DEVELOPMENTS

Naturalizations Obtained by Fraud – Can They be Revoked? The German Federal Constitutional Court's Judgment of 24 May 2006

By Stefan Magen[*]

A. Introduction

Like many of the provisions of the German *Grundgesetz* (Basic Law – GG) the constitutional protection of German citizenship enshrined in Article 16.1 GG is a reaction to the atrocities committed by Nazi-Germany. From early on, the Nazis had abused nationality law not only as a sanctioning device to discipline Germans living abroad but also to ostracize unwanted citizens and confiscate their property, i.e., as a means of large scale political and racial discrimination.[1] This inhuman denaturalization practice culminated in the *11. Verordnung zum Reichsbürgergesetz* (11th ordinance of 25 November 1941, issued by virtue of the Reich's Citizenship Law), which stripped Jewish citizens living abroad of their German nationality, aiming *inter alia* at Jews deported to concentration camps in Eastern Europe. To prevent any kind of political abuse of denaturalization measures in the future, Article 16.1 sent. 1 GG guarantees that no German may be deprived of his nationality.[2] There is a long-standing debate about the precise meaning of this strict ban on any "deprivation" of nationality, because at the same time Article 16.1 sent. 2 GG allows for the loss of German nationality against the will of the person affected if this loss has a statutory basis and the person does not become stateless as a result.[3] Thus, it is unclear whether the constitution permits a revocation of

[*] Dr. iur. Stefan Magen, M.A., Senior Research Fellow, Max Planck Institute for Research on Collective Goods, Bonn, Germany. Co-Editor (Public Law), German Law Journal. Email: magen@coll.mpg.de.

[1] *See*, Alexander Ernst, STAATSANGEHÖRIGKEIT IM DEUTSCHEN REICH UNTER DER HERRSCHAFT DER NATIONALSOZIALISTEN UND SEINE AUSWIRKUNGEN AUF DAS RECHT DER BUNDESREPUBLIK DEUTSCHLAND (1999).

[2] Gertrude Lübbe-Wolff, *Entziehung und Verlust der deutschen Staatsangehörigkeit – Art. 16 I GG*, 18 JURISTISCHE AUSBILDUNG 57 (1996).

[3] The whole Article 16.1 GG reads as follows: „*Die deutsche Staatsangehörigkeit darf nicht entzogen werden. Der Verlust der Staatsangehörigkeit darf nur auf Grund eines Gesetzes und gegen den Willen des Betroffenen nur*

https://doi.org/10.1017/S2071832200005010 Published online by Cambridge University Press

German citizenship, and if so under what conditions. Further, this debate broaches the questions of whether there are, in fact, exceptions to the constitutional protection against statelessness, e.g., in cases of fraud.

In its recent judgment from 24 May 2006, the *Bundesverfassungsgericht* (Federal Constitutional Court – FCC) addressed these questions thoroughly for the first time as the subject matter of a *Senatsentscheidung* (panel-decision).[4] The court held that the constitutional guarantees set down in Article 16.1 GG do not prohibit government authorities to revoke a naturalization which was obtained by fraud, even if statelessness is the consequence.[5] Despite the relatively scarce occurrence of denaturalization on grounds of deceitfulness in the past – there are 84 completed cases so far[6] - this decision may have a considerable impact in the future. As a result of ongoing political debates, naturalization requirements tend to increase in number and severity, making violations more likely and creating more possible grounds for denaturalization. At the same time there is growing public attention to perceived abuses of naturalization, leading administrative authorities to a more pronounced usage of discretionary revocation provisions. Not surprisingly, reports about the FCC decision appeared in all major newspapers.[7]

B. The Facts of the Matter and the Outcome of the Case

The complainant was a citizen of Nigeria. He unsuccessfully sought asylum in 1993 under a false identity, claiming to be a citizen of Liberia. He again entered the Federal Republic of Germany in 1996 under his current identity. His Nigerian born wife also came to Germany and was naturalized in 1997. The complainant applied for German citizenship in 1998. With regard to Sec. 8.1 no. 4. *Staatsangehörigkeitsgesetz* (Nationality Act – StAG), which requires applicants for naturalization to be able to support themselves and their dependents, the complainant pretended to be

---

dann eintreten, wenn der Betroffene dadurch nicht staatenlos wird". ("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").

[4] For earlier decisions by two chamber *see* below note 22.

[5] BVerfG, 2 BvR 669/04 of 24 May 2006, marg. nos. 37 onwards, available at http://www.bverfg.de/entscheidungen/rs20060524_2bvr066904.html, headnotes 1 and 2.

[6] *See*, *supra*, note 6, marg. no. 30.

[7] *See*, *e.g.*, FRANKFURTER ALLGEMEINE ZEITUNG, May 26, 2006, at 1, 4, 10; FRANKFURTER RUNDSCHAU, May 26, 2006, at 5; SUEDDEUTSCHE ZEITUNG, May 26, 2006, at 8; DIE TAGESZEITUNG, May 26, 2006, at 6; DIE WELT, May 26, 2006, at 4.

employed at a private firm and submitted a respective attestation of the firm. It was later discovered that, at the time of the naturalization proceedings, another person had been working at that firm pretending to be the complainant. The complainant himself made his living by trafficking heroin and cocaine, for which he was convicted in 2001 and sentenced to four years in prison (reduced on appeal in 2002 to three years).

After learning of the criminal conviction, the competent authority revoked the complainant's naturalization in 2002 based on Sec. 48 *Verwaltungsverfahrensgesetz* (administrative procedure act - VwVfG). Sec. 48 VwVfG allows (under some conditions) non-reviewable administrative acts to be withdrawn by a public authority if the act has been unlawful from the beginning. The authority held that this was the case with regard to the complainant since at the time of the proceedings he was unable to support himself and his family. Revenues from drug trafficking, the authority held, were not to be taken into account since they are not a proper source of support.

Pursuant to Sec. 10.1 no. 4 StAG, an applicant for citizenship is, in principle, obliged to relinquish his or her previous citizenship in order to avoid dual nationality.[8] The complainant took steps in this direction, but it was not established in the course of administrative and judicial proceedings whether he had actually lost his Nigerian citizenship. The courts presumed he did, giving him the benefit of the doubt. Subsequent denaturalization would thus render the complainant stateless, at least until he could recover his Nigerian citizenship, if this were possible. However, because of the complainant's fraudulent actions the authority did not regard this consequence as an impediment to the revocation of German citizenship.

A lower and a regional administrative court (*Verwaltungsgericht* und *Verwaltungsgerichtshof*) subsequently upheld the revocation.[9] Thereafter, the complainant filed a constitutional complaint and challenged the constitutionality of this measure on three grounds. First, the revocation of his citizenship would amount to a deprivation of citizenship prohibited by Article 16.1 sent. 1 GG. Second, even if the measure were to be regarded as a mere "loss of citizenship", it would violate the constitutional protection against statelessness set down in Article 16.1 sent. 2 GG. Third, Sec. 48 VwVfG would not – as required by the rule of law and the principle of democracy – provide a sufficient statutory basis for an encroachment on citizenship as protected by Article 16.1 GG, because Sec. 48 VwVfG was a general

[8] Possible exceptions are set out in Sec. 12 StAG.

[9] Verwaltungsgericht Karlsruhe, 2 K 1706/03 of December 18, 2003; Verwaltungsgerichtshof Baden-Württemberg, 13 S 537/04 of March 4, 2004.

provision not specifically tailored to naturalization issues. The FCC dismissed all three challenges and held that the decisions taken by the administrative authority and the administrative courts did not violate the complainant's constitutional rights. Further, it was held that the revocation of citizenship in cases of fraud does not amount to a deprivation as envisaged by sent. 1 of Article 16.1 GG, and sent. 2 of Article 16.1 GG does not protect deceitful applicants against statelessness when the willful deceit is later discovered. Furthermore, in cases like the one at hand, Sec. 48 VwVfG does provide a sufficient legal basis for an administrative encroachment on Article 16.1 GG.

C. The Court's Reasoning

I. Constitutional Ban on a Deprivation of Citizenship - Article 16.1 sent. 1 GG

Most interesting with regard to the interpretation of the constitutional protection of citizenship and the general understanding on questions of nationality embodied in the Basic Law is the court's interpretation of Article 16.1 sent. 1 GG. Any attempt to interpret this guarantee confronts the difficulty of reconciling the constitutional ban on any kind of "deprivation" of citizenship (*Entzug der Staatsangehörigkeit*), set down in sent. 1, with the fact that at the same time sent. 2 allows for a "loss" of citizenship (*Verlust der Staatsangehörigkeit*) against the will of the person concerned, provided that the measure has a statutory basis and that the person does not become stateless. To solve this puzzle, the court's starting point is that not every loss of citizenship against the will of the citizen can amount to a "deprivation", because if the involuntary loss of citizenship was banned outright there would be neither a scope of application for sent. 2 nor a need for protection against statelessness. Thus, the court assumes that a deprivation in the sense of sent. 1 must be a loss of citizenship that is qualified by some additional characteristic beyond merely being effected against the will of the person.[10]

Given the legislative history of this provision, this interpretation is remarkable. During the course of deliberations on the Basic Law, the *Parlamentarische Rat* (parliamentary council) explicitly drafted sentence 1 of the model of Article 15.2 of the Universal Declaration of Human Rights. This guarantee reads: "No one shall be arbitrarily deprived of his nationality […]." Here – as in ensuing conventions – the term "deprive" refers in a rather unspecific manner to all kinds of State acts that effect the involuntary loss of citizenship.[11] Consequently, in those conventions the

[10] *See*, *supra*, note 6, marg. no. 35.

[11] *See*, *e.g.*, Paul Weis, *The United Nations Convention on the Reduction of Statelessness, 1961*, 11 INT'L & COMP. L. QUARTERLY 1078, 1084 (1961); for the corresponding usage of the term in US immigration law

deprivation of citizenship is not banned *per se* but only for additional reasons. Two of those reasons are traditionally prominent,[12] namely if the deprivation is arbitrary[13] or discriminatory[14] or if it leads to statelessness.[15] In the same vein, an early draft of Article 16.1 GG reads "*Die Bundesangehörigkeit darf nicht willkürlich [!] entzogen werden*" (federal citizenship may not be deprived arbitrarily). However, in the course of deliberations the *Parlamentarische Rat* became concerned that the provision might by bypassed and therefore dropped the qualification of arbitrariness. Nevertheless, the *Parlamentarische Rat* retained sent. 2 of Article 16.2 GG which permits the loss of citizenship on a broader basis. Thus, a seemingly inconsistent provision was created that necessitated a narrower interpretation of the element of "deprivation" in Article 16.1 sent. 1 GG and hence a divergence from the language used in international conventions.

A plethora of scholarly opinions have since been put forward on the additional qualification that characterizes a deprivation in the sense of Article 16.1 sent. 1 GG:[16] the fact that the revocation of citizenship is effected by an administrative act or more generally by an individual State act (including judicial acts and laws which apply only in single cases) as opposed to a loss *ex lege*;[17] the fact that the revocation is effected against the will of the person concerned;[18] the fact that the revocation is

---

see Thomas A. Aleinikoff & David A. Martin & Hiroshi Motomura, IMMIGRATION AND CITIZENSHIP, 107 (5th edition 2003).

[12] *See*, Carol Batchelor, *Statelessness and the Problem of Resolving Nationality Status*, 10 INT'L J. REFUGEE L. 156, 158 (1998).

[13] European Convention on Nationality, Article 4 (c): "no one shall be arbitrarily deprived of his or her nationality"; American Convention on Human Rights, Article 20 (3): "No one shall be arbitrarily deprived of his nationality or right to change it".

[14] Convention on the Reduction of Statelessness of 1961, Article 9: "A Contracting State may not deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds".

[15] Convention on the Reduction of Statelessness of 1961, Article 8.1: "A Contracting State may not deprive a person of its nationality if such deprivation would render him stateless."; European Convention on Nationality, Article 7.3: "A State Party may not provide in its internal law for the loss of its nationality under paragraphs 1 and 2 of this article if the person concerned would thereby become stateless […]."

[16] For a concise overview, see, *supra*, note 3, at 60; *see also* Jörn A. Kämmerer, *Art. 16 in* BONNER KOMMENTAR ZUM GRUNDGESETZ, marg. nos. 46 onwards (Dolzer/Vogel/Graßhof eds., delivery complement 08/2006);

[17] Juliane Kokott, *Art. 16* in GRUNDGESETZ KOMMENTAR, marg. no. 16 (Sachs ed., 3rd ed. 2003).

[18] Friedrich E. Schnapp, *Art. 16* in GRUNDGESETZ-KOMMENTAR, marg. no. 11 (v. Münch/Kunig eds. 4th ed. 1992); however, differently now Schnapp, id., 5th ed. 2000, at marg. no. 12.

based on grounds the person concerned could not avoid;[19] or the fact that the revocation is based on grounds other than those traditionally endorsed.[20] To date, the FCC had only to deal with this question in two decisions by *Kammern* (chambers), which are subdivisions of the two *Senate* (panels). Those decisions endorsed the view that the decisive characteristic of a deprivation lies in the fact that the person concerned cannot avoid the loss of citizenship.[21] These decisions, however, had only restricted significance, because the FCC's Chambers have no, or at least very limited, competence to interpret the constitution. Rather, questions of fundamental constitutional significance have to be decided by a *Senat* (panel) whereas the jurisdiction of the chambers is restricted to cases in which the answer to the constitutional question can be derived from a panel decision.[22]

The case at hand is thus significant because it represents the first time a panel decision of the FCC directly addressed to this problem. Interestingly, the court does not bother much with the different theories but instead turns directly to the legislative history and in particular to the motives of the members of the *Parlamentarische Rat*.[23] For the members of the *Parlamentarische Rat*, the court reasons, it was paramount to prevent anything that was similar to certain historical manifestations of political abuse, first of all the inhuman denaturalization practice of Nazi-Germany, but also the displacement of ethnic Germans in Eastern European countries in the aftermath of the World-War II.[24] However, members of the *Parlamentarische Rat* had no common understanding of the defining features of those abuses. Moreover, they held quite divergent views as to how protection from political abuse could be attained and, even more importantly, how a clear dividing line could be drawn between abusive forms of deprivation and those that were

[19] Ulrich Becker, *Art. 16* in BONNER GRUNDGESETZ. KOMMENTAR, marg. no. 33 (v. Mangoldt/Klein/Starck eds., 4th ed. 1999); Kämmerer, *Art. 16*, *supra*, note 16, at marg. no. 49.

[20] Bodo Pieroth & Berhard Schlink, GRUNDRECHTE, 251 (21st ed. 2005).

[21] BVerfG, 3. Kammer des Zweiten Senats, 2 BvR 116/90 of June 22, 1990, 53 NEUE JURISTISCHE WOCHENSCHRIFT 2193 (1990); BVerfG, 1. Kammer des Zweiten Senats, 2 BvR 2101/00 of Aug 10, 2001, 20 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 1393 (2001).

[22] Article 93c *Bundesverfassungsgerichtsgesetz* (Law on the Federal Constitutional Court – BVerfGG); *see* Franz-Wilhelm Dollinger, § 15a, *in* BUNDESVERFASSUNGSGERICHTSGESETZ (BVerfGG), marginal no. 26 (Umbach/Clemens/Dollinger eds., 2nd ed., 2005).

[23] *See*, *supra*, note 5, marg. nos. 35 ff.

[24] *See*, *supra*, note 5, marg. nos. 41; *see* Hermann Kurthen, *Germany at the Crossroads*, 29 INTERNATIONAL MIGRATION REVIEW 919 (1995).

considered acceptable, even by members of the *Parlamentarische Rat* (e.g., the loss of citizenship as a consequence of marriage).[25]

To solve this problem, the FCC argues that the interpretation of Article 16.1 GG should rely on the "general and undisputed purpose" of the provision, i.e. to prevent political abuses like those the *Parlamentarische Rat* had in mind.[26] In this vein, the court first demonstrates that the abuse of denaturalization was historically not tied to a particular legal form but was effected by laws, ordinances and administrative acts. Abuse appears in many disguises. Thus, as the FCC convincingly argues, protection against abuse would be incomplete if it would be directed only against specific forms of state measures.[27] Rather, one has to look for material criteria that capture the essence of the historical cases of abuse and use them to translate the intentions of the *Parlamentarische Rat* into legal concepts. The FCC finds these criteria in the discriminatory nature of those measures: historical practices of abuse were characterized by the fact that they denied the same dignity of all citizens and sorted affiliations to the state accordingly into those of allegedly superior and those of allegedly inferior quality.[28] Thereby, citizenship was deprived of its significance and function as "a reliable foundation of affiliation to the State on the basis of equal rights"[29] and perverted into a means of exclusion rather than integration.

The FCC takes this function of citizenship – to provide a reliable and non-discriminatory basis of affiliation – as the prime rationale for the interpretation of Article 16.1 GG. From it the FCC derives the meaning of the term "deprivation" in a straightforward manner. It is simply defined as any state measure effecting the loss of citizenship that interferes with reliability and non-discrimination as the function of citizenship.[30] The court does not substantiate the two elements in greater detail, but gives some hints as to how they should be applied. As regards reliability, the court draws on well-known principles usually ascribed to the *Rechtsstaatsprinzip* (literally: principle of the Legal State), the particular German version of the rule of

[25] *See*, *supra*, note 6, marg. no. 42.

[26] *See*, *supra*, note 6, marg. no. 49.

[27] *See*, *supra*, note 6, marg. nos. 45 f.

[28] *See*, *supra*, note 6, marg. no. 49. Although the FCC does not say so explicitly, it should be noted that this particular inhumanity applies to racist Nazi politics rather than to the forced resettlement of the German population from Eastern Europe, which was rather driven by revenge.

[29] *See*, *supra*, note 6, marg. nos. 49.

[30] *See*, *supra*, note 6, marg. no. 49.

law.[31] Provisions on the loss of citizenship must be foreseeable, i.e. they must exhibit a sufficient degree of *Rechtssicherheit und Rechtsklarheit* (legal certainty and legal clarity).[32] As regards non-discrimination, the court equates the function of citizenship with the constitutional requirements that flow from this function and asks whether the loss of citizenship is discriminatory.[33] To put non-discrimination into more concrete terms, the court partially relies on the earlier jurisprudence of its chambers and defines as discriminatory any loss of citizenship the person affected cannot avoid or – and this is an extension of the earlier jurisprudence – any loss the person could not reasonably be expected to avoid.[34] The latter addition is important because it prohibits the State from employing denaturalization to enforce discriminatory standards of conduct or to bypass Article 16.1 sent. 1 GG by stipulating such standards.[35]

One of the reasons that the court did not have to further elaborate its interpretation of Article 16.1 sent. 1 GG was that, based on the court's criteria, the complaint's case obviously had no merit with regard to the constitutional ban on deprivation. In cases of deceit or comparable wrongdoing, the court held that there is no confidence in the reliability of the citizenship that would warrant constitutional protection. Hence the revocation of the complainant's citizenship does not affect the reliability requirement of citizenship. Also, revoking a citizenship obtained by fraud does not entail any form of discrimination (as long as the naturalization requirement concerned is not discriminatory). As a result, the complainant did not get "deprived" of his German citizenship in the sense assumed in Article 16.1.

---

[31] *See*, Kay Hailbronner & Marcel Kau, *Constitutional Law, in* INTRODUCTION TO GERMAN LAW 53, 57 f. (Reimann/Zekoll eds., 2005). For an illuminating analysis of the historical reasons for this particular emphasis of the rule of law *see Michael Stolleis*, *Nach der Sinnflut, in* FESTSCHRIFT FÜR WOLFGANG WIEGAND 1145 (Bucher/Canaris/Honsell/Koller eds., 2005).

[32] *See*, *supra*, note 5, marg. no. 50: *ausreichendes Maß an Rechtssicherheit und Rechtsklarheit* (sufficient degree of legal certainty and legal clarity).

[33] *See*, *supra*, note 6, marg. no. 51.

[34] *See*, *supra*, note 6, marg. no. 50.

[35] The court thus addresses a objection against the judicature of its chambers, *see* Lübbe-Wolff, *supra*, note 3, at 61.

II. Protection Against Statelessness – Article 16.1 sent. 2 GG

Whereas sent. 1 of Article 16.1 GG leaves considerable room for interpretation, sent. 2 seems to be clear-cut: citizenship may be revoked only if the person affected does not become stateless as a result ("*Der Verlust der Staatsangehörigkeit darf* […] *nur dann eintreten, wenn der Betroffene dadurch nicht staatenlos wird.*"). Hardly can this wording be understood as anything other than as a strict prohibition of rendering a citizen stateless. The FCC nevertheless decided otherwise: in its view, it would be clearly outside the spirit and purpose of the provision to prohibit a revocation of a citizenship fraudulently obtained.[36] The court found this so clearly manifest that it felt compelled to disregard the clear, literal meaning of the provision's wording.[37] What the members of the *Parlamentarische Rat* truly wanted, so the FCC argued, was to keep pace with international legal efforts to reduce statelessness. For this purpose it would not have been necessary to expand protection against statelessness to cases of fraudulent acquisition.[38] This, the court argues, accords with international conventions later promulgated which explicitly exclude cases of fraud from their protection as regards statelessness (e.g., Article 8 Sec. 2 (b) UN Convention on the Reduction of Statelessness; Article 7 Sec. 3 European Convention on Nationality). These exceptions were to be seen as an expression of a general legal principle that the *Parlamentarische Rat* can be assumed to have endorsed, namely the self-assertiveness of law.[39] A legal system that takes itself seriously must not reward the disregard of itself, the court writes in a slightly pathetic undertone. Although in principle parliament has to decide on the appropriate measures to ensure compliance with the law, no legal regime should invite abuse. Thus it could be ruled out that the *Parlamentarische Rat* would have regarded statelessness as an obstacle to the revocation of citizenship obtained by fraud.

After it had been clarified that statelessness does not impose an absolute barrier to revocation, one might have expected the court to address the usual requirements that must be met in order to justify an encroachment of liberty rights, in particular the proportionality test. But the court did not do so; rather, without providing any further arguments relating to the case at hand, the court asserts that the complainant's Article 16.1 sent. 2 GG rights are not violated.

---

[36] *See*, *supra*, note 6, marg. no. 53: „*eindeutig außerhalb des Sinns und Zwecks der Vorschrift*".

[37] *See*, *supra*, note 6, marg. nos. 53 onwards.

[38] *See*, *supra*, note 6, marg. nos. 58 onwards.

[39] *See*, *supra*, note 5, marg. nos. 62 ff.

III. Sec. 48 VwVfG as a Sufficient Statutory Basis

The decision on the issue of deprivation seems to have been taken unanimously, but two dissenting votes were cast on the question of statelessness discussed above.[40] Even more judges sided with the complainant on the question of whether Sec. 48 VwVfG provides a sufficient statutory basis for the measure at hand - in this regard the court was evenly divided.[41] Nevertheless, the complainant lost his case because a majority is required to establish an infringement of the Basic Law according to the court's procedural rules (Article 15.4 *Bundesverfassungsgerichtsgesetz* – Federal Constitutional Court Act, BVerfGG).

1. The Opinion of the Court[42]

The constitutional requirement to base an encroachment on a sufficient statutory basis is derived from the liberty rights and from the *Rechtsstaatsprinzip*. The *Rechtsstaatsprinzip* comprises, *inter alia*, the principle of the legality of administration (*Gesetzmäßigkeit der Verwaltung*) that subjects the administration to the rule of law. Not only is the administrative branch constitutionally obliged to obey the law (*Vorrang des Gesetzes* – precedence of law), but it is also constitutionally committed to act upon statutory authorization only if fundamental rights are encroached by its actions (*Vorbehalt des Gesetzes* - principle of subjection to the law).[43] As a consequence, almost all former preserves of governmental power have been thrown out under the Basic Law.[44] Correspondingly, there is no such thing as the "plenary power doctrine" in German constitutional law that limits constitutional protection in US immigration law.[45]

---

[40] The court is not obliged to publicise the results of its votes but he may do so, according to its procural rules. With regard to its ruling on Article 16.1 sent. 1 GG, the vote is not publicised. With regard to Article. 16.2 sent. 2 GG it is publicised that two dissenting votes occurred. However, the court does not tell who the two dissenters were nor did they file a dissenting opinion.

[41] Four out of eight justices ruled in the affirmative (Vice-President Hassemer and Judges Di Fabio, Mellinghoff and Landau), four in the negative (Judges Broß, Osterloh, Lübbe-Wolff and Gerhardt).

[42] The opinion of the court is written by those four judges who prevailed due to how the FCC's procedural rules resolve a split.

[43] Eberhard Schmidt-Aßmann, *Der Rechtsstaat, in* HANDBUCH DES STAATSRECHTS 541, 574 (Isensee/Kirchhof eds., Vol. 2, 3rd ed. 2004).

[44] Horst Dreier, *Art. 1 Sec. 3, in* GRUNDGESETZ KOMMENTAR marg. nos. 44 and 62 (Dreier ed., Vol. 1, 2nd ed. 2004).

[45] For the plenary power doctrine see Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L. Q. 925 (1994-1995); Hiroshi Motomura,

However, no statute provides a sufficient basis to encroach on a fundamental right, due to further constitutional principles. Most prominent is the so-called *Wesentlichkeitstheorie* (essential questions doctrine), which stems from the rule of law in conjunction with the principle of democracy.[46] It is based on the maxim that parliament should not delegate its core responsibility for encroachments on fundamental rights and requires parliament itself to address all regulatory issues that are essential to fundamental rights. Oddly enough, the *Wesentlichkeitstheorie* does not play an explicit role in either the opinion of the court or in the dissenting opinion.[47]

However, the court does quarrel about other requirements inherent in the *Rechtsstaatsprinzip*, the principle of legality of administration (*Gesetzmäßigkeit der Verwaltung*)[48] and the demand for legal certainty and legal clarity. Both principles are conflicting in the case at hand and have to be weighed against each other. On the one hand, and weighing against the complainant, the principle of legality is impaired by the continuing effectiveness of unlawful administrative acts. Therefore the *Rechtsstaatsprinzip* requires the State in principle to revoke any unlawful administrative act in order to restore legality of its actions.[49] On the other hand, the *Rechtsstaatsprinzip* demands legal clarity from a statute and protects a citizen if he reasonably relies on an administrative act.[50] With regard to denaturalization on the grounds of fraud, the person affected must be able to foresee what consequences follow from his fraudulent behavior as regards the constancy of his citizenship.[51] But according to the opinion of the court, this is the case with regard to Sec. 48. VwVfG because this provision conveys a clear and foreseeable message, i.e., that the State is authorized to revoke the citizenship. Thus, Sec. 48 VwVfG does not interfere with the constitutional commitments of reliability and clarity. Moreover, if

---

Immigration Law after a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation, 100 YALE L. J. 545 (1990).

[46] Cf. BVerfGE 49, 89 (126); 61, 260 (275); 83, 130 (142).

[47] *See*, *supra*, note 6, marg. no. 85.

[48] *See*, *supra*, note 6, marg. nos. 80 onwards.

[49] *See*, *supra*, note 6, marg. no. 80.

[50] *See*, *supra*, note 6, marg. nos. 75, 83. Usually these are general constitutional commitments not specific for any particular fundamental right. But because the function of citizenship demands reliability as well the court declared them to be also part of the specific protection provided by Article 16.1 GG (*Supra*, at note 32). As regards the content of the protection, however, it is not discernible what difference this reinforcement of protection makes.

[51] *See*, *supra*, note 6, marg. no. 83.

weighed against the demand to restore legality, a fraudulent person's reliance on the fruits of his deeds is rarely, if ever, worthy of protection. As a rule, the demand to restore legality prevails in such cases.[52] Only in exceptional cases does the administration have some leeway to refrain from revocation.[53]

Nevertheless, the opinion of the court concedes that cases may arise which must be addressed by parliament as a constitutional imperative and cannot be dealt with on the basis of Sec. 48 VwVfG. One of those cases is if a revocation affects the legal status of a third party, e.g. a child that had be naturalized accessorily.[54] However, Sec. 48 VwVfG does provide a sufficient legal basis for those cases where a naturalization obtained by fraud is promptly revoked.[55]

2. The Dissenting Opinion

The dissenting judges do not seem to deny that there is a conflict between legality and reliability of citizenship, in which the latter can claim little weight. Rather, they insist that Sec. 48 VwVfG leaves too many questions unanswered and thus lacks the clarity required by Article 16.1 GG.[56] For an encroachment on Article 16.1 GG, they claim, the benchmark for legal clarity has to be stricter, because of the fundamental relevance of citizenship for the individual as well as for the community.[57] They argue that any legal provision about revocation of citizenship has to address the peculiarities of citizenship in order to ensure that it can maintain its function as a reliable basis of equal affiliation to the State.[58]

Thus, the dissenters challenge Sec. 48 VwVfG on the grounds that this provision was not specifically tailored to acts of naturalization. In principle, Sec. 48 VwVfG applies to any kind of authoritative acts whatsoever. It basically states that an unlawful administrative act which gives rise to a right or an advantage may be withdrawn within one year from the moment the authority learns the relevant

[52] *See*, *supra*, note 6, marg. no. 76.

[53] *See*, *supra*, note 6, marg. no. 76.

[54] *See*, *supra*, note 6, marg. nos. 89.

[55] *See*, *supra*, note 6, marg. nos. 72 ff.

[56] *See*, *supra*, note 6, marg. nos. 90 ff.

[57] *See*, *supra*, note 6, marg. no. 92.

[58] *See*, *supra*, note 6, marg. no. 93.

facts.[59] According to the minority, the majority of the court ignored several relevant questions: the degree of malfeasance required to revoke citizenship, e.g. whether intent is necessary or gross negligence sufficient; whether there are temporal limits to the revocation such that if a fraud is detected decades after is was committed citizenship may only be revoked under exceptional circumstances; whether and when revocation shall take effect *ab initio* or thenceforth; what effect the revocation shall have on citizenship and/or legal status of relatives or other third parties, e.g. when children obtain a privileged naturalization; whether resulting statelessness justifies abstinence from revocation.[60] The point here is not that Sec. 48 VwVfG would not allow to deal with these issues. Rather, they argue that the provision conveys so much discretion on the administrative authority that the person affected could not determine what the law stipulates in his or her case.

D. Comments

The decision merits approval with regard to its view of the general function of citizenship and the conclusions drawn therefrom with regard to interpreting the strict ban of a "deprivation" of citizenship enshrined in Article 16.1 Sent. 1 GG. It is also convincing to admit a revocation despite ensuing statelessness in cases like the one at hand. Yet, although it was correct to dismiss the constitutional complaint in this particular case, some criticism is nevertheless appropriate with regard to the court's handling of Article 16.1 Sent. 2 GG. Here, in its quest to restore legality, the court fails to consider that Article 16.1 GG comprises further constitutional commitments beyond a strict ban. Even in cases of fraud, there should be at least some protection for reliance in the continuance of citizenship, depending on the quality and graveness of deceit, the time elapsed between the conferral of citizenship and its revocation, and other circumstances the dissenters rightly point to (albeit under the mistaken heading of legal clarity).

I. Protection of Citizenship against Deprivation

Mostly, the interpretation of Article 16.1 sent. 1 GG has been treated as a question of rather limited significance for the constitution's general understanding of

[59] Sec. 48 Subsec. 2 and 3 VwVfG also contains detailed provisions about *Vertrauensschutz* (protection of reliance), but they pertain only to material benefits or damages, which do not play a role here.

[60] *See*, *supra*, note 6, marg. nos. 93 onwards.

citizenship. The FCC's decision clearly merits applause for having approached this problem from a much broader perspective and for taking the opportunity to further elaborate the function of citizenship as envisaged by the Basic Law. According to the FCC, the yardstick to evaluate a denaturalization has to be the function of citizenship, namely to serve as reliable basis of the individual's affiliation to the State characterized by the equality of rights.[61] We will come back to the general implications later and turn to the revocation of naturalization first.

Since Article 16.1 Sent. 2 GG allows for an involuntary loss under some conditions, it is obvious that the strict ban on any deprivation of citizenship enshrined in Article 16.1 Sent. 1 GG had to be somehow narrowed. Of course, one might question the court's assertion that the *Parlamentarische Rat* historically wanted a protection against discrimination or assaults on the reliability of citizenship on methodological grounds. But these criteria do very well to capture what is problematic about the historical abuses the *Parlamentarische Rat* had in mind in the light of today's constitutional law. Furthermore, they solve the inconsistency between Sentence 1 and Sentence 2 of Article 16. 1 GG more convincingly than the solutions proposed to date, while maintaining a degree of protection of citizenship that probably still goes beyond the protection provided by international conventions.[62]

It is best to regard the court's approach as an interpretation that relates Article 16.1 GG to its systematic context. This opens up the opportunity to draw on the FCC's general jurisprudence on non-discrimination and reliability of State acts. Since this jurisprudence takes equality quite seriously, the court's approach will give some bite to the guarantee. For example, if one reads the non-discrimination clause in Article 16.1 GG according to the court's interpretation of equality and equal rights, the protection provided goes well beyond a protection against arbitrariness. Rather, it requires the State to give convincing reasons for any differentiation and strictly bans discriminatory criteria like sex, parentage, race, language, homeland and origin, faith, religious or political opinions (see Article 3.3 GG).[63] This effectively rules out any such practices as the *Parlamentarische Rat* historically envisaged, but this approach might also have very practical implications in the present. The situation most likely to occur is that an applicant will make false statements about a naturalization requirement which he later claims to be discriminatory in nature.

[61] The general direction of this approach is already visible in the FCC's judgment on the European Arrest Warrant Case, which concerns the protection against extradition enshrined in Article 16.2 Basic Law; see BVerfG, 2 BvR 2236/04, 18 July 18 2005, marg. no. 67.

[62] *See*, *supra*, notes 14 and 15.

[63] *See*, Hailbronner & Marcel, *supra*, note 32, at 76 onwards.

There is currently a heated political debate about the integration of the sizeable group of Muslim immigrants into German society, or rather the difficulties and failures thereof.[64] In reaction, some German *Länder* (States) tightened their handling of naturalization requirements, particularly with regard to the applicant's endorsement of the constitution including equal rights for women and homosexuals.[65] It has been argued that the administrative guidelines of one state were discriminatory because they were directed against Muslim immigrants only.[66] There are good reasons to question this opinion. Yet, if it were correct, it would not be far-fetched to assume that a revocation on the grounds of deceit would also be discriminatory because it perpetuates the original discrimination. In this case, Article 16.1 sent. 1 GG would block a revocation.

II. The Protection against Statelessness

The court approaches sentence 2 of Article 16.1 GG with a similar question as with regard to sentence 1. It is concerned only with the problem of whether Article 16.1 sent. 2 GG imposes an absolute barrier for a revocation, this time possibly erected by the constitution's commitment to avoid statelessness. The court has considerable difficulty overcoming the unambiguous, literal meaning of the provision, but nevertheless argues convincingly that a ban without exception would be inappropriate in cases of fraud. In cases like the one at hand a strict prohibition of revocation would indeed create problematic incentives. One has to bear in mind that applicants for German citizenship must give up their previous citizenship, as a rule.[67] As a consequence, revocation could lead to statelessness in many cases. If the constitution would strictly prohibit statelessness irrespective of the reasons, one could expect a significant increase in deceitful behavior on the part of applicants because, once obtained, citizenship could not be taken away.

---

[64] *See*, Bundesamt für Migration und Flüchtlinge (ed.), INTEGRATION UND ISLAM, 2006, available at http://www.bamf.de/cln_043/nn_566334/sid_57F47B075535F815B29C822153A367A1/SharedDocs/Anlagen/DE/Asyl/Publikationen/schriftenreihe-band-14.html__nnn=true.

[65] Meanwhile, the state's ministers of interior have decided to harmonize their handling of the naturalization; see *Sammlung der zur Veröffentlichung freigegebenen Beschlüsse der 180. Sitzung der Ständigen Konferenz der Innenminister und –senatoren der Länder am 5. Mai 2006,* available at http://www.stmi.bayern.de/ministerium/imk/beschluesse/.

[66] *See*, Rüdiger Wolfrum & Volker Röben, Gutachten zur Vereinbarkeit des Gesprächsleitfaden für die Einbürgerungsbehörden des Landes Baden-Württemberg mit Völkerrecht, March 2006, available at http://www.mpil.de/shared/data/pdf/gutacht_gespraechsleitfaden_einbuergerung.pdf. Prof. Wolfrum is currently President of the International Tribunal for the Law of the Sea at Hamburg.

[67] *See*, Sec. 10.1 no. 4 StAG.

Given the few completed cases of revocation[68] one might question the practical relevance of these considerations. Deceit, where it occurs, often seems to go unnoticed. But the court seems to regard this as a matter of principle: a legal order would undermine itself if it offered a bonus on the disregard of itself.[69] But there are also good practical reasons for this attitude; the social sciences constantly find that few things can be as damaging to one's willingness to respect the law as allowing the law to be violated publicly .[70] If findings from welfare and tax evasion carry over to this domain, the knowledge that fellow applicants cheat on naturalization requirements without the prospect of punishment will almost certainly increase the level of deceitful behavior, particularly amongst those that would normally be law abiding. Further, allowing this type of "cheating" would likely undermine public acceptance for immigration itself.[71] Neither the fact that cases like this one attract so much attention nor the fact that the court resorts to a slightly pathetic rhetoric is coincidental, given the huge symbolical significance of the problem. This also makes it more comprehensible that the majority of the court puts such a strong emphasis on the quest to restore legality, which in their eyes seems to leave little room to conceive of constitutional protection for deceitful applicants. But, as we will discuss later, the court's stance might be too rigorous and might be untenable when applied to rather minor cases of fraud.

III. Protection against a Loss of Citizenship

A striking feature of the decision is what the court does not discuss. As noticed before, the court concerns itself only with the problem of whether the constitution does impose a strict barrier on a revocation, either with regard to deprivation or with regard to statelessness. After denying the question in both regards, the court asserts that the complainant's rights form Article 16.1 sent. 2 GG are not violated without much further explanation. Thus, the court fails to consider whether Article 16.1 GG also comprises the usual constitutional commitments enshrined in liberty rights. This omission is rather remarkable, given that the court itself had explicitly interpreted Article 16.1 GG as guaranteeing a liberty right in its earlier decision on

---

[68] *See*, *supra*, at note 6; BVerfG, *supra*, note 6, marg. no. 30.

[69] *See*, *supra*, note 5, marg. nos. 63 onwards.

[70] TOM R. TYLER, WHY PEOPLE OBEY THE LAW? (1990); Stefan Magen, *Fairness, Eigennutz und die Rolle des Rechts*, PREPRINTS OF THE MPI FOR COLLECTIVE GOODS 2005/22 (2005).

[71] *See*, Ernst Fehr & Simon Gächter, *Fairness and Retaliation: The Economics of Reciprocity, in* 14 JOURNAL OF ECONOMIC PERSPECTIVES 159 (2000); Christina M. Fong, Samuel Bowles & Herbert Gintis, *Reciprocity and the Welfare State, in* Moral Sentiments and Material Interests 277 (Gintis *et al.* eds., 2005), Amy L. Wax, *Rethinking Welfare Rights*, 63 LAW AND CONTEMPORARY PROBLEMS 257 (2000).

the European Arrest Warrant.[72] If this is to be taken seriously and spelled out in accordance with regular doctrine of liberty rights, Article 16.1 GG must be interpreted as granting a fundamental right to every German citizen not to lose one's German citizenship. This would not mean that German citizenship could not be revoked, but that any encroachment on this right would have to be justified constitutionally, including a test of proportionality.[73] It would thus be part of the regular constitutional commitment that the relevant authority must weigh the constitutional principle of lawful administration – which speaks in favor of revocation in order to restore lawfulness – against the complainant's fundamental right not to lose his citizenship, which speaks against revocation when statelessness ensues. At a minimum, the administrative authority would be obliged to thoroughly consider the pros and cons of revocation and to provide sufficient reasons for its decision.[74]

If we consider the issues brought forward by the dissenters under the mistaken heading of legal certainty, the usual context to address them would have been the proportionality test. Traditionally, if one would have wanted to argue for specific constitutional guidelines with regard to temporal limits for the revocation of a citizenship or with regard to the required degree of fault or other substantial limitations, one would have based them on the grounds that an encroachment on the liberty right would otherwise be disproportionate or overly onerous. One has to keep in mind that any wrong statement concerning a piece of information the applicant must provide can render the conferment of citizenship unlawful. Obviously, this can involve many degrees of fault; different pieces of information can be of different importance for the decision. And there are a variety of reasons for false statements to appear, some of which may be heavily condemnable. Also, denaturalization can cause different degrees of hardship to each individual. All this would have had to be factored into the analysis in order to test the revocation for proportionality.

However, there is a recent (and not yet settled) approach to the doctrine of liberty rights, tentatively advocated primarily by the *Erste Senat* (first panel), that curbs the application of the principle of proportionality and its emphasis on the particulars of each case and rather tries to delineate constitutional commitments by general

---

[72] *BVerfG*, 2 BvR 2236/04, July 18, 2005, marg. no. 65; see Simone Mölders, The European Arrest Warrant in the German Federal Constitutional Court, 7 GERMAN L. J. 45 (2006), at http://www.germanlawjournal.com/pdf/Vol07No01/PDF_Vol_07_No_1_45-8_Developments_Moelders.pdf.

[73] In this vein *Kämmerer*, supra note 16, at marg. nos. 38, 55.a.

[74] *Id.*

interpretation of the liberty right concerned.[75] Those commitments are, compared to the traditional proportionality test, more specifically tailored to the respective liberty right, but more general with regard to the particulars of each case. Perhaps the dissenters thought along these lines when they derived an obligation of the parliament to set down the substantial and temporal conditions for the loss of citizenship directly from Article 16.1 GG.[76] Yet this simply shifts the onus to parliament. One could argue that Article 16.1 GG erects either substantial or temporal limits to the revocation of citizenship - it would then have been up to the FCC's to assert this and substantiate what those limits are, be they derived from the proportionality principle or directly from Article 16.1 GG. Or there are no such limits, leaving parliament free to do what it did, i.e. not to set down explicit limits.[77]

Similarly, this would also have been the appropriate context to reconsider the consequences of statelessness. That Article 16.1 sent. 2 GG admits of an exception in cases of fraud does not mean that there are no constitutional commitments flowing therefrom. As the Federal Administrative Court (*Bundesverwaltungsgericht* – FAC), on whose jurisprudence administrative and judicial practice was based until the FCC's ruling, has pointed out that sent. 2 of Article 16.1 GG was also to be read as a *verfassungsrechtliche Wertentscheidung* (a constitutional value decision) which the authority had to consider when exercising its discretion with regard to revocation.[78] This value decision includes a constitutional commitment against statelessness which must be considered in any case, even those of fraud. For example, if statelessness would cause exceptional hardship to the person affected, Article 16.1 sent. 2 GG may weigh more heavily than the fraudulent behavior and oblige state authorities to abstain from revocation.
On these issues the FCC remains almost silent. The court does concede that there may be good reasons to forgo the possibility of revocation in exceptional cases.[79] However, it does not say whether these good reasons are constitutional commitments stemming from Article 16.1 GG, as the FAC had assumed,[80] or just

[75] *See,* BVerfG, 1 BvR 670/91, June 26, 2002, BVerfGE 105, 279 ff.; BVerfG, 1 BvR 558/91 and 1 BvR 1428/91, June 26, 2002, BVerfGE 105, 252 ff; Ernst-Wolfgang Böckenförde, *Schutzbereich, Eingriff, verfassungsmäßige Schranken. Zur Kritik der Grundrechtsdogmatik*, 42 DER STAAT 165 (2004); Uwe Volkmann, *Veränderungen der Grundrechtsdogmatik*, 60 JURISTENZEITUNG 261 (2005).

[76] *See*, *supra*, note 6, marg. no. 91.

[77] There is another possibility to oblige parliament to decide on a regulatory issue without binding it with regard to the content of the decision. This is the before mentioned *Wesentlichkeitsdoktrin* (essential questions doctrine, see *supra,* note 48). It is not apparent, why the dissenters did draw on this doctrine.

[78] BVerwG, 1 C 19/02, June 3, 2003, 23 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 489, 490 (2004).

[79] *See*, *supra*, note 6, marg. nos. 67 and 76.

[80] BVerwG, 1 C 19/02, June 3, 2003, 23 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 489, 490 (2004).

any good reasons the administrative authority might find it appropriate to consider. Whether the FCC wanted to distance itself from the jurisprudence of the FAC or whether it simply wanted to avoid a controversial issue remains unclear. Thus, the court leaves part of the constitutional issue unaddressed. The court also does not take the opportunity to spell out what further constitutional commitments Article 16.1 GG entails with regard to revocation beyond the strict ban on deprivations. Perhaps the case at hand was not a good opportunity to do so, because, even in the light of the proportionality principle, the complainant would almost certainly have lost his case. Given the severity of the complainant's deceitful behavior – he pretended to be regularly employed while he actually was trafficking illegal drugs – and the timeliness of the revocation, the revocation of citizenship does not seem disproportionate or overly onerous.[81] Here, the complainant's wrongful behavior outweighs the hardship statelessness may confer upon him.

Also, no third parties are involved here. Still, it remains unclear why the court did not simply assert that the revocation was in line with the proportionality principle or with constitutional value decisions. Clearly, there are also conceivable cases where the proportionality of a revocation would be problematic, e.g. if a citizen is dismissed into statelessness for some minor lie decades after his naturalization. The way the majority argues, it is not clear whether this would make any difference: when the primary goal is to restore lawfulness and discourage deceit, negative consequences for the person affected do not matter. It seems to have been important to the court to convey a clear message, i.e., that the constitution does not reward the disregard of the law, and the court may not have wanted to water down its message with exceptions and qualifications that could be addressed in subsequent decisions.

IV. Sec. 48 VwVG as a Sufficient Statutory Basis?

Though the applicability of Sec. 48 VwVfG is of minor importance for the law of citizenship, the discussion very clearly reveals the different attitudes one can have vis-à-vis the appropriate reaction to deceitful applications. The disagreement about how much density of statutory regulation the constitution requires is only on the surface. Rather, the discussion revolves around the appropriate reaction to wrongdoing. It seems that the true reason the majority does not see the necessity of

[81] For the FCC's judicature on the proportionality principle see Albers/Witzke, The End of the "Woodward and Bernstein" Era? The German Constitutional Court and Journalists´ Privacy on Mobile Phones, 4 GERMAN J 647, 652 (2003); *Heilbronner & Kau, supra*, note 32 at 76.

a provision on revocation specifically adapted to citizenship is that in its eyes there is little to regulate - the principle of legality is paramount. Thus, revocation is the "obvious" reaction to deceitful applications,[82] whereas exceptional cases cannot be captured by a general rule.[83] If one accepts the majority's premise about the priority of legality, its logical conclusions are compelling.

Hence, the dissenters would have had to argue against the premise. Their call for specific provisions makes sense only if the constitutional protection of citizenship does constrain the principle of legality in a specific way. Otherwise there is indeed no need for a specific statutory basis. But to argue this, the dissenters would have had to make up for what the court ignored, namely to spell out the constitutional commitments enshrined in Article 16.1 GG as a liberty right. Little can be gained in this regard from the general protection of reliance inherent in the *Rechtsstaatsprinzip* because legal positions obtained by intentional deceit are considered normally not worthy of protection. Thus, the dissenters would have had to show that Article 16.1 GG provides some protection of reliance irrespective of deceit. Instead they focus on legal clarity, a secondary issue. In fact, the message conveyed by Sec. 48 VwVfG and the supporting jurisprudence is quite clear: no beneficiary who obtained an administrative act by deceit can ever confide in the continuing effectiveness of that act. This is the traditionally accepted consequence of deceit and has so far been regarded as sufficiently clear. One can hardly demand more clarity in the area of nationality law without showing that reliance on citizenship is protected irrespective of deceit as a constitutional imperative. This, however, is not an issue of clarity, but of reliance.

Yet, in substance, the dissenters have a point: there are good reasons that the constitution provides some protection of the reliance on one's citizenship even if it was obtained by fraud, be they derived from the principle of proportionality or directly from Article 16.1 GG. Given the paramount importance of citizenship for its holders, there should be substantial and temporal limits to the revocation of citizenship, depending on circumstance and the quality of wrongdoing. Take the case at hand. The immediate issue concerned the question of whether the complainant was able to support himself at the time he filed the application. It seems hardly convincing that because of a false statement about employment even after decades have passed the State's obvious reaction should be to revoke citizenship, though it would have been irrelevant if an applicant had had a job initially but had become unemployed shortly after his naturalization. Of course, trafficking in drugs or other serious criminal offences may permanently disqualify

[82] So explicitly BVerfG, *supra*, note 6, marg. no. 67 (*nächstliegende Reaktion*).

[83] *See*, *supra*, note 6, marg. no. 76.

an applicant's reliance on his citizenship as it is unworthy of protection. But in other, less serious cases the constitutional protection of the reliability of citizenship should put some temporal limits on revocation irrespective of deceit. The case at hand would have likely been inappropriate to detail what this constitutional protection entails, because the complainant would not have derived any benefit from it. However, the court should have acknowledged more explicitly that some constitutional limits to a revocation exist in order to avoid misunderstandings vis-à-vis its stance on the extant judicature of the administrative courts. Also, the court has not yet shown that those limits apply only to cases so highly exceptional that they could not possibly be addressed by a statute.

IV. The Constitutional Conception of Citizenship

German nationality law is often mentioned for its ethno-cultural conception of nationality, indicated by the fact that until recently citizenship could be acquired by birth through decent from a German parent only (*ius sanguinis*), but not by being born on German territory (*ius solis*).[84] However, this line of tradition, which goes back to the 19th century, was embodied by ordinary statutory law[85] and does not affect the contemporary constitutional notion of citizenship, as elaborated by the FCC.[86] In what is at least a major line of traditional German thinking about nationality, there is a peculiar difference between citizenship as the formal affiliation to a territorially organized state (*Staatsangehörigkeit* – belonging to the state) and nationality in the sense of being part of the German nation (*Volkszugehörigkeit* – belonging to the people).[87] Often, the German nation has been conceived of as an ethno-cultural entity defined by a common language and culture, but not as a political community organized in a state.[88] Belonging to this ethno-cultural entity is captured by the notion of *Volkszugehörigkeit*. *Staatsangehörigkeit* on the other

---

[84] *E.g.*, ROGERS BRUBAKER, CITIZENSHIP AND NATIONHOOD IN FRANCE AND GERMANY (1992); Helen Elizabeth Hartnell, *Belonging: Citizenship and Migration in the European Union and in Germany*, 24 BERKELEY J. INT'L L. 330, 373 (2006); *Kurthen, supra* note 25 at 919 and 929; see also Rolf Grawert, *Staatsvolk und Staatsangehörigkeit, in* HANDBUCH DES STAATSRECHTS 107, 132 Isensee/Kirchhof eds., Vol. 2, 3rd ed. 2004). Additionally there has always been the possibility to acquire the German citizenship by naturalization (*ius domicilii*), see *Kurthen, supra* note 25 at 929.

[85] For a historical overview see ROLF GRAWERT, STAAT UND STAATSANGEHÖRIGKEIT (1973).

[86] *Kurthen, supra*, note 25 at 929.

[87] *Brubaker, supra* note 86 at 50; Ulrich K. Preuss, *Citizenship and the German Nation*, 7 CITIZENSHIP STUDIES 37, 38 and 50 (2003).

[88] JOHANNES MASING, WANDEL IM STAATSANGEHÖRIGKEITSRECHT VOR DEN HERAUSFORDERUNGEN MODERNER MIGRATION 73, (2001); *Preuss, supra* note 89 at 39 onwards.

hand originally referred to the affiliation of individuals to one of the some 40 German particularistic states[89] and did not have to be congruent with *Volkszugehörigkeit*. However, the establishment of the Empire of 1871 was accompanied by an ethnification of citizenship in political and legal discourses. This entailed a reinterpretation of the *ius sanguinis* in ethno-cultural terms, which was later embodied in the *Reichs- und Staatsangehörigkeitsgesetz* of 1913 (law on the citizenship of the Empire and the States).[90] However, recent changes to the nationality law have shifted the balance in favor of the *ius solis*.[91] Now, children of immigrants who have been legally ordinarily resident for eight years obtain citizenship by birth (Sec. 4 Subsec. 3 StAG).[92] Immigrants themselves are also entitled to German citizenship after a waiting period of eight years and some additional requirements (Sec. 10 StAG). Thus, the development, supported by international conventions,[93] leads towards a law of citizenship which tends to include all persons habitually and lawfully residing on the German territory.

The notion of citizenship underlying the Basic Law is well prepared for this development, though this is not to say that the ethno-cultural notion of nationality cannot be found in the Basic Law. Article 116.1 GG defines as a German not only persons who possess German citizenship but also refugees of German ethnic origin who have been admitted to the German territory (so called *Statusdeutsche* – Status Germans).[94] And the original preamble to the Basic Law, which was changed after Reunification, claimed the Basic Law to be enacted also for those Germans who were not allowed to participate (i.e., Germans living in the former German Democratic Republic) and asserted an obligation for the entire German People to fulfill the unity and freedom of Germany in free self-determination (which, as illustrated by the new preamble, was considered to be achieved after reunification).

---

[89] *Id.*, 46.

[90] *Id.*, 47.

[91] The change was mainly effected by the *Gesetz zur Reform des Staatsangehörigkeitsrechts* (Act regarding the reform of the law of citizenship) of July 15, 1999 (BGBl. [Federal Gazette] I 6718). An overview of the reform is provided by Holger Hoffmann, *The Reform of the Law on Citizenship in Germany: Political Aims, Legal Concepts and Provisional Results*, 6 EUR. J. MIGRATION & L. 195 (2004).

[92] One parent must also be an EU-citizen or have an unlimited residence title (*Niederlassungserlaubnis* - settlement permit).

[93] Pursuant to Article 6.3 of the European Convention on nationality contracting states – Germany among them – shall provide for the possibility of naturalization of persons lawfully and habitually residing on its territory with a maximum waiting period of ten years.

[94] This inclusion of ethnic Germans was motivated to cope with the resettlement of ethnic Germans after World-War II.

But these references to the German nation do not taint the constitutional notion of citizenship with an exclusionary ethnic color. Without reference to any kind of ethnic homogeneity, the FCC conceives citizenship as a status of reliable affiliation for all citizens on the basis of equal political and civic rights.

Of course, there is an exclusionary aspect of citizenship insofar as non-citizens are not automatically entitled to the same rights. The FCC confirmed this view in its decision on foreigner's right to vote, which it denied except where explicitly permitted by the constitution.[95] Voting rights for foreigners are incompatible with the principle of democracy, as enshrined in the Basic Law, which restricts sovereignty to the German people, i.e., German citizens. However, as is often overlooked by the critics of the decision, the FCC also explicitly acknowledged that, as a matter of democracy, those who are perpetually subjected to State power should also have political rights. Therefore, the court reasoned, access to German citizenship should be facilitated for foreigners who are permanent residents and are therefore subjected to state power in a way comparable to German citizens.[96] Indeed, if the point about citizenship is not ethnic homogeneity but equality of rights between a people living together on a territory, it is difficult to find legitimate reasons to permanently exclude those immigrants who lawfully reside on the territory.

This is not to say that state discretion in matters of immigration must be replaced by a constitutionally enforced ideal of inclusive citizenship. Rather, the focus of migration policy shifts towards the awarding of long-term residence permits.[97] Thus, the flipside of the political or constitutional necessity to open the citizenry to long-term residents might be a closure of borders, a tendency currently pervading the immigration debate in the United States. Another open but urgent question is whether some kind of cultural "harmonization" is not required, even in allegedly post-nationalist societies.[98] Notwithstanding the general tendency to include permanent residents in the citizenry, even those nation states bound by international conventions still have considerable discretion with regard to further requirements of naturalization, e.g., criminal record or – as in the case at hand – the

---

[95] As is now the case for EU-citizens in county and municipal elections, see Article 28 Sec. 1 Sent 2 GG.

[96] BVerfG, 2 BvF 2/89 and 2 BvR 6/89 of October 31, 1990, BVerfGE 83, 37 [52].

[97] Christian Hillgruber, *Staaten unter Migrationsdruck: Nationale Identitätswahrung zwischen Fremdenfeindlichkeit und Multikulturalismus, in* GLOBALER DEMOGRAPHISCHER WANDEL UND SCHUTZ DER MENSCHENRECHTE 131, 138 (E. Klein ed., 2005).

[98] See, Rogers Brubaker, *The Return of Assimilation? Changing Perspectives on Immigration and Its Sequels in France, Germany, and the United States*, 24 ETHNIC AND RACIAL STUDIES 531 (2001); UDO DI FABIO, DIE KULTUR DER FREIHEIT (2005).

ability to support oneself economically, a power Germany also has vis-à-vis the Basic Law. In any case, the enforcement of law and the willingness to obey the law are basic and indispensable prerequisites of integration. The court is thus correct in its emphasis on legality; it is important that it did not deprive administrative authorities of the power to revoke naturalization obtained by fraud. However, there are constitutional constraints to revocation and it would have been preferable for the court to have found a way to acknowledge these constraints without compromising its legitimate message.