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HAS THE EUROPEAN COURT OF JUSTICE CHALLENGED
MEMBER STATE SOVEREIGNTY IN NATIONALITY LAW?

edited by Jo Shaw

EUROPEAN UNIVERSITY INSTITUTE, FLORENCE
ROBERT SCHUMAN CENTRE FOR ADVANCED STUDIES
EUROPEAN UNION DEMOCRACY OBSERVATORY ON CITIZENSHIP

*Has the European Court of Justice Challenged Member State Sovereignty in
Nationality Law?*

EDITED BY JO SHAW

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Abstract

In March 2010, the Court of Justice of the European Union (CJEU or Court) handed down its judgment in the long awaited case of Rottmann. This paper explores some of the implications of this important judgment through a series of comments placed contemporaneously on the EUDO Citizenship website and a conclusion finally revised by Jo Shaw in November 2011. The judgment clarifies the relationship between EU citizenship and national citizenship, stating that a withdrawal of national citizenship which results in a person ceasing to be an EU citizen altogether 'by reason of its nature and consequences' falls within the scope of EU law and is thus subject to review by national courts and the Court of Justice in the light of the requirements of EU law. The conclusion as to whether national authorities have overstepped the mark will be made in the light of a proportionality test. While Rottmann itself represents an interesting jumping off point for further reflection on the EU/national citizenship nexus, its broader interest partly lies in the fact that it sits – with the benefit of some hindsight – at the beginning of a new period of judicial activism on the part of the Court of Justice in relation to the scope and character of EU citizenship. This broader context is surveyed by Shaw in the concluding thoughts.

Keywords

Union citizenship, national citizenship, judicial activism, family life, European Convention on Human Rights, Charter of Fundamental Rights

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Setting the scene: the Rottmann case introduced

Jo Shaw*

In March 2010, the Court of Justice of the European Union (CJEU or Court) handed down its judgment in the long awaited case of *Rottmann*.¹ The Court's judgment is somewhat bolder and more direct in its phrasing than the earlier Opinion of Advocate General Maduro, which one blog described as being of 'shocking prudence'.² Whereas 'kick off' contributions to the EUDO-Citizenship Forum generally aim to provoke the debate by adopting a clear and perhaps provocative line on a controversial question, this short contribution instead lays out the facts of the case, identifies the general lines of argument which underpin the Court's judgment, and suggests what might be the main areas which are likely to prove controversial in subsequent discussion.

Dr. Janko Rottmann was born in Austria and had Austrian nationality from birth. He was prosecuted in the mid 1990s in Austria for alleged fraud, but moved to Germany in 1995, apparently before criminal sanctions could be applied. The Austrian courts raised a warrant for his arrest. In Germany, meanwhile, he sought naturalisation as a German, but without disclosing to the German authorities that he was the subject of criminal proceedings in Austria. A decision granting naturalisation was made in February 1999. As a result of acquiring German nationality, Rottmann automatically lost his Austrian nationality by operation of law. In late 1999, the City of Munich, which had handled the request for naturalisation, was informed by the Austrian authorities about the criminal proceedings against Rottmann in Austria. It took the decision to revoke the naturalisation decision on the grounds that it had been obtained fraudulently. The effect of the withdrawal of German nationality, which did not entail automatic reacquisition by Rottmann of Austrian nationality under Austrian law, would render Rottmann stateless. In addition, of course, he would also lose his EU citizenship and thus all the rights which are attached to that status (e.g. free movement; non-discrimination, voting in European Parliament and local elections, diplomatic protection, etc.). By virtue of Article 17(1) EC/Article 20(1) Treaty on the Functioning of the European Union (TFEU) (post-Lisbon), it is the nationals of the Member States who are the citizens of the European Union.

Rottmann challenged the administrative decision to withdraw nationality under German law, and the German supreme Federal Administrative Court decided to stay the proceedings before it and make a reference to the European Court of Justice, seeking answers to two questions. These were as follows:

Is it contrary to Community³ law for Union citizenship (and the rights and fundamental freedoms attaching thereto) to be lost as the legal consequence of the fact that the withdrawal in one Member State (the Federal Republic of Germany), lawful as such under national (German) law, of a naturalisation acquired by intentional deception, has the effect of causing the person concerned to become stateless because, as in the case of the applicant [in the main proceedings], he does not recover the nationality of another Member State (the Republic of Austria) which he originally possessed, by reason of the applicable provisions of the law of that other Member State?

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¹ Case C-135/08 *Rottmann v Freistaat Bayern*, 2 March 2010. The Court's judgment and the Advocate General's Opinion can be obtained in numerous official languages from the search page of the Court of Justice: http://curia.europa.eu/jcms/jcms/j_6/.

² <http://adjudicatingeurope.eu/blog/?p=206>.

³ Since the entry into force of the Treaty of Lisbon in 2009, 'Community law' as such no longer exists. References in older case law to 'Community law' should now be read as referring to what is now termed, in an undifferentiated manner, EU law. The latter term is used throughout this Working Paper, except in a direct quote from the case law.

[If so,] must the Member State ... which has naturalised a citizen of the Union and now intends to withdraw the naturalisation obtained by deception, having due regard to Community law, refrain altogether or temporarily from withdrawing the naturalisation if or so long as that withdrawal would have the legal consequence of loss of citizenship of the Union (and of the associated rights and fundamental freedoms) ..., or is the Member State ... of the former nationality obliged, having due regard to Community law, to interpret and apply, or even adjust, its national law so as to avoid that legal consequence?

The Opinion of Advocate General Maduro was quite cautious. Its main findings were the following:

Several Member States challenged the admissibility of the reference for a preliminary ruling. AG Maduro found that the Court of Justice has jurisdiction in a case such as this. In reply to assertions by Member States that this case concerns a challenge in a German Court, to a German administrative decision taken against a German citizen, and is thus a “wholly internal situation” unconnected to EU law, AG Maduro noted that it was significant that the fact that Rottmann eventually found himself in the situation under review was because of a prior exercise of free movement rights – i.e. taking up residence in Germany, which in turn allowed him to seek the acquisition of German nationality by naturalisation. He went on to list a number of other cases in which the link with the free movement scenario was relatively weak in character, such *Garcia Avello*, which concerned rules on surnames in Belgium, affecting children born and resident in Belgium, whose parents had exercised free movement rights.⁴

In principle, the rules on acquisition and loss of nationality fall within the exclusive competence of the Member States, but that does not mean that they can act without regard for EU law. In particular, as is well established, a Member State cannot, in the case of a dual national with the nationality of another Member State and of a third state, refuse to recognise such a person as an EU citizen. To do so would be to deny such a person the benefit of the free movement rights under the Treaty.⁵

The types of norms of EU law that would constrain the Member States in such circumstances would be those deriving from international law (e.g. rules on the avoidance of statelessness) as well as those deriving from EU fundamental rights or from the duties imposed upon the Member States to cooperate with the Union and with each other (Articles 10 EC/Article 4 Treaty on European Union post Lisbon). The type of scenario which might engage such a breach of EU law obligations would be one involving mass naturalisations of third country nationals without prior consultation with EU partners.

However, the case involving Dr Rottmann was different. International law does not prohibit the withdrawal of nationality from a person who has made false statements in the course of the naturalisation process, even if the effect of such a decision is to render the person stateless. Moreover, the Advocate General’s view was that the withdrawal of naturalisation was not connected to the exercise of free movement rights under EU law, and that therefore there was no reason based on this connection to EU law for the Court to scrutinise the national legislation itself, or to suggest to the national court that it should do so.

As regards the question of the role of the Austrian authorities in such a scenario, AG Maduro saw this as a matter for Austrian law alone. As the fact of acquiring German nationality led automatically to the loss of Austrian nationality, AG Maduro judged that the fact that Dr Rottmann would become stateless, if the German decision withdrawing naturalisation became definitive, was a consequence of his intentional act of seeking and acquiring German nationality. The only creative legal suggestion

⁴ Case C-148/02 *Garcia Avello* [2003] ECR I-1163.

⁵ Case C-369/90 *Micheletti* [1992] ECR I-4239.

Maduro felt able to make in the circumstances – and again he indicated that this was a matter for national law alone – was that since the effect of the withdrawal of the German nationality would be retrospective, Rottmann could be regarded as never having acquired German nationality at all, such that his reacquisition of Austrian nationality could happen automatically.

In stark contrast to the AG's Opinion, the judgment of the Grand Chamber of the Court of Justice concluded that the national decision in question should be scrutinised under EU law by reference to a standard of proportionality.

In a judgment which is considerably briefer than the AG's Opinion its reasoning runs as follows:

1. First, the Court made no separate comments about admissibility, but rejected the contention that the case concerned a 'wholly internal situation'. It noted that it is for each Member State to lay down the conditions for the acquisition and loss of nationality, but 'having due regard to Community law' (para. 39). It noted that 'in situations covered by European Union law, the national rules concerned must have due regard to the [EU law]' (para. 41). It then went on to make a very strong statement about the "reach" of Union citizenship and consequently the capacity of Member States to withdraw national citizenship where that results in the loss of Union citizenship:

'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 [i.e. Union citizenship] and the rights attaching thereto falls, by reason of its nature and its consequences, within the ambit of European Union law' (emphasis added; para. 42).

Notably, the Court does not focus on a human rights imperative to avoid statelessness, but rather on the EU-specific rights which a person will lose. It justifies its argument by reference to the oft-repeated statement that 'citizenship of the Union is intended to be the fundamental status of nationals of the Member States' (para. 43). Commentators will want to look hard at this particular finding and compare it to the manner in which the Court has previously justified looking at national rules which have an impact upon the exercise of rights under Union citizenship, whereas here it looks directly at the status conferred under national law because of its effects on the rights conferred by Union law. It will be interesting to see how far this reasoning can be stretched. Could it result, for example, in the scrutiny of the German nationality law which requires a person who has acquired German nationality by birth in the territory as the child of a legally resident non-national to opt, within five years of reaching the age of eighteen, for either German nationality or the nationality acquired by descent. This rule only applies to those who hold dual German/third country national citizenship, since Germany does not object to citizens of other Member States continuing to hold dual citizenship. Not renouncing the nationality acquired by descent in such circumstances means losing EU citizenship. Is this an issue falling 'by reason of its nature and its consequences' within the ambit of EU law?

2. Having decided that the issue was within the ambit of EU law, the Court then considered what standard of review is to be applied. It concluded that it is for the national court to apply a test of proportionality. Much of its subsequent discussion is devoted to assuring the Member States that it recognises that the withdrawal of naturalisation in circumstances such as these

'corresponds to a reason relating to the public interest. In this regard, it is legitimate for a Member State to wish to protect the special relationship of solidarity and good faith between it and its nationals and also the reciprocity of rights and duties, which form the bedrock of the bond of nationality' (para. 51).

Despite the fact that it wanted to assure the Member States of ‘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’ (para. 54) under international and EU law, nonetheless the Court empowered 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’.

This is an explicit invitation to national courts to weigh considerations relating to the national interest (i.e. the severity of the deception, for example) against the significance of losing EU citizenship (loss of free movement rights and other Union citizenship rights; possible impact upon family members). It emphasised again in para. 56 of the judgment ‘the importance which primary law attaches to the status of citizen of the Union’. Specifically, the Court advised that ‘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’ (para. 56). Finally, in para. 58, the Court invited the national court to consider whether proportionality requires that the person affected ‘to be afforded a reasonable period of time in order to try to recover the nationality of his Member State of origin.’ This seems to hint at some relationship of cooperation needing to emerge between Member States in these circumstances.

3. In its final comments, the Court noted that the German decision on withdrawing naturalisation had still not become definitive (because of the suspensive effects of the legal proceedings). In those circumstances, despite emphasising that the principles which it had established in the case applied to both Germany and Austria as the Member States of naturalisation and of original nationality, nonetheless it would be premature of the Court to rule on whether a decision not yet adopted (by Austria on the question of reacquisition) could be contrary to EU law.

In sum, there is much to ponder on in the *Rottmann* judgment, and much that might be regarded in some circles as a substantial increase in the effects of EU citizenship vis-à-vis national citizenship. *Rottmann* opens the way for further potential incursions in the sphere of nationality sovereignty, as aspects of nationality laws are held up for scrutiny against the standards inherent in EU law. What is the scope of review? It could be argued that an approach applied to cases of loss of citizenship might also apply to refusals of acquisition (e.g. certain types of refusal of naturalisation). More generally, does EU law now demand that all decisions on acquisition and loss of nationality be reasoned, such that judicial review can potentially be applied? And what approach might be expected of national courts now they have been invited to scrutinise such administrative decisions, by reference to the standard of proportionality, in the light of the effects of EU law and EU citizenship? And even if the scope and intensity of the judicial review proposed becomes clearer in the light of subsequent case law, what are the normative and political implications of the step change in the treatment of EU citizenship cases *within* Member States, which the Court appears to have placed on the agenda? This poses a huge challenge for EU law and politics for the future.

The entirely conventional supremacy of Union citizenship and rights

Gareth T. Davies*

Rottmann is a case which we will probably look back on as an important step in the gradual absorption of national citizenship within Union citizenship. In older cases, such as *Micheletti* and *Garcia Avello*,⁶ the Court has remarked that national laws on citizenship must have ‘due regard to Community law’ and that Union citizenship is destined to be the “fundamental status” of Europeans. The hints have therefore long been public that the Court does not consider national citizenship to be superior to, or autonomous of, its Union cousin. *Rottmann* is the first case, however, in which these propositions rise above the level of rhetoric and lead to a reordering of the relationship between national and Union legal orders in this field.

In a manner which is reminiscent of some of the other seminal cases in EU law – *Costa v ENEL*,⁷ *van Gend en Loos*,⁸ *Cassis de Dijon*,⁹ *Baumbast*,¹⁰ and *Gryzelczyk*,¹¹ to name a few – the Court has hung a very far reaching judgment on a relatively innocuous and sympathetic fact set. In the particular circumstances of the case it is hard to object to the substance of the Court’s intervention and it is difficult to portray it as an outrageous interference. The Court is, after all, merely trying to prevent a lack of co-ordination between states leading to a Union citizen becoming unnecessarily stateless. Moreover, it does not dictate any concrete result, simply asking the national judge to ensure that national rules are proportionate and do not lead to statelessness if this is reasonably avoidable. Now, who could object to that? It seems both eminently sensible in substance and deferential to the ultimate decision-making power of the national judge.

Yet the importance of the judgment is not in the substantive answer which the Court gives to the questions asked, but in the principle which makes that answer possible, and which is therefore established by this case: at least some aspects of national citizenship now fall within the scope of EU law, and are therefore subject to its authority, and to the authority of the Court of Justice.

This proposition can be unpacked into three questions:

- (1) What does it mean to say that national citizenship falls within the scope of EU law?
- (2) Which aspects exactly fall within this scope?
- (3) What are the practical consequences?

National citizenship within the scope of EU law

In ruling that the revocation of Mr Rottmann’s German citizenship must be tested against the EU law principle of proportionality the Court unequivocally finds that this revocation, and the German laws

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⁶ See nn5 and 4 above.

⁷ Case 6/64 *Costa v ENEL* [1964] ECR 585.

⁸ Case 26/62 *Van Gend en Loos* [1963] ECR 1.

⁹ Case 120/78 *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR 6.

¹⁰ Case C-413/99 *Baumbast and R. v Secretary of State for the Home Department* [2002] ECR I-7091.

¹¹ Case C-184/99 *Rudy Grzelczyk v Centre Public d’Aide Sociale d’Ottignies-Louvain-la-Neuve (CPAS)* [2001] ECR-I 6193.

governing it, fall within the scope of EU law. If that were not the case the Court of Justice would have no competence to address the matter.

This finding is not surprising to someone looking at the Treaty with a fresh and unbiased eye. Since the TFEU states that every citizen of a Member State is also a citizen of the Union it follows that any national measure determining the scope of national citizenship also affects the scope of Union citizenship, and as such the scope of EU rights. It is obvious that national citizenship law therefore falls within the sphere of EU law, meaning that it is not autonomous of EU law and must respect its rules and principles. Those familiar with EU law will know that even in areas where the Member States have primary competence, such as criminal law and healthcare and education, there is an obligation not to exercise these competences in a way contrary to EU law. In particular, where these competences impact on free movement and the rights of Union citizens and businesses they are subject to the relevant principles of EU law and must conform to them. Citizenship, at first glance, would seem to be an entirely analogous field: one where Member States have the primary competence to determine their own laws concerning access to and deprivation of national citizenship, but nevertheless subject to the principle that where this competence impacts on EU law rights – which it always does, since every national citizen is a Union citizen – they must respect EU law and its rules and principles.

So far so banal, and *Rottmann* is indeed a very conventional application of EU law. However, citizenship has always been regarded as in some sense ‘different’, and textbooks commonly emphasise that Union citizenship is “subordinate”, or “dependant” and that Member States continue to be the gatekeepers, deciding as an exercise of unfettered sovereignty who they will admit to citizenship status. There is however little legal support for this perspective. The Court has indeed often said that Member States in principle determine their own citizenship laws, but this statement is entirely compatible with the proviso that they must do so in conformity with EU law.

The most powerful argument against the Court in *Rottmann* is based on Declaration No. 2 on Nationality of a Member State, annexed to the TEU. This states that whether an individual is a national of a Member State is ‘to be settled solely by reference to the national law of the Member State concerned’. One might easily think that this gives the Member States *carte blanche*. However, the Court was unfazed. It breezily found that merely because a matter is governed by national law does not mean that the national law in question is exempted from the obligations of EU law. It is not clear, in the light of this, what the declaration is worth. It may be no more than a rejection of harmonisation of national citizenship, although of course even judicial intervention as in *Rottmann* is harmonisation of a sort.

One might find the Court’s approach unconvincing were it not so familiar. It has repeatedly taken this approach to national competences, for example in *Bickel and Franz*¹² and *Geraets-Smits*,¹³ confirming the principle of national legislative freedom, but emphasizing the EU law limits to this freedom. *Rottmann* was, for the EU lawyer, only to be expected. If the Member States had actually wished to protect national citizenship freedom in a more effective and durable way they needed to use a more explicit and unambiguous form of wording, and probably a somewhat harder instrument than a declaration. Indeed, the choice for this relatively weak legal form, rather than a protocol, may almost be taken as a concession that there is no serious intention to narrow the Treaty text, merely a half-hearted expression of national sentiment.

Be all that as it may, the Court has decided, and EU law now applies to, at the very least, some aspects of national citizenship law. This has two hard and immediate consequences: where national laws and measures on citizenship or nationality conflict with EU law they will not be applicable, and

¹² Case C-274/96 Criminal Proceedings against Bickel and Franz [1988] ECR I-7637.

¹³ Case C-157/99 *Geraets-Smits v Stichting Ziekenfonds* [2001] ECR I-5473.

where there is doubt about whether such conflict exists it will be the Court of Justice which is the final authority, not national courts. A minor *coup d'état* has been staged, and the Court has announced that it is now the supreme adjudicator on (at least some aspects of) the acceptable content of national citizenship law.

This makes the question of exactly which aspects of national citizenship fall within the scope of EU law all the more burning.

Which aspects of national citizenship are within EU law?

Rottmann has unusual facts. An Austrian becomes a German, and as a result is required to give up his Austrian nationality. His German nationality is later revoked because of fraud, but he has no longer an automatic right to reacquire Austrian nationality. He is therefore left stateless. In particular, he has lost his Union citizenship, which he possessed both as an Austrian and a German.

It is possible to argue that the case is limited to these facts, or at least similar ones. This limited view reads *Rottmann* as saying that: where a Union citizen transfers national citizenship between two Member States, then the Member State of which he becomes a citizen cannot revoke their grant of citizenship without taking into account the effect on the individual's EU rights and considering whether their revocation is proportionate. This is such a specific context, that it does not seem to matter so very much.

However, neither the judgment nor common sense provides much support for this narrow view. Firstly, the reason why the revocation of Mr Rottmann's German nationality fell within the scope of EU law was because it affected his status as a Union citizen, and therefore his capacity to benefit from EU law rights. This reasoning would apply to any withdrawal of national citizenship from an individual who did not also possess the citizenship of another Member State. It may also be noted that the fact that Mr Rottmann had moved between Member States seems to be irrelevant. He was, at the time of the case, in fact a German living in Germany, and in any case, whether an individual has migrated or not, if Union citizenship is withdrawn from them their capacity to enjoy EU citizenship rights is also withdrawn.

The key question is whether a distinction can be drawn between revoking or withdrawing citizenship, and failing to grant it (or granting it). If taking away Union citizenship is now clearly subject to EU law, is it necessarily also the case that refusing to grant Union citizenship, or indeed granting it, are equally so subject?

It is hard to avoid an affirmative answer. Coming back once again to the fundamental logic of the case, the principle is that EU law applies to national measures which impact upon, or attempt to limit, that EU law and its associated rights. Is it not clear that a refusal to grant national citizenship, with a consequence that Union citizenship is also denied, impacts upon an individual's capacity to enjoy EU law rights? If a state were to deny citizenship to an individual for some outrageous and disproportionate reason, does the logic of *Rottmann* not say that EU law would prevent this? Would it not be unconvincingly scholastic to say that disproportionately taking away Union citizenship rights engages EU law, but disproportionately denying them does not?

The judgment sends mixed messages. The Court states generally that 'Member States must, when exercising their powers in the sphere of nationality, have due regard to European Union law', and that 'the exercise of that power, in so far as it affects the rights conferred and protected by the legal order of the Union, as is in particular the case of a decision withdrawing naturalisation such as that in issue in the main proceedings, is amenable to judicial review carried out in the light of European Union law'. It also hints, in the last part of the judgment, that a refusal by Austria to reinstate Mr

Rottmann's Austrian nationality might be challengeable under EU law, suggesting that it is not just the act of withdrawal of citizenship which EU law governs.

Yet, on the other hand, the Court also distinguishes *Rottmann* from *Kaur*,¹⁴ an earlier case in which a refusal to grant full British nationality was challenged. In *Rottmann*, says the Court, the applicant is deprived of Union citizenship which he had previously enjoyed, whereas in *Kaur* the applicant had never enjoyed such rights and therefore could not be deprived of them. The clear implication is that it is only the deprivation of Union rights which is within EU law, not the denial of them.

Such a position would be highly illogical, and inequitable. EU law has always been concerned with measures which prevent the exercise of rights just as much as with those which hinder them. A Member State cannot defend measures hindering free movement by arguing that it has successfully prevented businesses or individuals from engaging in cross-border activity, and so therefore EU law does not apply. Preventing individuals from acquiring EU law rights is an obstruction of those rights, and therefore subject to EU law. Since an exclusion from Union citizenship impacts just as much on the scope and enjoyment of that citizenship as a deprivation, there is no reason why EU law should be more engaged in one circumstance than another. It is suggested that all national citizenship and nationality law impacts upon the capacity of individuals to enjoy Union citizenship, and is therefore within the scope of EU law.

How much does it matter?

Only a minority of Member States intervened in *Rottmann*, and some national authorities are relatively relaxed about its findings because they take the view that in practice they will rarely apply. The rules governing access to, and withdrawal of, national citizenship, vary from state to state but in general are based on familiar notions of inheritance, birth, fraud, and so on, none of which are likely to be found to be disproportionate by the Court. The possibility that a particular application in a particular odd situation – such as *Rottmann* – might conceivably be disproportionate is not enough to justify policy concern. Nothing in the case suggests that the Court envisages widespread intervention in the structure of national citizenship law.

This is certainly a plausible reading. The centrality of proportionality and the conventionality of citizenship concepts in the Member States does mean that dramatic effects of EU law are not obviously likely. This is particularly so given that it will usually be national judges who must apply the proportionality principle to the national measures – they are unlikely to wield an anarchic knife.

However, one should be cautious before dismissing EU law as harmless. Union citizenship is an example of a concept which was widely seen as bringing no substantive content in its early years, but has gradually developed into a peg upon which the Court has been able to hang important judgments, impacting on many areas of national law and policy, from access to benefits to the law on surnames. There may well be more aspects of national citizenship law vulnerable to EU law than a first glance suggests. It will be not so much the wider principles which will be potentially conflicting, but their use and application in particular circumstances.

For example, in the Netherlands, there has been considerable discussion concerning the withdrawal of Dutch nationality from first or second generation Dutch citizens who commit serious or multiple crimes. Some of the proposal envisaged could result in the stripping of Union citizenship from those who were born Union citizens, and who commit crimes which might not even be serious enough to justify their deportation under the citizenship directive. It is far from obvious that an appeal to EU law would be hopeless here.

¹⁴ Case C-192/99 *The Queen v Secretary of State for the Home Department, ex parte: Manjit Kaur* [2001] ECR I-1237.

Another example is recent Spanish nationality policy, which has made access to Spanish nationality for many South Americans of Spanish descent relatively easy. This has been very popular, and resulted in a large number of new Spaniards. The background to the policy is multi-faceted, but one factor which made it politically possible was the awareness that many of the new Spaniards who came to Europe would not stay in Spain but go to other Member States. Spain created Union citizens, in the knowledge that many would become residents of other states of the Union. There was a degree of political objection to this in various states, and it is also not self-evident that such a use of national citizenship policy would be, or should be, independent of some degree of EU law policing. Beyond a certain point even the grant of Union citizenship could be seen as disproportionate because of its (disproportionate) impact on other Member States.

A third kind of situation which might be challengeable under EU law is where national citizenship law results in apparently arbitrary results. Colonial or historical reasons may mean that one group of people have fairly easy access to national citizenship, while for others it is much harder, and while these differences may be explainable in terms of history, they may also be viewed in the light of non-discrimination rules and equality on the basis of race and religion. The position of Gurkhas, *Gastarbeiters*, residents of Hong Kong, or Germanic minorities in Transylvania are all open to critical analysis from this perspective. The fact that the Court in *Kaur* explicitly refused to go down this path should not be taken as determinative here. If there is one lesson to be learnt from Union citizenship, it is that the law develops, and if there is a second lesson it is that the underlying logic of Union citizenship is what largely determines the path of that development. The best way to understand *Rottmann* and its importance is to return to the principles upon which the judgment rests:

- i. Union citizenship is destined to be the fundamental status of nationals of the Member States.
- ii. Access to national citizenship is access to Union citizenship. Therefore, rules governing access to national citizenship are subject to EU law.

The consequences of these findings are that rules concerning national citizens must be proportionate, and respect the general principles of EU law:

- i. Proportionality in this context should presumably be understood in a way similar to its general EU law meaning. Here that would entail that rules which prevent access to national/Union citizenship must not go further than necessary, and must entail a justifiable balance of interests.
- ii. The general principles of EU law include a prohibition on discrimination, which may be understood as encompassing discrimination on the grounds of e.g. race, religion, ethnicity, sex, sexuality, disability and age.
- iii. The final arbiter in disputes on the above questions is the Court of Justice.

Whether it is now misleading to describe Union citizenship as secondary, or dependent, is open to debate. It is suggested that the most precise description of the current state of affairs is to say that the two levels of citizenship are intertwined in a mutually dependent way, neither able to develop without taking account of the other. Perhaps one should avoid hierarchical thinking, and speak of citizenship pluralism.

Two Sovereign States vs. a Human Being: CJEU as a Guardian of Arbitrariness in Citizenship Matters

Dimitry Kochenov*

“Kafkaesque” is a word for which no adequate synonym exists’.

Roz Safford, ‘Franz Kafka’s Quest for an Unavailable God’, *San Francisco Chronicle*, 5 April 1998.

Currently, the EU is still unable to decide who its citizens are. Meanwhile, it has been widely accepted that the *obiter dictum* contained in the famous paragraph 10 of the *Micheletti* decision¹⁵ – on the ‘due regard to Community law’ point – holds; *Rottmann* reaffirmed this reasoning (para. 45) without giving it a much needed practical application.

That *Rottmann* would be decided in the way it was, was predictable, given all the case law on competences and the recent trend to leave more and more freedom to the national courts as demonstrated, *inter alia*, in *Raccanelli*¹⁶ and *Delay* (2008),¹⁷ where fundamental issues of EU law were sent back to the national courts to resolve. While such an approach can be regarded as a step towards strengthening the relationship of co-operation between the two levels of judiciary in Europe, reinforcing the EU’s co-operative federalism, if not as a step towards ‘citizenship pluralism’, as Davies suggested in his contribution, it can also be viewed as undermining the unity of the EU legal order.

The decision can rightly be criticised as not going far enough in introducing at least minimal logic and predictability into the current context of interaction between EU law and national law on issues of nationality. In this respect it is clearly a step backwards compared with the seminal decision in *Micheletti*, as it failed to clear the minefield of contradictions that plague the lives of numerous EU citizens in the context of the rising importance of the “ever closer Union” in Europe.

The elusive logic of nationality laws of the Member States is not only an obstacle on the way towards achieving the goals of the European integration project; it also negatively affects the lives of numerous EU citizens who are faced with random and unexplainable rules intruding in their lives virtually each time they come in contact with nationality regulation of the Member States. The latter presents a scary labyrinth of logically incomprehensible and often contradictory rules as completely justified by state ‘sovereignty’, ignoring the fact that while sovereignty confers competence, it does not require the bringing about of regulation which is illogical and unjust. Agreeing with Carens, it is submitted that competency considerations should not be used to shield Member States from criticism, since being in the position to regulate clearly cannot be construed to mean that bad decisions must be taken.¹⁸ Unfortunately, the current Court has demonstrated that such long-awaited criticism is nowhere in sight, opting for easy solutions in compliance with the basic supremacy rationale.

While sharing the thoughts of the other commentators on the importance of the decision, this note takes a critical stance, focusing on four interrelated issues. Firstly, it critiques the Court’s failure to view the facts of *Rottmann* in the larger perspective of European integration where the crucial

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¹⁵ See n5 above.

¹⁶ Case C-94/07 *Andrea Raccanelli v Max-Planck-Gedellschaft zur Förderung der Wissenschaften eV* [2008] ECR I-5939, para. 37.

¹⁷ Case C-276/07 *Nancy Delay v Università degli Studi di Firenze et al* [2008] ECR II-3635.

¹⁸ J. Carens, ‘Citizenship and Civil Society: What Rights for Residents?’, in Hansen, Randall and Weil, Patrick (eds.), *Dual Nationality, Social Rights and Federal Citizenship in the U.S. and Europe*, New York/Oxford: Randall Books, 2002, 100 at 115.

problems related to the rules of access to the scope *ratione personae* are bound, sooner or later, to be resolved. It is not right when law and logic part ways. Secondly, the note exposes the unwillingness of the CJEU to follow its own approach formulated in *Micheletti*, where a potentially harmful rule of international law was dismissed to give way to logical solutions for concrete problems arising in the context of European integration. Thirdly, it questions the legitimacy of the choice made by the Court to leave the application of the principle of proportionality to the national judicial authorities, rather than shaping the law at the EU level. Fourthly, it critiques the Court's *hélas* not so uncommon failure to take the side of the individual in a situation when the answer to the question of whether the law to be applied is just is far from being clear. One should only hope that the CJEU will be ready to infuse common sense into the current state of affairs should the second chance arise.

The 'fundamental status of nationals of the Member States'¹⁹ has been reinforced by the CJEU in a consistent line of recent rulings. Legal developments both at EU level and at the national level of the Member States have demonstrated with abundant clarity that EU citizenship and the nationality of the Member States are two coexisting meaningful legal statuses. Once one has the essence of both in mind, being misled by the fact that one is derivative from the other is impossible. AG Poiares Maduro has outlined this state of affairs in his *Rottmann* Opinion in an admirably clear way: 'Union citizenship assumes nationality of a Member State but it is also a legal and political concept independent of that of nationality.'²⁰ We are thus dealing with two autonomous legal statuses which are connected through acquisition: enjoying one is a precondition to possessing another.

Consequently, each qualifying Member State national is also a citizen of the European Union. The two different statuses are associated with different rights. Arguments have been made that such autonomous existence of two fundamental personal legal statuses should not necessarily imply that since the EU status is acquired via the national one it should also be lost via the national one in all cases.²¹ In fact, when the Netherlands seemed to argue in *Eman and Sevinger*²² that those who leave the territory of the EU by moving into the parts of the Kingdom which are not covered by EU law *ratione loci* are not quite EU citizens, the CJEU squarely dismissed this supposition.²³ Pushing the meaning of "autonomous" to the extremes however, would imply that not only the loss of EU citizenship – an autonomous status – but also its acquisition should be governed autonomously from the Member States.

The position of separating the rules of acquisition of a supranational status (which remain at the national level) and the rules of its loss (which partly move to the supranational level) does not seem to be entirely logically coherent, since the issue of acquisition, which is bound to be derivative, is likely to loom large on the horizon any time when a claim of the lack of connection between national law and EU law in the issues of the loss of the status is made. It seems most impractical, if not impossible, to let two different legal orders govern the acquisition and the loss of the same legal status, since loss and acquisition are so obviously connected.

The logical resolution of possible conflicts, like the one at issue in *Rottmann*, can arise either through total separation of EU law and national law in the issues of governing the enjoyment of the

¹⁹ Case C-200/02 *Zhu and Chen v Secretary of State for the Home Department* [2004] ECR I-9925 para. 25.

²⁰ At para. 23 of the Opinion.

²¹ D. Kostakopoulou, 'The European Court of Justice, Member State Autonomy and European Union Citizenship: Conjunctions and Disjunctions', in de Witte, Bruno and Micklitz, Hans (eds.), *The European Court of Justice and the Autonomy of the Member States*, Oxford: Hart Publishing, 2011 forthcoming. A shorter version is available at <http://www.uaces.org/pdf/papers/1002/Kostakopoulou.pdf>.

²² Case C-300/04 *Eman and Sevinger* [2006] ECR I-8055.

²³ At para. 72 of the judgment.

two legal statuses in question (EU citizenship and Member State nationality), or through total harmonisation of nationality laws of all the Member States – a political impossibility in the current climate, notwithstanding the fact that six Member States already provide for different procedures of acquisition of Member State nationality along with EU citizenship as opposed to the Member State nationality alone for those who possess EU citizenship already.²⁴ A third alternative might consist in formulating clear supranational constraints on the exercise of the national level regulation, which seems the most feasible of the three, and is the approach advocated by the CJEU in *Micheletti*. The *Rottmann* Court failed to embrace the latter approach by delegating the application of proportionality to the national level.

1. The case of Dr. Rottmann exemplifies the untenable nature of the current half-way solution, where the statuses are separated in terms of rights, but their acquisition and loss are not. As a consequence, it is possible to rely on the status of EU citizenship and the rights associated therewith in order to change a Member State of nationality, which can bring about, in turn, not only the loss of the Member State-level statuses, but also the loss of the very status that enabled the relocation into the new Member State of nationality in the first place. AG Poiares Maduro was clear on this: ‘It was by making use of the freedom of movement and residence associated with Union citizenship which he enjoyed as an Austrian national that Mr Rottmann went to Germany and established his residence there in 1995, in order to initiate a naturalisation procedure.’²⁵

The situation is beyond logical understanding: the possession of the status gives EU citizen a right to move to another Member State. Once this right is legitimately exercised, the naturalisation in that other state results not only in the loss of the first Member State-level status (i.e. Austrian citizenship), but also the second one (i.e. the German one). On top of it all, the status of EU citizenship, which is based on either of the two and which essentially enabled the initial switch between them is equally lost. What is it, if not a nightmare for any common sense lover?

The CJEU in *Rottmann* did not solve any of the logical inconsistencies of the current state of affairs. Instead of ruling that the legitimate use of EU citizenship cannot trigger statelessness, the Court inconsistently relied on international law, interpreting it in a way that goes against its fundamental principle: the limitation of the cases of statelessness. *Rottmann* is thus a rare example of international law on citizenship regarded uniquely through the lens of the exceptions contained therein. That Member States are free, both under EU law and under international law, to decide who their citizens are does not mean that international law necessarily allows statelessness to arise as a result of using EU citizenship status when crossing a border between Austria and Germany, which is physically non-existent. Such interpretation of international legal rules on nationality is contrary to the very spirit of both EU law and international law.

2. The approach embraced by the court in *Rottmann* is a clear departure from its previous case law on nationality, exemplified by the sound *Micheletti* tradition, where the Court took a principled stance, refusing to accept the illogical orthodoxy of a “genuine connection” doctrine accepted in international law since *Nottebohm*,²⁶ saving both common sense and the common market. While *Micheletti* was a clear departure from an entirely arbitrary and potentially harmful rule of international law, openly dismissed by AG Tesauo as pertaining to the ‘romantic period of international law’,²⁷ *Rottmann* pretends to be faithful to international law by misinterpreting its main stance against statelessness.

²⁴ D. Kochenov, ‘Rounding up the Circle: The Mutation of Member States’ Nationalities under Pressure from EU Citizenship’, EUI RSCAS Working Paper No. 2010/23, http://cadmus.eui.eu/dspace/bitstream/1814/13634/1/RSCAS_2010_23.pdf.

²⁵ Para. 11 of the Opinion.

²⁶ *Liechtenstein v Guatemala (Nottebohm)* 1955 ICJ Reports 4, see esp. dissenting Opinions of Justices Klaestad and Read.

²⁷ Para. 5 of the Opinion in *Micheletti*, see above n5.

Unlike *Micheletti*, where the Court dismissed the standing mainstream international law rule on recognition of nationalities to shape reasonable and logical regulation in the internal market, *Rottmann* went in the opposite direction of fetishising the few exceptions from the main rule of international law on statelessness. It did not even pretend to shape clear logical solutions. Such departure from a critical view of international orthodoxy is particularly strange after *Kadi and Al Barakaat*,²⁸ where the Court seemed to be more than willing to protect the rule of law and common sense.

3. Besides refusing to depart from a handful of exceptions from the main rule of international law, the Court made another move, which is likely to have potentially myriad harmful consequences and which equally departs from the *Micheletti* tradition. Rightly underlining the importance of the proportionality principle in deciding cases such as *Rottmann*, the actual application of proportionality was left to the Member States, notwithstanding the fact that the case specifically concerned the loss of the EU-level legal status, as the first question from *Bundesverwaltungsgericht* has clearly indicated.

Although such a “hands off” approach has recently been applied by the CJEU even in the issues which were previously considered as falling exclusively within the competence of the Union, like the definition of a ‘worker’, for instance, as O’Brien has demonstrated,²⁹ its application in *Rottmann* is particularly unfortunate, as it undermines the autonomous nature of EU citizenship. Refusing to take fundamental decisions having a direct bearing on its essence will ensure EU citizenship never becomes a true ‘fundamental status of the nationals of the Member States’, exposing the half-hearted nature of the mantra employed by the Court. We are only left to wonder about the suitability of the solutions to the outstanding problems posed by the conflicts and imperfections of the nationality laws of the Member States in the long term. Allowing the Member States to apply the test of proportionality³⁰ is a dead-end, unlikely to bring about clarity; indeed, it cannot result in anything other than fragmenting and obscuring the law even further, which threatens to bring about a definitive loss of any logical explanations of Member States’ nationality legislation in a situation when Member State nationalities as legal statuses connected with enforceable rights are losing their importance at an astonishing pace.³¹

4. The perspective of an ordinary human being, caught between two omnipotent sovereign states able to destroy lives entirely without even noticing, is completely missing from the judgment. The Grand Chamber speaks of the need to apply proportionality ‘so far as concerns the consequences it entails for the situation of the person concerned in the light of European Union law ... [and] ... national law’³² in such a way as if it is not absolutely clear that virtually all the rights of the person in question are at stake. How can any state-asserted interest whatsoever prevail against the need to make sure that statelessness, especially arising in the context such as the one at issue, be avoided?

It is deeply discomfoting that the Court treats the issue of what essentially comes down to arbitrary deprivation of “the right to have rights” (paraphrasing Arendt) in such a way as if it was a technical issue of minor importance. In fact, the whole situation comes down to punishing Dr. Rottmann for using his right as an EU citizen to move from Austria to Germany and for being suspected of committing fraud by erasing him from the lists of members of any society, either national or supranational. The application of nationality rules of Germany and Austria functions in such a way that being suspected of a non-violent crime is regarded as sufficient in order to take away the very humanity of the person at issue.

²⁸ Cases C-402/05 P and C-215/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351.

²⁹ C. O’Brien, ‘Social Blind Spots and Monocular Policy Making: The ECJ’s Migrant Worker Model’, (2009) 46 *Common Market Law Review*, 1107.

³⁰ See para. 58 of the *Rottmann* judgment.

³¹ See Kochenov above n24.

³² Para. 55 of the *Rottmann* judgment.

This truly Kafkaesque situation to which “proportionality” is to be applied is precisely what the CJEU does not want to see, let alone resolve constructively. Instead of tackling the unfortunate consequence of co-application of nationality laws of two Member States to a situation of a real human being fully entitled to protection precisely at the supranational level given that the use of EU citizenship rights is unquestionably related to the problem at issue in the first place, the Court is seemingly technical and cold-blooded. Just like the revolutionary judges of the Stalinist Soviet Union it is unwilling to see the substance of the issue and the suffering it causes as long as formal rule of law has been applied.

5. How could the Court decide differently, taking all the aforementioned considerations into account?

A). Acknowledging that the conventional idea of supremacy can also apply to citizenship issues is not enough to shape clarity and reason; more has to be done to ensure that the EU is a rule of law Union not only in a formal, but also in a substantive sense.

B). The dismissal of the *Micheletti* tradition – of approaching potentially harmful rules of international law critically – is premature. Before embracing international legal norms it is necessary to make sure that they are in line with the ideas of liberty and common sense, if not the rule of law.

C). Application of international law, once a decision to do so has been taken, should include taking not only the exceptions from particular rules, but also fundamental principles, such as the impermissibility of multiplying the cases of statelessness into account.

D). When proportionality is called upon to safeguard the coherence of the EU legal order it is naïve and counterproductive to expect such consistency to arise from the application of proportionality at the national level.

E). Lastly, can the issues of statelessness be resolved through proportionality at all? What state interests can be weighed against the need to make sure that human beings are at least minimally protected, which in the current state of the law in the world which absolutely requires a nationality connection with a state? The Court’s answer pointing to the ‘wish to protect the special relationship of solidarity and good faith between [a State] and its nationals’³³ is hardly convincing, when juxtaposed with a complete legal elimination of a human being.

The Court failed in at least four respects: 1. It failed to create a suitable logical construct of interaction between Member State nationalities and EU citizenship which would be reasonable and explainable; 2. It failed to follow the *Micheletti* tradition of dismissing the rules of international law dangerous for the success of the European integration project – what it is clearly empowered, if not required, to do; 3. It chose a wrong forum for the application of the principle of proportionality, which is crucial for the success in the shaping of if not uniform, then at least predictable and logically explainable rules on EU citizenship to be applied throughout the EU; 4. And, lastly, it failed to adopt a perspective of the individual, treating fundamental issues of crucial importance with little acknowledgement as to how much was actually at stake for a concrete person at issue, for Dr. Rottmann.

It remains to be seen if the future will bring more reasonable solutions to the questions this case has touched upon, which are among the most acute in EU law today and relate to the need to limit the abuse of Member States’ discretion in EU citizenship matters. It is clear at this point, however, that the EU will not be able to escape the necessity to play a more significant role in framing the rules determining who its citizens are, anticipated in the *acquis academiques* since long ago. *Rottmann* is an important step towards applying conventional supremacy to the nationality issues having a clear EU dimension. Yet, more importantly, it is also an opportunity missed, where the CJEU presented itself as a powerful guardian of arbitrariness in citizenship issues.

³³ Para. 51 of the *Rottmann* judgment.

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Some comments on *Rottmann* and the "personal circumstances" assessment in the Union citizenship case law

Michael Dougan*

The ruling in *Rottmann* is, of course, crucially important for the impact of Union citizenship upon Member State sovereignty over nationality law – even if it leaves many open questions for discussion. For example, the Court’s ruling seems to be premised upon the view that Union citizenship is additional to, rather than merely derived from, Member State nationality (a notion now reflected in the wording of the post-Lisbon Article 20 TFEU, ex-Article 17 EC). For that reason, the loss of Member State nationality does not per se place the claimant altogether outside the scope of Union law, but constitutes a restriction on the rights associated with Union citizenship, which justifies scrutiny under the Treaty before it can validly take effect (and only then cast the claimant beyond the reach of Union law). Yet that conclusion sits rather uneasily with the previous ruling in *Cartesio*.³⁴ The Court in that case held that the question whether ex-Article 43 EC (now Article 49 TFEU) applies to a company which seeks to rely on the Treaty – like the question whether a natural person is a national of a Member State and hence entitled to enjoy freedom of movement – is a preliminary matter which, as Union law now stands, can only be resolved by the applicable national law; the question whether the company is faced with a restriction on the freedom of establishment, within the meaning of ex-Article 43 EC, can arise only if it has been established that the company actually has a right to that freedom. Those comments were made in the context of Member State rules depriving one of its own companies of domestic legal “nationality”. Of course, legal persons are different from natural persons – but the ruling in *Cartesio* nevertheless remains difficult to reconcile with that in *Rottmann*. In any case, it appears unclear how far the “complementary” understanding of Union citizenship underpinning *Rottmann* will extend: for example, whether all Member State decisions to deprive the claimant of existing nationality will be subject to scrutiny (e.g. even if the claimant who loses the nationality of one Member State still retains the nationality of another Member State, and thus remains a Union citizen – but that change in status alters the framework of his / her rights of residency and equal treatment under Union law); and whether the Court’s “complementary” understanding of Union citizenship can extend even to certain decisions to refuse a grant of Member State nationality in the first place, on the basis that the claimant is thereby deprived of the opportunity to acquire Union citizenship at all (which would seem to be stretching even the Court’s generous approach in *Rottmann* beyond its logical limits).

In any event, *Rottmann* is interesting not only because of its implications for Member State sovereignty over nationality law, but also when viewed in the broader perspective of the overall judicial development of Union citizenship. It will be recalled that one of the defining characteristics of the Court’s citizenship case law as it developed in the decade following *Sala*,³⁵ and especially after *Grzelczyk*³⁶ and *Baumbast*,³⁷ has been the Court’s insistence that, when Member States seek to justify restrictions on the migrant Union citizen’s rights under the Treaty, they cannot rely exclusively upon generalised criteria (such as past or continuing residency) but must also give due consideration to the

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³⁴ Case C-210/06 *Cartesio* [2008] ECR I-9641.

³⁵ Case C-85/96 *Maria Martinez Sala v Freistaat Bayern* [1998] ECR-I 2691.

³⁶ See above n11.

³⁷ See above n10.

personal circumstances of each individual claimant – even if this implies taking into account factors or circumstances not recognised as relevant or compelling under the applicable domestic legislation.

However, more recent case law has been much more ambivalent about the status and scope of that apparently well-settled “personal circumstances” test. On the one hand, some cases appear to offer Member States a relatively wide margin of discretion to use blanket criteria and generalised assessments. For example, the Court in *Förster*³⁸ upheld Dutch rules excluding the grant of student maintenance assistance to migrant Union citizens unless they qualified as workers or had been lawfully resident for a continuous period of five years. Even though the individual in that case appeared fully integrated into Dutch society at a personal and professional level, the Court made no effort whatsoever to require the Dutch authorities to examine her personal circumstances, with a view to establishing whether her link to Dutch society could be verified by reference to factors other than the generalised five year residency requirement. Similarly, consider *Wolzenburg*,³⁹ which concerned the principle of equal treatment as regards national implementation of the European Arrest Warrant Framework Decision. Dutch rules providing for the non-execution of a European Arrest Warrant in the case of migrant Union citizens, with a view to the enforcement of a custodial sentence, only if they had been lawfully resident within the national territory for a continuous period of five years, were considered compatible with ex-Article 12 EC (now Article 18 TFEU) without any need to undertake more detailed scrutiny of the individual’s personal circumstances and, in particular, the degree to which they might actually be integrated into the host society.

On the other hand, more light-touch rulings such as *Förster* and *Wolzenburg* live cheek-by-jowl with other decisions where the Court still insists that Member States undertake an assessment of each individual Union citizen’s personal circumstances before restricting the exercise of his / her fundamental Treaty freedoms. Consider, for example, *Gottwald*:⁴⁰ Austrian rules restricting free travel on toll roads to disabled persons ordinarily resident in the national territory were judged compatible with ex-Article 12 EC (now Article 18 TFEU), taking into account the flexible manner in which the national authorities were prepared to recognise other factors (such as regular travel by a non-resident to the territory for professional or personal reasons) capable of demonstrating a certain degree of integration between the claimant and the host society. Moreover, in *Rottmann* itself, the principle of proportionality required the competent national court to have regard to all relevant circumstances, when assessing the compatibility with Union law of the German decision to withdraw nationality, including any adverse consequences for the claimant and his / her family, the gravity of the deception offence, the time elapsed since naturalisation, and the possibilities for recovering the claimant’s original nationality. Read in its broader context, therefore, *Rottmann* supports the view that the CJEU has lost some, though not all, of its previous confidence in developing the institution of Union citizenship. But what we could be seeing is the emergence of an unhelpful fragmentation in the range of legal tools by which the Court reasons through the impact of Union citizenship upon national policy choices in different contexts and as regards different categories of individual migrant.

³⁸ Case C-158/07 *Jacqueline Förster v Hoofdirectie van de Informatie Beheer Groep* [2008] ECR I-8507.

³⁹ Case C-123/08 *Wolzenburg* [2009] ECR I-9621.

⁴⁰ Case C-103/08 *Arthur Gottwald v Bezirkshauptmannschaft Bregenz* [2009] ECR I-9117.

The correlation between the status of Union citizenship, the rights attached to it and nationality in *Rottmann*

Oxana Golyner*

The consequences of the *Rottmann* judgment for matters of nationality are relatively limited. The Court clearly distinguished the situation of a third country national who had never had the nationality of a Member State and that of a Union citizen who held the nationality of a Member State, but whose nationality has been withdrawn (para.49). But this judgment suggests a very controversial approach to the correlation between Union citizenship, the rights attached to it and nationality. The Court held that 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 to take into account the consequences that the decision entails for the person concerned and for the members of his family with regard to the loss of the rights enjoyed by every Union citizen (para.56). Therefore, once a person was entitled to enjoy the rights attached to the status of Union citizenship, the loss of those rights, in particular, of the rights to free movement, residence and equal treatment, is to be taken into account before the decision on withdrawal of nationality is made by the Member State.

The important consequence of the above approach is that the fundamental nature of the rights attached to Union citizenship, including the right to rely on ex-Article 12 EC (now Article 18 TFEU) in all situations falling within the material scope of Union law, is interpreted by the Court as a factor that brings the decisions on nationality within the scope of EU law and subjects them to the scrutiny of the Court with regard to compliance with the principle of proportionality (paras.43-45). In as much as the enjoyment of the rights and freedoms linked to Union citizenship depends on the possession of nationality of a Member State, there is an obligation to have due regard to EU law in the exercise by the Member States of their competence in the sphere of nationality (paras.42 and 56).

Furthermore, the Court adopts a broad approach which is concerned with not only actual, but also the potential implications of the loss of the status of Union citizenship for the enjoyment of rights attached to that status. In a narrow sense, the decision on deprivation of nationality in *Rottmann* does not affect the exercise of the right to free movement and residence under ex-Article 18 EC (now Article 21 TFEU) as it does not create any impediment retroactively to the exercise of the right to free movement and residence in a specific situation (Opinion, para.33). However, this approach was already rejected by the Court in *Garcia Avello*⁴¹ where specific obstacles to free movement were identified as likely to arise in the future. Yet, in *Rottmann* the Court goes even further raising the argument to a more general level: the loss of the status of Union citizenship and the loss of rights attached to it, as a result of the deprivation of the nationality, are not merely potential, but inevitable, and therefore, a situation of potential loss of the status of Union citizenship and the rights attached to it should fall, by reason of its nature and consequences, within the ambit of EU law (para.42).

Does this mean that both the status of Union citizenship and solidarity rights attached to it acquire the quality of being inalienable? The *Rottmann* judgment does not suggest that this should be the case, especially in cases of deception (para.57). But the Member States are required to consider the proportionality of their decisions to the gravity of the offence committed by the person, the lapse of time between the naturalisation decision and its withdrawal and the possibility to recover the original nationality (para.56). Therefore, although *Rottmann* does not assert that the loss of the status of Union

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⁴¹ See n4 above.

citizenship is precluded, it should be avoided, because of the fundamental nature of Union citizenship and the importance of the rights attached to it. In that regard, the requirement of a concerted effort on the part of the Member States of naturalisation and the original nationality that can be discerned implicitly from the *Rottmann* judgment (para.62) suggests the need for harmonisation of the nationality laws. Moreover, the conceptual implication of the Court's approach is that the elevated importance of rights attached to the Union citizenship status becomes definitive not only for the enjoyment of those rights without obstacles, but also for the retention of the status itself and, as a consequence, for the nationality status. It transforms the relationship between Union citizenship and nationality in ex-Article 17 EC (now Article 20 TFEU) into a reverse hierarchy or an "inverted pyramid".

Finally, although, according to the Advocate General, Union citizenship strengthens the ties between nationals and their Member States (Opinion, para.23), the *Rottmann* judgment can produce some unintended effects for the bond between nationals of a Member State. Securing the effectiveness of Union citizenship rights *Rottmann*-style splits nationals of the Member States into two groups where those who exercised their right to free movement within the territory of the European Union are privileged in terms of preservation of their bond with the home State whereas those who took up residence in a third country may be treated less favourably. In that respect, *Rottmann* is not unique because any case concerning the claims of Union citizens against their Member States of origin is capable of producing such a divisive effect (for example, entitlement to a disability pension granted to civilian victims of war or repression in *Nerkowska*.⁴² Therefore, a stronger concept of Union citizenship can undermine the equality of rights within the national bond between Member States and their nationals. The consequence of this might be negative harmonisation of nationality laws that would make it possible to avoid this problem. However, this should not come as a surprise because the way to *Rottmann* was paved by the *Micheletti* judgment⁴³ where the Court stated that the Member States should exercise their competence in issues of nationality in accordance with EU law. Early comments⁴⁴ to the effect that *Micheletti* could lead to incursion into nationality laws and influence the Member States' legislative choices in that area proved prophetic. But, unfortunately, *Rottmann* raises yet again the questions of legitimacy and judicial activism because it would be wrong to ignore the reaction of the Member States to the *Micheletti* judgment at the Edinburgh Summit of December 1992 which confirmed that delegation of competence on issues of nationality to the EU, even to a limited extent, was never intended by the Member States.

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O'Leary S. (1996), *The Evolving Concept of Community Citizenship*, The Hague: Kluwer.

⁴² Case C-499/06 *Nerkowska* [2008] ECR I-3993.

⁴³ See above n5.

⁴⁴ E.g. S. O'Leary, *The Evolving Concept of Community Citizenship*, The Hague: Kluwer, 1996, 57-63.

European Union citizenship and Member State nationality: updating or upgrading the link?

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Although legal and political phenomena are dynamic processes, we often tend to view them as static. So when change occurs, we feel surprised and unprepared. Additionally, despite the facts of being rooted in time and experiencing its complex and evolving dimensions on an everyday basis, more often than not time eludes us. Psychologists suggest that this is due to human beings' "mental laziness", that is, to our tendency to bracket out difficult and unfamiliar thoughts. The "cognitive fluency" of our brains thus designates "easy" thoughts as more important, preferable or true.

But mental laziness and cognitive fluency are irreconcilable with the process of European integration. All those involved in it, be they institutional actors and policy-makers, observers or students, have to display an intense mental alertness and a willingness to examine all the roads taken as well as not taken. The evolution of European Union citizenship and its remarkable judicialisation over the last fifteen years are cases in point. Inspired by the constitutionalisation of Union citizenship at Maastricht, European judges have expanded its material scope, thereby reflecting European citizens' needs and expectations and, by so doing, inviting both admiration and criticism from different quarters. But the case law concerning the personal scope of Union citizenship remained relatively underdeveloped and modest for nearly two decades. It is only recently, in *Rottmann*, that clarification emerged on the *Micheletti* ruling that the Member States' (MS) competence in the determination of nationality, which is the basis for the possession or acquisition of EU citizenship, should be exercised with due regard to Community (now Union) law.

Commencing with *Micheletti*, the Court confirmed that determination of nationality falls within the exclusive competence of the Member States, but it went on to add that this competence must be exercised with due regard to the requirements of EU law, and in *Kaur* it stated that 'it is for each Member State, having due regard to EU law, to lay down the conditions for the acquisition and loss of nationality'.⁴⁵ Accordingly, nationals of a Member state should be able to exercise their rights to free movement without impediments imposed by additional regulations adopted by other Member States. In *Chen*,⁴⁶ the restrictive impact of such additional conditions for the recognition of nationality of a Member State was criticised. It ruled that the United Kingdom had an obligation to recognise a minor's (Catherine Zhu's) Union citizenship status even though her Member State nationality had been acquired in order to secure a right of residence for her mother (Chen), a third country national, in the United Kingdom. Since Catherine had legally acquired Irish nationality under the *ius soli* principle enshrined in the Irish Nationality and Citizenship Act 1956 and had both sickness insurance and sufficient resources, provided by her mother, the limitations and conditions referred to in what was then Article 18 EC and laid down by Directive 90/364 had been met, thereby conferring on her an entitlement to reside for an indefinite period in the UK. In *Rottmann*, whose facts and implications have been laid bare in the other contributions to this forum, the CJEU held that the 'due regard to EU law' proviso:

'does not compromise the principle of international law previously recognised by the Court, and mentioned in paragraph 39 above, that the Member States have the power to lay down the

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⁴⁵ See above n14.

⁴⁶ See above n19.

conditions for the acquisition and loss of nationality, but rather enshrines the principle that, in respect of citizens of the Union, the exercise of that power, in so far as it affects the rights conferred and protected by the legal order of the Union, as is in particular the case of a decision withdrawing naturalisation such as that at issue in the main proceedings, is amenable to judicial review carried out in the light of European Union law' (para. 48).

One cannot but observe that this case law on the personal scope of Union follows an orderly pattern. Not only have European judges affirmed the Member States' competence in matters of nationality, but they have also emphasised the need for national authorities to exercise their authority in ways that do not compromise the integrity of the Union legal order and its effectiveness. In this respect, *Rottmann* does not produce any surprises. Rather, it follows the principle set out in *Micheletti* in such a linear way, such that if we wished to make a pictorial representation of the case law, we would see that all of these cases cluster on the same axis. This clustering pattern delineates the normative and material characteristics of a system relying on the interaction between the national and the supranational, national citizenship and EU citizenship, without affirming an explicit or implicit hierarchy of statuses.

The relative autonomy of Member States in nationality matters

Without a doubt, the Member States enjoy what may be called, a "relative autonomy" in the determination of the conditions for the acquisition and loss of nationality since the Court upholds the international law maxim that determination of nationality falls within the MS exclusive jurisdiction, but demands that the exercise of this jurisdiction is congruent with EU law. Since the mid-1990s, scholars have remarked that EU law would be infringed if national citizenship laws violated the general principles of EC law, including fundamental rights and the solidarity clause, by failing to consult with Brussels about the possible inclusion of third country nationals into their national population as well as the possible exclusion of a part of their population. Certain Member States have also displayed a mature appreciation of their relative autonomy in nationality matters by either facilitating the naturalisation of non-national EU citizens who are resident on their territory or removing denationalisation clauses in cases of long-term residence abroad and naturalisation in another Member State.

What can be reasonably inferred from the Member States' relative autonomy in this field is that neither do the Member States enjoy untrammelled authority and can thus criticise the *Rottmann* ruling for infringing on their competence in nationality withdrawal nor is EU citizenship a superior status that cannot be lost as a consequence of Member State law. Both these assertions would immediately transform a relation of mutual coordination and interaction between national and EU citizenships into a hierarchical relationship of superior and subordinate statuses. Indeed, the Court did not state that withdrawal of nationality, which has the effect of bringing about the loss of EU citizenship, is precluded by European Union law, as Golynger mentions in her contribution. What it stated is that when the loss of EU citizenship is at stake, national courts have to examine the proportionality of the withdrawal decision in light of the fundamental status of Union citizenship as well as in light of national law (para. 55), by considering whether the 'loss is justified in relation to the gravity of the offence committed by that person, to the lapse of the time between the naturalisation decision and the withdrawal decision and to whether it is possible for that person to recover his original nationality.' (para. 56).

By stating so, the Court is inviting national authorities to consider seriously whether the long-established principle of denationalisation on the ground of fraudulent naturalisation or misrepresentation, which remains 'in theory, valid' (para. 55) is appropriate, that is, whether it goes beyond the degree necessary in the public interest since punishment of the individual concerned via criminal law provides a less restrictive alternative and appears to be more consonant with the realities of the 21st century. Although deceitful individuals should not be allowed to benefit from their own

wrong doing, if they have made a country the hub of their activities for a number of years and have been enmeshed within the socio-economic fabric of the society, withdrawal of nationality is an extremely heavy penalty since it does not merely punish the ‘offender’, but crushes him/her, erases his/her status and destroys his/her relations.

Is this all there is? The relative autonomy of Union citizenship: an argument

Having examined the intimate connection between national citizenship and EU citizenship and what Member States’ relative autonomy in nationality matters implies, it may be worth reflecting on whether some form of relative autonomy could be applied to the other pole of the relationship, that is, to EU citizenship. While Advocate General Maduro eloquently pinpointed in his Opinion that EU citizenship and MS nationality are ‘inextricably linked but also autonomous’ (para. 23), ‘all rights and obligations attached to Union citizenship cannot be unreasonably limited’ by the conditions pertaining to access to Union citizenship (para. 23) and that national rules determining the acquisition and loss of nationality must be compatible with EU rules and must respect the rights of EU citizens (para. 23), he proceeded to state that inferring that the withdrawal of nationality is impossible if it entails the loss of Union citizenship would violate MS autonomy in this area and thus contravene ex-Article 17(1) EC (now Article 20 TFEU) as well as Article 6(3) EU concerning the EU’s obligation to respect the national identities of the MS (now, in a changed form, Article 4(3) TFEU). The Court, on the other hand, paid too much attention to the issue of naturalisation by deception (paras 50- 54) and very little attention to two other important considerations; namely, the fact that naturalisation in the MS of residence can bring about the loss of nationality in the MS of origin thereby contravening the free movement provisions of the Treaty and the international law obligation of preventing statelessness. Had the CJEU given more weight to these considerations, a pathway leading to transformational change could have been opened.

In the remainder of this contribution, I would like explore such a pathway by putting forward the argument that the MS can withdraw nationality, provided, of course, that they comply with EU law, but that EU law precludes the automatic loss of Union citizenship if a Union citizen is rendered stateless. In other words, loss of MS nationality would not automatically result in the forfeiture of Union citizenship, if the Union citizen concerned were rendered stateless. Given that EU citizenship is a dynamic concept and institution and a fundamental status, a certain degree of autonomy as far as Union citizenship is concerned is required in order to preserve the link between the citizen and the Union and his/her place in the European community of citizens. Arguably, it is not fair that a Union citizen, who has established a multitude of relations and connections in a Member State other than his/her state or origin and a link directly with the Union from which directly effective rights and obligations flow, is automatically denied social and political standing in the EU legal order because a Member State decides to deprive him/her of nationality, however legitimate the reasons may be. After all, the EU law rights of free movement, residence and equal treatment do not come into view because one is a Member State national (millions of Member State nationals cannot invoke these rights if their situations are purely internal, that is, they have not established links with EU law by engaging in activities with a crossborder dimension), but because a Member State national has activated his EU law status. Accordingly, this status, which is not a status of subjection - as nationality is - but a status of participation in civil society and the political life of the Union, needs to be protected. This can be done by recognizing that the status of citizen of the Union shall be unaffected by a subsequent loss of state nationality which renders the individual stateless.

On close reflection, this argument neither contravenes the Declaration on Nationality of a Member State nor threatens to replace national citizenship. Nor does it in any way impinge upon Member State autonomy which is clearly manifested in the act of deprivation of citizenship. It merely maintains the legal effects of Union citizenship and safeguards the rights that individuals derive directly from EU law, thereby enabling a stateless EU citizen to continue to enjoy the freedoms guaranteed by the

Treaty and the protection afforded to him/her by EU law, including security of residence, respect for family life and the maintenance of the relations (s)he has established. True, this would be of little use to persons holding two or more Member State nationalities. But it would make a great deal of difference to mono-national EU citizens resident in another Member State. It would also demonstrate in practice that EU citizenship is a fundamental status and that it matters.

The argument could be defended on both analytical and legal grounds, namely, the fundamental status of Union citizenship (the EU citizenship norm) and the *effet utile* of EU law. Analytically, the argument in favour of the independent legal effect of EU citizenship in the event of statelessness can be derived from the intersystemic relation between EU citizenship (A) and Member State nationality (B) as well as the nature of their interaction. By the latter, I mean the perception of the interaction as process-driven and dynamic. In most relations of dependence where A can only be activated by B, it would be incorrect to conclude that all properties and effects of A are contained by B. B may be the triggering mechanism or the source of A, but it can bear little or no relation to other parts of A and their reconfiguration at any time. I take this to be the true meaning of “additionality” or “complementarity” or “existing alongside”: it delineates a degree of relative autonomy and, by no means, implies that A and B cannot function apart. Additionality cannot entail a logic of complete subsumption of Union citizenship to the extent that it automatically disappears when Member State nationality is lost. To assert the latter would be tantamount to distorting the relation of complementarity or additionality and replacing it with a relation of complete subjugation. Such a relation of subordination may please state-centrists, but it would not be congruent with the principle of maintaining the full effectiveness of EU law and Union citizens’ legal positions which are protected by it. It is recognised that an individual who has activated EU law by crossing borders has the status of an EU citizen in addition to the status of a Member State national. The former has been granted to him by virtue of EU law and authenticates all the rights (s)he derives in the host Member State. A national decision depriving him/her of nationality interferes with his/her EU-based legal position and his/her free movement rights, thereby depriving them of full force and legal effects. A Union citizen may thus find himself/herself stripped of all his/her rights overnight, totally unprotected in the territory of the host Member State and bereft of Union citizenship.

In addition, all intersystemic relations are dynamic, that is, they entail a process-driven dimension in response to endogenous and exogenous pressures and possible discrepancies. As we have seen in the previous section, the relation between national citizenship and EU citizenship constitutes no exception. EU citizenship has become a fundamental status of Union citizens who have increasing expectations about the EU’s capacity to deliver and to give meaning and depth to it. Accordingly, a system within which nested citizenships overlap, interact, impact on each other, but also retain their relative autonomy and independent properties, would create the preconditions for citizens to develop their potential, to enrich their life chances and to enjoy adequate protection.

The survival of EU citizenship following the breakdown of the link between an individual and a Member State as a default option in cases of statelessness does not challenge the Member States’ definitional monopoly over nationality and their autonomy to withdraw nationality on the ground of fraudulent naturalisation. It is thus consonant with the CJEU’s rulings thus far. This tenet has no boundary-testing effects: it does not call into question the boundaries of national belonging. Nor does it undermine national identities. It merely ensures that the rights that EU law has conferred on individuals remain fully effective, facilitating thereby the attainment of the Union’s objectives pursuant to the EU law doctrine of *effet utile* (the principle of effectiveness) and the fundamental status of Union citizenship. For the full effectiveness of EU rules would be impaired and the protection of the rights granted by former Article 18 EC would be weakened if in being an apatriote and thus a person without ‘the right to have rights’, according to Arendt, one’s Union citizen status were erased automatically. Conversely, as long as the fundamental status of Union citizenship and the *effet utile* of EU law are kept in the forefront of the analysis, a stateless person would continue to

receive the protection of EU law, maintain his/her associative ties and be a participant in the European Union public. My main worry, here, is that if we look in the wrong place for European citizenship, it will become devoid of significance.

The consequences of the *Rottmann* judgment on Member State autonomy – The Court’s avant-gardism in nationality matters

Gerard René De Groot* and Anja Seling**

Introductory remarks

The very welcome judgment in *Rottmann* can be regarded as a milestone in the sphere of nationality law. Certainly the approach followed by the CJEU is active, yet the Court’s approach can be characterised as judicial avant-gardism and should not be seen as erroneous behaviour. It became clear that the CJEU is willing to challenge Member States’ autonomy in nationality matters. As has been rightly acknowledged by Davies and Kochenov in their contributions, the judgment cannot be considered as very surprising, or as coming somewhere out of the blue based solely on the CJEU’s creativity. No, this was certainly not the case in view of the Court’s previous rulings, especially with regard to *Micheletti*⁴⁷ which has been described by some commentators as ‘impérialisme communautaire’.⁴⁸ Moreover, the active stance of the Court with regard to shaping the concept of Union citizenship is clear in cases such as *Baumbast*,⁴⁹ *Martínez-Sala*,⁵⁰ *Grzelczyk*,⁵¹ *Garcia Avello*⁵² and *Bidar*,⁵³ 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.⁵⁴ Thus, the readiness of the Court to dare to take a further step in this “holy” domain of the Member States could have been easily foreseen. The signs were clearly there and therefore to speak of an outrageous or wrong approach taken by the Court cannot be supported. On the contrary, it has to be welcomed that the Court ruled as it did. Firstly, 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.

However, what makes the case so unique is that for the first time, the question was 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 for EU law (Opinion Maduro, para. 1). The indirect influence of Union law on nationality laws of the Member States was therefore directly addressed in *Rottmann*.

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⁴⁷ See above n5.

⁴⁸ D. Ruzié, Nationalité, Effectivité et Droit Communautaire, *Revue Générale de droit International Public* 1993, 119.

⁴⁹ See above n10.

⁵⁰ See above n35.

⁵¹ See above n11.

⁵² See above n4.

⁵³ Case C-209/03 *R (Dany Bidar) v London Borough of Ealing and Secretary of State for Education and Skills* [2005] ECR I-2119.

⁵⁴ S. Hall, ‘Loss of Union Citizenship in Breach of Fundamental Rights’, (1996) 21 *European Law Review* 488.

The questions which the judgment poses are multiple. Firstly, since the Court has ruled that the issue at stake falls within the scope of European Union law, it needs to be clarified to which situations within the sphere of nationality law the scope of Union law now applies, how far it reaches and what kind of situations it engages with. In addition, as pointed out by all contributions, the question of the relationship between Union citizenship and national citizenship has to be addressed. Does the judgment, as noted by Davies, 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 to rather speak of citizenship pluralism as he suggests? Moreover, the possible concrete consequences on nationality laws of the Member States have to be analyzed. It seems clear that some provisions in the Dutch Nationality Act, to take just one example, are not in line with the principle of proportionality and should therefore be amended.

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 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 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 (paras. 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?

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* 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'.⁵⁵ 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 only not an internal matter after use has been made of the Union citizen's free movement

⁵⁵ C-127/08 *Metock* [2008] ECR I-6241, para. 3 of the operative part of the judgment.

rights (Opinion, para. 11)? The answer to this question is not very clear but following *Metock* it is most likely to be negative.⁵⁶

What seems to be clear is that situations 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 took up residence in a third country and thus enjoy less protection should be avoided, as Golyner has shown. This would imply a distinction between for example “average” Dutch citizens and those carrying little Union stars around their heads.⁵⁷

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 national acquisition. Even though the Court differentiated between the situation in *Rottmann* and that in *Kaur* (see para. 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 (see the contribution by Davies). This could also be concluded from para. 62, where 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.

Possible consequences on Dutch nationality law

So far few contributions to this forum have pointed out the potential consequences the judgment will have for the nationality laws of the Member States. The Court ruled that the loss of Union citizenship and the rights attached to that status is amenable to judicial review carried out in the light of European Union law (para. 48). This will most certainly entail a scrutiny of the nationality laws of the Member States. In the following some possible examples will be outlined with regard to a scrutiny of Dutch nationality law.⁵⁸

In particular, problems could arise 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. However, in addition, following *Rottmann*, citizens need to have the chance before their newly acquired Member State nationality may be revoked to reacquire their old nationality. 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 Dutch passport even if the person concerned challenges this decision.⁵⁹ It can be questioned whether this is in accordance with EU law and in particular with the principle of proportionality. 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 concerned after having lost Dutch nationality can again be naturalised without making ‘every

⁵⁶ *Metock*, para. 73.

⁵⁷ See 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’, *Asiel & Migratierecht* 2010, 293-300.

⁵⁸ Compare also the remarks made by Shaw on German nationality law. Moreover, she rightly raises the question whether now all decisions on acquisition and loss of nationality have to be reasoned in order not to conflict with EU 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.

⁵⁹ Judgment of the Council of State, 18 August 2004, 403.

effort to divest himself of his or her original nationality'. It can be assumed that the Court will not accept such a situation as being compatible with the principle of proportionality. In particular, decisions relating to deprivation of nationality, where the person concerned promised to renounce his or her old nationality, but then subsequently discovers that this act actually costs a lot of money, seem to stand very uneasily with the principle of proportionality. In fact, the Council of State found it impossible to prevent the deprivation by using the argument of the high costs encountered.⁶⁰ However, after the loss of Dutch nationality, the person involved could apply again for naturalisation and ask for a waiver of the requirement of renunciation due to the high costs involved.

Further, difficulties may arise with regard to Article 14 (1) which is concerned with cases of 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 and the naturalisation took place after 1 April 2003, Article 14 (1) is applicable: deprivation of nationality is possible, but the principle of proportionality has to be observed. Problems actually arise with naturalisations which happened before 1 April 2003. According to the decision of the Supreme Court (Hoge Raad) of 30 June 2006,⁶¹ it is 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 naturalised before 1 April 2003, clearly cannot be said to meet the proportionality test. In addition, the principle of equality which Advocate General Maduro mentioned in his Opinion (para. 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.

Moreover, in line with the suggestion made by Davies, the amendment of Article 14 (2) of the Dutch Citizenship Act⁶² which allows for deprivation of Dutch nationality in case of certain criminal offences 'which might not even be serious enough to justify their deportation under the citizenship directive', may be problematic in the light of Union law.

Last but certainly not least, 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 (para. 31) cannot be disregarded by the Dutch authorities either. Until now, the courts in the Netherlands repeatedly ruled that the protection of legitimate expectations is not a ground for acquisition of Dutch nationality.⁶³ It is likely that this view can no longer be maintained. 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* urgently requires amendments to be made with regard to Dutch rules governing the loss of nationality in order to prevent long court proceedings and preliminary ruling questions.

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 on the national nationality rules, the judgment could be foreseen following

⁶⁰ Council of State, 25 August 2004, 404.

⁶¹ NJ 2007, 501.

⁶² Rijkswet 17 June 2010, *Staatsblad* 2010, 242.

⁶³ Compare the critical remarks of H.U. Jessurun d'Oliveira in his comment on the decision of the *Hoge Raad*, 11 October 1985, in *Ars Aequi* 1986, 225-229 and R. de Groot, *Nationaliteit en rechtszekerheid*, Den Haag: Boom Juridische Uitgevers, 2008, 44-55.

Micheletti, in that the CJEU is prepared to influence nationality laws in case there is a clear breach of Union law. Moreover, it shows the CJEU's important role of ensuring that the rights of the individual are protected when Member State rules lead to results undesirable in perspective of Union law.

Whether the Court indeed has changed the roles of Union citizenship and Member State nationality will become clearer in future cases. However, it should not 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. Therefore, the prospect of decoupling Union citizenship from Member State nationality is not feasible at this point in time.

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Concluding thoughts: *Rottmann* in context

Jo Shaw*

The contributions to this debate were originally written and put online soon after the *Rottmann* judgment was handed down by the Court of Justice. At that time, cases such as *Zambrano*,⁶⁴ which have caused significant consternation amongst the Member States as to the effects and scope of EU citizenship, were yet to be decided. In retrospect, we stood at that time on the cusp of another flurry of judicial activism in relation to EU citizenship,⁶⁵ a flurry that looks set to continue with a raft of cases already lined up for decision in the Court of Justice, on references from national courts, on key questions about the interpretation of the Citizens' Rights Directive. These concluding thoughts on the forum debate concentrate on pulling out some of the key aspects of the *Rottmann* case for national citizenship policies after first placing the judgment in a wider context of EU citizenship laws and policies.

Situating *Rottmann* in the landscape of EU citizenship

None of the contributors to this Forum regard the *Rottmann* judgment as a radical venture for the Court of Justice. Rather, it represents an incremental development of the Court's previous case law, not a bold new step. However one views the solidity of its foundations within the corpus of EU citizenship law (*Micheletti*, *Garcia Avello*), it is clear that *Rottmann* was always bound to generate a much greater variety of views about what its future effects might be, when one looks at it from the perspective of legal and constitutional policy, and the evolution of the EU as a constitutional polity with a putative citizenry.

It is possible to "approve" *Rottmann*, in the sense of seeing where the Court of Justice is coming from, viewing its reasoning as more than sufficient, and thinking that its effects – in the grand scheme of things – may well be limited because of the *sui generis* character of the facts on which it is based. Such a view may well see *Rottmann* as a welcome "smoothing" of the relationship between EU citizenship and national citizenship, because of the manner in which access to the former is dependent upon access to the latter; on that view, *Rottmann* offers important guidance to national courts and legislative and administrative authorities as to what an EU standard of proportionality might demand in the domain of loss and – potentially – acquisition of citizenship (see here Davies above). But as de Groot and Seling argue, a careful re-reading of the national citizenship regimes of many Member

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⁶⁴ Case C-34/09, *Ruiz Zambrano v. Office national de l'emploi*, judgment of 8 March 2011, not yet reported, hereinafter *Zambrano*.

⁶⁵ For a broader range of views, and more extended commentary, on *Rottmann*, see also T. Konstadinides, 'La Fraternité Européenne? The Extent of National Competence to Condition the Acquisition and Loss of Nationality From the Perspective of EU Citizenship', (2010) 35 *European Law Review* 401; D. Kochenov, Case Note on *Rottmann*, (2010) 47 *Common Market Law Review* 1837; H.U. Jessorun d'Oliveira. R. de Groot and A. Seling, 'Double Case Note: 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? *Case Note 2* The Consequences of the *Rottmann* Judgment on Member State Autonomy – The European Court of Justice's Avant-Gardism in Nationality Matters', (2011) 7 *European Constitutional Law Review* 138; R. Morris, 'European citizenship: cross-border relevance, deliberate fraud and proportionate responses to potential statelessness', (2011) 17 *European Public Law*, no. 3, forthcoming. More generally on the interface between EU law and national citizenship law, especially the regulation of dual citizenship, see C. Margiotta and O. Vonk, *Nationality Law and European Citizenship. The role of dual nationality*, EUI Working Paper, RSCAS 2010/66.

States may highlight some more significant potential impacts of *Rottmann* in the future for those regimes, especially if national courts show activist tendencies when thinking through the implications of the proportionality test. We will return to these points later. Meanwhile, for some commentators (Kochenov, Golynger, Kostakopolou), the Court of Justice has not gone far enough in articulating a positive notion of an EU citizenship which would exist in a constructive interrelationship with the constitutional character of the emergent euro-polity. This is essentially a normative position, with which one might agree or disagree. For others (Dougan), cases such as *Rottmann* illustrate the ‘unhelpful fragmentation in the range of legal tools by which the Court reasons through the impact of Union citizenship upon national policy choices in different contexts and as regards different categories of individual migrant.’ Overall, these differences in emphasis between the contributors helpfully articulate the various ways in which scholars can situate themselves as critics and commentators upon judicial doctrine. But then the question remains: is it truly the role of the Court of Justice to fashion the constitutional make-up of the euro-polity? Or should it cede this role to democratically elected actors, whether at the national or the EU level, even if their choice is *not to act* at all but to preserve the status quo over a longer period of time, as is apparent from the paucity of amendments and absence of extensions to the citizenship provisions since the Treaty of Maastricht?

The incremental character of the reasoning in *Rottmann* is very clear from the way that each of the contributions situates itself in relation to the wider case law on citizenship, invoking key moments along the Court’s journey from what was widely dismissed as the pure rhetoric of the original formulations of citizenship in the 1993 Maastricht Treaty, adding nothing to the existing provisions on free movement, to the present situation. And it is worth noting that this journey has continued even though the Treaty texts are largely unchanged, bar a reminder that Union citizenship is intended to be additional to, not to replace, national citizenship (Article 20(1) TFEU). Early uses of those Treaty articles by the Court of Justice seemed indeed to add little to what was already contained either in the primary and secondary rules governing freedom of movement (for workers, service providers and recipients, the self-employed, students, retired persons, people of independent means and their families). Only with the case of *Martínez Sala* in 1998⁶⁶ was a rubicon crossed, as in this case it was not obvious how the applicant could fall within any of the protected categories above; on the contrary, the Court crucially reformulated its approach to focus on the status of nationals lawfully resident in another Member State, who were entitled – because of that status – to the protection of the right to non-discrimination even though they stood outside the traditional “economic” categories of free movement. Today we see a scenario where citizenship of the Union is treated as a relatively autonomous legal basis for “solving” certain types of hard cases involving “citizens of the Union”, who are faced with an actual or potential denial of rights under the Treaties where other legal instruments, such as the Citizens’ Rights Directive of 2004 are insufficient.⁶⁷ To put it another way, citizenship, in the sense of a backstop legal status which claimants can invoke if no other instruments of EU law will avail them, has come a very long way since *Martínez Sala*. But the question remains: is it more than that? Is it truly a constitutional figure within the multi-level euro-polity?⁶⁸

To answer that question, we should note that much of that development has been rhetorically supported by the Court’s key mantra in this area: citizenship of the Union, it states repeatedly, is

⁶⁶ See above n35.

⁶⁷ European Parliament and Council Directive 2004/38 on Citizens’ Rights, OJ 2004 L158/77. For a more general discussion of the trajectory of EU citizenship, see J. Shaw, ‘Citizenship: contrasting dynamics at the interface of integration and constitutionalism’, in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law*, Oxford: Oxford University Press, 2nd Edition, 2011, 574, esp 584-597.

⁶⁸ For one answer to this question which takes an unequivocally constitutional approach supporting a unitary approach to the notion of Union citizenship see D. Kochenov, ‘A Real European Citizenship: A New Jurisdiction Test: A Novel Chapter in the Development of the Union in Europe (2011) 18 *Columbia Journal of European Law* 55-109

‘destined to be the fundamental status of the nationals of the Member States’.⁶⁹ This statement has seemed particularly powerful since the Court dropped the second part of the original phrase that first emerged in the *Grzelczyk* case. In recent cases, when it refers to the “fundamental status” mantra, it no longer limits this sweeping comment by noting that Union citizenship (merely) enables ‘those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.’ This seems to provide support for those who argue that the Union citizenship has acquired an autonomous, and constitutional, character. Of course, such an equal treatment principle would not have availed an applicant such as Dr Rottmann, whose argument was premised on the erection of barriers to the exercise of free movement rights, not some sort of equal treatment with nationals. As Dr Rottmann was by the time the case arose already ‘German’, with whom would he have been asking to be compared?

Indeed it is above all the connection to the “internal market” or free movement element of citizenship which has been apparently weakened over the years by the Court of Justice, and *Rottmann*, at first sight a case brought by a German citizen (at least until naturalisation is withdrawn), resident in Germany, in a German administrative court, against the German administrative authorities, would seem to conform to the pattern of cases where the Court has used increasingly tenuous links to the free movement elements of the Treaties in order to justify the application of either the non-discrimination principle⁷⁰ or, as here, the principle of proportionality.

In legal doctrinal terms, the Court has found itself increasingly being asked to draw a line between the circumstances where EU law applies, bringing along with it the underpinning principles of non-discrimination, equal treatment and proportionality, and those evincing a “wholly internal situation”, where EU law does not apply. This is a fundamental question which all federal or quasi-federal legal orders must grapple with. The question remains whether the Court has dealt with this issue in a manner which satisfies either legal commentators or political observers, especially those determined to protect a core of sovereignty for Member States. As commentators such as Alina Tryfonidou have observed,⁷¹ the Court’s apparently rather *ad hoc* approach has had two consequences. First, it has consistently widened the scope and effects of EU citizenship, with incremental extensions of the wording of its judgments and a willingness to apply EU law principles to novel situations involving more and more hypothetical exercises of EU law. And second, this has meant that the apparently anomalous and unfair situation of so-called reverse discrimination has become ever more prominent. Reverse discrimination arises where “static” EU citizens, that is, those subject *only* to national law, are denied legal rights and entitlements which are given to mobile EU citizens who benefit from the application of EU law. This seems unfair, given that static EU citizens outnumber mobile ones by a considerable margin. This form of “discrimination” seems reasonably easy to justify in cases where EU citizens are resident in *other* Member States, not least if one has regard to the underlying social and economic effects that migration – even under the conditions of “free movement” within the EU – has on individuals and families, such as de-skilling in the employment market, xenophobic prejudice within wider society, and difficulties in navigating the complexities of sometimes bureaucratic and legal minefields in order to regularise both immigration status and welfare entitlements.⁷² It could, in those terms, be said to be the compensatory effects of EU law. It seems much less easy to justify where the claim based on EU law is brought by a national against their own Member State, or where

⁶⁹ *Grzelczyk* above n11 at para. 31.

⁷⁰ See *Eman and Sevinger* n22 above.

⁷¹ A. Tryfonidou, *Reverse Discrimination in EC Law*, The Hague: Kluwer, 2009.

⁷² See for example the effects of free movement on migrants from the new Member States: S. Currie, *Migration, Work and Citizenship in the Enlarged European Union*, Farnham: Ashgate, 2008. Further work on obstacles to the exercise of free movement rights is being carried out at the University of Edinburgh under the aegis of the project ‘Friction and Overlap between EU Free Movement Law and UK Immigration Law’, <http://www.law.ed.ac.uk/overlap>.

the invocation of EU law seems to be based on a hard-to-justify quirk such as a case of “passport movement” (e.g. taking advantage of dual citizenship). The Court’s case law has been sometimes hard to understand, and has given rise to some negative publicity at the national level, as it seems that EU law is being reduced to the status of a quick fix for those concerned about the increasingly illiberal character of national immigration laws, although this ‘fix’ is not apparently without its limitations.

These points are well illustrated by a series of important cases decided in 2011, *Zambrano*, *McCarthy*,⁷³ and *Dereci*⁷⁴ which in turn build on three predecessor cases (*Garcia Avello*,⁷⁵ *Chen*,⁷⁶ and *Metock*⁷⁷), all highlighted at points in the various contributions discussing *Rottman*. A brief presentation of these six cases thus highlights the contribution of a rich interpretative genealogy of EU citizenship case law and in turn shines a light on some of the most contentious features of this concept and to place *Rottmann* in its wider context. We begin with the essential background.

The issue which arose in *Garcia Avello* concerned whether there was an EU law issue in a dispute between the Garcia Avello family and the Belgian state about the surnames of the children. Mr Garcia Avello married a Belgian woman in 1986 and had two children subsequently, who were born in Belgium and had dual Belgian-Spanish nationality, pursuant to national law. They were registered in Belgium with the surname of their father – Garcia Avello – whereas the family wanted the children to be registered according to the Spanish style, with the first part of the surname of the father – Garcia – plus the surname of the mother – Weber. Hence, according to Spanish norms they would be Garcia Weber. This was the name they were registered with in the consular section of the Spanish embassy. The children were thus faced with a scenario of having their surname registered differently by the two states to which they “belonged” as citizens. This could give rise to confusion.

The Court concluded that in principle this was not a wholly internal issue. It invoked *Micheletti*⁷⁸ to point out that a Member State cannot place an additional condition in relation to the recognition of the nationality of another Member State, if a person resident in that state also has the nationality of another Member State. It pointed to the difficulties that a person can encounter in both the public and the private spheres as a result of having different versions of their surname extant, in areas as diverse as the recognition of diplomas not to mention issues relating to passports and identity cards. This gives, in the Court’s view, a connection to EU law because of the potential impact on free movement in the future. Hence, the Court concluded that EU law was applicable, despite the absence of a competence as such for the EU to regulate matters of surnames. Furthermore, for the Garcia Avello children to be treated in the same way as persons who have *only* Belgian citizenship amounts to discrimination on grounds of nationality. Belgium was unable to justify its treatment by reference to the various grounds it brought forward (e.g. principle of immutability of surnames, integration into the host society). The refusal to treat the request for rectification of surnames as being one based on ‘serious grounds’ – which can in certain circumstances lead to rectification of the record – was thus disproportionate.

The second of the three predecessor cases is *Chen*. This case arose as a consequence of the effects of the Irish rules on *ius soli* or birthright citizenship, which was granted to all babies born on the island of Ireland at the time when the facts arose regardless of the status of the mother. A baby girl born to a Chinese mother in Northern Ireland thus automatically became an EU citizen, by virtue of the Irish provisions, and furthermore, as an EU citizen resident in a Member State other than the one of which

⁷³ Case C-434/09, *McCarthy v. Secretary of State for the Home Department*, judgment of 5 May 2011, not yet reported.

⁷⁴ Case C-256 *Dereci et al v. Bundesministerium für Inneres*, judgment of 15 November 2011, not yet reported.

⁷⁵ See above n4.

⁷⁶ See above n19.

⁷⁷ See above n55

⁷⁸ See above n5.

she was a national, Baby Chen was fully protected by the non-discrimination provisions of EU law. The issue which arose before the Court of Justice concerned the implications of this for the child's mother, as primary carer. She wished to reside in the United Kingdom with the child but otherwise had no right of abode. As a member of the family of an EU citizen, Mrs Chen was held by the Court of Justice to have the right of reside with, and care for, her child, as this was necessary for her child in practice to enjoy the benefit of her EU citizenship; this meant, that Mrs. Chen could not be denied the right to reside in the United Kingdom. At the time, while it was thought that this situation represented a considerable encroachment of what were traditionally thought to be the traditional immigration sovereignty prerogatives of the Member States to decide which third country nationals may lawfully take up residence within its borders was quite significant, but somewhat confined by its unusual facts. In any event, Ireland subsequently altered its *ius soli* rules to limit the granting of birthright citizenship on the basis of birth on the island of Ireland to the children of citizens or those otherwise entitled to be citizens. This case has been developed in significant ways by the subsequent *Zambrano* case.

Finally, the case of *Metock* should be cited as important background to the *Rottmann* case. *Metock* is not strictly relevant to the argument because it is not a 'citizenship' case but rather a case about the interpretation of the Citizens' Rights Directive, and specifically about whether Member States could require, under the terms of the Directive, that third country national spouses or partners of citizens of other Member States resident in the host state had to have been previously lawfully resident in *another* Member State. In other words, they had to have persuaded *one* Member State to allow them to reside lawfully on its territory, whether on the basis of employment, study, or other cause. In fact, the Court's conclusion in *Metock*, which put Irish law in this regard under the microscope, was that there was no such requirement foreseen in the Citizens' Rights Directive, and so one must not be imposed by national law. What is important for our purposes about *Metock*, however, is that it highlighted the Court's willingness to take on the Member States on the terrain of immigration law.

These are the three cases that provide much of the key context against which the Court concluded, in *Rottmann*, that, in certain circumstances, national prerogatives in relation to citizenship law and specifically the law governing residence-based naturalization must be exercised only in accordance with the EU law principle of proportionality. However, as subsequent cases make clear, neither these three cases, nor *Rottmann* itself, represent a final resting place for the Court's case law on the evolving relationship between EU law and national citizenship, but rather they are just lines in an evolving and always challenging conversation. Hence, in concluding the forum on *Rottmann* and its implications for national citizenship laws, we should also look forwards from there, in particular to the subsequent cases of *Zambrano*, *McCarthy* and *Dereci*, all of which also engage national citizenship law in different ways. *Rottmann* needs to be viewed historically, in the light of its predecessor and successor cases, in order for us to gain a fuller sense of how it might impact on the evolution of citizenship laws and policies in Europe, which is the point to which I shall turn in the final section of this concluding comment.

Zambrano concerned the claim for a right of residence in Belgium, as well as the right to work, brought by a Colombian citizen who had arrived in Belgium seeking asylum in 1999, along with his wife and one child (also with Colombian citizenship). While the Belgian authorities refused asylum in 2000, and ordered the family to leave Belgium, the decision contained a *non-refoulement* clause prohibiting their deportation back to Colombia because of continuing risks to their safety. The family remained in Belgium and in many respects integrated rather fully. Mr Zambrano obtained full time employment, and two further children were born who acquired Belgian citizenship on birth by virtue of a conjunction of Belgian and Colombian citizenship laws. After 2005, when Mr Zambrano applied for welfare benefits during a temporary suspension of his employment, his irregular situation came more clearly to the attention of the authorities, and after 2006 his employment was definitively terminated because he had no work permit. The crucial issue for the *Zambrano* case, aside from the apparently inconsistent and rather dilatory way in which the Belgian authorities managed the issues

over the years, was the status of Jessica and Diego Zambrano, the minor Belgian citizen children of Mr and Mrs Zambrano, who clearly were not capable of looking after themselves without the care and support of their parents. It was evident that if the parents had been deported, that would have meant the children also leaving. As EU citizens, it was argued, they would have been deprived of the right to reside in the EU, notwithstanding that they had never exercised their free movement rights. The Court agreed with this proposition in a very thinly reasoned judgment. Citing *Rottmann*, it concluded that '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*' (emphasis added). This seems to be an overwhelming endorsement of a rights-status connection for EU citizenship which effectively replaces the discretionary decision-making of national immigration law with a rights-based EU citizen status. It is, of course, a curious conclusion to come to without more extensive reasoning – for national immigration laws (and judges as adjudicators) themselves have wrestled with the question of whether or not it is right to deport citizen children indirectly as a result of the illegal alien status of their parents (or because a carer parent, for example, has been subject to a deportation order in conjunction with the serving of a jail sentence for the commission of crimes⁷⁹). Human rights considerations have not always held sway in such circumstances, despite the powerful arguments put forward by advocates who point out the unfairness of removing possibly well integrated children from their familiar educational and social surroundings.⁸⁰ It might seem a gross violation of international human rights law for a state to deport its own citizens, but in practice this has happened on a remarkably large scale since the Second World War, including in Member States of the EU such as Ireland and the United Kingdom.⁸¹ On this basis, EU citizenship would seem to provide a type of absolute protection against deportation outside the EU which national citizenship does not provide for children. Human rights advocates have unsurprisingly welcomed this development,⁸² but clearly it provides additional grist to the mill of those who argue that the Court of Justice has overstepped its legitimate bounds in relation to impacts upon national law and national sovereignty in cases such as *Zambrano*.

Curiously, the Court did not seem to reach the same conclusion regarding the position of an adult applicant whose partner was a third country national in a case that followed rapidly upon the heels of *Zambrano*. *McCarthy* also depended, like *Chen*, for its factual background upon the complex intertwining of UK and Irish citizenship laws, especially in Northern Ireland. This time, in a case decided by a chamber of five judges, not the Grand Chamber which took the highly emotive case of *Zambrano*, the Court of Justice decided that there was no link to EU law in such this case. The applicant, Mrs McCarthy, was resident in Northern Ireland as a UK citizen but was entitled to be an Irish citizen, and – after marrying a Jamaican citizen who did not have the right to reside in the UK – applied for and obtained an Irish passport. She then sought to argue that she was now a national of a Member State resident in *another* Member State and to obtain an EU law based residence permit as an Irish citizen resident in the UK from the UK authorities. In fact, Mrs McCarthy had never exercised her free movement rights, and indeed had never been a worker, service provider or self-employed person, and had always been dependent upon state benefits. Moreover, there was no evidence that she was economically dependent upon her third country national spouse. Although it is arguable that in order to enjoy the company of her spouse Mrs McCarthy would have had to have left the EU (although

⁷⁹ This is the issue which the UK, which now has extremely strict rules requiring the deportation – after the serving of a sentence – of third country national prisoners. The potential for a clash with *Zambrano* is obvious: see *Omotunde (best interests – Zambrano applied – Razgar) Nigeria* [2011] UKUT 00247(IAC).

⁸⁰ J. Bhaba, 'The Citizenship Deficit: on being a citizen child', (2003) 46 *Development* 53-59.

⁸¹ C. Sawyer, 'Not Every Child Matters: the expulsion of British citizens from the UK', (2006) 14 *International Journal of Children's Rights* 157-185.

⁸² For a presentation on how this impact on Irish law see <http://www.humanrights.ie/index.php/2011/03/09/impact-of-the-cjeu-decision-zambrano-and-irish-law/>.

presumably post-*Metock*, they could have moved to another Member State where she could have sought work and they could have relied upon the more generous family reunification rules confirmed in the *Metock* case), the Court would not accept that she was being deprived of the essence of her EU citizenship rights.

Most recently, in a series of cases referred by the Austrian courts (*Dereci*), the Court has once more been faced with the challenge of elaborating upon *Zambrano*, focusing on the application of the ‘genuine enjoyment’ test which it has formulated in such cases where there has been no prior movement to another Member State. This test requires it to be determined whether the action which the Member State has taken (e.g. the refusal of a residence permit to a third country national family member) amounts, for the EU citizen in question, to the ‘denial of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a citizen of the Union’. Where the Court brought additional clarity to the situation in *Dereci*, not necessarily to the satisfaction of those who want a uniform ‘law of citizenship’ to be developed, was that it stated explicitly that this is a matter for the national court to verify. This seems at odds with the more directive approach taken in *Zambrano* where the Court of Justice *itself* decided that the children would be unable to exercise their Union citizenship rights if the parents had to leave. The Court emphasised that the key question is whether the Union citizen would be required to leave the territory of the Union as a whole, not just the territory of the home state (in other words, the Court is suggesting that the Union citizen can (should?) always exercise free movement rights if this is possible (which it was not, in *Zambrano*, because of the youth of the Union citizens)). This reinforces the argument that it was the minor status of the Union citizens in *Zambrano* and the fact that they were dependent upon two carer parents, both of whose continued residence in Belgium was at issue, was the decisive factor in that case.

Moreover, the Court’s approach seems to separate the ‘genuine enjoyment’ criterion, as a freestanding jurisdictional test allowing the court to determine whether an issue concerns a purely internal situation or not, from the question of whether the steps proposed by the Member State would infringe the fundamental right to family life. Slightly oddly, the Court seemed to note that once the national court had decided that the measure taken by a Member State would deprive a Union citizen of the genuine enjoyment of their EU citizenship, thus engaging EU law, there was still room for an assessment of the question of the right to enjoyment of family life under Article 7 of the Charter of Fundamental Rights. This is odd, because it would surely be sufficient for a finding in favour of, for example, a residence permit for the third country national for the national court simply to conclude that the ‘denial of genuine enjoyment’ criterion is satisfied, without need for issues of family life to be engaged. There is no reference to a proportionality test. It seems to be a simple yes/no issue. Or perhaps it meant to suggest that there were *other* ways in which the application of EU law could be engaged, and thus Article 7 CFR would become applicable. If so, it was not made clear what those might be, although it may be that the types of issues engaged by the withdrawal of citizenship in *Rottmann* were what it had in mind. Unnecessarily, the Court then went on to remind the national courts that where EU law *does not* apply, they have to apply Article 8 ECHR, in order to determine whether a residence permit should be granted (presumably under national law). These sections of the judgment are very unclear, and can perhaps be attributed to a good deal of disagreement within the Grand Chamber before a judgment text could be settled upon. This would be likely, it would seem, to mirror disagreement in *Zambrano* itself which has revealed itself in an excessively succinct and terse judgment. In any event, the fact that the Court’s approach in *Dereci* appears to be close to the guidance issued by, for example, the United Kingdom Borders Agency on the applicability of *Zambrano*,⁸³ may not be coincidental, and the Court may – consciously or subconsciously – be seeking a closer rapprochement with the national authorities.

⁸³ <http://www.ukba.homeoffice.gov.uk/sitecontent/newsarticles/2011/september/48-british-carers>.

In sum, one can conclude that EU citizenship is wide, but perhaps not unlimited. The Court of Justice appears to take very seriously its point about the “fundamental status” of Union citizenship, as do clearly the contributors to this Forum and other commentators on the trajectory of EU citizenship. While *Rottmann* and *Zambrano* highlight that Union citizenship has and will in the future push at the boundaries of national citizenship and immigration law in ways that Member States will continue to find challenging, *McCarthy* and *Dereci* reinforce some of the traditional perspectives that there does remain a residual “core” of “wholly internal” matters which do not touch upon EU law. In other words, it seems premature – in the absence of clear political and constitutional will in that direction⁸⁴ – to conclude that Union citizenship has already reached what the Court of Justice regards as its destiny, namely to become the fundamental status for the nationals of the Member States. It may not be far from that point of evolution in relation to nationals who reside in *other* Member States, but it seems generally remote from that position – both empirically and normatively speaking – in relation to so-called “static” citizens, resident in the state of which they are citizens, especially those who have never moved. Whether this will change in the future cannot – from the perspective of democratic legitimacy – be driven solely by developments in the Court of Justice, but must engage also political deliberation within and across the Member States, as well as in supranational forums such as the European Parliament.

***Rottmann*: the implications for national citizenship regimes**

In this final section, we can return to the question of the extent to which *Rottmann* matters for national citizenship regimes. Domestic reaction – or more specifically the lack of it – would seem to indicate that for the most part the Member States are indifferent to the implications of *Rottmann*. *Rottmann* did not receive widespread press coverage, not least because its facts are quite *sui generis*, and the applicant hardly engendered widespread sympathy. In contrast, the Member States do care about the impact of a case such as *Zambrano*, as witness the number of Member States which intervened before the Court of Justice in that case, all arguing that this was a matter outwith the scope of EU law. Of course, the Court of Justice chose to ignore their arguments and now they are faced with the prospect of implementing *Zambrano*. One element of the national (immigration) reaction has been to attempt to limit *Zambrano* to its facts, and so in Ireland the Minister has refused to extend the right to work aspect of *Zambrano* to Romanian and Bulgarian parents of Irish citizen children who do not have an unrestricted right to work in Ireland under the transitional rules still in place since the 2007 accession of Romania and Bulgaria. In the UK, the UKBA has been anxious to ensure that there is a nexus of dependency before the *Zambrano* approach can be applied. Yet while the immigration consequences can be managed, what will be interesting to see over a longer period of time is whether *Zambrano* is used as an excuse to restrict *ius soli* for the children of migrants to the limited extent that it exists in the EU Member States thus far.⁸⁵ In some cases, *ius soli* birthright citizenship has been conferred on the children of migrant workers or those seeking asylum without too many obstacles on the part of the domestic authorities – this seems to be the case in Belgium with the *Zambrano* children, where the parents were reluctant to engage with the Colombian authorities. However, Member States may move towards demanding a higher standard on the part of parents who must prove that the alternative to *ius soli* is statelessness, before they are prepared to see children acquire citizenship solely by virtue of birth on the territory.

The interesting question which arises from *Rottmann* is whether any such changes could be subject to challenge on the grounds they are disproportionate. All the focus in *Rottmann* has been on the

⁸⁴ See the cautionary comments comparing the “market” and “constitutional” dimensions of Union citizenship in Shaw above n67.

⁸⁵ For a comparative review, see I. Honohan, *The Theory and Practice of Ius Soli*, EUDO Citizenship Comparative Report, RSCAS EUDO CIT COMP 2010/02, June 2010, <http://eudo-citizenship.eu/docs/IusSoli.pdf>.

question of whether the loss of citizenship could be regarded as a disproportionate measure, but clearly there should be no bright line distinction drawn between cases of loss and cases of acquisition. This could see challenges not only to general measures where the rules make it unreasonably hard for the children of settled residents of the EU to gain national and thus EU citizenship, but also challenges to the procedures regarding citizenship acquisition, if these are highly discretionary or lack a procedure for judicial review, and thus the capacity to be evaluated for their compliance with the requirements of EU law.

This raises finally the question as to what type of (national) citizenship policies and procedures are appropriate in a “European Union”? Should there be an obligation on the Member States to cooperate amongst themselves in order to avoid the situation that while a person such as Rottmann might legitimately be deprived of the German citizenship he obtained by fraud, he should not be additionally punished through a form of “civic death” intrinsic in the difficulties attendant on re-acquiring his Austrian citizenship? This apparently narrow and abstruse question goes, however, to the heart of what the longer term implications of *Rottmann* might be, on the assumption that the framework for integration in relation to the free movement of persons, as well as common immigration laws governing some aspects of the arrival and residence of third country nationals where these apply in particular Member States, continues to evolve. It is sometimes suggested that the missing element of EU citizenship is the apparently total absence of a focus on duties (of EU citizens). It is a moot point to ask, after *Rottmann*, what might become the duties of the Member States in an EU where citizenship laws become ever more closely intertwined with each other.

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