

EU CITIZENSHIP: POST-NATIONAL OR POST-NATIONALIST?
REVISITING THE *ROTTMANN* CASE
THROUGH ADMINISTRATIVE LENSES

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ABSTRACT

The *Rottmann* decision, adopted by the Court of Justice of the European Union in March 2010, marks a turning point in the evolution of European citizenship. EU judges have made clear that European citizenship is not going to become *post-national*, that is, independent from Member States' nationality. The federalist view that lies behind such a post-national anxiety overlooks both the letter of the treaties and the inherently composite and multi-layered structure of the EU legal order. *Rottmann*, while obstructing the post-national route, opens up a more discrete *post-nationalist* path. How? By subjecting administrative decisions on nationality to a strict scrutiny of proportionality devolved to domestic courts. The proportionality test imposed by the Court of Justice is likely to change, in the near future, the nature of judicial review over administrative decisions on nationality: both the measures of withdrawal and concession of nationality (at least, as long as they affect the citizenship of the Union) will gradually cease to be areas of unfettered discretion, as it has been the case in many EU countries. This way, the citizenship of the Union, whilst (still) based on nationality, will nonetheless gradually rule out nationalism and its excesses from the nation-state power to select its members.

1. INTRODUCTION

THE purpose of this contribution is to highlight the role that European citizenship has come to play as a constraint on domestic administrative decisions on nationality. This dynamic can be illustrated by discussing the

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Rottmann decision, adopted by the European Court of Justice in March 2010¹.

The *Rottmann* judgement has been criticized essentially on the ground that it fails both to protect the right of the individual concerned not to be stripped off of his nationality and to acknowledge the autonomy of European citizenship *vis-à-vis* domestic nationality. In this paper, I argue that most of these criticisms are based on an error of perspective. Those who attack *Rottmann* seem to look at the case from a constitutional, if not philosophical, point of view, while the relevance of *Rottmann* should rather be assessed in an administrative law perspective.

Rottmann halts the idea of a European *post-national* citizenship, in so far as its acquisition and loss will still depend on the acquisition and loss of domestic nationality: *Rottmann* makes clear that, unless an amendment of the treaties takes place, no EU citizenship will emerge *beyond the nation-state*. My alternative claim is that European citizenship seems prone to become a *post-nationalist* (rather than *post-national*) legal tool, in so far as it pushes nationality *beyond nationalism*. After *Rottmann*, EU citizenship not only keeps limiting the power of the state to discriminate according to nationality, as it did before, but it also begins to constrain the discretion of domestic authorities in adjudicating nationality cases. That discretion, being built upon sovereignty and public order concerns, has been traditionally very wide. Behind it, nationalist instincts leading to ethnic or religious discriminations may still be easily hidden. Constraining administrative discretion in nationality cases in the name of European citizenship may serve the purpose of piercing the veil and make those discriminations less likely.

This argument will be developed in three stages. First, a brief illustration of the *Rottmann* case is provided. Secondly, some of the harshest criticisms addressed to that judgement are illustrated. Thirdly, a different reading of *Rottmann* is offered, which requires administrative lenses to be worn.

2. THE *ROTTMANN* CASE

Mr Rottmann is an Austrian national. In 1998, after some years of residence in Germany, he obtained German nationality by naturalization. At the same time, according to Austrian nationality law (which excludes

¹ European Court of Justice (Grand Chamber), 2 March 2010, *Janko Rottmann v Freistaat Bayern*, Case C-135/08 (hereinafter, "*Rottmann* decision").

the possibility of dual citizenship), he lost his Austrian nationality. At the origin of the controversy lies the fact that, in his application for German nationality, Mr Rottmann did not mention the criminal proceedings by then initiated against him in Austria. German authorities discovered this circumstance and decided to revoke the act of naturalization obtained by deception.

Mr Rottmann challenged this decision before a German administrative court, arguing that the deprivation of his German citizenship would render him stateless and would also deprive him of his European Union citizenship. The German court activated a preliminary ruling procedure and asked the Court of Justice the following question: "whether it is contrary to European Union law, in particular to Article 17 EC, for a Member State to withdraw from a citizen of the Union the nationality of that State acquired by naturalisation and obtained by deception, inasmuch as that withdrawal deprives the person concerned of the status of citizen of the Union and of the benefit of the rights attaching thereto by rendering him stateless"².

The answer of the Court of Justice to that question is based on the following syllogism.

Major premise: "*Member States must, when exercising their powers in the sphere of nationality, have due regard to European Union law*"³. It is true - the Court explains - that the rules on acquisition and loss of nationality fall within the competence of the Member States. However, loss of nationality might also imply loss of European Union citizenship. When this is the case - and here is a first addition to the *Micheletti* formula - "the exercise of that power (...) is amenable to judicial review carried out in the light of European Union law"⁴.

Minor premise: *the state power to revoke nationality is consistent with the relevant international norms, as long as it is based on the ground of fraud or deception* (as in the case at hand). Both the Convention on the reduction of statelessness (Article 8) and the European Convention on Nationality (Article 7) limit the power of the state to revoke nationality when the person is rendered stateless. However, both those international

² This is the way European judges rephrase the relevant questions advanced by the German court: see *Rottmann* decision, para. 36.

³ *Rottmann* decision, para. 45 (emphasis added). This is the leading principle in the matter since the 1992 *Micheletti* case (European Court of Justice, 7 July 1992, *Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria*, Case C-369/90).

⁴ *Rottmann* decision, para. 48.

instruments admit, in principle, the legitimacy of a decision to revoke nationality because of deception. Why? Because citizens' allegiance is at stake: a deceptive behaviour puts in question the obligation of loyalty that nationals owe to their state⁵. The same rule - according to the Court of Justice - cannot but be applied when the withdrawal of nationality entails also loss of European citizenship.

Conclusion: *when assessing the legitimacy of national decisions that, by revoking nationality, also cause loss of European citizenship, domestic courts must observe the principle of proportionality*. From the *Micheletti* principle (which requires domestic authorities to *have due regard to European Union law*) the Court of Justice draws the innovative conclusion that domestic courts have to apply a strict scrutiny of proportionality on administrative decisions concerning nationality.

What is the immediate implication that the scrutiny of proportionality involves? According to the European judges, the scrutiny of proportionality requires 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"⁶. Moreover, the principle of proportionality "requires the person concerned to be afforded a reasonable period of time in order to try to recover the nationality of his Member State of origin"⁷. Mr Rottmann may lose his "new" German citizenship only if he committed an offense that is serious enough to make the administrative decision of withdrawal proportional. Even if so, he would be given enough time to recover his "old" Austrian citizenship⁸.

⁵ The Court of Justice somewhat emphatically states that "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" (*Rottmann* decision, para. 51).

⁶ *Rottmann* decision, para. 57.

⁷ *Rottmann* decision, para. 58.

⁸ Please, note that in his opinion to the case, Advocate General Maduro follows a very similar reasoning, yet without proposing the application of the proportionality scrutiny. Maduro's final remark points in another direction: "the view could be taken that, since the withdrawal of German naturalisation has retroactive effect, Mr Rottmann has never had German nationality, so that the event triggering the loss of Austrian nationality never took place. Consequently, he would have a right to automatic restoration of his Austrian nationality. However, it is for Austrian law to decide whether or not that reasoning should apply. No Community rule can impose it": Opinion of Advocate General Poiares Maduro, 30

Therefore, on the one hand, the possibility of statelessness is not ruled out, but the principle of proportionality, as conceived by the Court of Justice, makes it less likely. On the other hand, EU judges impose on national administrations the duty to respect a strict notion of proportionality when adjudicating nationality, but the mechanism of control is indirect, being entrusted with national courts.

3. THE POST-NATIONAL CRITIQUE

The *Rottmann* decision has immediately attracted intense criticism. Three main objections have been raised.

First, the Court failed to safeguard the relative autonomy of European citizenship. Since the latter provides specific additional rights - above all, free movement and residence in other Member States - and identifies a distinct political dimension of citizenship⁹, its link with Member States' nationality, in a case like *Rottmann*, should have been cut off: "loss of MS nationality [sh]ould not automatically result in the forfeiture of Union citizenship, if the Union citizen concerned [are] rendered stateless"¹⁰.

The counter-argument can be easily based on Article 17 EC Treaty. According to its wording, "[e]very person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship". It has been observed that, in the new formulation, European citizenship "shall be additional to" - rather than "complement" - national citizenship (Article 9 EU Treaty and Article 20 TFEU). Whatever the intention behind this amendment, the lexical result does not allow much room for judicial drift. From that text follows - as Advocate General Maduro acknowledges - that

September 2009, *Janko Rottmann v Freistaat Bayern*, Case C-135/08 (hereinafter "*Rottmann* AG opinion"), para. 34.

⁹ In the words of Advocate General Maduro, "Union citizenship assumes nationality of a Member State but it is also a legal and political concept independent of that of nationality. Nationality of a Member State not only provides access to enjoyment of the rights conferred by Community law; it also makes us citizens of the Union (...) It is based on their mutual commitment to open their respective bodies politic to other European citizens and to construct a new form of civic and political allegiance" (*Rottmann* AG opinion, para. 23).

¹⁰ D. KOSTAKOPOULOU, *European Union citizenship and Member State nationality: updating or upgrading the link?*, July 6, 2010, available at <http://eudo-citizenship.eu/citizenship-forum/254-has-the-european-court-of-justice-challenged-member-state-sovereignty-in-nationality-law?start=5>.

acquisition and loss of European citizenship are dependent on the acquisition and loss of Member States' nationality¹¹. The Court of Justice cannot depart from the letter of the Treaty in order to satisfy post-national anxieties. Moreover, the link between European citizenship and Member States' nationality is not merely formal (national citizenship gives access to European citizenship), but structural: the composite nature of the EU legal order is reflected in the composite character of EU citizenship, which is the result of an interplay between "different levels and different spheres in which individuals claim citizenship rights, carry out citizenship duties and act out citizenship practices."¹²

Second criticism: by acknowledging that the withdrawal of nationality in case of deception is consistent with international law, the Court - according to a much quoted yet too hasty view - "went in the (...) direction of fetishising the few exceptions from the main rule of international law on statelessness" and, thus, "failed to follow the *Micheletti* tradition of dismissing the rules of international law dangerous for the success of the European integration project"; next time - so the argument runs - the Court should rather make sure that it embraces only international norms that "are in line with the ideas of liberty and common sense, if not the rule of law"¹³.

Can we take such a claim seriously? Should the Court of Justice embrace only international norms that are consistent with (whose?) ideas of liberty and common sense, while rejecting the other ones? Is such a "cherry-picking" judicial approach really compatible with a workable notion of the rule of law? Should judges super-impose their own understanding of what is "common sense" or "logic" or "morality" and disregard the existence of positive (national and international) law established by democratic governments through legitimate decision-making processes? Again, the opinion of the Advocate General is there to

¹¹ *Rottmann* AG Opinion, para. 15.

¹² J. SHAW, *Citizenship: contrasting dynamics at the interface of integration and constitutionalism*, EUI working papers, RSCAS 2010/60, 3. On the "composite" citizenship of the Union, see also S. BESSON / A. UTZINGER, *Towards European Citizenship*, *The Journal of Social Philosophy*, 2008, 185 at 196.

¹³ D. KOCHENOV, *Two Sovereign States vs. a Human Being: ECJ as a Guardian of Arbitrariness in Citizenship Matters*, April 20, 2010, available at <http://eudo-citizenship.eu/citizenship-forum/254-has-the-european-court-of-justice-challenged-member-state-sovereignty-in-nationality-law?start=3>.

remind us that also the European Union is subject - together with the Member States - to the rule of *international law*¹⁴. *Dura lex, sed lex*.

Third criticism: "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 judgement."¹⁵ In this vein, the Court of Justice failed to adopt a right-based approach and rather deferred to national sovereignty. Is it true? In order to counter this argument, we need to wear administrative lenses.

4. ROTTMANN AND ADMINISTRATIVE LAW

The counter-argument can be illustrated by distinguishing between direct and indirect implications of *Rottmann*.

a) Direct Implications

Despite the existence of human rights regimes protecting individuals from statelessness, administrative discretion of the state in nationality matters is very wide. A recent survey reveals that in the legislation on nationality of EU Member States there are no less than fifteen grounds for the loss of citizenship¹⁶. Some of those grounds - renunciation of

¹⁴ Rottmann AG Opinion, para. 29.

¹⁵ D. KOCHENOV, *Two Sovereign States vs. a Human Being*, cit. In the same vein, F. FABBRINI, *La Corte di giustizia europea e la cittadinanza dell'Unione*, in: *Giornale di diritto amministrativo*, 2010, 708 s.

¹⁶ See <http://eudo-citizenship.eu/modes-of-loss/186>. For instance, Article 48(1) and (2) of the Code of administrative procedure of the *Land* of Bavaria (*Bayerisches Verwaltungsverfahrensgesetz*), relevant to the *Rottmann* case, is worded as follows: "(1) Even when it is no longer open to challenge, an unlawful administrative act may be withdrawn in whole or in part, for the future or with retroactive effect (...) (2) An unlawful administrative act granting a single or periodic benefit in cash or a divisible benefit in kind or one which is a condition for such a benefit, may not be withdrawn so long as the beneficiary relies on the continued existence of that administrative act and as his expectation, when weighed against the public interest in withdrawal, is judged worthy of protection. The beneficiary may not plead expectations (...) 1. [if he] obtained the adoption of the administrative act by fraud, threats or bribery, 2. [if he] obtained the adoption of the administrative act by giving information that was in essence false or incomplete, 3. [if he] was aware that the administrative act was unlawful or if his

citizenship, permanent residence abroad, service in a foreign army, employment in non-military public service of a foreign country, acquisition of a foreign citizenship - may be questionable in a human rights perspective, but do not leave a significant margin of discretion to the administration. Others, by contrast, do: disloyalty, violation of "duties as a national", false information or - as in *Rottmann* - fraud in the procedure of acquisition of citizenship are extremely vague grounds. As a result, the administration is allowed almost completely "free hands" by the legislator.

The problem is even more serious when national courts show deference to the government, as it is often the case in this matter. Administrative decisions concerning nationality - the internationally sanctioned mechanism of ascription of persons to states - are often treated as "political questions" or "acts of high administration"¹⁷. In a rule of law perspective, the combination of broad legislative delegation and lax judicial scrutiny is alarming. If the administration is allowed "free hands" not only by the legislator but also by judges, the individual is "nude" in front of the public power, especially if he or she belongs to an insular minority (ethnic, religious or else)¹⁸.

Here is where *Rottmann* steps in and contributes in a way that the first commentators have perhaps overlooked. By imposing on national courts the application of the principle of proportionality, the European Court of Justice forces them to abandon the mentioned doctrines of judicial restraint, often consolidated by decades of deferent jurisprudence. The test of proportionality is based on the following well-known criteria: suitability (the public interest aim should be pursued through adequate means), necessity (no less restrictive measure should be available) and proportionality *stricto sensu* (the disadvantage imposed on the individual must not be disproportionate to the importance of the aim). There seems to be little doubt that the adoption of such a standard of review on nationality matters is incompatible with the mentioned "political questions" or "acts of

ignorance of that fact amounted to serious negligence. In [those] cases (...), the administrative act is as a rule withdrawn with retroactive effect."

¹⁷ For some examples, drawn from the French, Italian and Spanish case-law, see below.

¹⁸ The problem was first articulated by the U.S. Supreme Court in the 1938 *Carolene Products* case: *United States v. Carolene Products Company*, 304 U.S. 144 (1938). According to its famous Footnote Four, written by Justice Stone, legislation aimed at discrete and insular minorities, who lack the normal protections of the political process, should be an exception to the presumption of constitutionality, and thus requires a heightened standard of judicial review.

high administration” doctrines. Thus, in principle, *Rottmann* will lead to a more stringent scrutiny (than in the past) and to a firmer protection of the rule of law.

Accordingly, also the third criticism mentioned above appears to be rebuttable. The Court of Justice did not fail to adopt a right-based approach: *Rottmann*, if taken seriously by domestic courts, will provide a higher level of guarantee for the individual in a field - nationality - where state sovereignty has been almost systematically translated in terms of wide administrative discretion.

b) Indirect Implications

So much granted, a crucial question arises: should domestic courts apply the *Rottmann* principle - involving the application of proportionality test to administrative decisions on loss of nationality - also to administrative decisions on the acquisition of nationality, *i.e.* to naturalization decisions?

The state power to select its members is exercised by means of two kinds of administrative measures: the concession of nationality (in particular, naturalization) and its contrary act, consisting in the withdrawal of nationality (as in the *Rottmann* case). *If*, as the Court of Justice reaffirms in *Rottmann* (following *Micheletti*), “Member States must, when exercising their powers in the sphere of nationality, have due regard to European Union law”, and *if* this implies - as it does in *Rottmann* - the adoption of a scrutiny of proportionality on nationality decisions implying the loss of EU citizenship, it seems reasonable to infer that also domestic decisions rejecting naturalization applications must be subjected to the same scrutiny, as long as they restrict access (of third-country nationals) to the citizenship of the Union.

If this *a contrario* argument holds, some interesting implications might follow. Few examples illustrate the point. In a ruling of 27 June 2008, the French *Conseil d’Etat* upheld an administrative decision denying naturalization to a Muslim woman “*pour défaut d’assimilation, autre que linguistique, à l’acquisition de la nationalité française*”¹⁹. The lack of assimilation was due to the fact that, during the interview with the administrative authority, Mme Faizat, a Moroccan woman married to a

¹⁹ *Conseil d’Etat*, 27 juin 2008, *Mme Faiza A*, n° 286798.

French man and mother of three French children, was wearing a burqa²⁰. For this reason she was denied not only French nationality but also European citizenship. Another example can be drawn from the jurisprudence of the Italian *Consiglio di Stato*. On 9 June 2009, it upheld a denial of naturalization on the ground that the applicant had received, some ten years before, two calls from mobile phones of two suspect Islamic terrorists²¹. Interestingly, the Italian court acknowledged that those phone calls “might have not happened”, and yet upheld the decision of rejection in consideration of the wide discretion that the administration enjoys in nationality matters, where all the measures are qualified as “acts of high administration”. Would such deferent decisions pass a stringent proportionality test? Unlikely so. Therefore, an extensive reading of *Rottmann* might have a significant impact also on naturalization decisions in Europe.

And such an impact might be seen as beneficial. A serious failure of EU citizenship is that it does little to solve the problem of third-country nationals’ integration in Europe. In some states, like Italy or Austria, third-country nationals have to wait ten years to qualify for naturalization and, once accomplished that period of legal residence, they have also to face an administrative proceeding that is time-consuming and - as the mentioned examples show - highly discretionary. One solution would consist in harmonizing Member States’ nationality regimes. However, apart from the lack of a specific EU competence in the matter, even a cursory comparison of those national regulations would be sufficient to deter anyone - the Commission included - from adopting such a wishful approach. Another remedy would be the direct access of third-country nationals to European citizenship. Yet, this would only be possible if its acquisition becomes independent from the acquisition of Member States’ nationality: as the European Court of Justice has made clear in *Rottmann*, that door - for the time being - is tightly locked.

However, *Rottmann* may have opened a third unnoticed door. By imposing on domestic courts the adoption of a strict scrutiny of proportionality, it may have marked a turning point in nationality matters. In the years to come, we might witness a shift from loose to strict judicial scrutiny in nationality matters at domestic level. If the *Rottmann* standard will be consistently applied, the margins of discretion available to the

²⁰ On this case, S. LE BARS, Une marocaine en burqa se voit refuser la nationalité française, *Le Monde*, 11 July 2008. See also E. FASSIN / J. SURKIS, Introduction: Transgressing Boundaries, *Public Culture*, 2010, vol. 22, 487 ss.

²¹ *Consiglio di Stato*, VI, 9 June 2009, n. 5190.

relevant administrative authorities will considerably shrink. The Court of Justice-imposed test of proportionality, hence, might play a crucial - albeit discrete - role in ruling out the ethnic or nationalist conception of nationality that is still hidden behind the seemingly ethnic-blind notions of public order and administrative discretion²².

5. CONCLUSIONS

To sum up, three conclusions can be drawn. First, a constitutional reading of the *Rottmann* case can be misleading or, at best, insufficient. This partially explains the ungenerous criticisms addressed to the Court of Justice. In its core, *Rottmann* is essentially an administrative case. Secondly, *Rottmann* shows that European citizenship is not going to become *post-national*, that is, independent from Member States' nationality. The federalist view that permeates most criticisms addressed to *Rottmann* should come to terms with the fact that the treaties do not allow such a possibility and that the EU legal order is inherently composite and multi-layered. Thirdly, the *Rottmann*-sponsored proportionality test is likely to change, in the near future, the nature of judicial review over administrative decisions on nationality: both the measures of revocation and of attribution of nationality (at least, as long as they affect the citizenship of the Union) will cease to be the areas of unfettered discretion that have traditionally been in many EU countries. If so, European citizenship might become a *post-nationalist* - rather than *post-national* - legal construct: still based on nationality, it will nonetheless gradually rule out nationalism and its excesses from the nation-state power to select its members.

²² M. SAVINO, *Oltre lo Stato-nazione. Il diritto amministrativo e lo straniero* [*Beyond the Nation-State. Administrative law and the foreigner*], Milano, 2012 (forthcoming).