The Oligarchs Among Us

Lorin-Johannes Wagner

18.03.2022 doi: 10.17176/20220319-001345-0

Since the start of the war in Ukraine ever more focus has been placed on the hunt for the ill-gotten wealth of Russian oligarchs. Yachts, jets, and mansions have been seized, accounts have been frozen and even football clubs have been left in a state of limbo. All these frantic actions against Russian oligarchs are of course part of a larger set of sanctions of the West intended to cripple Russia's economy and thus its ability to wage war. The righteous cause of these targeted, smart sanctions is to hurt the enablers in the upper echelons of the Kremlin where it hurts them most – the enablers, mind you, however, have come from far and wide. But even those Russian oligarchs that have been targeted are sometimes more a part of us than we would like to think. It is no secret that Russian oligarchs have not only been collecting fancy toys but also various golden passport, that not only have allowed them to make them feel like home in the European Union, but also to be a part of "us". And since the spotlight is already shifting towards how it is that some of these Russian oligarchs are indeed "our" very own oligarchs, there will be questions of what it is that validates the legal status of nationality actually. It is an old question to be fair, but the apparent answer of the day that nationality is what any State makes of it is therefore no less unconvincing and should lead to some soul searching.

The news flow of late has already uncovered that Roman Abramovich is a prominent example of a Russian oligarch with a European passport. He apparently acquired his Portuguese passport on the basis of being a descendent of Sephardic Jews that have been expelled from Portugal – and Spain – in the aftermath of the Reconquista some 500 years ago. A law passed in 2015 establishes that those who can prove their linage can acquire Portuguese nationality without any further requirements to make good on the wrongs of a long bygone time. So the fact that Mr Abramovich, as far as we know, had no further family ties in Portugal, did not permanently reside there, and most likely does not even speak Portuguese did not constitute material obstacles. The fact, however, that the Rabbi who apparently was involved in providing proof of Mr. Abramovich's descendance was taken into custody in connection with allegations that he forged documents and was involved in money laundering might prove to be rather unfavorable for his status as a Portuguese and consequently Union citizen.

Mr Abramovich is, however, certainly not the only one, being a Russian oligarch and a Union citizen at the same time. The infamous citizenship-for-investment schemes in Malta and Cyprus but also open-ended provision like in Austria's nationality law, allowing for the naturalization of a foreign national without any further requirements on the discretionary assumption of extraordinary accomplishments in the special interest of the Republic, might turn out to have been very successful integration vehicles for the Russian kleptocracy. Rather than any discernable links you just needed to have the will – and the money – to be whatever you want to be.

Now one might ask whether all of this does not fly in the face of thousands and thousands of people permanently living in Europe, being left on end for years and subjected to ridiculous and often arduous requirements to be given the chance to acquire a European passport? And to give the answer straight away: yes, it does. Nationality is certainly no stranger to hypocrisy. As long as we adhere to the wildly appreciated, but ultimately flawed argument that any State – including a Member of the European Union – enjoys an unlimited sovereignty to decide on the criteria of its nationality there is very little that distinguishes the selling of passports from handing them out for free – like Russia (but not only Russia) does in other parts of Europe. Nationality in this sense is not only what any

State makes of it, it is big business and nationalistic profiling alike.

European passports for Russian oligarchs will not, however, do much to save all the glitzy stuff from being seized. The eventual focus on the how and why these Russian oligarchs became a part of us and if we must not change this rather unfortunate passportization – as the case of Mr Abramovich already highlights – will, however, provide us with ample opportunity to ponder about the true nature of nationality. And in a liberal and democratic society, the fundamental status of the individual can neither be for sale nor can it be a fiat of nationalistic instincts. Our best hope is thus to take this opportunity and to seriously treat nationality for what it is supposed to be: a legal cipher rooted in the rule of law of the international legal order. That is to say that without a genuine link, nationality is either bound to become meaningless or ultimately undermines the assumption of an international legal order as such. And if you need further proof think not only of the oligarchs as forerunners of a rotten plutocratic global constitutionalism, being the citizens of everywhere where their money is. Rather think of the other side of the coin and the instrumentalization of nationality in the wake of Putin's dystopia of a "*russky mir*" (Russian world) that is wherever (perceived and passportized) Russians are and see what it is doing to the Ukraine and the whole international legal order. However dubious this "process of naturalization" may be it clearly shows that nationality as an instance of personal sovereignty that ought to be recognized by all other States, laden with protective rights and obligations for its people on the international plane, must not be conceived as a status that can be instrumentalized at will. Thus, the question just like in good old *Nottebohm* is, what can possibly count as an underlying genuine link that validates nationality as an instance of sovereignty beyond the territorial confines, allowing a State to bring claims on the international plane?

I have argued elsewhere that at least for the European legal sphere there seems to be a growing understanding that nationality cannot just be what any State makes of it. The European Court of Justice indeed has given us Rottmann, Tjebbes and most recently Wiener Landesregierung and thereby not only dealt a major blow to those believing in an unfettered domaine réservé but in fact assessed the fundamental status under EU law in light of "genuine and regular links" within the society of the respective Member State and the EU at large. At the center of nationality therefore stands the permanent integration of the individual into the society of a Member State. And make no mistake, while the Court may have made these assertions with regard to the loss of Union citizenship, the Court on the basis of the inseparable nature of Union citizenship as a derivative status of nationality in fact has reconfigured the criteria of nationality. As such, Mrs Tjebbes and the other claimants could recover their Dutch nationality ex tunc, and JY in Wiener Landesregierung reacquired her right to be awarded Austrian nationality. Taken together with other instances there is thus hope that nationality – at least for the sphere of the European Union – will (re-)gain its legal denotation that reflects (the prognosis of) an effective and lasting connection of the individual within the society of a State.

Portugal for its part has announced already a change to its nationality law that would require applicants like Mr Abramovich to additionally prove an effective connection with Portugal. While this, of course, is only a small step it may be seen as another move towards a rationalization of nationality under the larger influence of EU law. The influence of EU law in this sense will not lead to a harmonization of nationality laws, it will not do away with the original sin that also within the European Union there are different States and societies and that our initial belonging is an arbitrary fact of life. It will, however, put pressure on Member States to align their nationality with the social reality of the individual and the fact that our identity is part and parcel of a society that is shaped within a specific legal order. As such the disruptive influence of EU law may not only provide us with a more coherent and factual meaning of nationality as a legal status but more importantly will also stand in the way of an arbitrary instrumentalization of nationality.

ABOUT THE AUTHOR

Lorin-Johannes Wagner

Lorin-Johannes Wagner is an Associate Professor at the Institute of European Law at the University of Graz (Austria).

SUGGESTED CITATION

Wagner, Lorin-Johannes: The Oligarchs Among Us, Verfassungsblog, 18.03.2022, doi: 10.17176/20220319-001345-0.

Licensed under CC BY-SA 4.0.

Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20220319-001345-0.