

Case C-118/20**Request for a preliminary ruling****Date lodged:**

3 March 2020

Referring court:

Verwaltungsgerichtshof (Austria)

Date of the decision to refer:

13 February 2020

Appellant in cassation:

JY

Respondent authority: Wiener Landesregierung

Verwaltungsgerichtshof

EU 2020/0001-1
(Ra
2018/01/0159)
13 February 2020

In the appeal in cassation by JY of W, [...] against the judgment of the Verwaltungsgericht Wien (Administrative Court, Vienna) of 23 January 2016, [...] in the matter of citizenship (defendant authority before the Administrative Court: Wiener Landesregierung (Government of the Province of Vienna)), the Verwaltungsgerichtshof (Supreme Administrative Court) made the following

ORDER

:

The following questions are referred to the Court of Justice of the European Union ('the Court') for a preliminary ruling in accordance with Article 267 TFEU:

1. Does the situation of a natural person who, like the appellant in cassation in the main proceedings, has renounced her only nationality of a Member State of the European Union, and thus her citizenship of the Union, in order to obtain the nationality of another Member State, having been given a guarantee by the other Member State of grant of the nationality applied for, and whose possibility of

recovering citizenship of the Union is subsequently eliminated by revocation of that guarantee, fall, by reason of its nature and its consequences, within the scope of EU law, such that regard must be had to EU law when revoking the guarantee of grant of citizenship?

If the first question is answered in the affirmative,

2. Is it for the competent national authorities, including any national courts, involved in the decision to revoke the guarantee of grant of nationality of the Member States, to establish whether the revocation of the guarantee that prevented the recovery of citizenship of the Union is compatible with the principle of proportionality from the point of view of EU law in terms of its consequences for the situation of the person concerned? [**Or. 2**]

Grounds:

Facts and main proceedings

- 1 By her letter of 15 December 2008, the appellant in cassation applied for Austrian citizenship. At that time, she was a national of the Republic of Estonia and thus a citizen of the Union.
- 2 By decision adopted by the Niederösterreichische Landesregierung (Government of the Province of Lower Austria) on 11 March 2014, the appellant in cassation was given a guarantee of grant of Austrian citizenship in accordance with point 2 of Paragraph 11a(4), read in conjunction with Paragraph 20 and Paragraph 39, of the Staatsbürgerschaftsgesetz 1985 (1985 Federal Law concerning Austrian Citizenship, ‘the StbG’), on condition that she proved within two years that she no longer held the citizenship of her home country (Republic of Estonia).
- 3 Prior to expiry of that two-year deadline, the appellant in cassation, who had in the meantime moved her primary residence to Vienna, filed confirmation from the Republic of Estonia that her Estonian citizenship had been relinquished by decision adopted by the Government of the Republic of Estonia on 27 August 2015. Since relinquishing her Estonian citizenship, she has been a stateless person.
- 4 By decision of 6 July 2017, the Government of the Province of Vienna (‘the Authority’), which was now the competent authority, revoked the decision of the Government of the Province of Lower Austria of 11 March 2014 in accordance with Article 20(2) of the StbG and rejected, in accordance with point 6 of Article 10(1) of the StbG, the application for Austrian citizenship filed by the appellant in cassation.
- 5 The Authority gave as its reason that, having committed two serious administrative offences after being given the guarantee of grant of Austrian citizenship, and bearing in mind the eight administrative offences ascribed to her

before that guarantee was given, the appellant in cassation no longer satisfied the requirements for the grant of citizenship laid down in point 6 of Paragraph 10(1) of the StbG.

- 6 The appellant in cassation lodged an appeal against that decision with the Verwaltungsgericht Wien (Administrative Court, Vienna, ‘the Administrative Court’). **[Or. 3]**
- 7 By the judgment under appeal before the Supreme Administrative Court, the Administrative Court dismissed the appeal as unfounded and held that appeal in cassation in the Supreme Administrative Court was inadmissible under Article 133(4) of the Bundes-Verfassungsgesetz (Federal Constitutional Law, ‘the B-VG’).
- 8 In essence, the Administrative Court gave as its reason that a guarantee of Austrian citizenship had to be revoked on the basis of Paragraph 20(2) of the StbG even where a ground for refusal arose only after proof of relinquishment of the previous citizenship had been adduced, such as, specifically, where the requirement for the grant of citizenship laid down in point 6 of Paragraph 10(1) of the StbG is not fulfilled, and that, when verifying that requirement for the grant of citizenship, the overall conduct of the applicant, especially any crimes which he or she has committed, must be taken into account based on the criterion of whether any such breaches of the law justify a finding that the applicant will also disregard in future essential provisions enacted to protect against risks to life, health, security, peace and public order or other public interests referred to in Article 8(2) of the ECHR.
- 9 The Administrative Court noted that, after the guarantee of grant of Austrian citizenship had been given, the appellant in cassation had been penalised, first, under Paragraph 134, read in conjunction with Paragraph 36(e) of the Kraftfahrzeuggesetz 1967 (Law on Motor Vehicles, ‘the KFG’), for failure to display a compliant vehicle inspection disc in her motor vehicle, an infringement likely to hinder the application of road traffic legislation or road safety legislation and thus jeopardise road safety and, second, for having driven a motor vehicle while under the influence of alcohol. It held that that constituted particularly dangerous conduct in terms of the safety of other road users and should be regarded as a ‘serious breach of the law’; that these two administrative offences, taken in combination with the eight administrative offences committed between 2007 and 2013, did not bode well for her future conduct; that the long period of time in which the appellant in cassation had resided in Austria and her professional and personal integration were not capable of supporting a positive prognosis of her future overall conduct **[Or. 4]** within the meaning of point 6 of Paragraph 10(1) of the StbG;

that the judgment of 2 March 2010, *Rottmann*, C-135/08, EU:C:2010:104, does not apply, because the appellant in cassation was already stateless, and thus not a citizen of the Union, on the date of the decision; and that,

lastly, ‘serious crimes’ had been committed, such that revocation of the guarantee and rejection of her application for citizenship were proportionate in light of the Convention on the Reduction of Statelessness

and the requirements for revocation of the guarantee of the grant of Austrian citizenship laid down in Paragraph 20(2) of the StbG had therefore been satisfied.

- 10 The appeal in cassation before the Supreme Administrative Court in this case has been brought in respect of that judgment. The Authority did not lodge a response during the preliminary procedure initiated by the Supreme Administrative Court.

The relevant provisions of European Union law:

- 11 The Treaty on the Functioning of the European Union (TFEU) provides, in extract, as follows:

‘PART TWO

NON-DISCRIMINATION AND CITIZENSHIP OF THE UNION

...

Article 20

(ex Article 17 TEC)

(1) Citizenship of the Union is hereby established. Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

(2) Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, *inter alia*:

(a) the right to move and reside freely within the territory of the Member States;

... [Or. 5]

(c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;

...’

The relevant provisions of national law

- 12 The 1985 Federal Law concerning Austrian Citizenship, Federal Law Gazette 311, in the version applicable in this case (promulgated in the Federal Law Gazette I No. 136/2013) reads, in extract, as follows:

‘Grant of citizenship

Paragraph 10. (1) Except as otherwise provided for in the present federal law, citizenship may be granted to an alien only if:

6. On the basis of his or her conduct hitherto, the alien guarantees that he or she has a positive attitude towards the Republic and neither represents a danger to law and order and public safety nor endangers other public interests as stated in Article 8(2) of the European Convention on Human Rights;

...

- (3) An alien possessing foreign nationality may not be granted citizenship if he or she:

1. Fails to take the necessary steps to relinquish his or her previous citizenship even though such steps are possible and reasonable for the alien; or

[...]

Paragraph 20. (1) The granting of citizenship shall provisionally be guaranteed to an alien in cases where within two years he or she gives proof of having relinquished the citizenship of his or her previous home country, if:

1. He or she is not stateless;
2. ... and [Or, 6]
3. Such guarantee makes possible or could facilitate his or her relinquishing of the citizenship of his or her previous home country.

(2) The guarantee shall be revoked if the alien no longer fulfils any one of the requirements except of point 7 of Paragraph 10(1) [not relevant in this case], laid down for the granting of citizenship.

(3) Citizenship whose granting has been guaranteed, shall be granted as soon as the alien:

1. relinquishes the citizenship of his previous home country; or

2. gives proof that he was unable or could not reasonably be expected to take the necessary steps to relinquish the citizenship of his or her previous home country.

[...]

...'

Capacity to refer

- 13 The Supreme Administrative Court is a court against whose decisions there is no judicial remedy under national law within the meaning of Article 267 TFEU.
- 14 The Supreme Administrative Court is of the opinion that the questions concerning the interpretation of EU law referred in this request for a preliminary ruling and explained in greater detail below arise in the appeal in cassation on which it is required to give judgment.

Explanations of the questions referred

Preliminary observation

- 15 Austrian law on citizenship is based, *inter alia*, on the legal premise that multiple nationalities should be avoided wherever possible. The provision of point 1 of Paragraph 10(3) of the StbG is intended to help achieve that objective. It states that an alien [Or. 7] possessing foreign nationality may not be granted Austrian citizenship if he or she fails to take the necessary steps to relinquish his or her previous citizenship even though such steps are possible and reasonable for him or her. In order to prevent statelessness, various foreign legal systems do not allow the citizenship of their State to be relinquished straight away. On the other hand, that does not mean that the other (in this case Austrian) citizenship must be acquired first; a guarantee of grant of citizenship may suffice. In order to enable citizenship to be relinquished in such cases, the StbG makes provision (in Paragraph 20) for a guarantee of grant of citizenship [...].
- 16 What distinguishes this case is that the appellant in cassation renounced her Estonian nationality and thus her citizenship of the Union in light of a guarantee of Austrian citizenship, which was then revoked.
- 17 According to Paragraph 20(1) StbG, a guarantee of grant of citizenship is given only if, aside from relinquishing his or her previous citizenship within two years, the alien fulfils all the requirements for grant of citizenship. Consequently, it establishes a legal claim to grant of citizenship which remains contingent upon proof of relinquishment of the foreign citizenship [...]. However, according to Paragraph 20(2) StbG, the guarantee must be revoked, notwithstanding the extant

conditional claim to grant of citizenship, if the alien no longer fulfils even one of the requirements for the grant of citizenship [...].

- 18 For the purposes of point 6 of Paragraph 10(1) of the StbG, it is the settled case-law of the Supreme Administrative Court that the overall conduct of the applicant, especially any crimes which he or she has committed, must be taken into account based on the criterion of whether any such breaches of the law justify a finding **[Or. 8]** that the applicant will also disregard in future essential provisions enacted to protect against risks to life, health, security, peace and public order or other public interests referred to in Article 8(2) of the ECHR. Any such negative attitude of the person concerned towards the laws enacted to prevent such dangers finds expression in the type, severity and frequency of such breaches [...].
- 19 [...] [explanations relating to the case-law of the Austrian Verfassungsgerichtshofs (Constitutional Court)]
- 20 Failure to display a compliant vehicle inspection disc in a motor vehicle is of itself a serious offence of laws enacted to protect public order and road safety, as it is likely to hinder the application of road traffic legislation or road safety legislation and thus jeopardise road safety [...].
- 21 Similarly, according to the case-law of the Supreme Administrative Court, driving a motor vehicle while under the influence of alcohol must be regarded as such a serious infringement of laws enacted to protect public order and road safety that it can of itself substantiate failure to fulfil the requirement for the grant of citizenship enacted in point 6 of Paragraph 10(1) of the StbG, whereby the degree of intoxication is immaterial [...]. **[Or. 9]**
- 22 The risk prognosis made by the Administrative Court cannot be contested, especially in light of the administrative crimes committed by the appellant in cassation in this particular case after the guarantee of grant of citizenship was given and the administrative offences already committed prior to that. It must be borne in mind here that the grant of citizenship is intended to complete the alien's (successful) integration in Austria [...]. The appellant in cassation is unable to show anything against the individual assessment in this case in her appeal in cassation. Acceptance of the conditions for revocation of the guarantee of grant of citizenship and rejection of her application for Austrian citizenship in accordance with point 6 of Paragraph 10(1) of the StbG cannot therefore be refuted under national law.

First question

- 23 To summarise, the appellant in cassation argues that revocation in accordance with Paragraph 20(2) of the StbG of the guarantee of grant of Austrian citizenship given after she had proved that her Estonian citizenship had been relinquished falls, by reason of its nature and its consequences, within the ambit of EU law, as it eliminated the conditional legal claim to recovery of citizenship of the Union;

that, according to the judgment of 2 March 2010, *Rottmann*, C-135/08, EU:C:2010:104, any such revocation must be preceded by examination of the proportionality of the consequences of the associated loss of the conditional legal claim to recovery of citizenship of the Union; and that neither the Authority nor the Administrative Court had discharged that obligation.

- 24 Conversely, the Administrative Court held that the judgment of the Court in *Rottmann*, C-135/08, does not apply, as that judgment concerned loss of citizenship of the Union, whereas the appellant in cassation was no longer a citizen of the Union when the decision to revoke the guarantee was adopted. **[Or. 10]**
- 25 It is the settled case-law of the Court that ‘it is for each Member State, having due regard to international law, to lay down the conditions for acquisition and loss of nationality’. However, the fact ‘that a matter falls within the competence of the Member States’ does not alter the fact ‘that in situations covered by EU law, the national rules concerned must have due regard to the latter’ (see judgment of 12 March 2019, *Tjebbes and Others*, C-221/17, EU:C:2019:189, paragraph 30, with reference to judgment of 2 March 2010, *Rottmann*, C-135/08, EU:C:2010:104, paragraphs 39 and 41 and the case-law cited).
- 26 ‘Article 20 TFEU confers on every individual who is a national of a Member State citizenship of the Union, which, according to settled case-law, is intended to be the fundamental status of nationals of the Member States. Accordingly, the situation of citizens of the Union who [...] are nationals of one Member State only and who, by losing that nationality, are faced with losing the status conferred by Article 20 TFEU and the rights attaching thereto falls, by reason of its nature and its consequences, within the ambit of EU law. Thus, the Member States must, when exercising their powers in the sphere of nationality, have due regard to EU law’ (see judgment of 12 March 2019, *Tjebbes and Others*, C-221/17, EU:C:2019:189, paragraphs 31 and 32, with reference to judgment of 2 March 2010, *Rottmann*, C-135/08, EU:C:2010:104, paragraphs 42 and 45 and the case-law cited).
- 27 The Court has upheld this in connection with the loss of citizenship of the Union and, more specifically, of the nationality of a Member State acquired by naturalisation through withdrawal of naturalisation (withdrawal) (see judgment of 2 March 2010, *Rottmann*, C-135/08, EU:C:2010:104) and in connection with the loss of nationality of a Member State by operation of law (see judgment of 12 March 2019, *Tjebbes and Others*, C-221/17, EU:C:2019:189) in the case of persons who do not also hold the nationality of another Member State. According to this case-law of the Court, Article 20 TFEU does not preclude the loss of nationality of a Member State through withdrawal of naturalisation acquired by deception or by operation **[Or. 11]** of the law of that Member State if the national authorities or any national courts examined the consequences of that loss for the situation of the person concerned and, if applicable, that of his or her family

members from the point of view of EU law in terms of their compatibility with the principle of proportionality.

- 28 In this case, the Authority initially gave the appellant in cassation a guarantee of grant of citizenship in accordance with Paragraph 20(1) of the StbG further to her application for Austrian citizenship, on condition that she proved within two years that she had relinquished Estonian citizenship.
- 29 By that guarantee, the appellant in cassation acquired a legal claim to grant of citizenship which only remained contingent upon timely proof of relinquishment of her Estonian citizenship [...].
- 30 Based on that guarantee, the appellant in cassation, who was not a national of any other Member State, voluntarily relinquished her Estonian nationality, thereby voluntarily renouncing her citizenship of the Union, so that she could acquire Austrian citizenship and thus recover citizenship of the Union in accordance with the guarantee given by the Authority once she had provided proof of relinquishment.
- 31 [...] [redundant passage]
- 32 The Supreme Administrative Court always reviews judgments of the administrative courts in the light of the situation in fact and in law when the contested decision was adopted [...] [Or. 12] [...]. The Supreme Administrative Court must therefore assume that the appellant in cassation was not a citizen of the Union at the material time of the revocation of the guarantee.
- 33 Thus, what distinguishes these proceedings is that the appellant in cassation was no longer a citizen of the Union at the time of revocation. Contrary to the aforementioned case-law established in *Rottmann*, C-135/08, and in *Tjebbes and Others*, C-221/17, judgment in these proceedings does not concern loss of citizenship of the Union. On the contrary, when the guarantee was revoked and her application for Austrian citizenship was rejected, the appellant in cassation lost her conditional legal claim to recovery of the citizenship of the Union which she had previously renounced.
- 34 The question that arises is whether this situation also falls, by reason of its nature and its consequences, within the ambit of EU law and whether the Authority has to have due regard for EU law in such a decision, even though the appellant in cassation was no longer a citizen of the Union at the material time of the decision revoking the guarantee, and judgment in these proceedings concerns elimination of the conditional legal claim to recovery of the citizenship of the Union which she previously renounced, not the loss of citizenship of the Union.
- 35 The Court has held that, in terms of the application of EU law, it is essential that the citizen of the Union is 'faced with losing the status conferred by Article 20 TFEU and the rights attaching thereto' (see judgment of 12 March 2019, *Tjebbes and Others*, C-221/17, EU:C:2019:189, paragraph 32). As summarised by

Advocate General Mengozzi in his Opinion in *Tjebbes and Others*, that case concerned a ‘position capable of causing them to lose that status’ or to lose citizenship of the Union (see Opinion of 12 July 2018, *Tjebbes and Others*, C-221/17, point 28 and point 44). It is the settled case-law of the Court that ‘Union citizenship is destined to be the fundamental status of nationals of the Member States’ (see judgment of 13 June 2019, C-22/18, *TopFit and Biffi*, EU:C:2019:497, paragraph 28). **[Or. 13]**

- 36 Thus, the Court has held that: ‘The proviso that due regard must be had to European Union law does not compromise the principle of international law previously recognised by the Court [...] that the Member States have the power to lay down the conditions for the acquisition and loss of nationality, but rather enshrines the principle that, in respect of citizens of the Union, the exercise of that power, in so far as it affects the rights conferred and protected by the legal order of the Union, as is in particular the case of a decision withdrawing naturalisation such as that at issue in the main proceedings, is amenable to judicial review carried out in the light of European Union law’ (see judgment of 2 March 2010, *Rottmann*, C-135/08, EU:C:2010:104, paragraph 48), thereby emphasising that regard must be had to EU law only ‘in respect of citizens of the Union’.
- 37 [...] [redundant]. The appellant in cassation was no longer either a national of a Member State of the European Union or, therefore, a citizen of the Union at the material time of the decision to revoke the guarantee. In the opinion of the Supreme Administrative Court, and as assumed by the Administrative Court before it, that suggests that this case does not fall within the ambit of EU law.

Second question

- 38 If the answer to the first question is in the affirmative, the Supreme Administrative Court then faces a second question, namely whether that means that the competent national authorities and courts involved in the decision must establish within the meaning of the case-law of the Court whether the revocation of guarantee preventing recovery of citizenship of the Union is compatible with the principle of proportionality from the point of view of EU law in terms of its consequences for the situation of the person concerned.
- 39 In its case-law concerning the loss of nationality of a Member State causing the loss of citizenship of the Union **[Or. 14]** (see judgments of 2 March 2010, *Rottmann*, C-135/08, EU:C:2010:104, and of 12 March 2019, *Tjebbes and Others*, C-221/17, EU:C:2019:189), the Court requires an examination of proportionality. According to that case-law, that examination requires an individual assessment of the situation of the person concerned and that of his or her family in order to determine whether the consequences of the loss might, with regard to the objective pursued by the national legislature, disproportionately affect the normal development of his or her family and professional life from the point of view of

EU law. Those consequences cannot be hypothetical or merely a possibility (judgment in *Tjebbes and Others*, C-221/17, EU:C:2019:189, paragraph 44).

- 40 Inasmuch as the Court also requires the national authorities and courts to have regard to EU law for the purpose of a decision such as that in the main proceedings, that suggests to the Supreme Administrative Court that this requires an examination of proportionality from the point of view of EU law as described above.
- 41 In that context, the Supreme Administrative Court questions whether, for the purpose of proportionality from the point of view of EU law, the sole criterion can be that the natural person renounced his or her citizenship of the Union and thus voluntarily removed him or herself from ‘the special relationship of solidarity and good faith between [the Member State] and its nationals and also the reciprocity of rights and duties, which form the bedrock of the bond of nationality’ (judgment of 12 March 2019, *Tjebbes and Others*, EU:C:2019:189, paragraph 33).

Relevance to judgment in the main proceedings

- 42 [...] [redundant]
- 43 Although the Administrative Court examined the proportionality of the revocation in connection with the statelessness of the appellant in cassation with due regard for [Or. 15] the Convention on the Reduction of Statelessness and found that it was proportional in light of the criminal offences committed by the appellant in cassation, it did not examine the proportionality of the consequences of the revocation of the guarantee for the situation of the person concerned and that of any family members from the point of view of EU law, as it held that the abovementioned case-law of the Court does not apply.
- 44 The questions referred are therefore legally relevant in terms of enabling the Supreme Administrative Court to give judgment in the appeal in cassation pending before it.

Conclusion

- 45 As the application and interpretation of EU law do not appear to be so obvious as to leave no scope for any reasonable doubt (see judgment of 6 October 1982, *Srl C.I.L.F.I.T. and Others*, C-283/81, EU:C: 1982:335) the questions formulated at the beginning are referred to the Court for a preliminary ruling in accordance with Article 267 TFEU.

Vienna, 13 February 2020