Non-discriminatory access to the nationality of the father protected by the ECHR

A comment on Genovese v. Malta (European Court of Human Rights, 11 October 2011)

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The facts

The Maltese national Genovese had a cursory relation with a British woman, resulting in the applicant in the present case: Ben Alexander Genovese, born in the United Kingdom. The mother succeeded in having Genovese's paternity established in Scotland (par. 11). The determination of paternity was apparently not recognized in Malta, since a Maltese court subsequently also decided on the matter of paternity. This court finally decided likewise by concluding that Genovese was Ben Alexander's father and sentenced Genovese to pay maintenance (par. 15). Ben Alexander's mother made a request for Maltese nationality in her own name and on behalf of her son. This request was denied because the child was born out of wedlock to a Maltese father. One would at first sight come to a different conclusion if one reads Section 5(2)(b) of the Maltese Nationality Act. This Section provides that a child born to a Maltese father or Maltese mother acquires Maltese nationality. However, there is a snag in Section 17(1)(a), which states that a child born out of wedlock to a Maltese father will, for the purposes of Maltese nationality law, only be considered the child of a Maltese national if he or she has been legitimated.

Not content with that, the mother challenged the refusal to grant Maltese nationality to her son in court. Although she initially succeeded, the first-instance judgment was reversed on appeal by the Maltese Constitutional Court (par. 16-20).

The Maltese Nationality Act was amended in 2007 (see Section 5(1)-(7) of the Act). From that moment onwards descendants of a parent born in Malta to a grandparent who was also born in Malta could, by means of registration of a declaration expressing the wish to acquire Maltese nationality, become a Maltese national (par. 21). This possibility was also open to Ben Alexander. His mother must either have been an extremely principled woman or someone who was legally misinformed as she did not use this option but brought the case before the Strasbourg court instead. For this we should be grateful to her, since it led to an extremely important decision by the European Court of Human Rights (hereafter: ECtHR).

The Court focused on the situation before the amendment of 2007 and concluded that Maltese legislation was discriminatory. Children born out of wedlock to a Maltese father were treated differently from children born within wedlock to a Maltese father. What is more, these children were treated differently from children born out of wedlock to a Maltese mother. Consequently, it was not difficult for the Court to conclude that Art. 14 ECHR was violated (par. 43-49).

Yet, does the Convention protect against discrimination regarding the acquisition of nationality? The Court observed in par. 33 that there was no violation of 'family life' as safeguarded under Art. 8 because Genovese had apparently only had a very cursory relation (a one night stand?) with Ben Alexander's mother. As Genovese had evinced no intention to build a relationship with his son, there existed no family life between him and his son.

But could one perhaps speak of relevant 'private life'? The Court answered this question in the affirmative by stating that the non-acquisition of Maltese nationality (the Court speaks of 'the denial of citizenship') had an impact on the applicant's social identity. Discriminatory rules regarding access to nationality therefore affect a person's private life as safeguarded by Art. 8 ECHR.

The Court apparently presumed that States are under no obligation to provide for acquisition of nationality iure sanguinis *by children born abroad to one of their nationals. This becomes clear from the fact that the Court stated that Malta "has gone beyond its obligations under Article 8" (par. 34). Yet if a country provides for such a mode of acquisition, it should be applied in a non-discriminatory manner. Since Maltese legislation was discriminatory with regard to the* iure sanguinis *acquisition of Maltese nationality, Art. 8 ECHR was violated.*

Comment

1. The importance of the judgment in Genovese v. Malta cannot be overestimated. The Court for the first time explicitly provides that (access to) nationality falls within the scope of protection of the ECHR as part of a person's social identity, which in turn is part of that person's private life. There can be no doubt that discrimination is not allowed in cases concerning access to nationality. After Genovese v. Malta, we can expect the Court to be more favourable to other applicants as well. Paragraph 5 will address this point in more detail.

2. It clearly follows from the present case that Malta will have to amend its nationality law. While it was already seen above that Malta had changed its law in 2007, the possibility to register only applied to persons born outside Malta. The fact that Ben Alexander fell within this category of persons being eligible for registration under Section 5(2)(b) was more or less a coincidence. Apparently, it was relevant that the subsections added to Section 5 referred to "parent", not "father". Consequently, the limitation of the latter term by Section 17(1)(a) was irrelevant. It is remarkable, however, that a child born in Malta out of wedlock to a Maltese father and a non-Maltese mother cannot – provided we understand Section 5(1) in conjunction with Section 17(1)(a) correctly – register as a Maltese national. In any case, Malta would be well advised to swiftly delete the contested provision of Section 17(1).

3. Will other countries have to amend their nationality laws as well because they treat children born out of wedlock to a male national differently from children born within wedlock to a male national, or children born out of wedlock to a female national? The answer is without any doubt in the affirmative.

This is most clear for Austria, whose legislation contains exactly the same rule as was in force in Malta until 2007: children born out of wedlock to an Austrian father and a non-Austrian mother do not acquire the father's nationality, not even when the child is born in Austria. Only when the child is legitimated will he or she acquire Austrian nationality (Par. 7a(1) Staatsbürgerschaftsgesetz). It is beyond any doubt that arrangements such as these can no longer be maintained after the present decision by the ECtHR.

Denmark will also have to undertake action, legislatively speaking. A child born out of wedlock to a Danish father and a non-Danish mother only acquires Danish nationality if he or she is born in Denmark (Art. 1(1) Lov om dansk indfødsret). Discrimination of children born out of wedlock and outside Denmark to a Danish male national will have to be abolished.

Since the Danish government in November 2011 already announced to give up its opposition to the phenomenon of dual nationality, Danish nationality law is to be amended anyway. The Danish legislator can take this case of discrimination in its stride.

At first sight the Finnish and Swedish provisions do not appear to be discriminatory. Children born out of wedlock in Finland (respectively Sweden) to a Finnish (respectively Swedish) father and a mother who does not hold that nationality will automatically acquire the father's nationality. However, when the child is born abroad, the child only acquires the father's nationality if he registers the child with the consular or diplomatic office of the country of his nationality (Art. 26 Kansalaisuuslaki and Art. 5 Lag om svenskt medborgarskap respectively). Since it takes an additional act by the father, he can prevent the child from acquiring his nationality by refusing to cooperate. It follows from the casuistry of Genovese v. Malta that this is problematic. After all, it was clear that Mr. Genovese had not made a single attempt to procure Maltese nationality for his apparently unwanted child. Finland and Sweden will therefore have to amend their nationality laws in such a way that both the child's mother and the child him/herself (if need be by means of an appointed guardian) can request for the father's nationality.

Legislative modifications are also required in two countries where an additional condition is in place regarding the acquisition of the father's nationality by children born out of wedlock whose parental descent has already been established. Thus, the Icelandic Nationality Act provides that a child born out of wedlock and outside Iceland to an Icelandic male national will only acquire Icelandic nationality if it is proven that the child is in fact his biological child (Art. 2(2) Lög um islenskan rikisborgarrett). Requesting such an additional piece of evidence in cases where a father-child relationship has already been legally recognized can no longer be accepted after the decision in Genovese v. Malta. After all, in cases where a child is born within wedlock and outside Iceland to an Icelandic father and a non-Icelandic mother, no proof is requested that the Icelandic husband 'did it'. States may in principle of course demand proof of the 'biological truth' with regard to cases of recognition of children born out of wedlock. If so, the State will however have to make an exception to this demand if there is family life between the father and the child (see for example Art. 1:204(1)e of the Aruban Civil Code and the corresponding provisions in the Civil Codes of Curaçao, Sint Maarten and the so-called BES-islands (Bonaire, Sint Eustasius and Saba)).

The second country where an additional condition is in place regarding the acquisition of the father's nationality by children born out of wedlock whose parental descent has already been established, is the Netherlands. Art. 4(4) of the Dutch Nationality Act makes acquisition of Dutch nationality for children born out of wedlock to a foreign mother and a Dutch father conditional upon proof of the 'biological truth' in cases where the child was recognized after the age of seven. This proof must be furnished by means of a DNA-report from an accredited institute from which it follows, with a likelihood of more than 99,99 per cent, that the recognized child is indeed the man's biological child. This additional demand is untenable in light of the judgment in Genovese v. Malta. Moreover, we submit that the demand that proof must be furnished within one year is utterly disproportional. What reasonable interest is served with this one-year time frame? We would not know. From this it follows that Art. 4 of the Nationality Act, already amended in 2003 and 2009, will again have to be changed!

4. Does the Court's emphasis on the principle of non-discrimination in relation to the acquisition of nationality come as a surprise? This question should be answered in the negative. Art. 6 of the European Convention on Nationality (hereafter: ECN) provides with

regard to children born out of wedlock that a State must provide that these children will acquire the nationality of their parent following a procedure determined by the State's internal law. Austria was well aware of its legislation violating Art. 6 of the ECN, and therefore made a reservation to this provision upon ratification of the Convention. It is remarkable that Denmark did not make a similar reservation. The registration demand under Finnish and Swedish law is in accordance with Art. 6 ECN, but, as already stated above, Finland and Sweden will in light of the Court's decision additionally have to provide for the possibility of registration by the mother or on behalf of the child.

The Netherlands and Iceland ratified the ECN without making a reservation to Art. 6. However, both countries had adopted a wrong interpretation of the provision. It becomes clear from the explanatory report to Recommendation 2009/13 of the Committee of Ministers on the Nationality of Children that this wrong interpretation had already been noted by the Council of Europe. Principle 11 of the Recommendation calls on States to provide that "children whose parentage is established by recognition, by court order or similar procedures acquire the nationality of the parent concerned, subject only to a procedure determined by their internal law".

This is a literal repetition of what is laid down in Art. 6 ECN. There were two reasons for this repetition. The explanatory report emphasizes, firstly, that the Recommendation is also targeted at Member States of the Council of Europe that have not yet ratified the ECN. The report subsequently states that a repetition of Art. 6 is also necessary

"because several member states, including member states which ratified the ECN, do not completely implement the rules enshrined in that provision of the Convention".

This phrase is an implicit rebuke aimed at the Netherlands and Iceland. We have – informally – been told that the Netherlands was not amused by this reprimand. The same will be probably be true for the judgment in Genovese v. Malta. There is legislative work to be done.

5. Is Genovese v. Malta only of interest for its message that discrimination is not allowed in cases concerning the acquisition of nationality by descent? We feel that it is not.

The conclusion that nationality, as part of a person's social identity, falls under private life as protected by the ECHR, is also very interesting for the grounds of loss of nationality. Some grounds of loss act crudely and insensitively, and do not allow for a concrete test that will assess and – if applicable – take into account the individual's clearly existing ties with the country whose nationality is lost. Would some of these grounds of loss, under specific circumstances, not result in violation of Art. 8?

In this connection, it is also relevant to look at the national procedures on the withdrawal of nationality, on the one hand, and the protection of Art. 8 in conjunction with Art. 6 ECHR, on the other. Art. 14(1) of the Dutch Nationality Act, for example, provides for the possibility to withdraw a naturalization with retroactive effect when it is discovered that Dutch nationality was acquired by fraud (cfr. K. Hendriks and O. Vonk, *Mapping Statelessness in the Netherlands*, UNHCR report, available in English and Dutch at www.unhcr.nl). The decision to withdraw Dutch nationality can only be taken if all relevant circumstances are taken into account. A decision to withdraw nationality will be communicated to the person concerned, who then has six weeks to object this decision with the administrative authorities that took the decision (the Immigration and Naturalization Service). If the objection fails, the withdrawal

takes immediate effect and the person will have to hand in his or her Dutch passport. While the person can appeal this decision in court, it follows from the above that he or she can only do this as a non-Dutch national. This state of affairs is for several reasons very problematic. Firstly, it is subject to doubt whether this method is in tune with EU law (cfr. G.R. de Groot and A. Seling, (2011), 'The Consequences of the Rottmann Judgment on Member State Autonomy – The European Court of Justice's Avant-Gardism in Nationality Matters', *European Constitutional Law Review*, pp. 150-160).
Secondly, a procedure in which the withdrawal of naturalization can lead to statelessness is clearly in violation of Art. 8(4) of the 1961 Convention on the Reduction of Statelessness, which provides that the person concerned has the right to a fair hearing by a court or other independent body. An appeal procedure annex hearing with the Immigration and Naturalization Service will definitely not suffice. Holding the view that Art. 8(4) of the 1961 Convention has direct effect, we feel that in cases where the withdrawal of naturalization results in statelessness a Dutch court will have to conclude that the person concerned still holds Dutch nationality. This conclusion should stand for as long as a Dutch court has ruled that the government rightly decided to withdraw a naturalization. While it is unfortunate that one cannot complain about the incorrect interpretation of the 1961 Convention to an international court, Genovese v. Malta opens up new perspectives. After all, is the message conveyed by Art. 8(4) of the 1961 Convention not the same as Art. 6 ECHR? In this connection we also wish to emphasize that the right to a fair hearing by an independent body should not be limited, in our view, to cases that could lead to statelessness, but to all cases in which persons are deprived of their nationality.

Could problematic naturalization demands perhaps also be successfully challenged with the ECtHR? The Netherlands proceeds in a very inflexible manner regarding the condition that a potential naturalisee must produce a legalized or apostillized birth certificate as well as an identification document (such as a passport or an ID-card). Most applicants who cannot produce these documents will surely receive a negative decision on their naturalization application. Will this negative decision hold in Strasbourg if it is shown that the applicant has established such close ties with the Netherlands as have Dutch nationals, and that these ties with the Netherlands consequently constitute a substantial part of his or her social identity?

And what about the demand in the Caribbean part of the Kingdom that potential naturalisees do not only have to show sufficient knowledge of the Dutch language, but also of Papiamento (if they live on Aruba, Bonaire or Curaçao) or English (if they live on Sint Maarten, Saba or Sint Eustasius)? Is this double language test for naturalisees living in the Caribbean part of the Kingdom not discriminatory when compared to the single language test for those applying for naturalization in the European part of the Kingdom? We can even pose an additional question after the Dutch Antilles were dissolved as per 10 October 2010: do the naturalisees on Bonaire, Saba and Sint Eustasius not officially live in the European part of the Kingdom? And why are they, unlike naturalisees in Frisia and Limburg, then confronted with a double language test, in spite of the fact that the Netherlands officially registered Frisian and Limburgian as protected regional languages in Strasbourg under the European Charter for Regional and Minority Languages (Strasbourg, 5-11-1992; CETS 148), while Papiamento and English are not?

In short, we see a whole range of very interesting and relevant questions that we expect will sooner or later be brought before the Court in Strasbourg. Many of these questions could, by the way, also find their way to the European Court of Justice in Luxembourg in the form of preliminary questions. We therefore see plenty of reasons to call on the legislators of the

Member States of the Council of Europe to undertake action. The nationality laws of several States are in urgent need of revision after the decision in Genovese v. Malta, but also in light of the ECJ's decision in *Rottmann*. It would moreover be wise to also implement the principles laid down in Recommendation 2009/13 of the Committee of Ministers of the Council of Europe.