international

Summary

“Three steps forward two steps back”

Legal opinion on the compatibility of the revised ‚option model’ (Optionsmodell) contained in draft Section 29 of the German Nationality Act with European Union law, German constitutional law and public international law

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Summary of the export opinion

I. Introduction

The obligation, contained in section 29 of the German Nationality Act ('Staatsangehörigkeitsgesetz' - StAG) and relating to double nationals, who have acquired German nationality by virtue of jus soli, has been the subject of both legal and political controversy ever since its entry into force in 2000. The issue also featured prominently in the last German federal election campaign in 2013. In their coalition agreement, the now governing parties, i.e. the CDU/CSU and the SPD, agreed, to set aside the above-mentioned obligation, to opt for one of the two nationalities for those children who have acquired German nationality jus soli, provided they were not only born in Germany, but who were also "raised in Germany" ('in Deutschland aufgewachsen'). Most recently, the German government presented a draft amendment to the German Nationality Act, intended to implement this change. This proposed amendment to section 29 of the German Nationality Act (draft section 29) provides, as its core point, that the obligation, otherwise incumbent upon German nationals having acquired their German nationality jus soli, to opt for one of their nationalities, is no longer applicable for two groups, which constitute a large part of those hitherto affected. Those are, more specifically, on the one hand, persons who are either-nationals of another EU member State, or of Switzerland.. On the other hand, under the new draft law, persons who, until they have reached the age of 21, have either resided in Germany for more than eight years; have for six years or more attended a school in Germany, or have earned a school or vocational degree in Germany shall neither be any longer subject to this obligation. In addition, a person is neither subject to this obligation provided he or she possesses a similar close relationship with Germany and if, at the same time, the obligation to opt for either of his or her nationalities would present a special hardship for him or her.

Notwithstanding, a significant number of persons, who simultaneously have acquired German nationality jus soli and another nationality jus sanguinis, but who have not 'grown up' in Germany within the meaning of the draft, new law, nor are nationals of either another EU Member State or of Switzerland, will continue to be subject to and affected by the obligation to opt for one of their nationalities, and are thus also subject eventually to an ensuing loss of their German nationality.

The reform of the German Nationality Act, as now proposed by the German government and currently pending in parliament, raises significant questions, as to its compatibility with European Union law, as well as with German constitutional and international law.

II. European Union Law Issues

While under European Union law, the determination of national citizenship is, in principle, subject to the sovereignty of individual member States, EU law ought to be taken into account if, and to the extent, any domestic regulation of nationality has an impact on the European Union citizenship of an individual.

Under draft section 29 German Nationality Act individuals, that simultaneously hold the nationality of a third, non-EU-member State in addition to German nationality continue to be subject to, as a matter of principle, to the obligation to opt for either of their nationalities. Accordingly, any resulting loss of German nationality by virtue on an individual not having opted for German nationality ipso facto leads to a complete loss of European Union citizenship and the associated rights arising under applicable rules of EU law. Given these legal consequences, it is questionable, to say the least, whether the draft provision as proposed is in line with EU law. As a matter of fact, most Member States of the European Union do accept by now, as a matter of principle, multiple-citizenship to a great extent. In addition, even under German law multiple-nationality is accepted in various circumstances. This is true, inter alia, for children being born out of mixed nationality couples, which children are then not subject to any obligation to later opt for one of their respective nationalities.

A further serious problem arises due to the fact that the very exercise of the freedom of movement, as guaranteed by EU law, can trigger the obligation to opt, and can thus lead to the loss of German nationality, and accordingly then also ensue the loss of European Union citizenship as such.

On the whole, the draft law, as proposed, therefore

raises significant concerns as to its compatibility with European Union law.

III. German Constitutional Law Issues

1. Deprivation of nationality (Article 16, para. 1 sent. 1 Basic Law)

Article 16, para. 1 Basic Law provides that "[n]o German may be deprived of his nationality". According to the jurisprudence of the German Federal Constitutional Court, such 'deprivation' is meant to encompass any unavoidable loss of one's nationality "without or against the will of the person concerned". In view of this jurisprudence, draft section 29 German Nationality Act is highly problematic, in that Germans, having acquired their German nationality jus soli, and who have later transferred their residence abroad, are not possibly informed of their obligation to opt for or against their German nationality and about the possible loss of their German nationality, in a manner, constitutionally required by Article 16, para. 1 Basic Law. Accordingly, any such loss of German nationality would then amount to a deprivation of German nationality, prescribed by Article 16, para. 1, sent. 1 Basic Law.

2. Equality before the law (Article 3 Basic Law)

a) Specific prohibition of discrimination (Article 3, para. 3, sent. 1 Basic Law)

It is at least indirectly, that the obligation to opt for one nationality, as still contained, as a matter of principle, in draft sect. 29 German Nationality Act, for persons having acquired German nationality jus soli, is linked to the descent of the person concerned, since it depends on the nationality of his or her parents. As a matter of fact, the obligation to opt for one nationality as outlined above, concerns only children of foreign parents, the former acquiring German nationality jus soli by birth and who are not considered to have 'grown up' in Germany, as defined in draft sect. 29 German Nationality Act . In contrast thereto, children who have at least one German parent and who thus acquire German nationality jus sanguinis (and one further nationality either jus sanguinis, via the other parent, or jus soli by virtue of being born abroad) are, under German law, not obliged to opt for one nationality, even if they have neither 'grown up' in Germany.

This different treatment may not, however, be justified and thus runs counter to Article 3, para. 3 Basic Law. In particular, it cannot be assumed that an acquisition of German nationality jus sanguinis would necessarily provide for stronger links to Germany, when compared with an acquisition jus soli. This is true, when considering that, in order to acquire German nationality jus soli, at least one of the parents of the child concerned, born in Germany of foreign parents, must have been lawfully resident in Germany for eight years. Accordingly, it cannot be presumed that those persons are to a lesser degree integrated into German society, when compared with children born and permanently resident abroad, and where only one of the two parents is a German national.

b) General prohibition of discrimination (Article 3, para. 1 Basic Law)

Even if one were to find that the different treatment, as outlined above, would not run counter to the specific prohibition of discrimination, as contained in Art. 3, para. 3 Basic Law, it would at least run counter to the general prohibition of discrimination, as laid down in Art. 3, para. 1 Basic Law, given that those individuals subject to the obligation to opt for one of their nationalities, as laid down in draft Section 29 German Nationality Act are treated differently, when compared with various other groups which otherwise find themselves in a comparable situation.

For one, children with parents, one of who only possesses German nationality and who, therefore, as a matter of principle, acquire dual nationality by birth, are not subject to the obligation to opt for one of them under draft section 29 German Nationality Law, regardless of their place of birth, the place of their upbringing and indeed regardless of the multiple nationality they possess.

The same applies to Germans, who acquire German nationality jus soli, but who, besides of being Germans, are also nationals of either. another EU Member State or of Switzerland. It is in these and other similar situations, that German law, as a matter of course, accepts German nationals simultaneously possessing one or more additional other nationalities.

Such difference in treatment between various groups

of dual nationals cannot be legally justified. In particular, the alleged goal of avoiding situations of dual or multiple nationality, apart from being pursued for one specific groups of dual nationals only, does not provide for a sufficient justification, since any such avoidance of multiple nationality does not constitute a constitutional value, as such even more since the legislature increasingly accepts, as shown, such situations.
As to the fact that Germans acquiring German nationality jus soli and who, at birth, simultaneously acquire the nationality of another EU member State and who, for this reason alone, are exempt from the mandatory duty to opt for one of their nationalities, it suffices to note that the underlying assumption that there necessarily exist closer cultural and other links to any one of the currently 27 other EU member States, as compared to other States, seems to be at least questionable in an increasingly inhomogeneous European Union.
It is all those different groups of cases and examples that conclusively demonstrate that the revised law, as proposed, has not been able to provide for a consistent and logical set of norms, free of contradictions. In particular, children of German nationals, the latter being subject to the obligation to opt for one nationality, can fully acquire German nationality jus sanguinis and, even when having never lived in Germany and having acquired a second nationality at birth, are not obliged to opt for one of them, while the respective parent, by virtue of whom they have acquired German nationality at the first place, is forced to do so and would, unlike the child, then eventually loose his or her German nationality in case of not opting for German nationality.

III. International Law Issues

As long as Germany maintains its reservation to Article 14 of the European Convention on Nationality, the draft revised section 29 German Nationality Act will not run counter to Germany's obligations arising under international law.

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