



# Reflections on *quasi-loss* of nationality in comparative, international and European perspective

Gerard-René de Groot and Patrick Wautelet

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## Abstract

This paper focuses on situations in which a person is said never to have had the nationality of a country, even though (s)he assumed (and in many cases the authorities of the country concerned shared that assumption) that (s)he possessed that nationality. Contrary to situations of *loss* of nationality, where something is taken away that had existed, *quasi-loss* involves situations in which nationality was never acquired. This contribution seeks to examine whether a person should under certain circumstances be protected against *quasi-loss* of nationality. In order to do so, the paper first maps out situations of *quasi-loss* in EU Member States, describing typical cases in which a person never acquired the nationality of the country, although (s)he was at some time considered as a national. Drawing on this taxonomy, the paper attempts to uncover whether national, European and international laws offer some protection, and if yes, to which extent, for situations of *quasi-loss*. It concludes with outlining best practices which Member States should comply with in handling such situations.



This paper was prepared in the context of the ILEC project (Involuntary Loss of European Citizenship: Exchanging Knowledge and Identifying Guidelines for Europe), which aims to establish a framework for debate on international norms on involuntary loss of nationality. For more information visit: [www.ilecproject.eu](http://www.ilecproject.eu)

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# Reflections on *quasi-loss* of nationality in comparative, international and European perspective

Gerard-René de Groot and Patrick Wautelet\*

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## 1. Introduction

This paper is concerned with situations in which a person who assumed to possess the nationality of a country is confronted with a message from the authorities that (s)he never acquired that nationality. Even though the authorities may argue that the person concerned never did *acquire* this nationality, this person will experience this as *loss* of nationality. This is even more so since in many cases, the authorities of the country involved will have treated the person as being a national before ascertaining that the nationality was not duly acquired. In this paper we will refer to these situations as *quasi-loss*. At first sight, *quasi-loss* cases seem to be situations where a nationality is lost, but the authorities of the country involved construct this “loss” as “non-acquisition”. We will attempt to refine this definition in the course of this paper.

The central question of this paper is how *quasi-loss* situations should be treated, both from the perspective of national law and international law. More specifically, may the authorities of a country rightly argue that situations of *quasi-loss* amount to a mere non-acquisition of nationality? Or should we start from the assumption that there is no significant difference between the loss of and the *quasi-loss* of nationality? If the two situations differ, a next question is whether and how a person should under certain circumstances be protected against *quasi-loss* of her or his nationality.

In section 2 we will describe three cases, which aim to illustrate the *quasi-loss* problem. The three cases will be situated in jurisdictions in which the case in question will lead to the conclusion that a person did never acquire the nationality of the country, although (s)he was previously considered as a national. It has to be emphasised that the three situations are only illustrations of *quasi-loss* categories. It is possible to distinguish more categories of *quasi-loss* cases.

After the three case descriptions, section 3 will be devoted to a comparative description of *quasi-loss* situations in the nationality law systems of the Member States of the European Union. This comparison is in particular interesting because the nationalities of all Member States are linked to the possession of European citizenship. Consequently, *quasi-loss* of the nationality of a Member State implies also *quasi-loss* of European citizenship.

Section 4 will explore the rules of international law and European law that could be relevant for *quasi-loss* cases. Attention will be paid to rules and principles that have to be observed by States, before the authorities of a State may conclude that a person has lost the nationality of that State. It has to be determined whether these rules and principles also apply in *quasi-loss* situations. Furthermore, particular attention will be paid to rules and principles that can – under certain conditions – offer concrete protection against *quasi-loss* of nationality.

This paper will conclude with pointing to best practices in Member States regarding the way how *quasi-loss* situations are treated and regulated. These best practices could constitute the building stones for recommendations to authorities in Member States, how they could deal with *quasi-loss* situations.

A brief terminological remark is appropriate at this point: in this paper, the term “loss” of nationality is used in a wide sense, including both automatic (*ex lege*) loss of nationality and the deprivation of nationality.<sup>1</sup>

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## 2. Three cases of *quasi-loss*

*Quasi-loss* is not a classic concept of nationality law. In order to give the reader a better understanding of what this concept may cover, we have selected three examples that aim to illustrate the nature and the reach of the *quasi-loss* of a nationality.

### 2.1 A case of identity fraud

José Gonzalvez Campos is a professor at a university in the Netherlands. He grew up in Chile and participated in student protests against the Pinochet regime in the 1970s. In 1976 he managed to leave Chile and came as a refugee to the Netherlands. He was successful and built up an academic career in the Netherlands. José married Mary Miller, an American citizen, in 1982. The couple has two children, Irena and Julio, born in 1983 and 1984, respectively. In 1986, he became a naturalised Dutch citizen.

On the occasion of the application for a new passport in 2014, he told a civil registrar status that he actually entered the Netherlands using the name and the passport of a friend. His true name is Felipe Maduro de Pimentel. His friend, who also participated in the student protests against Pinochet, was killed during one of the protests by a bullet shot from a police gun. After the death of his friend, Felipe realised that he should urgently leave Chile, but did not possess an international passport at that time. He therefore used the passport of his dead friend to leave Chile.

In the meantime, he decided that he would prefer to continue his life under his real identity and for that reason, wanted to change his name. One possibility would be to change the name back into his original name, but he would actually prefer another solution: the combination of both names as 'Felipe José Gonzalvez Maduro'. This would allow him to reveal a part of his original identity, but there would also be a partial continuity with the name he had been using since arriving in the Netherlands. Moreover, this continuity would also pay homage to his dear friend. Felipe, alias José, asked the registrar, whether under Dutch law such modifications (and preferably the second) would be possible and – if yes- which procedure would have to be followed.

The civil registrar explained that the chance of obtaining such a combined family name was close to zero. The modification of a family name can only take place under highly rigid conditions by Royal Decree and first names have to be changed by court decree.<sup>2</sup> But he also pointed to another, much more important problem.

From the facts told by José, alias Felipe, it has to be concluded that he was naturalised under a name that was not his name. In other words: he committed fraud during the naturalisation procedure, more in particular he committed so-called 'identity' fraud. And what are – under the law of the Netherlands - the legal consequences of such identity fraud?

Reading the text of the Kingdom Statute on Netherlands Nationality (*Rijkswet op het Nederlanderschap*),<sup>3</sup> the consequences do not appear to be particularly serious. At first sight, it would be possible to revoke the naturalisation because of the fraud committed by José. Since 2003, the Kingdom Statute on Netherlands nationality provides for such a nullification procedure in Article 14 (1). This provision reads as follows:

Our Minister may revoke the acquisition or grant of Netherlands nationality if it is based on a false declaration made by the person concerned or fraud and/or on concealment of any fact relevant to the acquisition or grant. The revocation has retroactive effect to the time of the acquisition or grant of

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<sup>1</sup> In Art. 15 of the Universal Declaration of Human Rights (UDHR), the term “deprivation” obviously also includes automatic loss of nationality, whereas the 1961 UN Convention on the Reduction of Statelessness distinguishes between “loss” (meaning automatic loss) and “deprivation” (withdrawal on initiative of the State). In the 1997 European Convention on Nationality (ECN), the term “loss” is used in a wide sense, including loss at the initiative of the State; the term “deprivation” is not used in the European Convention.

<sup>2</sup> See Gerard-René de Groot, commentary on Art. 1:4, respectively Art. 1:7 Burgerlijk Wetboek (Dutch Civil Code), in *Personen- en Familierecht*, Deventer: Kluwer loose leaf edition (Supplement December 2013).

<sup>3</sup> Most recently amended by Kingdom Act of 18 December 2013, *Staatsblad* 2014, 10. ([http://wetten.overheid.nl/BWBR0003738/geldigheidsdatum\\_20-02-2014](http://wetten.overheid.nl/BWBR0003738/geldigheidsdatum_20-02-2014)).

Netherlands nationality. The revocation is not possible following the expiration of a period of twelve years from the acquisition or grant of Netherlands nationality [...]<sup>4</sup>

Because the provision contains a limitation period of twelve years to be counted from the naturalisation decree, this revocation could not take place anymore in the case of Felipe/José.<sup>5</sup> Furthermore, a revocation of the naturalisation is only a possibility and not an automatic step in the process. The Minister must apply a proportionality test and has to take into consideration all relevant circumstances of the fraud.

However, the Dutch Supreme Court decided that the revocation procedure under Article 14(1) applies only in case of identity fraud if the naturalisation took place *after* 1 April 2003.<sup>6</sup> If the naturalisation took place before 2003, a nullification procedure is not necessary in case of discovery of an identity fraud: in those cases the naturalisation is, according to the Court, deemed to be void *ab initio*. Further, it has to be stressed that it does not matter when the fraud was discovered. The only relevant moment is that of the naturalisation: before or after 1 April 2003.

The naturalisation of José Gonzalez Campos, alias Felipe Maduro de Pimentel, took place *before* 2003. Consequently, the revocation procedure of Article 14(1) is not relevant. The case should be decided using the *ab initio* void construction. We must therefore conclude that Felipe was never naturalised and therefore never acquired Netherlands nationality.

Moreover, his children Irena and Julio also never acquired Netherlands nationality since they could only acquire it by descent (*iure sanguinis*) of their father, their mother being an American national.

## 2.2 A case of denial of paternity

Manuel Torres Coelho is a 17-year old student at a boarding school in Coimbra. He was born in Recife (Brazil) in 1995, to a Brazilian mother Maria Almeida Torres and a Portuguese father Paolo Bevilaqua Coelho. He acquired both Brazilian and Portuguese nationality (the latter by registration at the Portuguese consulate upon application of his father). Manuel grew up in Brazil, but came to Portugal one year ago in order to study at the boarding school, where his father also studied.

Manuel has recently experienced tremendous difficulties in concentrating on his studies, however, because he received extremely disturbing news from Brazil. As far he can remember, the relationship between his parents has always been quite stormy, but three months ago, he received a letter from his father in which he learned that the person he always thought was his father, was in fact not his father. It seems that his mother has conceded that Manuel was fathered by Miguel Angelo del Cilo Casanova, a merchant from Uruguay. Manuel's 'father' is extremely upset about this information and wants to have Manuel's collaboration for a DNA test. Having done so, Manuel recently received a copy of the DNA report, which came to the conclusion that with a certainty of 99.999% Paolo is not the father of Manuel. The 'father' announced that he now will start legal proceedings in order to challenge his paternity of Manuel.

Apart from the psychological stress caused by these messages, Manuel is also extremely worried about the legal consequences of a successful denial of paternity. If he is no longer considered the son of a Portuguese father, will he still be a Portuguese national? From some friends enrolled in law school, Manuel learned that under the Portuguese Nationality Act (*Lei da nacionalidade portugueses*),<sup>7</sup> Portuguese nationality can only be lost by voluntary renunciation. Portugal does not provide for automatic loss of nationality, or for possibilities

<sup>4</sup> Translation by Olivier Vonk (<http://eudo-citizenship.eu/admin/?p=file&appl=currentCitizenshipLaws&f=NL%20Netherlands%20Nationality%20Act%20%28consolidated%202010%2C%20English%29.pdf>).

<sup>5</sup> UNTS [].

<sup>6</sup> Hoge Raad 30 June 2006, *Nederlandse Jurisprudentie* 2007, 551 (with comment by G.R. de Groot).

<sup>7</sup> Act 37/81 of 3 October 1981, most recently amended by Act 43/2013 of 3 July 2013 (<http://eudo-citizenship.eu/admin/?p=file&appl=currentCitizenshipLaws&f=POR%20Law%202%202006%20%28original%2C%20consolidated%20vrs%20in%20appendix%29.pdf>; see for an English translation <http://eudo-citizenship.eu/admin/?p=file&appl=currentCitizenshipLaws&f=POR%20Law%2037%2081%20as%20consolidated%20by%20Law%202%202006%20%28English%29.pdf>). The Act of 3 July 2013 can be consulted on [http://eudo-citizenship.eu/NationalDB/docs/POR%2043\\_2013\\_as%20enacted\\_ORIGINAL%20LANGUAGE.pdf](http://eudo-citizenship.eu/NationalDB/docs/POR%2043_2013_as%20enacted_ORIGINAL%20LANGUAGE.pdf)).

of deprivation of nationality. Manuel is happy with that conclusion. However, in order to be absolutely sure, he contacts the registrar of civil status of Coimbra.

The registrar admits that Portugal does not provide for rules that would lead to the automatic loss of nationality nor for deprivation of nationality, but he stresses that Manuel would nevertheless not continue to be a Portuguese national in case of a successful denial of paternity. He explains that according to Art. 1787, in combination with Art. 1838 ff. *Código civil*,<sup>8</sup> a denial of paternity has retroactive effect. Consequently, Paolo is deemed never to have been the legal father of Manuel. The registration as a Portuguese national will therefore have to be corrected, because, looking back, Manuel will not have been born as a child of a Portuguese father.<sup>9</sup> Portuguese courts have already reached this decision in several similar cases. As a Brazilian national, Manuel will have to apply for a residence permit in Portugal.

### 2.3 Wrong registration as a national

Per Gustavson was born in South Rhodesia (now: Zimbabwe) in 1955. His Danish parents Gustav Gustavson and Jette Persen emigrated to South Rhodesia in the early 1950s because they feared that the Soviet army would occupy Denmark. The parents were vegetable producers. They bought a farm in South Rhodesia and managed to transform their farm to a very successful vegetable production centre. Because of the troubles and the fighting between the white government and the ZANU rebels in the 1970s, however, Gustav and Jette decided to move back to Denmark. They did so in 1977. From that year until 1979, Per lived with his parents in Denmark. In 1979, he moved to Canada. There he married Issy Popper, a Canadian citizen. From 1985 until 1991, he worked and lived in the US. From 1991 until 2009, he lived and worked in London. Since 2009, he has been back in Denmark and lives in Copenhagen. Per and Issy have two children: William (born in the US in 1988) and Mary (born in the UK in 1993). William has recently settled in Brussels, where he just got his first appointment as an EU official in DG Home Affairs, and Mary is also doing well: since 2012 she is studying at the University of Oxford.

In 2013, Per's father Gustav died at the age of 85 years. A few days before his death, Gustav told Per that he was very happy to have him as a son: it was the best decision of his life to adopt him in 1955. Per is totally shocked. His mother Jette confirms that Per was actually born in South Rhodesia as the child of an unmarried girl of South African nationality, who gave him up for adoption immediately after his birth. A judicial adoption decree testified to his adoption by Gustav and Jette. Consequently, the South Rhodesian authorities issued a new birth certificate for Per in which Gustav and Jette are mentioned as parents. On the occasion of the registration of the death of Gustav, Per tells the registrar the whole story about the adoption he learned only a couple of days before. The registrar tells him that this could be problematic for his Danish nationality. It is very uncertain whether the adoption can be recognised in Denmark. If no recognition takes place, he is not a Danish national. This would also have consequences for his children, William and Mary. They also would be deemed never to have acquired Danish nationality.

## 3. Mapping *quasi-loss* in domestic nationality law of the Member States of the European Union

### 3.1 Introductory remarks

The narratives in the previous section illustrate three typical categories of cases in which authorities may in some jurisdictions conclude that nationality was never acquired – in other words, that a *quasi-loss* of nationality occurred. Many other similar examples could be found in relation to other jurisdictions. Furthermore, other

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<sup>8</sup> Available on [www.verbojuridico.com/download/codigocivil2010.pdf](http://www.verbojuridico.com/download/codigocivil2010.pdf) (visited on 15 July 2014).

<sup>9</sup> Manuel's situation has to be qualified as one of cancellation of the Birth Registration falling under the scope of Article 91, n.º 1, b), of the Portuguese Civil Registration Code, i.e. a cancellation of a registration on the grounds that the registered fact (birth of child of a Portuguese father) was declared inexistent, null or void by a judicial court. Under Article 91, n.º 2, the cancelled registration produces no effects. See also eudo-citizenship, database Loss of nationality, survey for Portugal (<http://eudo-citizenship.eu/databases/modes-of-loss?p=&application=modesLoss&search=1&modeby=country&country=Portugal>).

situations could give rise to a *quasi-loss* of nationality. This could be the case following a denial of maternity, the annulment or revocation of a recognition of paternity or of an adoption. *Quasi-loss* of nationality may also be the result of a discovery by the authorities that rules relating to the acquisition or the loss of nationality were wrongly interpreted and/or applied in a given case. We can also witness *quasi-loss* in cases in which a person acquired nationality on the basis of incorrect registration of parenthood.

In this section we will examine how the various Member States of the European Union are dealing with the problems just described. As a matter of fact, all jurisdictions are confronted with these types of problems: people may acquire the nationality by naturalisation on the basis of wrongful or even false personal data; the paternity of a child may be challenged successfully; a parent-child relationship may be annulled or revoked for other reasons, authorities may sometimes interpret rules wrongly, registrations may take place erroneously or based on untrue information. The question arises whether these facts always lead in all countries to *quasi-loss* of nationality and, if yes, whether protection mechanisms perhaps exist and how they operate.

If we focus on *quasi-loss* of nationality, it is in particular appropriate to compare the rules in force in other Member States of the European Union. If e.g. Dutch nationality is lost, this will automatically bring about the loss of European citizenship, at least if the person involved does not possess additionally the nationality of another EU Member State. As there is no functional difference between loss and *quasi-loss*, the same goes for the *quasi-loss* of the nationality of a Member State. The comparative study of *quasi-loss* cases in the Member States of the European Union is therefore not only useful in order to uncover best practices that may inspire the legislators of Member States to improve the rules in force in their own jurisdiction. It will help to verify whether the protection of European citizenship based on the possession of nationality of a Member State is on the same level in all Member States.

Until now, very little research has been undertaken on the issue of *quasi-loss*. One reason for this may be that comparative research on this issue proves difficult. When looking for instances of *quasi-loss*, one cannot simply rely on statutory provisions and handbooks that contain comments on domestic nationality law. Even a careful observation of such provisions will indeed not always reveal cases of *quasi-loss*. In order to uncover such instances, one needs to go further and pay close attention to the practice of nationality law. The application of the *ab initio* void construction of naturalisation in the Netherlands in case of the discovery of identity fraud is a good example. If one simply reads the current statutory provisions of the Kingdom Statute on Netherlands nationality, one will come to the conclusion that if such a case a fraud is discovered, a revocation procedure may be applied, which is constrained by a limitation period and requires that a proportionality test be passed (see section 1). In the context of this proportionality test, the authorities could pay attention to the reasons why in the case described above, Felipe applied for naturalisation under the name of José.<sup>10</sup> And in that context attention will also be paid to the fact that the fraud was committed so many years ago. Moreover, in respect of a possible deprivation of the nationality of the children, it would be necessary to take into account that they had no share in their father's fraud and that they grew up as Dutch nationals. Only if one pushes the inquiry further, will one discover that the Supreme Court has decided that for fraud committed *before* 1 April 2003, another legal regime applies, which is much more radical as it leads to the conclusion that the foreigner never obtained Dutch nationality.<sup>11</sup>

Comparative research in this field should therefore not only gather and analyse relevant statutory provisions, case law and administrative instructions, but should ideally also include interviews with stakeholders and experts in the different jurisdictions in order to uncover potentially useful information. The ILEC research project, which deals with involuntary loss of European citizenship in general and not only with *quasi-loss* of nationality, provided a useful avenue to obtain relevant information. An essential element of this project is indeed a detailed questionnaire that has been completed by stakeholders in nationality law in the Member States. The questionnaire contains several theoretical questions (including some questions on *quasi-loss*

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<sup>10</sup> Although sometimes the proportionality test is applied in a rather superficial way. See Raad van State 11 December 2013, *Jurisprudentie Vreemdelingenrecht* 2014, N° 66, pp. 338-342 (with critical comments by G.R. de Groot).

<sup>11</sup> See the “Instructions for the application of the Kingdom Act on Netherlands Nationality” (“Handleiding voor de toepassing van de Rijkswet op het Nederlanderschap”), and in particular comments 2.1.1 and 2.1.2 on Art. 14.

issues) and also includes two cases dealing with *quasi-loss* issues. Much of the information gathered through the questionnaire was taken into account in this paper.

### 3.2 A (provisional) typology of cases of *quasi-loss*

Cases of *quasi-loss* may arise out of a variety of circumstances. Given the nature of cases of *quasi-loss*, it may prove very difficult to draw up a definitive taxonomy. In the following, we will offer a first attempt to categorise the various cases of *quasi-loss*. It should be emphasised that the borderline between the various cases may prove difficult to draw and some duplication may therefore occur.

#### i) *Quasi-loss following the disappearance of a family relationship*

Family relationships are a primary method for children to acquire a nationality. At least within the EU, there is a consensus that a child should obtain the nationality of his parents, although this principle may be qualified in certain circumstances.<sup>12</sup> In many countries, marrying a national entitles the spouse to an accelerated acquisition of the nationality.

The disappearance or annulment of a family relationship could have consequences for the nationality that was acquired on the basis of the relationship.<sup>13</sup> If it is found that a child is legally not the child of his father, this could imperil the nationality acquired by the child from his father.<sup>14</sup> Likewise, the annulment of a marriage could put in danger the nationality acquired by one of the spouses following the marriage.

In some jurisdictions, such consequence may be treated as a *loss*. This is, for example, the case in Finland. The annulment of the paternity of a husband is treated as a ground of loss under Section 32 of the Finnish Act on Nationality. What is striking about this provision is that it limits the effects of the annulment on the child's nationality: first, the annulment may only have consequences for the child's nationality if the annulment takes place before the child reaches the age of five;<sup>15</sup> second, the loss of Finnish nationality is not automatic. A decision must be taken that must be based “on an overall consideration of the child's situation”, taking particular account “of the child's age and ties with Finland”.

This is also the case under Dutch law, which provides a specific ground of loss in case of disappearance of the family relationship (Art. 14, para. 4 NET). Likewise, under German law, when the paternity of a man has been successfully challenged in court (under § 1599 BGB), leading to a decision that such paternity does not exist, this is deemed to be a case of loss of the nationality that was acquired by the child on the basis of the father's nationality. This new ground of loss was introduced in 2009 (law of 5 February 2009), following a case where the Constitutional Court had decided that when a court finds that a person is not the father of a child, the loss of German nationality that derives from this decision for the child was not contrary to the constitutional protection enjoyed by the child even though the loss was retroactive, because the child had not

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<sup>12</sup> See G.-R. de Groot and M. Vink, “Birthright citizenship. Trends and regulations in Europe”, EUDO Citizenship Observatory, Robert Schuman Centre for Advanced Studies, 2010, pp. 5-20.

<sup>13</sup> See in general, G.R. de Groot, “Loss of Nationality: a Critical Inventory”, in David A. Martin, Kay Hailbronner, *Rights and Duties of Dual Nationals: Evolution and Prospects*, The Hague: Kluwer, Law International, 2003, pp. 252-254, 284.

<sup>14</sup> A question arises whether the child would lose his nationality in case of the disappearance of a family relationship, when the child obtained his nationality as a consequence of the naturalisation granted to the parent. In many countries, children will indeed benefit from the naturalisation granted to their parents (e.g. Art. 11 NET; Art. 12 BEL; § 10-2 GER). It may be asked whether the disappearance of a family relationship should also lead to a loss of nationality in this case. It may be argued that the child derives his nationality from the naturalisation and that it should therefore remain even after the loss of the family relationship. See, however, Supreme Court (Netherlands), 25 May 2012, *NJ* 2012/337 (in this case, a Somali citizen was naturalised Dutch; his children benefited from this naturalisation. It later appeared, however, that the children were in reality his half-brothers. On this ground, the Dutch authorities considered that the half-brothers had never benefited from the naturalisation. The Supreme Court refused to apply the *Rottmann* ruling of the ECJ, holding that the half-brothers had never enjoyed the Dutch nationality).

<sup>15</sup> A similar period of five years is taken into account when the paternity has been established after the birth of the child. In that case, it appears that the possibility to lose Finnish citizenship only exists for a period of five years after the paternity has been established.



yet developed a legitimate trust on the existence and continuity of his/her status as German national<sup>16</sup>. In the case at hand, the child had only been one and a half years old when the paternity had been challenged. The Court found that at that age, the child could not have yet developed any expectations as to the existence of his German nationality.<sup>17</sup> Following up on the Court's advice, the legislator has determined that loss of citizenship following the annulment of paternity could only take place if the child has not yet reached the age of five.<sup>18</sup> It is worth noting that the new provision does not apply in all cases of annulment of paternity.<sup>19</sup>

Finland, the Netherlands and Germany, however, stand out as an exception. In most jurisdictions indeed, such consequence is not characterised as a case of *loss* of nationality, but rather as a case where the nationality was never acquired. The nationality legislation concerned will indeed treat this difficulty not as a case of loss of nationality, but as a case where acquisition never occurred. Under Danish law, for example, since foreigners may only acquire Danish nationality by statute, if it is found that the legal requirements that govern the acquisition of Danish nationality through a family relationship were not met, the person is not considered to have lost Danish nationality, but rather never to have acquired it.

From the perspective of the person concerned, the consequences will, however, in all aspects resemble that of a loss of nationality. What is more, contrary to what is usually the case when a ground of loss applies, the *quasi-loss* will lead to the *disappearance* of the nationality. This means in effect that the nationality is deemed never to have been acquired. This is a clear difference with cases where a child loses his/her nationality as a consequence of the fact that his/her parent loses his/her nationality.<sup>20</sup> In the latter case, the loss is indeed recognised and treated as such by the relevant nationality legislation.

It seems that *quasi-loss* of nationality following the disappearance of a family relationship could occur in two situations: i) one in which a parent-child relationship disappears and ii) one in which a marriage is deemed never to have taken place.

As far as parent-child relationships are concerned, the *quasi-loss* could arise in the following instances: the successful denial of paternity (either a challenge of a recognition or the overturn of the presumption of paternity) or maternity, the annulment or revocation of a recognition or adoption. Many Member States appear to accept that in those cases, the nationality that was acquired following the creation of the family relationship, disappears with the relationship on which it was based.<sup>21</sup>

In most jurisdictions, there is no express provision stating that the nationality will disappear following the annulment or disappearance of the family relationship. Rather, this is inferred *a contrario* from legal rules that provide that children obtain their nationality from their parents. Under French law for example, the

<sup>16</sup> Bundesverfassungsgericht, 24 October 2006, 2 BvR 696/04. In that case, the child complained that the retroactive loss (*der rückwirkende Wegfall*) of the German nationality as a consequence of the successful challenge to the paternity was contrary to the protection afforded by Article 16 of the German Constitution, which protects against unauthorised deprivation of nationality. The child was born in Germany in 1998, to an Albanian mother married to a German citizen, who later successfully challenged his paternity in court.

<sup>17</sup> See in particular paras. 19 and 22 of the judgment. The Court referred to the situation where “*das betroffene Kind sich in einem Alter befindet, in dem Kinder üblicherweise ein eigenes Vertrauen auf den Bestand ihrer Staatsangehörigkeit noch nicht entwickelt haben*” (para. 19) and held that “*Eine Beeinträchtigung der deutschen Staatsangehörigkeit in ihrer Bedeutung als verlässliche Grundlage gleichberechtigter Zugehörigkeit kommt nicht in Betracht, wenn Staatsangehörige in einem Alter, in dem sie normalerweise noch kein eigenes Bewusstsein ihrer Staatsangehörigkeit und kein eigenes Vertrauen auf deren Bestand entwickelt haben, nach Maßgabe der geltenden einfachgesetzlichen Vorschriften von einem durch erfolgreiche Vaterschaftsanfechtung bedingten Wegfall der Staatsangehörigkeit betroffen werden oder betroffen werden können*” (para. 22).

<sup>18</sup> § 17-2 GER.

<sup>19</sup> According to § 17-3 GER, the new ground of loss does not apply if paternity is challenged pursuant to section 1600, sub-section 1, n. 5 and sub-section 3 of the BGB. The first of these provisions refers to the possibility for the authorities to challenge the recognition of a child by a father (under § 1592 sub-section 2 BGB). See also the decision of the Bundesverfassungsgericht, 17 December 2013, 1 BvL 6/10 discussed hereinafter.

<sup>20</sup> So-called 'extension of loss' – see e.g. Art. 16, para. 1-d and e NET.

<sup>21</sup> This is the case in Portugal (Report 1 – question 3.1), Belgium (Art. 8 para. 4 BEL) and France (Report 1 – question 3.3).

disappearance of the French nationality appears to follow from the application of Article 20-1 of the Civil code, according to which “*La filiation de l'enfant n'a d'effet sur la nationalité de celui-ci que si elle est établie durant sa minorité*” (“the parentage of a child only has effect on his nationality where it is established during his minority”).<sup>22</sup>

Express provisions may occasionally be found such as for example in relation to the nationality acquired following an adoption. In some countries, the nationality that was acquired following an adoption, may be lost when the adoption is found to be null or cancelled. Specific provisions exist in this regard, contrary to the case for other situations of *quasi-loss*.<sup>23</sup>

In some jurisdictions, the absence of express rules and the lack of precedents make it difficult to predict what would be the consequences of the disappearance of a family relationship. Under Italian law, it appears unlikely that a child would lose his/her Italian nationality if the link with the father is severed.<sup>24</sup> However, in one case, the Italian Supreme Court appeared to have decided that the nationality could disappear when the parent-child link is found never to have existed.<sup>25</sup> When answering the ILEC questionnaire, two of the three English experts replied that if British nationality was acquired on the basis of a family relationship and the latter disappeared for other reasons than fraud, this would have no effect on the British citizenship. A third expert, however, replied that if British citizenship was acquired by automatic operation of law by virtue (at least in part) of a parent/child relationship where there is a British citizen parent and then it transpires that that person said to be the parent is not in fact the parent, the citizenship would be treated as never having been acquired (that is to say as a nullity). The expert added that an incorrect entry on a birth register “would simply fall to be rectified in line with what were now known facts”.

Turning to the nationality acquired by *marriage*, the nationality that has been acquired following marriage with a national could come under pressure when the marriage is annulled or declared void. In some countries, such annulment could lead to the loss of the nationality. This is the case in Belgium where the nationality acquired following marriage with a Belgian citizen may be withdrawn when it is found that the marriage was a marriage of convenience and as a consequence it is declared void.<sup>26</sup> In this case, there is no *quasi-loss*. As the annulment of the marriage leads to the loss of nationality, its consequences are delineated in the law.<sup>27</sup>

In many jurisdictions, the annulment of the marriage will, however, lead to annulment of the acquisition of nationality. In this case, the individual concerned is deemed never to have been a national. This is the case under French law: the annulment of the marriage leads to the “*caducité*” (voidness) of the declaration by

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<sup>22</sup> A similar rule exists in Portuguese law, see Art. 14 Portuguese Act.

<sup>23</sup> See e.g. Art. 7 of the Romanian Law N° 21/1991 – which provides that in case of “dissolution” of the adoption, the child shall lose Romanian citizenship, whereas in case the adoption is declared null and void, the child shall be considered never to have been a Romanian citizen; Art. 3.3 of the Italian Act in relation to deprivation of nationality in case the adoption is revoked for homicide or attempted homicide of the adopter. Compare with Section 1(6) of the British Nationality Act 1981 in relation to the annulment of an adoption order. According to this provision, where an order or a Hague Convention Adoption as a consequence of which any person became a British citizen ceases to have effect, whether on annulment or otherwise, the cesser shall not affect the status of that person as a British citizen.

<sup>24</sup> See R. Clerici, *La cittadinanza nell'ordinamento giuridico italiano*, Padova, 1993, pp. 219 ff.

<sup>25</sup> Corte di cassazione, 2 October 2009, N° 21094 – An Ethiopian citizen was recognised as a natural child by an Italian citizen. The recognition was later cancelled as a criminal court found that the act of recognition was false. The Supreme Court appears to have considered that the Ethiopian citizen had never acquired Italian nationality, as it ordered the cancellation of the nationality from the civil status records. However, the Court also considered that the Ethiopian citizen could have become Italian on the basis of another provision. See the comments of P. Morozzo della Rocca, “La cancellazione dell'atto di elezione della cittadinanza indebitamente registrato in rapporto ad altri titoli di acquisto dell status civitatis”, *Il diritto di famiglia e delle persone*, 2010, Vol. 39, pp. 1538-1547.

<sup>26</sup> BEL – Art. 23/1, para. 1-3.

<sup>27</sup> So it is that under Belgian law, deprivation of the nationality following the annulment of the marriage only works for the future. According to Art. 23/1, para. 3 CNB, the deprivation only works starting from the moment the judgment is registered in the civil status registers.

which the foreigner requested the French nationality (Art. 21-5). Since the declaration is deemed to be void, the foreigner is deemed never to have been French.<sup>28</sup>

## ii) *Identity fraud*

Identity fraud has been a much debated issue in many EU Member States in recent years. Nowadays, at least in the EU, cases of fraud are mostly governed by specific provisions, which also apply to instances of identity fraud.<sup>29</sup> When such a fraud is discovered, it may lead to the loss of nationality, meaning that the person concerned will enjoy the benefit of the protection afforded in case of loss.

However, in other cases, no specific legislation will be available to treat such a case as an instance of fraud. A question then arises whether the discovery that the acquisition was based on identity fraud could lead to a withdrawal or loss of the nationality.

In some countries where this question arose, the answer given to the discovery of fraud did not borrow from the doctrine of loss of nationality. Rather, the discovery of fraud was taken to lead to the conclusion that the nationality was never acquired.

The best example of this technique can be found in a ruling of the Dutch Supreme Court, which has already been mentioned in the first section of this paper.<sup>30</sup> The Court had to deal with the case of two spouses from Iraq who had applied for and been recognised as refugees in the Netherlands in 1992 and obtained naturalisation in 1997. Fearing that the use of their real names and identities could lead to adverse consequences for their family remaining in Iraq, the spouses had not used their real names and dates of birth in their applications to be recognised refugees and in the application of naturalisation. When it transpired that the spouses had used a false identity, the Dutch authorities decided that the Royal Decree whereby naturalisation has been granted could not have any legal consequences. The Supreme Court refused to quash this decision, arguing that “a naturalisation decree in which false or fictive personal data are included, cannot serve to identify a person, save in exceptional circumstances that are not present in this case. It cannot therefore have any legal consequences”<sup>31</sup>. The Supreme Court specifically distinguished cases of loss, which were only relevant when somebody had acquired the Dutch nationality, and cases where the naturalisation decree was tainted by false or fictive data, in which case the decree did not lead to any acquisition.<sup>32</sup>

Although no case law is known, the same result is apparently achieved in Portugal: if Portuguese nationality was registered on the basis of fraud or false information, the registry entry that led to the acquisition of the

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<sup>28</sup> The *quasi-loss* will, however, only occur if the spouse did not marry “in good faith”. That the annulment of the marriage leads to the voidness of the acquisition of nationality, is heavily criticised by various commentators, who point out that attaching automatic consequences to the annulment of the marriage is not compatible with the fact that marriage does not have any automatic effect on the nationality. See e.g. P. Lagarde, *La nationalité française*, Dalloz, 4th ed., 2011, pp. 263-264, nr. 52.14-52.15.

<sup>29</sup> See e.g. Art. 14 NET; Art. 23 BEL, section 8A Danish Nationality Act, section 35 GER, section 33 of the Finnish Nationality Act, Section 40 of the British Nationality Act 1981, Art. 25(1) lit. c Romanian Law N° 21/1991, etc. For a comparative survey, see G.-R. de Groot and Martin Vink, “Loss of Citizenship. Trends and regulations in Europe”, Eudo Citizenship Observatory, 2010, pp. 13-17.

<sup>30</sup> Supreme Court Netherlands, 11 November 2005, *NJ*. 2006, 149. See the comments of G.-R. de Groot, “Identiteitsfraude en het Nederlanderschap van vóór 1 april 2003 genaturaliseerde personen”, in *Groenboek, Drie opstellen aangeboden aan Bart Groen*, Maastricht: Universiteit Maastricht, 2006, pp. 42-60.

<sup>31</sup> Para. 3.3.

<sup>32</sup> Note that, as already explained, Dutch law has been modified since then. It now includes a specific ground of loss for cases where acquisition through option or naturalisation rests upon a false declaration made by the person concerned or fraud and/or on concealment of any fact relevant to the acquisition or grant (see Art. 14 NET). However, this new ground of loss could not be applied in the famous *Ayaan Hirsi Ali* case due to the fact that the naturalisation took place before 1 April 2003. On this case, see H.U. Jessurun d'Oliveira, “Turmoil around a naturalisation decree. Or how the Dutch cabinet stumbled over a pebble”, in *Vers de nouveaux équilibres entre ordres juridiques. Mélanges en l'honneur de Hélène Gaudemet-Tallon*, Dalloz, 2008, pp. 319-333. The *ab initio* construction has been applied in other cases, see e.g. Supreme Court, 30 June 2006, R05/095HR, *JV* 2006/314, *NJ* 2007, 551 (with comments by G.-R. de Groot – in this case the person concerned originally came from ex-Yugoslavia).

nationality will be cancelled. As a consequence, the case is treated as a non-acquisition and not as a loss of the nationality.<sup>33</sup>

Courts in England have also treated some cases of impersonation and use of false identity as leading to the nullity of the registration. If a person acquires British nationality using a false identity, courts have accepted that the grant of citizenship may be treated as a nullity. As a consequence, the person concerned does not have to be subject to the statutory procedure for deprivation of nationality. Courts, however, have accepted that only some cases should be treated as nullity.<sup>34</sup> As a consequence, the grant had and has no effect in law. The borderline between cases leading to deprivation and cases where the registration is null and void is not easy to draw.<sup>35</sup>

It is interesting to note that the courts have reviewed whether finding that a grant of citizenship is a nullity for fraud or deception would render the statutory procedure for deprivation of citizenship useless. According to Justice Templeman LJ, as he then was, finding that a grant of citizenship is a nullity does not render the procedure for deprivation of citizenship useless because there are circumstances in which an otherwise valid grant of citizenship (valid in the sense of having been intentionally granted to the actual recipient) may have been obtained by fraud or deception, for example as to residency qualification, in which case the grant subsists unless or until deprivation pursuant to the statutory procedure occurs.<sup>36</sup> Interestingly, it appears that English courts will not treat as null the acquisition of British nationality by the husband or wife of somebody who obtained British nationality by fraud.<sup>37</sup>

In all these cases, the rules on loss of nationality are deemed not to be applicable. As a consequence, the various mechanisms that would apply in case of loss, such as protection against statelessness or statute of limitations, will be deemed not to be relevant. Further, since the acquisition is treated as never having taken place, it could be that family member who have acquired nationality (whether automatically or on application) following the grant of nationality to a person due to fraud, are also treated as never having acquired the nationality.<sup>38</sup>

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<sup>33</sup> It falls on the Central Office Registrar to take a decision and cancel the registry entry.

<sup>34</sup> In *Kadria*, the court explained that “where person A with attributes A represents himself to be person B with different attributes B and thereby obtains a grant to person B, the grant to A may be a nullity”, whereas “where, however, the application is by A who has attributes A and the grant is to A who in fact has attributes B, the grant may remain effective or may be a nullity depending on the nature, quality and extent of the fraud, deception or concealment”: *R (Kadria) v SSHD and R (Krasniqi) v SSHD* [2010] EWHC 3405 (Admin), para. 33.

<sup>35</sup> See the explanations provided by the UK Visas and Immigration Authority in the “UK Visas and Immigration Nationality Instructions”, chapter 55 ([www.gov.uk/government/publications/chapter-55-deprivation-section-40-and-nullity-nationality-instructions](http://www.gov.uk/government/publications/chapter-55-deprivation-section-40-and-nullity-nationality-instructions)), specifically para. 55.8 ff.

<sup>36</sup> *R v Secretary of State for the Home Department ex parte Parvaz Akhtar* [1981] QB 46, pp. 54E-55B.

<sup>37</sup> See *R v Secretary of State for the Home Department ex parte Nahid Ejaz* [1994] QB 496 - in which a person used a British passport in the name of another person to masquerade as a British citizen. This person's wife then applied for naturalisation as a British citizen on the ground that she was married to a British citizen and she obtained the certificate of naturalisation. The court held that the wife could only lose her British citizenship if she was deprived of it under section 40 of the 1981 Act.

<sup>38</sup> This could be the case e.g. in England: whereas family members who have acquired nationality on application following the grant of nationality to a person due to fraud, will not be automatically deprived of their nationality when the person who committed the fraud, is deprived of nationality based on the statutory procedure, this will not hold when the acquisition of the British nationality by a person is treated as a nullity. In this case, any automatic acquisition of nationality by other family members will also be treated as of no effect. See *Bibi and Others v Entry Clearance Officer*, [2007] EWCA Civ 740 – in this case, a citizen of Pakistan came to the UK in 1962 and obtained citizenship of the UK and Colonies in 1967. He did so using another name than his own. After his death, his widow and four children, who resided in Bangladesh, attempted to come to the UK. Noting the “limited circumstances in which the verdict of the law is that citizenship never existed” (para. 20), the court nevertheless found that this person had not acquired British citizenship. As a consequence, his widow and children did not benefit from any right of entry to the UK. However, if the family member has obtained British citizenship not automatically, but on the basis of an application following the grant of nationality to a person, the fact that the latter committed fraud, will not automatically lead to the nullity of the acquisition by the family member. See *R. v Secretary of State for the Home Department ex parte Ejaz* [1994] QB 496

### iii) **Wrongful interpretation/ application of nationality law rules**

In other cases, the *quasi-loss* will occur following discovery that a provision of nationality law has been incorrectly applied. The mistake may have been made by the authorities or by the person concerned.

Not many cases have been reported.<sup>39</sup> One such case has been decided by a Dutch court.<sup>40</sup> It concerned a person born in Suriname in 1931 who had obtained Dutch nationality through naturalisation in 1947. Starting in the 1960s, the person settled in the United States where he worked as a doctor. In order to keep his license to practice as doctor, the person obtained US citizenship in 1976. At that time, voluntary acquisition of a foreign nationality was a ground of loss of Dutch nationality.<sup>41</sup> Nevertheless, the person renewed his Dutch passport several times. Even though the Dutch authorities had been informed that he had obtained US citizenship, they concluded at first that this was not a case of voluntary acquisition of a foreign nationality. In 2005, the Dutch authorities, however, reviewed the case and came to the conclusion that the person had lost his Dutch nationality.

Another case was decided by Portuguese courts: the Court of Appeal had to rule on a case where an entry in a register proved to be wrong due to a mistake by the authorities: Court of Appeal of Lisbon, 29 01 2004 – citizen born in Angola – wrong registration in 1983.

In another case, the Constitutional Court in Croatia was faced with a situation involving a woman who was born in Croatia in 1964 and had lived there all her life.<sup>42</sup> Even though the person was duly informed several times that she was not entitled to Croatian citizenship, she was issued a citizenship certificate and later a Croatian passport. After an internal revision procedure, the person was found not to be a Croatian citizen. The authorities therefore concluded that the passport was issued by mistake. Reviewing the case, the Constitutional Court refused to consider that the person had been deprived of the Croatian citizenship. According to the Court, the person had never acquired Croatian citizenship, so that she could not have been deprived of it. The Court concluded that there had been a grave mistake by the administrative body issuing illegally a certificate of citizenship, after which she was issued a passport.

In a case decided in 2012 by a Danish court, the question arose whether a child born in Egypt in 2005 to two Egyptian parents was entitled to Danish nationality. The child had come to Denmark with his mother in 2007, a number of years after his father had settled in Denmark. Upon arrival in 2007, the child was registered by the municipality as a Danish citizen, based on the fact that the father had been a naturalised Danish citizen in 2005. A passport was issued. In 2008, the Ministry of Integration informed the father that his child was not a Danish citizen. This decision was challenged in court, the father arguing among other things that the decision should be overturned based on legitimate expectations founded on the issuance of the Danish passport or other imaginable errors in the administrative procedures.<sup>43</sup>

Another interesting case was decided in Finland in 2011, which reveals a situation of *quasi-loss*: a child born in Finland to a Gambian mother and an unknown father was first considered to be a Finnish citizen on the basis of the default *ius soli* provision of the Finnish Nationality Act.<sup>44</sup> As new information on the child's father became available, the authorities reversed their previous decision a little less than one year after the

(CA, 1993). In that case, a woman had acquired British nationality upon application, based on the fact that her husband was a British national. It later appeared that her husband was not a British national. The question arose whether the woman had automatically lost British nationality. The Court of Appeal refused to treat this case as a case of nullity.

<sup>39</sup> See, however, G.-R. de Groot, *Nationaliteit en rechtszekerheid*, Boom juridische uitgevers, 2008.

<sup>40</sup> Court of First Instance of The Hague, 29 March 2007, LJN:BA1968.

<sup>41</sup> See Article 7 of the Dutch Act of 1892, in the version in force in 1976.

<sup>42</sup> Constitutional Court, case U-III-2006/2001, 11 July 2006, Official Gazette Republic of Croatia, N° 96/2006, 30 August 2006.

<sup>43</sup> Danish Eastern High Court, 2 February 2012, BS 3A-71/2010. This ruling is further commented on below.

<sup>44</sup> Section 9(1)(a), which provides for acquisition of the citizenship for a child born in Finland, who did not acquire the citizenship of any foreign State at birth and did not have a secondary right the citizenship of any other foreign State.

first determination. The Directorate of Immigration came then to the conclusion that the child was stateless. The matter was then brought to the Supreme Administrative Court.<sup>45</sup>

Presumably, similar cases exist in other jurisdictions. It is difficult, however, to discover them. In many cases, this is an untried and untested area. When a case arises, it may be decided based on general principles instead of precise rules. Finland stands out as an exception, as its law provides for an explicit provision covering cases where the nationality was granted by mistake (section 18 of the Finnish nationality act, see below).

What is peculiar about these cases is that again they fall outside the province of provisions dealing with loss of nationality. The mistakes made by the authorities are not anticipated by the legislator. Hence no provision has been made to address the consequences of such mistakes, except in Finland.

### 3.3 Protection mechanisms

When one loses his/her nationality, both national and international law provide some mechanisms which may alleviate the consequences of the loss or even prevent the loss from occurring. So it is that in some cases, a loss may not occur if it would lead to statelessness. Further, one may be able to *recover* a nationality one has lost. In general, protection mechanisms available in case of loss include:

- the statute of limitations,
- the prevention of statelessness,
- the facilitated reacquisition and
- the prohibition of retroactivity.

In case of *quasi-loss*, the mechanisms provided by national laws will not be applicable since *quasi-loss* is not formally a case of loss of nationality. So it is that cases of *quasi-loss* are not prevented by a general principle of prohibition of retroactivity. When such principle exists,<sup>46</sup> it will indeed only apply to cases of loss.

The most striking example of the absence of protection concerns the case of identity fraud in Dutch law, which has already been mentioned above.<sup>47</sup> For a long time, identity fraud was not specifically addressed as a ground of loss under Dutch law. It is only with the law of 21 December 2000 that a new provision was inserted in Article 14 RWN, which made it possible to withdraw a Dutch nationality acquired by fraud. As has been explained, this provision only applies to cases of fraud committed starting on 1 April 2003. For cases of identity fraud that occurred before this date, the Supreme Court reference made it clear that in such a case, acquisition never took place.<sup>48</sup> As a consequence, it must be accepted that the person never became a Dutch citizen. In other words, under Dutch law there are two different regimes for the same facts: depending on when identity fraud took place, the fraud will lead to a statutory loss of nationality or a finding based on court practice that acquisition never took place. In the former case, the individual will benefit from a statute of limitation (12 years). Further, the authority in charge of determining whether loss takes place, must take into account all circumstances and apply a proportionality test. Such guarantees are absent in case of fraud committed before 1 April 2003.

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<sup>45</sup> Supreme Administrative Court, 16 September 2011, KHO:2011:77. The Court considered that the child should not be deprived of his Finnish citizenship. According to the court, a decision by which a person's citizenship status was determined as Finnish created an assumption that the person was a Finnish citizen with related rights and duties. As there were no provisions in the Nationality Act on the possibility to change a decision ascertaining the status of a child, the Finnish Immigration Service had no right under the Nationality Act to decide a determination of citizenship status anew.

<sup>46</sup> See e.g. Art. 2.1 NET; Art. 2 BEL.

<sup>47</sup> See section 1 of this paper.

<sup>48</sup> Supreme Court, 11 November 2005, NJ. 2006, 149. In general see G.-R. de Groot (2007), "Identiteitsfraude en het Nederlanderschap van vóór 1 april 2003 genaturaliseerde personen", NJ, 82(2), pp. 74-80 and Groot, G.R. de and Schneider, H.E.G.S. (2007), "Erschlichene Einbürgerungen, Identitätsbetrug und Entzug der Staatsangehörigkeit in Deutschland und den Niederlanden", in E. Klein, S.U. Pieper and G. Ress (eds), *Rechtsstaatliche Ordnung Europas - Gedächtnisschrift für Albert Bleckmann* (pp. 79-102), Köln: Carl Heymanns Verlag.

However, other protection mechanisms may be available due to the circumstances in which the *quasi-loss* occurred. A distinction can be made between protection mechanisms that i) are built in the law of nationality and ii) derive from other fields of law. These mechanisms are important not only because they may prevent the *quasi-loss* of a nationality, but also because they reveal the extent to which there is a *protection gap*.

### ***i) Mechanisms peculiar to the law of nationality***

A close scrutiny of nationality law reveals that individuals may be protected in some instance against *quasi-loss*. It is in fact very often by examining these mechanisms that one is able to discover cases of *quasi-loss*. In the following, a survey will be offered of the main mechanisms that appear to be relevant in case of *quasi-loss*. Some of these mechanisms will prevent the disappearance of a nationality.<sup>49</sup> Other will permit a person to recover or keep his nationality even though the nationality was 'quasi-lost'.

#### ***Constitutional protection of nationality***

In some countries, the application of Constitutional principles will afford some protection against *quasi-loss*. This appears to be the case in Sweden. The Swedish Supreme Court issued a ruling in November 2006 in a case concerning a child who had acquired Swedish citizenship at birth on the ground that his father was a Swede.<sup>50</sup> Sixteen years after the birth, a court in Sweden decided that the fatherhood did not exist. As a consequence, a Swedish authority determined that the child had never been a Swedish citizen, as he had acquired citizenship through his father who was later declared not to be his father.<sup>51</sup> The Supreme Court, however, found that the Swedish Constitution did not allow people to be deprived of their citizenship against their own wishes. According to the Court, it is not possible to revoke a citizenship decision based on wrong information, and it is not possible to revoke a citizenship by claiming that citizenship never existed.

In a recent decision, the German Constitutional Court also made reference to constitutional principles in a case of *quasi-loss*.<sup>52</sup> In the case presented to the Court, the question arose of what were the consequences for the nationality of a child following the annulment of a recognition by a German father, who appeared not to be the biological father.<sup>53</sup> The child had derived his German citizenship from this recognition and as a consequence obtained the right to reside in Germany together with his Vietnamese mother who resided illegally in Germany. The local authorities attempted to challenge the recognition. The local court requested the Constitutional court to decide on the constitutionality of the rule under which a child loses his German nationality in case of successful challenge to the paternity. The Court held that since a successful challenge to the paternity automatically led to the loss of the Germany nationality by the child, this should be characterised not as a loss but rather as a *deprivation* under Article 16 of the German Constitution. The Court based this decision on the fact that neither the child, nor the parents could in any way influence the loss of nationality, nor could they have any influence on the proceedings leading to the disappearance of the

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<sup>49</sup> Other mechanisms of this type could be mentioned. One may for example refer to the various rules which provide that a withdrawal of citizenship shall not affect the spouse or children of the person whose citizenship has been withdrawn (see e.g. Art. 26 of Romanian Law N° 21/1991; Art. 3(2) of the Portuguese Act).

<sup>50</sup> Swedish Supreme Court, 8 November 2006, RA 2006 ref. 73. The child was not born in Sweden. He moved to Sweden with his mother when he was 8 y. old.

<sup>51</sup> The mother was a British citizen.

<sup>52</sup> Bundesverfassungsgericht, 17 December 2013, 1 BvL 6/10.

<sup>53</sup> This ruling stands in sharp contrast with an earlier ruling of the same court, which has already been mentioned: in a decision of 24 October 2006, the Bundesverfassungsgericht (24 October 2006, 2 BvR 696/04) was faced with a child who complained that the retroactive loss (*rückwirkende Wegfall*) of German nationality as a consequence of the successful challenge to the paternity, was contrary to the protection afforded by Article 16 of the German Constitution, which protects against unauthorised deprivation of nationality. The child was born in Germany in 1998, to an Albanian mother married to a German citizen, who later successfully challenged his paternity in court. The Court decided that when a court finds that a person is not the father of a child, the loss of German nationality that derives from this decision for the child was not contrary to the constitutional protection enjoyed by the child, even though the loss was retroactive, because the child had not yet developed a legitimate trust in the existence and continuity of his/her status as a German national.

paternity. Under Article 16, para. 1 of the Constitution, deprivation of nationality is altogether forbidden and cannot be justified.

It is very interesting to note that the Court was not convinced by the argument that Article 16 of the Constitution could not apply since the child was deemed never to have been a German citizen following the successful challenge of the paternity. The Court expressly rejected this view, holding that when a child is recognised by a German father, he obtains German nationality and not only the “appearance of a nationality”. Likewise, the Court indicated that until the paternity is successfully challenged in court, the father is at law the father of the child and this is a legal fully-fledged paternity and not an “appearance of paternity”.<sup>54</sup> The Court added that from the perspective of the constitutional protection of this German nationality, no difference should be made based on the fact that the loss of nationality following the challenge to the paternity was constructed as a case where the paternity and hence the nationality were null and void *ab initio*. The Court explained that this was a “technical regulation that intended to correct *ex post* a given result, without which the reality of the recognition of paternity and the nationality arising thereof disappear and automatically render moot their constitutional protection”.<sup>55</sup>

This type of protection is dependent on the constitutional protection of nationality. Constitutional traditions differ widely between Member States in this respect. Even in countries where nationality is constitutionally protected, it may be that a case of *quasi-loss* is found not to be incompatible with the constitutional protection.<sup>56</sup>

### *Mechanisms linked to the passing of time*

Under some nationality laws, a nationality that was acquired through a family relationship may only be lost or disappear within a certain time period. In other words, the disappearance of a family relationship does not have any consequence on the nationality that was created thanks to the relationship, provided the beneficiary of the nationality has reached a certain age. In many countries, the limit is set at the age of 18 years.<sup>57</sup> So it is that under Portuguese law, a denial of parental relationship should not have consequences on nationality if subsequent to attaining majority (Article 14 of Nationality Law). Under Belgian and Dutch law, no loss will occur if the annulment of family relationship intervenes when the child has already reached the age of 18 years (BE: Art. 8, para. 4 CNB; NL: Art. 14, para. 4 RWN). In other words, it may well be that in such a case, the child is from a legal perspective no longer deemed to be the child of the father. This will, however, not impact the child's nationality. Under French law, it is likewise accepted that if the recognition is successfully challenged and hence the parent-child relationship disappears, this may not have any

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<sup>54</sup> “Die gerichtliche Feststellung des Nichtbestehens der Vaterschaft, an die der Geburtserwerb der deutschen Staatsangehörigkeit des Kindes geknüpft ist, beseitigt eine zuvor bestehende deutsche Staatsangehörigkeit des Kindes und nicht etwa nur den Schein einer solchen. Nach § 1592 Nr. 2 BGB ist der Mann, der die Vaterschaft anerkannt hat, Vater dieses Kindes. Bis zur Rechtskraft eines auf Anfechtung hin ergehenden Urteils, in dem das Nichtbestehen der Vaterschaft festgestellt wird, besteht im Rechtssinne die Vaterschaft dieses Mannes. Die durch Anerkennung erworbene Vaterschaft ist eine rechtlich vollwertige Vaterschaft, keine bloße Scheinvaterschaft. Schon deshalb ist auch die nach Maßgabe des § 4 Abs. 1 oder 3 StAG von ihr abgeleitete deutsche Staatsangehörigkeit keine bloße Scheinstaaatsangehörigkeit.”

<sup>55</sup> “Am verfassungsrechtlichen Schutz der zwischenzeitlich bestehenden deutschen Staatsangehörigkeit ändert auch der Umstand nichts, dass der Verlust der Staatsangehörigkeit durch Vaterschaftsanfechtung einfachrechtlich als anfängliche Unwirksamkeit der Vaterschaft und Staatsangehörigkeit konstruiert wird und damit rückwirkend entfällt. Es handelt sich insoweit lediglich um eine Regelungstechnik zur nachträglichen Korrektur eines bestimmten Ergebnisses, das die zwischenzeitlich Realität gewordene rechtliche Anerkennung von Vaterschaft beziehungsweise Staatsangehörigkeit nicht ungeschehen und ihre Schutzwürdigkeit nicht automatisch hinfällig macht”

<sup>56</sup> See Croatian Constitutional Court, case U-III-2006/2001, 11 July 2006, Official Gazette Republic of Croatia, N° 96/2006, 30 August 2006 (the Court found that the applicant's case could not be examined from the aspect of the illegal deprivation or restriction of liberty, provided for in Article 22/2 of the Constitution, because this constitutional provision is not relevant in the specific administrative matter).

<sup>57</sup> As is required by Art. 7 para. 1 f) European Convention on Nationality.



consequence on the nationality acquired by the child when the latter is already 18 years old.<sup>58</sup> The same limitation appears to apply under Polish law.<sup>59</sup>

German law goes further and provides that loss of citizenship pursuant to the finding of non-existence of paternity (under section 1599 BGB) will not affect the German citizenship of children who have already reached the age of five (section 17, para. 3 StAG).<sup>60</sup> Under Finnish law, there is also a five-year time limit for the loss of Finnish citizenship to occur if it discovered that the citizenship was acquired based on a false paternity presumption and the paternity is annulled (section 32).

A similar mechanism concerns the situation in which a marriage is annulled. Such annulment may have as a consequence that the children born out of the marriage could lose their nationality. In some countries, however, such annulment may not have any consequence for the nationality of the children. This is the case under French law.<sup>61</sup>

Time may also play a role when it is the nationality of the parent, and not the paternity or maternity that disappears. It may indeed be that a child acquires a given nationality by virtue of his link with one parent – either at birth or later when the parent himself/herself acquires a nationality – and that the parent later loses this nationality. This may be the case e.g. if it later appears that the parent did not meet the requirements to obtain the nationality or that the acquisition was tainted by fraud. In those cases, it may be that under the relevant national law, the loss (retroactive or not) by the parent does not affect the child's nationality because of the time that has lapsed since the acquisition.

It is on the basis of a mechanism of this kind that the French Supreme Court refused to hold that a person who was born in 1967 in Djibouti had lost her French nationality. The father of this person had acquired French nationality in 1984. As a consequence, her child also became a French national. It later transpired that the father did not fulfil the requirements to obtain the French nationality. The declaration was therefore declared void in 1992. When the public prosecutor sought to have the French nationality of the child voided, the Court ruled that since the father's nationality had been declared void after the child had reached the age of 18 years, the annulment could not have any consequence on the child.<sup>62</sup>

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<sup>58</sup> Lagarde, § 21.44, p. 88.

<sup>59</sup> According to Art. 6(2) of the Polish Act, “Any changes concerning the identity of the father arising under a final court judgment issued in the procedure for the denial of paternity or cancellation of recognition of parentage shall only be relevant in the determination of the citizenship of the minor within 18 years of the date of birth whereas the minor’s consent shall be required for such relevance as of 16 years of age.” A much shorter time frame is provided for other cases of disappearance of family relationship under Art. 6(1) which provides that changes concerning the identity or citizenship of the parents “shall only be relevant to the determination of the citizenship of the child in as much as such changes occur within a year of the date of birth of the child”.

<sup>60</sup> However, this reservation does not apply if the paternity is challenged pursuant to § 1600, sub-section 1, n° 5 and sub-section 3 BGB. See the decision of the Bundesverfassungsgericht, 24 October 2006, 2 BvR 696/04 (*supra*).

<sup>61</sup> Art. 21-6 of the French Civil Code provides that “*L’annulation du mariage n’a point d’effet sur la nationalité des enfants qui en sont issus*” (“The annulment of a marriage may not have any effect on the nationality of the children born thereof”).

<sup>62</sup> Supreme Court, 17 February 2004, *Bulletin* 2004 I N° 52 p. 41. The court held that “Attendu qu’il résulte de ces textes que l’annulation d’une déclaration de nationalité française ne produit aucun effet sur la nationalité de l’enfant du déclarant devenu majeur”. Lagarde indicates that the Court’s decision rests upon a generous reading of Art. 20-1 of the Civil Code, according to which “La filiation de l’enfant n’a d’effet sur la nationalité de celui-ci que si elle est établie durant sa minorité” (§ 71.45, p. 347). Such a broad reading of Article 20-1 had been advocated by commentators. See e.g. H. Fulchiron, “Nationalité – Naturalisation”, Fasc. 40, *Juris-Classeur Code Civil*, at para. 157 (1996). See, however, the ruling of the Court of Appeal of Poitiers, 2 May 2000 (*JCP*, 2002, IV, 1309) – in which the court held that since the acquisition of the French nationality by a person born in Djibouti following the acquisition of the French nationality by her father, never took place since the declaration whereby the father requested the nationality had been found to be null and void. According to the court, such finding meant that the declaration never produced any effect. The fact that the declaration was only found to be void at a moment when the child had already reached the age of 18 years, could not therefore protect the child since the declaration was void *ab initio*.

### *Mechanisms linked to the prevention of statelessness*

Protection is also available in case the child would otherwise become stateless. This could take various forms. In jurisdictions where the disappearance of the family relationship is treated as a case of loss, the protective mechanism preventing statelessness will apply. So it is that under Dutch law, which provides a specific ground of loss in case of disappearance of the family relationship (Art. 14, para. 4 RWN), the law also indicates that loss of nationality following the disappearance of the family relationship will not take place if this would lead to the statelessness of the child (Art. 14, para. 6 RWN).

In a similar fashion, another protective mechanism that could apply in case of *quasi-loss* is to be found in the provisions on acquisition of nationality for stateless children. Those provisions, mandated by international law, make it possible for children to acquire a nationality if they would otherwise be or become stateless.<sup>63</sup> These provisions could therefore offer a solution for children who lose their nationality either because of the disappearance of a family relationship, or because they are affected by the lack of validity of the acquisition of nationality by one of their parents.

### *Mechanisms linked to the protection of legitimate expectations*

None of the States studied have developed a general principle whereby legitimate expectations of individuals would be directly protected in nationality matters. However, some rules may be considered to be applications of this principle in nationality law.<sup>64</sup> This applies in particular to the various provisions that recognise some effects to the 'apparent status of national' (*'bezit van staat van nationaliteit'* / *'possession d'état de nationalité'*). In some countries, an individual may indeed continue to claim his/her nationality even after it has been found that s/he was subject to a case of *quasi-loss* provided s/he demonstrates that s/he fulfils the requirements for the so-called 'apparent status of national'. French law offers a good example of this possibility. Under Art. 21-13 of the French Civil Code, a person who has enjoyed for at least 10 years the French nationality, may request that this status be confirmed.<sup>65</sup> A similar provision exists under Spanish law.<sup>66</sup> This mechanism also existed under Belgian law until it was abolished in 2012.<sup>67</sup>

Technically speaking, these provisions are deemed to concern the *acquisition* of nationality. In contrast with other provisions dealing with acquisition, the rules apply to persons who already enjoyed, at least apparently, the nationality. The rationale for such provisions is the wish to uphold legitimate expectations. They are clearly inspired by the mechanism of 'apparent status' that can be found in the family law of some countries (see below).

In other countries, the concept of *'possession d'état'* may be unknown. This does not mean, however, that no protection will be afforded to those who have enjoyed the status of a national during a certain period. So it is that German law provides a possibility to claim German citizenship on the basis of apparent status. Under Art. 3(2) GER, a person may indeed acquire German citizenship provided that he/she demonstrates that

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<sup>63</sup> See e.g. Arts 19 and 19.1 FR; Art. 10 BEL; Art. 3 NEL; § 8 StAG GER (for children born abroad; for children born in Germany: Gesetzes zur Verminderung der Staatenlosigkeit); Section 1(2) of the British Nationality Act 1981; Finland: section 9 (1)(4) of the Nationality Act, etc. See also Art. 7, para. 3 ECN.

<sup>64</sup> Statutes of limitations which could exist in case of fraud or of disappearance of a family relationship, could also be taken to aim at the protection of expectations. So it is that under Finnish law, various time limits exist which make it impossible to take away somebody's nationality after a certain period in case the acquisition occurred on the basis of false information (5 years, section 33) or following a paternity which is annulled (5 years, section 32).

<sup>65</sup> Art 21-13 provides that "May claim French nationality by declaration ...persons who have enjoyed in a constant way the apparent status of French for the ten years prior to the declaration".

<sup>66</sup> See Art. 18 of the Spanish Civil Code, which provides that "*La posesión y utilización continuada de la nacionalidad española durante diez años, con buena fe y basada en un título inscrito en el Registro Civil, es causa de consolidación de la nacionalidad, aunque se anule el título que la originó.*" See e.g. the ruling of the Spanish Supreme Court of 28 October 1998 (ruling N° 6268/1998, appeal N° 617/1996) applying this provision.

<sup>67</sup> See the Art. 17 of the Code of Belgian Nationality, abolished by the Law of 14 December 2012. It remains unclear why this provision was abolished. No explanation was given during the discussion of the bill in Parliament.

he/has “has been treated by German public authorities as a German national for 12 years and this has been due to circumstances beyond his or her control”.<sup>68</sup>

Rules relating to 'apparent status of a national' may be considered to protect legitimate expectations. Such expectations may also be protected using other means. Finnish law provides a good example. Under section 18 para. 1(2)(c) of the Finnish Act on Nationality, an exception may be made to various requirements that must in principle be met for Finnish nationality to be acquired through naturalisation. More specifically, an exception may be made to the required period of residence and the language skills if “the applicant has, through no fault of his or her own, been considered a Finnish citizen for a minimum of 10 years as a result of such a mistake made by a Finnish public authority which has led to a serious consequence related to the rights and obligations of a Finnish citizen”. When this provision was discussed in Parliament, the Government indicated that this provision might be applied in a case when a foreigner has e.g. been issued a Finnish passport by mistake. It was also explained that this provision should not be applied if the mistake by the public authority is corrected swiftly and has not led to any serious consequence.

What all these rules have in common is that they attach consequences to the fact that a person has been treated as a citizen during a given period of time. In all cases, the protection can only be granted if a sufficiently long period of time has passed. It seems that a consensus emerges to set the minimum threshold at ten years.

## **ii) Protection mechanisms available outside nationality law**

If one goes beyond nationality law, other mechanisms may be found that could offer some protection in case of *quasi-loss*. One should in the first place look at *family law* for some protection in case of *quasi-loss*.

### *Protection mechanisms linked to family law provisions*

The main instruments that could provide some protection in case of *quasi-loss*, may be found in family law. Family law is used to deal with situations where a status or relationship that was deemed to exist during a certain period of time, no longer does. As the annulment of a status or relationship may have serious consequences for the person concerned but also for third parties, some States provide a mechanism whereby the consequences of the annulment are tempered. This is usually done by accepting that if a person enjoyed a family law status for a long period, he/she may be entitled to keep this status even though it has been found to be void or invalid.<sup>69</sup>

So it is that under French law, the Civil code provides that if sufficient facts reveal a bond of parentage and relationship between an individual and the family to which the person is said to belong, the apparent status may be accepted (Art. 311 Civil Code). According to the same provision, the relevant facts that may be used to demonstrate apparent status include that the individual has always borne the name of those from whom he is said to descend; that the latter have treated him as their child, and that he has treated them as his father and mother; that they have, in that capacity, provided for his education, support and settling; that he is so recognised in society and by the family and that public authorities consider him as such. All these

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<sup>68</sup> The provision reads as follows: “In particular, any person who has been issued a certificate of nationality, a passport or a national identity card shall be treated as a German national. Acquisition of citizenship shall apply as of the date when the person was deemed to have acquired German citizenship by treating him or her as a German national. The acquisition of German citizenship shall extend to those descendants who derive their status as Germans from the beneficiary pursuant to sentence 1.”

<sup>69</sup> Limitation periods found in family law could also be used to protect against instances of *quasi-loss*. This will be the case when under the relevant family law provisions, a challenge to an existing family relationship must be brought within a certain time period. However, it should be noted that the application of such limitation periods may be challenged under Art. 8 Eur Ct.HR.

circumstances are taken to indicate that the person possessed the status at hand.<sup>70</sup> This so-called '*possession d'état*' also exist in other Member States,<sup>71</sup> but is not recognised in all Member States.<sup>72</sup>

The mechanism of apparent status may serve to bar challenges to paternity/maternity.<sup>73</sup> It may also serve to replace a birth certificate when the latter is missing. Although this mechanism is primarily meant to operate as a family law mechanism, it may have an impact in nationality matters. If a parent-child relationship is found never to have existed or is annulled, the child could indeed continue to claim the nationality of the 'parent' if he enjoys the apparent status of child. So it is that under French law, if a child-parent relationship is annulled, the apparent status could allow the child to keep the nationality of the parent. Under Dutch law, the mechanism has been used in a case submitted to the Supreme Court.<sup>74</sup> In that case, a girl had been born in the Dominican Republic. The birth certificate drawn up at birth contained false information about her parents. When she reached the age of 15, she was recognised by a Dutch citizen, who had recently married her mother. As a consequence thereof, she obtained Dutch nationality. When it was later found that the birth certificate contained false information, the authorities decided that the girl was no longer entitled to the Dutch nationality. The Supreme Court approved the lower court's ruling, which had found that the girl had always been treated by her mother's husband as his daughter. Accordingly, the court deemed that the girl possessed the status of child of the Dutch husband and that she was therefore entitled to Dutch nationality.

There is another technique that may be found in family law provisions and could provide some assistance in some cases of *quasi-loss*, i.e. those cases where the loss arises out of the disappearance of a family relationship. The technique consists in deeming that a particular relationship that was found to be void, nevertheless may produce some (or all) its effects. The most common situation is that of a marriage that has been declared void. Since the nullity may be attributable to one of the spouses only, some Member States provide that such marriage may nevertheless produce its effects or some of its effects with regard to the spouses who contracted the marriage in good faith.<sup>75</sup> Usually this is limited to those effects that have already taken place. One of the effects of marriage relates to the possibility to acquire the nationality of the spouse. When a marriage is annulled and the court accepts that this marriage nevertheless produces some of its effects, this may mean that the nationality acquired on the basis of the marriage withstand the annulment thereof. So it is that under Italian law, it is thought that the protection granted to putative marriages under Art. 128 of the Civil Code also extends to nationality. This would mean that even if a marriage is annulled, a *bona fide* spouse would not lose the nationality acquired on basis of the marriage. The same would apply to children born during the marriage.<sup>76</sup>

In some jurisdictions, the idea of protection of *bona fide* family members in case of annulment of a family relationship has been directly incorporated into the nationality law. Portuguese law provides, for example, that the annulment of a marriage does not affect the nationality acquired by a spouse, if the acquisition occurred *bona fide*.<sup>77</sup> Likewise, French law provides that the annulment of a marriage does not have any effect on the nationality of children born during the marriage.<sup>78</sup> These provisions represent the direct implementation in nationality law of the concept of 'putative' relationship. In the absence of such specific

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<sup>70</sup> The concept is often referred to by using the Latin shorthand "*tractatus, fama, nomen*".

<sup>71</sup> Luxembourg: Art. 320, 322 and 334 Civil Code; Spain: Art. 131 Código civil; Belgium: Art. 324 Civil Code; Italy: Art. 237 Codice civile; Portugal: Art. 1831 f Civil Code (for filiation); Netherlands: Art. 209 NBW.

<sup>72</sup> In some Member States, there is no concept of '*possession d'état*' (e.g. Germany, Croatia, Turkey, Greece, England, etc.).

<sup>73</sup> Under Luxembourg law, a challenge to a filiation link is impossible if the child possesses an apparent status that coincides with the birth certificate (Art. 322 Civil Code).

<sup>74</sup> Hoge Raad, 9 March 2012, ECLI:NL:PHR:2012:BU9887, *RvdW*, 2012/386; NJ, 2012/291, comments by Wortmann.

<sup>75</sup> See Art. 201 French Civil Code; Art. 1:77-2 NBW; Art. 201 Belgian Civil Code.

<sup>76</sup> In Belgium, see case 2.5 mentioned in *Mediateur fédéral, L'état civil des Belges à l'étranger et les contestations de nationalité*, 2013, p.12.

<sup>77</sup> According to Article 3, para. 2 of the Portuguese Act: "A declaration invalidating or annulling the marriage does not impair the nationality acquired by the spouse who married in good faith."

<sup>78</sup> Art. 21-6 French Civil Code.

provision, it is submitted that the spouse and children could be protected by the general provisions on putative relationships.<sup>79</sup>

### *Mechanisms linked to the protection of legitimate expectations*

In a number of countries, the protection of citizens in their relationships with the authorities include the protection of legitimate expectations. Under Portuguese law, for example, the Constitution protects legitimate expectations (Art. 2). In other countries, this principle has not received express statutory confirmation and only exists as a general principle of law.<sup>80</sup> In those countries where the principle is recognised, it is generally found outside the law of nationality and mainly in administrative law. It is unclear, however, what impact this provision has in nationality cases.

This has not prevented some courts, however, from making a reference to the principle of protection of legitimate expectations or using it in disputes involving the application of nationality law. A Belgian Court of Appeal, in fact, refers to the principle in a case involving the silent loss of nationality by a citizen born abroad, but this was an *obiter dictum*, which was not strictly necessary for the Court's decision.<sup>81</sup> The Finnish Supreme Administrative Court also indicated that when a Finnish authority has issued a decision determining that a person possessed the Finnish nationality, this creates an assumption that the person is a Finnish citizen, with related rights and duties. The Court drew, among others, on this element to conclude that the Finnish Immigration Service had no right under the Nationality Act to decide a determination of citizenship status anew without a party's request and hence to reverse a decision whereby it was found that a child did not possess the Finnish nationality.<sup>82</sup>

In some countries, the principle of legitimate expectations is also used in the context of situations of *quasi-loss* not so much to prevent the *quasi-loss*, but rather to facilitate the acquisition of nationality for the person concerned. Danish practice reveals indeed the existence of another use of the principle of legitimate expectations in case of *quasi-loss*. When a person has been found never to have had Danish nationality, this person may apply to acquire Danish nationality by naturalisation. Naturalisation is granted by Parliament, which decides unconstrained by any requirement. This makes it possible for the Danish Parliament to take into account the legitimate expectations of an applicant, who has enjoyed Danish citizenship for a long time before suffering a case of *quasi-loss*. It appears that this circumstance is duly taken into account by the Danish authorities deciding on naturalisation. Likewise in Finland, the principle of legitimate expectations has found a practical application in case of acquisition of nationality by naturalisation. Under section 18(1) of the Finnish Nationality Act, such naturalisation is indeed facilitated if it appears that the foreigner has been considered a Finnish citizen for at least 10 years.

In the Netherlands, legitimate expectations are also taken into account for the same purpose. Under Art. 10 of the Dutch Act, Dutch nationality may be granted in special circumstances. The applicant is in that case not required to meet all requirements that usually apply for naturalisation. According to the official instructions for the application of this provision, one of the situations where Art. 10 can apply is in case of "serious administrative error". This covers among other cases the situation in which a person has during a long period

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<sup>79</sup> Under French law, Art. 202 of the Civil Code for children born during a marriage. See e.g. Paris Court of Appeal, 10 December 2009, Juris-Data N° 2009-018100 (a foreigner had obtained the French nationality following his marriage with a French citizen; after one year, the marriage was found to be null and void since the foreigner had already been married with another person and this marriage had not ended. The court found, however, that since the foreigner had married *bona fide*, he was entitled to keep his French nationality). See in the same line, Paris Court of Appeal, 23 February 1996, JurisData N° 1996-021083; Supreme Court, 25 April 2013, N° 12-17645 (a citizen of Peru had become French following his marriage with a French citizen; this marriage was annulled when it was found that the Peruvian citizen was still bound by a previous marriage; the Peruvian citizen did not obtain the benefit of the 'putative' marriage; hence he lost his French nationality).

<sup>80</sup> See e.g. under Belgian administrative law, the protection through the 'vertrouwensbeginsel' (e.g. M. Van Damme en A. Wirtgen, "Het rechtszekerheids- en vertrouwensbeginsel", in *Beginselen van behoorlijk bestuur*, I. Opdebeek en M. Van Damme (ed.), Die Keure, 2006, pp. 326-349).

<sup>81</sup> Court of Appeal Brussels, 11 April 2013 (2011/AR/1433).

<sup>82</sup> Finnish Supreme Administrative Court, 16 September 2011.

erroneously been considered a Dutch citizen. On the basis of “legitimate expectations”, this person could be entitled to the Dutch nationality.<sup>83</sup> Although there is no automatism and each application will be considered on its own merits, this possibility is remarkable since it starts from the assumption that a person may have a legitimate expectation to be a Dutch citizen.

Even in the absence of a general principle of protection of legitimate expectations, protection may be found in other general principles of law. Under Portuguese law, for example, the principle of legal certainty, which is found in Art. 2 of the Constitution, could protect a person against the nullification of an entry into a register of citizens that proves to be wrong. In one reported case, an entry into such a register proved to be wrong due to a mistake by the authorities. The Court of appeal decided that in view of the fact that 20 years had passed since the entry, the principles of legal security and the prohibition of law abuse prevented the declaration of nullity.

### 3.4 What can we learn from the comparative law analysis?

The examination of the laws of Member States has first revealed that cases of *quasi-loss* are not the privilege of a few jurisdictions. Instances of *quasi-loss* occur or could occur in most jurisdictions. At the same time, the analysis has revealed that in many instances, there remains some uncertainty on the existence and extent of cases of *quasi-loss*. In many cases, no clear answer exists on questions pertaining to *quasi-loss* situations. It may be unclear whether a given set of facts will indeed lead to the loss or disappearance of nationality. It may also be unclear whether and how in case a nationality is deemed never to have been acquired by a party, this party may be protected against such finding.

The comparative analysis has also made clear that identical situations could be treated differently in the various Member States. The consequences for the nationality of a child of the annulment of the paternity is in some Member States treated as a case of loss. As a consequence, the loss will only occur in certain circumstances. It will also only work for the future. In other Member States, the same facts will lead to the conclusion that the child never acquired his ‘father’s’ nationality. Likewise, the consequences of identity fraud committed by a foreigner during the naturalisation process could differ: in some cases, such fraud leads to the loss of the nationality; in other cases, the nationality is deemed never to have been acquired. The boundaries of the categories ‘loss’ and ‘*quasi-loss*’ are hence not firmly established.

Turning to the second part of the analysis, the comparative law examination has pointed out that in many Member States, citizens may rely on some protection mechanisms. Some of these mechanisms are built into the law of nationality itself. Other may be found in family law provisions. What is striking is that Member States employ a wide diversity of such mechanisms. Further, use of protective rules will not prevent in all cases the loss/*quasi-loss* of nationality. Most protection mechanisms are predicated on certain requirements being met.

When taking together the various cases of *quasi-loss* and the potential protection mechanisms, what is striking is the sheer diversity of attitudes taken by Member States in situations of *quasi-loss*. In order to assess whether this diversity is tolerable and to select the best practices, it is necessary to examine international law and European law in order to identify criteria that can be used as *tertia comparationis*.

## 4. *Quasi-loss* from an international law perspective

What kind of rules does international law contain with relevancy for *quasi-loss* of nationality? Three categories of rules can be distinguished:

1. Rules that protect persons against statelessness,
2. Rules prohibiting arbitrary deprivation of nationality and
3. Rules that protect the continuation of the possession of a nationality.

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<sup>83</sup> See para. 2.3 under Art. 10 of the “Instructions for the application of the Kingdom Act on Netherlands Nationality”.

## 4.1 Protection against statelessness

The most important rules on avoidance of statelessness as a consequence of loss or deprivation of nationality can be found in the 1961 UN Convention on the Reduction of Statelessness, in particular in its Articles 5-9. These provisions prescribe that a State may only in some exceptional cases conclude that loss of nationality has taken place or deprivation of nationality is possible, with statelessness as a consequence.

For the issue of *quasi-loss* of nationality, we must raise and answer the question whether the protection these provisions provide against statelessness also applies if a State does not conclude that loss has taken place or deprivation could be appropriate, but that the nationality has never been acquired. An in-depth study of the 1961 Convention demonstrates in our opinion that the safeguards of the Convention against statelessness should also work in such cases of *quasi-loss*.<sup>84</sup> Two examples may illustrate this.

### 4.1.1 Loss of nationality as a consequence of the change in personal status

Art. 5(1) of the 1961 Convention on the reduction of statelessness provides:

If the law of a Contracting State entails loss of nationality as a consequence of any change in the personal status of a person such as marriage, termination of marriage, legitimation, recognition or adoption, such loss shall be conditional upon possession or acquisition of another nationality.

For the protection given by this provision, it should not matter whether the loss of nationality operates retroactively or the acquisition is deemed never to have happened. Another approach would in many countries completely frustrate the scope of application of the protection of Article 5(1) of the 1961 Convention in cases such as annulment of a marriage, (annulment or revocation of a) legitimation, recognition or adoption. This is because the rules regulating these situations in many legal systems have *retroactive* effect. For example, the parentage relevant for the acquisition of nationality is often lost with retroactive effect and consequently the same applies for the loss of the nationality acquired based on this parentage. It would frustrate the object and purpose of the Convention if Contracting States could escape from obligations under the Convention by using the legal construction of retroactivity. Therefore, the retroactivity or non-retroactivity cannot be relevant for the scope of protection of Article 5.<sup>85</sup>

The same should apply, if for other reasons it is concluded that the civil status of a person with relevancy for the nationality position of the person involved is different than one assumed in the past, e.g. if it is discovered that a child was born by a surrogate mother and as a consequence cannot obtain the nationality of the intentional mother, or that the registration of a person as a child happened on the basis of a wrong interpretation of applicable rules or due to wrong information. Those cases also have to be classified as loss of nationality as a consequence of a change in personal status, which implies that no statelessness may be caused.<sup>86</sup>

The question needs to be raised whether Article 5(1) also applies if it is discovered that the personal status was registered erroneously. For example, if a person was registered as the child of a national and was therefore considered to have acquired the parent(s) nationality *iure sanguinis* and after considerable time, the authorities discover that the person involved is not the child of this national, may the nationality be lost, even if this results in statelessness? The Tunis Summary Conclusions 2013 underline that the protection of Art. 5 of the 1961 Convention also applies in these types of cases.<sup>87</sup>

Article 7(1)(f) of the 1997 European Convention on Nationality (ECN)<sup>88</sup> also deals with this issue, concluding that loss of nationality would result in cases of non-fulfilment of the preconditions that led to

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<sup>84</sup> See also the Summary Conclusions of the Tunis Expert Meeting convened by the UNHCR on the interpretation of the Arts 5-9 of the 1961 Convention (hereinafter: the Tunis Conclusions), in particular paras 13 and 14 (available on <http://www.refworld.org/docid/533a754b4.html>).

<sup>85</sup> Tunis Conclusions, paras. 12-14.

<sup>86</sup> Tunis Conclusions, para. 37.

<sup>87</sup> Tunis Conclusions, para. 38.

<sup>88</sup> CETS 166.

automatic acquisition of nationality while the child was a *minor*, except if *statelessness* would be caused. These protective restrictions (only during minority and not leading to statelessness) also apply if the legal system involved provides that in such cases “the acquisition had never taken place (*ex tunc*)”.<sup>89</sup>

In line with this explanation, the Explanatory Memorandum of the Council of Europe Recommendation 2009/13 on the nationality of children mentions in this respect:<sup>90</sup>

It has to be stressed that Article 7, paragraph 1, *f* of the ECN also applies if it is established that, for instance, the family relationship that constituted the basis of the acquisition of the nationality of the child, was registered by mistake. The latter may be the case if, for example, the identity of the parent, which is relevant for the *jure sanguinis* acquisition of nationality, is discovered to be wrong, or in situations where it is discovered, after acquisition of the nationality by an *ex lege* extension of naturalisation, that no family relationship ever existed between the parent and the child.

However, in scenarios, where the registration of the family relationship is based on fraudulent information, deprivation of nationality acquired as a result of fraud or misrepresentation would be possible (Article 8(2)(b) of the 1961 Convention, respectively Article 7(1)(b) of the 1997 ECN). In case of fraud committed by a child’s legal representative, a State is, however, required to take into consideration the best interests of the child in the context of a proportionality test. In practice, this would mean that not all acts of an adult in relation to a child may be attributable to the child, for example if the adult concerned acted fraudulently as legal representative because he or she pretended to be the parent of the child, which was in fact not the case.<sup>91</sup>

#### **4.1.2 Deprivation of nationality due to fraud**

Article 8(1) of the 1961 Convention sets out a basic rule: “A Contracting State shall not deprive a person of its nationality if such deprivation would render him stateless.” However, Article 8(2)(b) allows for an exception to this rule “where the nationality has been obtained by misrepresentation or fraud”. The same rule can be found in Art. 7(1)(b) of the 1997 European Convention on Nationality.

A majority of the EU Member States explicitly provides that fraud in the procedure of acquisition of nationality may be a ground for revocation of the acquisition.<sup>92</sup> Only a minority of States have no relevant provisions in this regard. The majority of Member States that provide for deprivation of nationality after the discovery of fraud use a *withdrawal* procedure: if it is finally decided that the deprivation will take place, the nationality is lost *ex nunc* (“from now on”). In some other States, the deprivation will become effective after the decision becomes final but has *ex tunc* effect (“from the outset”). However, some Member States apply alternatively a procedure where the naturalisation may be nullified subsequently if it is discovered that the decree was based on fraudulent information, concealment of relevant facts or a non-existent fact. If the nullification takes place, the naturalisation is declared null and void *ab initio* (“from the beginning”). One important difference from the revocation procedure is that nullification always applies retroactively: the nationality is assumed never to have been acquired. The result of such nullification is therefore in fact an *ex tunc* deprivation of nationality. However, for the applicability of protection mechanisms under e.g. the 1961 Convention both the *ex nunc* and *ex tunc* procedures are to be considered as deprivation of nationality.<sup>93</sup> It

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<sup>89</sup> See the Explanatory Memorandum on the European Convention on Nationality, para. 73.

<sup>90</sup> Explanatory Memorandum on Recommendation 2009/13, para. 45.

<sup>91</sup> Tunis Conclusions, para. 39.

<sup>92</sup> There is even an obvious trend towards introducing this ground for deprivation. See <http://eudo-citizenship.eu/databases/modes-of-loss?p=&application=modesLoss&search=1&modeby=idmode&idmode=L09>.

<sup>93</sup> Please see e.g. POR 16, 18. It is notable that in some countries (like Greece and Germany until 2009), the nationality law itself does not expressly provide for deprivation of nationality due to fraud, but such deprived may be applied on the basis of general principles of administrative law. In Austria, apart from the nullification procedure mentioned in the Nationality Act (AUT 24), it is also possible to reopen the naturalisation procedure on the basis of administrative law in the case of fraud, new facts, new evidence or new decisions on relevant preliminary questions. In case of fraud, the revocation of a naturalisation decree is possible even if statelessness would be the consequence. In other cases, reopening is only possible if the revocation would not cause statelessness.



should not matter for the obligation of a Contracting State under the Convention which juridical construction is precisely chosen. This also applies for Article 7(1)(b) of the 1997 ECN.<sup>94</sup>

Article 8(4) of the 1961 Convention prescribes a procedural safeguard if a State envisages a deprivation of nationality under Art. 8(2)(b):

4. A Contracting State shall not exercise a power of deprivation permitted by paragraphs 2 or 3 of this Article except in accordance with law, which shall provide for the person concerned the right to a fair hearing by a court or other independent body.

Following from this provision, deprivation of nationality may only take place in accordance with law and accompanied by full procedural guarantees, including the right to a fair hearing by a court or other independent body.<sup>95</sup> It is essential that the decisions of the body concerned be binding on the executive power. This judicial or other independent control also implies that the person affected by deprivation of nationality should have the decision issued in writing, including the reasons for the deprivation. Otherwise, any judicial or other independent control would be frustrated.

The obligations of Article 8(4) of the 1961 Convention correspond with the obligations of European Convention on Nationality (ECN) Articles 11 and 12, which provide that decisions on nationality matters “contain reasons in writing” and “be open to an administrative or judicial review in conformity with its internal law”. It is worth noting, however, that the European Convention on Nationality opens all decisions on nationality matters to such review and procedural guarantees, while the 1961 Convention only provides explicitly for a right to a fair hearing in relation to decisions on deprivation of nationality. Subsequent to the adoption of the 1961 Convention, however, the right to a nationality and not to be arbitrarily deprived of one’s nationality have been incorporated in a range of universal and regional treaties, some of which also include the right to an effective remedy.<sup>96</sup>

These procedural guarantees also apply if a State concludes in respect of fraud in general or a specific kind of fraud that the nationality was never acquired. Another approach would also preclude the application of a proportionality test. It must also be borne in mind that the *ab-initio* void construction may have automatic consequences for the children (and potentially other descendants) whose nationality depends exclusively on the fact that their parent acquired the nationality concerned by naturalisation. This would also conflict with Article 6 of the 1961 Convention, which prohibits extension of loss or deprivation of nationality by parents to their children if it results in statelessness.<sup>97</sup>

In this context again a citation from the Explanatory Memorandum on the European Convention on Nationality is relevant. In respect of the construction of loss of nationality due to fraud, it underlines:<sup>98</sup>

In cases where the acquisition of nationality has been the result of the improper conduct specified in sub-paragraph b, States are free either to revoke the nationality (loss) or to consider that the person never acquired their nationality (void *ab initio*).

It is of course evident that the above-mentioned choice does not influence e.g. procedural guarantees, such as those enshrined in Arts. 11 and 12 of the Convention.

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<sup>94</sup> Tunis Conclusions, paras 63, 64.

<sup>95</sup> Please see for remarks on the question as to what can be understood as an “otherwise independent body”: Summary Record of the 16th Plenary Meeting, A/CONF.9/C.1/ SR.16 (13 April 1959), p. 7.

<sup>96</sup> Please note that in Europe it was held until recently that nationality matters did not fall under Article 13 of the European Convention on Human Rights (ECHR), guaranteeing an effective remedy in case of violation of the rights protected under the Convention. However, after the European Court of Human Rights ruled in *Genovese v Malta* that (non-)access to a nationality has an impact on the social identity of a person – protected under the European Convention on Human Rights Article 8 as a part of private life – that view can longer be maintained. If the right to acquire a nationality is protected under ECHR Article 8, the same must apply *a fortiori* to continued possession of a nationality. Consequently, the effective remedy guarantee of ECHR Article 13 would also apply in claims relating to loss (including *quasi-loss*) of nationality.

<sup>97</sup> Tunis Conclusions, paras. 25-27; 63, 64.

<sup>98</sup> Explanatory Memorandum on the ECN, para. 63.

## 4.2 Protection against arbitrary deprivation

The loss and deprivation provisions of the 1961 Convention can be seen as a partial implementation of the general prohibition on arbitrary deprivation of nationality, enshrined in the Universal Declaration of Human Rights, Article 15. This principle is repeated in a number of international treaties (inter alia, in Art. 4(c) European Convention on Nationality), but until recently only few international documents elaborated on how “arbitrary deprivation” has to be understood.

Some relevant remarks can be found in the Explanatory Memorandum on the European Convention on Nationality:<sup>99</sup>

Several indications can be given concerning the prevention of an arbitrary deprivation of nationality. They relate both to the substantive grounds for deprivation and the procedural safeguards. As regards the substantive grounds, the deprivation must in general be foreseeable, proportional and prescribed by law. If it is based on any of the grounds contained in paragraph 1 of Article 5, it is contrary to this paragraph. Thus the withdrawal of nationality on political grounds would be considered arbitrary. More specifically, Article 7 of the Convention exhaustively lists the grounds for deprivation. Where deprivation would lead to statelessness, the prohibition contained in paragraph 3 of Article 7 applies. According to this paragraph the only exception concerns the acquisition of nationality by the improper conduct of the applicant (see paragraph 3 of Article 7).

As regards the procedural safeguards, reference should be made to Chapter IV, in particular the provision that decisions relating to nationality shall contain reasons in writing and shall be open to an administrative or judicial review.

In 2009, the UN Secretary-General, submitted a report on this issue to the Human Rights Council.<sup>100</sup> In this contribution some rules mentioned in that report need to be highlighted, as far as they are relevant for *quasi-loss* situations.

The UN Secretary-General underscored that the obligation not to deprive a person arbitrarily of his nationality implies that it must be possible to challenge the loss or deprivation of nationality in court:

Procedural safeguards are essential to prevent abuse of the law. States are thus expected to observe minimum procedural standards in order to ensure that decisions on nationality matters do not contain any element of arbitrariness.

More specifically: “Violations of the right to a nationality must be open to an effective remedy.”<sup>101</sup>

He also stressed that it follows from Article 15 UDHR, that the grounds for a deprivation decision must be proportional:<sup>102</sup>

Measures leading to the deprivation of nationality must serve a legitimate purpose that is consistent with international law and, in particular, the objectives of international human rights law. Such measures must be the least intrusive instrument of those that might achieve the desired result, and they must be proportional to the interest to be protected. In this respect, the notion of arbitrariness applies to all State action, legislative, administrative and judicial. The notion of arbitrariness could be interpreted to include not only acts that are against the law but, more broadly, elements of appropriateness, injustice and lack of predictability also.<sup>103</sup>

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<sup>99</sup> Explanatory Memorandum on the European Convention on Nationality, paras. 36 and 37.

<sup>100</sup> UN General Assembly, *Human Rights and Arbitrary Deprivation of Nationality: Report of the Secretary-General*, 14 December 2009, A/HRC/13/34. This Report was prepared following a request by the Human Rights Council at its 42nd Meeting (Resolution 10/13 of 26 March 2009 – Human rights and arbitrary deprivation of nationality). Based on this Report, the Human Rights Committee adopted a resolution regarding human rights and arbitrary deprivation of nationality (Resolution 20/5 of 5 July 2012, A/HRC/20/L9).

<sup>101</sup> See A/HRC/13/34, para. 43 and 46.

<sup>102</sup> Compare the European Court of Justice judgment in *Janko Rottmann v. Freistaat Bayern* on 2 March 2010 (Case C-135/08 [2010]). Please see on that decision: De Groot/ Seling 2011.

<sup>103</sup> See A/HRC/13/34, para. 25 and 27.

The UN Secretary-General underpinned furthermore, that loss or deprivation of nationality needs to have a firm legal basis.<sup>104</sup>

It is clear from the wording of UDHR Article 15 that these principles have not only to be observed if loss or deprivation of nationality results in statelessness, but *in all cases* where a person has his or her nationality withdrawn.<sup>105</sup> We also see no reason, why these principles should not apply in case of *quasi-loss* of nationality.

### 4.3 Protection of the continuation of the possession of nationality

Until now there are no explicit treaty provisions that oblige States to protect legitimate expectations regarding the possession of a nationality. However, a relevant rule can be found in Recommendation 2009/13 of the Council of Europe.

Principle 18 of the Recommendation calls upon States to provide that:

... children who were treated in good faith as their nationals for a specific period of time should not be declared as not having acquired their nationality.

In many cases, the children involved will enjoy some protection by Art. 7 (1) (f) ECN already mentioned above: loss of nationality in cases of non-fulfilment of the preconditions, which led to the acquisition of the nationality *ex lege*, is only allowed during the minority of the person involved and no statelessness may be caused.

The Explanatory Memorandum on Recommendation 2009/13 underpins that several different situations are covered by this provision:<sup>106</sup>

- 1) Situations in which a child has acquired a nationality as a foundling and later, after discovery of his or her parent(s), appears to have the foreign nationality of a parent.
- 2) The rule also applies in the event that a child has acquired the nationality of his or her state of birth because (s)he would have otherwise been stateless, but further evidence shows that (s)he had acquired another nationality *iure sanguinis*.

In both cases, the loss involved is a correction of a default *ius soli* acquisition.

- 3) The loss can also be the consequence of a retroactive (*ex tunc*) loss of the family relationship on which the acquisition of nationality *iure sanguinis* was based, for example because of a successful denial of paternity, annulment of a recognition of paternity or an *ex tunc* annulment of an adoption.
- 4) The rule also applies if it is established that, for instance, the family relationship that constituted the basis of the acquisition of the nationality of the child, was registered by mistake.

The Explanatory Memorandum para. 47 mentions that serious doubts have arisen in several States in the past few years regarding the age limit of 18 years. It is doubtful whether the loss of nationality can still be justified when the child involved has been in possession of a nationality for a considerable number of years.<sup>107</sup> The Explanatory Memorandum underscores:

This is in particular the case if the child was treated as a national for a period exceeding the period of residence required for naturalisation, which according to Article 6, paragraph 3 of the ECN should not exceed ten years. Furthermore, the desirable preferential treatment of children could even justify a much shorter limit.

<sup>104</sup> Please see A/HRC/13/34, para. 24.

<sup>105</sup> Tunis Conclusions, para. 15-27.

<sup>106</sup> Explanatory Memorandum on Recommendation 2009/13, para. 43-45.

<sup>107</sup> Gerard-René de Groot and Hildegard Schneider, Erschlichene Einbürgerungen, Identitätsbetrug und Entzug der Staatsangehörigkeit in Deutschland und den Niederlanden, in Eckhart Klein, Stefan Ulrich Pieper and Georg Röss (eds), *Rechtsstaatliche Ordnung Europas – Gedächtnisschrift für Albert Bleckmann*, Köln: Carl Heymanns, 2007, pp. 79-102.

However, principle 18 of Recommendation 2009/13 does not prescribe a certain maximum period after which the non- (or no longer) fulfilment of the preconditions for the acquisition should not have consequences. The specification of the relevant period is left to the discretion of the State, but it is obvious that this period should be considerably shorter than 18 years.

## 5. *Quasi-loss* from a European perspective

Until now European law did not deal explicitly with *quasi-loss* of nationality, but there is an important case dealing with loss of nationality by deprivation due to fraud committed during the naturalisation procedure, the case of *Janko Rottmann* decided by the ECJ on 2 March 2010.<sup>108</sup>

Janko Rottmann was an Austrian citizen who was naturalised in Germany in 1999. In the following year, the German authorities discovered that Rottmann committed fraud during the naturalisation procedure by not informing the German authorities that he was “wanted” in Austria because of the accusation of crimes committed there. Consequently, the German authorities wanted to deprive him of German nationality. This deprivation would render Rottmann stateless, because he had lost Austrian nationality by the voluntary acquisition of German nationality. Rottmann challenged the deprivation decision of the German authorities in court.

The question was raised of whether a deprivation of German nationality with statelessness as a consequence would violate EU law. The German Federal Administrative Court (*Bundesverwaltungsgericht*) decided to initiate a preliminary ruling procedure. The first issue that had to be dealt with in Luxembourg was whether the deprivation of German nationality of a German national by German authorities was an internal matter outside the ambit of European law.

In his Opinion, Advocate-General Poiares Maduro underpinned that Rottmann could only fulfil the residence requirement for naturalisation in Germany by having used the right of free movement and that, for that reason, EU law was involved. The ECJ states, without any reference to the use of free movement rights, that it is clear that the situation of a citizen of the Union who is confronted with the deprivation of the nationality of a Member State and therefore of European citizenship “falls, by reason of its nature and its consequences, within the ambit of European Union law.”(para. 42). Furthermore, the Court stresses: “citizenship of the Union is intended to be the fundamental status of nationals of the Member States”. (para. 43)

Second, the influence of European law on the nationality law of the Member States had to be assessed. The Court observes: “ [The exercise of] power to lay down the conditions for the acquisition and loss of nationality, [...], is amenable to judicial review carried out in the light of European Union law.” (para. 48). Regarding the withdrawal of naturalisation with statelessness as a consequence, the Court observes that this could be compatible with European Union law (para. 50), but underpins:

In such a case, it is, however, for the national court to ascertain whether the withdrawal decision at issue in the main proceedings observes the principle of proportionality so far as concerns the consequences it entails for the situation of the person concerned in the light of European Union law, in addition, where appropriate, to examination of the proportionality of the decision in the light of national law. (para 55)

The ECJ also indicates which interests and facts have to be taken into account in the context of the required proportionality test. Attention must be paid to the consequences that the decision entails for the person concerned and, if relevant, for the members of his family with regard to the loss of the rights enjoyed by every citizen of the Union. In this respect, it is necessary to establish, in particular, whether that loss is justified in relation to:

- a) the gravity of the offence committed by that person
- b) the lapse of time between the naturalisation decision and the withdrawal decision and
- c) whether it is possible for that person to recover his original nationality.

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<sup>108</sup> C 135/08.

The Court also underlines, that deprivation may also be possible if the original nationality is not recovered (para. 57), but in such cases:

it is, nevertheless, for the national court to determine whether, before such a decision withdrawing naturalisation takes effect, having regard to all the relevant circumstances, observance of the principle of proportionality requires the person concerned to be afforded a reasonable period of time in order to try to recover the nationality of his Member State of origin.

The obvious message of the *Rottmann* ruling of the ECJ is that the European proportionality principle has to be observed by Member States in the case of deprivation of nationality. Does this rule only apply in clear-cut deprivation scenarios or also in cases where European citizenship is at risk due to *quasi-loss* of the nationality of a Member State? We submit that the *Rottmann* ruling is also relevant in such *quasi-loss* cases. One should realise that the *Rottmann* case itself was already very much on the borderline of loss by deprivation and *quasi-loss*. The construction of German law was a nullification of the naturalisation with retroactive effect. After the nullification decision became effective because no judicial appeal could be lodged against the final decision of the Bundesverwaltungsgericht,<sup>109</sup> *Rottmann* was deemed never to have acquired German nationality. The only difference with a *quasi-loss* construction that concludes that the naturalisation was *ab initio* void is that an authority and – if challenged – a court has to decide that the nullification happens. But as we argued above in light of international law, a court should also be involved if authorities reach a conclusion of *ab initio* voidness.

Moreover, one should appreciate that not only the proportionality principle but also other general principles of EU law could be of relevance for the grounds for loss (including *quasi-loss* of nationality). In his Opinion in the *Rottmann* case, Advocate-General Poiares Maduro identified the equality principle (Opinion, para. 34) and the principle of protection of legitimate expectations (Opinion, para. 31). It is evident that the principle of access to the court can be added to this, because without judicial control the other principles would not be effective.

## 6. Recommendations

On the basis of the international treaties and documents examined in this contribution – namely EU and international law and the practices in some Member States – we put forward the following recommendations for dealing with *quasi-loss* cases:

### 1) Procedural guarantees

In all situations of *quasi-loss*, the following guarantees should be fully granted to the individuals concerned:

- i) judicial review, i.e. access to an independent judge leading to a reasoned decision,
- ii) treatment as a national during the course of judicial review and
- iii) the (judicial) decision takes effect only when it cannot be challenged any longer.

### 2) Preference for treatment as a case of possible deprivation of nationality

States should give preference to treatment of cases of *quasi-loss* as a situation where the person concerned *can be deprived* of his/her nationality, instead of considering that the acquisition is annulled or lost *ex lege*. This will ensure full application of all existing protection measures, including existing limitation rules and age limits.

A State may, however, consider that due to the specific circumstances of a situation, e.g. fraud, it is preferable to consider that such deprivation becomes effective back to the day the acquisition occurred (annulment *ex tunc*).

A State should not, however, react to a situation of *quasi-loss* by considering that no nationality was ever acquired; i.e. an *ab-initio* null and void construction should not be used.

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<sup>109</sup> Decision of 11 November 2010 (<http://www.bverwg.de/entscheidungen/entscheidung.php?ent=111110U5C12.10.0>).

### 3) *Protection of legitimate expectations - substance*

In all cases of *quasi-loss*, and regardless of the characterisation retained by the State (i.e. constructing a situation of *quasi-loss* as a case of loss, deprivation or annulment of acquisition), it is recommended that States strive to protect legitimate expectations of the persons concerned. The extent and strength of this protection may vary depending on the specific circumstances of the case.

When a case of *quasi-loss* is discovered, States should preferably attempt to guarantee the *continuation* of the nationality of the person concerned. States are free to decide what mechanism or device they wish to use to guarantee such continuation. It may be that under the relevant national law, such continuation is achieved through the legal instrument of apparent status of national (*possession d'état de nationalité*), through an administrative recognition of nationality or through another device. It is advisable to combine such legal instruments with limitation provisions.

Such continuation is important as it guarantees that there will be no discontinuation in the rights and entitlements enjoyed by the person as a national.

### 4) *Protection of legitimate expectations – procedure*

In order to determine the extent to which legitimate expectations deserve protection, a State should take into account all relevant specific circumstances of each individual case and apply a proportionality test.

If a State intends to draw consequences from a situation of *quasi-loss* to members of the family of the person concerned by the *quasi-loss*, i.e. spouses or children, separate decisions on their nationality are necessary, which cannot be a mere and automatic replica of the decision taken for the person concerned. These decisions should instead be taken after an individual assessment of the position of the spouse and/or children under application of a proportionality test.

If the decision to consider that a person can be deprived of his nationality was based on fraudulent conduct by this person, this conduct cannot automatically be attributed to the spouse and/or children of the person. Such attribution can never take place in relation to children, if the adult only pretended to be the legal representative.

If such decision concerns the situation of children of a person affected by a situation of *quasi-loss*, the decision should in the first place be guided by the best interests of the child.



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