Federal Administrative Court
Supreme Court
(https://www.bverwg.de/en)

## Important information

Due to the risk of infection with the coronavirus, the Federal Administrative Court remains closed for visitors until further notice.

It is still possible to attend oral hearings when wearing a medical face or FFP2 mask. The courtrooms are fit to keep sufficient distance.

# Judgment of 11 November 2010 - BVerwG 5 C 12.10

ECLI:DE:BVerwG:2010:111110U5C12.10.0



## Headnotes

1. It is principally not contrary to European Union law, in particular to article 17 EC, for a Member State to withdraw from a citizen of the Union the nationality of that state acquired by naturalisation when that nationality was obtained by deception, on condition that the decision to withdraw observes the principle of proportionality (ECJ, judgment of 2 March 2010 - C-135/08 - NVwZ 2010, 509, 512 paragraph 59). This also applies if the person concerned may become stateless and lose the citizenship of the Union as a result.

2. The principle of proportionality may require allowing the person concerned a limited period in which to attempt to restore a nationality held before the naturalisation.

## Sources of law

EC article 17 (1)

Bavarian Administrative Procedure article 48 (1) sentence 1

Code of Administrative Court Procedure section 114 sentence 2 section 144 (6)

Nationality Act section 35

## Headwords

EU citizenship obtained by deception; Withdrawal; failure to report investigation procedures abroad; principle of accessoriness; principle of proportionality under Community law; restoring original nationality;

# Reasons

## I

1

The appellant challenges the withdrawal of his naturalisation as a national of the German state.

2

The appellant was born in Graz, Austria, in 1956 and had been an Austrian citizen until his naturalisation. After the federal police in Graz had initiated investigations against the appellant due to suspected serious fraud on a commercial basis (contested by him), he left Austria and took up residence in Munich. There he worked as an independent business consultant. The Landesgericht für Strafsachen (Regional Court for Criminal Matters) in Graz issued a national arrest warrant against the appellant in February 1997.

3

The appellant applied for his naturalisation in Germany in February 1998. The form used for this purpose and signed by him, under “pending investigation procedures”, reads “none” in his handwriting. The naturalisation certificate of 25 January 1999 was handed over to the appellant on 5 February 1999.

4

The authority responsible for nationality matters learned in August 1999 that the appellant was the subject of an Austrian arrest warrant and in September 1999 that he had been questioned as an accused person before the Landesgericht für Strafsachen in Graz as early as in July 1995. After hearing the appellant, the appellee withdrew the naturalisation with retroactive effect by decision of 4 July 2000 on the grounds that the appellant had not disclosed the fact that he was the subject of judicial investigation in Austria and that he had, in consequence, obtained German nationality by deception.

5

The appellant's application for judicial review was dismissed by the Administrative Court and his appeal dismissed by the Higher Administrative Court (VGH). The appeal to the Federal Administrative Court as court of last resort resulted in the remission of the case to the Higher Administrative Court (see judgment of 3 June 2003 - 1 C 19.02 - Buchholz S. 11 article 16 no. 73 = BVerwGE 118, 216).

6

In the following period the Higher Administrative Court investigated the issues still open and sought legal advice regarding Austrian law on nationality from the competent administrative agency in the regional government of Styria. The agency informed by letters of 8 October 2004 and of 22 March 2005 that a withdrawal of the German nationality with retroactive effect would not automatically lead to a revival of the Austrian nationality and that the appellant failed to fulfil the prerequisites for naturalisation.

7

As a result, the appellee supplemented his discretionary considerations. Even considering the threatening statelessness of the appellant and the expected loss of citizenship of the Union, there was an overriding public interest in with-drawing German nationality obtained by deception. The appellee assumed that being married to a German the appellant would, also as a stateless person, be able to obtain a residence permit and identification documents for business travels.

8 The Higher Administrative Court rejected the appellant’s appeal again by judgment of 25 October 2005. The Federal Administrative Court submitted the proceedings to the ECJ by decision of 18 February 2008 - 5 C 13.07 (see no. 1 above). In its judgment of 2 March 2010 - C-135/08 - (NVwZ 2010, 509) the Grand Chamber

of the ECJ decided on the relevant issues regarding Union law.

## II

12 The appellant's application for judicial review (to the Federal Administrative Court) was dismissed for the following reasons:

13 1. The Higher Administrative Court had correctly assumed that the appellee's withdrawal notification of 4 July 2000 had a sufficient legal basis. Although the withdrawal provision of section 35 of the Law on nationality (StAG), created especially for cases of naturalisation obtained by deception, did not yet exist at the time the contested decision was issued, its prerequisites are also fulfilled as borne out by the factual findings of the Higher Administrative Court. This provision was introduced only during the appeal proceedings (before the Federal Administrative Court) with the law amending the Law on nationality of 5 February 2009 (BGBl I, page 158), taking effect on 12 February 2009. Before the amendment the public authorities for nationality matters could resort to the general withdrawal provisions of the codes of administrative procedure (VwVfG) of the federal states - here: article 48 VwVfG of the Land of Bavaria – if naturalisation had been acquired by intentional deception (see judgment of 3 June 2003, loc. cit., page 2 or page 218 et seq.; BVerfG, judgment of 24 May 2006 - 2 BvR 669/04 BVerfGE 116, 24). The prerequisites for withdrawal in the present case of naturalisation obtained by deception do not differ between section 35 StAG and article 48 VwVfG of the Land of Bavaria. Against this background, it is not required to conduct a final examination in order to establish whether the new federal law (section 35 StAG) needs to be applied in the appeal procedures before the Federal Administrative Court.

14 The withdrawal of naturalisation is, contrary to the appellant's opinion, not generally prohibited due to superior law. Neither the prohibition of deprivation of German citizenship stipulated under article 16 (1), 1st sentence, German Basic Law (GG), nor the protection against statelessness provided in article 16 (1), 2nd sentence, GG, preclude a withdrawal of naturalisation obtained by deception (BVerfG, judgment of 24 May 2006, loc. cit., paragraph 50, et seq.). Contrary to the appellant's opinion the presumption of innocence as guaranteed in article 6 (2) of the European Convention on Human Rights is also not affected since the withdrawal of naturalisation is not based on an alleged criminal offence committed by the appellant (judgment of 3 June 2003, loc. cit., page 7 resp. 226).

15 2. Furthermore the Higher Administrative Court had correctly assumed that the prerequisites for a withdrawal pursuant to article 48(1), 1st sentence, VwVfG of the Land of Bavaria, which in their decision-relevant core correspond to the prerequisites of section 35 StAG, were fulfilled in the present case.

16 a) As stated by the division in its decision of 18 February 2008 (loc. cit. paragraph 12) the appellant, pursuant to the binding (section 137(2), VwGO) factual findings of the Higher Administrative Court in its judgment of 25 October 2005, lied about the existence of the prerequisites for naturalisation and, in consequence, obtained his naturalisation by deception. Since naturalisation had been unlawful right from the beginning it could be withdrawn at the appellee's dutifully exercised discretion. Taking into consideration the comprehensive discretionary considerations submitted later in the appeal proceedings to the Federal Administrative Court, there are also no reasons to object to the discretionary decision on a point of national law.

18 c) The additional discretionary considerations submitted by the appellee on 3 May 2005 were permissible pursuant to section 114, 2nd sentence, VwGO. The considerations introduced by written statement of 3 May 2005 with regard to statelessness, the loss of citizenship of the Union and the resultant consequences for the appellant, despite their significance for the appellant, continue the line of argumentation of the contested withdrawal decision without affecting its "identity" (see decisions of 14 January 1999 - 6 B 133.98 NJW 1999, 2912 and of 30 April 2010 - 9 B 42.10 Buchholz 310, section 114,no. 57, paragraph 4). The argument underlying the withdrawal, i.e. the restoration of a lawful state, remains in place. The final weighing of the

conflicting public and private interests leaves the result unaffected.

19 d) The discretionary decision supplemented in a manner permitted by law is also no abuse of discretion in the meaning of section 114, 1st sentence, VwGO. When weighing the public and private interests for and against a withdrawal, the appellee had taken into account all the factors pertinent under the circumstances. He had considered and reasonably weighed the negative consequences a withdrawal of German citizenship would have for the appellant in his supplementary discretionary considerations of 3 May 2005. Although a recovery of Austrian nationality cannot be excluded according to the declarations made by the Republic of Austria in the oral pleadings before the ECJ, it does not imply an error of assessment to the detriment of the appellant to assume the worst case for him – i.e. statelessness and loss of the status of citizen of the Union – resulting from a withdrawal of naturalisation. The consequence of statelessness does not constitute an error of assessment, neither in general – as borne out by section 35 (4), StAG – nor in the present case – as set out below – due to violation of the principle of proportionality. There are no indications of any other errors of assessment (see judgment of 3 June 2003, loc. cit.).

20 3. The withdrawal of naturalisation observes the principle of proportionality also with regard to the appellant's status under Union law.

21 a) According to the ECJ ruling sought in the present proceedings, it is principally not contrary to European Union law, in particular to article 17 EC (= article 18 TFEU), for a Member State to withdraw from a citizen of the Union the nationality of that state acquired by naturalisation when that nationality was obtained by deception, on condition that the decision to withdraw observes the principle of proportionality (judgment of 2 March 2010, loc. cit., paragraph 59). Accordingly, a Member State whose nationality has been acquired by deception cannot be considered bound, pursuant to article 17 EC, to refrain from withdrawing naturalisation merely because the person concerned has not recovered the nationality of his Member State of origin (ibidem, paragraph 57).

22 Having regard to the importance which primary law attaches to the status of citizen of the Union, when examining a decision withdrawing naturalisation it is necessary, as further pointed out by the ECJ, to take into account the consequences that the decision entails for the person concerned and, if relevant, for the members of his family with regard to the loss of the rights enjoyed by every citizen of the Union. In this respect it is necessary to establish, in particular, whether that loss is justified in relation to the gravity of the offence committed by the person concerned, to the lapse of time between the naturalisation decision and the withdrawal decision and to whether it is possible for that person to recover his original nationality (judgment of 2 March 2010, loc. cit., paragraph 56). Having regard to all the relevant circumstances, observance of the principle of proportionality may in individual cases require to afford the person concerned a reasonable period of time before the withdrawal decision takes effect in order to try to recover the nationality of his Member State of origin (ECJ, judgment of 2 March 2010, loc. cit., paragraph 58). It is for the national court to determine whether this is the case.

23 The ECJ assumes that while member states are, on the one hand, entitled to sanction naturalisation obtained by deception with the withdrawal of their national citizenship on the basis of international conventions, such a sanction may, on the other hand, be excessive in parts for persons who - like the appellant - had possessed the citizenship of the Union prior to naturalisation. As a result of the principle of accessoriness of article 17, EC, the withdrawal entails in addition to the loss of the national citizenship obtained by deception also the loss of the citizenship of the Union not obtained by deception. While this "excessive loss of rights" does not in general prevent a withdrawal, it may, in individual cases, lead in conjunction with the other circumstances mentioned (e.g. low gravity of the offence etc.) to a situation where a withdrawal is, in exceptional cases, disproportionate.

24 b) According to these considerations by the ECJ, on which the division bases its deliberations, European Union law - contrary to the appellant's view - does not, in the cases mentioned above, require to always afford to the person concerned a reasonable period of time in order to try to recover the nationality of his Member State of origin.

25 aa) The state withdrawing the naturalisation is not obliged to align and to coordinate *ex officio*, without exception, the coming into effect of its decision with the competent authorities of the other EU state in such

a way that not even a temporary loss of citizenship of the Union may occur. A coordination obligation independent of the relevant circumstances of the individual case would render the withdrawal of naturalisation obtained by deception considerably more difficult, neglecting the fact that the person concerned essentially caused the “excessive loss of rights” by his dishonest conduct.

26 bb) It is, nevertheless, for the public authority responsible for nationality matters to examine whether to grant the person concerned for reasons of proportionality a reasonable period of time in which to attempt to recover a nationality. Whether it should grant such a period depends on all the relevant circumstances of the individual case (ECJ, judgment of 2 March 2010, loc. cit.).

27 The present case gives no reason for a final clarification of all the circumstances that may need to be taken into consideration here. The granting of such a period of time principally requires, as a necessary precondition, that the person concerned makes serious efforts to restore his former nationality, files the necessary applications as early as possible or, if appropriate, as a precautionary measure and actively pursues them. Furthermore, the granting of a period in which to attempt to restore nationality makes only sense, if a restoration of nationality does not manifestly lack the prospects of success under the law of the country of origin. But since it is not for the German authorities or courts to finally assess foreign law on nationality, sufficient prospects of success are already assumed if an application does not appear pointless from the outset according to the foreign caselaw and literature, or if relevant foreign authorities - here the Austrian government before the European Court of Justice - declare or indicate that such an application has prospects of success. Sufficient prospects of success may also result from the need to interpret and apply national law in accordance with the law of the Union. Foreign law may, in individual cases, speak against a suspension of the withdrawal proceedings, if the final loss of German citizenship poses an absolutely certain precondition for recovering the foreign nationality and for conducting legal proceedings to this end. From a perspective of proportionality, it is furthermore in particular necessary to assess and weigh, in each individual case, the private interest in temporarily upholding the rights of Union citizenship against the public interest in quick and binding consequences resulting from a withdrawal under nationality law. Factors to be considered here are in particular how early the person concerned has started efforts to recover his former nationality and whether he has missed reasonable opportunities to do so.

28 According to national law, it is first the task of the administrative authorities to ensure observance of the principle of proportionality under Community law. According to the judgment of the ECJ of 2 March 2010 (loc. cit.) this will include in future - as shown above - the decision whether, in case of a threatening loss of a citizenship of the Union that had existed prior to the naturalisation obtained by deception, to afford the person concerned a reasonable period of time in order to recover his former nationality. If the principle of proportionality requires such a period of time, it may, in individual cases, make sense to determine such a period prior to the withdrawal decision.

29 cc) Since in the case of the appellant the relevant requirements under Union law were not yet clear when the last public authority decision was made, it was only the division handing down the judgment that had exceptionally to decide whether to grant an additional period in order to recover Austrian nationality.

30 No such period needs to be granted here retrospectively in order to establish or observe the proportionality of the withdrawal, though it could, at least temporarily, mitigate the consequences of the withdrawal of nationality with regard to the excessive loss of the citizenship of the Union. With his application of 26 September 2010 for establishment of status the appellant now also earnestly strives for restoration of his Austrian nationality, a fact that is no longer contentious between the parties concerned following the oral pleadings before the division. Nevertheless, the parties assess the prospects of success of his request in different ways. Contrary to the appellee's opinion, it is not obvious that a final decision by a German court confirming retrospective withdrawal is a precondition for the Austrian authority responsible for nationality matters to arrive at a decision in favour of the appellant.

31 Observance of proportionality does not require the granting of a (further) period of time for the simple reason that the appellant had failed to make as soon as possible reasonable efforts to recover his Austrian citizenship and to file an application to this end. At least the decision of the Federal Administrative Court of 18 February 2008 should have caused the appellant – with regard to the second question referred to the ECJ for a preliminary ruling - to initiate procedures with the Austrian authorities with a view to reviving or

otherwise recovering the Austrian citizenship, that had by act of law expired when he acquired German nationality, when naturalisation was withdrawn. Also given his own legal position, the appellant could be reasonably expected to file such an application with the Austrian public authorities at the latest after the declaration made by the Republic of Austria in the oral pleadings before the ECJ on 30 September 2009. Even when considering not the full period of the suspensive effect of his appeals, the appellant had objectively more than appropriate time at his disposal in order to attempt a recovery of Austrian nationality. The above applies even if the judgment by the European Court of Justice of 2 March 2010 is taken as a basis. Even then the appellant allowed more than half a year to elapse before he filed a formal application initiating the required procedure with the competent administrative agency of the regional government of Styria.

32 Giving due consideration to all the relevant circumstances and weighing the private and public interests in this individual case, there are also no other reasons that warrant a (further) period. After some ten years of process duration, there is an overriding public interest in achieving and implementing a binding withdrawal decision as promptly as possible.

33 c) The retroactive withdrawal of the appellant‘s naturalisation is also in other aspects not disproportionate despite the potential consequences the withdrawal of nationality may have on the status of the appellant under Union law.

34 In case of an unfavourable outcome of the recovery proceedings the appellant would finally become stateless and probably also lose the citizenship of the Union for good. These are serious legal effects, leading not only to the loss of the rights of free movement under Union law but affecting also the area of political participation related to nationality or citizenship of the Union, that could hit the appellant in his capacity as an independent business consultant very hard after his release from prison.

35 The withdrawal entails, nevertheless, no negative consequences for his wife or any other members of his family. Even as a stateless person the appellant enjoys sufficient protection of residence under national law. Given his marriage to a German, he continues – as was correctly pointed out by the appellee – to have a relatively secured residence status including the possibility to leave and return. These effects mitigate the negative consequences of the loss of the citizenship of the Union which, in the final analysis, were caused by the appellant‘s own behaviour.

37 4. The disposition as to costs is founded on section 154 (2) of the Code of Administrative Court Procedure.