Anything Goes?

The Permissive Approach of the ECtHR towards Deprivation of Nationality and Subsequent Expulsion in the Fight against Terrorism

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Last month, the European Court of Human Rights (ECtHR) ruled in the case of *Johansen v. Denmark* on the deprivation of nationality and expulsion due to terrorist offences. The Court rejected the applicant's complaint of an infringement of his right to private and family life under Art. 8 of the European Convention on Human Rights (ECHR) and declared the application inadmissible. The decision underlines the Court's reluctance to engage with issues raised by deprivations of nationality in terrorism cases. Instead of setting out clear limits on such measures based on the rights guaranteed by the Convention, the Court does not seem to be willing to interfere with measures related to national security, no matter how drastic the consequences for the individual.

The facts of the case

The decision of the ECtHR was preceded by a judgement of the Danish Supreme Court in November 2018 in which – overturning the judgements of two lower courts – it revoked the citizenship of Adam Johansen who had been convicted of travelling to Syria as a fighter for the terrorist organization IS. Furthermore, the Supreme Court ordered that Mr. Johansen, who held Danish and Tunisian nationality, be expelled to Tunisia with a permanent ban on his return to Denmark.

This decision of the Supreme Court is controversial, because it is the first time a Danish national with strong ties to Denmark was deprived of his citizenship: Mr. Johansen was born, raised, and educated in Denmark and his mother and siblings live there. He is married to a Danish woman and has a son with her.

Deprivation of citizenship under the ECHR

The right to citizenship is not explicitly mentioned in the Convention or its Protocols. However, the arbitrary denial of citizenship does raise an issue under Art. 8 ECHR in certain circumstances because of its impact on the private life of an individual (*Ramadan v. Malta*, para. 85). The ECtHR employs a "two-step approach" to review the justification for the deprivation of nationality (*Ghoumid v. France*; *K2 v. the UK*; *Ramadan v. Malta*; *Karassev v. Finland*). As a first step, the Court examines whether the revocation of nationality was arbitrary. This depends on whether the revocation of nationality was in accordance with national law, the necessary procedural safeguards were respected, and the national authorities acted diligently and swiftly. As a second step, the Court considers whether the effects of the deprivation of nationality on the private life of the person concerned are proportionate. Here, the Court grants the contracting States a wide margin of appreciation. This two-step-approach has created some confusion with regard to the balancing of the interests involved that the Court has so far not adequately addressed.

No limits to the margin of appreciation?

Regrettably, the current decision leaves the impression that the ECtHR does not want to limit the Contracting States in any way when it comes to the withdrawal of nationality. In examining the consequences of a revocation, the decisive factor for the Court was usually whether there was a threat of expulsion and/or of statelessness as a result of the loss of nationality (*Ghoumid v. France*, paras. 49-51; *K2 v. the UK*, paras. 62-63; *Ramadan v. Malta*, paras. 90-93). In contrast to

previous cases, this case presented radically different facts, as Mr. Johansen had strong ties to Denmark (and very weak ones to Tunisia – having stayed there, apart from short vacations, for only six months of his life) and the deprivation went hand in hand with an expulsion order by the Danish Supreme Court. The Court's usual approach can be glanced from *Ghoumid*, where it emphasized that the deprivation of nationality did not in and of itself automatically result in a deportation order. Therefore, the impact the deprivation had on the private life of the applicants was considered less incisive ("However, since no deportation order had been forthcoming, the consequence of the deprivation of nationality for their private life had solely consisted in the loss of an element of their identity", *Ghoumid v. France,* para. 49). Although the ECtHR emphasizes in its case law that Art. 8 ECHR cannot be interpreted to guarantee a right to a specific residence title (*Johansen v. Denmark*, para. 54; *Kaftailova v. Latvia*, para. 51), in the case of an expulsion the Court, nevertheless, normally uses different criteria such as the duration of residence and the social, cultural, or family ties that the person concerned has with his home country (*Üner v. the Netherlands*/*Boultif v. Switzerland*) to assess whether an expulsion following a deprivation of nationality is proportionate. Considering that Mr. Johansen was a Danish citizen who was born and lived all his life with his mother and siblings in Denmark, is married to a Danish woman and has a Danish son, there seems to be a substantial interference with family and private life not just for the applicant but also for his spouse and child. But the Court, disappointingly, completely defers to the argumentation of the Danish Supreme Court that stressed Mr. Johansen's ties to Tunisia without making any proportionality considerations of its own or questioning the Danish Court's assessment of the strength of Mr. Johansen's links to Tunisia (*Johansen v. Denmark*, para. 69).

The expulsion order and the ban on re-entry

In addition to these considerations, the case also afforded the Court an opportunity to elaborate on the restrictions it places on an expulsion following the deprivation of nationality. The Court starts its analysis with a short reference to Art. 3 of the 4th Protocol to the ECHR that prohibits the expulsion of nationals and acknowledges that Mr. Johansen could therefore initially not be expelled, but it immediately follows this up by claiming that once deprived of his nationality Mr. Johansen could obviously be expelled, since States have the right to expel aliens, as long as such a measure is compatible with Art. 8 II of the ECHR (*Johansen v. Denmark*, paras. 72-73).

That approach, though, would rob Art. 3 of the 4th Protocol of much of its meaning, because it implies that States can simply deprive a person of their nationality to evade its application. The issue of revocation of nationality followed by expulsion is dealt with in the Guide on Art. 3 of the 4th Protocol. The Guide explicitly acknowledges that "the revocation of citizenship followed by expulsion may raise potential problems […], especially where such decision is taken for the purpose of expelling the applicant" (here, para. 18). As regards the connection between a revocation and an expulsion, it states that "the existence of a causal link between the two decisions can create the presumption that the denial of citizenship was solely intended to make the expulsion possible" (ibid., para. 17).

Unfortunately, the Court glosses over this issue and simply relies on the claim that "Contracting States have the power to expel an alien convicted of criminal offences" (*Johansen v. Denmark*, para. 73). While this is true, it misses the point, as Mr. Johansen was not an alien at the time of conviction, but a Danish national. The conviction itself was merely the justification for the measures imposed by the Supreme Court. But it is only the order to deprive Mr. Johansen of his Danish nationality that paves the way for his expulsion and the re-entry ban thus raising the very issues of a causal link between the two measures addressed in the Guide.

Instead of addressing this and trying to elucidate when a deprivation of nationality might be considered as having occurred specifically for the purpose of expulsion, the Court concentrates on the consequences for the applicant of an expulsion following a deprivation of nationality. Its analysis therefore focuses on the compatibility of the expulsion with Art. 8 II ECHR,

an issue the Court settles by balancing a catalogue of criteria developed in its case law.

While the Court acknowledges that "very serious reasons" are required for an expulsion, because Denmark is the center of Mr. Johansen's whole family life, it reiterates its traditional stance that protecting the public from the threat of terrorism is of utmost importance (*K2 v. UK*, para. 66; *Ghoumid v. France*, para. 50).

What this balancing amounts to in practice quickly becomes apparent from the Court's assessment of the links Mr. Johansen has to Denmark. From the outset it downplays Mr. Johansen's connections to Denmark, revealingly calling him "a settled migrant [...] who spent his whole childhood and youth in the host country", instead of referring to him as a (former) national who was born on Danish territory, acquired Danish nationality at birth and grew up in his home country (*Johansen v. Denmark*, para. 76).

As regards the impact of an expulsion paired with a lifelong re-entry ban on the right to respect for his family life, the Court attaches much weight to the argument put forward by the Supreme Court that the spouse of Mr. Johansen had converted to Islam and his son had visited an Islamic school, drawing the farfetched conclusion that the two of them "were not entirely unprepared" to follow Mr. Johansen to Tunisia even though they have no connection whatsoever to this country just because they are Muslims (*Johansen v. Denmark*, para. 82). But even if they didn't join him, there would be no problem, because they could either visit or stay in touch via modern means of telecommunication. If this approach is taken at face value, it is hard to imagine an expulsion ever interfering with the right to respect for family life as access to modern telecommunication is virtually ubiquitous these days.

This interpretation suggests that the weight of even very strong personal and familial links pales in comparison to the paramount aim of combating terrorism. It is therefore hard to imagine how, on this reading, Art. 8 ECHR would ever pose an obstacle to the removal of undesirable persons from a State's territory. Apart from these considerations, the logic behind expulsions for the sake of protecting the public from terrorism employed by the Court quickly breaks down, as it merely shifts the problem elsewhere. This begs the question if the Court would, for example, be prepared to accept an expulsion on these grounds to another Contracting State.

When the fight against terrorism trumps individual rights

This decision is the latest proof of the Court's reluctance to engage with issues raised by deprivations of nationality in terrorism cases. Instead of delving into a detailed analysis of specific rights guaranteed by the Convention, the Court seems to by and large accept States' arguments in these matters and is very cautious to question the motives for those measures and their concrete application. While on the one hand the Court wants to prevent statelessness, on the other hand it seems to be prepared to accept even the most tenuous of links to another country as sufficient for deprivation and subsequent expulsion. The upshot of all this is that the Court seems loath to limit States' room for manoeuvre when it comes to the fight against terrorism, and, more importantly, that individual rights do not seem to count for much when weighed against this aim.

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