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Brexit, Nationality and Union Citizenship: Bottom Up

Hans Ulrich Jessurun d'Oliveira

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Abstract

In this paper an inquiry is made into the reactions of Union citizens to the imminent Brexit and the uncertainty the unfinished negotiations bring. UK citizens seek to acquire the nationality of EU27 Member States, while EU27 citizens, residing in the UK, try to bolster up their position by acquiring UK citizenship. Key element in these activities securing freedom of movement is the acceptance of dual citizenship in the legislations concerned. Various avenues and legal barriers are explored and data about numbers of naturalisations and options are tentatively given. EU citizenship has come alive with Brexit.

Keywords

Brexit, Nationality, Union Citizenship, people's (re)actions, Freedom of Movement

1. Introduction

“Our friendly experienced legal team will assist you in obtaining Polish citizenship and secure the [sic] continued EU citizenship after Brexit.”

With this enticing ad on the internet, a Polish lawyer’s office, having previously assisted the proverbial Polish plumbers in the UK in asserting their rights as Union citizens,¹ is seeking a new category of clients in that country. In the Brexit referendum of 23 June 2016, 51.9% of those voting, with a turnout of 72.2% of eligible voters, voted that the UK should leave the EU. This rather unexpected result gave rise to about feverish activities at all levels on a host of topics. The offer for help by Polish lawyers is one example in the area of nationality law.

In this essay I will confine myself to developments in that domain. At the outset I have to warn that we find ourselves in the midst of uncontrolled dynamics and we are not sure at all where the powers that are unleashed by this breakaway will take us. Governments – among which an unstable UK government, regional authorities, the EU with its institutions and negotiators – not to mention private parties and lobbies for divergent interests all tug in different or even opposite directions. It may even come to a new referendum or new elections provoking the revocation of Brexit. For the time being, this results in code orange uncertainty.

In this essay I will leave aside the negotiations between the EU27 and the UK.² They form the backcloth of my picture of the movements of parts of the populations of the EU-28. This backcloth is cause for constant worry, as there are still many issues that have not yet been addressed. First and foremost: nothing is decided as long as not everything has been decided. People are waiting for a package deal that may not even come about. It ain’t over until the fat lady sings. A no deal Brexit is still a looming outcome.

We lawyers are biased in our more or less instinctive and natural propensity to look first and foremost to the activities of politicians and rule-makers, the law in the books, and to overlook the law in action, activated by the citizens. Brexit has alerted quite a number of them to take their own precautionary measures in order to reduce their uncertainties. They have no intention to wait for what the powers that be eventually decide, but plan their own interventions within the existing frameworks. They are actors that academic lawyers easily overlook. What happens on the ground?

While we are hearing an ominous rumble in the political jungle we may register the various movements of people and speculate about possible outcomes.

But first some elementary information on the law of nationality.

a. Persons, possessing the nationality of a MS of the EU, are, by that token, citizens of the EU. Citizenship of the EU, a status not gained by political struggle, but generously bestowed upon nationals of MS by the Maastricht Treaty in 1992, entails a number of rights: first and foremost freedom of movement within the countries of the EU. Furthermore franchise for the EU-Parliament, the right to vote and stand for office in local elections in the MS, on the same footing as nationals of that MS, the right to diplomatic protection by other MS than one’s own, and so on. The list is not limitative: other rights (and duties) may be attached to the EU citizenship, by interpretation of the treaty or by new secondary legislation. The existing rights are mostly implemented in directives, among which the important Directive 2004/38 on the freedom of movement and residence of EU citizens and their

¹ See, for a vivid account of the reception of Polish plumbers in Western European countries, Elizabeth Buettner, *Worrying about Migration. Episodes in Western European History since 1945*. Inaugural address University of Amsterdam (2016).

² See e.g. Annette Schrauwen, ‘(Not) losing out from Brexit’, <https://doi.org/10.1.4324/111.444.ewlj.2017.04>; Jo Shaw, *Citizenship and free movement in a changing EU: navigating an archipelago of contradictions*. University of Edinburgh School of law Research Paper series No. 2017/18.

families, which codifies a number of earlier directives. A large proportion of the European population are not aware of being Union citizens, even though the European Court of Justice persists in stating that this status is “intended to be the fundamental status of nationals of the Member States”. Although this status is dependent on the possession of the nationality of one or more Member States, the phrase suggests a potential shift in importance. Not only in terms of ideological emphasis laid on Union citizenship, but also implying a reversal of dependence: Union citizenship entailing nationality of a MS, or blocking the loss of that nationality. In this way the ECJ has declared repeatedly that “MS, exercising their power in the sphere of nationality, must have due regard to European Union law.” Thus, in the *Rottmann* case, concerning the withdrawal of German nationality from an Austrian national who had acquired this German nationality by fraud (having omitted to mention the fact that he was being persecuted for crimes committed in Austria), the German Courts had to check whether this withdrawal had been performed with due regard to the European principle of proportionality, as explained in detail by the European Court.³

This is an interference with the competence of States to lay down rules for acquisition and loss of their nationality, although the ECJ tries to deny this. According to the Court in *Rottmann* it does not compromise this power of MS, but this national competence is amenable to judicial review carried out in the light of European law. If a decision by the authorities to withdraw their nationality, or to bestow the nationality on certain persons, or a law to that effect, cannot pass the Union law test, what else is this than an inroad upon this power? A case is pending before the Court about Dutch legislation on loss of the Dutch nationality after spending a period of more than ten years abroad without renewing one's Dutch passport as a token of one's link with the Netherlands.⁴ The Advocate General has concluded that insofar as minor children share the loss of their parents, the Dutch legislation does not hold water, as these minors could not themselves prevent this loss. If the ECJ follows the conclusion, this would lead inevitably to a change in the Dutch law on nationality. Not only individual decisions by authorities on the basis of the existing law, but – for the first time – the law itself will be scrutinized and curtailed by the ECJ. Union citizenship is indeed becoming the fundamental status, and municipal laws on nationality the dependent ones.

b. Nevertheless, according to international law, the power to determine who are its own nationals or citizens belongs to states. Art.3 of the European Convention on Nationality (1998) recodifies this principle, stating “Each State shall determine under its own law who are its nationals”. It adds: “This law shall be accepted by other States in so far as it is consistent with applicable international conventions, customary international law and the principles of law generally recognized with regard to nationality.” Recognition by other *States* is the rule; no mention is made of recognition by an international organisation such as the EU. One could argue that such an international entity is free to withhold recognition if it does not comply with the principles laid down in the treaty establishing this entity with its own legal order. In any event, there is no competence on the part of the EU to legislate in the area of nationality law. No transfer of powers by the MS has taken place yet. What exists, in this relationship between nationality and Union citizenship, between the EU and its Member States, is the right that the ECJ has appropriated to subject nationality laws of the Member States and their application in the individual case to a form of scrutiny in the light of principles of Union law, such as the non-discrimination principle and the proportionality principle. Other EU institutions, such as the European Commission, recognize that they have no competence in the matter, and content themselves with criticizing and nudging states into obedience. This is e.g. the case in the recent statements by Commissioner for Justice Affairs Vera Jourova concerning so-called Golden Visas: the practice includes the acquisition of the nationality of states such as Malta or Cyprus, which are by no means the only

³ Case C-135/08, *Rottmann*, 2 March 2010.

⁴ *Tjebbes and others v Netherlands*, Case C-221/17; Conclusions of Advocate General Mengozzi of 12.7.2018: ECLI:EU:C:2018:572

Member States to engage in this practice, by wealthy foreigners who invest smaller or larger amounts of money in these countries in return for nationality and thus for Union citizenship.

c. Union citizenship guarantees the right to move freely within the whole EU, and to settle in other MS than one's own. In addition, the Union citizen may be accompanied by his or her family members, even if they do not possess the nationality of a MS. That is why the possession of a MS nationality, entailing Union citizenship is such a sought after status. It opens up the whole of Europe for Union citizens. It allows them to move, but also to stay where they are, once they made use of this freedom. And: the whole population of the EU always has the option to move and reside elsewhere, even if they still stay in their home countries.

In order to impose some structure upon the description of activities on the ground I will distinguish four aspects of the impact of Brexit on the domestic nationality laws of the UK and the 27 remaining Member States of the EU.

1. First the situation in which there are, formally, no changes in the laws to be noticed, but there are shifts in their practical application.
2. The rules are unchanged, but their territorial field of application is changed by the fact that the UK ceases to be a Member State of the EU.
3. Brexit incites Member States to change their laws on nationality.
4. Forms of decoupling Member State nationality and Union citizenship may come about to guarantee for UK nationals a status akin to that of EU citizenship. That is, they may acquire a kind of quasi-union citizenship.

2. Business as usual

It is to be expected that the nationality laws of all 28 states will for some time remain unchanged, as law reforms take time. Nevertheless, shifts in their application have shown up, even immediately after the referendum. These changes of direction are brought about, to be sure, by the desire of the UK citizens involved to retain their Union citizenship with its concomitant rights in the remaining 27 Member States, first and foremost their freedom of movement in the territories of the Member States. An estimated 1.2 million Britons already live in other Member States, and an undefined number of those that have not yet exercised their right to free movement would not want to lose that opportunity, even among Brexiteers. They are doomed to become third-country nationals, subjected to the restrictive immigration laws of the individual EU27. Freedom of movement to the other Member States is no more available.

At the other end of the spectrum we find a number of Union citizens resident in the UK who do clearly wish to remain there. Their primary and safest ticket to stable residence is the nationality/citizenship of the UK. Over three million EU27 citizens, residing in the UK, are unsure about their destiny there and may seek assurance in acquiring British citizenship. Their 'substantial uncertainty'⁵ is not unwarranted: indeed, one of the main motives for the vote of the Brexiteers was the wish to regain and tighten immigration control: the 'splendour of isolation'.

Movements in both directions benefit from the fact that British nationality law poses no difficulties in relation to dual nationality: both persons voluntarily acquiring British citizenship and UK citizens who pursue naturalisation elsewhere are allowed to keep their original nationality. Certainly, the British Nationality Act allows UK citizens who want to acquire the nationality of a State that requires applicants to dispose of their original nationality to renounce their UK nationality, but that will normally not serve the purpose of the exercise: most of them will want to remain British with right of abode as well. A dwindling number of Member States require that their nationals lose their nationality by operation of

⁵ Elspeth Guild and Kim Vowden, 'Brexit and the Fate of EU Citizens: Substantial Insecurity', *Asiel & Migratierecht*, 2018, nr.6-7, p. 301-306 (306). They describe the negotiations between the UK and the EU27 up till April 2018.

law if they aspire to another nationality, such as that of the UK. A case in point is the Dutch Nationality Act which states in its article 15 s. 1: “The Dutch nationality is lost by an adult: a. by acquiring voluntarily another nationality”.⁶ This radical statement is mitigated in art.15 s.2 for certain categories: persons born in the country of which they acquire the nationality insofar as they reside there at the time of acquisition; persons who have, before reaching the age of majority, resided continuously for at least five years in that country; and finally and importantly persons who have married or concluded a registered partnership with a person possessing that nationality.⁶ All others forfeit their Dutch nationality.

This ground for loss is permitted by the European Convention on Nationality which declares in its art.7 that loss of nationality is allowed in the case of (a) voluntary acquisition of another nationality. The UK is not a party to this Convention, and the same goes for a number of (other) Member States of the EU.⁷ (For a survey of the position of the Member States concerning the voluntary acquisition of another nationality as a grounds for loss of the original nationality one may consult the work of Sergio Carrera and Gerard René de Groot.⁸)

If one of the two countries involved attaches the loss of its nationality to the voluntary acquisition of the nationality of the other, inclination to do so will dwindle. A Briton who has to commit to doing everything in his power to renounce his British citizenship in order to qualify for naturalisation in the Netherlands will probably abandon his or her plan;⁹ in the reverse, a Dutch person, residing in the UK, who wishes to secure his or her residence there will not easily give up his or her Dutch nationality in order to remain in the UK. Retaining or acquiring Union citizenship is an important factor in the manner in which people will take their decision.

Official figures are scarce. Nevertheless some movements can be shown.

Interestingly, there exists the opportunity for descendants of Sephardic Jews to acquire rather easily the Portuguese or – somewhat less easily – the *Spanish* nationality.¹⁰ Legislation was put into place as a kind of redress (*Wiedergutmachung*) for the atrocities and expulsion of these Jews in the aftermath of the *Reconquista* (1496-1821). It was Spain that started legislation in 2012, as a “redress of what must be considered without doubt to be one of the most important historic mistakes”, as the minister in charge announced. Originally the redress implied giving up one’s previous nationality, but this clause was eventually stricken.¹¹ An obstacle is formed by art. 22 *Código Civil* which puts as condition for naturalisation by descendants of Sephardic Jews a (reduced) period of two years’ residence in Spain.

⁶ These categories correspond with those mentioned in the Second Protocol to the 1963 Strasbourg Convention on Reduction of Cases of Multiple Nationality, in force since the mid-Nineties between Italy, France and the Netherlands. Since then, Italy and France have denounced the Second Protocol as well as the chapter on nationality of the Convention itself. Only the Netherlands sticks to the Second Protocol and is bound by it.

⁷ By the end of 2017 more or less half of the Member States have ratified the Convention: Austria, Bulgaria, Czech Republic, Denmark, Finland, Germany, Hungary, Luxembourg (as of 1/1/2018), Netherlands, Norway, Portugal, Romania, the Slovak Republic and Sweden. No ratifications (yet) from: Belgium, Estonia, Cyprus, France, Greece, Ireland, Italy, Latvia, Lithuania, Malta, Poland, Slovenia, Spain, and the UK.

⁸ Sergio Carrera Nunez and Gerard-René de Groot, *European Citizenship at the Crossroads. The Role of the European Union on Loss and Acquisition of Nationality*. (2015), ch.3.

⁹ In a newspaper report (*Trouw*, 30 May 2018) mention is made of an increase of British settlers in the Netherlands. In 2017, 65562 British citizens were registered as newcomers in the Netherlands, compared with 5193 in the previous year. There is also an increase in naturalisations: in 2016, 636 UK citizens became Dutch, more than 400 more than the previous year. Marriage to Dutch nationals may have helped.

¹⁰ See H.U. Jessurun d'Oliveira, 'Iberian Nationality Legislation and Sephardic Jews. 'With due regard to European law'?', in: Carrera and de Groot, o.c. (footnote 8), ch. 9; also in: *European Constitutional Law Review* 2015, Vol.11, Issue 1, p.12-29.

¹¹ Art.23 *Código Civil* requires persons to give up their original nationality, but some categories are exempted: 'los naturales de países mencionados en el apartado 1 del artículo 24 (most former colonies) y los sefardíes originarios de España.'

Portugal followed suit. Descendants of Portuguese Sephardic Jews have to demonstrate that they belong traditionally to a Sephardic community of Portuguese origin, based upon objective data concerning their link to Portugal, more specifically through their names, language spoken at home, direct or collateral descent.¹² If this condition is met, as certified by the Jewish communities of Oporto¹³ or Lisbon, these descendants can be naturalized, even without any requirement of residence in Portugal, and without losing their previous nationality.

Initially there was no great enthusiasm among European Sephardim to embrace an Iberian nationality and accept this redress: here, as well, the existence of Union citizenship was decisive.¹⁴ Not much improvement or gain was to be expected by embracing Spanish or Portuguese nationality, given the fact that Member State nationals were already, by that token, Union citizens. Third country Sephardim, e.g. Israeli nationals, showed interest. But numbers rose in the UK immediately after Brexit. In particular, it has been the possibility of acquiring Portuguese nationality that has been favoured. After Brexit hundreds of Sephardic Jews in Britain have rushed to acquire Portuguese nationality, primarily to maintain their link with Europe and European citizenship, while staying at home.¹⁵ There are, of course, strong historic and economic links between Portugal and the UK. Spanish nationality is considerably less popular because of the residence requirement and linguistic demands on applicants. A recent survey confirms these differences.¹⁶

A second sudden increase in applications for citizenship concerns *Ireland*. Quite a number of UK citizens are Irish citizens by descent from parents or grandparents born in the Republic of Ireland or Northern Ireland. Persons born outside the island of Ireland to parents entitled to Irish citizenship who are themselves born outside of Ireland must register for a foreign birth certificate. As of the date of registration they become Irish Republic citizens.¹⁷ At the end of 2017, 779,000 Irish passports have been issued, of which some 20% to people in Northern Ireland and Great Britain: more than 160,000. A large number of people born in Great Britain have registered as Irish citizens, rocketing by 95% to a total of 12,926 persons,¹⁸ including 10 members of the House of Commons or the House of Lords. Under the Good Friday Agreements, persons born in Northern Ireland are entitled to identify as Irish or British, or both, and are entitled to both British and Irish citizenship, however they define themselves.

A third foothold in the EU is found by descendants of refugees, mostly Jewish, from the Nazi regime who settled in Great Britain and eventually acquired British citizenship. In accordance with the *Elfte Durchführungsverordnung zum Reichsbürgergesetz* (one of the infamous Nuremberg Laws that made Jews outlaws), those who fled from Germany to other countries (and even all those who were deported to concentration camps outside German territory such as Oswiecim or Terezin) had been stripped *ex lege* of their German nationality before being murdered¹⁹ After the war art. 116 of the German

¹² Art.6(1) under 7, Act 43/2013, introduced by an organic law unanimously approved of 1/2013

¹³ See for details: Comunidade Israelite do Porto, Portuguese Nationality for Sephardic Descendants. 1 March 2018.

¹⁴ Interest was shown by third-country nationals: Israeli, Turkish and Moroccan descendants of Iberian Sefardim.

¹⁵ The Guardian, 31 December 2016. According to this newspaper at the time more than 400 British had applied after Brexit, while only 5 persons had applied before that date. Very few seem to be rejected. In all, 713 descendants from various countries have been naturalized in Portugal, mostly from Israel (56) Turkey (171), Argentina and Morocco, according to *The Jewish Chronicle*, October 26, 2017. Some 8,000 applications await decision, a number which increases by 500 every month.

¹⁶ BBC News, 'Surge in Britons getting another EU Nationality', 30 June 2018, reproduced in: House of Commons Briefing Paper No. 8765, 6 July 2018, Brexit and European Citizenship. Portugal: 2014: 13; 2015: 11; 2016 20; 2017: 147. Spain: 2014: 67; 2015: 28; 2016: 44; 2017: 48. These numbers include some descendants of Sephardic Jews.

¹⁷ See Department of Foreign Affairs and Trade, EU UK Referendum, FAQs Citizenship, Passports and residency.

¹⁸ The Guardian, 29 December 2017.

¹⁹ See H.U.Jessurun d'Oliveira, Zwangsausbürgerung. Damals und Heute. Lecture for the German-Dutch Lawyers Association at the Bundesverwaltungsgericht in Leipzig, 7 October 2017. Informationsbrief Ausländerrecht 2018/5, Mai 2018, p. 168-178; also (in Dutch) in : Asiel& Migratierecht 2018/3, p. 112-121.

Grundgesetz was intended to mend this illegal forfeiture of the German nationality by declaring: “*Frühere deutsche Staatsangehörige, denen zwischen dem 30. Januar 1933 und dem 8. Mai 1945 die Staatsangehörigkeit aus politischen, rassistischen oder religiösen Gründen entzogen worden ist und ihre Abkömmlingen sind auf Antrag wieder einzubürgern. Sie gelten als nicht ausgebürgert, sofern sie nach dem 8. Mai 1945 ihren Wohnsitz in Deutschland genommen haben und nicht einen entgegengesetzten Willen zum Ausdruck gebracht haben*”. The intention to apply for the German nationality by the (descendants of) survivors of the Nazi regime is striking, given the fact that they have lost many family members in the Holocaust. Among their motives count the experience that Germany has done its utmost for its *Vergangenheitsbewältigung*, and has changed into an exemplary democracy, the feeling that there is still a German sentiment hiding in them, and, apart from the obvious advantage of Union citizenship, the idea that they belong to Europe, its culture and its history.²⁰ Although most of them do not intend to migrate to Germany, the opportunity to settle elsewhere in Europe remains attractive to them for a multitude of reasons. The figures are quite striking. Starting in 2014 with 496 naturalisations in Germany, the number increased to 7493 in 2017, more than tenfold.²¹

A special case is that of *Belgium*. In that country some 1300 UK citizens are involved in serving the European Union and its various institutions as staff members established in and around Brussels. Under the existing provisions of Belgian nationality law²² they encounter near-insurmountable difficulties in acquiring the Belgian nationality as many of them now wish. Indeed, they are worse off than the other 24,000 UK citizens in Belgium who do not serve in the EU: lobbyists, lawyers and many others humming around the EU institutions. Their special position turns into a disadvantage, as compared with other foreign residents, because they are unable to fulfil certain conditions for naturalisation. A first insurmountable hurdle is that of proving (principal) residence. EU officials are provided with a special ID, issued by the Ministry of Foreign Affairs, instead of an ordinary Belgian ID card. Their diplomatic card is not listed as proof of residence, according to a Royal Decree of 2013.²³ Is this list exhaustive or is there room for other ways of proving residence, such as waving the Foreign Affairs ID? Lower court cases indicate a certain willingness to broaden the interpretation of the pertinent provisions of the law on nationality, but the soundness of their reasoning is questioned.²⁴

A further impediment is formed by the legal condition that the applicant prove his economic participation. As EU staff members do not pay local taxes and do not participate in social security schemes, both of which are provided by the EU, it is questionable whether they are able to comply with this condition. Legislation to accommodate British staff members – rumours have it that the Ministry of Justice is up to something – will prove to be cumbersome, given the present political situation that is not too friendly for foreigners. This notwithstanding, the figures show the same trend: 2014: 110 naturalised Britons; 2017: 1381.²⁵

These examples highlight the activity of various groups of British citizens to acquire the nationality of one of the 27 remaining Member States of the EU. There are many channels available: adoption,

²⁰ Those who have taken advantage of this provision of German law include Baroness (and Rabbi) Julia Neuberger, member of the House of Lords. See www.abc.net/news/2017-01-14/post-brex-it-british-jews-are-applying-for-german-citizenship.

²¹ See footnote 16.

²² Art.12 bis Code de la Nationalité Belge. I thank Prof. Patrick Wautelet (University of Liège) for his valuable information on the subject.

²³ Royal Decree, 14 January 2013, which refers back to an Act of 15 December 1980, containing closed list of types of residence, and which does not mention holders of the Foreign Affairs ID.

²⁴ A MEP's assistant won her case in the Lower Court of Louvain, 8 May 2017. The judgment stated that the special ID-card was acceptable as proof of residence. There was a similar case in the Court of Brabant-Wallon on 14 July 2017. These courts refer to art.7 bis par.2 Code de la Nationalité Belge which defines 'principal residence' in a way that leaves some room for broader interpretation. Legislative history indicates, however, that a limitative, closed, system was what the legislator had in mind.

²⁵ See footnote 16.

naturalisation, option, even buying. Suffice it to establish a remarkably heightened interest of various categories of British citizens in maintaining or acquiring Union citizenship by acquisition of a Member State nationality.

Attention should be drawn here to an opposite direction of mobility: many professionals, e.g. in the medical sector, are motivated by insecurity about their future in the UK and quit their jobs, leaving gaps in the UK health care system. They prefer to return to their country of origin or elsewhere in the EU. This de-diasporisation, a return migration presumably by the tens of thousands, is another defensive response to Brexit.²⁶

3. Field of application is changed

There exist a number of nationality laws in the Member States that take explicitly into account the existence of the EU and its territories. By Brexit, the territories of the UK are subtracted from the EU territories, and this has its consequences in certain domestic nationality laws.

Let us examine a few examples. The *German* code of nationality allows foreigners to apply for naturalisation on a number of conditions which include loss or renunciation of the previous nationality.²⁷ An exception is made for nationals of other Member States of the EU and Switzerland.²⁸ It is clear, after Brexit, that UK citizens who comply with all other conditions for naturalisation will have to lose their British citizenship if they acquire German citizenship. For most of them, this price is presumably too high. Becoming German will become unappealing after Brexit, but remains attractive as long as the negotiations are still ongoing. Intertemporal problems may arise. Must one be a Member State national at the date of application or at the time the naturalisation decree is issued? Must one get rid of the UK citizenship at D-Day of Brexit in order to maintain the German nationality?

According to the *Slovenian* Nationality Act Member State nationals who want to become Slovenian citizens by naturalisation are not subjected to the condition that they give up their previous nationality, on the basis of reciprocity with the other Member State. One way or the other the new Slovenians will remain Union citizens. This opportunity falls away for UK citizens after Brexit. They will have to give up their UK citizenship if they really want to become Slovenians.²⁹

Another example is to be found in the *Netherlands*. According to Dutch nationality law a national can lose his Dutch nationality, unless this leads to statelessness, if he has his principal residence outside the Netherlands (...) *and outside the territories for which the TEU applies* (...) during majority, for an uninterrupted period of ten years, while in possession of both nationalities.³⁰ The ‘uninterrupted period of ten years’ may be broken by the issue of a new passport or other identity documents and the like.³¹

²⁶ In other areas of law other defensive measure are taken. To take an example: since 2016 more than 1600 UK advocates have registered in Ireland (previously only 100) afraid of not being allowed to assist their clients in EU27 Courts. See on free movement of lawyers in the European Union S. Claessens with her dissertation of the same name (2008).

²⁷ Par. 10 (1) 4 Staatsangehörigkeitsgesetz: ‘Ein Ausländer der seit acht Jahren rechtmässig seinen gewöhnlichen Aufenthalt im Inland hat (...) ist auf Antrag einzubürgern, wenn er (...) 4. eine bisherige Staatsangehörigkeit aufgibt oder verliert.’

²⁸ Par.12 (3) StaG.: ‘Von der Voraussetzung des Par. 10 Abs.1 Satz 1 Nummer 4 wird ferner abgesehen, wenn der Ausländer die Staatsangehörigkeit eines anderen Mitgliedstaates der Europäischen Union oder der Schweiz besitzt.’ According to the Dutch newspaper *Trouw* (24 May, 2018) more than 10.000 Britons acquired German nationality in the years 2016-2017; twice as many as in the full period between 2000 and 2015. In 2017 alone 7500 new Anglo-Germans were welcomed.

²⁹ Art.10 Citizenship of the Republic Slovenia Act. Consolidated Text, Act nr. 127 /2006, 7 December 2006.

³⁰ Art.15 (1) under c Rijkswet Nederlandschap. A Bill, among other items extending the period in the diaspora to fifteen years was defeated by the Upper Chamber on 3 October 2017. It will presumably be included in the proposed modernization Bill. The extension to fifteen years was not motivated by ideas about what consists of a genuine link, but, technically and bureaucratically, because the validity of Dutch passports has been extended to ten years.

³¹ Art.15 (4) Rijkswet Nederlandschap.

As from that date, a new period of ten years commences. Many Dutch nationals living outside the Netherlands are unaware of this provision and have lost their nationality in this way. There are a number of Dutch nationals living elsewhere in the EU who, up till now, are not touched by this provision for the loss of their nationality. After Brexit, however, Dutch dual citizens living in the UK are all of a sudden liable to lose their Dutch nationality if they do not act and apply for or renew their Dutch passport in time. Here as well intertemporal problems will arise. Will a new period of ten years begin after Brexit? And will Dutch nationals in the UK be warned that they are liable to lose their nationality if in possession of another one?³² And what about their children, who have no means of estoppel by renewing their passports as their parents have?

Italy is another case in point. Citizenship may be granted by decree of the President of the Republic amongst others “to citizens of a Member State of the European Community who have been legally resident in the territory of the Republic for at least four years”.³³ After Brexit, a UK citizen does not fulfil the condition of being a national of a Member State anymore, and has been ejected from the priority lane for naturalisation in Italy. And what about UK citizens who are stuck in the middle of their four-year term? Are they allowed to refer to the fact that they started out as Union citizens, or will they have to fulfil the condition of a longer period of legal residence? Will the ECJ be the competent court to deal with these questions or the domestic courts? And into the bargain: their legal residence itself is at stake, as they cannot rely anymore upon the freedom of movement and its Directives and Regulations anymore.

4. Changes in the nationality laws

It is obviously too early to register activities under this heading. Nevertheless a few incipient vibrations can be detected. In the Netherlands, the coalition agreement of the Rutte III government stated on October 10, 2017: “*The cabinet prepares integrated proposals to modernize the law on nationality. It concerns an extension of the possibility of the possession of several nationalities for future first-generation immigrants and emigrants. At the same time, subsequent generations will encounter a moment of obligatory choice, which will lead in practice to the retention of not more than one nationality.*”³⁴ This is interesting, because only a few months before, the same prime minister had declared firmly that “for this cabinet combatting dual nationality is still the basic principle for its policy”. Indeed, although there were some waverings under previous governments, generally government policy had chosen to reduce the possibility of having more than one nationality, especially in the area of voluntary acquisition by naturalisation of Dutch or foreign nationalities.³⁵ For this volte-face two factors are responsible: the participation in the new government by the social-liberal party D66, which has always favoured plural nationality, and Brexit. Indeed, the coalition agreement contained the intention “to demand special attention during the Brexit negotiations for the position of Dutch nationals in the United Kingdom”.³⁶

If it is indeed the intention to assist Dutch nationals resident in the UK – of course a provision should be couched in general terms, including Dutch persons in other countries than the UK and nationals of other countries than the UK in the Netherlands – a bill should be brought before parliament as soon as

³² A case is pending at the ECJ concerning this provision. Is it ‘with due regard to Union law’ in terms of proportionality and previsibility? See footnote 4.

³³ Art.9 L.5 Febbraio 1992 n.91.

³⁴ See for a first comment: H.U. Jessurun d'Oliveira, *Het Parool*, 2 November 2017.

³⁵ It made use, however, from the existence of dual nationality to introduce and apply legislation allowing forfeiture of Dutch nationality by foreign terrorist fighters and their co-adjutants possessing another nationality. See H.U. Jessurun d'Oliveira, l.c. (footnote 19).

³⁶ A few days before prime minister Rutte had adamantly closed the door to dual citizenship I had pleaded for opening up, given the predicament of Dutch nationals in the UK who desired to stay there and could use some support in acquiring UK citizenship without losing their Dutch nationality: *Het Parool*, 1 July 2017.

possible, to be enacted before Brexit.³⁷ It remains to be seen what is meant by the term ‘future first-generation’ migrants, and, given the experience in Germany, the proposals for the second generation are most unhelpful. They imply a turn towards *ius soli*, away from *ius sanguinis*, and are apparently denying the existence of a genuine link with either country after just one generation in a new country. It seems a perverse obligation to choose one of both nationalities: parents have acquired a new nationality, mostly in order to settle in the new country, and now their children are faced with the prospect of losing their safe residence status if they choose the original nationality their parents still hold.

How important it is to retain the original nationality whilst acquiring British citizenship is shown in the recent judgment of the CJEU in the case of *Toufik Lounes v Secretary of State for the Home Department*.³⁸ Mr. Lounes, an Algerian national, had married Ms Ormazabal, who, as a Spanish national, had moved to the UK, and had become a naturalized British citizen before her marriage. Mr Lounes applied for a residence card as family member of an EEA (European Economic Area) national, but was denied that status as his wife was a British citizen and not an EEA national for the purposes of the relevant national and EU legislation. The British court sought an answer to the question whether in this case Directive 2004/38 applied. The Court rephrased the question, as it had done before, by including art.21 (1) TFEU. Concerning the applicability of Directive 2004/38 it confirmed its previous position by considering that Ms Ormazabal was a person enjoying, according to international law, an unlimited right of residence in the country of which she possessed the nationality, and that the Directive is therefore not intended to govern the residence of a Union citizen in the State of which she is a national. But that was not the end of it: Art.21 TFEU comes into play. This provision of the treaty itself lays down, in general terms, the rights appertaining to European citizenship. A derived right of residence of the spouse of a Union citizen is only available if that derived right is necessary for the EU national to exercise her right to freedom of movement. The situation cannot be assimilated to a purely domestic one, as Ms Ormazabal had previously exercised her right to freedom of movement, and in this way had created a link with EU law. “A national of one Member State who has moved to and resides in another Member State cannot be denied that right (to a normal family life, d’O.) merely because he subsequently acquires the nationality of the second Member State in addition to his nationality of origin, otherwise the effectiveness of Article 21 (1) TFEU would be undermined”.³⁹ The Court concluded, following the Advocate General, that the conditions for the derived right of residence for the husband, third country national, must not be stricter than those provided for by the Directive, applicable by analogy.

Interestingly, nowhere in the decision of the court mention is made of its *Micheletti* case⁴⁰. That case concerned a person with dual Italo-Argentinian nationality, neither one being the nationality of the Spanish host state. It made no difference that the status of an EU citizen depended on a very weak link with Italy, as compared to a strong link with Argentina. Weighing of nationalities, as the Spanish Civil Code prescribed, is not permitted under EU law. Is it permitted to weigh the two nationalities of a person possessing two EU Member State nationalities if one is the nationality of the host State and to give preference to the host state nationality? Ms Ormazabal retained her Spanish nationality when acquiring British citizenship, and it is this fact that breaks the chains of what is called a ‘purely internal situation’, where EU law stops.

The decision leaves open the question what the position is for UK citizens who have lost their previous Member State nationality by naturalisation in the UK, as is still the case for Dutch nationals. Like Ms Ormazabal, they have exercised their freedom of movement and by that token activated EU

³⁷ To this day, a Bill has not yet been introduced. See H.U.Jessurun d’Oliveira, ‘Sta dubbele nationaliteit toe: hoog tijd vanwege Brexit’, *Volkskrant*, 16 August 2018. According to a letter by the Secretary of State for Justice and Security dd. 11 September 2018 after internetconsultation, a Bill will be introduced in the course of the year 2019; too late to serve Dutch nationals in the UK: Parliamentary Documents 34775 VI nr.121.

³⁸ Case -165/16, *Toufik Lounes v Secretary of State for the Home Department*, CJEU (Grand Chamber), 14 November 2017.

³⁹ Cons. 53.

⁴⁰ *Micheletti v Delegacion del Gobierno en Cantabria* [1992] Case C-369/90.

law. If they are married before their naturalisation Directive 2004/38 applies, at least until Brexit. What if the marriage takes place after naturalisation? Is this still a matter of EU law, or does UK immigration law take over? To bolster their position, following the *Lounes* decision, Dutch law should allow retaining the nationality of the Netherlands, also outside the case of marriage with a Union citizen.

The situation in *Lithuania* is unclear. Quite a number of Lithuanians, estimated as nearly 200.000, emigrated to the UK after their country joined the EU in 2004. The Lithuanian constitution allows dual nationality only under very limited conditions. Nonetheless a bill was tabled in April 2017 to allow Lithuanians in the UK to apply for UK citizenship and keep their Baltic nationality. There is an important population drain from Lithuania, relevant to the Lithuanian economy and to its nation-rebuilding, and the government would not want to lose its diaspora to the UK. On the other hand, it fears problems with Russia and Russians in the country in allowing dual nationality. The Lithuanian President may veto the bill as unconstitutional, and urge a change in the Constitution before allowing the enactment of a law granting Lithuanians the right to retain their nationality.⁴¹ Alongside the status of national there is a right of entitlement to the nationality of Lithuania, which avoids dual nationality for all those whose parents, grandparents or even great-grandparents show a link with what is now Lithuania. These sleeping Lithuanians may obtain UK citizenship without losing this privileged status. It is, however, questionable, whether they are EU-citizens.

5. Quasi-Union citizenship and some conclusions

I arrive at some concluding remarks. Brexit has engendered a lot of activity by Britons and nationals of the EU27 seeking security in an insecure situation. The respective diasporas are eager to accommodate their situation to their interests.⁴² Many UK citizens, already living and working on the continent are motivated by the desire to maintain their Union citizenship with its right to free movement and work within the entire EU and other privileges. They use the existing laws on nationality of the Member States to acquire the nationality of one of those states. Naturalisation in its various forms – general and privileged, e.g. for persons married to an EU national – is available for many. Sometimes they do not even have to move physically, as in the case of UK Sephardic Jews acquiring the Portuguese nationality. Special groups, such as those entitled to the nationality of Ireland, need not take the hurdle of residence requirements either. They all become dual nationals, as they maintain their UK citizenship, and thus may eat their cake and have it too.

Union citizens resident in the UK seek to acquire UK citizenship, although with waning enthusiasm if this involves loss of their original nationality. This loss is provoked in a number of states because their nationality laws, allowing dual nationality in the case of acquisition of a Member State nationality, will, after Brexit, require giving up their previous citizenship. Other EU27 citizens just leave Great Britain and return to the continent. These choices are made on the basis of assessments about personal situations, with widely varying motives and with opportunities at hand. It is normally easier, for instance, to acquire a given nationality if one's partner possesses that nationality.⁴³

I am reminded of Mr Nottebohm by these movements on the ground under the pressure of historic events.⁴⁴ He was a German, settled for many years in Guatemala as a businessman, without, however

⁴¹ Euractiv.com with AP, 12 April 2017.

⁴² Cf. Rainer Bauböck and Thomas Faist (eds), *Diaspora and Transnationalism. Concepts, Theories and Methods* (2010).

⁴³ Colin Firth, the actor (George VI!), is a case in point: he is married to Livia Giuggioli, Italian, and received his naturalization as Italian on 22 September 2017; he now possesses, alongside British citizenship, the same nationality as his wife and children. Many members of royal families possess more than one nationality. Representatives of the nation are transnationalist and of foreign origin. Many Dutch monarchs, including Wilhelmina, Juliana and Beatrix were also British. See H.U. Jessurun d'Oliveira, 'The EU and its Monarchies. Influences and Frictions', *European Constitutional Law Review*, 2012, p.63-81.

⁴⁴ *Liechtenstein v Guatemala* [1955] ICJ 1.

acquiring the nationality of the state of his residence. In the wake of the Second World War he travelled to Liechtenstein, where his brother lived, and acquired, possibly bought, the nationality of that principality. By doing so he lost his German nationality, as was recognized by the German authorities. On his return to Guatemala in 1940 he was nevertheless interned, first in Guatemala, later in the US as 'enemy alien', although not being of German nationality anymore, and he was dispossessed of his assets. After the war he settled in Liechtenstein, where he lived ever after. In 1955 the International Court of Justice, in a landmark decision, which may not have survived the storm of criticism, and may be outdated by now, denied Liechtenstein the right to extend diplomatic protection to its citizen against Guatemala, because he was judged to have closer ties with Guatemala than with Liechtenstein.

WW II created similar, though of course much more dangerous threats to individuals than Brexit, and especially Jews have tried to survive by embracing a safe nationality, or at least a safe haven.

Big events bring people on the move. When the Dutch Government disclosed its plans to withdraw from its colony Surinam in 1975, and agreed that the Dutch nationals, residing in the Netherlands at the date of independence, would retain their Dutch nationality, an exodus from Surinam towards the Netherlands was the result. Half of the Surinam population settled before D-day in the Netherlands, in order to escape the uncertain future of the former colony. It concerned some 250.000 persons. This was an unexpected but foreseeable result of this arrangement.

Governments tend to frown upon these initiatives, but the existence of versatile citizens looking after their own interests is not a bad thing, and anyhow inevitable. In the context of Brexit they endeavour to reach for the best solution possible: they become nationals of the UK or a EU27 Member State, mostly retaining their original nationality.

What the negotiations between the EU and the UK will yield for the less lucky ones are presumably various forms of quasi-citizenship. Where dual nationality is not available for a specific group of persons, because it is not accepted by one of the two countries involved, or both, quasi-citizenship steps in as a second-best solution. This is a status in which not all of the rights which go with possession of a nationality are conferred, but rather a reduced package that allows migratory persons to pursue their lives in the host country on somewhat less than the same footing as nationals of that state. This status may take the form of a near-national status, or may be reduced to just a few rights, but it is at least not similar to the position of the average alien.⁴⁵ In the Netherlands, for instance there is a vanishing group of previous inhabitants of the South Moluccan islands who have the status of 'being treated as Dutch nationals' (*Behandelingsnederlanders*).⁴⁶ They are not allowed to vote in national elections, and are exempted from military service (which is suspended anyhow, and for which most of them are too old).

The scheme upon which the Brexit negotiators tend to agree seems symmetric and similar: the special status on both sides is geared towards a continuation of the status the group involved enjoys under Union law. But there is a distinction. In the UK the special status concerns the rights and duties to be enjoyed in the UK, granted by the UK on the basis of the Withdrawal Agreement. They will enjoy the right of (re)entry in the UK, the right to work, study and the right to family reunification etc. Their status can be considered as a quasi-citizenship in the UK. Future mobility from the EU27, however, will be curtailed by UK domestic immigration law.

⁴⁵ Cf generally Ngo Chun Luk, *Diaspora and Citizenship Rights. A Comparative Legal Analysis of the quasi-citizenship Schemes of China, India and Suriname*, Diss. Maastricht University (2017).

⁴⁶ Act of September, 9 1976, *Staatsblad* 468. They form remnants of the decolonisation of the Dutch East Indies. Considered as collaborators with the Dutch motherland by Indonesia, Moluccan army men with their family were transported to the Netherlands and demilitarized there. Many cherished the idea of an independent Moluccan state and did not wish to voluntarily acquire Dutch nationality. The 1976 Act assimilated them in most aspects with Dutch nationals, sparing their sensibilities. Are they also Union citizens? See H.U.Jessurun d'Oliveira, 'Zijn Molukkers Unieburgers?' *Asiel & Migratierecht* 2016, pp. 49-53.

On the other hand the position of UK citizens in the EU is characterized by the fact that it is the EU, and not the individual Member States, that may grant them rights akin to those under the Treaty and the Directives. If one defines the status of nationals of Member States under EU law as a quasi-citizenship both of the EU itself and of the individual Member States (home state excluded), the situation of UK citizens under the regime that will eventually be laid down in a Withdrawal Agreement can be described as a quasi-citizenship grafted upon another quasi-citizenship. Their status is not identical with that of nationals of Member States: they are not EU citizens, but have a privileged third-country status, not based on Union law, but on a specific international instrument, a treaty between the EU and the UK. Their right of entry, their right to work, etc. concerns not one country, but the whole EU27. But they will presumably have no political rights in the EU: no right to vote and stand for elections in the EP. They may derive rights in municipal elections from the law in individual Member States. Furthermore, the group of persons involved will eventually vanish, whereas Union citizenship will renew itself by every birth. UK citizens will enjoy, in other words, a quasi-quasi-citizenship in the EU. Nationality of a non- Member State, a third country, will give access to most of the rights granted to EU-citizens, nationals of Member States. In the UK one should compare the situations of nationals of Member States of the EU with that of other aliens, in the EU the status of UK citizens is to be compared with that of EU citizens.⁴⁷

Finally, I should say a word on the motivations behind the actions taken by citizens concerning their nationality. Two main and opposite motives can be distinguished. On the one hand the wish to maintain their position in the foreign country where they have settled, to stay put, and not being eventually 'turfed out'.⁴⁸ On the other hand the desire to maintain their mobility and to keep the option for travelling and settling all about Europe open, even if they have never before availed themselves of their freedom of movement as a Union citizen. On the one hand to sustain the mobility they have used to settle in another EU country, on the other to avoid being isolated and restricted in the ability to move and settle elsewhere in Europe. The key to both moves is empowerment: the endeavour to shape your own life as you think fit, whatever governments may have to say or sway on the matter.

Union citizenship, a bleak outcome of Maastricht in 1992, has sprung to life for many Europeans through the Brexit operation. Previously more or less unaware of the status, they discover it as a life-buoy for the continuity of their existence and for sustained mobility. This is a lucky by-effect of the UK breakaway from the EU. Dual citizenship paves the way to the idea of the paramount importance of an incipient Union nationality.⁴⁹

⁴⁷ Negotiations between the EU and Switzerland precede the Brexit dealings. Switzerland, a Schengen partner, has tried, like the UK, to curb immigration with a clear impact on the free movement of EU citizens in a Switzerland. The AFMP seems still to hold, notwithstanding the referendum in February 2014 to introduce immigration quota and a change in the Swiss Constitution. Switzerland is now negotiating on two tables. First with the EU about the remodelling the four freedoms, including the freedom of movement, and second with the UK (Mind the Gap Strategy); its relationship with the UK largely derives from that of the EU with the UK. The Swiss enjoy a quasi-quasi citizenship in the EU as well: not being nationals of a Member State they possess more or less the same status as Member State nationals.

⁴⁸ The expression used by the new British negotiator Raab: in the event of a no deal Brexit, he said, EU citizens in the UK would not be turfed out (21 August 2018).

⁴⁹ This is an updated and adapted version of H.U.Jessurun d'Oliveira, 'Brexit, Nationality and Union citizenship: bottom up and top down', in: Hess/Jayme/Mansel (eds) *Europa als Rechts- und Lebensraum. Liber Amicorum für Christian Kohler* (2018), p.201-214. It served at the workshop organized by the History and Archeology Secrion of the Academia Europaea at the Wroclaw Academic Hub on 3-4 September 2018 on 'Mobility: a Bridge between the Past and the Present'.

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