# The Loss of Citizenship by Revocation of Naturalization or *ex lege*: Overview of German Case Law and Legislative Changes of 2009

*By Andrea Kirsch*[*]

## A. Introduction

In recent years, German nationality law was subject to changes. Several legal issues that had previously not been decided by the *Bundesverwaltungsgericht* (Federal Administrative Court—FAC) and the *Bundesverfassungsgericht* (Federal Constitutional Court—FCC) were clarified by these courts. Still, some questions had been left unanswered; the courts explicitly demanded that parliament become active. Issues were namely the time limit for revocation of naturalization, the effect of revocations on third parties (like children) that had been naturalized at the same time and the effects of the discontinuance of certain premises that had been the condition for the obtainment of citizenship by children *ex lege* on their naturalization.[1] Parliament complied with this call to action; in February of 2009, the changes came into force.[2]

This article deals with revocation of naturalizations obtained by fraud on the one hand and with the question to what extent the citizenship of children is affected in the cases mentioned on the other hand. For that purpose, both the case law as well as the legislative changes will be presented and compared to each other.

## B. The Loss of Citizenship

German citizenship can be lost in different ways, which are enumerated in Sec. 17.1 *Staatsangehörigkeitsgesetz* (Nationality Act—StAG). These ways include a voluntary decision by the citizen like dismissal (No. 1), naturalization by another country (No. 2),

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[1] *Cf*. BUNDESTAG DRUCKSACHEN [BT] 16/10528, at 2 (Ger.).

[2] BUNDESGESETZBLATT [BGBL. I] [Federal Law Gazette], 6 Feb. 2009, at I 158 (Ger.).

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renunciation (No. 3), declaration by the citizen (No. 6),[3] or acceptance as a child by a foreigner (No. 4). Apart from that, the entrance into the armed forces or a comparable armed alliance of a foreign state also leads to the loss of citizenship (No. 5). Until 2009, citizenship could only be lost in these cases. The StAG did not differentiate between obtainment of citizenship by birth or by naturalization.

### C. Revocation of Naturalizations Obtained by Fraud

Aside from the cases mentioned in the previous paragraph, citizenship can also be lost by revocation of naturalization. In contrast to the obtainment of citizenship by birth, naturalization requires an administrative act to procure German citizenship. Nationality law provides several possibilities for the authorities to naturalize an individual, and each possibility has different requirements. If after naturalization it turns out that one or more of these requirements were in fact not fulfilled at the time of naturalization and this unlawfulness results from a fraud by the naturalized person, the question arises whether naturalization may be revoked by the same standards as any other unlawful administrative act.

#### *I. Constitutional Requirements*

Art. 16.1 *Grundgesetz* (Basic Law—GG) states that "no German may be deprived of his citizenship. Citizenship may be lost only pursuant to a law, and against the will of the person affected only if he does not become stateless as a result." Thus, revocation would be prohibited if it were a deprivation in this sense. If it constituted a loss its lawfulness would depend on the fulfillment of the requirements of Art. 16.1 sent. 2 GG.

##### *1. Administrative Courts Before 2006*

Some administrative courts regarded citizenship as not even protected by Art. 16.1 sent. 1 GG if it was obtained by fraud.[4] They reasoned that Art. 16.1 only protected the vested German citizenship ("*wohlerworbene deutsche Staatsangehörigkeit*").[5]

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[3] This applies to children who obtained German citizenship by birth along with their parents' citizenship and have to decide which citizenship they want to keep as soon as they turn eighteen (Sec. 29 StAG).

[4] Oberverwaltungsgericht Münster [OVG] [Higher Administrative Court of Münster], 2 Sept. 1996, 10 NORDRHEIN-WESTFÄLISCHE VERWALTUNGSBLÄTTER (NWVBL) 71 (72), 1997 (Ger.); Verwaltungsgericht Gießen [VG] [Administrative Trial Court of Gießen], 7 June 2004, ENTSCHEIDUNGEN DES BUNDESVERWALTUNGSGERICHTS [BVERWGE] 2666/03 (Ger.).

[5] Verwaltungsgericht Schleswig [VG] [Administrative Trial Court of Schleswig], 19 Feb. 2001, BVERWGE 178/98 (Ger.); Verwaltungsgerichtshof München [VGH] [Higher Administrative Court of München], 17 June 2002, BVERWGE 01.1385 (Ger.); Verwaltungsgericht Augsburg [VG] [Administrative Trial Court of Augsburg], 13 May 2003, BVERWGE 03.212 (Ger.).

Whether revocation is an encroachment upon the extent of protection of Art. 16.1 sent. 1 GG or if such an encroachment would be justified by a historical and teleological interpretation of Art. 16.1 sent. 1 GG was left unanswered by the FAC in 2003. The historical interpretation showed that the Article was not supposed to provide for the protection of reliance in cases of naturalizations obtained by deceit. If at all, such a protection of reliance could only be granted for unlawful naturalizations that were based on erroneous decisions by the authorities. Furthermore, the court ruled that Art. 16.1 sent. 2 GG (prohibiting the loss of citizenship against the will of the person affected if he becomes stateless as a result) did not conflict with revocation of naturalization obtained by an intentional deceit due to the principle of lawful administration. The FAC ruled that the aspect of imminent statelessness, however, had to be considered when exercising legal discretion as statelessness had to be avoided to the best extent possible. The constitutional value decision ("*Wertentscheidung*") to avoid statelessness had to also be weighed against the constitutional imperative of lawful administration.[6]

*2. Leading Decision by the FCC 2006*

In its leading decision of 2006, the FCC also dealt with the definitions of "deprivation" and "loss of citizenship."[7] The court stated that the wording of Art. 16.1 GG showed that there are cases in which the loss of citizenship against the will of the person affected can be permissible. A deprivation which is not permissible pursuant to Art. 16.1 sent. 1 GG demanded more than the loss against the will of the person. The FCC ruled that in the case of deprivation, the infliction of loss of citizenship impairs the function of citizenship as a reliable basis of equal affiliation to the state. Such impairment would especially be an infliction of loss that the person affected had little or no effective influence on. Part of the reliability of citizenship must be the foreseeability of such a loss. Therefore, the provision on the loss of citizenship must reach a sufficient degree of legal certainty and legal clarity.[8] If someone is not allowed to keep a legal position that he obtained by deceit or a comparable misdemeanor such as bribery or threats, this does not impair a legitimate reliance of the person affected nor the reliance of others that obtained their naturalization without such abuse.[9] In conclusion, revocation in these cases is not a deprivation, but only a loss.

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[6] Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court], 3 June 2003, 118 BVERWGE 216 (221) (Ger.); Bundesverwaltungsgericht [BVERWG] [Federal Administrative Court], 9 Sept. 2003, 119 BVERWGE 17 (19) (Ger.).

[7] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 24 May 2006, 116 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 24 (Ger.). *See also* Stefan Magen, *Naturalizations Obtained by Fraud: Can They be Revoked? The German Federal Constitutional Court's Judgement of 24 May 2006*, 7 GERM. L.J. 681, 684 (2006).

[8] *See* 116 BVERFGE 24 (37, 44) (Ger.).

[9] *See id.* at 45.

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Therefore, the next question was whether the prohibition of statelessness in Art. 16.1 sent. 2 GG conflicts with revocation. The FCC stated that the spirit and purpose of the law showed that the protection from statelessness did not include the cases of naturalization obtained by fraud. These cases were not envisioned by the *Parlamentarische Rat* (parliamentary council) when establishing the Basic Law.[10] Apart from that, a legal system taking itself seriously should not reward the disregard of itself. Otherwise, this would mean an incentive to breach the law, a discrimination of legal behavior and undermine the conditions of its own effectiveness.[11] Thus, the FCC did not take the wording of Art. 16.1 sent. 2 GG literally.[12] Pursuant to German law, naturalization usually requires the renunciation of the former citizenship; therefore, statelessness after revocation of naturalization is not the exception, but the normal case accepted by law.

Consequently, Art. 16.1 GG does not prohibit revocation of naturalization obtained by fraud.

*II. Statutory Basis*

The rule of law—and explicitly Art. 16.1 sent. 2 GG—requires that revocation is based in statute, making decisions by the authorities foreseeable for the person affected.

*1. Before 2009*

Until 2009, no special legal basis for revocation existed in nationality law. Before the FAC rendered a verdict in this issue in 2003, it was disputed amongst courts whether Sec. 48 of the *Landesverwaltungsverfahrensgesetze* (Codes of Administrative Procedure of the *Länder*—LVwVfG) could be used as a statutory basis for revocation of naturalization. German administrative law allows falling back on the general Code of Administrative Procedure in the case of missing special legal bases. Sec. 48 LVwVfG (having the same wording in every *Bundesland*) regulates revocation of unlawful administrative acts. Falling back on that provision, however, is barred in the event that the relevant field of law contains coextensive or conflicting regulations (*cf*. Sec. 1.1 LVwVfG), thus regulating the problem of annulability of administrative acts exhaustively.

[10] *See id.* at 45–49.

[11] *See id.* at 49.

[12] *See* Magen, *supra* note 7, at 689.

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*1.1 Administrative Courts*

Both the Administrative Court of Berlin as well as the Higher Administrative Court of Berlin regarded Sec. 48 LVwVfG as not applicable for revocation of naturalization because the StAG contained special regulations for the loss of citizenship in its Sec. 17.[13] The courts stressed that revocation was not mentioned in Sec. 17 StAG and the listing therein was exhaustive.

The majority of the courts, however, considered a revocation of naturalization on the basis of Sec. 48 LVwVfG possible if naturalization had been obtained by fraud.[14]

In 2003, the FAC approved this view.[15] It ruled that nationality law did not contain a special regulation for the loss of citizenship. Sec. 17 StAG is only comprised of provisions that relate to circumstances occurring after having obtained citizenship, not in the process thereof. The FAC—like the administrative and higher administrative courts before—referred to the constitutional principle of lawful administration of Art. 20.3 GG, stressing its considerable meaning on the field of nationality law because of the severe consequences that the status of citizenship has.[16]

After this decision of the FAC, the Administrative Court of Berlin dropped its adjudication in this matter and subscribed to the view of the majority.[17]

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[13] Oberverwaltungsgericht Berlin [OVG] [Higher Administrative Court of Berlin], 2 Nov. 1988, BVERWGE 53.82 (Ger.); Verwaltungsgericht Berlin [VG] [Administrative Trial Court of Berlin], 30 Oct. 2002, 25 INFORMATIONSBRIEF AUSLÄNDERRECHT (INFAUSLR) 67 (68), 2003 (Ger.).

[14] Oberverwaltungsgericht Münster [OVG] [Higher Administrative Court of Münster], 2 Sept. 1996, 10 NWVBL 71 (72), 1997 (Ger.); Verwaltungsgericht Schleswig [VG] [Administrative Trial Court of Schleswig], 19 Feb. 2001, BVERWGE 178/98 (Ger.); Oberverwaltungsgericht Hamburg [OVG] [Higher Administrative Court of Hamburg], 28 Aug. 2001, 20 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT (NVWZ) 885 (886), 2002 (Ger.); Verwaltungsgerichtshof Kassel [VGH] [Higher Administrative Court of Kassel], 3 Dec. 2001, BVERWGE 2451/01 (Ger.); Verwaltungsgerichtshof München [VGH] [Higher Administrative Court of München], 17 June 2002, BVERWGE 01.1385 (Ger.); Verwaltungsgerichtshof Mannheim [VGH] [Higher Administrative Court of Mannheim], 29 Nov. 2002, BVERWGE 205/03 (Ger).

[15] *See* 118 BVERWGE 216 (218) (Ger.); 119 BVERWGE 17 (19) (Ger.).

[16] *See* 118 BVERWGE 216 (219) (Ger.).

[17] Verwaltungsgericht Berlin [VG] [Administrative Trial Court of Berlin], 14 Sept. 2004, BVERWGE 146.04 (Ger.); Verwaltungsgericht Berlin [VG] [Administrative Trial Court of Berlin], 14 Dec. 2004, BVERWGE 135.04 (Ger.); Verwaltungsgericht Berlin [VG] [Administrative Trial Court of Berlin], 11 Mar. 2005, BVERWGE 161.04 (Ger.); Verwaltungsgericht Berlin [VG] [Administrative Trial Court of Berlin], 18 Mar. 2005, BVERWGE 179.04 (Ger.); Verwaltungsgericht Berlin [VG] [Administrative Trial Court of Berlin], 18 Mar. 2005, BVERWGE 133/04 (Ger.); Verwaltungsgericht Berlin [VG] [Administrative Trial Court of Berlin], 16 Aug. 2005, BVERWGE 161/04 (Ger.); Verwaltungsgericht Berlin [VG] [Administrative Trial Court of Berlin], 20 Dec. 2005, BVERWGE 114.05 (Ger.).

*a) Reasons for Revocation*

According to Sec. 48 LVwVfG, the revocation of an administrative act requires its unlawfulness at the time of its decree.[18] Also, the person affected must have caused the administrative decision by deceit, threats or bribery or by giving information that was in essence false or incomplete. In these cases, pursuant to Sec. 48. 2 sent. 3 No. 1 and 2 LVwVfG, he may not plead expectations. These cases constitute the superordinate concept of "obtaining naturalization by fraud." If the naturalization was unlawful—meaning that it should not have been decreed—depends on the different provisions on naturalization in the StAG, leading to a multitude of reasons for revocation. Yet, case law shows that certain situations occur repeatedly.

*(1) Fictitious Marriages and Polygamy*

When naturalization is granted with respect to an existing marriage (*cf*. Sec. 9.1 No. 2 StAG), "marriage" does not only mean a legal and in the time of naturalization existing marriage, but also that the spouses actually live together. Thus, whenever the spouses already live separated, this constitutes an atypical case, leading to the unlawfulness of naturalization.[19] Marriage must also have been entered into for the purpose of living together, meaning that fictitious marriages also constitute atypical cases that are not covered by the regulation.[20]

In case of polygamy, the person affected is not "integrated into the German living conditions" ("*Einordnen in die deutschen Lebensverhältnisse"*) as required by Sec. 9.1 No. 2 StAG,[21] even if he was married to two women at the same time only for a short time and

[18] PAUL STELKENS ET AL., VERWALTUNGSVERFAHRENSGESETZ: KOMMENTAR § 48, ¶ 49 ( 2008).

[19] Verwaltungsgericht Schleswig [VG] [Administrative Trial Court of Schleswig], 19 Feb. 2001, BVERWGE 178/98 (Ger.); Verwaltungsgericht Augsburg [VG] [Administrative Trial Court of Augsburg], 13 May 2003, BVERWGE 03.212, (Ger.); Verwaltungsgerichtshof München [VGH] [Higher Administrative Court of München], 4 May 2005, BVERWGE 03.1679, (Ger.).

[20] Verwaltungsgerichtshof Mannheim [VGH] [Higher Administrative Court of Mannheim], 29 Nov. 2002, 25 INFAUSLR 205 (207), 2003 (Ger.); 119 BVERWGE 17 (20) (Ger.).

[21] Oberverwaltungsgericht Münster [OVG] [Higher Administrative Court of Münster], 2 Sept. 1996, 10 NWVBL 71 (73), 1997 (Ger.); Verwaltungsgericht Schleswig [VG] [Administrative Trial Court of Schleswig], 19 Feb. 2001, BVERWGE 178/98 (Ger.); Verwaltungsgericht Oldenburg [VG] [Administrative Trial Court of Oldenburg], 29 Oct. 2003, BVERWGE 746/03 (Ger.); Verwaltungsgericht Braunschweig [VG] [Administrative Trial Court of Braunschweig], 4 Nov. 2003, BVERWGE 308/03 (Ger.); Oberverwaltungsgericht Lüneburg [OVG] [Higher Administrative Court of Lüneburg], 14 Oct. 2004, 58 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 524, 2005 (Ger.); Verwaltungsgericht Berlin, [VG] [Administrative Trial Court of Berlin], 11 Mar. 2005, BVERWGE 161.04 (Ger.); Verwaltungsgerichtshof München [VGH] [Higher Administrative Court of München], 4 May 2005, BVERWGE 03.1371 (Ger.); Verwaltungsgericht Berlin [VG] [Administrative Trial Court of Berlin], 16 Aug. 2005, BVERWGE 161.04 (Ger.); Verwaltungsgericht Saarland [VG] [Administrative Trial Court of Saarland], 28 Oct. 2005, BVERWGE 235/04 (Ger.); Oberverwaltungsgericht Lüneburg [OVG] [Higher Administrative Court of Lüneburg], 13 July 2007,

had already intended to get a divorce from his first wife at the time he entered into marriage with his second.[22] It is also irrelevant if he lives together with both wives or not.[23]

*(2) Criminal Offenses*

Pursuant to Sec. 8.1 No. 2 and Sec. 10.1 No. 5 StAG, it can be a requirement for naturalization that the person affected has not been convicted of a crime. Naturalization is unlawful if the applicant has concealed a conviction.[24] Whenever there are investigations because the person affected is suspected of having committed a crime the authorities have to suspend the decision about naturalization until the proceedings are ended or, in case of conviction, the verdict becomes final. Therefore, naturalization is also obtained by fraud in case the applicant did not tell the authorities about the pending criminal proceedings.[25]

*(3) Relations to Extremist Groups*

Pursuant to Sec. 11 sent. 1 No. 1 StAG, naturalization is barred in case there is evidence that justifies the assumption that the foreigner pursues or supports or has pursued or supported endeavors that are directed against the free democratic basic order, the existence or security of the Federation or of a *Land* (unless the foreigner credibly proves that he has tergiversated from his former pursuit or support of these endeavors). Such pursuits or support were presumed *inter alia* in the case of a member and accountant of a group associated with the PKK ("Kurdistan Workers' Party"),[26] a member of Milli Görüs

61 DAS STANDESAMT [STAZ] 110 (112), 2008 (Ger.); Verwaltungsgericht Darmstadt [VG] [Administrative Trial Court of Darmstadt], 20 Aug. 2008, BVERWGE 840/07.

[22] Oberverwaltungsgericht Münster [OVG] [Higher Administrative Court of Münster], 2 Sept. 1996, 10 NWVBL 71 (73), 1997 (Ger.).

[23] Verwaltungsgericht Berlin, [VG] [Administrative Trial Court of Berlin], 11 Mar. 2005, BVERWGE 161.04 (Ger.)

[24] *See, e.g.*, Verwaltungsgericht Gießen [VG] [Administrative Trial Court of Gießen], 7 June 2004, BVERWGE 2666/03 (Ger.); Verwaltungsgericht Ansbach [VG] [Administrative Trial Court of Ansbach], 28 Nov. 2008, BVERWGE 08.00866 (Ger.).

[25] Verwaltungsgericht Arnsberg [VG] [Administrative Trial Court of Arnsberg], 7 Sept. 2005, BVERWGE 4025/04 (Ger.); Verwaltungsgerichtshof München [VGH] [Higher Administrative Court of München], 17 June 2002, BVERWGE 01.1385 (Ger.); 118 BVERWGE 216 (222) (Ger.); Verwaltungsgerichtshof München [VGH] [Higher Administrative Court of München], 25 Oct. 2005, BVERWGE 03.2462 (Ger.); Verwaltungsgerichtshof Mannheim [VGH] [Higher Administrative Court of Mannheim], 10 Oct. 2007, 30 INFAUSLR 44 (45), 2008 (Ger.); Verwaltungsgericht Freiburg [VG] [Administrative Trial Court of Freiburg], 5 Sept. 2007, BVERWGE 1851/06 (Ger.); Verwaltungsgericht Sigmaringen [VG] [Administrative Trial Court of Sigmaringen], 18 Nov. 2008, BVERWGE 54/08 (Ger.). This was the reason for revocation in the *Rottmann* case. *See* Part C.III.

[26] Verwaltungsgericht Gießen [VG] [Administrative Trial Court of Gießen], 3 May 2004, BVERWGE 2691/03 (Ger.); *cf.* Verwaltungsgericht Oldenburg [VG] [Administrative Trial Court of Oldenburg], 17 Oct. 2007, BVERWGE 3636/06 (Ger.).

who was the founding member and Vice President of a member group of Milli Görüs,[27] and a person affected in whose apartment publications and symbols of the movement *Kalifatsstaat* ("caliphate state") had been found.[28]

*(4) Statelessness*

Naturalization is also unlawful if the person affected was naturalized in order to reduce statelessness,[29] but had in fact held the citizenship of another state. These cases have occurred repeatedly with individuals claiming to be stateless from Lebanon who actually hold Turkish citizenship.[30]

*b) Period of Time for Revocation*

Pursuant to Sec. 48 LVwVfG, an unlawful administrative act can only be revoked within a one-year period. This time limit does not begin with the administrative decision, but at the point of time the authorities learn about the facts that justify revocation. The authorities must both know all facts necessary for revocation and be aware of the unlawfulness of the administrative act and its annulability due to this.[31] Therefore, an administrative act might be revoked 20 years after its decree because the authorities learned about the relevant circumstances after 19 years and one day.

Still, the one-year period does not apply in case the person affected obtained the administrative act by deceit, threats or bribery (*cf*. Sec. 48.4 sent. 2 LVwVfG). In these cases, an unlawful administrative act may be revoked at any time. An exception is made only if the authorities forfeited their right to revoke.[32] The second case of an obtainment

[27] Verwaltungsgericht Gießen [VG] [Administrative Trial Court of Gießen], 5 Apr. 2004, BVERWGE 4911/03 (Ger.).

[28] Verwaltungsgericht Freiburg [VG] [Administrative Trial Court of Freiburg], 5 Dec. 2007, BVERWGE 1851/06 (Ger.).

[29] Ausführungsgesetz zu dem Übereinkommen vom 30.08.1961 zur Verminderung der Staatenlosigkeit [Act of the Implementation of the Convention on the Reduction of Statelessness of 30 Aug. 1961], 29 June 1977, BGBl I at 1101, art. 2.

[30] Oberverwaltungsgericht Münster [OVG] [Higher Administrative Court of Münster], 12 Nov. 2002, BVERWGE 2187/02 (Ger.); Verwaltungsgericht Berlin [VG] [Administrative Trial Court of Berlin], 14 Dec. 2004, BVERWGE 135.04 (Ger.); Verwaltungsgericht Berlin [VG] [Administrative Trial Court of Berlin], 18 Mar. 2005, BVERWGE 179.04 (Ger.); Verwaltungsgericht Berlin [VG] [Administrative Trial Court of Berlin], 18 Mar. 2005, BVERWGE 133.04 (Ger.); Verwaltungsgericht Arnsberg [VG] [Administrative Trial Court of Arnsberg], 12 May 2005, BVERWGE 335/05 (Ger.); Verwaltungsgericht Berlin [VG] [Administrative Trial Court of Berlin], 20 Dec. 2005, BVERWGE 114.05 (Ger.).

[31] *See* STELKENS ET AL., *supra* note 18, § 48, ¶ 229.

[32] *See id.* ¶ 204.

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by fraud, the obtainment by giving information that was in essence false or incomplete, is not mentioned in Sec. 48.4 sent. 2 LVwVfG. In these cases, the regular one-year period of Sec. 48.4 sent. 1 LVwVfG applies.[33]

The courts disagreed upon the issue of, in case of deceit, revocation was possible at any point in the future or whether time limits of other provisions applied. Some mentioned the five-year period that was regulated in Sec. 24.2 sent. 2 *Gesetz zur Regelung von Fragen der Staatsangehörigkeit*[34] (Act on the Regulation of Questions of Citizenship—StAngRegG).[35] The StAngRegG regulated special naturalizations in the context of dealing with the national socialist nationality law. Sec. 24 StAngRegG dealt with the invalidity of naturalization that could only be decreed within five years if naturalization had been obtained due to an applicant's fault.

In contrast, some courts regarded Sec. 48.4 LVwVfG as exhaustive of the limitations of a possible revocation. Sec. 24.2 sent. 2 StAngRegG did not apply directly or analogically.[36] On these grounds, a revocation almost twelve years after naturalization was ruled to be lawful.[37] Other courts did not discuss the possible application of the period of time of Sec. 24.2 sent. 2 StAngRegG, but presumed a limitless competence to revoke due to the non-applicability of Sec. 48.4 sent. 1 LVwVfG.[38] Therefore, they ruled time periods of eight,[39]

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[33] *See* Verwaltungsgerichtshof Mannheim [VGH] [Higher Administrative Court of Mannheim], 29 Nov. 2002, 25 INFAUSLR 205 (210), 2003 (Ger.); Verwaltungsgericht Gießen [VG] [Administrative Trial Court of Gießen], 5 Apr. 2004, BVERWGE 4911/03 (Ger.); Verwaltungsgericht Gießen [VG] [Administrative Trial Court of Gießen], 7 June 2004, BVERWGE 2666/03 (Ger.);

[34] Abrogated by *Gesetz über die weitere Bereinigung von Bundesrecht* [Further Simplification of Federal Law], 8 Dec. 2010, BGBL. I at 1864, art. 2.

[35] Oberverwaltungsgericht Münster [OVG] [Higher Administrative Court of Münster], 2 Sept. 1996, 10 NWVBL 71 (75), 1997 (Ger.); Oberverwaltungsgericht Hamburg [OVG] [Higher Administrative Court of Hamburg], 28 Aug. 2001, 20 NVWZ 885 (887), 2002 (Ger.) (even though this question was left unanswered in both cases).

[36] Verwaltungsgericht Schleswig [VG] [Administrative Trial Court of Schleswig], 19 Feb. 2001, BVERWGE 178/98 (Ger.); Verwaltungsgericht Berlin [VG] [Administrative Trial Court of Berlin], 11 Mar. 2005, BVERWGE 161.04 (Ger.); Verwaltungsgericht Berlin [VG] [Administrative Trial Court of Berlin], 16 Aug. 2005, BVERWGE 161.04 (Ger.); Verwaltungsgericht Berlin [VG] [Administrative Trial Court of Berlin], 20 Dec. 2005, BVERWGE 114. 04 (Ger.).

[37] Verwaltungsgericht Berlin [VG] [Administrative Trial Court of Berlin], 11 Mar. 2005, BVERWGE 161.04 (Ger.); Verwaltungsgericht Berlin [VG] [Administrative Trial Court of Berlin], 16 Aug. 2005, BVERWGE 161.04 (Ger.); Verwaltungsgericht Berlin [VG] [Administrative Trial Court of Berlin], 20 Dec. 2005, BVERWGE 114.05 (Ger.).

[38] Verwaltungsgericht Berlin [VG] [Administrative Trial Court of Berlin], 14 Sept. 2004, BVERWGE 146.04 (Ger.); Verwaltungsgericht Berlin [VG] [Administrative Trial Court of Berlin], 14 Dec. 2004, BVERWGE 135.04 (Ger.); Verwaltungsgericht Berlin [VG] [Administrative Trial Court of Berlin], 18 Mar. 2005, BVERWGE 179.04 (Ger.); Verwaltungsgericht Berlin [VG] [Administrative Trial Court of Berlin], 18 Mar. 2005, BVERWGE 133.04 (Ger.); Verwaltungsgericht Arnsberg [VG] [Administrative Trial Court of Arnsberg], 7 Sept. 2005, BVERWGE 4045/04 (Ger.).

[39] Verwaltungsgericht Berlin [VG] [Administrative Trial Court of Berlin], 14 Sept. 2004, BVERWGE 146.04 (Ger.).

almost ten[40] and eleven years[41] to be lawful.

Other courts were of the opinion that revocation of naturalization obtained by fraud was not permissible without any time limit even though the one-year period did not apply.[42] Some thought that this did not mean an absolute time limit, only the general provisions of forfeit applied, the time limit thus being dependent on the special circumstances in each individual case. On the grounds of this, revocation was not forfeited five and a half years after naturalization if the authorities were at no point in time suggestive of a refrainment of revocation of naturalization.[43] Still other courts favored an absolute period of five years. The naturalized person could not be expected to live under the threat of revocation of naturalization forever, even if it had been obtained by fraud.[44]

*c) Children*

When a family is naturalized in one administrative process, the applications are usually completed by the parents. If the parents are deceptive about facts that are relevant for naturalization, the courts agree that such a deceit by the parents is imputed to the naturalized children,[45] because it was this behavior that led to the children benefitting from naturalization which now is supposed to be revoked.[46] On these grounds, naturalization of the children can usually be revoked.

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[40] Verwaltungsgericht Berlin [VG] [Administrative Trial Court of Berlin], 14 Dec. 2004, BVERWGE 135.04 (Ger.); Verwaltungsgericht Berlin [VG] [Administrative Trial Court of Berlin], 18 Mar. 2005, BVERWGE 133.04 (Ger.).

[41] Verwaltungsgericht Berlin [VG] [Administrative Trial Court of Berlin], 18 Mar. 2005, BVERWGE 179.04 (Ger.).

[42] Verwaltungsgerichtshof München [VGH] [Higher Administrative Court of München], 4 May 2005, BVERWGE 03.1371 (Ger.); *see also* Magen, *supra* note 7, at 700.

[43] Verwaltungsgerichtshof München [VGH] [Higher Administrative Court of München], 4 May 2005, BVERWGE 03.1371 (Ger.).

[44] Verwaltungsgericht Hamburg [VG] [Administrative Trial Court of Hamburg] 15 Feb. 2000, BVERWGE 98/99 (Ger.), cited in Verwaltungsgericht Schleswig [VG] [Administrative Trial Court of Schleswig] 19 Feb. 2001, BVERWGE 178/98 (Ger.).

[45] Oberverwaltungsgericht Münster [OVG] [Higher Administrative Court of Münster], 12 Nov. 2002, BVERWGE 2187/02 (Ger.); Verwaltungsgerichtshof Mannheim [VGH] [Higher Administrative Court of Mannheim], 29 Nov. 2002, 25 INFAUSLR 205 (210), 2003 (Ger.). *See* 119 BVERWGE 17 (24) (Ger.); Verwaltungsgericht Berlin [VG] [Administrative Trial Court of Berlin], 14 Dec. 2004, BVERWGE 135.04 (Ger.); Verwaltungsgericht Berlin [VG] [Administrative Trial Court of Berlin], 18 Mar. 2005, BVERWGE 133.04 (Ger.); Verwaltungsgericht Arnsberg [VG] [Administrative Trial Court of Arnsberg], 12 May 2005, BVERWGE 355/05 (Ger.); Verwaltungsgericht Berlin [VG] [Administrative Trial Court of Berlin], 20 Dec. 2005, BVERWGE 114.05 (Ger.); Oberverwaltungsgericht Lüneburg [OVG] [Higher Administrative Court of Lüneburg], 27 Sept. 2007, BVERWGE 108/07 (Ger.).

[46] Oberverwaltungsgericht Münster [OVG] [Higher Administrative Court of Münster], 12 Nov. 2002, BVERWGE 2187/02 (Ger.).

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However, the FAC decided in 2003 that the decision on revocation of naturalization of children by the authorities has to be an independent, discretionary decision. The court held that the authorities must consider the children's age as well as if they deceived themselves or if they were involved in the deceit by their parents and to what extent they had integrated into the German living conditions. These issues had to be weighed against the public interest of getting back lawful conditions on the field of nationality law with its special significance.[47]

*1.2 FCC 2006*

In 2006, the FCC clarified some of these disputed issues in its leading decision.[48]

It ruled that Sec. 48 LVwVfG was a sufficient statutory basis for simple cases of prompt revocations of naturalizations obtained by fraud.[49] Legal certainty and legal clarity demanded by the constitution were fulfilled because of the foreseeability of a possible revocation pursuant to Sec. 48 LVwVfG; furthermore, courts could fall back on the established and "well-tried" case law on revocations.[50]

Thus, for a revocation to be based on Sec. 48 LVwVfG, three conditions had to be fulfilled: First, naturalization of the person affected had to be unlawful because it had been obtained by deceit or a comparable misdemeanor like bribery or threats. Second, revocation had to be decreed promptly ("*zeitnah*"). Third, the case had to be simple, meaning that no third parties were affected.

*a) Obtained by Fraud*

After the FCC decision, some administrative courts specified "obtainment by fraud" by saying that whenever the facts in the application were only false or incomplete, but without any fault by the applicant, the misdemeanor is not "comparable" to a deceit as demanded by the FCC.[51] Whenever the applicant is culpable of the false or incomplete

[47] *See* 119 BVERWGE 17 (24) (Ger.).

[48] *See* 116 BVERFGE 24 (59, 60) (Ger.).

[49] *See id.* at 52. Four out of eight judges supported this view which is enough to dismiss the case. *Cf. Bundesverfassungsgerichtsgesetz* [BVerfGG] [Federal Constitutional Court Act], § 15.4 sent. 3 (Ger.). There was a dissenting opinion on this issue: Four judges held that Parliament had to decide on the conditions for revocations of naturalizations in a special statutory basis. *See* 116 BVERFGE 24 (60–69).

[50] *See* 116 BVERFGE 24 (54–55) (Ger.).

[51] Verwaltungsgerichtshof Kassel [VGH] [Higher Administrative Court of Kassel], 18 Jan. 2007, 29 INFAUSLR 207 (208), 2007 (Ger.); *cf*. Verwaltungsgerichtshof München [VGH] [Higher Administrative Court of München], 1 Mar. 2007, BVERWGE 05.1783 (Ger.); Verwaltungsgericht München [VG] [Administrative Trial Court of München], 6 Dec.

information, this will constitute a deceit in most cases as well, so there will be an overlap between the two alternatives.

If the requirements of a provision are not clear and the person affected has to assess them himself, false information given is not sufficient to constitute a fraud either. This is the case *inter alia* when the applicant has to declare not to pursue or support endeavors that are directed against the free democratic basic order.[52]

*b) Promptly*

The FCC did not explain what it meant by "promptly." In the case at hand, only two years had passed between naturalization and its revocation. However, the case law ruled by the administrative and higher administrative courts after the judgment by the FCC highlights some criteria.

First, the term "promptly" refers to the time period between naturalization and its revocation; contrary to Sec. 48.4 LVwVfG, it does not mean a time period for the authorities to decide about revocation after they learned about the facts.[53]

Some courts considered applying the period of time set forth in Sec. 24.2 sent. 2 StAngReG,[54] meaning that revocation would only be possible within five years after

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2007, BVERWGE 06.4896 (Ger.); Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court], 3 June 2003, BVERWGE 132/07 (Ger.).

[52] Verwaltungsgerichtshof Mannheim [VGH] [Higher Administrative Court of Mannheim], 17 Sept. 2007, 30 INFAUSLR 173 (175), 2008 (Ger.).

[53] Oberverwaltungsgericht Berlin-Brandenburg [OVG] [Higher Administrative Court of Berlin-Brandenburg], 19 Oct. 2006, BVERWGE 1/05 (Ger.); Oberverwaltungsgericht Berlin-Brandenburg [OVG] [Higher Administrative Court of Berlin-Brandenburg], 19 Oct. 2006, BVERWGE 15/03 (Ger.); Verwaltungsgericht Stuttgart [VG] [Administrative Trial Court of Stuttgart], 5 Mar. 2007, BVERWGE 4105/04 (Ger.); Verwaltungsgerichtshof Mannheim [VGH] [Higher Administrative Court of Mannheim], 9 Aug. 2007, 30 INFAUSLR 41 (43), 2008 (Ger.); Verwaltungsgericht Freiburg [VG] [Administrative Trial Court of Freiburg], 14 Nov. 2007, BVERWGE 1854/05 (Ger.); Verwaltungsgericht Freiburg [VG] [Administrative Trial Court of Freiburg], 5 Dec. 2007, BVERWGE 1851/06 (Ger.); Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court], 14 Feb. 2008, 130 BVERWGE 209 (212) (Ger.); Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court], 30 June 2008, 28 Zeitschrift für Ausländerrecht und Ausländerpolitik [ZAR] 311 (312), 2008 (Ger.); Verwaltungsgericht Darmstadt [VG] [Administrative Trial Court of Darmstadt], 20 Aug. 2008, BVERWGE 840/07 (Ger.).

[54] Verwaltungsgericht Stuttgart [VG] [Administrative Trial Court of Stuttgart], 5 Mar. 2007, BVERWGE 4105/04 (Ger.); Verwaltungsgerichtshof Mannheim [VGH] [Higher Administrative Court of Mannheim], 17 Sept. 2007, 30 INFAUSLR 173 (177), 2008 (Ger.); Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court], 30 June 2008, 28 ZAR 311 (312), 2008 (Ger.); Verwaltungsgericht Darmstadt [VG] [Administrative Trial Court of Darmstadt], 20 Aug. 2008, BVERWGE 840/07, ¶ 20 (Ger.); Verwaltungsgericht Sigmaringen [VG] [Administrative Trial Court of Sigmaringen], 18 Nov. 2008, BVERWGE 54, 2008 (Ger.); Verwaltungsgericht Ansbach [VG] [Administrative Trial Court of Ansbach], 28 Nov. 2008, BVERWGE 08.00866, ¶ 21 (Ger.).

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naturalization. But on the grounds of that approach, a time period of about five and a half years was also held to be lawful since it only exceeded the five-year period by a few months.[55] Without a reference to this provision, time periods of one year[56] and a little more than two years[57] were thought to be "prompt"; periods of more than eight years, however, were in most cases ruled to be too long for revocation.[58]

The FAC regarded parliament to be in charge of deciding on an absolute time limit.[59]

*c) "Simple Case"*

The FCC decided that cases in which third parties are involved are not to be considered "simple." In these regards, Sec. 48 LVwVfG might not be a sufficient legal basis because the decision by the authorities would not be foreseeable enough. There was a need for a parliamentary act to establish a basis for revocation in more complex cases, in particular, cases with children involved.[60]

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[55] Verwaltungsgericht Darmstadt [VG] [Administrative Trial Court of Darmstadt], 20 Aug. 2008, BVERWGE 840/07 (¶ 20) (Ger.).

[56] Verwaltungsgericht Freiburg [VG] [Administrative Trial Court of Freiburg], 5 Dec. 2007, BVERWGE 1851/06 (Ger.).

[57] Verwaltungsgerichtshof Mannheim [VGH] [Higher Administrative Court of Mannheim], 17 Sept. 2007, 30 INFAUSLR 173, 2008 (Ger.); Verwaltungsgericht Freiburg [VG] [Administrative Trial Court of Freiburg], 14 Nov. 2007, BVERWGE 1854/05 (Ger.); Verwaltungsgericht Sigmaringen [VG] [Administrative Trial Court of Sigmaringen], 18 Nov. 2008, BVERWGE 54/08 (Ger.).

[58] 8.5 years. *See* Oberverwaltungsgericht Berlin-Brandenburg [OVG] [Higher Administrative Court of Berlin-Brandenburg], 19 Oct. 2006, OVG 15/03 (Ger.); Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court], 14 Feb. 2008, BVERWGE 130 (209, 213) (Ger.). Eight years and eleven months. *See* Oberverwaltungsgericht Saarlouis [OVG] [Higher Administrative Court of Saarlouis], 3 July 2008, BVERWGE 396/07. Nine years and nine months. *See* Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court], 14 Feb. 2008, BVERWGE 5/07 (Ger.). More than ten years. *See* Verwaltungsgerichtshof Mannheim [VGH] [Higher Administrative Court of Mannheim], 9 Aug. 2007, 30 INFAUSLR 41, 2008 (Ger.). About eleven years. *See* Verwaltungsgericht Stuttgart [VG] [Administrative Trial Court of Stuttgart], 5 Mar. 2007, BVERWGE 4105/04 (Ger.); Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court], 14 Feb. 2008, BVERWGE 14/07; Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court], 14 Feb. 2008, BVERWGE 15/07. Ten to twelve years. Oberverwaltungsgericht Berlin-Brandenburg [OVG] [Higher Administrative Court of Berlin-Brandenburg], 19 Oct. 2006, OVG 1/05. *But see* Oberverwaltungsgericht Lüneburg [OVG] [Higher Administrative Court of Lüneburg], 13 July 2007, 61 STAZ 110, 2008 (Ger.) (impling that the term "promptly" may be ignored and that a 9.5-year period be permissible); Kathrin Engst, *Die Rücknahme rechtswidriger Verwaltungsakte am Beispiel der Einbürgerung*, 47 JURISTISCHE SCHULUNG (JUS) 225 (229), 2007.

[59] Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court], 14 Feb. 2008, 130 BVERWGE 209 (213) (Ger.); Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court], 30 June 2008, 28 ZAR 311 (312), 2008 (Ger.).

[60] *See* 116 BVERFGE 24 (59–60) (Ger.).

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*2. Legislative Changes of 2009*

As a result of the demands of the FCC and the FAC, Parliament felt compelled to act. In February 2009, the newly introduced Sec. 35 StAG came into force. Sec. 35.1 states that an unlawful naturalization can only be revoked if the administrative act was obtained by deceit, threats or bribery or by willfully giving false or incomplete information that was essential for its decree. Thus, the elements of Sec. 48 LVwVfG previously used for revocation of naturalizations obtained by fraud are now codified in a special provision in nationality law. Sec. 35.2 regulates that revocation generally does not conflict with the person affected becoming stateless. Thereby, the principle of lawful administration usually prevails over the interest in preventing statelessness.[61] The wording ("generally") allows the authorities to use their discretion in exceptional cases.

Parliament also decided to regulate a period of time for revocation. Sec. 35.3 states that naturalization may only be revoked within five years after naturalization. From this point in time, the interest in legal certainty outweighs the public interest in getting back lawful conditions. Parliament oriented itself at the time period set forth in Sec. 24.2 StARegG.[62] Sec. 35.4 clarifies that revocation has a retroactive effect. Some scholars had regarded that law inadequate in light of the possible consequences for third parties,[63] but the provision makes a clear statement now.

As the FCC had demanded in its decision in 2006, parliament decided how revocation of naturalization of parents affects the citizenship of children that were naturalized in the same administrative process. First, Sec. 35 generally applies for both the parents and the children. But Parliament reverted to the specifications by the FAC: Pursuant to Sec. 35.5 StAG, the authorities now have to make an independent discretionary decision for each person affected. In particular, they have to weigh the involvement of the third party in the deceit, threats or bribery or the willful giving of false or incomplete information against his interests worthy of protection, especially with consideration to the child's best interests. The reasons stated in the draft law show that it also has to be considered in the weighting decision whether the child has integrated into the German living conditions well.[64] However, this was not explicitly included in the wording of the provision.

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[61] BUNDESTAG DRUCKSACHEN [BT] 16/10528, at 8 (Ger).

[62] *Id.*

[63] *Cf.* Jörn Axel Kämmerer, *Die Rücknahme erschlichener Einbürgerungen—Tor zur Staatenlosigkeit?*, 25 NVwZ 1015, 1018 (2006); Juliane Kokott, *Art. 16, in* GRUNDGESETZ KOMMENTAR ¶ 32 (Michael Sachs ed., 5th ed. 2009); Waltraud Nettersheim, *Rücknahme und Widerruf von Einbürgerungen*, 119 DEUTSCHES VERWALTUNGSBLATT (DVBL) 1144, 1145 (2004).

[64] BUNDESTAG DRUCKSACHEN [BT] 16/10528, at 8 (Ger.).

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At last, Parliament amended Sec. 17.1 StAG that enumerates the cases in which citizenship is lost.[65] Now, revocation of naturalization pursuant to Sec. 35 StAG is mentioned in Sec. 17.1 No. 7 StAG.

*3. Comments*

The parliamentary decision to create a special provision for revocation of naturalization deserves approval. The dissenting opinion of the FCC decision of 2006 thought Sec. 48 LVwVfG not to be sufficient even for simple cases and criticized that it did not contain a time limit for revocation. Furthermore, it was not clear if naturalization could be revoked in cases in which the person affected only acted grossly negligently, not intentionally.[66] By introducing the term "willfully," parliament clarified that—compared to Sec. 48.2 sent. 3 No. 2 LVwVfG—giving false or incomplete information is not enough for revocation.

The absolute five-year period for revocation leads to the necessary legal certainty. Also, the established and "well-tried" case law concerning Sec. 48 LVwVfG mentioned by the FCC had particularly not agreed on the time period to be applied;[67] hence, Parliament clarified an important issue.

The violation of the law by the person deceiving usually justifies revocation of naturalization obtained by fraud. Contrary to other administrative acts, the consequences of naturalization cannot in all cases be restored easily. Whereas, for example, money can easily be paid back in case of revocation of an administrative act granting a benefit in cash, naturalization may have had consequences that by their very nature are hard or even impossible to reverse. Citizenship legally equates the former foreigner with the other German citizens. From the moment of naturalization on, pursuant to Art. 33.1 GG, he has the same civic rights and duties. Citizenship, therefore, must be the reliable basis of equal affiliation in order to prevent "first class" and "second class" Germans. This relevance has to be provided for when allowing a possible revocation. Revocation ten years after naturalization, as it was considered permissible by some administrative courts, can hardly be justified. In this regard, it has to be considered that naturalization does not only regulate the citizenship of the person affected in a sense that he may leave and enter the country at any time, that he can claim the basic rights restricted to Germans[68] and has the

[65] *Cf*. *supra* Part B.

[66] *See* 116 BVERFGE 24 (66–67) (dissenting opinion) (Ger.). These concerns were already expressed by Oberverwaltungsgericht Berlin [OVG] [Higher Administrative Court of Berlin], 20 Feb. 2003, 25 INFAUSLR 211 (214), 2003 (Ger.).

[67] *Cf*. *supra* Part (C)(II)(1)(1.1)(b).

[68] *Cf*. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], 23 May 1949 BGBI. I (Ger.) (for example the freedom of assembly in Art. 8 and the freedom to choose an occupation in Art. 12.1).

active voting right.[69] Consequences of naturalization go even further: Only Germans can become members of parliament[70] and civil servants.[71] Children born after naturalization are Germans by law.[72] Law of succession depends on the deceased's citizenship.[73] Thus, third parties can also be affected by revocation of naturalization with retroactive effect; not only the naturalized person benefits from legal certainty. The time limit of Sec. 35.3 StAG, therefore, is of high importance.

Parliament also explicitly regulated the element "obtained by fraud," which is needed for revocation of naturalization, in the provision. Therefore, the only reason for a revocation of naturalization in Germany can be a misdemeanor of the naturalized person that led to naturalization in the first place. Neither conduct or error by the authorities leading to an unlawful naturalization, nor a misdemeanor by the naturalized person after naturalization can be the grounds for revocation. Such misdemeanor is only punishable by laws that apply to all Germans, *inter alia* criminal law. Revocation of naturalization on the grounds of having committed a crime—as it is possible in France for example—would mean a deprivation of citizenship in Germany that is prohibited by Art. 16.1 sent. 1 GG.

### *III. Union Citizenship: The* Rottmann *Case*

The loss of German citizenship may also affect the individual's Union Citizenship. Union Citizenship is granted to every citizen of a European Union member state in addition to national citizenship, which it does not replace (*cf*. Art. 9 sent. 2 and 3 of the Treaty on European Union—TEU).

In 2010, the European Court of Justice (ECJ) decided the *Rottmann* case.[74] Mr. Rottmann was an Austrian citizen before he obtained German citizenship and due to that lost his Austrian one. The German authorities later revoked his citizenship because in his application he had not mentioned a pending Austrian criminal investigation.

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[69] Bundeswahlgesetz [BWahlG] [Federal Voting Act], BGBL. I at § 12.1 (Ger.).

[70] *Id.* § 15.1 no. 1.

[71] *Cf*. GG art. 33.2; Bundesbeamtengesetz [BBG] [Federal Civil Servants Act], § 7.1 no. 1 (Ger.) (apart from Germans also citizens of other member states of the European Union, citizens of other contracting states of the Agreement on the European Economic Area and citizens of third countries in case of a special contract between the states).

[72] StAG § 4.1 sent. 1. *See* Part D.I.1.

[73] Einführungsgesetz zum Bürgerlichen Gesetzbuch [EGBGB] [Introductory Act to the Civil Code], art. 25.1 (Ger.).

[74] European Court of Justice [ECJ], 2 Mar. 2010, Case C-135/08. *See* Hannah Tewocht, *Comment on Judgment of 2 Mar. 2010 of European Court of Justice*, 30 ZAR 145 (2010).

The FAC referred the question to the ECJ if it is contrary to Community law for Union citizenship to be lost as the legal consequence of the revocation of naturalization in one member state in case the person affected becomes stateless as a result because he does not recover the nationality of the former state.[75] The ECJ ruled that in this case revocation of state citizenship is compatible with European Union law. However, the authorities have to observe the principle of proportionality with regard to the consequences it entails for the situation of the person affected in light of European Union law.[76] They also have to take into account the consequences that the decision entails for the members of the person's family and establish, in particular, whether that loss is justified in relation to the gravity of the offence committed by that person, to the lapse of time between naturalization and revocation and whether it is possible for the naturalized person to recover his original nationality. The ECJ, however, ruled that it is for the national court to determine whether the principle of proportionality requires the person affected to be afforded a reasonable period of time in order to try to recover the nationality of his member state of origin.[77]

In November 2010, the FAC ruled that the revocation of Mr. Rottmann's naturalization was proportionate in this sense.[78] The principle of proportionality did not demand the affording of a time period in which Mr. Rottmann could try to recover his Austrian citizenship.

The *Rottmann* case shows the growing influence of Community law on national citizenship, although it is for each member state to lay down the conditions for the obtainment and loss of citizenship.[79] Most of the requirements the ECJ stated are already set forth in Sec. 35 StAG. The authorities have to decide revocation separately for each person affected. However, they can consider the issue of imminent statelessness with regard to Union Citizenship pursuant to Sec. 35.2 StAG and consider it an exceptional case whenever necessary.[80]

[75] Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court], 18 Feb. 2008, 27 NVwZ 686 (687), 2008 (Ger.).

[76] *See* ECJ, *supra* note 74, ¶ 55.

[77] *See id.* ¶ 58.

[78] Judgment 5 C 12.10 of 11 Nov. 2010, 30 NVwZ 760 (762), 2011 (Ger.).

[79] *Cf.* ECJ, *supra* note 74, ¶ 39.

[80] Tewocht, *supra* note 74, at 145.

**D. The Loss of Citizenship *ex lege***

Another issue that had not been clarified until the legislative changes in 2009 was the retroactive loss of German citizenship by children that had obtained citizenship by birth.

Since German nationality law was reformed in 1999,[81] the obtainment of citizenship by birth does not only depend on parentage (*jus sanguinis*) anymore, but also on the place of birth (*jus soli*). Now, a child obtains the German citizenship either by birth if one parent is a German citizen (Sec. 4.1 StAG) or by birth in Germany if one parent has been living in Germany lawfully for at least eight years and has a permanent residence title (Sec. 4.3 sent. 1 StAG).[82] These premises can later cease to exist with retroactive effect, meaning that they are treated legally as if they never existed.

*I. Case Law*

The following cases, dealing with the loss of citizenship *ex lege*, had already been decided by the administrative courts before the respective legislative changes in 2009.

*1. One Parent is a German Citizen*

When a child obtained his German citizenship as a consequence of the German citizenship of one of his parents, citizenship of the parent can either be lost or the relationship between parent and child may undergo legal changes.

If citizenship is derived only from a German father, the assumed father may contest his paternity. Until the legislative changes of 2009, the child retroactively lost his German citizenship in any case if the father did so successfully.[83]

In 2006, the FCC decided that this case constitutes a loss of German citizenship within the

[81] Gesetz zur Reform des Staatsangehörigkeitsrechts [Law to Reform Nationality Law], 15 July 1995, BGBL I at 1618 (Ger.). *See* Albrecht Weber, *Das neue Staatsangehörigkeitsrecht*, 115 DVBL 369 (2000).

[82] In the second case the child may also hold the citizenship of his parents. Then he must decide if he wants to keep the German or the foreign citizenship as soon as he turns eighteen. *Cf*. STAG § 29.

[83] *See* Verwaltungsgericht Düsseldorf [VG] [Administrative Trial Court of Düsseldorf], 10 Sept. 1985, 39 NJW 676 (677), 1986 (Ger.); Verwaltungsgericht Hamburg [VG] [Administrative Trial Court of Hamburg], 25 Jan. 2001, BVERWGE 4877/2000 (Ger.); Oberverwaltungsgericht Hamburg [OVG] [Higher Administrative Court of Hamburg], 28 June 2001, BVERWGE 15/01 (Ger.); Verwaltungsgerichtshof Mannheim [VGH] [Higher Administrative Court of Mannheim], 17 July 2001, BVERWGE 221/01 (Ger.); Oberverwaltungsgericht Hamburg [OVG] [Higher Administrative Court of Hamburg], 20 Sept. 2002, BVERWGE 238/02 (Ger.); Oberverwaltungsgericht Hamburg [OVG] [Higher Administrative Court of Hamburg], 10 Feb. 2004, BVERWGE 238/03 (Ger.); Oberverwaltungsgericht Magdeburg [OVG] [Higher Administrative Court of Magdeburg], 1 Oct. 2004, 28 INFAUSLR 56 (57), 2006 (Ger.).

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meaning of Art. 16.1 sent. 2 GG.[84] It did not mean a deprivation of citizenship in the sense of Art. 16.1 sent. 1 GG in case the child affected was of an age in which children usually have not yet developed awareness of their citizenship and reliance on its continuance.[85] The same principles must apply when the parent lost his or her citizenship which the citizenship by the child was derived from. This will especially occur in cases where the naturalization of the parent was revoked.

In its decision, the FCC could, however, leave the question unanswered at what age one usually has developed awareness of one's citizenship and reliance on its continuance. In the case at hand, the child was only one and a half years old. Since the FCC ruled that these conditions "usually" had to be fulfilled, a certain age limit should be determined. An individual assessment in each case would also lead to practical difficulties and discriminations.[86]

The Administrative Court of Potsdam held that the aforementioned conditions are not met if the child is three years old.[87] The Higher Administrative Court of Lüneburg ruled that even at the age of ten and eleven[88] and ten, thirteen and sixteen,[89] children have not developed awareness of their citizenship and reliance on its continuance yet. The Administrative Court of Hamburg referred to the age during the usual enrollment in elementary school, which in Germany is usually the completion of the sixth year of life.[90] Thus, the courts did not agree on the time limit in this constellation either.

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[84] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 24 Oct. 2006, 60 NJW 425, 2007 (Ger.).

[85] *Id.*

[86] Verwaltungsgericht Hamburg [VG] [Administrative Trial Court of Hamburg], 25 Sept. 2009, BVERWGE 1457/08, ¶ 28 (Ger.).

[87] Verwaltungsgericht Potsdam [VG] [Administrative Trial Court of Potsdam], 31 July 2008, BVERWGE 172/08 (Ger.); Verwaltungsgericht München [VG] [Administrative Trial Court of München], 16 Apr. 2009, BVERWGE 08.5928 (Ger.).

[88] Oberverwaltungsgericht Lüneburg [OVG] [Higher Administrative Court of Lüneburg], 13 July 2007, 61 STAZ 110 (113), 2008 (Ger.).

[89] Oberverwaltungsgericht Lüneburg [OVG] [Higher Administrative Court of Lüneburg], 27 Sept. 2007, BVERWGE 108/07 (Ger.).

[90] Verwaltungsgericht Hamburg [VG] [Administrative Trial Court of Hamburg], 25 Sept. 2009, BVERWGE 1457/08 (Ger.); *see also* Gerard-René de Groot & Hildegard Schneider, *Erschlichene Einbürgerungen, Identitätsbetrug und Entzug der Staatsangehörigkeit in Deutschland und den Niederlanden*, *in* RECHTSSTAATLICHE ORDNUNG EUROPAS, GEDÄCHTNISSCHRIFT FÜR ALBERT BLECKMANN 79, 102 (Eckart Klein, Stefan Ulrich Pieper & Georg Ress eds., 2007).

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*2. One Parent Has a Permanent Residence Title*

Before the legislative changes of 2009, a child also lost his German citizenship with retroactive effect in any case if the residence title of the parent, which was one condition for the obtainment of citizenship *ex lege*, was revoked.[91]

In 2006, the FAC left the question unanswered what constitutional limits arise from Art. 16.1 GG in this situation because it had not been relevant to the case at hand. However, the court suggested that Parliament consider the circumstances of this case when dealing with other issues of nationality law in the near future.[92]

The Higher Administrative Court of Münster, on the contrary, transferred the idea developed by the FCC in situations of contested paternity to this case.[93] The retroactive loss of citizenship of the child due to revocation of the residence title of the parent was only permissible if the child had not developed awareness of his citizenship and reliance on its continuance yet. A similar approach had been suggested by scholars before: The loss was not permissible if the child had already arranged his life with regard to the German citizenship and therefore had already integrated into German society.[94] This was assumed to be the case no later than graduating from elementary school.

*II. Legislative Changes of 2009*

These issues, dealing with the impact of legal changes on the citizenship of children, were also addressed by parliament in 2009.

The law now provides that in cases of children having obtained the German citizenship *ex lege*, they do not lose their German citizenship when five or more years old if the legal premise ceases to exist retroactively (Sec. 7.2 and 17.3 StAG).[95] Thus, parliament holds the view that at the age of five, children have developed awareness of their citizenship and reliance on its continuance. In the rationale, the draft law explicitly refers to the suggested age of elementary school age, but parliament intentionally determined the age limit one

[91] Verwaltungsgericht Berlin [VG] [Administrative Trial Court of Berlin], 27 Feb. 2003, BVERWGE 237.02, ¶ 42, 2002 (Ger.).

[92] Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court], 5 Sept. 2006, BVERWGE 470 (471) (Ger.).

[93] Oberverwaltungsgericht Münster [OVG] [Higher Administrative Court of Münster], 28 May 2008, BVERWGE 425/08 (Ger.).

[94] Yvonne Becker, *Rückwirkender Wegfall der deutschen Staatsangehörigkeit—Entziehung oder Verlust?* 25 NVWZ 304, 306 (2006).

[95] Section 17.2 regulates the case of the revoked naturalization of one parent pursuant to StAG § 35. Section 17.3 regulates the cases of contested paternity and revoked residence titles.

year prior to that date.[96] The time limit for revocation of naturalization set forth in Sec. 35 StAG and the age limit with respect to a lawful loss of citizenship by the child set forth in Sec. 17.2 and 17.3 StAG are now congruent.

*III. Comments*

While parliament adopted the requirements demanded by the FAC regarding the issues of the use of discretion within revocation of citizenship of children that were naturalized simultaneously with their parents into Sec. 35.5 StAG almost in their entirety, it decided to go below the limit previously discussed by courts and among scholars when determining the time period of Sec. 17.2 and 17.3 StAG. This five-year period enacted by parliament deserves approval. Although a higher age could have been justifiable in light of the specifications shaped by the FCC, a shorter time period strengthens legal certainty. In these constellations, the children did not contribute to the ceasing of the premise that they derived their citizenship from; they did not have influence on the contestation of paternity or the revocation of naturalization or a residence title of the parent. Also, German family law does not state an absolute time limit for the contestation of paternity. Though it regulates a two-year period[97], this period does not begin until the person entitled learns of the circumstances that argue against the paternity[98]. Thus, without the five-year period in Sec. 17.3 StAG, children deriving their citizenship from their German father would have to live with the threat of losing German citizenship for a long time.

These circumstances are dealt with adequately by the five-year period. Apart from that, the congruence with the time period in Sec. 35.3 StAG is reasonable. Due to the time period of Sec. 35.3 StAG, naturalization of the parent that was the condition for the obtainment of citizenship by the child can only to be revoked until a point in time in which the child cannot be older than five years.

**E. Conclusion**

Before 2009, in German law the only issue regarding revocation of naturalization that was not disputed was that revocation could only be permissible in the case of fraud. Only misdemeanors by the applicant during the naturalization proceedings could be reasons for revocation. Now, this principle is stipulated in nationality law in Sec. 35 StAG.

Several other issues regarding revocation were disputed. In particular the questions of a

[96] BUNDESTAG DRUCKSACHEN [BT] 16/10528, at 7 (Ger.).

[97] BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], 18 AUG. 1896, REICHSGESETZBLATT [RGBL] 195, as amended, § 1600b.1 sentence 1 (Ger.).

[98] *Id.* § 1600b.1 sentence 2 (Ger.).

time limit for revocation and the age limit for the loss of citizenship *ex lege* had led to legal uncertainty for many people. Parliament decided to create a strict statutory limit in both cases. Thereby, the special significance of citizenship in Germany resulting from the constitution and thus also from German history, is provided for in nationality law.

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