocate the grant or withdrawal of State citizenship to the competence of the Union or subject it to the jurisdiction of the Court of Justice. [...] 

40. Nor is it clear what is meant by such an obligation, or by the proposition that decisions as to the loss or acquisition of citizenship are "amenable to judicial review carried out in the light of European Union law" (Rottmann paragraph 48)."
Reception of Rottmann (3) – UK

**G1 v. Secretary of State for the Home Department (ECWA 4 July 2012)**

- "41. In these circumstances I consider with respect that the Rottmann decision has to be read and applied with a degree of caution. It cannot in my judgment be applied so as to require that in a case such as this the adjudication of a decision to deprive an individual of citizenship must be conducted subject to any rules of law of the European Union. On the facts, as Mr Eicke submitted, there is no cross-border element whatever. There has been no actual, attempted or purported exercise of any right conferred by EU law. From first to last this is a domestic case. Quite aside from the difficulties as to the scope of EU competences,
  - "it is settled case-law that the Treaty rules governing freedom of movement for persons and the measures adopted to implement them cannot be applied to situations which have no factor linking them with any of the situations governed by European Union law and which are confined in all relevant respects within a single Member State..." (McCarthy, paragraph 45)
- 43. There is a further dimension to which I ought to refer. The conditions on which national citizenship is conferred, withheld or revoked are integral to the identity of the nation State. They touch the constitution; for they identify the constitution's participants. If it appeared that the Court of Justice had sought to be the judge of any procedural conditions governing such matters, so that its ruling was to apply in a case with no cross-border element, then in my judgment a question would arise whether the European Communities Act 1972 or any successor statute had conferred any authority on the Court of Justice to exercise such a jurisdiction. [...]"
Reception of *Rottmann* (3) – UK

**Deliallisi** (Upper Tribunal 30 August 2013, [2013] UKUT 439):

- “39. [...] it will still be necessary to decide whether deprivation of British citizenship “observes the principle of proportionality so far as concerns the consequences it entails for the situation of the person concerned in the light of a European Union law, in addition, where appropriate, to examination of the proportionality of the decision in the light of national law” (Rottmann v Freistaat Bayers [2010] EUECJ C-135/08 (02 March 2010)). [...]

- 42. In the light of Zambrano (European Citizenship) [2011] EUECJ C-34/09 (08 March 2011), we do not consider that Rottmann can be said to be of no application to the circumstances of the present case, merely because the present appellant has not engaged EU free movement laws by moving to another EU State. It is clear from Zambrano that the CJEU requires importance to be attached to the rights and benefits derived from EU citizenship, not merely as regards free movement. [...]”
Reception of *Rottmann* (3) – UK

**Deliallisi** (Upper Tribunal 30 August 2013):

- “69. We turn to EU proportionality. [...] In determining whether the deprivation of citizenship is proportionate, we have had regard to factors bearing on the appellant’s side of the balance. Although the appellant has not exercised free movement rights and the evidence does not disclose any intention or wish to do so in the future, we nevertheless recognise that the principle of free movement is an important one and that, if deprived of British (and hence EU citizenship), the appellant will lose both that and the other benefits inherent in EU citizenship. We give this matter weight.

- 70. We find that depriving the appellant of British citizenship will have no effect whatsoever on the EU citizenship rights of his wife or children. There is no prospect of the children being deprived of their ability to exercise such rights, including the right to education.”
Deliallisi (Upper Tribunal 30 August 2013):

• “71. We have considered the lapse of time between the naturalisation decision and the withdrawal decision. The certificate of naturalisation in the present case is dated 15 May 2006. In 2007, information came to light that the appellant may have given false information. The decision to make a deprivation order was made on 3 October 2009. Plainly, the passage of time between the naturalisation decision and the deprivation decision raises no issues that might affect the proportionality of the latter decision. Thereafter, we acknowledge matters have moved more slowly [...]. But, during that time, the evidence does not suggest the appellant’s position has materially altered, such as by his becoming significantly more integrated into United Kingdom society. [...] In summary, we do not consider the lapse of time (or “delay”) issue has a significant role to play in the circumstances of the present case.”
Deliallisi (Upper Tribunal 30 August 2013):

“72. Although deprivation will remove the appellant’s EU citizenship, he does have continuing Albanian citizenship. So far as factors on the respondent’s side are concerned, there is, of course, the important public policy aim of ensuring that the laws regarding British citizenship (and, by extension, EU citizenship) are not undermined by the kind of deception that undoubtedly was employed by the appellant. Confidence in the citizenship laws of a Member State needs to be maintained, with the inevitable consequence that those who are found to have obtained such citizenship deceitfully should, as a general matter, not be permitted to benefit therefrom. Overall, we find that the decision to deprive the appellant of British citizenship is, in all the circumstances, a justified and proportionate response, which does not go further than is necessary for the purposes of the respondent’s legitimate policy aims. On the contrary, on the facts as we find them, any other conclusion risks being seen as undermining those aims, since the effectiveness of section 40 of the 1981 Act would be severely circumscribed.”
Advice of the Belgian Council of State of 16 and 23 August 2011 on amendment of the Belgian Nationality Code:

- “14.1.1. Article 23, § 1, of the Code on the Belgian Nationality, as amended by Article 10 of the Amendment Bill, provides for the following: [...] .

Neither this paragraph 1 or Article 23 make any reservations for cases where the possibility may arise that the individual concerned would become stateless as a result of the revocation.

- 14.1.2. In the proposed Article 23bis of the Code on the Belgian Nationality (Article 11 of the Amendment Bill) [...] further in paragraph 2, in contrast to the silence of the aforementioned Article 23, contains the following:

‘The fact that the revocation [of the Belgian nationality] could result in the individual concerned becoming stateless, is a factor that the court shall take into account in its decision regarding the revocation.” (translation by NCL)
Advice of the Belgian Council of State (cont’d):

“14.2. Irrespective of the fact that the aforementioned provision [...] does not impose clear obligations on the court and thus does not contain a rule of law, the obligations with regard to statelessness on the part of States should be recalled.

These [obligations] flow from the [1961] Convention on the Reduction of Statelessness [...] and [...] the European Convention on Nationality [...].

Notwithstanding that these treaties have not been ratified by Belgium [...] the obligation to avoid statelessness has become part of customary international law [...], and thus Belgium is bound by this obligation.

This obligation is not absolute, however [...]” (translation by NCL)
Advice of the Belgian Council of State (cont’d):

• “14.3. Supplementary to these general rules of customary international law are the more specific rules stemming from the law of the European Union, in particular the rules whereby the citizens of the Member States are granted the status of European Citizens (Article 20 TFEU).

In this regard, reference is made to the Rottmann v. Freistaat Bayern ruling [...].

• 14.4. The provisions mentioned in section 14.1 above have to be revised in light of the international and European obligations set forth above [...]” (translation by NCL)
Conclusion

- Importance of *Rottmann*

- Five (5) MS examines, only two (2) seem to accept (to a certain extent) the ‘proper’ interpretation of *Rottmann*

- Possible reasons for the lack of reception? (Kalinichenko 2014)
  - Costs of compliance (e.g. amendment of legislation) v. assumed costs of non-compliance
  - Institutionalised ‘domestic norms’ which hinder compliance with *Rottmann*
  - Lack of interest/awareness on the part of (national) societal actors
  - Hesitant position of European Commission to promote national reforms in this matter

Y. Kalinichenko (2013), *EU and National Citizenship: Explaining the Lack of Member States’ Response to the Rottmann ruling of the CJEU*, Master’s thesis, Central European University, Budapest (www.etd.ceu.hu/2013/kalinichenko_yulia.pdf);
Interesting publications and links


Thank you for your attention.

Questions?