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**EUROPEAN UNION CITIZENSHIP:
THE ACQUISITION OF NATIONALITY AND THE EVER-EXPANSIVE REACH
OF THE EUROPEAN COURT OF JUSTICE**

**RESEARCH ESSAY
SUBMITTED TOWARDS A CERTIFICATE OF PROFICIENCY**

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Abstract

European Union citizenship was established by the Treaty of Maastricht in 1992. Intended to fall within the exclusive prerogative of the Member States, it soon became clear that the autonomy of Member States to determine matters relating to nationality would be restricted by the ever-expansive reach of the European Court of Justice. As such, the European Court of Justice transformed the law on citizenship in the 2010 case of Rottmann where measures affecting or depriving the rights conferred and protected by the European Union were held to fall within the scope ratione materiae of European Union law.

While Rottmann affirmed the law as to the deprivation of European Union citizenship, it left unanswered the question whether the acquisition of nationality also falls within the scope of European Union law. This paper aims to identify and analyse the law arising post-Rottmann to determine whether the acquisition of nationality could fall within the scope of European Union law. It shall then analyse whether fundamental principles of European Union law, namely the principle of proportionality, could be applied in order to regulate the conditions imposed by Member States in relation to the acquisition of nationality.

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I Introduction - Citizenship and the European Union

European Union (EU) citizenship was established by the Treaty on European Union (TEU) in 1992.¹ It has since been amended and extended, and is now incorporated into Article 20(1) of the Treaty on the Functioning of the European Union (TFEU), which provides:²

Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

While citizenship as a concept has been subject to a variety of interpretations and understandings, the fundamental conceptual elements are clear: citizenship denotes the relationship between an individual and a body of politics.³ Following Greek democratic thought, the rights of citizens were established by the constitution and protected through various institutions created by the *polis*, establishing a political regime in which all who were citizens had full and equal membership.⁴ In its modern the rights attaching to citizenship are established and protected through the nation-state - of which the EU is neither nation nor state.

The formation of the nation-state saw a sovereign political body establish authority over the people residing within its boundaries as legitimate subjects of the state, while the socialisation of the masses and the promotion of common values created bonds between the people of the state and between them and the state.⁵ As a result, individuals came to consider themselves as a people; individuals with a shared national identity established under the nation-state. EU citizenship confers political and legal status on these individuals beyond the state; a transnational citizenship which is inextricably linked with their possession of nationality. It is for this reason that while EU citizenship is "destined to be the fundamental

¹ Treaty on European Union [1992] 35 OJ C 191/01 (7 February 1992), Art 8(1).

² Consolidated Version of the Treaty on the Functioning of the European Union [2012] 55 OJ C 326/49 (13 December 2007).

³ Lyn Dobson *Supranational Citizenship* (Manchester University Press, Manchester, 2006) at 20.

⁴ Richard Bellamy, Dario Castiglione and Jo Shaw "Introduction: From National to Transnational Citizenship" in Richard Bellamy, Dario Castiglione and Jo Shaw (eds) *Making European Citizens: Civic Inclusion in a Transnational Context* (Palgrave MacMillan Ltd, Hampshire, 2006) 1 at 3.

⁵ At 4.

status of nationals of the Member States",⁶ Art 20(1) makes it clear that Union citizenship is dependent upon nationality of a Member State (MS).

As provided for in the Declaration on Nationality of a Member State appended to the TEU, matters relating to nationality fall within the exclusive prerogative of each MS:⁷

...wherever in the Treaty establishing the European Community reference is made to nationals of the Member States, the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned.

As noted by Advocate-General Maduro in his Opinion to the Court in *Rottmann*, with nationality the State defines its people, therefore it is highly logical that the State determines who its nationals are.⁸ However, Maduro goes on to note that the competence of the MS is not without restrictions. Union citizenship creates a political area from which rights and obligations independent of the MS are established.⁹ While possession of MS nationality is a precondition for accessing Union citizenship, the rights and obligations conferred by Union citizenship cannot be unjustifiably limited.¹⁰ Thus, the European Court of Justice (ECJ) in its landmark decision in *Micheletti* held that while matters relating to nationality fall within the exclusive prerogative of each MS, the conditions for nationality must be determined "having due regard to Community law".¹¹ This imposes a restriction on the competence of each MS, having since been interpreted to mean, that where the issue is a situation which falls within the scope *ratione materiae* of EU law, due regard must be had to EU law.¹²

The ECJ in *Rottmann* had the opportunity to discuss and clarify what it means to have "due regard" to EU law. In so doing, the Court transformed the law on citizenship by holding that measures affecting or depriving the rights conferred and protected by the EU fall within the scope *ratione materiae* of EU law and are therefore amenable to review by the ECJ. This requires MSs to observe fundamental principles of EU law when imposing measures relating

⁶ Case C-184/99 *Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193 at para 31.

⁷ Declaration No 2 on Nationality of a Member State appended to the Treaty on European Union, above n 1.

⁸ Opinion of Advocate-General Maduro, Case C-135/08 *Rottmann v Freistaat Bayern* [2010] ECR I-2449, at para 17.

⁹ At para 23.

¹⁰ At para 23.

¹¹ Case C-369/90 *Micheletti v Delegación del Gobierno en Cantabria* [1992] ECR I-4239 at [10].

¹² See, eg, Case C-299/95 *Kremzow v Austria* [1997] ECR I-2629 at para 15; Case C-148/02 *Garcia Avello v Belgium* [2003] ECR I-11613 at para 23; *Rottmann*, above n 8, at para 41.

to the deprivation of nationality and, consequently, Union citizenship, to ensure that the measures comply with EU law.

II The Rottmann Judgment

A Factual Background

Janko Rottmann was an Austrian national who had lost his nationality upon acquiring German nationality by naturalisation. He failed to inform the German authorities of criminal proceedings filed against him in Austria, and a decision to revoke his citizenship was made on the grounds of deception. The revocation of his citizenship would not only have taken away his German nationality but it would also have deprived him of his Union citizenship. A preliminary hearing by the ECJ was sought to determine whether it is contrary to EU law for a MS to withdraw from a citizen the nationality acquired by deception inasmuch as the withdrawal deprives the person of their status of citizen of the Union and the benefit of the rights attaching thereto.

B Issues

The first issue for the Court was whether the situation fell within the scope *ratione materiae* of EU law. Satisfied, the Court held that "it is clear" that the situation of a citizen who is faced with a decision revoking his nationality which would put him in a position capable of causing him to lose his EU citizenship and the rights attaching thereto, falls "by reason of its nature and its consequences" within the ambit of EU law.¹³ Citizenship of the Union is intended to be the fundamental status of all nationals of MSs and the provisions relating to Union citizenship attaches to that status rights and duties, therefore when exercising their powers in the sphere of nationality MSs must have due regard to EU law.¹⁴

Finding that "by reason of its nature and its consequences" the withdrawal of national citizenship fell within the ambit of EU law, the ECJ went on to hold:¹⁵

The proviso that due regard must be had to European Union law... enshrines the principle that, in respect of citizens of the Union, the exercise of that power [to determine matters of nationality], in so far as it affects the rights

¹³Rottmann, above n 8, at para 42.

¹⁴ At paras 43-45.

¹⁵ At para 48.

conferred and protected by the legal order of the Union...is amenable to judicial review carried out in the light of European Union law.

As Rottmann had enjoyed the status and the rights conferred by Union citizenship, a decision to revoke his Union citizenship would undeniably affect the enjoyment of those rights.¹⁶

The Court went on to hold that it is for the national court to conduct the review in the light of EU law.¹⁷ This review must ascertain whether the withdrawal decision observes the principle of proportionality - a fundamental principle of EU law.¹⁸ However, in theory, any principle of EU law may be applied when determining due regard.¹⁹

C *Where to from here?*

Although the ECJ held that the deprivation of Union citizenship fell within the scope *ratione materiae* of EU law, the ECJ left unanswered the question whether the acquisition of nationality also falls within the scope of EU law and thus whether the measures imposed when granting nationality must also have due regard to EU law. The importance of addressing this question has become evident with the establishment of investment programmes offered by MSs. Such programmes could allow for mass naturalisation of individuals who can "buy" Union citizenship, which may have the potential to negatively affect another MS and the rights protected by the EU.

The remainder of this paper shall analyse the law post-*Rottmann* to determine whether the acquisition of nationality could fall within the scope of EU law. It shall then analyse whether the principle of proportionality could be applied in order to regulate the measures imposed by MSs in relation to the acquisition of nationality, with specific reference to Malta's Individual Investor Programme.

¹⁶ *Rottmann*, above n 8, at para 49.

¹⁷ At para 55.

¹⁸ At para 55.

¹⁹ Opinion of Advocate-General Maduro, *Rottmann v Freistaat Bayern*, above n 8, at para 28. In theory, "any rule of the Community legal order may be invoked if the conditions for the acquisition and loss of nationality laid down by a Member State are incompatible with it".

III Acquisition of Nationality - A Situation Which Falls Within the Scope Ratione Materiae of EU law?

The statement made by the ECJ in *Rottmann* that the issue of deprivation of Union citizenship fell within the scope of EU law "by reason of its nature and consequences" is seemingly broad in its ordinary language; however the reasoning of the Court provides two interpretations for this statement. First, where the situation affects the rights conferred and protected by EU law, due regard must be had to EU law. Second, by virtue of the fundamental nature of the rights attached to Union citizenship, citizenship as a concept falls in its entirety within the scope of EU law.

Upon the face of it, the acquisition of nationality could fall within either approach. However, it has consistently been held that the application of EU law does not extend to matters of citizenship which otherwise have no link to situations governed by the EU.²⁰ Such matters are "internal situations" and fall within the competence of the MS. Consequently, an individual must exercise one of their fundamental rights conferred by the EU in order for the situation to fall within the ambit of EU law, in particular, the right to freedom of movement.²¹ Following this traditional approach, the acquisition of MS nationality could not fall within the ambit of EU law as it does not involve a cross-border element, thus it would be a purely internal situation.

In recent years, however, the ECJ seems to have changed its focus. Culminating in the decision in *Rottmann* which failed to mention internal situations, the focus seems to have embraced a wider rights-orientated approach. While the restriction still remains, it is arguable that the hurdle of internal situations is slowly beginning to diminish. Should this be the case, the argument that the acquisition of nationality is a situation which falls within the scope of EU law takes much stronger effect.

²⁰ See *Kremzow*, above n 12, at para 15; Joined Cases C-64/96 and 65/96 *Uecker and Jacquet v Land Nordrhein-Westfalen* [1997] ECR I-3171 at para 16.

²¹ Case C-127/08 *Metock and Others* [2008] ECR I-6241 at paras 73 and 77; *Garcia Avello*, above n 12, at para 24.

A *Internal Situations: Diminished Effect or an Effective Hurdle?*

While *Metock* reiterated the requirement of a cross-border element in order for Union citizenship rights to be engaged,²² subsequent cases have expanded upon the interpretation of cross-border dimensions in order to find a cross-border element in situations that would ordinarily be regarded as internal. Thus the ECJ in *Garcia Avello* held that an issue involving the surname of children who possess dual MS nationality falls within the ambit of EU law, despite there being no exercise of fundamental rights.²³ Further, where the spouse of a Union citizen moves from one MS to another which has the effect of affecting that Union citizen's tax requirements, the situation cannot be regarded as purely internal.²⁴

However the ECJ in *Rottmann* took expansion one step further by failing to regard the internal situation restriction, indicating a shift in the jurisprudence. One interpretation of this omission is the favouring of the disengagement with the internal situation restriction. This approach was upheld in *Zambrano* where the ECJ stated that "national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred" are precluded by Article 20(1) TFEU.²⁵ Similarly to *Rottmann*, no mention was given to the restriction on internal situations, despite the applicant being a third-country national who was relying solely on his children's rights as Union citizens. Further, the ECJ in *McCarthy* subsequently held that the failure of an applicant to exercise her right to freedom of movement is insufficient to regard the situation as purely internal as, based on *Zambrano*, the emphasis is on the deprivation of the genuine enjoyment of the substance of the rights.²⁶ Thus, the case law post-*Rottmann* indicates a shift away from requiring a cross-border element and towards the effect that the measure has on the rights instead, though it has not removed the restriction in its entirety.

The decoupling of internal situations from matters regarding citizenship has gained support in recent years from academics. In her Opinion to the Court in *Zambrano*, Advocate General Sharpston discussed the paradoxical effect that arises from the requirement to exercise fundamental rights in order to fall within the ambit of EU law.²⁷ Should the law require an

²² *Metock* at para 77.

²³ *Garcia Avello*, above n 12, at para 45.

²⁴ Case C-403/03 *Schemmpp v Finanzamt München* [2005] ECR I-6421 at paras 22-25.

²⁵ Case C-34/09 *Ruiz Zambrano v Office National de l'Emploi* [2011] ECR I-1177 at para 42.

²⁶ Case C-434/09 *McCarthy v Home Secretary* [2011] ECR I-0000 at paras 46-47. Note, as the national measure in no way had the effect of depriving Mrs McCarthy of the genuine enjoyment of the substance of the rights nor affected her ability to exercise her rights of free movement, her application failed.

²⁷ Opinion of Advocate-General Sharpston, *Ruiz Zambrano*, above n 25, at para 84.

individual to move in order for EU law to be engaged, this puts them in a better position than a person who has not exercised their right to freedom of movement - even though their situations may otherwise be identical.²⁸ This results in reverse discrimination towards the national who has chosen not to exercise their rights,²⁹ and thus "lottery rather than logic"³⁰ would seem to dictate the result.

Although her Opinion was given in the context of the "right to reside" being independent from the "right to move",³¹ Advocate General Sharpston's argument in its broader application favours the removal of an internal situation restriction. Should freedom of movement be divided into two independent rights, as advocated for by Sharpston, then a cross-border element need not be necessary in order for EU law to be engaged. The focus would be the negative effect on the rights rather than the exercise of fundamental rights. Acquisition of nationality would therefore not be barred from falling within the scope of EU law simply because it may be considered an internal situation. Although the ECJ in its judgment in *Zambrano* did not elaborate on the points discussed by Sharpston, in holding that the emphasis is on the enjoyment of rights while failing to mention internal situations the Court implicitly accepted that there need not be an exercise of the freedom of movement for the situation to fall within the scope of EU law, thus confirming Sharpston's Opinion.

This illogical effect of reverse discrimination was reiterated by Advocate General Kokott in her Opinion to the Court in *McCarthy*.³² Kokott noted that while the current law does require an exercise of rights, it cannot be ruled out that this could be subject to review should an occasion to review it arise as Union citizenship is destined to be the fundamental status of all nationals.³³ Taking a less conservative approach, the ECJ in that case held that the fact that there had been no exercise of the freedom of movement could not, by that reason alone, constitute a purely internal situation.³⁴ Rather, EU law cannot be engaged where there has been no exercise of fundamental rights *provided that* the situation does not include the application of measures which would have the effect of depriving the person of the genuine enjoyment of the substance of the rights.³⁵ Where there has been a negative effect on the

²⁸ At para 84.

²⁹ At para 133.

³⁰ At para 88.

³¹ At para 80.

³² Opinion of Advocate-General Kokott, *McCarthy*, above n 26, at paras 42 and 46.

³³ At paras 42 and 46.

³⁴ *McCarthy* above n 26, at para 46.

³⁵ At para 56.

enjoyment of the rights, the fact that it would ordinarily be an internal situation does not preclude the application of EU law. It is important to note that the applicant in that case had not exercised her right to freedom of movement, nor did the measure affect her enjoyment of the substance of the rights, therefore the case was not affirmed on the law enunciated by the Court.

The significance of both Opinions cannot be denied in the face of Directive 2004/38/EC which provides that "Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence".³⁶ As explicitly stated, in order for EU law to be engaged there must be an exercise of the right to freedom of movement. Despite this, both Advocate-Generals advocate for the review of this requirement on the grounds of reverse discrimination and the intention for Union citizenship to be the fundamental status of all nationals. Furthermore, the path taken by the ECJ shows a clear intent to focus on the effect on rights rather than the exercise of rights. This inconsistency with EU secondary law indicates a significant shift in the jurisprudence, resulting in the diminished effect of the restriction posed by internal situations.

B A Conservative Approach: Measures that "Affect" the Rights Conferred

As outlined in the above discussion, following *Rottmann* there has been a shift in the jurisprudence to focus on the effect that a measure has on the rights conferred and protected by the EU, in particular the genuine enjoyment of the substance of the rights. The difficulty with this approach is that a strict interpretation of *Rottmann* and *Zambrano* confines their application to measures aimed at affecting or depriving the national of their *pre-existing* EU rights.³⁷ Even if one accepts the argument favouring the removal of the internal situation restriction, the acquisition of nationality would not fall within the ambit of EU law as applicants have no pre-existing EU rights that can be affected by a measure imposed by the MS. EU law would only be invoked once an individual has become a Union citizen by dint of acquiring MS nationality.³⁸

³⁶ Directive 2004/38/EC (of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States) ([2004] OJ L158/77, at para 3)

³⁷ See *Rottmann*, above n 8, at para 48. Note, the ECJ refers to the proviso to have due regard to EU law "in respect of citizens of the Union"; *Ruiz Zambrano*, above n 25, at para 42. Note, the ECJ refers to measures that have the effect of depriving "citizens of the Union" of the genuine enjoyment of the substance of the rights conferred.

³⁸ Opinion of Advocate-General Sharpston, *Ruiz Zambrano*, above n 25, at para 105.

However, both *Rottmann* and *Zambrano* dealt *exclusively* with the deprivation of pre-existing rights. In neither case was the acquisition of nationality explicitly discussed. It could be argued that statements made referring to Union citizens and their pre-existing rights were made due to the context of the cases. Furthermore, Advocate-General Maduro in his Opinion in *Rottmann* makes specific reference to the compatibility of conditions with EU law for both the acquisition and loss of nationality,³⁹ yet the ECJ makes none. This provides further indication that the ECJ determined the case solely by reference to the specific issue at hand and did not intend to restrict its application to measures depriving citizenship as there was no need to discuss broader issues.

In support of a broader interpretation of *Rottmann*, the one statement made with indirect reference to acquisition was made in the context of reacquisition and how the principles enunciated apply both to the MS withdrawing nationality and to the MS of original nationality.⁴⁰ This implies that should an ex-national reapply for citizenship the original State of nationality must have due regard to EU law.⁴¹ Based on the reasoning in that case this could be interpreted to mean that the ECJ considers measures imposed on the reacquisition of nationality could affect the enjoyment of the substance of the rights, despite the applicant no longer being entitled to those rights.

A further hurdle is the decision in *Kaur* which was distinguished on its facts in *Rottmann*,⁴² as the applicant in that case had no pre-existing EU rights to be deprived of, therefore her situation did not fall within the scope of EU law.⁴³ The clear implication is that it is only the deprivation of citizenship that falls within EU law. However *Kaur* can be distinguished here, again based on its facts. The applicant obtained British nationality as a British Overseas Citizen. This status did not confer on her any immigration rights or the right to abode in the United Kingdom, and thus it did not confer on her Union citizenship. The ECJ upheld her status as a non-EU citizen based upon the right of the UK to choose which nationals shall also be considered Union citizens.⁴⁴ The issue in that case was not whether acquisition fell within the scope of EU law but whether her particular category of nationality precluded her

³⁹ Opinion of Advocate-General Maduro, *Rottmann*, above n 8, at paras 23 and 26.

⁴⁰ *Rottmann*, above n 8, at para 62.

⁴¹ Jo Shaw, *Setting the scene: The Rottmann case introduced* (European University Institute: Robert Schuman Centre for Advanced Studies, EUDO Citizenship Observatory, EUI Working Papers 2011/62, December 2011) at 4.

⁴² *Rottmann*, above n 8, at para 49.

⁴³ Case C-192/99 *Kaur* [2001] ECR I-1237, at para 25.

⁴⁴ At para 27.

from benefiting from Union citizenship. The distinction between that case and the issue at hand is that her already acquired nationality was never intended to give her Union citizenship thus she could never be deprived of any rights, whereas the question in this paper examines whether the refusal to grant MS nationality and consequently Union citizenship can be considered as affecting the enjoyment of the substance of the rights conferred and protected by Union citizenship.

Undeniably, the deprivation of Union citizenship affects an individual's ability to enjoy the substance of the rights conferred by that status. The question becomes, can a distinction reasonably be drawn between the deprivation of EU rights and the granting of it (or the failure to grant it)? Logic would dictate no. The exclusion from Union citizenship impacts just as much on the ability to genuinely enjoy the rights as does the deprivation of Union citizenship.⁴⁵ As argued by Davies, a measure which hinders free movement cannot be defended on the grounds that it prevents an individual from engaging in cross-border activities and therefore EU law does not apply.⁴⁶ Why then should it not follow that a measure which prevents the acquisition of Union citizenship and the rights conferred by that status also cannot be defended? The prevention of acquisition of nationality obstructs the "right to have rights" just as much as a measure hindering free-movement obstructs the right to exercise that right of free movement. If national measures which affect the rights conferred and protected are amenable to review by the ECJ, a refusal to grant nationality also falls within the scope of EU law as it affects the ability of the applicant to exercise and enjoy those rights.⁴⁷ It would otherwise be absurd and illogical to have two different legal orders govern the deprivation and acquisition of the same legal status, as the two are so obviously connected.⁴⁸

Furthermore, while national measures which are liable to 'hamper' or 'render less attractive' the exercise of fundamental rights and freedoms by Union citizens falls within the scope of EU law,⁴⁹ the EU has traditionally been just as much concerned with measures which prevent

⁴⁵ Gareth T. Davies *The entirely conventional supremacy of Union citizenship and rights* (EUI Working Papers 2011/62), above n 41, at 8.

⁴⁶ Gareth T. Davies *The entirely conventional supremacy of Union citizenship and rights* (EUI Working Papers 2011/62), above n 41, at 8.

⁴⁷ At 7.

⁴⁸ Dimitry Kochenov *Two sovereign states vs a human being: CJEU as a guardian of arbitrariness in citizenship matters* (EUI Working Papers 2011/62), above n 41, at 12.

⁴⁹ Case C-19/92 *Kraus v Land Baden-Württemberg* [1993] ECR I-1663, at para 32.

the obtainment and exercise of fundamental rights.⁵⁰ Thus, the Tampere European Council concluded in its 1999 Milestones that the freedom of movement is not the exclusive prerogative of citizens of the Union:⁵¹

Its very existence acts as a draw to many others world-wide who cannot enjoy the freedom Union citizens take for granted. It would be in contradiction with Europe's traditions to deny such freedom to those whose circumstances lead them justifiably to seek access to our territory.

The Tampere European Council went on to discuss the objective of fair treatment towards third country nationals and the aim to grant those who reside legally within the MS with rights and obligations comparable to those of Union citizens:⁵²

The legal status of third country nationals should be approximated to that of Member States' nationals. A person, who has resided legally in a Member State for a period of time... should be granted in that Member State a set of uniform rights which are as near as possible to those enjoyed by EU citizens... The European Council endorses the objective that long-term legally resident third country nationals be offered the opportunity to obtain the nationality of the Member State in which they are resident.

There is no logical reason why the deprivation of nationality and the acquisition of nationality should be treated any different from each other. Both equally affect the ability to genuinely enjoy the substance of the rights conferred and protected by the EU. In particular, the endorsement of the Tampere European Council to offer nationality to long-term resident third country nationals indicates that these individuals have the right to have Union citizenship rights. Any denial of that right affects those individuals just as much as it affects an individual as in Mr Rottmann's situation who is deprived of those rights.

⁵⁰ Gareth T. Davies *The entirely conventional supremacy of Union citizenship and rights* (EUI Working Papers 2011/62), above n 41, at 8.

⁵¹ Tampere European Council, 15 and 16 October 1999, Presidency Conclusions [EU: European Council] (16/10/1999 - Nr: 200/1/99) at 3, < http://www.europarl.europa.eu/summits/tam_en.htm >

⁵² At 21.

C *A Broader Approach: By Virtue of its Fundamental Nature*

A broader approach interprets "by reason of its nature and consequences" to mean that the fundamental nature of the rights attached to citizenship is enough to bring the concept in its entirety within the ambit of EU law.⁵³ This means, in practice, that *any* decision regarding either the conferral or deprivation of nationality taken by a MS that affects the status of citizenship of an individual falls within the scope of EU law.⁵⁴ As Union citizenship is destined to be the fundamental status of all nationals, such an approach would give the ECJ the ability to ensure that the rights provided by the EU are given proper effect.

This approach is controversial as it calls for the effective removal of MS competence in matters regarding nationality. While each MS would still get to determine who its citizens shall be, they must only do so having due regard to EU law. National laws would be directed by EU law, so it cannot be said that the MS retains substantive competence under this approach.

The controversial nature of this approach was noted by the court of second instance, the Bayerischer Verwaltungsgerichtshof, in its judgment against Mr Rottmann. The Court noted that in the situation of a decision to withdraw nationality resulting in a person becoming stateless, for the proviso formulated in *Micheletti* to be observed the importance of the rights conferred through Union citizenship must be taken into consideration.⁵⁵ Should there be an obligation to refrain from withdrawing naturalisation, on the basis that the importance of those rights take precedence, the effect would be to strike at the heart of the sovereign power of the MS to determine matters regarding nationality.⁵⁶ While the result in *Rottmann* did not impose an obligation to refrain from withdrawing nationality, the requirement to have due regard to EU law poses a substantive restriction on the sovereign right of the MS to determine its nationals, thus nevertheless striking at the heart of its powers.

The shift in the jurisprudence represents a recognition that matters of citizenship and nationality are no longer within the exclusive prerogative of each MS. If Union citizenship is destined to the fundamental status then by virtue of status all citizenship matters fall within the scope *ratione materiae* of EU law. However, this approach encroaches too far on state

⁵³ Oxana Golynka *The correlation between the status of Union citizenship, the rights attached to it and nationality in Rottmann* (EUI Working Papers 2011/62), above n 41, at 19.

⁵⁴ Dimitry Kochenov "Case C-135/08 *Janko Rottmann v Freistaat Bayern*, Judgment of the Court (Grand Chamber) of 2 March 2010, not yet reported" (2010) 47 CMLR 1831 at 1842.

⁵⁵ *Rottman*, above n 8, at para 32.

⁵⁶ *Rottmann*, above n 8, at para 32.

sovereignty, into an area that was never intended to fall within the competence of EU law, as indicated by the Declaration on Nationality attached to the TEU. Furthermore, recent German Federal Constitutional Court (FCC) decisions have upheld the approach taken by the FCC which allows it to review the acts of EU institutions to determine whether they are *ultra vires* their sovereign power.⁵⁷ Should the act be *ultra-vires* the FCC may refuse to apply them.⁵⁸ A decision to draw all citizenship matter within the competence of EU law would very likely be considered *ultra-vires* the power of the ECJ, resulting in a conflict of laws. Therefore while this approach has merit, it cannot be the intended interpretation of the principles enunciated in *Rottmann*.

IV The Principle of Proportionality - A Restriction on the Acquisition of Nationality?

The fact that acquisition could fall within the ambit of EU law does not mean the removal of MS competence to determine matters regarding nationality. To the extent that the conditions on nationality imposed by the MS are consistent with EU law, the MS shall retain full competence. However, where the conditions may be inconsistent with EU law they will be amenable to judicial review by the national courts of the MS concerned.⁵⁹ This will require an analysis of general principles of EU law and fundamental rights to determine whether the measures imposed are compatible with them or not.⁶⁰

The power of the ECJ to determine whether a measure concerning nationality falls within the scope of EU law and is thus amenable to judicial review by the national courts has been exercised and upheld when a measure restricts or deprives an individual of the benefit of EU rights, as was the case in both *Rottmann* and *Zambrano*. What is unclear is whether that power can apply and be upheld in regards to a measure which may result in harm to a group of individuals while conferring a benefit to an individual. In other words, can a measure which too readily grants nationality be subject to judicial review on the basis that it may result in harm to the EU, another MS or the rights of existing Union citizens? Once an individual is a citizen of one MS they are a citizen of all MSs by dint of their Union citizenship, so it is necessary to ensure that the granting of citizenship will not unjustifiably

⁵⁷ BVerfGE 123, 267 [2010] 3 CMLR 13 [*Lisbon*] paras 240-241.

<http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html>

⁵⁸ At 241.

⁵⁹ *Rottmann*, above n 8, at para 55.

⁶⁰ Opinion of Advocate-General Maduro, *Rottmann*, above n 8, at para 28.

cause harm to the other MSs. Furthermore, the aim of the EU is to promote peace, its values and the well-being of its peoples.⁶¹ To this end, it would seem desirable to regulate the conditions for acquisition to ensure that the rights of pre-existing Union citizens and the attainment of EU values are not unjustifiably harmed.

A Regulation: A Justified Restriction on Member State Competence?

It is one thing for a measure restricting the acquisition of nationality to be held incompatible with EU law. It is quite another for a measure which too readily confers nationality to be held incompatible. Both strike at the heart of the sovereign right of the MS to choose their own citizens, though the latter may be seen as more antagonistic as it requires a MS to refrain from doing something that they have the legal right to do. However, where the decision shall affect an entire body of people, there is the need for a balance to be struck in order to ensure that the measures are proportional to the harm that may ensue.

While MSs consistently assert their exclusive right to determine nationality matters, support for some form of regulation has increased in recent years by way of political backlash. Thus the decision of Spain⁶² to regularise almost 700,000 illegal immigrants in 2005 was highly criticised by certain MSs as there was genuine concern that the decision could provide an incentive for further illegal immigration to Europe or it could have potential spill-over effects into neighbouring countries.⁶³ It is important to note that backlash to this decision occurred despite the fact that the regularisation did not confer any entitlement to nationality or residence and therefore no legal right to move freely across any border into another MS. On this basis alone it is reasonable to infer that any measure which has the effect of mass naturalisation and therefore conferral of Union citizenship would be subject to extreme backlash, calling for the MS to have due regard to EU fundamental laws.

The establishment by Malta of its Individual Investor Programme (IIP) in 2013 elicited such a response. The IIP proposes to grant Maltese nationality to individuals who contribute to the economic development of Malta.⁶⁴ The programme has received considerable backlash, most

⁶¹ Consolidated Version of the Treaty on European Union [2012] above n 2, Art 3(1).

⁶² Joaquín Arango and Maia Jachimowicz. "Regularizing immigrants in Spain: a new approach." *Migration Information Source* 1.9 (2005): 2005, at 2-3.

⁶³ Dan Nowicki "Spain has granted amnesty, but not without controversy" *The Arizona Republic* <<http://www.azcentral.com/news/articles/global-immigration-spain-amnesty.html>> Accessed 16/05-14

⁶⁴ Maltese Citizenship (Amendment) Act 2013 (MAL), Art 3.

notably from the European Commission.⁶⁵ While it is not uncommon for a MS to implement such a programme,⁶⁶ the controversial element is the omission of any requirement of prior or subsequent residence.⁶⁷ Any individual who has the financial means could purchase Union citizenship without any link to Europe. Under political pressure and the threat of a request to the ECJ to provide a preliminary hearing on the matter,⁶⁸ Malta agreed to engage in discussions with the European Commission. As a result, Malta agreed to require proof of Maltese residence for a term of at least 12 months before nationality would be granted.⁶⁹

The failure of Malta to implement a residence requirement raises genuine concerns about the affect the IIP would have had on fundamental objectives of the EU, the rights of Union citizens and the interests of other MSs, had it not been amended. As it was not referred to the ECJ for a preliminary ruling the remainder of this paper shall examine the potential harm arising from the IIP in its original form and whether that harm is disproportionate to the benefit that is conferred on the individual applicant.

B Principle of Proportionality

The principle of proportionality is defined in Article 5(4) of the Treaty on European Union.⁷⁰

Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.

Rottmann makes it clear that the principle also applies to an act of the MS.⁷¹ Further, as noted above, it is for the national court to ascertain whether the act or measure observes the principle "so far as concerns the consequences it entails for the situation of the person concerned in the light of European Union law".⁷²

⁶⁵ Andrew Rettman "EU Commission prepares legal challenge on Malta passport sale" (23 January 2014) EUobserver < <http://euobserver.com/justice/122843>>

⁶⁶ See eg: UK Tier 1 (Investor) visa < <https://www.gov.uk/tier-1-investor>>; see §10(6) *Staatsbürgerschaftsgesetz*, BGBI. 311/ 1985 (available in German only), see summary of Austrian citizenship-by-investment in English <<http://www.globalcitizen.ru/en/ur/Austria/>>

⁶⁷ Maltese Citizenship (Amendment) Act 2013, above n 63.

⁶⁸ Andrew Rettman "EU Commission prepares legal challenge on Malta passport sale", above n 64.

⁶⁹ European Commission "Joint Press Statement by the European Commission and the Maltese Authorities on Malta's Individual Investor Programme (IIP)" (press release, 29 January 2014).

⁷⁰ Consolidated Version of the Treaty on European Union, above n 2, Art 5.

⁷¹ *Rottmann*, above n 8, at para 55.

⁷² At para 55.

The test for proportionality as applies to actions of a MS requires two steps:⁷³ First, the national rule must be objectively necessary in order to help achieve the aim sought by the rule and, secondly, the restrictions caused by the rule must not be disproportionate to the aim sought by the rule.

The first requirement is often straight-forward to satisfy. The objective of the IIP is the enhancement of economic development in Malta. An investor is conferred Maltese nationality and Union citizenship in order to give them an incentive to invest in Malta. Malta is a small country and is largely economically dependent on foreign trade, tourism and imports.⁷⁴ Without the conferral of nationality there may be little incentive to invest. On this basis, the IIP is necessary in order to achieve the objective of economic growth.

The second requirement is much more difficult to determine. While the focus is ordinarily on the restrictions imposed by the measure, here the focus is on the lack of restrictions and whether the failure to impose restrictions is proportionate to the potential harm that could be done.

1 "An ever closer union among the people of Europe"

The ultimate aim of EU integration is to create "an ever closer union among the people of Europe".⁷⁵ The reference to "people of Europe" could be interpreted to imply an aim to create a 'European' identity, which a Union citizen has a right to achieving by dint of their bond to the MS. In this respect, the existence of a bond with the state of nationality is crucial to establishing a higher European identity and thus fulfilling the aim of European integration.

Nationality has been recognised as "a legal bond, having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties".⁷⁶ The characteristic feature of that relationship is the existence of a bond of allegiance to the State. As such, it has been suggested by critics that this relationship between the state and the national cannot be transposed to the

⁷³ Opinion of Advocate-General Van Gerven, Case C-159/90 *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan et al* [1991] ECR I-4685, at para 27.

⁷⁴ Malta.com "Economy of Malta: Strong points, and development of Maltese business and trade" <<http://www.malta.com/en/about-malta/economy>> Accessed 04/06-14; see also European Commission "Economic and Financial Affairs: Malta - Robust growth outlook" (European Economy 3|2014, 05 May 2014) <http://ec.europa.eu/economy_finance/eu/forecasts/2014_spring/mt_en.pdf>

⁷⁵ Consolidated Version of the Treaty on European Union, above n 2, Art 1.

⁷⁶ *Nottebohm (Liechtenstein v Guatemala) Judgment of April 6 1955*, I.C.J Reports 1955, 4 at 23.

transnational level.⁷⁷ This is because the transnational level does not establish the same complex rights independent of the state and it does not generate a sense of emotional connection.⁷⁸ While a bond to the state is important to establishing a national identity, it would be irrelevant to the determination of whether the aim of and right to a European identity is being fulfilled. However arguments that propound complexity at the transnational level, such as ineffective democratic representation and lack of one shared language, have just as much applicability at the national level,⁷⁹ in particular in countries which embrace multi-culturalism.

Along a similar vein, Advocate-General Maduro in his Opinion to the Court in *Rottmann* discussed the conceptual elements behind Union citizenship and how Union citizenship is the "product of a decoupling from nationality".⁸⁰ While Union citizenship presupposes a political relationship, it is not a relationship of *belonging* to a people.⁸¹ It is founded upon the commitment to construct a new form of European political allegiance in a geographical area which does not consist of people of the same nationality.⁸² In this way, it ensures that the relationship with the MS is the primary allegiance while recognising that there can be a transnational citizenship which is not determined by nationality.⁸³

While Union citizenship may not require a sense of belonging or an identity to Europe in order to be obtained, it does not necessarily mean that a higher European identity is not an objective that ought to be achieved or ought to be aimed for. Political integration does not by itself lead to an ever closer union of people. As evidenced by the results of the recent 2014 European Parliamentary Elections,⁸⁴ it is the support of the people and their sense of belonging to Europe that will determine the continued existence and effectiveness of the EU. President of the European Commission, José Manuel Barroso in his statement on the outcome of the election recognised this when he said the following:⁸⁵

⁷⁷ M. Victoria Costa "Citizenship and The State" (2009) 4/6 *Philos Compass* 987 at 989.

⁷⁸ At 990.

⁷⁹ At 992.

⁸⁰ Opinion of Advocate-General Maduro, *Rottmann*, above n 8, at para 23.

⁸¹ At para 23.

⁸² At para 23.

⁸³ At para 23.

⁸⁴ BBC News Europe "Eurosceptic 'earthquake' rocks EU elections" (26 May 2014)

<<http://www.bbc.com/news/world-europe-27559714>>

⁸⁵ European Commission "Statement of President Barroso on the outcome of the 2014 European Parliament Elections" (press release, 26 May 2014).

Standing together as Europeans is indispensable for Europe to shape a global order where we can defend our values and interests. This is the moment to come together and to define the Union's way forward.

In further support, the ECJ in *Rottmann* held that it would not be contrary to EU law to deprive an individual of their Union citizenship where MS nationality had been obtained by deception.⁸⁶ This is because it is legitimate for a MS to protect the relationship of solidarity and good faith which forms the bedrock of the bond of nationality - a bond which is undeniably broken by an act of deception.⁸⁷ Therefore the bond with the state cannot be dismissed as being irrelevant to Union citizenship in the light of this decision.

By failing to incorporate a requirement of residence prior to the granting of nationality, the IIP grants to an applicant MS nationality without a bond ever being established between the applicant and the MS. This frustrates the aim of an ever closer union of the people of Europe, as the lack of a bond to the MS impedes the creation of a higher European identity. The failure to form a bond results in a body of people who have no identity to a European state and therefore no identity to Europe. There is no sense of belonging and no will to attain the objective of a closer union of European people. Failure to require residence in order to establish a bond with the MS not only frustrates the fundamental aim of the EU but it also affects the right of the Union citizen to obtain this European identity which they are destined to have through their fundamental status as citizens of the EU.

2 *The Rule of Law and anti-discrimination*

Malta's IIP programme discriminates against those who cannot afford to buy citizenship, however there is nothing to say that countries cannot discriminate based on financial wealth. The accession of the EU to the European Convention on Human Rights (ECHR), of which the draft accession agreement has been finalised,⁸⁸ will require the EU to comply with the ECHR in ensuring that rights are protected and upheld, however the ECHR also fails to mention discrimination based on financial wealth.⁸⁹ While the prohibition on discrimination

⁸⁶ *Rottmann*, above n 8, at para 59.

⁸⁷ At para 51.

⁸⁸ Council of Europe "Accession of the European Union to the European Convention on Human Rights" Human Rights and Rule of Law <http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/default_en.asp>

⁸⁹ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at: <<http://www.refworld.org/docid/3ae6b3b04.html>> Note: Art 14 Prohibition on Discrimination: The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground

enshrined in Art 14 of the ECHR extends beyond the rights contained within the ECHR, the State must provide the additional rights for which the prohibition shall extend to.⁹⁰ As investment programmes are desirable contributors to the economic growth of the State, it would be contrary to both logic and public policy for a State to prohibit discrimination based on financial wealth.

Nevertheless, the EU is founded on a number of values including the Rule of Law, where individuals have a right to be treated equally under the law.⁹¹ Any rules surrounding nationality must not unjustifiably treat applicants differently. The effect of the absence of a residence requirement is the creation of an elite category of citizenship, where those who have the financial means to buy their nationality are treated most favourably compared to all other applicants. To demonstrate, the average applicant must be resident in Malta for a term of at least 5 out of the 7 years preceding the application for nationality, whereas the IIP in its original form required no residence whatsoever.⁹² This is inconsistent with the Rule of Law as it unjustifiably treats some individuals as 'more equal than others' and gives much more favourable treatment to those who can buy their way in.

3 *Right to security - the prevention and combating of crime*

A further objective of the EU is to ensure an area of security, where appropriate measures are implemented with the aim of preventing and combating crime.⁹³ The main concern raised by the European Commission was that each MS would be put at risk should due diligence fail to ensure criminals are kept out of Malta's IIP.⁹⁴ As the applicants would gain access to all EU countries it is reasonable for each MS to want to ensure criminals do not gain access, in order to minimise any potential harm.

Directive 2004/38 permits MSs to restrict the freedom of movement and residence of Union citizens on the grounds of public policy, public security or public health.⁹⁵ While criminality is a ground for public policy, a criminal conviction is not of itself sufficient to justify a

such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

⁹⁰ *Genovese v. Malta*, Application no. 53124/09, Council of Europe: European Court of Human Rights, 11 October 2011, at para 32.

⁹¹ Consolidated Version of the Treaty on European Union, above n 2, Art 2.

⁹² Maltese Citizenship Act 1964 (MAL), Art 10(1)(a)(b); Subsidiary Legislation 188.03 Individual Investor Programme of the Republic of Malta Regulations 2014, Art 7(12).

⁹³ Consolidated Version of the Treaty on European Union, above n 2, Art 3(2).

⁹⁴ Andrew Rettman "EU Commission prepares legal challenge on Malta passport sale", above n 64.

⁹⁵ Directive 2004/38/EC, above n 36, Art 27(1).

restriction on free movement.⁹⁶ In order to fall within the grounds of public policy there must be a "genuine, present and sufficiently serious threat affecting one of the fundamental interests".⁹⁷ Furthermore, the measure taken must be based exclusively on the personal conduct of the person concerned.⁹⁸

There is no legitimate reason why Malta shall fail to exercise due diligence in ensuring criminals do not gain access to the EU, as the failure to require prior residence has no link to the good character requirements contained in the Maltese Citizenship (Amendment) Act 2007 which must be satisfied.⁹⁹ Furthermore, the ability of the MS to restrict the freedom of movement under Directive 2004/38 on the grounds of public policy contributes significantly towards satisfying the objective of preventing and combating crime. Although the threshold for imposing a restriction is high, this ensures that the restriction on the fundamental right to freedom of movement is proportionate to the harm. The fact that criminals may not be adequately weeded out by the IIP falls far short of being sufficient enough to impose a restriction, especially where any restriction would be general, therefore there is no inconsistency with this objective.

4 *Considering the competing interests*

The failure to implement a residence requirement in the IIP results in a negative effect on the attainment of EU objectives and on the rights conferred to Union citizens. Nevertheless, the competing interests must be weighed, having regard to all the circumstances, to determine whether a fair balance has been struck between those interests.¹⁰⁰

As the IIP is based on financial wealth, the applicants could not possibly pose an "unreasonable burden" on public finances. The argument being that where the Union citizen shall become an unreasonable burden on the finances of the MS, the MS can subordinate their right to residence on the grounds of legitimate state interests.¹⁰¹ Nevertheless, the fact remains that the unjustified discrimination due to financial wealth is inconsistent with the

⁹⁶ Case C-430/10 *Gaydarov v Direktor na Glavna direktsia 'Ohranitelna politisia' pri Ministerstvo na vatreshnite raboti* (17 November 2011), at para 34.

⁹⁷ At para 33.

⁹⁸ Directive 2004/38/EC, above n 36, Art 27(2).

⁹⁹ Maltese Citizenship (Amendment) Act 2007 (Cap. 188), Art 10(1)(d).

¹⁰⁰ Wolf Sauter *Proportionality in EU Law: A Balancing Act?* (Tilburg Law and Economics Centre, Discussion Paper No. 2013-003, January 2013) at 10, citing Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Austria* [2003] ECR I-5659.

¹⁰¹ Case 413/99 *Bambaust v R* [2002] ECR I-7091 at para 90.

fundamental principle of the Rule of Law. The inability of the applicant to pose an unreasonable burden on the finances of the MS is not enough to outweigh this inconsistency.

It is understandably a matter of public policy for the MS to take measures to enhance its economic development. In fact, it would be contrary to EU law for a MS to not undertake measures aimed at promoting balanced economic growth, as they have committed to work for the sustainable development of Europe through economic means.¹⁰² However, there are alternatives that can be applied so as not to result in the effects discussed above. The imposition of a short-term residence requirement would greatly reduce the negative effects while arguably not substantially affecting the objectives sought by Malta. It can in fact be argued that it would be beneficial for Malta to impose a residence requirement as it would ensure the applicant first establish a bond with the state, rather than acquiring nationality and having no genuine connection which would stop them from moving to another part of the EU.

5 Conclusion

Based on the above, the failure of Malta to implement a residence requirement into the IIP results in disproportionate harm to the attainment of the objectives of the EU and to the rights of Union citizens. However, that does not mean that the IIP is incompatible with fundamental EU law. The concern is to ensure that Malta's IIP remains lucrative to those who are looking to invest. A short-term residence requirement would still fulfil the desired objective of enhancing economic development at the same time as ensuring that the rights of Union citizens are not unjustifiably affected by the granting of nationality to individuals who have no link to Europe.

IV Conclusion

The ECJ has persistently encroached on an area which was intended to remain within the exclusive prerogative of the MSs, in what can only be seen as a bid to realise the full potential of Union citizenship as the fundamental status of nationals. As such, the ECJ has transformed the law on citizenship and has established mechanisms to protect Union citizens from arbitrary acts of the state in the field of nationality.

While it is clear that acts aimed at depriving or affecting the rights conferred and protected by the EU fall within the scope *ratione materiae* of EU law, it remains to be seen whether the

¹⁰² Consolidated Version of the Treaty on European Union, above n 2, Art 3(3).

same applies for acts affecting the acquisition of nationality. A shift in the jurisprudence since *Rottmann* suggests that this is strongly open for debate and will likely form the basis of disputes in the near future.

What is also clear is that any act that does fall within the scope of the EU must be compatible with EU law, in particular the principle of proportionality. As evidenced by Malta's Individual Investor Programme, the consequences of having to observe the principle of proportionality may result in the national rule being found incompatible with EU law. As national courts are the gatekeepers of proportionality, it shall be interesting to see whether the judicial outcomes favour the preservation of national sovereignty or the further integration of Europe, thus bringing Europe closer to a union of peoples.

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