The Disruptive Influence of EU Law in Nationality Matters: The Genuine Link Trajectory and Judicial Engineering in *Udlændinge- og Integrationsministeriet*

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Introduction

Who is a Union citizen and who is not? The sacredly-held paradigm that every member state can decide who its nationals are – still reverberating in the judgments of *Micheletti*[1] and *Kaur*[2] – has been quickly evaporating ever since *Rottmann*,[3] and subsequently *Tjebbes*,[4] *Wiener Landesregierung*[5] and *Udlændinge- og Integrationsministeriet*.[6] *Udlændinge- og Integrationsministeriet*, as the latest judgment decided by the Grand Chamber of the Court of Justice,[7] not only

[1]ECJ 7 July 1992, Case C-369/90, *Micheletti and Others* v *Delegación del Gobierno en Cantabria*, ECLI:EU:C:1992:295.

[2]ECJ 20 February 2001, Case C-192/99, *Kaur*, ECLI:EU:C:2001:106.

[3]ECJ 2 March 2010, Case C-135/08, *Rottmann*, ECLI:EU:C:2010:104.

[4]ECJ 12 March 2019, Case C-221/17, *Tjebbes and Others*, ECLI:EU:C:2019:189.

[5]ECJ 18 January 2022, Case C-118/20, *Wiener Landesregierung (Révocation d'une assurance de naturalisation)*, ECLI:EU:C:2022:34.

[6]ECJ 5 September 2023, Case C-689/21, *Udlændinge- og Integrationsministeriet (Perte de la nationalité danoise)*, ECLI:EU:C:2023:626.

[7]Note that the Court, sitting in chamber of five and building on the judgment *X v Udlændinge- og Integrationsministeriet*, decided the case in *Stadt Duisburg (Perte de la nationalité allemande)* in April 2024; ECJ 25 April 2024, Case C-684/22, *Stadt Duisburg (Perte de la nationalité allemande)*, ECLI:EU:C:2024:345.

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illustrates the growing influence of EU law, but raises some further questions. While the judgment underscores the underlying genuine link trajectory in EU law that is set to challenge old and new practices of member states in nationality matters,[8] the assessment of the ECJ also provides a cautionary tale about the incursions of EU law into the procedural domain. There are good reasons to doubt the prudence of channelling the disruptive influence of EU law through the national courts alone. To this end, the following analysis will first outline the background of the case of *Udlændinge- og Integrationsministeriet*, the Opinion of Advocate General Szpunar and the judgment of the ECJ, before, in the second part, addressing the genuine link trajectory in the case law and its implications for the conception of nationality in the context of EU law. In the third part, a closer look will then be taken at the procedural dimension of the case, and the wider ramifications of the approach taken by the Court will be assessed.

Background of the case

The case of *Udlændinge- og Integrationsministeriet* revolves around X, a born Danish and American national, who, upon turning 22, lost her Danish nationality.[9] The reason for this loss of Danish nationality – and Union citizenship by extension – lies in section 8 of the Law on Danish nationality, which sets out the presumption that any Dane who was born abroad and had never resided or lived in Denmark is *ex lege* perceived to have no genuine link with Denmark.[10] The *ex lege* loss of Danish nationality upon turning 22 aims to make sure that Danish nationality is not simply passed on for generations without a genuine link to Denmark.[11] According to section 8 of the Law on Danish nationality, the loss of Danish nationality can be prevented if the person concerned lodges an application to retain his or her nationality, between the age of 21 and 22, on the basis of an otherwise substantiated genuine link with Denmark.[12] In line with the relevant practice, an existing genuine link can thereby either be inferred from a residence in Denmark of at least one year or from shorter stays that 'relate to

[8] *See*, *inter alia*, M. van den Brink, 'Revising Citizenship within the European Union: Is a Genuine Link Requirement the Way Forward?', 23 *German Law Journal* (2022) p. 79; I. Gambardella, '*JY v Wiener Landesregierung*: Adding Another Stone to the Case Law Built Up by the CJEU on Nationality and EU Citizenship', 7 *European Papers* (2022) p. 399; and L.-J. Wagner, 'The Case of *Wiener Landesregierung*: The Pitfalls of Reckless Driving on the Winding Roads of Nationality', *Austrian Law Journal* (2023) p. 1.

[9] *Udlændinge- og Integrationsministeriet*, *supra* n. 6, paras. 10 and 13.

[10] Ibid., para. 7. This provision is, however, subject to the restriction that the person concerned does not become stateless.

[11] Ibid., para. 34.

[12] Ibid., para. 8ff.

periods of military service, higher education, training or recurring holidays lasting a certain length of time'.[13]

In the case at hand none of these criteria seem to have been met by X.[14] Her application to remain a Danish national, however, was not rejected on these substantive grounds but because her application was lodged after her 22nd birthday, at a time when X had already lost her Danish nationality.[15] X appealed and demanded the annulment of this decision and a reconsideration of her case.[16] The case eventually came before the High Court of Eastern Denmark, which, due to the fact that the loss of Danish nationality also meant that X had lost her status as a Union citizen, decided to refer the following question to the ECJ:

> Does Article 20 TFEU, in conjunction with Article 7 [of the CFR], preclude legislation of a Member State, such as that at issue in the main proceedings, under which citizenship of that Member State is, in principle, lost by operation of law on reaching the age of 22 in the case of persons born outside that Member State who have never lived in that Member State and who have also not resided there in circumstances that indicate a close attachment to that Member State, with the result that persons who do not also have citizenship of another Member State are deprived of their status as Union citizens and of the rights attaching to that status, taking into account that it follows from the legislation at issue in the main proceedings that:
>
> (a) a close attachment to the Member State is presumed to exist, in particular, after a total of one year's residence in that Member State,
> (b) if an application to retain citizenship is submitted before the person reaches the age of 22, authorization to retain citizenship of the Member State under less stringent conditions may be obtained and for that purpose the competent authorities must examine the consequences of loss of citizenship, and
> (c) lost citizenship can be recovered after the person concerned reaches the age of 22 only by means of naturalization, to which a number of requirements are attached, including that of uninterrupted residence in the Member State for a longer duration, although the period of residence may be somewhat shortened for former nationals of that Member State?'[17]

[13]Opinion of AG Szpunar of 26 January 2023 in Case C-689/21, *Udlændinge- og Integrationsministeriet (Perte de la nationalité danoise)*, ECLI:EU:C:2023:53, para. 22.

[14]Ibid., para. 11.

[15]*Udlændinge- og Integrationsministeriet*, *supra* n. 6, para. 13.

[16]Ibid., para. 15.

[17]Ibid., para. 24.

Opinion of Advocate General Szpunar

Advocate General Szpunar delivered his Opinion on 26 January 2023, some nine months before the judgment of the ECJ. At the outset, it is noteworthy that Szpunar had been the Advocate General in the case of *Wiener Landesregierung*[18] and also provided the Opinion in the most recent case of *Stadt Duisburg*.[19]

In his Opinion, Szpunar remained on familiar ground and assessed the case in light of the judgments in *Rottmann*, *Tjebbes* and *Wiener Landesregierung*.[20] In accordance with these cases, the Advocate General established that there are two principles that seem to guide the Court's decisions.[21]

First, the loss, but also the acquisition, of a member state's nationality are subject to having due regard to EU law. EU law, in this sense, does not call into question the member states' competence in nationality matters, but requires member states to set out conditions that are compatible with EU law because member state nationality and Union citizenship are axiomatically intertwined.[22]

This led the Advocate General to the second principle, under which it must be possible to carry out a judicial review 'in the light of EU law and, in particular, in the light of the principle of proportionality'.[23] As the Advocate General pointed out, it may be inferred from this that there must be the possibility of an individual examination to assess whether the consequences of the loss of Union citizenship are consistent with the rights set out in EU law and the Charter in particular, and, if that is not the case, to allow for an *ex tunc* recovery of the nationality.[24] At the end of these considerations that guide the assessment under EU law, the Advocate General quite pointedly stated that 'the examination of the proportionality of the loss of nationality entailing the loss of citizenship of the European Union ... must be carried out comprehensively and scrupulously by the competent authorities and the national courts'.[25]

Having set the scene, the Advocate General then proceeded to the application of these principles to the case at hand. In the first step of the ensuing proportionality assessment, the Advocate General established that the relevant provision of the Law on Danish nationality pursues a legitimate aim in 'that it is

[18]Opinion of AG Szpunar 1 July 2021, Case C-118/20, *Wiener Landesregierung*, ECLI:EU:C:2021:530.

[19]Opinion of AG Szpunar 14 December 2023, Case C-684/22, *Stadt Duisburg (Perte de la nationalité allemande)*, ECLI:EU:C:2023:999.

[20]*Compare* the extensive assessment in the Opinion of AG Szpunar, *Udlændinge- og Integrationsministeriet*, *supra* n. 13, para. 29ff.

[21]Ibid., para. 44.

[22]Ibid., para. 45.

[23]Ibid., para. 46.

[24]Ibid., para. 46.

[25]Ibid., para. 46.

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'.[26] In line with the considerations of the Court in *Tjebbes*[27] but also in line with Article 7 para 1(e) of the European Convention on Nationality[28] it is thus in principle compatible if a member state makes the retention of its nationality subject to the existence of a genuine link.[29] To this end, member states can set out that 'criteria such as residence in its territory for periods whose (cumulative) duration is less than one year are not indicative of a genuine link with that Member State' and [moreover] can set an age limit 'for the examination of whether the conditions for loss of nationality are satisfied'.[30]

In a sidestep – 'beyond the matter before the referring court'[31] – the Advocate General noted that the criteria in the Law on Danish nationality would be incompatible with EU law if they were to be applied to a Danish child who had been living with its parents in another member state, and not in a third country as X had. Such an indiscriminate application that does not distinguish between living in a third country and another member state would undermine the right to free movement in Article 21 TFEU. Otherwise 'the exercise of the rights attached to his or her parents' citizenship of the European Union would paradoxically result in that person losing all the rights attached to his or her citizenship of the European Union'.[32] Concurring with the position of the Commission, the Advocate General concluded that 'living and residing in the territory of the European Union should not be regarded as a severing of the genuine link between a citizen of the European Union and his or her Member State of origin'.[33]

Going back to the case at hand, the Advocate General turned to the procedural dimension that retaining Danish nationality was only possible if a person in the position of X lodged an application to retain his or her Danish nationality after his or her 21st and before his or her 22nd birthday. This, according to the Advocate General, raises two issues: first, the limited timeframe for an application that leads to an individual assessment; and, second, compounding that, the lack of an alternative way to instigate an individual assessment and recover an already lost nationality.[34]

[26]Ibid., para. 55.
[27]*Cf Tjebbes*, *supra* n. 4, para. 37.
[28]European Convention on Nationality, 6 November 1997, E.T.S. No. 166.
[29]Opinion of AG Szpunar, *Udlændinge- og Integrationsministeriet*, *supra* n. 13, para. 56ff.
[30]Ibid., para. 59.
[31]Ibid., para. 60.
[32]Ibid., para. 61.
[33]Ibid., para. 65.
[34]Ibid., para. 67.

With regard to the first issue, the Advocate General noted that the understanding of the Danish government that, according to the Court in *Tjebbes*, it is compatible with EU law to restrict the possibility for an individual proportionality assessment,[35] was wrong.[36] Rather, an individual proportionality assessment must be possible in all situations.[37] The procedural limitation under the Law on Danish nationality and practice, which restricts the timeframe for the submission of an application to one year – between the age of 21 and 22 – implies that there is a 'systematic lack of an individual examination for persons who have submitted their application after the age of 22'.[38] Although member states can set a deadline for the *ex lege* loss of their nationality, a procedural restriction like the one in question could not be deemed compatible with EU law, as 'the competent authorities or, as the case may be, the national courts must be in a position to examine individually *every* loss of nationality, entailing loss of citizenship of the European Union'.[39]

As regards the second point, the Advocate General noted that for a person such as X, there was therefore no way of re-acquiring Danish nationality other than through the general naturalisation procedure.[40] This cannot be considered compatible with EU law, as the Court has made clear in *Tjebbes*[41] that there must be a possibility to recover a lost nationality *ex tunc* if the loss of that nationality has disproportionate consequences from the point of view of EU law.[42]

In sum, Advocate General Szpunar therefore concluded that:

> Article 20 TFEU, read in the light of Article 7 of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding legislation of a member state which provides, under certain conditions, for the loss of the nationality of that member state by operation of law upon reaching the age of 22 on the ground of lack of a genuine link where no application to retain the nationality has been made before that age, entailing, in the case of persons who are not also nationals of another member state, the loss of their citizenship of the European Union and the rights attaching thereto, without there being, where that application to retain nationality is made after the age of 22, an individual examination, based on the principle of proportionality, of the consequences of that loss for their situation in the light of EU law, coupled with the possibility of having

[35]Ibid., para. 72.
[36]Ibid., para. 74.
[37]Ibid., para. 79.
[38]Ibid., para. 83.
[39]Ibid., para. 87.
[40]Ibid., para. 89.
[41]*Cf Tjebbes*, *supra* n. 4, para. 42.
[42]Opinion of AG Szpunar, *Udlændinge- og Integrationsministeriet*, *supra* n. 13, para. 93ff.

the persons concerned recover their nationality *ex tunc* when they apply for a travel document or any other document showing their nationality.[43]

The judgment of the Court

The Grand Chamber of the Court delivered its judgment on 5 September 2023 and, as in the cases of *Tjebbes* and *Wiener Landesregierung*, Judge Lycourgos served as rapporteur. This procedural set-up indicates a continuation with the respective case law. It is nevertheless noteworthy that the Court, once again,[44] decided to address this case in the Grand Chamber, underlining the fact that issues of nationality have been considered particularly difficult and/or important.[45]

At the outset the Court recalls its standing reference 'it is for each Member State, having due regard to international law, to lay down the conditions for acquisition and loss of nationality'.[46] This, however, does 'not alter the fact that, in situations covered by EU law, the national rules concerned must have due regard to the latter'.[47] The Edinburgh Decision and Declaration No. 2, which are aimed at clarifying the concept of nationality for the definition of the scope of EU law *ratione personae* are merely 'instruments for the interpretation of the EU Treaty' that 'have to be taken into consideration ... for the interpretation of the EU Treaty'.[48]

The obligation to observe EU law thereby stems from the fact that 'Article 20 TFEU confers on every person holding the nationality of a Member State Union citizenship, which is destined to be the fundamental status of nationals of the Member States'.[49] Losing one's nationality, as indicated in the case of X, hence means losing the status of Union citizenship and thereby necessarily falls within the ambit of EU law.

That said, the Court went on to note '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'.[50] A rule like section 8(1) of the Law on Danish nationality, which sets out that 'Danish nationals born abroad, who have never

[43]Ibid., para. 96.

[44]Note, however, that *Stadt Duisburg*, *supra* n. 7, was not decided in the Grand Chamber.

[45]*See* on the requirements to have a case decided in the Grand Chamber Art. 60(1) Rules of Procedure of the Court of Justice of the European Union.

[46]*Udlændinge- og Integrationsministeriet*, *supra* n. 6, para. 28; as well as *Tjebbes*, *supra* n. 4, para. 30; *Rottmann*, *supra* n. 3, para. 39; and, *Micheletti*, *supra* n. 1, para. 10.

[47]*Udlændinge- og Integrationsministeriet*, *supra* n. 6, para. 28.

[48]Ibid., para. 27.

[49]Ibid., para. 29.

[50]Ibid., para. 31.

been resident in Denmark and have also not spent time there in circumstances indicating a genuine link with Denmark, are to lose, by operation of law, Danish nationality at the age of 22, unless they would thereby become stateless', is therefore in principle not precluded by EU law.[51] In line with its previous case law, the Court thereby reaffirmed that the first step in the assessment of whether the loss of a member state's nationality is compatible with EU law reflects the limitations of sovereignty of member states under international law. The legitimate grounds the Court has so far accepted have indeed all been underpinned by references to the European Convention on Nationality or the Convent on the Reduction of Statelessness.[52] Although the Court in the case at hand does not reference these international conventions directly, the reference made to *Tjebbes*[53] leaves little doubt that the Court, again, is guided by the fact that the loss of a genuine link – so that 'Danish nationality [is not] being handed down from generation to generation to persons established abroad who have no knowledge of or link with the Kingdom of Denmark'[54] – is internationally conceived as a legitimate reason for the withdrawal of nationality.

The Court in this context also noted it was not necessary 'to address the legitimacy of such criteria in so far as, for the purposes of that assessment, they do not draw a distinction between the birth and residence or stay of the person concerned in a Member State and the birth and residence or stay of that person in a third country'.[55] Thus, unlike the Advocate General, the Court left open the question of whether the assessment would have turned out differently had X resided in another member state. Considering the facts of the case and the questions referred to the Court, this approach is understandable. At the same time, it leaves an important issue unanswered, which is bound to come before the Court eventually.

After establishing that section 8(1) of the Law on Danish nationality is, in principle, compatible with EU law, the Court proceeded to address the issue of a proportionality assessment in light of EU law. The loss of the fundamental status of the individual must, as the Court recalls, entail an individual examination of 'the consequences of that loss for the situation of the person concerned and, if relevant, for that of the members of his or her family, from the point of view of EU law'.[56] The obligation to provide such a proportionality assessment, moreover, must, where appropriate, be complemented with the possibility to enable a person

[51]Ibid., paras. 33 and 37.

[52]*Cf* in this respect the references in *Rottmann*, *supra* n. 3, para. 53; *Tjebbes*, *supra* n. 4, para. 37; and *Wiener Landesregierung*, *supra* n. 5, para. 55.

[53]*Udlændinge- og Integrationsministeriet*, *supra* n. 6, para. 32.

[54]Ibid., para. 34.

[55]Ibid., para. 36.

[56]Ibid., para. 38.

who has lost their nationality to recover it – and with it their status as a Union citizen – *ex tunc*.[57] The Court's approach to this end closely mirrors the approach outlined in *Tjebbes*.

The focus of the judgment, however, is not on the material modalities of the proportionality assessment, but rather revolves around the procedural dimension and the limitations set out in the law and practical application of section 8(1) of the Law on Danish nationality. The Court in this context started its considerations by stating that it is 'for the national legal system of each Member State to lay down procedural rules to ensure the safeguarding of rights which individuals derive from EU law'.[58] The procedural autonomy of member states, nevertheless, is limited by the principle of effectiveness. Therefore, the procedures laid down by the member state must 'not make it in practice impossible or excessively difficult to exercise rights conferred by EU law'.[59] While procedural limitations in the interest of legal certainty can hence be compatible with EU law, they must be reasonable – to avoid making it impossible or excessively difficult to rely on rights set out in EU law.[60]

Based on this outline, the Court established that the limitations under the Law on Danish nationality for Danish nationals, who were born abroad and have not resided in Denmark, to apply for the retention of their nationality and thereby ask for an 'individual examination of the proportionality of the consequences, from the point of view of EU law',[61] were incompatible with the principle of effectiveness.[62] This is, first, because the limitation to apply for the retention of Danish nationality between the age of 21 and 22 'runs even if that person has not been duly informed by the competent authorities of the fact that he or she is exposed to the imminent loss of Danish nationality by operation of law, and that he or she is entitled to apply, within that period, for the retention of that nationality'.[63] Second, the Court notes that, under the relevant Law on Danish nationality, the individual examination of an existing genuine link is based 'on all the relevant matters which may have arisen up to his or her 22nd birthday'[64] and that it therefore must be possible 'to raise such matters after his or her 22nd birthday'.[65] Consequently, where the national legislation has the effect of causing the loss of nationality and Union citizenship by extension 'on the date on which

[57]Ibid., para. 40.
[58]Ibid., para. 41.
[59]Ibid., para. 41.
[60]Ibid., para. 42.
[61]Ibid., para. 46.
[62]Ibid., para. 48.
[63]Ibid., para. 47.
[64]Ibid., para. 49.
[65]Ibid., para. 49.

he or she reaches the age of 22, that person must have a reasonable period in which to make a request … for an examination of the proportionality of the consequences of that loss' and this must 'extend, for a reasonable length of time, beyond the date on which that person reaches that age'.[66] In essence, this means that while member states can legitimately set the age of 22 as a cut-off date for having established a genuine link with their home member state, it must be possible for the person concerned to apply for an individual assessment of such a genuine link beyond that date. Coupled with the obligation to make sure that, where appropriate, the individual concerned is able to recover his or her nationality *ex tunc*, the Court set out a comprehensive mechanism to safeguard the status of nationality. As the recurring reference to Union citizenship as the precursor for 'the effective exercise of the rights which citizens of the Union derive from Article 20 TFEU'[67] shows, these considerations are very much underpinned by the importance of the status of Union citizenship as 'the fundamental status of nationals of the Member States'.[68]

In view of the central importance of Union citizenship, it is perhaps not surprising that the Court did not stop there, but added some further instructions:

> Failing that, … competent national authorities and courts must be in a position to examine, as an ancillary issue, the proportionality of the consequences of loss of nationality and, where appropriate, to have the person concerned recover his or her nationality *ex tunc* in the context of an application by that person for a travel document or any other document showing his or her nationality, even if such an application has not been lodged within a reasonable period ….[69]

The Court thus laid out a way to overcome the apparent procedural incompatibilities of section 8(1) of the Law on Danish nationality in any case. In doing so, the Court also rejected the Danish government's argument that a new naturalisation process, in which an individual like X could 'recover' her nationality, could compensate for the insufficient procedural framework. This, as the Court made clear, would otherwise be 'tantamount to accepting that a person could be deprived, even for a limited period, of the possibility of enjoying all the rights conferred on him or her by virtue of his or her citizenship of the Union, without it being possible for those rights to be restored for that period'.[70]

[66]Ibid., para. 50.

[67]*See* ibid., para. 48 and similar in para. 51.

[68]*See* ibid., para 29; as well as ECJ 20 September 2001, Case C-184/99, *Grzelczyk*, ECLI:EU:C:2001:458, para. 31.

[69]*Udlændinge- og Integrationsministeriet*, *supra* n. 6, para. 52.

[70]Ibid., para. 58.

In doing so, the Court not only went beyond the Opinion of Advocate General, but made clear that, whatever the procedural circumstances may be, there must always be a way for an individual proportionality examination in light of EU law.

On the material substance of the proportionality examination, the Court, rather briefly, recapitulated that 'the loss of nationality is consistent with the fundamental rights guaranteed by the Charter, the observance of which the Court ensures, and specifically the right to respect for family life as stated in Article 7 of the Charter'[71] as well as Article 24 paragraph 2 of the Charter.

From a substantive perspective, the judgment is thus very much in line with its previous case law, emphasising that the loss of a member state's nationality must be subject to a proportionality assessment that considers the individual relationships and ties within the applicant's member state and the EU at large. The procedural aspects, however, have a significant and broader impact on the 'autonomy' of member states to define the procedures for the loss of nationality and Union citizenship. As such, the loss of nationality and, consequently, the loss of Union citizenship can only be deemed compatible with EU law if:

- there exists an opportunity to lodge, within a reasonable period, an application for a retroactive retention or recovery of the nationality on the basis of an individual proportionality assessment, assessing the consequences of the loss of nationality from the point of view of EU law;[72]
- the period for lodging such an application extends to a reasonable length of time beyond the date on which the person concerned reaches the age limit in question and cannot begin to run unless those authorities have duly informed that person;[73]
- and if these criteria are not met, authorities are in a position to carry out such an individual proportionality examination, as an ancillary issue, in the context of an application by the person concerned for a travel document or any other document showing his or her nationality.[74]

In short, the judgment concerns two main points: the legitimacy of using a genuine link as a basis for loss of nationality, and the procedural aspects of conducting a proportionality test. Prima facie, *Udlændinge- og Integrationsministeriet* thus runs along the trodden paths of *Rottmann*, *Tjebbes* and *Wiener Landesregierung*, which have similarly been structured along the lines of establishing a legitimate ground and further indications on how to conduct a

[71]Ibid., para. 55.
[72]Ibid., para. 50.
[73]Ibid., para. 51.
[74]Ibid., para. 52.

proportionality assessment in light of EU law.[75] Upon closer examination, the judgment, however, provides important insights into a genuine link-based conception of nationality in EU law and the ever-growing influence of EU law on the procedural aspects of nationality.

The genuine link trajectory

Nationality for the purpose of EU law

Udlændinge- og Integrationsministeriet is not the first judgment in which the Court had to assess whether the – assumed – loss of a genuine link could provide a legitimate reason for the loss of nationality and Union citizenship by extension. In line with *Tjebbes*,[76] the Court accepted that 'it is also legitimate for a Member State to take the view that nationality is the expression of a genuine link'[77] and that Denmark therefore could establish the loss of Danish nationality at the age of 22 if the person concerned was born abroad, had never resided in Denmark and had also not spent time there, all indicating the lack of a genuine link with Denmark.[78] Nationality, according to the Court, is after all to be understood as a 'special relationship of solidarity and good faith between [a Member State] and its nationals and also the reciprocity of rights and duties, which form the bedrock of the bond of nationality'.[79]

And, while questions about the nationality of member states are 'to be settled solely by reference to the national law of the Member State',[80] the Court rejected the argument that member states retain an absolute right to determine the ambit of the Treaties' *ratione personae*.[81] The Edinburgh Decision and Declaration No. 2 on nationality are only interpretative instruments and consequently have no normative meaning.[82] This side-note of the Court is important because it makes clear that, contrary to voices in the literature,[83] neither the Edinburgh Decision or

[75] *Cf Rottmann*, *supra* n. 3, para. 54ff; *Tjebbes*, *supra* n. 4, para. 39ff; *Wiener Landesregierung*, *supra* n. 5, para. 54ff and para. 58ff.

[76] *See Tjebbes*, *supra* n. 4, para. 35.

[77] *Udlændinge- og Integrationsministeriet*, *supra* n. 6, para. 32.

[78] Ibid., para. 33. This conclusion is subject to the caveat that he or she does not become stateless.

[79] Ibid., para. 31.

[80] Declaration No. 2 on Nationality of a Member State, O.J. 1992 C 191.

[81] *Udlændinge- og Integrationsministeriet*, *supra* n. 6 para. 27.

[82] *Cf* on this S. Hall, *Nationality, Migration Rights and the Citizenship of the Union* (Martinus Nijhoff 1995) p. 112.

[83] *See*, *inter alia*, D. Kochenov and A. Dimitrovs, 'EU Citizenship for the Latvian "Non-Citizens": A Concrete Proposal', 38 *Houston Journal of International Law* (2013) p. 55 at p. 60ff; G.R. de Groot, 'Towards a European Nationality Law', 8 *Electronic Journal of Comparative Law* (2004) p. 1; van den Brink, *supra* n. 8, at p. 95; S. Peers, 'Citizens of Somewhere Else? EU

Declaration No. 2, nor any other declaration can be construed as a legal basis for member states to alter the personal scope of EU law by 'redefining' their understanding of nationality for the purpose of EU law.[84]

The underpinning genuine link from the point of view of EU law

Given that the notion of nationality, as used in Article 20 TFEU, reflects a specific understanding of nationality – for and within the context of EU law[85] – it takes only a little imagination to tweak and reassemble the relevant paragraphs of the judgment to infer that nationality as a 'special relationship of solidarity and good faith between [a Member State] and its nationals' associated with 'the reciprocity of rights and duties, which form the bedrock of the bond of nationality' not only allows member states to make nationality dependent on a genuine link but indeed requires a certain discernable form of a genuine link. In line with *Tjebbes* and *Lounes*,[86] the present judgment underscores a trajectory towards a 'Unionised' understanding of nationality that affects and indeed produces effects beyond the remit of EU law. As in *Tjebbes*, the Court in *Udlændinge- og Integrationsministeriet* also called for an *ex tunc* recovery of Danish nationality if the loss of said nationality was disproportionate from the point of view of EU law. Such a restoration of Danish nationality, however, not only implies a recovery of the Danish nationality in the context of EU law but for all other domestic and international purposes as well.[87]

The central question from the point of view of EU law, addressed under the heading of proportionality, is whether or not the loss of nationality and Union citizenship by extension is detrimental to the 'normal development of his or her family and professional life' and to this end infringes the right to respect for family life under Article 7 Charter. Although member states are in principle free to regulate the loss of nationality on the basis of a generalised assessment of a genuine link, which *inter alia* may draw on criteria such as the place of birth of the

Citizenship and Loss of Member State Nationality', *EU Law Analysis*, 27 March 2019, https://eulawanalysis.blogspot.com/2019/03/citizens-of-somewhere-else-eu.html, visited 26 December 2024; C. Schönberger, *Unionsbürger* (Mohr Siebeck 2005) p. 276.

[84]*See* on this also L.-J. Wagner, 'Member State Nationality under EU Law – To Be or Not to Be a Union Citizen?', 28 *Maastricht Journal of European and Comparative Law* (2021) p. 304 at p. 314ff.

[85]Ibid.

[86]In *Lounes*, the Court equated the naturalisation of a Union citizen in another member state with the permanent integration in the society of that member state; *see* ECJ 14 November 2017, Case C-165/16, *Lounes*, ECLI:EU:C:2017:862, para. 56ff.

[87]Against this background, there has been criticism that the Court went beyond the scope of the Treaties. *See*, *inter alia*, M. van den Brink, 'Bold, but Without Justification? *Tjebbes*', 4 *European Papers* (2019) p. 409 at p. 413.

individual concerned or whether he or she had resided in his or her home country, there must be room for an individual assessment. And it is this individual assessment of the personal and professional under EU law that may override the initial (domestic) evaluation of the existence of a genuine link. In other words, the individual proportionality assessment under EU law thus turns into a substitute assessment of a genuine link. This understanding is admittedly supported by the structure of the assessment, which, in essence, revolves around the question of whether the individual has substantive personal and professional ties within his or her home member state or the EU at large and would face, as a consequence of the loss of nationality and Union citizenship, particular difficulties in retaining 'genuine and regular links with members of his or her family, to pursue his or her professional activity or to undertake the necessary steps to pursue that activity'.[88]

The fundamental status of the individual under EU law is thus laden with an understanding that the individual is – permanently[89] – integrated into the society of his or her member state. Despite the exclusive competence of member states to lay down the rules governing the acquisition and loss of nationality, member states are therefore also constrained by a Unionised understanding of nationality. This means that a Union citizen may not lose his or her nationality if, in light of the warranted proportionality assessment, there are (still) sufficient genuine links from the point of view of EU law.

It is easy to see that this Unionised understanding of nationality and the obligation to have due regard to EU law[90] can also be employed to work in the opposite direction, meaning that the conferral of nationality without any discernible links to that member state may be qualified as incompatible with EU law in general and Article 20 TFEU in particular. Seen from this perspective, the genuine link vector in *Udlændinge- og Integrationsministeriet* may therefore also buttress the position of the Commission[91] in the pending infringement action

[88] *Tjebbes*, *supra* n. 4, para. 46.

[89] *Cf Lounes*, *supra* n. 86, para. 57.

[90] In this context it seems worth recalling that, ever since *Micheletti*, *supra* n. 1, the Court has held that the obligation to have due regard to EU law not only concerns the loss but also the acquisition of nationality.

[91] *See* Commission, 'Investor Citizenship and Residence Schemes in the European Union', COM(2019)12 final, 23 January 2019, p. 5. It is submitted that there is a substantive body of literature which argues that the doctrine of a genuine link relates to a 'romantic time' of public international law (*see also* Opinion of AG Tesauro 30 January 1992 in Case C-369/90, *Micheletti*, ECLI:EU:C:1992:47, para. 5) and that, based on the division of competences, member states are free to employ investment programmes in order to facilitate access to their nationality; *see*, *inter alia*, M. Tratnik and P. Weingerl, 'Investment Migration and State Autonomy: The Quest for the Relevant Link', *Investment Migration Working Paper* 2019/4, https://investmentmigration.org/wp-content/uploads/2020/09/IMC-RP-2019-4-Tratnik-and-Weingerl.pdf, visited 26 December 2024; H.U. Jessurun d'Oliveira, 'Union Citizenship and Beyond', in N. Cambien et al. (eds.), *European*

against Malta[92] and its citizenship investment scheme, which provides for pecuniary access to Malta's nationality and Union citizenship.[93]

Thinking ahead – the creation and loosening of genuine links in the EU

In accordance with the overall tenor of the judgment, one could leave things at this point. However, there is one aspect which the Court intentionally left aside, and which seems worth further comment.

Section 8(1) of the Law on Danish nationality sets out that, in principle, everyone born and living outside Denmark is to lose his or her Danish nationality at the age of 22. As noted by the Court,[94] the provision thereby does not differentiate between the individual concerned living in a third country or in another EU member state. As the situation of X, who had never lived in another member state, did not require an assessment of this lack of differentiation, the Court felt no need to address this issue.[95]

While it is understandable that the Court saw no need to address this issue, this omission certainly is regrettable as it raises interesting questions, particularly regarding Article 21 TFEU and the right to free movement. An enlightening *obiter dictum* would have been more than welcome, given that other member states also have provisions which, in one way or another, imply a loss of nationality rights as a consequence of the right to free movement.[96]

The following considerations are thus an attempt to shed some light on this pertinent issue. First, it is important to keep in mind that such loss of nationality

Citizenship under Stress (Brill 2020) p. 28; P. Spiro, 'Nottebohm and "Genuine Link": Anatomy of a Jurisprudential Illusion', *Investment Migration Working Paper* 2019/1, https://investmentmigration.org/wp-content/uploads/2020/10/IMC-RP-2019-1-Peter-Spiro.pdf, visited 26 December 2024; and D. Kochenov, 'Policing the Genuine Purity of Blood: The EU Commission's Assault on Citizenship and Residence by Investment and the Future of Citizenship in the European Union', 25 *Studia Europejski - Studies in European Affairs* (2021) p. 33.

[92] *See* ECJ Case C-181/23, *European Commission v Malta*, O.J. 2023 C 173; as well as IP/22/5422, 29 September 2022.

[93] *Similar* also K. Hyltén-Cavallius, 'The Genuine Links Requirement – Both a Win and a Loss for Member State Competence in the Sphere of Nationality Law: Case C-689/21, X (Loss of Union Citizenship)', *EU Law Live*, 19 February 2024, https://eulawlive.com/op-ed-the-genuine-links-requirement-both-a-win-and-a-loss-for-member-state-competence-in-the-sphere-of-nationality-law-case-c-689-21-x-loss-of-union-citizenship-by-kat/, visited 26 December 2024.

[94] *Udlændinge- og Integrationsministeriet*, *supra* n. 6, para. 36.

[95] *See* ibid.

[96] The Commission, for example, raised concerns about the disenfranchisement in national elections in Cyprus, Denmark, Germany, Ireland and Malta for citizens who had moved to another Member State as early as 2014 and took up this issue again in 2020; *cf* Commission, 'EU Citizenship Report 2020: Empowering Citizens and Protecting their Rights', COM(2020) 730 final, 15 December 2020, at p. 13.

in a situation similar to the case at hand, but where the individual concerned has lived in another member state, is problematic not only from the point of view of Article 20 TFEU, but also of Article 21 TFEU.[97] A national measure that leads to the loss of nationality as a consequence of making use of the right to free movement clearly makes living abroad in another member state less attractive and hence interferes with Article 21 TFEU. The question of whether member states can set out such measures thus boils down to a question of justification. In this context, it is important to recall that the wish to protect the special bond of nationality can be qualified as a legitimate interest, in principle allowing member states to introduce provisions 'to prevent nationality being handed down from generation to generation to persons established abroad who have no knowledge of or link with'[98] the member state in question. This line of reasoning, arguably, also covers intra-EU situations where an individual, despite being a national of one member state, has exercised his or her right to free movement and has been living in another member state, without ever establishing or loosening the genuine link with his or her home member state.[99]

However, in contrast to a third country scenario, Union citizenship – and with it the right to free movement – is itself meant to allow for the integration of individuals in another (host) member state. Union citizenship, hence, not only implies that individuals – via nationality and Union citizenship – are woven into the larger structures of the legal order of the EU but that the ensuing right to free movement is meant to allow for the integration into the society of another member state.[100] This suggests that exercising the right to free movement also encompasses the possibility of loosening ties with one's own member state. Arguing that the status of nationality, which is instrumental for the right to free movement, can be withdrawn because of the latter's side effects, nevertheless, seems like a *contradictio in adiecto*. It is therefore not surprising that Advocate General Szpunar – rather apodictically – concluded 'that living and residing in the

[97]While it is not entirely clear from the case law whether Art. 20 and Art. 21 TFEU can be applied in parallel or if Art. 20 TFEU is a subsidiary norm, it is evident that the considerations with regard to encroachments to the right to residence follow similar lines; *see* e.g. Case C-165/14, *Rendón Marín*, ECLI:EU:C:2016:675, paras. 57 and 81ff.

[98]*See* Case C-689/21, *Udlændinge- og Integrationsministeriet*, *supra* n. 6, para. 34.

[99]This, as AG Szpunar has pointed out, is even true in cases where the individual concerned has been born in another member state and, as a consequence, has also acquired the nationality of the host member state; *cf* Opinion of AG Szpunar, *Udlændinge- og Integrationsministeriet*, *supra* n. 13, para. 64.

[100]*Cf Lounes*, *supra* n. 86, para. 56; as well as ECJ 13 June 2019, Case C-22/18, *TopFit and Biffi*, ECLI:EU:C:2019:497, para. 32.

territory of the European Union should not be regarded as a severing of the genuine link'.[101]

However, there is room for a more nuanced answer. In this context it is submitted that exercising the right to free movement does not necessarily mean that there can be no negative consequences for the individual concerned. Member states can restrict the right to free movement on legitimate grounds, such as preserving the special bond of nationality. The loss of nationality, however, challenges the very foundation of the right to free movement and can thus only be an *ultima ratio* instrument where no other less restrictive options are available.[102] From this perspective, limiting voting rights in national elections or withdrawing other prerogatives attached to the status of nationality may indeed be considered as a less intrusive measure to secure the special bond of nationality.

Another central aspect in the weighing of interests is whether the negative consequences for the individual can be mitigated. In an intra-EU situation, the loss of nationality implies that one can no longer rely on a right to free movement *vis-à-vis* one's host member state. In this context, it is, however, worth recalling that the right to free movement according to the Court in *Lounes* is intended to allow for the 'gradual' – and indeed permanent – integration of Union citizens into the society of another member state[103] – by becoming a national of that member state. Neither Union citizenship as such nor the right to free movement, however, provide for a right to nationality in another member state. Member states can still determine their specific integration requirements for the acquisition of their nationality, but, arguably, must provide for a – discrimination-free[104] – process to this end. However, under Article 6 paragraph 3 of the European Convention on Nationality, a legal instrument to which not all member states are a party,[105] but which has regularly been referenced in the case law of the Court,[106] '[e]ach State Party shall provide in its internal law for the possibility of naturalisation of persons lawfully and habitually resident on its territory', with the maximum period of residence before being able to lodge such an application not

[101]Opinion of AG Szpunar, *Udlændinge- og Integrationsministeriet*, *supra* n. 13, para. 65.

[102]This also implies that an assessment in light of Art. 21 TFEU, while focused on the right to free movement, should – in principle – concur with a similar assessment under Art. 20 TFEU, although the ambit of consideration within this latter context is arguably wider, as the loss of Union citizenship has repercussions beyond the right to free movement.

[103]*Cf Lounes*, *supra* n. 86, para. 56ff.

[104]If the naturalisation of Union citizens falls within the scope of EU law – as inferred from ibid., para. 36 and *Wiener Landesregierung*, *supra* n. 5, para. 43 – it follows that Art. 18 TFEU is also applicable and that naturalisation procedures must consequently be non-discriminatory.

[105]Belgium, Cyprus, Ireland, Slovenia and Spain have neither signed nor ratified the European Convention on Nationality.

[106]*Cf* in this respect the references in *Rottmann*, *supra* n. 3, para. 53; *Tjebbes*, *supra* n. 4, para. 37; and *Wiener Landesregierung*, *supra* n. 5, para. 55.

exceeding ten years. Taken together this suggests that residence in another member state for more than ten years – the maximum requirement for legal residence according to the European Convention on Nationality – indicates the establishment of sufficient societal links in that member state to open up the possibility to acquire the nationality of the host member state. This, in turn, allows for the argument that after ten years of continuous residence and the subsequent possibility of naturalisation in that member state, the withdrawal of nationality by the member state of origin due to the erosion of a genuine link could in principle be compatible with EU law. The fact that an individual in such a hypothetical case has not tried to mitigate the negative consequences by applying for naturalisation in the host member state, despite being aware that the steady erosion of the genuine link with their home member state may ultimately lead to the loss of the nationality of the home member state and consequently Union citizenship, can be regarded as a factor that may tilt the balance of interests in favour of the member state and thus render the loss of nationality, the interference with the right to free movement and Union citizenship as such, proportionate under EU law.

These considerations are further supported if one takes the view that the negative effects on the right of residence – as a Union citizen – in the host member state could also be mitigated by an analogous application of Directive 2003/109/EC, allowing former Union citizens to transition to the status of third-country nationals who are long-term residents.[107] In this case, their rights *vis-à-vis* the host member state would have an autonomous character and build on the fact that they have been residing in that member state. In keeping with the broader understanding of a genuine link – reflecting the idea of a permanent integration in the society of a member state[108] – this also suggests a move towards aligning the legal status with the factual circumstances. In other words, the status as a long-term resident reflects their relationship to and within the member state in which they have resided.[109]

[107]Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, O.J. 2004, L 16. *See*, on the application and its relationship with Union citizen's rights, ECJ 8 November 2012, Case C-40/11, *Iida*, ECLI:EU:C:2012:691, para. 75; and in particular ECJ 7 September 2022, Case C-624/20, *Staatssecretaris van Justitie en Veiligheid (Nature du droit de séjour au titre de l'article 20 TFUE)*, ECLI:EU:C:2022:639, para. 49ff.

[108]*See*, on this conception of the genuine link, Wagner, *supra* n. 84, p. 308.

[109]Note that the Court in *Staatssecretaris van Justitie en Veiligheid* has alluded to the logic of an underlying genuine link for long-term third country nationals by pointing to the fact that the prolonged residence together with the right to work 'is such as to ingrain that [third country] national's roots [in the host Member State] even further': *Staatssecretaris van Justitie en Veiligheid*, *supra* n. 107, para. 47.

In addition to these individual considerations, it seems important to also take stock of the consequences such a situation would have on the relationship between member states. With the loss of nationality and Union citizenship, the (former) member state of origin is relieved of its obligation to take back its own nationals. Although this obligation is derived from international law,[110] it serves as a central premise for the right to free movement, underscoring that the right to free movement is ultimately conditioned by the – territorially bound – obligation of every member state to take care of and be responsible for its own nationals.[111] The loss of a home member state can thus be problematic from the perspective of a host member state. However, in the assumed scenario this may be considered less problematic since the loss of the genuine link with the home member state coincides with an integration of the individual concerned in the society of the host member state. In light of the limitations for expelling Union citizens under EU law, there is, from a practical point of view, only a marginal difference between a situation where a person is a EU citizen, but the possibility of expelling that person is severely restricted due to his or her integration in the host member state,[112] and a scenario where the same person is no longer a EU citizen but can remain in the host member state because there is no longer a home member state to which he or she could be returned. In both cases the burden to take care of the person concerned gravitates towards the host member state.

On a larger point, all these considerations can be understood to form part and parcel of a conception of nationality based on a genuine link. The genuine link, as pointed out above, is thereby understood as a reflection of the (legally assumed)[113]

[110] *Cf Lounes*, *supra* n. 86, para. 37; as well as ECJ 4 December 1974, Case C-41/74, *Van Duyn* v *Home Office*, ECLI:EU:C:1974:133, para. 22.

[111] *See*, further on this aspect Wagner, *supra* n. 84, p. 309ff.

[112] According to Art. 28(1) Directive 2004/38/EC, any expulsion of Union citizens or their family members covered by the Directive must be proportionate, taking into account 'how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin'. Furthermore, Union citizens with a right of permanent residence may not be expelled, 'except on serious grounds of public policy or public security', whereas Union citizens, who have resided in the host Member State for more than ten years, may only be expelled 'based on imperatives grounds of public policy or public security'. This makes it very difficult, if not impossible, for a host Member State to expel Union citizens – and family members – who have integrated into its society over a longer time span. *See* on this also for example ECJ 23 November 2010, Case C-145/09, *Tsakouridis*, ECLI:EU:C:2010:708, para. 24ff; as well as ECJ 16 January 2014, Case C-400/12, *G*, ECLI:EU:C:2014:9, para. 30.

[113] It is important to note that, as has sometimes been done, nationality must not be equated with a continuous genuine link that must exist at any given point in time. While nationality is constructed as a continuous status, the underpinning genuine link can only be assessed at a given point in time and as a consequence must be established at the time of acquisition. The legal criteria upon which a genuine link is established thereby are always approximations for the assumption of a

integration of the individual in a society of a member state and the fact that the individual is welded in rights and duties that themselves legally structure the societal relationships within that member state. And while EU law extends the radius of these legal relationships, it cannot and is not meant to be a substitute for the genuine link of the individual in the society of a member state.[114] In other words, there is no genuine link reflecting the individual's embeddedness within EU law as such. The dynamics of EU law and most importantly the right to free movement, however, have a profound impact on the possibility of creating such (societal) relationships as they entail the possibility of creating rights and duties beyond the jurisdictional confines of one's member state.[115] In this sense, EU law can also be conceived as a legal mechanism to open up the legal orders of member states in that it protects the rights and duties created in the legal order of another member state and requires member states to recognise them.[116] The requirement in *Tjebbes* and *Udlændinge- og Integrationsministeriet* to assess the private and professional relationships in the EU at large underscores that the legal emanations of certain personal and professional relationships forged in another member state reverberate within the jurisdiction of the home member state and to this end also affect the rights and duties that underpin the genuine link within the home member state.

This at the same time implies that the Union citizenship and the right to free movement can be instrumental in loosening the genuine link as an enduring and stable bond that is translated into the legal hypostasis of the status of nationality. In this sense, EU law not only allows for the development of new (genuine) links but may be instrumental in eroding an existing genuine link to the point of severing it. If, however, nationality, conceived as being rooted in a genuine link, is to retain some meaning, one must accept that there must be a possibility to address the divergence between the legal hypostasis and factual links. Although

continuous embedment of the individual in the society of his or her home State; *see* further on this point L.-J. Wagner, 'Nationality as We Know It? – A Note on the Genuine Link', *EJIL-Talk!,* 21 September 2020, https://www.ejiltalk.org/nationality-as-we-know-it-a-note-on-the-genuine-link/, visited 26 December 2024.

[114]This is also evident from the wording of Art. 20 TFEU, stating explicitly that Union citizenship is not meant to 'replace national citizenship'.

[115]In this sense, Union citizenship was, some 30 years ago, already aptly described as a status that opens up a much broader playground for opportunities beyond the confines of one's own membersState: *see* U. Preuss, 'Problems of a Concept of European Citizenship', 1 *European Law Journal* (1995) p. 267.

[116]This issue is particularly evident in the case law on same-sex marriage and surnames, where Member States are obliged to recognise the legal effects despite having different legal traditions; *cf*, *inter alia*, ECJ 5 June 2018, Case C-673/16, *Coman and Others*, ECLI:EU:C:2018:385; ECJ 14 October 2008, Case C-353/06, *Grunkin and Paul*, ECLI:EU:C:2008:559; as well as ECJ 8 June 2017, Case C-541/15, *Freitag*, ECLI:EU:C:2017:432.

not to be taken lightly, the loss of nationality and Union citizenship by extension can be seen to align the (evolving) genuine links of a person with the legal reality of his or her nationality.

Judicial engineering of nationality laws

Differences in the fine print

Apart from the substantive aspects, the judgment in *Udlændinge- og Integrationsministeriet* is also notable for its procedural implications. In this context, it is important to first recall the apparent difference between the judgment and the Opinion of the Advocate General.

Although the judgment and the Opinion approach the case on the same parameters and very much align in their reasoning, there is a marked difference in the outcome. The judgment states that a provision like the one found in Denmark can be compatible with EU law if there is an opportunity for an individual proportionality assessment within a reasonable timeframe and the ensuing possibility for the retention or *ex tunc* recovery of nationality.[117] Interestingly, the Court not only describes in more detail the specifics of the reasonable timeframe but, moreover, also sets out a somewhat abrupt demand at the end of the judgment and tenor: '[f]ailing that [a possibility to lodge an individual complaint within a reasonable timeframe], those authorities must be in a position to carry out such an examination, as an ancillary issue, in the context of an application by the person concerned for a travel document or any other document showing his or her nationality'.[118] The Opinion, while in principle making all the same points, is framed differently. Rather than setting out under what conditions the Danish law can be deemed to be compatible with EU law, Advocate General Szpunar makes the point that EU law is 'precluding legislation of a Member State' such as the one at hand 'without there being … an individual examination … coupled with the possibility of having the persons concerned recover their nationality *ex tunc* when they apply for a travel document or any other document showing their nationality'.[119]

The practical difference between these two approaches is anything but negligible. What is undoubtedly clear, no matter whether one follows the Opinion or the judgment, is that there must be a chance for an individual proportionality assessment and that the possibility to ask for such an assessment

[117] *See Udlændinge- og Integrationsministeriet*, *supra* n. 6, para. 50ff as well as para. 59.
[118] Ibid., para. 59 (and similar at para. 52).
[119] Opinion of AG Szpunar, *Udlændinge- og Integrationsministeriet*, *supra* n. 13, para. 96.

must not be procedurally 'impossible or excessively difficult'[120] in practice. The fact that under the provisions of the Law on Danish nationality, a person like X was not specifically informed of her imminent loss of Danish nationality on turning 22 and that she was effectively only able to lodge an application to retain her nationality between her 21st and her 22nd birthday, was deemed to be excessively difficult. In this light, there can thus be little doubt that the Law on Danish nationality and the respective practice were in principle incompatible with EU law for the Court and the Advocate General alike.

Unlike the Advocate General, the Court, however, focused on ways to address these 'shortcomings' within the applicable procedural framework. In doing so, the Court not only inferred, but indeed demanded[121] that there must be a hitherto unknown procedural avenue to overcome these deficiencies and provide for a proportionality assessment in line with EU law.

The respective outcomes, seen from the perspective of the referring court and X, are diametrically opposed. While following the Opinion of the Advocate General suggests that the relevant provision of the Law on Danish nationality is detrimental to Article 20 TFEU and consequently must remain unapplied,[122] implying that X retains her Danish nationality no matter what, following the judgment suggests otherwise. Accordingly, either the referring court or another Danish authority that is at some later point confronted with an application from X for the issuance of a nationality document, is supposed to somehow make way for an individual proportionality assessment in light of EU law. Given the circumstances surrounding the case of X and her evident lack of family or professional ties within Denmark or the EU at large,[123] the present judgment, in the long run, will most certainly not help X to recover her Danish nationality.

In contrast to the Opinion, the judgment allows section 8(1) of the Law on Danish nationality to stand, but encroaches on Denmark's procedural autonomy. On the basis of an 'ancillary' procedural extension, to be inferred by national courts and/or authorities, the Court shielded Danish sovereignty over its nationality. Although the relevant provision in its current form and practice were 'obviously' incompatible with EU law, the material content of section 8(1) of the

[120] *Udlændinge- og Integrationsministeriet*, *supra* n. 6, para. 42.

[121] Note that the Court stated in the indicative that '*failing*' the possibility of a proportionality assessment, 'competent national authorities and courts *must* be in a position to examine, as an ancillary issue, the proportionality of the consequences of loss of nationality': ibid., para. 52 (emphasis added) and similar in para. 59.

[122] Although it is true that AG Szpunar made the point that, in line with *Tjebbes*, such an ancillary proportionality assessment must be possible, he concluded that Danish rules 'do not provide for that possibility' and are thus incompatible with EU law: Opinion of AG Szpunar, *Udlændinge- og Integrationsministeriet*, *supra* n. 13, para. 93ff.

[123] *See* ibid., para. 27.

Law on Danish nationality, namely that a Danish dual- or multi-national without a genuine link at the age of 22 is to lose his or her Danish nationality, has been rendered permissible.

This outcome is all the more surprising, since, as the Advocate General outlined in his Opinion, the Danish legislator and the Danish Government had deliberately introduced the procedural cap for an individual examination after the age of 22. And although the Danish legislator and the Danish Government, in this context, may have been guided by a wrong interpretation of *Tjebbes*,[124] there can be no doubt that the restricted possibility for an individual assessment was intended. The judgment, and more to the point the tasks set out by the Court for national courts and authorities, therefore, are factually overriding this central procedural aspect of section 8(1) of the Law on Danish nationality.

Overriding procedural impediments

The judgment at hand – but also the judgment in *Tjebbes*[125] – suggests that procedural incompatibilities, limiting or otherwise diminishing the right to an individual proportionality assessment in nationality cases, can and must be overcome by simply adding an ancillary possibility for such an assessment. This approach in turn warrants three conclusions to be drawn.

First, taking into account the obligation to provide for an individual proportionality assessment in light of EU law, there can be no real *ex lege* loss of member state nationality, as there must always be a way for an individual proportionality assessment with the possibility for an *ex tunc* reinstatement of said nationality. Any *ex lege* loss of nationality must therefore be deemed to be subject to an as-long-as caveat, reflecting the overriding influence of EU law.

Second, the principle of procedural autonomy of member states in nationality matters should be approached with caution. The interference of EU law, as the present case highlights, may indeed go so far as to require member states to 'invent' additional, hitherto unknown procedural avenues to ensure the effective application of (material) EU law. This suggests that the principle of effectiveness trumps the principle of procedural autonomy even when and if member states deliberately adopt substantially deficient procedural provisions that – as in this case – make the right to an individual proportionality assessment excessively difficult.

Third, and in connection with the point above, this implies that, rather than the national legislator, it is (ultimately) for national courts to ensure that provisions on the loss of a member state's nationality conform with EU law. In this

[124] *Cf* ibid., para. 71ff.

[125] *See* in this respect also *Tjebbes*, *supra* n. 4, para. 42.

sense, national courts are not only obliged to oversee and/or conduct a (material) proportionality assessment but to provide or even create procedural avenues for such an assessment and, if need be, to reinstate an already lost nationality *ex tunc*.

From this vantage point, the judgment in *Udlændinge- og Integrationsministeriet* marks a new step in the nationality case law with the Court for the first time wading head-on into the procedural terrain of nationality matters.

On the one hand, this is not surprising. Given the principal understanding that, due to the intrinsic relationship of nationality and Union citizenship, nationality matters fall within the scope of EU law, it was only a matter of time before procedural questions would come before the Court. On the other hand, what is more surprising is how the Court approached the issue: rather than setting out the limits of procedural autonomy in general terms, the Court laid down very detailed requirements for national courts and authorities to 'adapt' to the relevant procedure in the light of EU law. Interestingly, the Court deduced these requirements solely from the principle of effectiveness,[126] while Article 47 Charter finds no mention.[127] Given the scope of Article 20 TFEU in nationality matters, the path towards Article 47 of the Charter, nevertheless, seems almost inevitable. In this sense, *Udlændinge- og Integrationsministeriet* may be seen as a judgment that foreshadows an increasing procedural influence of EU law in nationality matters – with Article 47 Charter still lurking in the background.

In this context, it is submitted that this case, and the development of the case law of the Court in nationality matters in general, also stands in stark contrast to the case law of the European Court of Human Rights. While Article 8 ECHR only prohibits the arbitrary deprivation of nationality,[128] nationality matters are altogether excluded from the scope of Article 6 ECHR.[129] This means that EU law not only provides for a broader fundamental rights-based limitation of the

[126] *Udlændinge- og Integrationsministeriet*, *supra* n. 6, para. 41.

[127] Art. 47 Charter has indeed been described as informing all considerations under the principle of effectiveness: *see* further T. Lock and D. Martin, 'Art. 47 Charter', in M. Kellerbauer et al. (eds.), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press 2019) para. 23.

[128] *See*, *inter alia*, ECtHR 21 June 2016, No. 76136/12, *Ramadan* v *Malta*; ECtHR 7 February 2017, No. 42387/13, *K2* v *United Kingdom*; ECtHR 25 June 2020, No. 52273/16, *Ghoumid and Others* v *France*, Appl.; and ECtHR 1 February 2022, No. 27801/19, *Johansen* v *Denmark*; as well as A. Szklanna, 'The Right to a Nationality in Recent Case Law of the European Court of Human Rights and Council of Europe Bodies' Work', in P. Czech et al. (eds.), *European Yearbook on Human Rights 2019* (Intersentia 2019) p. 319 at p. 326ff; and M. Gerdes and S. Hartwig, 'Anything Goes?', *Verfassungsblog,* 12 April 2022, https://verfassungsblog.de/anything-goes/, visited 26 December 2024.

[129] *See* e.g. ECtHR 14 June 2011, No. 9958/04, *Borisov* v *Lithuania*, para. 116.

sovereignty of the member states in matters of nationality but is for the most part the only comprehensive 'externalised' means of protecting the right to have rights.

Procedural autonomy and judicial engineering – handle with care!

Nevertheless, the problem with *Udlændinge- og Integrationsministeriet*, as indicated above, is the shift in responsibilities. As such, the decision of who is and who is not a national in light of EU law requirements is taken from the national legislator and turned ever more into a judicial exercise. This, *prima facie*, sits uneasily with the mantra rehearsed by the Court that member states are (remain) sovereign to lay down the rules for the award and loss of nationality, and it also begs the question of how this interference of EU law can be accommodated with the principle of procedural autonomy. And while the former point can be conceptualised as a negative competence that does not alter the division of competences in principle, but limits the member states' competence[130] and to this end operates as a disruptive force against formalistic and often entrenched nationality laws and practices, the latter point is more problematic. To imply that member states' courts – and authorities – have to stretch the procedural limb of nationality laws in ways not foreseen within the existing legal framework means nothing less than a substantial hollowing out of the principle of procedural autonomy.

Under the umbrella of securing the fundamental status of the individual under EU law, the procedural autonomy to adopt procedural provisions that limit or omit the right to an individual proportionality test is effectively suspended. As a consequence, the nationality laws of member states are *inadvertently* brought in line with EU law through a process of judicial engineering. Although, as the present judgment shows, this keeps up the impression that member states are in principle *not precluded* from adopting such – incompatible – nationality laws, this approach goes beyond a mere EU law confirmation of the interpretation of national procedures.

At first sight, one might be tempted to compare the situation to the direct effect of directives.[131] In this context, individual rights are also effectuated in a way that supersedes non- or insufficient actions by member states and thereby, in substance, overrides their ability not to conform with EU law. Thus, in both cases,

[130] *See* on this point in general B. de Witte, 'Exclusive Member State Competences – Is There Such a Thing?', in S. Garben and I. Govaere (eds.), *The Division of Competences between the EU and the Member States* (Bloomsbury 2017) p. 59.

[131] *See*, *inter alia*, ECJ 6 October 1970, Case C-9/70, *Grad* v *Finanzamt Traunstein*, ECLI:EU:C:1970:78, para. 5ff; ECJ 24 January 2012, Case C-282/10, *Dominguez*, ECLI:EU:C:2012:33, para. 33; as well as generally on this point M. Klamert and P.-J. Loewenthal, 'Art. 288 TFEU', in Kellerbauer et al., *supra* n. 127, para. 30ff.

individual rights take precedence over the sovereignty concerns of member states. This analogy, however, can only be taken so far. As the direct effect of a directive is (only) an auxiliary means,[132] it does not do away with the fundamental obligation of member states to spring into legislative action and to fully implement the directive in question.[133] The process of judicial engineering, in contrast, implies full compliance with EU law *eo ipso*. This, it might be argued, is a natural consequence flowing from the importance the EU's legal order attaches to the fundamental status of the individual. And while this line of reasoning underlines that the fundamental character of Union citizenship is more than a rhetorical phrase – but in an undisclosed weighing of interests[134] that overrides the procedural autonomy of member states – it is only an 'auxiliary' explanation, lacking a coherent doctrinal concept.

Indeed, the problems with this approach of judicial engineering become evident upon closer inspection. While superficially beneficial to the individual, the process of judicial engineering opens new voids. The most apparent and at the same time individually disadvantageous aspect of this approach is that it is susceptible to creating more legal – i.e. procedural – uncertainty: to say, as the Court has done, that there must be a procedural way to ask for an individual proportionality assessment at some point is one thing; to know, as an individual, when and how to do so if procedural rules and the relevant practice on the ground indicate otherwise is quite another. Now clearly, the Court laid out the fallback option that if all else fails, 'the authorities must be in a position to carry out such an examination, as an auxiliary issue, in the context of an application by the person concerned for a travel document or any other document showing his or her nationality'.[135] However, from the perspective of the individual and the relevant practice, it is unclear what 'failing' means. This is all the more so as the Court has clarified that member states may, on the basis of the principle of legal certainty, set reasonable time limits for the possibility to request an individual proportionality assessment.[136] What if, for example, under the new 'interpretation' of the relevant procedural framework, anyone can ask – and retrospectively always could have

[132] *See*, *inter alia*, ECJ 11 July 2002, Case C-62/00, *Marks & Spencer*, ECLI:EU:C:2002:435, para. 24ff.

[133] *Cf* ECJ 13 July 2000, Case C-160/99, *Commission* v *France*, ECLI:EU:C:2000:410, para. 22ff.

[134] Indeed the Court's approach to procedural autonomy has been described as a 'balancing exercise between the interests which are served by the national rules at issue and the effectiveness of Community law': S. Prechal, 'Community Law in National Courts: The Lessons from Van Schijndel', 35 *CML Rev* (1998) p. 681 at p. 690; similar also K. Lenaerts, 'National Remedies for Private Parties in the Light of the EU Law Principles of Equivalence and Effectiveness', 46 *Irish Jurist* (2011) p. 13 at p. 16.

[135] *Udlændinge- og Integrationsministeriet*, *supra* n. 6, para. 52.

[136] Ibid., para. 43; *see also Stadt Duisburg*, *supra* n. 7, para. 53.

asked – for a full EU law proportionality assessment, but failed to do so unknowingly? Can an individual concerned – despite his or her blithe ignorance towards the performative influence of EU law – call for an auxiliary examination, or is it permissible to install some sort of procedural limitations in the name of legal certainty? After all, if the retention of one's own nationality is of such fundamental importance, is it not reasonable to expect that the person concerned will make use of all possible and seemingly impossible legal remedies?

This may sound hypothetical,[137] yet, in the grander scheme of things, there should be little doubt that the practice in many member states will (again[138]) try to limit the adversarial influences of EU law and keep up their entrenched practices. Nationality is, after all, often perceived as a status rooted in the inertial and normative power of traditions.[139] And what easier way to defend these normative traditions than by reverting to artistic procedural constructions? To assume that persons subject to similarly incompatible nationality laws will – not only in spite but because of this approach – face a procedural agility course, does not seem particularly far-fetched.

This conclusion seems all the more bitter because things could have been different: if only the Court had been courageous enough to state the obvious, namely that the Danish legislation on the loss of nationality without a clear path for an individual and full proportionality assessment in light of EU law is precluded under EU law. Rather than a muddy process of judicial engineering, the national legislator would have been forced to come to the rescue and enact new nationality law provisions that not only in substance but also in procedural terms meet the requirements flowing from EU law. Obviously, not going down this route has spared the Court a wider outcry of a critical chorus bemoaning the loss

[137]It is worth pointing out that the case in *Stadt Duisburg* highlights the procedural uncertainties that can ensue from – in this case material – changes to the nationality law and the implicit intertwining of the obligations under EU law, which leave the individual – and the referring national court – in a procedural conundrum as to whether or not the possibility for an individual proportionality assessment in light of the influence of EU law has been met; *see Stadt Duisburg*, *supra* n. 7, para. 48ff and para. 60ff; and Opinion of AG Szpunar, *Stadt Duisburg*, *supra* n. 19, para. 60ff and para. 75ff.

[138]Indeed, the whole *ratio legis* underpinning section 8(1) Law on Danish nationality seems to be testament to efforts to minimise the influence of EU law: *cf* Opinion of AG Szpunar, *Udlændinge- og Integrationsministeriet*, *supra* n. 13, para. 71ff.

[139]Brubaker e.g. stated in his work on citizenship and nationhood in France and Germany: 'Die seit langer Zeit gültigen deutschen und französischen Definitionen des Staatsvolkes haben tatsächlich die Trägheitskraft und normative Würde von Traditionen angenommen … Wegen ihrer Übereinstimmung mit den politischen und kulturellen Traditionen werden sie als Rechtstraditionen verstanden und verteidigt. Diese Übereinstimmung ist es, die ihrer Langlebigkeit ihre normative Kraft verleiht': R. Brubaker, *Staats-Bürger* (Junius 1994) p. 241.

of sovereignty in nationality matters.[140] The judgment might have soothed critics. But make no mistake, this last citadel of sovereignty[141] fell a long time ago. What will follow is a more drawn-out endgame with pawns sacrificed on the way.

Moreover, and beyond the realms of nationality matters, this approach seems indicative of a trend, with the ECJ ever more relying on national courts as the ultimate backstop of ensuring compatibility with EU law.[142] The importance of independent national courts and their role in EU law cannot, as the rule of law crisis has dramatically made clear, be overstated.[143] Nevertheless, to assume that the European legal order can be protected by ever-expanding the role of national courts as judges welded to EU law[144] and thereby forgoing the responsibilities and tasks of other branches and institutions of member states, seems somewhat short-sighted.[145] The European Union as a legal order cannot and will not be saved by courts alone – not least because the expansion of responsibilities for national courts, beyond, and to some extent in contrast to, their traditional roles, risks itself contributing to legal uncertainty and fuelling conflicts between national and EU courts.

The decentralised character of the judicial protection system in the EU, allowing every court to question and disapply settled case law, in this sense, is not

[140] *See inter alia* Jessurun d'Oliveira, *supra* n. 91; van den Brink, *supra* n. 87.

[141] Though Spiro has described the sovereignty over nationality as the 'last bastion in the citadel of sovereignty': P. Spiro, 'A New International Law of Citizenship', 105 *American Journal of International Law* (2011) p. 694 at p. 746.

[142] In light of the evolution of the rule of law case law, Spieker remarked that 'the CJEU seems to develop the diffused and decentralized EU judicial network into a value monitoring and enforcement mechanism': *see* L. Spieker, 'Defending Union Values in Judicial Proceedings. On How to Turn Article 2 TEU into a Judicially Applicable Provision', in A. von Bogdandy et al. (eds.), *Defending Checks and Balances in EU Member States* (Springer 2021) p. 237 at p. 253.

[143] The seminal judgment in ECJ 20 June 2018, Case C-64/16, *Associação Sindical dos Juízes Portugueses*, ECLI:EU:C:2018:117 has indeed been described by President Lenaerts as a 'constitutional moment' which operationalised the values in Art. 2 TEU. Moreover, it set the Court in tandem with other national courts ('as European judges') at the apex of defending the rule of law and the integrity of the European legal order; *see* K. Lenaerts, 'Upholding the Rule of Law through Judicial Dialogue', 38 *Yearbook of European Law* (2019) p. 3 at p. 7; as well as Spieker, *supra* n. 142, p. 250ff; and J. Kokott, 'Zur unmittelbaren Wirkung des Unionsrechts: Aufgabe der Kriterien von Van Gend & Loos', 148 *Archiv des öffentlichen Rechts* (2023) p. 496 at p. 508ff.

[144] Halberstam has put it aptly by pointing out that 'Union law "piggybacks" on the existing institutional infrastructure of Member States': D. Halberstam, 'Understanding National Remedies and the Principle of National Procedural Autonomy: A Constitutional Approach', 23 *Cambridge Yearbook of European Legal Studies* (2021) p. 128 at p. 137.

[145] In this sense, Prechal has warned against a direct empowerment of national courts through EU law that entrusts national courts with powers they do not have and ultimately sets them on a collision course with the constitutional setting from which they derive their formal power: S. Prechal, 'National Courts in EU Judicial Structures', 25 *Yearbook of European Law* (2006) p. 429 at p. 445ff.

only a necessary ingredient for upholding the autonomy of the EU's legal order, but has at the same time an unsettling effect on the hierarchical judicial structures within member states. Nurturing a culture of more assertive lower courts could thus destabilise the judicial structures within member states[146] and may ultimately also undermine the relationship between national courts and the ECJ itself.[147] In light of an 'atomisation of national judicial hierarchies', Bobek made the point that a system with the Court at the apex and all other national courts as a 'randomly moving, loose set of atoms beneath [it]', risks leaving national courts in a state where they do not feel bound by anything at all.[148] The ever-growing list of *ultra vires* judgments,[149] and the well-established observation that disagreements between national courts very often take on a new life as conflicts over and within EU law,[150] may serve as a gentle reminder that judicial engineering carries its own systemic risks.

These risks, to come back to the subject of nationality, are all the more pervasive where the issues to be decided are themselves contentious. And to state the obvious, nationality can most certainly count as an issue that is, from its legal as well as political and societal dimensions, most sensitive. To expect that the disruptive influence of EU law in nationality matters can be (primarily) managed by and through the judiciary, thus not only brings with it eminent political and societal challenges but ultimately may also instigate resistance from national courts.[151]

[146]Alter in particular has pointed out that 'lower courts are often more willing to make references because a reference bolsters their authority in the national legal system and allows the court a way to escape national legal hierarchies and challenge higher court jurisprudence': K. Alter, 'The European Union's Legal System and Domestic Policy: Spillover or Backlash?', 54 *International Organization* (2000) p. 489 at p. 504ff.

[147]Similarly, *see* J. Bobek, 'Landtová, Holubec, and the Problem of an Uncooperative Court: Implications for the Preliminary Rulings Procedure', 10 *EuConst* (2014) p. 54 at p. 75.

[148]Ibid. at p. 74ff.

[149]*See*, *inter alia*, Decision of the Danish Supreme Court of 6 December 2016, Case 15/2014, *Højesteret afgørelse af*; Decision of the Czech Constitutional Court 31 January 2012, Case Pl ÚS 5/12, *Nález Ústavního soudu*; and judgment of the German Federal Constitutional Court 5 May 2020, 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15, ECLI:DE:BVerfG:2020:rs20200505.2bvr085915. For an instructive insight to these and other cases *see* T. Flynn, 'Constitutional Pluralism and Loyal Opposition', 19 *ICON* (2021) p. 241.

[150]*Cf* generally on this point Bobek, *supra* n. 147, at p. 80; as well as the underlying conflicts in ECJ 22 June 2010, Case C-188/10, *Melki and Abdeli*, ECLI:EU:C:2010:363; ECJ 22 June 2011, Case C-399/09, *Landtová*, ECLI:EU:C:2011:415; and ECJ 11 September 2014, Case C-112/13, *A*, ECLI:EU:C:2014:2195.

[151]It has been pointed out that highest national courts in particular are inclined to limit the influence of EU law in order to keep issues within the (established) national jurisdiction; *see* e.g. Alter, *supra* n. 146, at p. 505. For a more differentiated 'behavioural' assessment as to why – and on what premises – national courts decide to initiate a preliminary ruling procedure before the Court,

The prospect of such resistance on the part of national courts is likely to increase with the extent of the discrepancy between the current practice under national law and the results expected under the influence of EU law,[152] as well as with the burden that this change constitutes for the operation of the courts concerned. The latter aspect is not only of particular importance but essentially concerns the procedural dimension, as it is the procedural framework that is most relevant for structuring the inner operation of courts. To suggest that national courts must overcome their established procedural practice and create new procedural avenues may, in this sense, be more dramatic than (merely) adding substantive requirements within an established procedural framework. The recourse to judicial engineering and the visible tilt towards the procedural dimension in a sensitive area such as nationality therefore carries the risk of greater legal uncertainty for the individual, and also of overstretching the disruptive influence of EU law in and through national courts.

Conclusion

This very cautious and critical assessment of *Udlændinge- og Integrationsministeriet* and the disruptive influence of EU law in the domain of nationality should not be misunderstood. The requirement for an examination of personal and professional ties in light of EU law – and Article 7 Charter in particular – must be seen as a welcome externalised influence in the field of nationality, a field very often subject to entrenched and overcome traditions veiled in the mantle of sovereignty. The disruptive influence of EU law not only reflects a move towards an individual assessment and a better understanding of the factual genuine links of the individual concerned, but conceptually strengthens the status of nationality as a status of the right to have rights.

The trajectory towards a European conception of the genuine link that underpins nationality thereby places a clear emphasis on the individual links within a society. The obligation under EU law to assess these links individually

see K. Leijon, 'National Courts and Preliminary References: Supporting Legal Integration, Protecting National Autonomy or Balancing Conflicting Demands?', 44 *Western European Politics* (2021) p. 510. With regard to the issue of nationality, it is interesting to note that, in the *Wiener Landesregierung* case, the Austrian Supreme Administrative Court argued that the revocation of the assurance of being granted Austrian nationality was beyond the scope of EU law, but nevertheless felt compelled to refer the case to the Court due to the obligation of courts of last instance to request preliminary rulings in cases which are not clear-cut; *see* on this point Wagner, *supra* n. 8, at p. 6.

[152]Dehousse, to this end, argued that 'European law is often a source of disruption' that can threaten the coherence of the national legal order and 'is often perceived as [a source of] disintegration from the perspective of national legal systems': R. Dehousse, *The European Court of Justice: The Politics of Judicial Integration* (Palgrave Macmillan 1998) p. 173.

and to make provisions for the *ex tunc* recovery of a lost nationality renders member states' provisions on the *ex lege* loss of their nationality effectively untenable, since any *ex lege* loss of a member state's nationality must always be subject to the possibility of an individual process of judicial review and is thus only ever relative.

While the case law of the ECJ has mainly dealt with cases concerning the loss of nationality, it is easy to see that the trajectory towards a genuine link-based understanding of nationality and the ever-expanding influence of EU law will eventually also affect the sovereignty to grant nationality.

The assessment of the present case, however, also clearly shows that there are dangers in channelling the influence of EU law through the judiciary alone. Rather than providing legal certainty for the individual, this approach of judicial engineering might lead to greater legal – and in particular procedural – uncertainty and provoke controversies within and between national courts and the ECJ itself. In this sense, *Udlændinge- og Integrationsministeriet* is a missed opportunity to define more clearly the material and procedural limits for the loss of a member state's nationality under EU law. It is also a missed opportunity to initiate a political discourse on the relevance and inherent characteristics of nationality at both national and EU level. A continued piecemeal approach that relies on the interpretative capabilities and whims of national courts therefore not only risks creating more legal uncertainty and heightening the potential for judicial conflict, but ultimately appears detrimental to promoting a clearer and more aligned understanding of nationality as the fundamental status of the individual.

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