

Stateless Union Citizens in a Nationality Conundrum: EU Law Safeguarding Against Broken Promises

ECJ 18 January 2022, Case C-118/20, *Wiener Landesregierung (Revocation of an assurance of naturalisation)*, ECLI:EU:C:2022:34

Katarina Hyltén-Cavallius* 

INTRODUCTION

To reside, to integrate, to naturalise. A Union citizen who, in accordance with the spirit of EU law on free movement, has taken firm steps towards achieving the ‘deepest form of integration’ in a host member state, i.e. naturalisation, will not be completely abandoned by EU law during the possible perils of that process.¹ This is the main message of the Court of Justice’s judgment in Case C-118/20, *JY*, concerning member state discretion in the area of nationality law.² The case resonates with its predecessors, *Rottmann* and *Tjebbes*; all three cases deal with member state obligations arising from Article 20 TFEU regarding an individual’s *de jure* loss of Union citizenship.³ *JY* can also be linked to the free movement case of *Lounes*, concerning a Union citizen who naturalised in the host member state, which, under national practices, led to the loss of the EU free movement law-based residence rights in the host member state for her third-country national

*Assistant Professor of Law, Linnaeus University, Sweden

¹ECJ (Grand Chamber) 14 November 2017, Case C-165/16, *Lounes*, ECLI:EU:C:2017:862, para. 58.

²ECJ (Grand Chamber) 18 January 2022, Case C-118/20, *Wiener Landesregierung (Revocation of an assurance of naturalisation)*, ECLI:EU:C:2022:34, (*JY*).

³ECJ (Grand Chamber) 2 March 2010, Case C-135/08, *Rottmann*, ECLI:EU:C:2010:104; ECJ (Grand Chamber) 12 March 2019, Case C-221/17, *Tjebbes and Others*, ECLI:EU:C:2019:189.

European Constitutional Law Review, 18: 556–571, 2022

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doi:10.1017/S1574019622000219

spouse.⁴ In its judgment in *Lounes*, the Court of Justice confirmed that Article 21(1) TFEU provides protection against a loss of rights that have been acquired through the exercise of freedom of movement but then lost due to naturalisation in the host member state. The judgment in *JY*, while protecting against the permanent loss of Union citizenship due to naturalisation, does not prohibit the practice of some host member states that require Union citizens to renounce their nationalities and become stateless for an unforeseeable period of time before subsequent naturalisation. Statelessness results not only in the loss of Union citizenship, but also the right to reside in *any* member state and the right of access to employment and social rights. It makes the individuals concerned particularly vulnerable. It is argued here that such a situation should not be permissible under EU law, even if only temporarily, while the individual seeks to naturalise in a host member state where they reside based on free movement law.

This case note presents the facts of the case, the Opinion of the Advocate General, and the judgment of the Court of Justice. Then follows a case analysis dealing with three issues: first, the relationship between Articles 20 and 21 TFEU; second, the personal scope of Article 20, i.e the issue of whether protection under that provision is limited to persons who were once Union citizens, and not extended to those who strive to acquire Union citizenship for the first time; and, third, the dual responsibility of home and host member states for the continued enjoyment of Union citizenship by persons seeking naturalisation in another member state.

FACTUAL BACKGROUND

In 2008, an Estonian national, JY, applied for Austrian nationality. In 2014, she received a decision of assurance from the Austrian authorities that she would be granted this nationality upon providing proof that she had renounced her Estonian nationality within two years. In 2015, the Estonian government removed JY's Estonian nationality. She delivered the relevant proof to the Austrian authorities that she had become a stateless person.⁵

In 2017, the Wiener Landesregierung (Local Government of the Province of Vienna) revoked the decision of assurance of naturalisation and rejected JY's application for Austrian nationality. The authority held that JY no longer fulfilled the legal conditions for acquiring Austrian nationality. She had committed two 'serious administrative offences' since the assurance had been granted. These two offences (failing to display a vehicle inspection disc, and driving a motor

⁴Case C-165/16, *Lounes*, *supra* n. 1.

⁵Request for a preliminary ruling from the Verwaltungsgerichtshof (Austria) lodged on 3 March 2020 – JY (Application), point 3.

vehicle while under the influence of alcohol), taken in combination with eight other administrative offences she had committed between 2007 and 2013, led the Local Government 'to doubt that JY would conduct herself properly in the future'.⁶ According to Austrian law, the assurance of naturalisation should be revoked if the alien no longer fulfils any of the requirements, e.g. if she represents a danger to law, order and public safety, or endangers other public interests mentioned in Article 8(2) of the European Convention on Human Rights.⁷ The Local Government withdrew JY's assurance despite the fact that, at that point, she had already been stateless in Austria for two years. JY appealed the decision revoking the assurance and rejecting her nationality application.

On appeal, the Verwaltungsgerichtshof (the Supreme Administrative Court of Austria) decided to make a reference for a preliminary ruling to the European Court of Justice. The assessment of the referring court was that the 2010 *Rottmann* jurisprudence regarding the conditions for a member state's active withdrawal of an applicant's nationality, and consequently his Union citizenship, did not apply to the present case. Its reasoning was that the contested decision to reject JY's nationality application had not directly led to the loss of Union citizenship, since the decision had been adopted at a point in time when JY was already stateless, and was therefore no longer a Union citizen.⁸ At any rate, the referring court held that the contested decision was proportionate with regard to Austria's obligations under the Convention on the Reduction of Statelessness.⁹

The Court of Justice had to consider, first, whether the situation of a person who renounces the nationality of her home member state to naturalise in another member state and who obtains an assurance of naturalisation comes within the scope of EU law. Secondly, it had to consider whether Article 20 TFEU requires the national authorities and courts of the host member state to assess whether the revocation of the assurance is compatible with the principle of proportionality when it results in the permanent loss of Union citizenship.¹⁰

⁶Opinion of AG Szpunar in Case C-118/20, *Wiener Landesregierung (Revocation of an assurance of naturalisation)*, ECLI:EU:C:2021:530, para. 23.

⁷Para. 20(2) of the Staatsbürgerschaftsgesetz 1985 (1985 Federal Law concerning Austrian Citizenship, (the StbG)); Application, *supra* n. 5, point 12.

⁸Application, *supra* n. 5, points 33-34; Case C-135/08 *Rottmann*, *supra* n. 3.

⁹Application, *supra* n. 5, points 40-43; United Nations Convention on the Reduction of Statelessness, adopted in New York on 30 August 1961.

¹⁰JY, *supra* n. 2, paras. 29 and 45; Application, *supra* n. 5, points 37 and 41.

OPINION OF THE ADVOCATE GENERAL

Advocate General Szpunar concluded, first, that the issue in *JY* did fall within the scope of EU law; and second, that the decision to revoke the assurance and reject the naturalisation request was not compatible with the principle of proportionality in *JY*'s case.¹¹

He began by referencing the 1992 judgment in *Micheletti and Others*, which established that the member states are obligated to have due regard to EU law when laying down the conditions both for the *acquisition* and *loss* of nationality.¹² The 2010 judgment in *Rottmann* had affirmed this stance regarding the member state's active withdrawal of a person's national citizenship, as such withdrawal triggered the risk of losing the status and rights of a Union citizen.¹³ The loss of member state nationality and, consequently, the loss of Union citizenship was the issue also in the 2017 judgment in *Tjebbes and Others*, which concerned an automatic operation of law rather than an active measure of withdrawal.¹⁴ The Advocate General admitted that *JY*'s case was slightly different as the applicant had already lost her Union citizenship by renouncing her Estonian nationality. In addition, the contested decision was not based on the Austrian legal conditions for revoking nationality but on those that govern its *acquisition*, which *JY* no longer met, according to the Austrian authorities.¹⁵

Advocate General Szpunar emphasised that *JY* had *once been a Union citizen* and had given up that status only to recover it through acquiring the Austrian nationality that she had been promised.¹⁶ To actively rid herself of her Union citizenship was part of the Austrian conditions for acquiring nationality, which were amenable to judicial review under EU law according to the judgment in *Micheletti and Others*.¹⁷ The Advocate General rejected the Austrian view that *JY* had 'voluntarily' renounced her Estonian nationality and, consequently, her Union citizenship.¹⁸ On the contrary, for the Advocate General, *JY* had taken these steps of renouncing her nationality and her Union citizenship with the 'sole purpose' of *recovering* the latter through acquiring the promised Austrian

¹¹Opinion of AG Szpunar, *supra* n. 6, respectively paras. 36-85, and paras. 86-126.

¹²*Ibid.*, paras. 45-46; ECJ 7 July 1992, Case C-369/90, *Micheletti and Others v Delegación del Gobierno en Cantabria*, ECLI:EU:C:1992:295, para. 10; Opinion of AG Tesouro in Case C-369/90, *Micheletti and Others v Delegación del Gobierno en Cantabria*, ECLI:EU:C:1992:47, notably para. 3.

¹³Opinion of AG Szpunar, *supra* n. 6, para. 47; Case C-135/08 *Rottmann*, *supra* n. 3.

¹⁴Opinion of AG Szpunar, *supra* n. 6, paras. 49-50; Case C-221/17, *Tjebbes and Others*, *supra* n. 3.

¹⁵Opinion of AG Szpunar, *supra* n. 6, para. 54.

¹⁶*Ibid.*, para. 56.

¹⁷*Ibid.*, para. 57.

¹⁸*Ibid.*, paras. 58-61.

nationality.¹⁹ In the Advocate's General view, 'JY's legitimate expectation of recovering her citizenship of the Union falls within the protective scope of EU law'.²⁰

As he had done elsewhere before, Advocate General Szpunar took a consolidated view of the *Ruiz Zambrano* and *Rottmann* strands of case law interpreting Article 20 TFEU. He found that both strands essentially concern the same thing: *the complete deprivation of Union citizenship rights*.²¹ In *Ruiz Zambrano*, EU law was applicable to the situation of a Union citizen who had not exercised freedom of movement, but who risked deprivation of the *substance* of the rights stemming from Union citizenship, protected under Article 20 TFEU, by being obliged to leave the EU's territory.²² In JY's case, as the Advocate General pointed out, the applicant had in fact exercised freedom of movement, as governed under Article 21(1) TFEU, but was now faced with being deprived of *all* the rights of her Union citizenship stemming from Article 20 TFEU.²³ By reason of 'its nature and its consequences', the permanent loss of Union citizenship, which the Austrian decision to revoke the assurance of naturalisation had caused, should fall within the ambit of EU law.²⁴ Further endorsing that finding, the Advocate General referred to the similarities in *JY* with the free movement case of *Lounes* on the naturalisation of a Union citizen permanently residing in a host member state.²⁵ Both *Lounes* and *JY* concerned Union citizens who, by virtue of their Union citizenship, had exercised the most evolved level of freedom of movement under Article 21(1) TFEU by residing long term, achieving full integration, and seeking naturalisation in a host member state.²⁶ In such a case, as the Court had found in *Lounes*, a naturalisation process should not result in the loss of rights incurred under EU law.²⁷ However, while *Lounes* concerned the loss of free movement *rights* enjoyed under Article 21(1) TFEU as a consequence of naturalisation, *JY*, more dramatically, concerned the loss of the *status* of being a Union citizen itself, thereby placing it within the material scope of application of Article 20 TFEU.

In addition, the Advocate General sided against the view that it was the 2015 Estonian decision to relinquish JY of her Estonian nationality which should be scrutinised as non-compliant with EU law.²⁸ That decision, as he argued, although

¹⁹Ibid., paras. 61-63.

²⁰Ibid., para. 63.

²¹Ibid., para. 68; Opinion of AG Szpunar in Case C-165/14, *Rendón Marín*, and Case C-304/14, *CS*, ECLI:EU:C:2016:75, para. 130.

²²ECJ (Grand Chamber) 8 March 2011, Case C-34/09, *Ruiz Zambrano*, ECLI:EU:C:2011:124.

²³Opinion of AG Szpunar, *supra* n. 6, para. 69.

²⁴Ibid., para. 66.

²⁵Case C-165/16, *Lounes*, *supra* n. 1

²⁶Opinion of AG Szpunar, *supra* n. 6, paras. 71-75.

²⁷Case C-165/16, *Lounes*, *supra* n. 1, para. 59.

²⁸As argued by the French Government, *see* Opinion of AG Szpunar, *supra* n. 6, para. 76.

directly causing the *de jure* loss of Union citizenship, had been taken in the context of a naturalisation process of another member state, where the *temporarily* lost status of Union citizenship was legitimately expected to be recovered.²⁹ The Estonian State could neither have foreseen nor be blamed for the *permanent* loss of Union citizenship that had ensued as a consequence of the Austrian decision.³⁰

Regarding the proportionality of the contested decision, the Advocate General found that, while the public interest ground that Austria relied on was legitimate, it was however inappropriate, not only in view of EU law, but also in view of international law, that Austrian law was construed in a way that made it legally possible to withdraw an assurance of naturalisation in a situation where that revocation would render the individual stateless.³¹

Furthermore, the eight administrative offences committed before 2013 were known to the relevant authorities when they delivered the assurance. Hence, argued the Advocate General, these offences should have been disregarded in the revocation decision.³² Finally, Advocate General Szpunar asserted the Austrian measure to be disproportionate by picking up the gauntlet thrown down in the Opinion of Advocate General Mengozzi in *Tjebbes*, who had hypothetically considered that it would be manifestly disproportionate to deprive someone of their Union citizenship due to mere road traffic offences.³³

JUDGMENT OF THE COURT

Sitting as the Grand Chamber, the Court adopted the conclusion of the Advocate General. A Union citizen should not be forced to put her Union citizenship at risk for the sake of a naturalisation in another member state.³⁴ However, the Court's route to that conclusion differed in several respects from that of the Advocate General.

On the scope of EU law

Like the Advocate General, the Court held that a person such as JY could not be considered to have 'voluntarily' renounced her Union citizenship. She did it only

²⁹Opinion of AG Szpunar, *supra* n. 6, paras. 77-81.

³⁰*Ibid.*, para. 82.

³¹*Ibid.*, paras. 94-96.

³²*Ibid.*, paras. 104-105.

³³*Ibid.*, para. 127. See Opinion of AG Mengozzi in Case C-221/17, *Tjebbes and Others*, ECLI:EU:C:2018:572, para. 88.

³⁴JY, *supra* n. 2.

as an essential part of complying with the requirements of Austrian law.³⁵ For the Court, it was the Austrian naturalisation procedure that affected Union citizenship under Article 20 TFEU, and which came within the scope of this provision.³⁶

As a second reason, and citing its most recent case on Union citizenship and nationality law, *VMA*, the Court highlighted that in laying down both the conditions for the loss and acquisition of nationality, member states must have due regard to their obligations under EU law.³⁷ As the applicant was put in a situation in which it was ‘impossible for that person to continue to assert the rights arising from the status of citizen of the Union’,³⁸ the situation at hand came within the scope of Article 20 TFEU.

As a third entry point to EU law, the Court pointed to the strong element in the case of freedom of movement under Article 21(1) TFEU.³⁹ Just as in *Lounes*, it perceived a Union citizen’s act of naturalisation in a host member state as a natural continuation of the exercise of freedom of movement.⁴⁰ For the Court, in sum, the contested decision came within the scope of EU law, as its effect was that of preventing JY from recovering her Union citizenship.⁴¹

On proportionality

Turning to the proportionality assessment, the Court reasoned that the requirements for naturalisation in a host member state should not place the individual at any time in a situation where he or she is ‘liable to lose the fundamental status of citizen of the Union by the mere fact of implementation of that procedure’.⁴² The Court went on to say that ‘[a]ny loss, even temporary, of that status means that the person concerned is deprived, for an indefinite period, of the opportunity to enjoy all the rights conferred by that status’.⁴³ From that standpoint, the Court observed that Estonia, being JY’s home member state, should have a certain responsibility to safeguard against the loss of Union citizenship. As an interpretation of the home member state’s obligations under Article 20 TFEU, the Court held that Estonia should not have finalised its decision to remove JY’s Estonian nationality before making sure that she had acquired her new member state

³⁵Ibid., paras. 35-36.

³⁶Ibid., paras. 31-36.

³⁷Ibid., para. 37; see ECJ (Grand Chamber) 14 December 2021, Case C-490/20, *Stolichna obshtina, rayon ‘Pancharevo’*, ECLI:EU:C:2021:1008 (*VMA*), para. 38.

³⁸JY, *supra* n. 2, para. 39.

³⁹Ibid., paras. 41-44.

⁴⁰Ibid., para. 43; Case C-165/16, *Lounes*, *supra* n. 1, paras. 58-60.

⁴¹JY, *supra* n. 2, para. 44.

⁴²Ibid., para. 47.

⁴³Ibid., para. 48.

nationality.⁴⁴ The Advocate General had rejected this specific point. However, turning again to *the effects* of the contested decision, the Court pointed out that it was the host member state, Austria, that carried the primary 'obligation to ensure the effectiveness of Article 20 TFEU',⁴⁵ since the entire conundrum stemmed from the workings of the Austrian naturalisation process.

Next, the Court recognised as legitimate the host member state's requirement for another nationality to be relinquished before naturalisation, and the requirement that the applicant not pose a danger to public order and security, as these were reasons related to the public interest.⁴⁶ However, the safeguarding of such public interest aims must be weighed against the contested decision's consequences for the individual concerned and her family members, in view of the fundamental status of Union citizenship.⁴⁷ Such a decision, the Court reasoned, with a nod to its preceding nationality law judgment in *Tjebbes*, should not disproportionately 'affect the normal development of his or her family and professional life from the point of view of EU law'.⁴⁸ That proportionality assessment should consider that it would be virtually impossible for JY to recover her Estonian nationality, since Estonian law requires a further residence period of eight years to (re) naturalise once nationality has been relinquished. Furthermore, the proportionality assessment must be linked to a review under the right to family life under Article 7 of the Charter and, to the extent that children are concerned, the child's best interest under Article 24(2) of the Charter.⁴⁹

Like the Advocate General, the Court rejected the Austrian measure of considering the eight administrative offences that had been committed before JY had first received her assurance, as they had been known to the authority that granted the assurance.⁵⁰ Regarding the two offences that JY committed after receiving the assurance, their nature and gravity, in the Court's view, were not of such a degree as to say that JY represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society or a threat to public security in Austria. Traffic offences, which had not even led to JY losing her driving licence, 'punishable by mere administrative fines, cannot be regarded as capable of demonstrating that the person responsible for those offences is a threat to public policy and public security which may justify the permanent loss of his or her status of citizen of the Union'.⁵¹

⁴⁴Ibid., para. 50.

⁴⁵Ibid., para. 51.

⁴⁶Ibid., para. 57.

⁴⁷Ibid., para. 58.

⁴⁸Ibid., para. 59.

⁴⁹Ibid., paras. 60-62, notably the references to Case C-221/17, *Tjebbes and Others*, *supra* n. 3.

⁵⁰JY, *supra* n. 2, para. 65.

⁵¹Ibid., para. 71.

COMMENT

The judgment in *JY* demonstrates the added value of Union citizenship. Its status may remedy manifestly disproportionate national measures that adversely affect the individual, when their effects cannot be rectified by relying solely on the nationality laws of the two member states involved. Yet, the case does not represent a new strand of Article 20 TFEU jurisprudence inasmuch as Union citizenship cannot effectively challenge statelessness as such, when renouncing one's nationality is a precondition for acquisition of a new one. On the contrary, the accentuation of the individual's suffered *loss* of Union citizenship, and the use of the proportionality assessment only to ensure its *recovery*, confines the personal and jurisdictional scope of the ruling to what the *Rottmann* and *Tjebbes* rulings have already established.

On the choice of legal basis: Article 20 TFEU over Article 21 TFEU

Given the similarities of the case to the preceding nationality law cases of *Rottmann* and *Tjebbes*, the Court had little difficulty in placing the *JY* case within the scope of EU law, and in particular, within Article 20 TFEU.⁵² For that reason, the reference to *Lounes* and freedom of movement in Article 21(1) TFEU seems at first superfluous. Arguably, it confirmed the Court's view that a Union citizen's act of naturalisation in the host member state is part of the normal exercise of freedom of movement. Comparable only to the grant of permanent residence status under Directive 2004/38, it represents the deepest level of integration that can be achieved in a host member state.⁵³ On the other hand, to declare Article 21(1) TFEU applicable but then solve the cases based solely on Article 20 TFEU as the Court did, does not fit with the 'supplementary' nature of Article 20 TFEU that the Court has established in its case law on *residence* rights based on Union citizenship.⁵⁴ In judgments like *Alokpa and Moudoulou* and *NA*, the Court reasoned that Union citizens' residence rights in a host member state are primarily to be governed by EU free movement law, so primarily by Article 21(1) TFEU and its applicable legislation, rather than by Article 20 TFEU, which serves to protect the enjoyment of the status of EU citizenship itself.⁵⁵ By doing so in these cases, the Court highlighted the exceptionality of Article 20 TFEU as a legal basis for

⁵²*Ibid.*, paras. 43-50; cf Case C-135/08 *Rottmann*, *supra* n. 3; and Case C-221/17, *Tjebbes and Others*, *supra* n. 3.

⁵³*JY*, *supra* n. 2, paras. 42-43; cf Case C-165/16, *Lounes*, *supra* n. 1.

⁵⁴M. van den Brink, 'Is It Time to Abolish the Substance of EU Citizenship Rights Test?', 23 *European Journal of Migration and Law* (2021) p. 13 at p. 19.

⁵⁵ECJ 10 October 2013, Case C-86/12, *Alokpa and Moudoulou*, ECLI:EU:C:2013:645, para. 32; ECJ 30 June 2016, Case C-115/15, *NA*, ECLI:EU:C:2016:487, paras. 73-74.

residence rights.⁵⁶ Following that line of reasoning, van den Brink has pointed out that the substance of rights doctrine under Article 20 TFEU does not really solve any substantial legal problems that could not be solved directly under Article 21 TFEU instead.⁵⁷ The Court's references to *Lounes* and Article 21(1) TFEU in *JY* gives credit to that argument. It suggests that a loss of rights granted under EU law because of a naturalisation process in a host member state could just as well be treated as a *restriction* on freedom of movement under Article 21(1) TFEU, instead of a *deprivation* of Union citizenship and rights conferred under Article 20 TFEU.⁵⁸ In that light, the difference between the two provisions seems to be marginal. Yet, the Court's choice in *JY* of Article 20 TFEU over Article 21 TFEU signals an important recognition of an order of events. The enjoyment of Union citizenship *rights* depends on first acquiring Union citizenship. Evidently, to be a Union citizen is primary, while the use of its free movement rights is secondary. Therefore, in *JY*, in contrast to *Lounes*, the loss of Union citizenship is the root of the problem, and the loss of free movement rights only follows as the inevitable – but ancillary – issue.

Implicitly, the Court's reference to Article 21(1) TFEU lowers any expectation that the interpretation given to Article 20 TFEU in *JY* could apply to quash the requirement of descending into statelessness as such, as part of a naturalisation process, to acquire Union citizenship for the first time. Since *Lounes* established that the act of naturalisation forms part of the exercise of freedom of movement in a host member state, the discussed judgment implies that *JY* is protected by EU law only because she once was a Union citizen and lost her Union citizenship due to an active use of freedom of movement. That a member state's naturalisation process requires an applicant to first become stateless in order to acquire nationality is therefore not, per se, a problem under Article 20 TFEU. What the Court is sure to oppose is the permanent *loss* of Union citizenship suffered by a person who was actively pursuing naturalisation as part of her exercise of freedom of movement in a host member state.

On the personal scope of Article 20 TFEU: the stateless Union citizen

In *JY*, the Court refrained from taking a direct stance regarding the incompatibility of statelessness, as such, with Union citizenship. However, it offered protection against statelessness to those individuals who have at some point *been*

⁵⁶See ECJ 5 May 2011, Case C-434/09, *McCarthy*, ECLI:EU:C:2011:277; ECJ 8 November 2012, Case C-40/11, *Iida*, ECLI:EU:C:2012:691; ECJ 8 May 2013, Case C-87/12, *Ymeraga and Ymeraga-Tafarshiku*, ECLI:EU:C:2013:291.

⁵⁷van den Brink, *supra* n. 54, p. 27.

⁵⁸*JY*, *supra* n. 2, para. 44.

Union citizens, and who have had to renounce their first member state nationality to acquire a new member state nationality.⁵⁹

The fact that JY was already stateless when Austria decided to revoke the assurance of naturalisation did not hinder the Court from seeing her as within the personal scope of Union citizenship.⁶⁰ By virtue of having had Union citizenship via her original member state nationality and losing it as a continuum of her use of freedom of movement to a host member state, she never stopped being protected by Union law while being stateless. Rather, she fell into being a Union citizen with no member state, or a 'stateless Union citizen'. Here, Union citizenship shows itself as the citizenship status 'beyond the State' that Advocates General have often hailed it to be.⁶¹ It is a personal status that may operate through Article 20 TFEU, even for an individual who – like JY – is caught in a no-man's land between two member state nationalities. While being a Union citizen at the time of the contested decision was not a prerequisite for coming within the scope of Article 20 TFEU, to once *have been* a Union citizen certainly was. Nevertheless, the legal reality is that Union citizenship is not an autonomous status, decoupled from nationality, but rather the 'dependent variable' that follows any change in a person's nationality status.⁶² Forcibly, the individual's ties to *some* member state nationality is a prerequisite in order to enjoy its 'extension' of rights.⁶³

Probably because of its recognition of the 'genuine link' doctrine with regard to nationality law, which was also presented in the judgment in *Tjebbes*, the Court in *JY* found it legitimate that Austrian law on national citizenship was based, among other things, on the principle that multiple nationalities should be avoided

⁵⁹The deference to the situation of statelessness itself in Art. 20 TFEU case law has been criticised: D. Kochenov, 'Case C-135/08, Janko Rottmann v. Freistaat Bayern, Judgment of the Court (Grand Chamber) of 2 March 2010', 47 *Common Market Law Review* (2010) p. 1831 at p. 1836.

⁶⁰Compare to the reasoning of the lower instance Austrian Administrative Court as explained in the Application, *supra* n. 5, point 24.

⁶¹Opinion of AG Szpunar, *supra* n. 6, para. 33, referencing the Opinion of AG Poiares Maduro in Case C-135/08, *Rottmann*, ECLI:EU:C:2009:588, para. 16. See also Opinion of AG La Pergola in Case C-85/96, *Martínez Sala v Freistaat Bayern*, ECLI:EU:C:1997:335, paras. 18-20; and Opinion of AG Jacobs in Case C-168/91, *Konstantinidis v Stadt Alensteinig and Landratsamt Calw*, ECLI:EU:C:1992:504, para. 46.

⁶²HU Jessurun d'Oliveira et al., 'Court of Justice of the European Union: Decision of 2 March 2010, Case C-315/08, *Janko Rottman v. Freistaat Bayern Case Note 1* Decoupling Nationality and Union Citizenship? *Case Note 2* The Consequences of the *Rottmann* Judgment on member state Autonomy – The European Court of Justice's Avant-Gardism in Nationality Matters', 7 *EuConst* (2011) p. 138 at p. 147.

⁶³M. Szpunar and E. Blas López, 'Some Reflections on Member State Nationality: A Prerequisite of EU Citizenship and an Obstacle to Its Enjoyment', in D. Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press 2017) p. 110 and p. 114.

wherever possible.⁶⁴ Consequently, the ruling in *JY* does not take issue with the condition of statelessness for acquiring a member state's nationality. It only establishes that a rejection of naturalisation in a situation like *JY*'s requires a proportionality assessment under Article 20 TFEU, at least if it results in the individual not being able to *recover* their Union citizenship in any other way. As in the *Kaur* ruling, the Court resisted extending the protection of Article 20 TFEU to benefit a person who does not yet have Union citizenship but aspires to obtain it.⁶⁵ While the Court emphasises that the contested decision by Austria has to do with the conditions for *acquiring* nationality and Union citizenship, Article 20 TFEU is only triggered in the case because of the *permanent loss* of Union citizenship that is caused by that acquisition process. Therefore, the ruling has been criticised as a lost opportunity for EU law to safeguard outright against having to endure a situation of statelessness as part of the acquisition process of Union citizenship.⁶⁶ Instead, the ruling creates inequality between nationality candidates, where only former Union citizens are protected for the sake of their pursuit of *recovery* of their Union citizenship, but not individuals who are forced to become stateless for pursuing their first *acquisition* of that status.⁶⁷ EU law is here shown to protect *Union citizens* against the broken promises given by a host member state in the pursuit of further integration in a free movement situation.

Following the path of the most recent Article 20 TFEU judgments, *JY* continues the trend of streamlining the acceptable derogations to Article 20 TFEU to those that apply to freedom of movement under Article 21 TFEU.⁶⁸ The Court referred to the right to family life in Article 7 of the Charter in the proportionality

⁶⁴*JY*, *supra* n. 2, paras. 53-55; Case C-221/17, *Tjebbes and Others*, *supra* n. 3; and the analysis by K. Swider, 'Legitimizing Precarity of EU Citizenship: Tjebbes Case C-221/17, M.G. Tjebbes and Others v. Minister van Buitenlandse Zaken, Judgment of the Court (Grand Chamber) of 12 March 2019, EU:C:2019:189', 57 *Common Market Law Review* (2020) p. 1163 at p. 1167-1169.

⁶⁵ECJ 20 February 2001, Case C-192/99, *Kaur*, ECLI:EU:C:2001:106. See comparison of the situation of the applicant *Kaur* to that of *Rottmannin Jessurun d'Oliveira et al.*, *supra* n. 62, p. 143.

⁶⁶See critique of the *JY* judgment by D. Kochenov and D. De Groot, 'Curing the Symptoms but Not the Disease', *Verfassungsblog*, 20 January 2022, (<https://verfassungsblog.de/curing-the-symptoms-but-not-the-disease/>), visited 9 August 2022.

⁶⁷For a similar critique of the inequality between Union citizens and third country nationals in Art. 20 TFEU case law, see H. van Eijken, 'Tjebbes in Wonderland: On European Citizenship, Nationality and Fundamental Rights: ECJ 12 March 2019, Case C-221/17, *M.G. Tjebbes and Others v Minister van Buitenlandse Zaken*, ECLI:EU:C:2019:189', 15 *EuConst* (2019) p. 714 at p. 728.

⁶⁸See ECJ (Grand Chamber) 16 September 2013, Case C-165/14, *Rendón Marín*, ECLI:EU:C:2016:675; ECJ (Grand Chamber) 16 September 2013, Case C-304/14, *CS*, ECLI:EU:C:2016:674; Case C-221/17, *Tjebbes and Others*, *supra* n. 3; ECJ (Grand Chamber) 10 May 2017, Case C-133/15, *Chavez-Vilchez and Others*, ECLI:EU:C:2017:354; ECJ 27 February 2020, Case C-836/18, *Subdelegación del Gobierno en Ciudad Real*, ECLI:EU:C:2020:119; H. van Eijken, 'Connecting the Dots Backwards, What Did Ruiz Zambrano Mean for EU

assessment and, in so far as children are affected by the contested decision, also to the protection of the child's best interest in its Article 24(2).⁶⁹ This triggers the question of whether these Charter rights are part and parcel of the 'substance of rights' that the Article 20 TFEU case law seeks to protect.⁷⁰ The Court also recognises legal protection against the loss of incurred rights under EU law that any accompanying family members of JY might have suffered in the host member state as a consequence of the loss of Union citizenship.⁷¹ However, the conclusion of the case remains that it is only thanks to the proportionality assessment that JY is saved from her stateless condition, and not by a direct challenge under EU law of the Austrian practice to demand nationality renunciation before naturalisation, nor by a direct challenge to the Estonian decision to irreversibly remove the applicant's Estonian nationality. This confines the interpretation given in this preliminary reference ruling to the very specific facts of the case. In addition, the Court chose to take the matter out of the referring court's hands and directly solved the outcome of the case, based on the astonishingly disproportionate effects of the Austrian measure.⁷²

A joint responsibility to protect against the loss of Union citizenship

Unlike the Advocate General in his Opinion, the Court in its judgment in *JY* stresses the dual responsibility of both the home and the host member state to ensure the effectiveness of Union citizenship under Article 20 TFEU.⁷³ At first, this seems to be a jurisdictional broadening of Article 20 TFEU. The Court makes this provision directly relevant to a *host* member state for the first time, but the Court also cements the limited personal scope of the case. The reasoning assumes the presence of a *home* member state; that the stateless applicant must have had an original member state nationality that was renounced, reconfirming that the essential issue is the *loss* and failed *recovery* of Union citizenship rather than its acquisition.⁷⁴

Citizenship and Fundamental Rights in EU Law?', 23 *European Journal of Migration and Law* (2021) p. 48 at p. 59.

⁶⁹*JY*, *supra* n. 2, para. 61.

⁷⁰*Ibid.*, paras. 58-61. See in general M. van den Brink, 'The Origins and the Potential Federalising Effects of the Substance of Rights Test', in D. Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press 2017). Opposing the view that fundamental rights should be assimilated to Union citizenship rights is K. Lenaerts, 'Limits on Limitations: The Essence of Fundamental Rights in the EU', 20 *German Law Journal* (2019) p. 779.

⁷¹This was also the situation in Case C-165/16, *Lounes*, *supra* n. 1.

⁷²*JY*, *supra* n. 2, paras. 70-74.

⁷³*Ibid.*, paras. 49-51.

⁷⁴See in general F. Strumia, 'Supranational Citizenship's Enablers: Free Movement from the Perspective of Home Member States', 45 *European Law Review* (2020) p. 507.

The Court held Estonia responsible, albeit without legal consequences, for the revocation of the applicant's national citizenship before she had completed naturalisation in the host member state. By tightly pulling together the actions of both the home and host member states, JY never lost her access to protection under EU law in the eyes of the Court. She was protected under Article 21 TFEU up until she was protected under Article 20 TFEU, but she was never deprived of Union citizenship protection.

Again, this can be likened to *Lounes*, where the applicant remained a 'free mover' under Article 21(1) TFEU in the eyes of the Court, and therefore retained her family reunification rights based on freedom of movement also after she had naturalised and become a national in her host member state.⁷⁵ Similarly to *Lounes*, the Union citizen in *JY* had done just what free movement is meant to allow Union citizens to do. Union citizens should therefore not be abandoned by the protective scope of EU law just because the host member state is intended to become the new home member state.⁷⁶

The role of Austria in relation to JY was not predominately that of a host member state. Rather, the contested decision concerned a process where Austria was acting as the prospective *new home* member state of the Union citizen. Similar to the judgment in *Rottmann*, the member state of naturalisation carried the heaviest obligation under Article 20 TFEU, in terms of having to make the individualised proportionality assessment where the fundamental status of Union citizenship must be weighed against the reasons for rejecting the applicant's naturalisation.⁷⁷ That allocation of responsibility makes sense, considering that it was Austria that had promised JY that she could become its national, which, in turn, entailed a promise that her renounced Union citizenship would be recovered.

It was already clear from the case law that Article 20 TFEU allows for derogations from the effectiveness of Union citizenship for the protection of legitimate aims and to respect the principle of proportionality.⁷⁸ The fact that the Court accepts a *temporary* loss of Union citizenship as part of a naturalisation process in a host member state means that such legal treatment of the individual is, in principle, 'proportionate'. However, considering the devastating condition of legal vulnerability that statelessness means for any individual, it is astonishing that even a 'temporary' or 'unfinalised' loss of nationality and Union citizenship is tolerated under EU law as a normal aspect of a naturalisation process. It is submitted in this comment that any period of statelessness forcibly endured by an individual in

⁷⁵Case C-165/16, *Lounes*, *supra* n. 1.

⁷⁶*cf* Opinion of AG Szpunar, *supra* n. 6, paras. 71-75.

⁷⁷Case C-135/08, *Rottmann*, *supra* n. 3.

⁷⁸*Ibid.*, paras. 51-57; and Case C-221/17, *Tjebbes and Others*, *supra* n. 3, paras. 33-41; *cf* also Case C-165/14, *Rendón Marín*, *supra* n. 68, paras. 81-87.

their process towards acquisition of Union citizenship should be incompatible with 'the fundamental status' of Union citizenship, with its close ties to EU fundamental rights standards.⁷⁹ Even if JY had been granted the Austrian nationality following her application, the two long years that she was forced to wait for the Local Government's decision as a stateless person, maintaining residence in Austria on humanitarian grounds only, should in itself be seen as a disproportionate interference with Article 20 TFEU.⁸⁰

It should be considered that third country nationals who renounce their original nationality for the sake of naturalising in a member state would also have legitimate expectations of receiving Union citizenship status. There is no reason why a failed promise of the *first acquisition* of Union citizenship should not be protected under Article 20 TFEU just as much as a failed promise of the *recovery* of that status.

CONCLUSION

The Gordian knot to untangle by application of EU law in *JY* was how to address the legal workings of a member state's nationality law that revoked a decision guaranteeing a future naturalisation, in a situation where the individual had already been without any member state nationality for two years, and the road traffic offences committed were not even grave enough to cause the loss of her driving licence. With this judgment, such member state practices, at least insofar as they affect persons who *have been* Union citizens before becoming stateless, have been ruled as incompatible with EU law due to their clear disproportionality. In that regard, the judgment affirms the 'added value' of Union citizenship under Article 20 TFEU, which is capable of upholding a certain standard of legal protection against disproportionate member state measures that severely limit the individual's legal status.

In *JY*, the act of naturalisation, to pass through the gates of the state's nationality laws, resembles an initiation ritual. Only as a clean slate, stripped of former nationalities, may the individual be initiated into her new national identity. Unfortunately, the judgment in *JY* states that such rituals are not per se incompatible with the effectiveness of Union citizenship. Rather than rejecting such naturalisation practices altogether, the Court places the onus on the first member state not to definitively strip the person of their original nationality until it is

⁷⁹See discussions by N. Nic Shuibhne, 'Integrating Union Citizenship and the Charter of Fundamental Rights', in D. Thym (ed.), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Hart Publishing 2017) and van den Brink, *supra* n. 70.

⁸⁰Consider Opinion of AG Szpunar, *supra* n. 6, on the 'soft law' requirements of international law in view of statelessness, paras. 94-96.

certain that they have acquired their new nationality. In that regard, the *JY* judgment draws the attention of every member state of the Union to the fact that their granting of a requested relinquishment of nationality might incur them a 'culpa' in causing the loss of Union citizenship for a national who fails to regain it elsewhere. On the other hand, it is curious that the Court was so intent on pointing to the fault of Estonia, while ultimately laying the tangible legal responsibility solely on Austria. If the proportionality assessment in the case had resulted in a different outcome, Estonia might have seen a judicial case coming towards it in this matter. All in all, the judgment states that it is for the *host* member state to observe the principle of proportionality by ensuring that a nationality applicant is not perpetually caught in a limbo of stateless Union citizenship, as the result of minor offences. What is more, rather than providing just an interpretation of EU law, the Court, by its assertion of the clear disproportionality of the Austrian measure, left no room for the referring court to make any other assessment of the facts of the case.

Can it be said that Union citizenship protects against disproportionate conditions for the *acquisition* of member state nationality? The judgment in *JY* does not tell us that. The core problem in the Court's view remains that of the permanent *loss* of Union citizenship. In other words, only stateless applicants who once were Union citizens can rely on Article 20 TFEU, and their relationship to their original home member state here matters greatly. *JY* was not a stateless *person* in the Court's eyes. She was a stateless *Union citizen*, since she was still able to rely on the protection of that status, even when finding herself in the position of having no member state nationality. That the entire problem stemmed from the practice of some member states of demanding the renunciation of other member state nationality before granting the individual naturalisation was not confronted directly.⁸¹ The Court's hesitation in this area is understandable, since the member states' competence in the area of their nationality laws is a prerogative of a different standing than with regard to just any area of domestic law.⁸² It remains to be seen whether Article 20 TFEU is also applicable to a failed promise of – or disproportionate legal requirements for – the *first* acquisition of a member state's nationality and thus Union citizenship. If so, that would truly open the door to a new phase in the case law on the effect of Union citizenship on member states' nationality laws.



⁸¹See critique of such practices by Szpunar and Blas López, *supra* n. 63, p. 123.

⁸²As described well in Jessurun d'Oliveira et al., *supra* n. 62, p. 148-149.