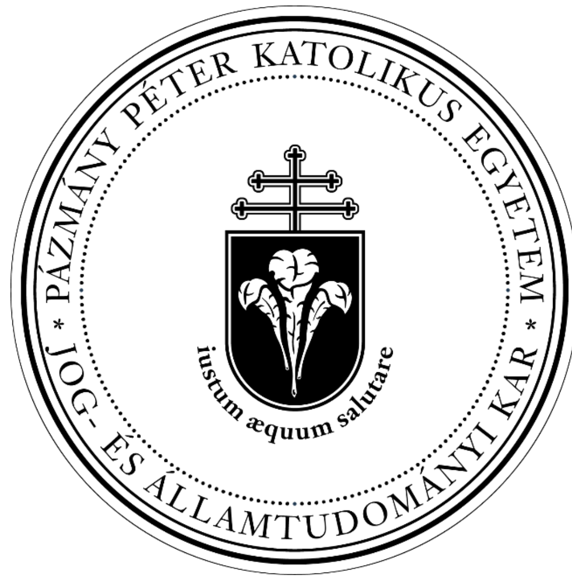

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The CJEU's statelessness related case law

A step forward to reduction of statelessness in the Member States?

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A step forward to reduction of statelessness in the Member States?

*Blanka Ujvári**

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1. Introduction

Statelessness is one of the forgotten human rights crises which affects the lives of millions. Stateless people – those, who are not considered as a national by any state under the operation of its law[1] – cannot enjoy the most basic rights which are connected to nationality, *i.e.* they are unable to participate in the society, therefore they must face marginalization and discrimination. The phenomenon of statelessness is present worldwide, and is relevant in the European Union too.

Statelessness is proving to be a highly controversial phenomenon in the European Union, for a number of reasons. The cornerstone of this controversial role is Declaration No. 2 to the Maastricht Treaty[2], which *expressis verbis* states that it is for the Member States to lay down the rules on nationality, so it is considered as a competence of the Member States. In view of this, the rules covering all aspects of statelessness, and thus the central question of when and how a stateless person can acquire citizenship, have not been and cannot be defined in EU law.

2. Case Law of the Court of Justice of the European Union

Although the rules on the acquisition and loss of nationality are not within the competence of the EU, it is important to note at this point the judgments of the Court of Justice of the European Union (hereinafter: CJEU) on the loss of nationality in the sense of the loss of EU citizenship in preliminary rulings, which are a milestone in the development of EU law on nationality.

2.1. Rottman Case

Germany has referred a request for a preliminary ruling to the CJEU concerning the citizenship of the European Union in connection with the withdrawal of the applicant's naturalized nationality.[3] Janko Rottman, an Austrian citizen, was questioned by the criminal court in Graz on suspicion of serious fraud in the course of his employment, and after questioning, Rottman moved to Munich, while denying his guilt. Mr. Rottman applied for and obtained citizenship in Germany by naturalization, as a result of which he lost his Austrian citizenship *ex lege*.

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[1] Convention relating to the Status of Stateless Persons, Article 1
United Nations, Treaty Series, vol. 360. 117.

[2] The Conference declares that, 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. Member States may declare, for information, who are to be considered their nationals for Community purposes by way of a declaration lodged with the Presidency and may amend any such declaration when necessary.
Treaty on European Union, signed at Maastricht on 7 February 1992, 92/C 191/01
https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:1992:191:FULL&from=NL

[3] Judgement of 2 March 2010, *Case C-135/08, Rottman*, ECLI:EU:C:2010:104

However, as an essential fact in the context of preliminary ruling request, Rottman did not mention the pending criminal proceeding against him in Austria during the naturalization procedure. After the Municipality of Graz informed Munich of the existence of an arrest warrant for Janko Rottman and the criminal proceedings against him, his German citizenship by naturalization was retroactively revoked on the grounds that he had fraudulently obtained it by concealing the criminal proceedings pending against him in Austria. The court of second instance held that the revocation of his nationality was lawful under German law, notwithstanding the fact that it would render him stateless after the decision had become final. The court of second instance in the main proceedings referred two questions to the Court of Justice of the European Union for a preliminary ruling. The first question was principally concerned with the jurisdiction of the Court of Justice of the European Union, according to which is it contrary to Community law for Union citizenship (and the rights and fundamental freedoms attaching thereto) to be lost as the legal consequence of the fact that the withdrawal in one Member State (the Federal Republic of Germany), lawful as such under national (German) law, of a naturalization acquired by intentional deception, has the effect of causing the person concerned to become stateless because, as in the case of the applicant [in the main proceedings], he does not recover the nationality of another Member State (the Republic of Austria) which he originally possessed, by reason of the applicable provisions of the law of that other Member State? The second question was based on the first one, according to which if it is contrary, then must the Member State … which has naturalized a citizen of the Union and now intends to withdraw the naturalization obtained by deception, having due regard to Community law, refrain altogether or temporarily from withdrawing the naturalization if or so long as that withdrawal would have the legal consequence of loss of citizenship of the Union (and of the associated rights and fundamental freedoms) …, or is the Member State … of the former nationality obliged, having due regard to Community law, to interpret and apply, or even adjust, its national law so as to avoid that legal consequence?’[4]

Concerning the first question, it was necessary to take a position primarily on whether the revocation of nationality, which results in statelessness, is typically an internal legal problem. Advocate General M. Poiares Maduro, in his opinion on the case explained that the question is not exclusively an internal problem of law, since EU law allowed Janko Rottman to exercise his rights under the freedom of movement, *i.e.* in fact, it was EU citizenship that enabled the plaintiff in the main proceedings to settle in Germany as an Austrian citizen.[5] In view of this, it becomes clear that there are cross-border elements, as Rottman exercised fundamental freedoms enshrined in the Treaties, which are fundamental rights embedded in EU citizenship. Advocate General Maduro also pointed out that it would undoubtedly constitute an infringement of the rights entitled to EU citizens to move and reside if a Member State required the loss of nationality in the event of a transfer of residence to another Member State.[6]

The Court of Justice of the European Union went further than the Advocate General's finding and established its jurisdiction in these cases by clarifying that EU law applies to any case in which a naturalized person has been deprived of his or her nationality - and has lost his or her

[4] *Case C-135/08, Rottman*, para. 35.
[5] Opinion of Mr Advocate General Poiares Maduro delivered on 30 September 2009, *Case C-135/08, Rottman*, ECLI:EU:C: 2009:588, para. 11.
[6] Ibid. para. 32.

original nationality as a result of naturalization - and thereby loses the status of EU citizen[7] and the rights attached to it.[8]
The importance of this finding of the CJEU is that certain questions of statelessness may fall within the competence of the EU, depending on the future development of the law, since, as stated in the *Rottman* case, any decision of a Member State relating to nationality which may be connected with citizenship of the Union falls within the competence of the CJEU. Consequently, the CJEU has extended its jurisdiction to any question of nationality which may affect citizenship of the Union. In view of this, it is not necessary to determine whether the case in question falls within the jurisdiction of the CJEU.

The CJEU has also ruled in this case on the principle of proportionality.[9] By introducing the proportionality test the *Rottman* judgment is a landmark judgment requiring Member States to apply the principle of proportionality in their legislation on nationality or in amending their nationality legislation. Consequently, legislation governing nationality issues which does not take into account the proportionality principle and the proportionality test is contrary to EU law.

The CJEU also concluded in relation to the first question, that under international law, the withdrawal of nationality is admissible in cases even if the person concerned would otherwise be stateless, where the nationality was acquired fraudulently, as provided for in Article 8(2)(b) of the 1961 Convention, according to which a person may be deprived of his or her nationality even if the nationality was acquired by deception or fraud. However, this act cannot be arbitrary, which otherwise contrary to international human rights instruments. According to the CJEU, the withdrawal of nationality may prove to be lawful, provided that the principle of proportionality is respected.[10]

In the light of the foregoing, I consider that the *Rottman* case was a major step forward regarding certain aspects of statelessness in cases where the core of EU citizenship is affected, thus the exercise of the rights conferred by the fundamental freedoms guaranteed by the Treaties. This judgment could also, in my view, foreshadow a possible future tendency in case law which would make a more ambitious effort to reduce cases of statelessness in the European Union.

2.2. Tjebbes Case

Case C-221/17[11] does not specifically address the issue of statelessness but relates to the loss of nationality, which could open up a new door for deepening the relevance of the European Union's competence in matters of nationality. The Dutch case was referred to the CJEU for a preliminary ruling concerning the loss of nationality *ex lege*, where four applicants' application

[7] Treaty of the European Union, Article 9:
„In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies. Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship."
[8] *Case C-135/08, Rottman*, para. 42.
[9] Ibid. para. 56: "Having regard to the importance which primary law attaches to the status of citizen of the Union, when examining a decision withdrawing naturalization it is necessary, therefore, to take into account the consequences that the decision entails for the person concerned and, if relevant, for the members of his family with regard to the loss of the rights enjoyed by every citizen of the Union. In this respect it is necessary to establish, in particular, whether that loss is justified in relation to the gravity of the offence committed by that person, to the lapse of time between the naturalization decision and the withdrawal decision and to whether it is possible for that person to recover his original nationality."
[10] The withdrawal of naturalized citizenship would be contrary to EU law in that case, if, for example, it is for non-payment of a traffic fine.
[11] Judgement of 12 March 2019, *Case C-221/17. Tjebbes,* ECLI:EU:C:2019:189.

for the renewal of their Dutch passports were refused on the basis of a provision in the Dutch nationality law according to which the applicants had resided outside the territory of the Netherlands or the Member States of the European Union for an uninterrupted period of ten years.

The question referred for a preliminary ruling has two parts, namely whether it is proportionate for that an adult, who is also a national of a third country, loses, by operation of law, the nationality of his or her Member State, and consequently loses citizenship of the Union, on the ground that, for an uninterrupted period of 10 years, that person had his or her principal residence abroad and outside the [Union], although there are possibilities for interrupting that 10-year period, moreover it is proportionate that under certain circumstances a minor loses, by operation of law, the nationality of his or her Member State, and consequently loses citizenship of the Union, as a consequence of the loss of the nationality of his or her parent, as referred to under (1) …?'[12]

The CJEU has ruled that it has jurisdiction not only because of the nature of the case but also because of its consequences, since the loss of nationality of a Member State automatically entails the loss of citizenship of the European Union. According to the CJEU, the method of loss of nationality established by Netherlands law is proportionate, having regard to the fact that 10 years may be a sufficient period for the applicant to apply for the renewal of the Dutch passport during that period and that the real link between the State and the citizen, as established in *Nottebohm*[13] case, is not established within such a period.[14]

Consequently, it had been held in this case, that the loss of a genuine link between the State and the citizen also legitimizes the loss of citizenship of the EU. The Dutch legislation can be considered lawful, since not applying for a travel document within ten years can be considered that the persons concerned do not wish to maintain the actual and genuine link with the Kingdom of the Netherlands. However, an application submitted during the ten-year period interrupts this period, so applicants could have had the opportunity to express their wish to retain their Dutch nationality in this way. This is supported by the wording of the 1961 Convention, but it is important to note that there was no risk of statelessness in the present case. The CJEU has pointed out, that, on the one hand, the legislation according to which a child also loses his or her nationality in order to maintain family unity is legitimate, but that, on the other hand, an individual examination is required to determine whether the loss of EU citizenship would be detrimental to the best interests of the child.

In this respect, in paragraphs 46 and 47 of the judgment, the CJEU emphasized the importance of respect for family life and the best interests of the child by pointing out the indispensability of the examination of the individual circumstances in the context of compliance with the proportionality test, thus reiterating the criterion of the proportionality test laid down in the *Rottman* case in relation to relatives. The CJEU held in paragraph 42 of the present judgment, that a national legislation is contrary to EU law where no individual examination is provided for, accordingly, the authority must be able to conduct an individual examination and to carry

[12] Ibid. para. 26.
[13] *Nottebohm Case (Liechtenstein v. Guatemala),* Judgement of 6 April 1955, 1955 I.C.J. Rep. 12.
[14] Caia Vlieks: *Tjebbes and Others v Minister van Buitenlandse Zaken: A Next Step in European Union Case Law on Nationality Matters?* Tilburg Law Review: Journal on international and comparative law, Vol. 24, Issue 2, 2019, pp. 142-146.
https://tilburglawreview.com/articles/10.5334/tilr.149/

out a subsidiary examination of the consequences of the loss of nationality and the possible *ex tunc* restoration of nationality.

Although it can be noted that the CJEU has not established a new criterion compared to the *Rottman* case, *i.e.* it has merely confirmed the findings of the *Rottman* judgment, the requirement of individual examination appeared as a means of the reduction of statelessness in such decisions of the Member States.

2.3. Stolichna obshtina, rayon „Pancharevo” Case

In case C-490/20 ('Pancharevo'),[15] the CJEU delivered its judgment on 14 December 2021. It is important to note that I do not intend to go into the legal implications of same-sex marriage, but will only examine the case in the context of statelessness, in line with the theme of the article.

A Bulgarian woman and a woman with UK nationality married in Gibraltar and moved to Spain, where they had a child. The Spanish authorities issued a birth certificate for the child, in which both women were listed as the mother of the child. The Bulgarian mother contacted the Bulgarian authorities to obtain a birth certificate for the child, which is a prerequisite for the child to obtain an identity card or passport. This request was rejected by the Bulgarian authorities on the grounds that the child could not be issued with the requested document unless the biological mother was identified. The Bulgarian mother then turned to the court, which then referred the case to the CJEU for preliminary ruling. The judgment was delivered in fast-track procedure in view of the fact that the child was currently residing in a Member State where she does not have a passport and therefore does not have travel documents.

The referring court expressly emphasized, *inter alia*, that according to the Bulgarian constitution, which is at the top of the national hierarchy of legal sources, the child's Bulgarian nationality is not questionable. It is therefore clear that the child has Bulgarian citizenship, but is unable to exercise the rights attached to citizenship, and thus to EU citizenship, *i.e.* the child has become a *de facto* stateless person on the basis that Bulgaria does not recognize same-sex marriage.

In addition, the judgment explains the that EU law[16] requires the Member States, in this case the Bulgarian authorities, the obligation to issue an identity card or passport. In so far as Bulgarian law requires a Bulgarian birth certificate to be drawn up before a Bulgarian identity card or passport is issued, a Member State cannot rely on its national law as justification for refusing to draw up such an identity card or passport.[17]
Consequently, in my view, the CJEU delivered a crucial judgement, which is in fact tried to find the solution for *de facto* statelessness. The decision is crucial given that, although the CJEU has repeatedly ruled that citizenship is essentially left in the competence of the Member States, however, in the context of the right of free movement and recognition of family ties, it ruled that birth certificates must always be issued by the Member State to its own nationals, thus,

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[15] Judgment of 14 December 2021, *Case C-490/20., V.M.A. kontra Stolichna obshtina, rayon „Pancharevo“*, ECLI:EU:C:2021:1008

[16] Directive (EC) No. 2004/38 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 amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC
Article 4(3): “Member States shall, acting in accordance with their laws, issue to their own nationals, and renew, an identity card or passport stating their nationality.”

[17] *Case C-490/20., V.M.A. kontra Stolichna obshtina, rayon „Pancharevo“*, para. 45.

albeit indirectly, avoiding *de facto* statelessness. In my view, on the basis of the arguments presented above, this decision can be considered as an important milestone in the abolition of *de facto* statelessness.

2.4. JY Case

On 18 January 2022, the CJEU delivered its judgment in case C-118/20 JY,[18] which is the latest in a series of legal developments in the EU on statelessness. In the proceedings which formed the basis of the reference for a preliminary ruling, JY applied for Austrian nationality; at the time of his application, was an Estonian national. The Austrian authorities eventually rejected the application for naturalization on the grounds that the applicant did not fulfil the conditions of public security and public order, as he had committed several offences. As a result of the Austrian authorities' refusal, the applicant became stateless, since the acquisition of Austrian nationality is conditional upon proof of the cessation of his former nationality, which was ceased two years before the Austrian authorities' decision.

JY's appeal against this decision was dismissed and the case was referred to the CJEU. In doing so, the court concerned referred two questions to the CJEU[19]; whether does the situation of a person who has renounced her only nationality of a Member State of the European Union, and thus her citizenship of the Union, in order to obtain the nationality of another Member State, having been given a guarantee by the other Member State of grant of the nationality applied for, and whose possibility of recovering citizenship of the Union is subsequently eliminated by revocation of that guarantee, fall, by reason of its nature and its consequences, within the scope of EU law, such that regard must be had to EU law when revoking the guarantee of grant of citizenship? The second questions is based on the first one, since if the answer is affirmative, is it for the competent national authorities, including any national courts, involved in the decision to revoke the guarantee of grant of nationality of the Member States, to establish whether the revocation of the guarantee that prevented the recovery of citizenship of the Union is compatible with the principle of proportionality from the point of view of EU law in terms of its consequences for the situation of the person concerned?

The CJEU stated in its judgment that JY could not be considered to have renounced his EU citizenship voluntarily, since, given that the received assurance from the hosting Member State, *i.e.* Austria, Austrian citizenship would have been acquire in the future, JY's purpose in applying for the termination of the Estonian citizenship was to fulfil the conditions for acquiring Austrian citizenship and at the same time continue to enjoy the rights conferred by EU citizenship. At the same time, the CJEU emphasized, that the development of rules on the conditions for the acquisition and loss of nationality is essentially in the competence of the Member States, although in cases falling within the scope of EU law, national rules must respect it. In that regard, the CJEU held that the withdrawal of the guarantee of nationality places the applicant in a situation which made *JY* unable to exercise the rights deriving from EU citizenship and that, consequently, the matter falls within the scope of EU law.[20]

On the question of proportionality, the judgment established that an essential element of the principle of proportionality under EU law is the assessment and examination of the situation of the person concerned and his or her family in relation to the possible consequences of the withdrawal of the guarantee of nationality.

[18] Judgment of the Court (Grand Chamber) of 18 January 2022, *Case C-118/20., JY Case*, ECLI:EU:C:2022:34
[19] *Case C-118/20., JY Case* para. 28.
[20] *Case C-118/20., JY Case* para. 44.

In my view, the *JY* case is another milestone in the EU legal dimension of statelessness. In line with previous case law, the CJEU highlighted once again the importance of the principle of proportionality and the inescapable relevance of EU citizenship and the rights it confers. It went beyond its previous case law, since it also declared the case in the main proceedings to be covered by EU law, taking into account the fact that, although the applicant no longer had Estonian nationality, he had a guarantee of Austrian nationality, the withdrawal of which would have made it impossible to enjoy the benefits and rights conferred by EU citizenship.

3. Concluding Remarks

As a development of EU law in the pioneering *Rottman* case principle of proportionality was laid down for Member States' legislation on the acquisition and loss of nationality, because it affects the exercise of citizenship of the Union and the rights attached to it, and established its competence in these matters.

After the *Rottman* case, the CJEU confirmed the principle of proportionality in the *Tjebbes* case, and then, with regard to the case law relevant to the present study, in the *JY* case, which serves more evidence of the judicially determined direction of legal development than of the principle of proportionality. As regards the right to nationality, the CJEU in the *Pancharevo* case made a very important ruling that it ruled in favor of avoiding *de facto* statelessness by interpreting EU law as requiring the issue to citizens of identification documents enabling them to exercise effectively the nationality and rights conferred by it on a person who is a national but *de facto* stateless. In this way, the CJEU has taken a major step towards reducing child statelessness.

Consequently, I believe that the CJEU has been taking a step forward to the reduction of statelessness in the Member States with the development of EU law throughout the aforementioned cases. However, it is still important to take into account that determining the members of the body of the *demos* is still one of the most relevant and crucial tool and aspect regarding state sovereignty which cannot be challenged. The CJEU has got competence over citizenship issues only if – mainly the loss of it – affects the rights which are connected to EU citizenship.