

## European Citizenship and the Competence of Member States to Grant and to Withdraw the Nationality of their Nationals

Case C-135/08, *Janko Rottmann v Freistaat Bayern*, Judgment of the Court of Justice of the EU (Grand Chamber) of 2 March 2010

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### Keywords

European citizenship, Nationality, Division of Competences between Member States and the EU, Proportionality, ECJ.

### Abstract

In the case of Janko Rottmann, the competence of the Member State to grant and to withdraw the nationality of their nationals is topic of debate. Does the fact that European citizenship is founded on the nationality of the Member States preclude the exercise of this competence without considering the consequences for the status and rights of Union citizenship? The Court of Justice of the EU concludes in the present case that this exercise of competences by the Member States may be limited by the principle of proportionality. In this case note this judgement is analysed, also in the context of previous case law on Union citizenship and nationality.

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*Merkourios* 2010 – Volume 27/Issue 72, Case Note, pp. 65-69.

URN: NBN:NL:UI:10-1-100927

ISSN: 0927-460X

URL: [www.merkourios.org](http://www.merkourios.org)

Publisher: Igitur, Utrecht Publishing & Archiving Services

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## I. Introduction

In the Treaty of Maastricht,<sup>1</sup> which entered into force in 1993, European citizenship was introduced as the legal status of nationals of the Member States of the European Union. Specific rights were attached to that status of European citizenship, such as free movement (Article 21 Treaty on the Function of the European Union, hereafter TFEU) and electoral rights (Article 22 TFEU).

Article 20 TFEU provides that ‘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’.<sup>2</sup> The competence to regulate nationality laws has remained in the hands of the Member States, which is also explicitly expressed in Declaration 2, annexed to the Treaty of Maastricht. This declaration states that whenever the Treaty makes reference ‘to nationals of the Member States, the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned’. In the case of Janko Rottmann the essential question was whether the exercise of that Member States’ competence to grant and revoke nationality is limited by provisions of Union citizenship.

Already in 1992, a preliminary reference was made to the Court of Justice (ECJ) with regard to the Member State competence to regulate nationality, in the case of *Micheletti*.<sup>3</sup> In that case the question arose whether Mr. Micheletti, who had dual Argentine and Italian nationality and wanted to settle as a dentist in Spain, could be refused permanent residency by the Spanish authorities. This refusal was based on Spanish law, according to which, the nationality corresponding to the habitual residence before Mr. Micheletti’s arrival in Spain was used as yardstick. In this case, the ECJ emphasised that the competence to regulate nationality belongs to the Member States, thus Spain should accept the Italian nationality legislation, in which a person could acquire the Italian nationality by being born from Italian parents. The ECJ concluded that ‘under international law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality. However, it is not permissible for the legislation of a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty’.<sup>4</sup> This case was a pre-Union citizenship case that concerned the freedom of establishment. Since then, European citizenship has been introduced, thereby extending the right of free movement of persons beyond the economic dimension.

In the case law of the ECJ on Union citizenship, the substantive rights of European citizens have been linked to equality and the exercise of free movement rights through Europe. Whenever a Union citizen exercises his or her right to move and reside freely within the territory of the EU, these citizens should, in principle, be treated on an equal footing with the host Member State’s own nationals. Also any restriction of the exercise of free movement by Union citizens should be objectively justified by the Member States. The question is what this would mean for the competence of the Member States to grant and revoke nationality.

## II. Facts and Background

Janko Rottmann, who originally had Austrian nationality, acquired the Union citizenship status with the accession of Austria to the Union in 1995. In that same year Rottmann migrated to Munich, Germany. Three years later he applied for German nationality, which was granted a year later, in 1999. According to the Austrian nationality regulations, Rottmann lost his Austrian nationality at the moment he acquired German nationality.

During the naturalisation process Rottmann failed, however, to mention that the Criminal Court of Graz (Austria) had opened legal proceedings against him, on account of suspected serious fraud on an occupational basis in the exercise of his profession. The Austrian authorities informed the city of Munich that a warrant for the arrest of Rottmann was issued in Graz, and furthermore that Rottmann had been questioned before the criminal court in 1995 as an accused person. The

1 Treaty of Maastricht (also known as the Treaty of the European Union) signed 7 February 1992, Official Journal C191 (entered into force 1 November 1993).

2 The original text of Article 17 EC had a subtle difference; it stated that Union citizenship will be ‘complementary’ to national citizenship, instead of ‘additional’. What this difference means is still unclear. Compare for instance J Shaw, ‘The Treaty of Lisbon and Citizenship’ (2008) The Federal Trust European Policy Brief and HCFJA de Waele, ‘EU Citizenship. Revisiting its Meaning, Place and Potential’ (2010) 12 EJML 319. Interestingly enough in the Draft of the Constitutional Treaty the text was proposed: ‘every citizen of a Member State is a citizen of the Union; enjoys dual citizenship, national citizenship and European citizenship; and is free to use either, as he or she chooses, with the rights and duties attaching to each’. Preliminary Draft Constitutional Treaty of 28 October 2002 [2002] CONV 369/02.

3 Case C-369/90 *Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria* [1992] ECR I-04239.

4 *Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria* (n 3) para 10.

Freistaat Bayern decided to withdraw Rottmann's German nationality with retroactive effect, due to Rottmann's failure to mention these criminal proceedings in Austria. The result of the withdrawal of German nationality was that Rottmann became stateless, since he had lost his Austrian nationality as the result of getting German nationality. As Rottmann no longer held the nationality of one of the EU Member States, he also lost his status as European citizen. That loss of status meant that the substantive rights conferred on Union citizens, such as the right to free movement or to diplomatic protection in third countries, could no longer be enjoyed by Rottmann.

The preliminary questions to the ECJ in the Rottmann case are twofold. In the first place, the national court wanted to know whether Rottmann's loss of his status as a Union citizen and the attached rights was contrary to Union law under the present circumstances. Secondly, the national court asked the ECJ to clarify, in case of an affirmative answer on the first question, which Member State would be obliged to respond in case of violation of EU law. Should Austria adjust its laws in order to prevent a situation in which an Austrian national could become stateless, or should Germany, under the present circumstances, adjust its laws in order to prevent Rottmann losing his status as a Union citizen?

In essence, the question in this case is how the sensitive balance between 'true' Union citizenship, on the one hand, and the sovereignty of Member States on the regulation of nationality, on the other hand, should be weighed. In earlier case law of the ECJ the impact of European citizenship on certain areas which belong to the competence of the Member States was shown. For example, in the *Avello* case,<sup>5</sup> the ECJ reviewed the way surnames are governed in a Member State with regard to equal treatment of Union citizens. Another example is the *Schempp* case,<sup>6</sup> in which a tax provision that disadvantaged a Union citizen was at stake. In that case Schempp was disadvantaged because his former spouse had migrated to another Member State. Although the competence to regulate surnames and direct taxation also lies in the hands of the Member States, regulation of nationality is (more) explicitly excluded from the scope of Union law by Article 21 TFEU, and also by the declaration on nationality.

For that reason, in the present case, the intervening Member States as well as the Commission and Freistaat Bayern, argued before the ECJ that the issues of acquisition and loss of nationality do not fall within the scope of Union law, and therefore should not be scrutinised on its restrictive effect for Union citizens. In the second place, the German and Austrian governments argued that the situation of Rottmann was a purely internal one, since Rottmann was residing in Germany with the German nationality, which was withdrawn based on German legislation. The same reasoning was followed by Advocate-General Maduro, who was of the opinion that the revocation of German nationality did not have a sufficient link with the free movement of Union citizens, and therefore fell outside the scope of Union law. This would be different only when a direct link between free movement and the revocation of nationality would be at stake.

### III. The Judgment of the ECJ

The ECJ first confirmed that setting conditions for the acquisition and loss of nationality is indeed a matter of the Member States. The ECJ, however, continued by emphasising that in exercising their competences the Member States still have to comply with the principles of Union law whenever the particular situation falls within the scope of Union law. As observed above, this is indeed well-established case law, for example with regard to tax measures or the governing of surnames. The remaining question was whether regulation of nationality conditions in the present case fell within the scope of Union law. As has been mentioned, the Advocate-General, the intervening Member States, and the Commission took the view that it would fall outside the scope of application. Surprisingly, the ECJ concluded differently:

It is clear that the situation of a citizen of the Union who [...] is faced with a decision withdrawing his naturalization, 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 [Article 20 TFEU] and the rights attaching thereto falls, by reason of its nature and its consequences, within the ambit of European Union law.<sup>7</sup>

The ECJ acknowledged nevertheless that Member States may legitimise the revocation of nationality and its consequences for the status of EU citizens for the protection of their special relationship with their nationals, based on 'solidarity and good faith, and the reciprocity of rights and duties, which forms the bedrock of the bond of nationality'.<sup>8</sup> Such legitimate interest is, however, subject to the test of proportionality. In order to balance proportionality the national court should take

5 Case C-148/02 *Carlos Garcia Avello v Belgian State* [2003] ECR I-11613.

6 Case C-403/03 *Egon Schempp v Finanzamt München V.* [2005] ECR I-06421.

7 Case C-135/08 *Janko Rottmann v Freistaat Bayern* [2010] ECR nyp, para 42.

8 *Janko Rottmann v Freistaat Bayern* (n 7) para 51.

into account the specific circumstances of the case, weigh the gravity of the offence against the consequences of the loss of the status of Union citizenship, the lapse of time between the naturalisation decision and the decision to withdraw the nationality, as well as take into account whether it is possible to recover the nationality of origin. The ECJ left it up to the national court to decide whether it would be proportional to withdraw the German nationality.

From an international law perspective, each State is able to determine who its nationals are, since nationality is defined as the 'legal bond between a person and a State'.<sup>9</sup> The decision to revoke nationality is not solely within the sovereignty of Member States, but finds its limits in international law norms in the form of treaties or customary law. In the first place, Article 15 of the Universal Declaration on Human Rights states that 'everyone has the right to a nationality', which may not be withdrawn arbitrarily. The European Convention on Nationality<sup>10</sup> provides that 'statelessness shall be avoided' and the loss of nationality at the initiative of the state party may be based on a number of grounds, fraud being one of them. The Convention on the Reduction of Stateless Persons<sup>11</sup> may also be mentioned as an important treaty in that respect. This Convention also includes a ground of derogation from the obligation of States to ensure that persons do not become stateless when the nationality of the State is acquired by deception and fraud.<sup>12</sup> In its decision the ECJ briefly mentioned these international law obligations but found that in *Rottmann* the revocation of nationality would not constitute a violation of these Conventions. Janko Rottmann did not argue that his fundamental right to nationality was breached, although he might have argued that the right to have a nationality and not to become stateless should be balanced against his failure to mention criminal investigations.<sup>13</sup>

The ECJ concluded that 'it is not contrary to European Union law, in particular to Article 17 EC [now 20 TFEU], 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'.<sup>14</sup>

#### IV. Comment

At first sight the ECJ decision in *Rottmann* leaves the Member States with discretion with regard to the regulation of nationality laws; it concluded that under the present circumstances the withdrawal is not contrary to EU law, *in principle*.

The most important point is that for the first time the ECJ ruled very clearly that the exercise of the Member State competence to regulate the conditions of their nationality falls within the scope of Union law, a ruling which also has certain consequences for the application and judicial review of nationality regulations.<sup>15</sup>

As observed above, also in earlier case law the ECJ has decided on nationality before the introduction of Union citizenship, in the case of *Micheletti*. After the introduction of European citizenship another important case on nationality and EU citizenship can be mentioned, the case of Ms. Kaur. In the case of *Kaur*,<sup>16</sup> the British nationality rules were examined by the ECJ. In that case a third country national who was recognised by the UK as citizen of the UK and Colonies<sup>17</sup> but did not fall within the personal scope of citizens entitled to reside in the UK, could not rely on her Union citizenship. The ECJ held, in that case, that the declaration on nationality of the UK 'did not have the effect of depriving any person who did not satisfy the definition of a national of the United Kingdom of rights to which that person might be entitled under Community law. The consequence was rather that such rights never arose in the first place for such a person'.<sup>18</sup>

In *Rottmann* the ECJ decided that Janko Rottmann could, unlike Ms Kaur, rely on his rights as a European citizen. Comparing the situation of Mr. Rottmann with that of Ms. Kaur, the denial of access to nationality would not constitute a problem, but the fact that Rottmann once had the status of a Union citizen, which was withdrawn, was crucial in order to fall within the

9 See Article 2 of the European Convention on Nationality (n 10).

10 European Convention on Nationality [1997] ETS 166.

11 The Convention on the Reduction of Stateless Persons [1961] UN Treaty Series 989.

12 Germany and Austria are both a party to these Conventions, albeit with some reservations and declarations.

13 As was argued in the case of Ms. Kaur, in which Ms. Kaur claimed that her fundamental rights were violated (para 17). The ECJ did not decide on that point. See more details on this case below (n 16).

14 *Janko Rottmann v Freistaat Bayern* (n 7) para 59.

15 See GT Davies, 'The entirely conventional supremacy of Union citizenship and rights' (*EDU forum*) <<http://eudo-citizenship.eu/citizenship-forum/254-has-the-european-court-of-justice-challenged-member-state-sovereignty-in-nationality-law?start=2>>.

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

17 According to the British Nationality Act 1948 the British nationality is granted to certain persons, but not all those nationals had the actual right to access and reside within the UK. This was only allowed for certain nationals of whom the right to abide in the UK was recognised, according to the Immigration Act of 1971.

18 *The Queen v Secretary of State for the Home Department, ex parte: Manjit Kaur* (n 16) para 25.

scope of EU law. So the crucial difference is that Ms. Kaur never had the status of a Union citizen, while Rottmann did until he lost this status.<sup>19</sup>

In *Rottmann*, the ECJ relied interestingly enough on the ‘nature and the consequences’ of Union citizenship and the situation of Janko Rottmann, in order to argue that the matter fell within the scope of Union law. This statement is especially interesting taking into account the fact that the ECJ did not rely on the *past* free movement of Rottmann, from Austria to Germany, but focused instead on the *future* consequences of his loss of the Union citizenship status. The link with free movement is therefore not the previous migration, but Mr Rottmann’s potential future migration or exercise of other Union citizens’ rights. With the Advocate-General Maduro’s opinion in this case at the back of one’s mind, the decision in *Rottmann* was somewhat unexpected. Maduro concluded that EU law was not applicable, since a link with free movement was lacking. Up until now the case law of the ECJ on citizenship was grounded on free movement, although in some cases the cross-border link was not very obvious, such as in the *Schempp* case mentioned above. What the ECJ exactly had in mind by the wording ‘the nature and consequences’ will probably become clear in the future.<sup>20</sup>

Nevertheless, the judgment in *Rottmann* did not come totally out of the blue, since the ECJ has earlier concluded that the freedom to regulate nationality had to be exercised *having due regard to Union law*.<sup>21</sup> It is common case law that the exercise of competences by the Member States has to comply with the principles of EU law whenever the particular situation falls within the scope of EU law. As a result, Member States are limited by the principles of Union law, such as the principle of proportionality. It means also that whenever a national provision governing nationality restricts the Union citizen without a legitimate interest and/or in a disproportionate manner, this provision shall have to be put aside by the national court.

In connection with this, the ECJ becomes the final instance to scrutinise whether national conditions of nationality do comply with Union law. The idea that Member States are the ultimate gatekeepers of Union citizenship status is more nuanced than was thought by (some) Member States. Although the ECJ leaves it up to the national court to decide on the proportionality test, the outcome of the *Rottmann* case might be predictable, taking the indications of the ECJ into account. Not much room is left for the national court to decide on proportionality, since the ECJ made very strong suggestions for weighing the circumstances.<sup>22</sup> Nevertheless, the discretion to use the proportionality test is respected by the ECJ. This might be a good instrument to balance the pervasive effect of Union law in the national legal order in sensitive policy areas, so that only measures that are exercised in a manner that exceeds the principle of proportionality are ‘caught’ by Union law. Nevertheless, a problem with proportionality as limited to the competences of Member States is the legal certainty for individuals. Where more discretion is left to national courts to decide on proportionality, legal certainty of Union citizens is reduced at the same time, since in some individual cases the outcome may not be predictable, as might be the case in *Rottmann*. This is especially so since personal circumstances have to be weighed (for instance, balancing the consequences of the withdrawal and the seriousness of the fraud during neutralisation), which will differ for each individual.

Since the ECJ has expressed in several judgments that Union citizenship is the ‘destined fundamental status of nationals of the Member States’,<sup>23</sup> the *Rottmann* case seems the right step forward. Such a fundamental status as Union citizenship is hard to imagine if this status is dependent on the Member States alone. The fact that the decision to withdraw nationality with the result of losing the status of being a Union citizen is limited by the proportionality principle (and probably also by the other general principles of Union law) is logical, viewed from that ideal starting point. The decision is also in compliance with the common case law of the ECJ which states that the exercise of competences of Member States can be limited by the general principles of Union law, even in fields in which the Member States are competent to act, such as healthcare or direct taxation measures. Through the inclusion of Union citizenship as a status, disconnected from any economic aim, areas of law that affect this citizenship now come within the scope of Union law and thus also under the scrutiny of the European Court of Justice. ■

19 See also the case note of S Hall, ‘Determining the Scope *ratione personae* of European Citizenship: Customary International Law Prevails for Now. ECJ, Judgment, 20 February 2001, Case C-192/99, *The Queen v. Secretary of State for the Home Department ex parte Kaur*’ [2001] *Legal Issues of Economic Integration* 355, with a good prediction of the present outcome.

20 See especially the Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l’emploi (ONEM)* [2009] OJ C90/15 in which Advocate-General Sharpston pleads for application of Union citizenship connected with fundamental rights, independent of cross-border activities, also with reference to *Rottmann*, *inter alia* in para 95.

21 *Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria* (n 3).

22 At the moment of writing, November 2010, the decision of the Bundesverwaltungsgericht is not available on its website.

23 Case C-184/99 *Grzelczyk* [2001] ECR I-6193, para 31; Case C-224/98 *D’Hoop* [2002] ECR I-6191, para 28; Case C-148/02 *Avello* [2003] ECR I-1161, para 22; Case C-403/03 *Schempp* [2005] ECR I-6421, para 15.