CEPS Paper in
LIBERTY and SECURITY in Europe

How to deal with quasi-loss of nationality situations?

Learning from promising practices

Gerard-René de Groot and Patrick Wautelet

No. 71/November 2014

1. What are *quasi-loss* of nationality situations?

This policy brief – prepared in the context of the ILEC-project (Involuntary Loss of European Citizenship: Exchanging Knowledge and Identifying Guidelines for Europe*)* is concerned with situations in which a person who assumed to possess the nationality of a country is confronted with the discovery that (s)he never acquired the nationality of the country involved. Even though the authorities may argue that the person concerned never did *acquire* this nationality, this person will experience this as *loss* of nationality. This is even more so since in most cases, the authorities of the country involved will have treated the person as being a national before ascertaining that the nationality was not duly acquired. In this policy brief we will refer to these situations as *quasi-loss.* At first sight *quasi-loss* cases seem to be situations where a nationality is lost, but the authorities of the country involved construct this "loss" as "non-acquisition".

The central question of this policy brief is how *quasi-loss* situations should be treated in the European Union and its 28 Member States. More specifically, may the authorities of a Member State rightly argue that situations of *quasi-loss* amount to a mere non-acquisition of nationality? Or should we start from the assumption that there is no significant difference between the loss of and the *quasi-loss* of nationality? A next essential question is whether and how a person should under certain circumstances be protected against *quasi-loss* of

This paper was prepared as a Policy Brief for discussion at the final conference of the project on Involuntary Loss of European Citizenship: Exchanging Knowledge and Identifying Guidelines for Europe, 11-12 December 2014. Co-funded by the European Commission's DG for Justice, Citizenship and Fundamental Rights, the ILEC project has aimed to establish a framework for debate on international norms on involuntary loss of nationality. For more information visit: www.ilecproject.eu.

ILEC is a research project co-funded by the European Commission's DG Justice, Citizenship and Fundamental Rights.

Dr. Gerard-René de Groot is a Professor of Comparative Law and Private International Law in Maastricht, Aruba and Hasselt. Dr. Patrick Wautelet is a Professor of Private International Law and Comparative Nationality Law in Liège.

her or his nationality? Due to the fact that a Member State entitles to European citizenship, it is desirable to compare the approaches of the different Member States to these questions and to develop recommendations to member States in light of the best practices.

2. Types and causes of *quasi-loss* situations

Several types and causes of *quasi-loss* situations can be distinguished. They can be divided in three main categories:

(i) Quasi-loss following the disappearance of a family relationship

Family relationships are a primary method for children to acquire a nationality. At least within the EU, there is a consensus that a child should obtain the nationality of his parents, although this principle may be qualified in certain circumstances. In many countries, marrying a national entitles to an accelerated acquisition of the nationality.

The disappearance or annulment of a family relationship could have consequences for the nationality which was acquired on the basis of the relationship. If it is found that a child is legally not the child of his father, this could imperil the nationality acquired by the child from his "father". Likewise, the annulment of a marriage could put in danger the nationality acquired by one of the spouses following the marriage.

(ii) Quasi-loss after the discovery of wrongful interpretation/ application of nationality law rules

Quasi-loss can also occur following discovery that a provision of nationality law has been incorrectly applied. The mistake may have been made by the authorities or be caused by the person concerned. If the incorrect application has as consequence that a person was mistakenly registered and treated as a national, a quasi-loss situation can be observed.

(iii) Quasi-loss in case of discovery of identity fraud

Identity fraud has been a much debated issue in many EU Member States in recent years. Nowadays, in most Member States, cases of fraud are governed by specific provisions, which also apply to instances of identity fraud. When such a fraud is discovered, it may lead to the loss of nationality by deprivation. Protection mechanisms available in deprivation procedures will apply.

However, in some Member States (some types of) identity fraud are treated as a different category. In case of the discovery of identity fraud committed during e.g. the application for naturalization it may be concluded, that the person involved never acquired the nationality by the naturalization, because the real identity data of the person involved does not appear in the naturalization decree.

3. Why do *quasi-loss* situations cause problems?

If a State applies the *quasi-loss*- approach in a certain situation, this has important consequences. The various mechanisms which would apply in case of loss, such as procedural rules, protection against statelessness, the statute of limitations or the prohibition of retroactivity, will be deemed not to be relevant. The same goes for the facilitation of (re)acquisition in case of loss. Further, since the acquisition is treated as never having taken place, it could be that family members who have acquired their nationality (whether automatically or on application) as a consequence of the possession of nationality by or following the grant of nationality to a person who is now deemed never having possessed that status, are also treated as never having acquired their nationality. There is in such situations evidently a *protection gap*.

4. Different approaches by the Member States of the EU

The examination of the laws of Member States reveals that the extent to which the *quasi-loss* approach is used, differs considerably from Member State to Member State. This is remarkable in light of the fact that the nationalities of all Member States are linked to European citizenship. Consequently, we have can observe that the risk that authorities conclude to the non-possession of European citizenship after the application of a *quasi-loss* approach is in some Member States considerably higher than in other. To put it differently: the protection of European citizenship based on the treatment as a national of a Member State is not on the same level in all Member States.

A comparative analysis makes clear that identical situations are treated differently in the various

Member States. In some Member States, when a paternity is annulled, the consequences for the nationality of a child are dealt with under the loss heading. As a consequence, the loss will only occur in certain circumstances. It will also only work for the future. In other Member States, the same facts will lead to the conclusion that the child never acquired his father's nationality. Likewise, the consequences of identity fraud committed by a foreigner during the naturalization process could differ: in some cases, such fraud leads to the loss of the nationality; in other cases, the nationality is deemed never to have been acquired. The boundaries of the categories 'loss' and 'quasi-loss' are hence not firmly established.

Furthermore, a comparative law examination learns that in many Member States, citizens may rely on some protection mechanisms. Some of these mechanisms are built in the constitution or the law of nationality itself. Other may be found in family law provisions. What is striking is that Member States employ a wide diversity of such mechanisms. Further, use of protective rules will not prevent in all cases the loss / *quasi-loss* of nationality. Most protection mechanisms are predicated on certain requirements being met.

Moreover, it can be observed for several Member States, that no clear answer exists on questions pertaining to *quasi-loss* situations. It may be unclear whether a given set of facts will indeed lead to the loss or disappearance of nationality. For some Member States it is unclear whether and how in case a nationality is deemed never to have been acquired by a party, this party may be protected against such finding.

The different approaches of Member States in *quasi-loss* situations are highly problematic in view of European Union law. It follows from the ruling of the European Court of Justice in the *Rottmann*-case, that grounds for loss of nationality of Member States must comply with general principles of European law, in particular the proportionality principle. In that light Member States cannot avoid the impact of European principles in this field by not qualifying certain situations as loss-cases but by applying instead a *quasi-loss* approach.

The same follows from the obligations enshrined in international treaties and documents, in particular on the protection against statelessness, the protection against arbitrary deprivation and the protection of the continuation of the possession of nationality.[1] States cannot to escape from those obligations by using the *quasi-loss* approach instead of labelling a certain situation as loss of nationality.

European citizenship must in all cases – including those of *quasi-loss* – be protected in light of binding principles like proportionality, effective remedies and protection of legitimate expectations.

5. Policy recommendations

The fragmented and differentiated picture in European Union Member States in respect of rules, procedures and practices in *quasi-loss* cases, as well as the blurring boundaries between loss and *quasi-loss,* reveal protection gaps for European citizens, which is problematic in light of international and European standards in the field of nationality law. On the basis of the international treaties and documents, respectively, EU law and the practices in some Member States the following recommendations can be made for dealing with quasi-loss cases:

a) Procedural guarantees

In all situations of *quasi-loss*, the following guarantees should be fully granted to the individuals concerned:

- judicial review, i.e. access to an independent judge leading to a reasoned decision;
- treatment as a national during the course of judicial review (including any appeal); and
- only effect when the (judicial) decision can no longer be challenged.

b) Preference for treatment as case of possible deprivation of nationality

States should give preference to treatment of cases of quasi-loss as a situation where the person concerned can be deprived of his/her nationality, instead of considering that the acquisition is annulled or lost *ex lege*. This will ensure full application of all existing protection measures,

[1] See on those obligations Gerard-René de Groot and Patrick Wautelet (2014), "Reflections on quasi-loss of nationality in comparative, international and European perspective", CEPS Paper in Liberty and Security in Europe No. 66, CEPS, Brussels, August.

including existing limitation rules, age limits and a proportionality test.

A State may consider that due to the specific circumstances of a situation [e.g. fraud], it is preferable to consider that such deprivation is deemed to work back to the day the acquisition occurred (annulment *ex tunc*). However, also in that case, the retroactive loss of nationality should only become effective at the moment the (judicial) decision cannot be challenged anymore.

A State should not, however, react to a situation of quasi-loss by considering that no nationality was ever acquired; i.e. an ab initio null and void construction should not be used.

c) Protection of legitimate expectations - substance

In all cases of quasi-loss, and whatever characterization is retained by a State (i.e. constructing a situation of quasi-loss as a case of loss, deprivation or annulment of acquisition), it is recommended that States strive to protect legitimate expectations of the persons concerned. The extent and strength of this protection may vary depending on the specific circumstances of the case.

When a case of quasi-loss is discovered, States should preferably attempt to guarantee the **continuation** of the nationality of the person concerned. States are free to decide what mechanism or device they wish to use to guarantee such continuation. It may be that under the relevant national law, such continuation is achieved through the legal instrument of apparent status of national (possession d'état de nationalité), through an administrative recognition of nationality or through another device. It is advisable to combine such legal instruments with limitation provisions.

Such continuation is important as it guarantees that there will be no discontinuation in the rights and entitlements enjoyed by the person as a national.

d) Protection of legitimate expectations – procedure

In order to determine the extent to which legitimate expectations deserve protection, a State should take into account all relevant specific circumstances of each individual case and apply a proportionality test.

If a State intends to extend the consequences of a situation of quasi-loss to members of the family of the person concerned by the quasi-loss, i.e. spouses or children, separate decisions on their nationality are necessary, which cannot be mere and automatic replicas of the decision taken for the person concerned. These decisions should instead be taken after an individual assessment of the position of the spouse and/or children taking into account a proportionality test.

If the decision to consider that a person can be deprived of his nationality was based on fraudulent conduct by this person, this conduct cannot automatically be attributed to the spouse and/or children of the person. Such attribution can never take place in relation to children, if the adult only pretended to be the legal representative.

In all cases concerning the situation of children involved in a quasi-loss situation, the decision should in the first place be guided by the best interests of the child.

Bibliography

ILEC Papers

de Groot, G.R. (2013), "Survey on Rules on Loss of Nationality in International Treaties and Case Law", CEPS Paper in Liberty and Security in Europe No. 57, CEPS, Brussels (http://www.ceps.eu/book/survey-rules-loss-nationality-international-treaties-and-case-law).

de Groot, G.R. and P. Wautelet (2014), "Reflections on Quasi-Loss of Nationality in Comparative, International and European Perspectives", CEPS Paper in Liberty and Security in Europe No. 66, CEPS, Brussels, August (www.ceps.eu/system/files/No%2066%20ILEC%20-%20Quasi-loss%20of%20nationality.pdf).).

Other Publications

de Groot, Gerard-René (2013), "Avoiding statelessness caused by loss or deprivation of nationality: Interpreting Articles 5-9 of the 1961 Convention on the reduction of statelessness and relevant international human rights norms", Background paper UNHCR, Genève.

UN High Commissioner for Refugees (UNHCR), *Expert Meeting - Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality ("Tunis Conclusions")*, March 2014 (www.refworld.org/docid/533a754b4.html).

ABOUT CEPS

Founded in Brussels in 1983, the Centre for European Policy Studies (CEPS) is widely recognised as the most experienced and authoritative think tank operating in the European Union today. CEPS acts as a leading forum for debate on EU affairs, distinguished by its strong in-house research capacity, complemented by an extensive network of partner institutes throughout the world.

Goals

- Carry out state-of-the-art policy research leading to innovative solutions to the challenges facing Europe today,
- Maintain the highest standards of academic excellence and unqualified independence
- Act as a forum for discussion among all stakeholders in the European policy process, and
- Provide a regular flow of authoritative publications offering policy analysis and recommendations,

Assets

- Multidisciplinary, multinational & multicultural research team of knowledgeable analysts,
- Participation in several research networks, comprising other highly reputable research institutes from throughout Europe, to complement and consolidate CEPS' research expertise and to extend its outreach,
- An extensive membership base of some 132 Corporate Members and 118 Institutional Members, which provide expertise and practical experience and act as a sounding board for the feasibility of CEPS policy proposals.

Programme Structure

In-house Research Programmes

Economic and Social Welfare Policies
Financial Institutions and Markets
Energy and Climate Change
EU Foreign, Security and Neighbourhood Policy
Justice and Home Affairs
Politics and Institutions
Regulatory Affairs
Agricultural and Rural Policy

Independent Research Institutes managed by CEPS

European Capital Markets Institute (ECMI)
European Credit Research Institute (ECRI)

Research Networks organised by CEPS

European Climate Platform (ECP)
European Network for Better Regulation (ENBR)
European Network of Economic Policy Research Institutes (ENEPRI)
European Policy Institutes Network (EPIN)