The legality of revocation of Dutch nationality of dual nationals involved in terrorist organizations

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TABLE OF CONTENTS

1. Introduction

This expert opinion was written at the request of lawyers E. van Kempen and C.F. Wassenaar. It concerns cases of revocation of Dutch nationality of dual nationals (allegedly) involved in terrorist organizations. In some of these cases Dutch nationality is revoked on the basis of a final conviction for a terrorism-related crime. Other cases concern the revocation of Dutch nationality of so-called 'jihadists' who travelled to Syria, in the interests of national security. These two types of revocation are based on two different provisions in the Dutch Nationality Act.

The revocation of Dutch nationality of dual nationals raises important legal questions, which will be addressed in this expert opinion. This expert opinion first explains the concept of nationality and its importance. It will argue that the Dutch legislation, which allows for the revocation of Dutch nationality of dual nationals, leads to unequal treatment of mono- and dual nationals, in particular Dutch-Moroccan nationals. It is contended that there are strong indications that Dutch legislation is directly discriminating on grounds of nationality and that no convincing justification for this has been brought forward by the Dutch Government. Moreover it is argued that the question whether a person's conduct is seriously prejudicial to the vital interests of the state should be answered on an individual basis. Even if a person's conduct fulfils this criterion, the proportionality of the revocation of nationality should be assessed.

1.1 Background of the cases

1.1.1 Revocation on the basis of a final criminal conviction

The first type of revocation cases concerns persons who are convicted of a terrorism-related crime. The revocation decision is based on Article 14(2) of the Dutch Nationality Act. This provision states that the Minister of Justice and Security may revoke Dutch nationality of a person who is irrevocably convicted for one or more of a series of enumerated crimes under the Dutch Criminal Code or the Rome Statute of International Criminal Court, related to terrorism. It concerns crimes mentioned in Article 134a of the Criminal Code (CC): 'intentionally obtaining or attempting to obtain for himself or another person means or information for the commission of a terrorist offence or a serious offence in preparation or facilitation of a terrorist offence, or gaining knowledge or skills for that purpose or imparting this knowledge or these skills to another person'.[1]

It is only since 5 March 2016[2] that a conviction for preparatory and assisting actions of terrorism has become ground for revocation of Dutch nationality. According to the Minister defending the bill in Parliament, the legal justification for the revocation of Dutch nationality on the basis of such a crime is provided by Article 7(1)(d) of the European Convention on Nationality (henceforth: ECN).[3] Provided that it does not lead to statelessness,[4] this provision allows for the

[1] See Art 14(2) Rijkswet op het Nederlanderschap (Dutch Nationality Act), accessed 28 May 2018 and Art 134a Wetboek van Strafrecht (Dutch Criminal Code) accessed 28 May 2018.
[2] Rijkswet van 5 maart 2016 tot wijziging van de Rijkswet op het Nederlanderschap ter verruiming van de mogelijkheden voor het ontnemen van het Nederlanderschap bij terroristische misdrijven, Staatsblad van het Koninkrijk der Nederlanden 2016, nr 121 accessed 28 May 2018.
[3] *Kamerstukken II* 2013/14, 34 016 (R2036), nr 3, p 3.
[4] Art 7(3) European Convention of Nationality.

revocation of nationality in case of 'conduct seriously prejudicial to the vital interests of the State Party'.

Official advisory organs warned that the bill could lead to unreasonable results. The Dutch Advisory Committee for Migration Affairs (*Adviescommissie voor Vreemdelingenzaken*) recalled the importance of a proportionality assessment, in the light of the *Rottmann* case[5] of the Court of Justice of the European Union (henceforth: CJEU).[6] The Dutch Council for the Judiciary (*Raad voor de Rechtspraak*) further stressed the risk of discrimination, since the bill only has consequences for dual nationals, while mono-nationals could have comparable positions in terrorist organisations, without risking revocation of their nationality.[7]

The Dutch government rejected the latter argument of non-discrimination,[8] but acknowledged the importance of a proportionality analysis.[9] However, the Minister stated that application of the proportionality test will in 'normal' cases never lead to a different conclusion with regard to the revocation of Dutch nationality. Only in exceptional cases will Dutch nationality *not* be revoked, due to factors as 'very distressing individual circumstances, particular dependence on a family member or the fact that the person concerned is still a minor'.[10] In other words, only in 'very special circumstances pertaining to the person concerned and in case of pressing humanitarian reasons' will the proportionality test lead to non-revocation.[11]

The cases giving rise to this expert opinion

On 10 December 2015, the District Court of The Hague (hereinafter: the District Court) in the Netherlands convicted nine individuals for terrorism-related crimes.[12] Six of these persons were convicted for 'participation in a criminal organisation with terrorist intent', one person was convicted for 'incitement' to terrorism, another person was convicted for participation 'in a Syrian training camp', while the last person was convicted for 'one inciting retweet'.

All nine individuals were sentenced to imprisonment, ranging from seven days for the inciting retweet to six years for one of the six individuals convicted for participation in a criminal organisation with terrorist intent. An important element of the conviction is that the actions of six individuals consisted of participation 'in a recruitment organisation based in The Hague, which incited, recruited, facilitated and financed youngsters who wanted to travel to Syria to fight there'. Three of the convicted individuals also travelled to Syria to combat. One of them has now returned to the Netherlands.

For three out of those nine individuals the Dutch government also decided to revoke Dutch nationality because they had dual nationality (Dutch and Moroccan). Their status as dual national was unavoidable in the sense that they obtained their Moroccan nationality automatically by

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[5] CJEU Case C-135/08 *Rottmann* [2010].

[6] Adviescommissie voor Vreemdelingenzaken, 'Consultatie voorstel van Rijkswet inzake de verruiming van de mogelijkheden tot ontneming en de gronden voor verlies van het Nederlanderschap bij terroristische activiteiten' (14 October 2013) accessed 6 May 2018, pp 2-3

[7] Raad voor de Rechtspraak, 'Advies voorstel Wijziging Rijkswet op het Nederlanderschap ter verruiming van de mogelijkheden voor het ontnemen en verlies van het Nederlanderschap bij terroristische activiteiten' (30 October 2013) accessed 6 May 2018, 4.

[8] *Kamerstukken II* 2013/14, 34 016 (R2036), nr 3, p 5.

[9] Ibid, p. 4.

[10] *Kamerstukken I*, 2015/16, 34 016 (R2036), C, p 10.

[11] Ibid, p 9.

[12] Rb Den Haag 10 December 2015, ECLI:RBDHA:2015:16102.

descent[13] while not being allowed in practice by the Moroccan authorities to give up that nationality voluntarily.[14] The Dutch attorney Florimond Wassenaar challenged the decision to withdraw their Dutch nationality before the district court on their behalf.

1.1.2. Revocation in the interest of national security

The second type of revocation cases concerns persons who are considered to be a danger to Dutch national security because they are allegedly involved in terrorist activities abroad. The revocation decision is based on Article 14(4) of the Dutch Nationality Act. This provision states that the Minister of Justice and Security may, in the interest of national security, revoke Dutch nationality of a person who has reached the age of sixteen and who is outside the Kingdom if his conduct shows that he has joined an organisation that is placed by the Minister on a list of organisations participating in a national or international armed conflict and constituting a threat to national security. For such revocation, no prior criminal conviction is required.[15]

Only organisations that consider the Netherlands as a 'legitimate target of violence'[16] are included on the list of terrorist organisations. In practice, this means that mainly organisations participating in the 'jihad', such as ISIS (also called Daesh) are included, while organisations such as the FARC are excluded.[17] This selective system also appears from the stated aim of the bill: the reduction of the threat posed by 'global jihadism'.[18] The preventive character of this aim is further pursued by accompanying the revocation of Dutch nationality with the issuance of a declaration of undesirability on the basis of Article 67(1)(c) Dutch Aliens Act.[19] As a result, the person whose Dutch nationality is revoked cannot legally return to the Netherlands.

A draft of Article 14(4) of the Dutch Nationality Act was introduced on 10 February 2017[20] to the Dutch Parliament. Here again, the Dutch government justified the legality of this provision referring to the 'vital interests' mentioned in Article 7(1)(d) ECN. In commenting on the draft provision, several Dutch organisations criticised its discriminatory character. The Dutch Bar Association (*Nederlandse Orde van Advocaten*)[21], the Netherlands Institute for Human Rights (*College van de Rechten van de Mens*)[22] and the Dutch section of the International Commission of Jurists (*Nederlands Juristen Comité voor de Mensenrechten*)[23] all stated in similar terms that the bill

[13] Art 6 Code de la Nationalité Marocaine (2011).
[14] IND, Landenlijst behoud nationaliteit accessed 28 May 2018.
[15] *Kamerstukken II* 2015-2016, 34 356 (R2064), nr. 3, p 1.
[16] Ibid, p 3.
[17] Ibid, p 2.
[18] Ibid, p 3.
[19] Ibid, p 7.
[20] Rijkswet van 10 februari 2017, houdende wijziging van de Rijkswet op het Nederlanderschap in verband met het intrekken van het Nederlanderschap in het belang van de nationale veiligheid, Staatsblad van het Koninkrijk der Nederlanden 2017 nr 52.
[21] Adviescommissies van de Nederlandse orde van advocaten inzake vreemdelingenzaken, strafrecht en familierecht, 'Wijziging Rijkswet op het Nederlanderschap in verband met het intrekken van het Nederlanderschap in het belang van de nationale veiligheid' (18 February 2015) accessed 9 May 2018, pp 1-2, 7-8.
[22] College voor de Rechten van de Mens, 'Advies conceptvoorstel tot wijziging van de Rijkswet op het Nederlanderschap in verband met het intrekken van het Nederlanderschap in het belang van de nationale veiligheid' (24 February 2015) accessed 9 May 2015.
[23] This report is not published. See for a summary *Kamerstukken II* 2015/16, 34 356 (R2064), nr. 3, pp 21-22.

makes an unjustified distinction between mono-nationals and dual nationals.[24] Multiple organisations also recalled the importance of the proportionality analysis following from the *Rottmann* case. In this regard, the Dutch Bar Association went so far as to state that the revocation of Dutch nationality on grounds of Article 14(4) Dutch Nationality Act can *never* comply with the proportionality requirement, since less intrusive measures will always be available.[25] The Dutch Lawyers Committee for Human Rights made a similar remark.[26] The Dutch Advisory Committee for Migration Affairs emphasised that several individual factors and circumstances could render the revocation of Dutch nationality illegal.[27]

In reaction to these critiques, the Government acknowledged the applicability of the *Rottmann* judgment and indicated that the legislative choice was made for revocation instead of an automatic ground for loss of nationality, in order to make a proportionality test possible.[28] In the proportionality test, the consequences of the loss of nationality, for instance the loss of the right to vote, will be taken into account. However, the Government deemed it highly improbable that the loss of voting rights alone would block the revocation of nationality.[29] As to the discrimination issue, the Government stated that there is no issue of inequality before the law. The distinction that emerges between persons with a dual and a single nationality is a justified distinction as a consequence of the protection against statelessness by international law. [30]

The cases giving rise to this expert opinion

Persons targeted by Article 14(4) of the Dutch Nationality Act are by definition *outside* the Netherlands, which complicates the acquisition of accurate information about their whereabouts and identity and whether they are alive or dead. Three procedures against the revocation of Dutch nationality convicted of terrorism-related crimes by final decision are initiated by the Dutch attorney Edward van Kempen.

1.2 Research Question

This expert opinion aims to address the legality of revocation of Dutch nationality of dual nationals involved in acts of terrorism under international and European law. As explained above, cases of revocation can be divided into two distinct types: (i) individuals who have received a final conviction under Articles 83, 134a and 205 CC; (ii) individuals who are not convicted and are outside of the Netherlands yet have participated in organisations whose activities pose a threat to the national security of the Netherlands.

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[24] *Kamerstukken II* 2015/16, 34 356 (R2064), nr. 3, p 20.

[25] Adviescommissies van de Nederlandse orde van advocaten inzake vreemdelingenzaken, strafrecht en familierecht, 'Wijziging Rijkswet op het Nederlanderschap in verband met het intrekken van het Nederlanderschap in het belang van de nationale veiligheid' (18 February 2015) accessed 9 May 2018, p 9.

[26] *Kamerstukken II* 2015-2016, 34 356 (R2064), nr. 3, p 21.

[27] Adviescommissie voor Vreemdelingenzaken, 'Advies voorstel wijziging Rijkswet op het Nederlanderschap i.v.m. intrekken van het Nederlanderschap in het belang van de nationale veiligheid' (16 February 2015) accessed 9 May 2015, pp 5-6.

[28] *Kamerstukken II* 2015-2016, 34 356 (R2064), nr 6, p 4.

[29] Ibid, p 33.

[30] Ibid, p 30.

The research question that will be considered is:

- Given the fundamental importance of nationality, under which circumstances can the Netherlands revoke the Dutch nationality of dual nationals on the basis of a conviction for a terrorism-related crime or a danger for national security?

1.3 Outline of the expert opinion

This expert opinion will first address the concept of nationality in Chapter 2. This chapter will also underline the fundamental importance of nationality. Chapter 3 will set out the European legal framework applicable to the revocation of nationality, in particular the European Convention on Nationality, the European Convention on Human Rights and EU law. It will show that these three legal instruments require that the revocation of nationality is not discriminatory and proportionate. For this reason the principle of non-discrimination and the principle of proportionality will be discussed in more detail in Chapter 4. Chapter 5 will draw conclusions. Annex 1 will provide an overview of the possibilities for revocation of dual nationality in other EU Member States. Annex II provides a list of nationalities that cannot be renounced. The numbers of dual nationals in the Netherlands are provided in Annex III.

2. The fundamental importance of nationality

This chapter will explain how the concept of nationality is understood and how it was developed under international law. It will also address the importance of nationality for both mono- and dual nationals. It is contended that the Dutch legislation on revocation of Dutch nationality for reasons of involvement in terrorist activities lead to differential treatment between mono- and dual nationals for which a justification is required.

2.1. The concept of nationality

In simple terms, nationality is a link between an individual and a state. It is a legal link. However, more dimensions are relevant than only the legal dimension. Nationality also expresses different forms of connections between an individual and a state; it reflects the existence of a bond between the individual and the state, based on many different dimensions such as family, residence and history. The nature of nationality is a multi-layered one.

Nationality of a particular state grants its possessor a range of goods, services and rights, e.g. the right to reside, to participate in public life, to vote and access to social benefits and consular services. On the other hand, it requires persons to perform military service or to pay taxes.[31]

The importance of nationality can best be understood by the consequences of statelessness, eloquently formulated by Hanna Arendt in her book '*The Origins of Totalitarianism*'[32]. Being deprived of his nationality, an individual will lose his 'right to have rights'. The author argues that the plight of stateless people made them aware of the existence of a 'right to have rights', the 'right to belong to some kind of organized community'.[33] According to Arendt, the people who were stripped of their legal and political status – their citizenship – have lost all their human rights and were thus rightless. However, the calamity was not 'the loss of specific rights [..] but the loss of a community willing and able to guarantee any rights whatsoever.[34]

2.2. The concept of nationality from an international legal perspective

It has since long been beyond doubt, that questions regarding nationality are primarily within the sole jurisdiction of a state. However, already in 1923, the Permanent Court of International Justice (PCIJ) recognised in *Nationality Decrees in Tunis and Morocco*[35] that

> it may well happen that, in a matter which, like that of nationality, is not, in principle regulated by international law, the right of a State to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other States.[36]

[31] A Edwards, 'The meaning of nationality in international law in an era of human rights', in: A Edwards and L van Waas (eds), *Nationality and statelessness under international law*, (Cambridge, Cambridge University Press, 2014), p 12.
[32] H Arendt, 'The Decline of the Nation-State and the End of the Rights of Man', in: H Arendt, *The Origins of Totalitarianism,* (New York, Harcourt Brace Jovanovich, 1973), p 267.
[33] Ibid, p 296.
[34] Ibid, p 297.
[35] The PCIJ was the predecessor of the International Court of Justice.
[36] PCIJ 7 February 1923, *Advisory Opinion No 4, Nationality Decrees in Tunis and Morocco Opinion*, p 24.

Thus, in such cases limitations can be derived from international law.

A similar consideration can be found in the first article of the 1930 Convention on Certain Questions Relating to the Conflict of Nationality Laws[37], which provides that each state determines under its own law who are its nationals and that the law 'shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principle of law generally recognised with regard to nationality'.[38] In accordance with the law of the state concerned, questions regarding the possession of a nationality shall be established.[39] The Convention was the first international instrument to set out limitations to the state's discretion regarding nationality. However, at the same time it recognised the primary authority of the state.

After the Second World War, in the era of the emergence of human right regimes, the Universal Declaration of Human Rights (UDHR), proclaimed in 1948, in Article 15 provides that 'everyone has the right to a nationality' and 'no one shall be arbitrarily deprived of his nationality or denied the right to change his nationality'.[40] This confers to every individual in the world the right to have a legal connection with a state and thus entitles him or her to various civil and political rights.

Until the 1950s, there was no general definition of what constitutes nationality. In 1955, the International Court of Justice (ICJ) had to deal with the topic of nationality for the first time. In its judgment in *Nottebohm* the ICJ pointed out that '[n]ationality serves above all to determine the person upon whom it is conferred enjoys the rights and is bound by the obligation which the law of the state in question grants to or imposes in its nationals.'[41] The Court stated that 'nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interest and sentiments, together with the existence of reciprocal rights and duties.'[42] Thus, social ties between an individual and his country of nationality determine nationality; once it is established, mutual rights and obligations arise.[43]

In the years that followed, several legal instruments were adopted at the international and regional level, underlining the fundamental importance of having a nationality. In 1953, the European Convention on Human Rights[44] entered into force. Although no right to have a nationality is enshrined in this Convention, the ECtHR recognised that nationality is a part of one's social identity and as such protected under Article 8 ECHR.[45] The International Covenant on Civil and Political Rights (ICCPR) was adopted by the United Nations General Assembly in 1966, which states that every child has the right to acquire a nationality.[46] The European Convention on Nationality (ECN), a comprehensive convention of the Council of Europe dealing with the law of nationality, was signed in 1997.[47]

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[37] League of Nations, Convention on Certain Questions Relating to the Conflict of Nationality Law, 13 April 1930.
[38] Ibid, Art 1.
[39] Ibid, Art 2.
[40] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948.
[41] ICJ 6 April 1955, *Nottebohm* (*Liechtenstein v Guatemala*) ICJ Rep 4, para 15.
[42] Ibid, para 15.
[43] A Edwards, 'The meaning of nationality in international law in an era of human rights', in: A Edwards and L van Waas (eds), *Nationality and statelessness under international law*, (Cambridge, Cambridge University Press, 2014), p 12.
[44] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950.
[45] ECtHR 11 October 2011, *Genovese v Malta* Appl no 53124/09, para 33.
[46] Art 24 UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966.
[47] Council of Europe, European Convention on Nationality, 6 November 1997.

2.3. Inequality between mono- and dual nationals

Is there an issue of inequality before the law if only dual nationals are subject to a measure of revocation of nationality? What can be said about the statement of the Dutch government in defence of its legislation, that the distinction that thus emerges between persons with a dual and a single nationality is a justified distinction as a consequence of the protection against statelessness by international law?

Revoking the nationality of mono-nationals is prohibited indeed under Article 7 ECN and Article 8 of the United Nations Convention for the Reduction of Statelessness (UNCRS), as this will render them stateless. This argument thus justifies that mono-nationals cannot be deprived of their nationality. However, it does not – by itself - justify that dual nationals can be.[48]

For all nationals, be it mono or multiple, Article 4(c) ECN prohibits arbitrary deprivation of their nationality. Distinguishing between mono- and dual nationals is by its nature a distinction on grounds of nationality. The mere fact that only revocation of the nationality of *mono*-nationals will lead to statelessness, does not entail that mono- and dual nationals may be considered unequal categories as such. Also it does not in itself justify a less favourable treatment of dual nationals than mono-nationals. In the case *Tănase v Moldova* the Grand Chamber of the ECtHR concluded that differentiation between Moldovan nationals of mono- and dual nationality in national suffrage is disproportionate in a democratic society.[49] In that judgment the ECtHR referred to the European Convention on Nationality (ECN).

Article 17 ECN states that nationals of a state party in possession of another nationality shall have, in the territory of that state party in which they reside, the same rights and duties as other nationals of that state party. It is therefore far from self-evident that revoking the nationality of jihadists, who have two nationalities, is allowed if the same sanction is not applied to mono-nationals. If a dual national would be subject to a sanction that cannot be imposed on the mono-national, persons behaving the same way would be treated differently.[50] The justification of an intrusive measure based on the seriousness of the behaviour of a dual national is less convincing, if the same behaviour of a mono-national is consistently met with other, less intrusive measures.

An intuitive justification for the distinction between mono- and dual nationals with regard to revocation of nationality appears to be that losing nationality would not be such a severe measure if the person can fall back on another nationality. This approach negates the intrinsic value of nationality as such. The anomaly of this way of thinking may become visible if we apply it to children. Is depriving a person from a child less intrusive if the parent would still have one or more children left? Though it is true that dual national deprived of one nationality still may have a 'right to have rights' in another country, the impact of the loss of all his rights in the state which bans him from its protection is not less serious, especially since this is the state to which the person has strong social and other ties.

[48] B de Hart and AB Terlouw, 'Born here. Revocation and the automatic loss of Dutch nationality in case of terrorist activities', in: M van den Brink, S Burri and J Goldschmidt (eds), *Equality and human rights: nothing but trouble?: Liber Amicorum Titia Loenen* (Utrecht, SIM, 2015), p 313.
[49] ECtHR (GC) 27 April 2010 *Tănase v Moldova* Appl no 7/08, para 180.
[50] P Wautelet, Deprivation of citizenship for 'jihadists', Analysis of Belgian and French practice and policy in light of the principle of equal treatment (SSRN, 2016) accessed 4 June 2018, p 12.

The differentiation is the more questionable since some nationals, such as Iranians and Moroccans[51], do not have the option of renouncing their 'second' nationality and becoming only Dutch. Dual nationals, who can easily give up their non-Dutch nationality, can prevent deprivation of their Dutch nationality.[52] As a result, it is foreign nationality law that determines whether someone loses his Dutch nationality or not.[53]

In addition, it may be contended that the distinction between mono- and dual nationals de facto mainly affects Dutch citizens, who also have Moroccan nationality. The measure of revoking nationality thus mainly affects a group defined by its national origin.[54] Dutch-Moroccans are the largest group of dual nationals in the Netherlands. In this regard, it is worth noting that in France, the public debate surrounding the legislative proposal for the deprivation of nationality for dual nationals failed specifically because the measure was considered to discriminate between mono- and dual nationals, and, indirectly, on grounds of ethnicity and religion. As a result, the Parliament could not agree on satisfactory wording that would dispel any doubts that the measure constituted discrimination against dual nationals.[55] As Jaghai argues, this differential treatment destabilises social cohesion and creates two separate categories of citizens: the 'good' citizens (mono-nationals), who cannot be deprived of their nationality, and the 'tolerated' citizens (dual nationals), whose citizenship becomes conditional upon 'good behaviour'.[56]

[51] IND, Landenlijst behoud nationaliteit accessed 28 May 2018. Dutch authorities assume that it is impossible to renounce the nationality of 23 countries. In three of these countries the nationality can only be renounced if it was acquired at birth. See Annex II.

[52] P Wautelet, Deprivation of citizenship for 'jihadists', Analysis of Belgian and French practice and policy in light of the principle of equal treatment (SSRN, 2016) accessed 4 June 2018, p 12.

[53] B de Hart and AB Terlouw, 'Born here. Revocation and the automatic loss of Dutch nationality in case of terrorist activities', in: M van den Brink, S Burri and J Goldschmidt (eds), *Equality and human rights: nothing but trouble?: Liber Amicorum Titia Loenen* (Utrecht, SIM, 2015), p 313.

[54] See Annex III for statistics on dual nationality of the Dutch Central Bureau of Statistics.

[55] Le Monde, *Le Sénat enterre la déchéance de* nationalité (18 March 2016) accessed 20 May 2018.

[56] S Jaghai, 'Citizenship deprivation, (non) discrimination and statelessness', Statelessness Working Paper Series No 2017/7, p 5.

3. European Legal Framework

The cases at hand are governed by three European jurisdictions, which are simultaneously binding the Netherlands: the European Convention on Nationality (ECN), the European Convention on Human Rights (ECHR) and the European Union (EU). Hereunder these systems are summarily described as to their relevant provisions.

3.1 The European Convention on Nationality

The ECN contains the primary set of norms where nationality is concerned. It has been ratified by the Netherlands.[57] The ECN was introduced with the purpose of ensuring that

> nationality is lost only for good reason and cannot be arbitrarily withdrawn, to guarantee that the procedures governing applications for nationality are just, fair and open to appeal, and to regulate the situation of persons in danger of being left stateless as a result of State succession.[58]

Article 7 ECN, which allows for deprivation of nationality only in exceptional cases, has direct effect in the Dutch legal order.[59] The Administrative Jurisdiction Division of the Council of State of the Netherlands (henceforth: ABRvS) has stated that for the implementation of Article 7 ECN, no further national legislation is required.

The ECN does not provide for supranational judicial supervision, like the ECHR and the EU. Thus, the highest judicial authority controlling the right application of the ECN is the national judiciary. However, the norms of the ECN do serve as a source of inspiration for supranational judges in the application of the law of the ECHR and the EU.

The ECN's definition of nationality is detailed in Article 2(a), which states that 'nationality means the legal bond between a person and a State and does not indicate the person's ethnic origin'. A principal provision in the ECN is Article 4(c), which states that 'no one shall be arbitrarily deprived of his or her nationality'. The need for a proportionality assessment is further detailed in the Explanatory Report on the ECN.[60] Paragraph 36 details: 'As regards the substantive grounds, the deprivation must in general be foreseeable, proportional and prescribed by law.' This implies that a proportionality assessment shall be implemented when an individual is being deprived of nationality. Article 5 ECN reaffirms the need to refrain from discrimination, *inter alia,* on grounds of 'religion, race, colour or national or ethnic origin' or on the circumstance of acquisition of citizenship (by birth or subsequent naturalisation), all of which are relevant for the present cases. Article 17(1) ECN, meanwhile, reminds states that dual nationals are to have the same rights as mono-nationals.[61]

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[57] Council of Europe, 'Simplified Chart of signatures and ratifications: Members of Council of Europe' accessed 4 May 2018.
[58] Council of Europe, 'Details of Treaty No. 166' accessed 3 June 2018.
[59] ABRvS 25 August 2004, ECLI:NL:RVS:2004:AQ7463 accessed 28 May 2018, para 2.4.1.
[60] Council of Europe, Explanatory Report to the ECN, European Treaty Series - No. 166, Strasbourg, 6.XI.1997.
[61] Art 17(1) ECN states: 'Nationals of a State Party in possession of another nationality shall have, in the territory of that State Party in which they reside, the same rights and duties as other nationals of that State Party'.

The prohibition of discrimination in cases of revocation of nationality can be regarded a sub-species of the prohibition of arbitrary withdrawal of Article 4(c). Zorzi Giustiniani sums it up clearly: '[i]n light of the crucial importance of the principle of non-discrimination, which informs the whole international legal framework, and of its customary status, it can thus be safely affirmed that *any deprivation of nationality based on discriminatory practices is arbitrary*'.[62]

Nationality can only be revoked in specific circumstances, as defined in the ECN. Article 7(d), which is drawn from Article 8(3)(a)(ii) of the 1961 Convention on the Reduction of Statelessness, reads: a 'State Party may not provide in its internal law for the loss of its nationality *ex lege* or at the initiative of the State Party except in the following cases: [..] d) conduct seriously prejudicial to the vital interests of the State Party'.[63] Section 4.2.1 of this expert opinion addresses the term 'vital interests of the State Party'.

Article 7 provides an additional six situations through which nationality can be revoked. Citizenship cannot be revoked from an individual if that would render that individual stateless, save in circumstances involving 'acquisition of the nationality of the State Party by means of fraudulent conduct, false information or concealment of any relevant fact attributable to the applicant'.[64]

3.2 The European Convention on Human Rights

The Netherlands ratified the ECHR and almost all of its protocols.[65] Its provisions normally have direct effect in the Dutch legal order.[66] Although the ECHR does not contain a human right to nationality, the ECtHR has recognised that nationality is part of one's social identity and as such is protected under Article 8 ECHR.[67] This right provides for the right to respect for private and family life. Although the relevance of this right in the context of the revocation of nationality is not immediately apparent from the text of Article 8 ECHR, the Council of Europe already implied in 1998 that Article 8 ECHR may also govern nationality issues.[68]

Quite recently, the ECtHR also elaborated on the applicability of Article 8 ECHR to persons who are (threatened to be) deprived of their nationality. Firstly, the ECtHR stated in *Genovese v Malta* that the 'arbitrary denial of citizenship might in certain circumstances raise an issue under Article 8 of the Convention because of the impact of such a denial on the private life of the individual'.[69] Later, the ECtHR explained more explicitly in *Ramadan v Malta* that the 'loss of citizenship already acquired or born into can have the same (and possibly a bigger) impact on the person's private and family life'.[70] A more recent admissibility decision confirmed this interpretation of Article 8 ECHR.[71] In assessing the legality of revocation of Dutch nationality, the right to respect

[62] F Zorzi Giustiniani, 'Deprivation of nationality: in defence of a principled approach' *Questions of International Law* (2016), p 13 (emphasis added).
[63] Art 7 ECN.
[64] Art 7 ECN.
[65] Council of Europe, 'Simplified Chart of signatures and ratifications: Members of Council of Europe' accessed 4 May 2018.
[66] Art 94 Grondwet voor het Koninkrijk der Nederlanden (Dutch Constitution) accessed 28 May 2018.
[67] ECtHR 11 October 2011, *Genovese v Malta,* Appl no 53124/09, para 31.
[68] Council of Europe, *Explanatory Report to the European Convention on Nationality, Strasbourg 6.XI.1997, European Treaty Series – No 166* (1997) accessed 28 May 2018, para 16.
[69] ECtHR 11 October 2011, *Genovese v Malta* Appl no 53124/09, para 30.
[70] ECtHR 21 June 2016, *Ramadan v Malta* Appl no 76136/12, para 85.
[71] ECtHR 7 February 2017, *K2 v the UK* Appl no 42387/13, para 49.

for private and family life is thus highly relevant. According to Article 8(2) ECHR, an interference with that right is only allowed if it is

> in accordance with the law and [..] necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

Furthermore, Article 14 ECHR prohibits discrimination on grounds of 'sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'. Since non-discrimination is protected in the enjoyment of other rights set out in its text, it is of accessory nature. However, it does not require the violation of another Convention right, it is sufficient that it falls within the ambit of that right.[72] For the purpose of this expert opinion, it should be examined whether the Dutch practice of revocation of nationality in the case of terrorist acts violates Article 14 in conjunction with Article 8 ECHR.

Additionally, the case must be judged from the viewpoint of the Protocol No. 12 to the ECHR, which was ratified by the Netherlands. This Protocol introduces a general prohibition of discrimination 'in the enjoyment of any right set forth by law'. As nationality certainly is a 'right set forth by law', it is beyond doubt that Protocol No. 12 ECHR prohibits discrimination with regard to nationality on grounds of 'sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'. According to the Explanatory Report with the Protocol, the Protocol applies to discrimination caused 'by a public authority in the exercise of discretionary power'.[73]

3.3 EU Law

The Netherlands has been an EU Member State since 1 January 1958 and its territory is part of the Schengen Area since 26 March 1995.[74] Since EU law is directly applicable in the national legal order of the Member States,[75] the Netherlands is bound by all primary and subsidiary EU legislation. Nevertheless, 'applicability' does not equate 'scope'. With regard to the latter, EU instruments often set conditions. Most notably, the rights of EU citizenship are normally[76] only applicable if the person concerned has made use of his freedom of movement.[77] In other words, the scope of EU citizenship is generally open only to those matters having cross-border implications.[78] However, this is different,

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[72] European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European non-discrimination law* (March 2018) accessed 20 May 2018, p 29.
[73] Council of Europe, *Explanatory report to the Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms* (2000) accessed 3 June 2018, para 22, point (iii).
[74] European Union, 'EU member countries in brief' accessed 3 June 2018.
[75] CJEU Case C-26/62 *Van Gend en Loos v Administratie der Belastingen*[1963], p 13.
[76] 'Normally' because there are nuances; see eg CJEU Case C-200/02 *Zhu and Chen* [2004], para 19 and CJEU Case C-34/09 *Ruiz Zambrano* [2011], para 45.
[77] Art 3 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L 158/77.
[78] CJEU Case C-64/96 *Land Nordrhein-Westfalen* [1997], para. 23; CJEU Case C-95/99 *Khalil and others* [2001], para 69.

if a national measure would violate the fundamental status of EU citizenship *itself*.[79] In that case, the national measure would violate the fundamental status of EU citizenship and all the rights attached to it. This fundamental status, which is laid down in Article 20 of the Treaty on the Functioning of the European Union (henceforth: TFEU), is also relevant for nationality issues.

Article 20 TFEU states that EU 'citizenship shall be additional to and not replace national citizenship'. EU citizenship is thus *dependent* on national citizenship of one of the EU Member States. Nonetheless, EU citizenship establishes rights and obligations *autonomously*, since 'Union citizenship is destined to be the fundamental status of nationals of the Member States'.[80]

Against this background, the CJEU made clear in *Rottmann*[81] that any revocation of nationality, which leads to the loss of Union citizenship will fall 'by reason of its nature and consequences, within the ambit of European Union Law'.[82] The revocation of Dutch nationality thus automatically affects Union law by excluding the person concerned from the rights deriving from his EU citizenship.[83] In *Ruiz Zambrano*, the CJEU, once again, favoured the strong character of EU citizenship by arguing that 'Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union'. [84]

Member States must recognise Union citizenship of a person, even if he or she also holds the nationality of a third country. Thus, holding the nationality of an EU Member State shall be sufficient in itself to be recognised under the European legal system.[85] Accordingly, EU citizenship is directly relevant to any case of revocation of nationality of one of the EU Member States. Depriving the persons concerned of their Dutch nationality would take away their freedom of movement under Article 20(2) TFEU. More existentially, they would be deprived of the citizenship that is perceived to be the fundamental status of nationals of the Member States.[86] Bearing this in mind, the Dutch government must take into account the rights following from EU citizenship in its assessment of the legality of revocation of Dutch nationality.

One of these rights is non-discrimination, which is a key component of the Union according to Article 2 of the Treaty on European Union (henceforth: TEU). Additionally, Article 18 TfEU[87] and Article 21(2) of the Charter of Fundamental Rights of the European Union (henceforth: CFR)[88] both express prohibitions of discrimination on the basis of nationality. Article 18 TFEU, which prohibits any discrimination on grounds of nationality, is applicable in all situations falling within the material scope of EU law. Those situations include the exercise of the freedom conferred by Article 21 TFEU

[79] See eg CJEU Case C-34/09 *Ruiz Zambrano* [2011], para 42.
[80] CJEU Case C-184/99 *Grzelczyk* [2001], para 31.
[81] CJEU Case C-135/08 *Rottmann* [2010].
[82] Ibid, para 42. See also S Mantu, *Contigent Citizenship: The Law and Practice of Citizenship Deprivation in International, European and National Perspectives* (Leiden, Brill Nijhoff, 2015), p 163.
[83] See also S Hall, 'Loss of Union Citizenship in Breach of Fundamental Rights' *European Law Review* (1996) p 142.
[84] CJEU Case C-34/09 *Ruiz Zambrano* [2011], para 42.
[85] CJEU Case C-369/90 *Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria* [1992].
[86] CJEU Case C-184/99 *Grzelczyk* [2001], para 31 and CJEU Case C-413/99 *Baumbast* [2002], para 82.
[87] Art 18 TFEU states: '[w]ithin the scope of application of the Treaties, and without prejudice to any special provisions contained therein, *any discrimination on grounds of nationality shall be prohibited*' (emphasis added).
[88] Art 21(2) CFR states: '[w]ithin the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, *any discrimination on grounds of nationality shall be prohibited*' (emphasis added).

to move and reside within the territory of the Member States[89]. Article 18 TFEU can be applied independently, and is intended for situations governed by EU law to which no specific prohibition of discrimination is applicable.[90] This is the case here, given the absence of secondary legislation prohibiting discrimination on grounds of nationality outside of the workplace or the provision of goods and services.[91] Likewise, the CJEU has ruled that Article 21 CFR is sufficient by itself to confer rights on an individual.[92]

Another 'right' is the principle of proportionality, which is a general principle of EU law.[93] The criteria for applying this legislation are set out in Protocol 2 on the Application of Proportionality and Subsidiarity.[94] Further, *Rottmann* gives interpretative guidance for a proportionality assessment specifically for the revocation of nationality.[95]

3.4 Sub-conclusion: non-discrimination and proportionality as common norms

The descriptions above of the ECN, the ECHR and EU law show that the three systems contain similar norms for approaching the phenomenon of revoking nationality, be it from different perspectives.

The ECN, which is explicitly dealing with nationality, exceptionally allows for loss of nationality on the initiative of a state only in seven categories of cases. Article 7(1)(d) ECN applies to the cases discussed in this expert opinion: conduct seriously prejudicial to the vital interests of the State Party. The words 'seriously' and 'vital' imply a certain proportionality assessment. Moreover, Article 4(c) ECN prohibits arbitrary deprivation of nationality. Article 5 ECN prohibits discrimination in nationality legislation.

The ECHR applies to nationality law because it is considered to be an aspect of the right to respect for private life under Article 8 ECHR. According to the case law of the European Court of Human Rights (henceforth: ECtHR), the assessment whether Article 8 has been violated includes a proportionality test. Article 14 ECHR prohibits discrimination with respect to the right to private life, while Protocol 12 ECHR prohibits discrimination in general.

EU law leaves discretion to its Member States where it concerns granting and revoking nationality. However, the nationality of one Member State implies EU citizenship, which in its turn grants rights in the whole European Union. For that reason EU-law opposes to the arbitrary revocation of nationality of a Member State and the resulting loss of EU citizenship. The CJEU held in *Rottmann* that Member States are required to apply a proportionality test when revoking nationality. It is not unlikely, that the Court will also be of the opinion that discriminatory deprivation of Union citizenship is prohibited, as the prohibition of discrimination is one of the core principles of the EU.

Thus, two norms specifying a general prohibition of arbitrariness emerge in all three systems: non-discrimination and proportionality. The provisory answer to the research question of this expert opinion is therefore that the Netherlands may revoke Dutch nationality of dual nationals,

[89] CJEU Case C-233/14 *Commission v the Netherlands* , para 76, CJEU Case C-75/11 *Commission v Austria*, para 39 and the case-law cited.
[90] CJEU Case C-474/12 *Schiebel Aircraft* [2014], para 20.
[91] This is the traditional scope of the non-discrimination Directives under EU law.
[92] CJEU Case C-176/12 *Association de médiation sociale v Union locale des syndicats CGT* [2014], para 47.
[93] Art 5 TEU.
[94] Consolidated version of the Treaty on the Functioning of the European Union - PROTOCOLS - Protocol (No 2) on the application of the principles of subsidiarity and proportionality [2012] OJ C 326/206.
[95] CJEU Case C-135/08 *Rottmann* [2010], para 59.

only if it the measure is (a) non-discriminatory and (b) proportionate. For this reason, the next chapter will examine the revocation of Dutch nationality of dual nationals in the light of the principles of non-discrimination and proportionality as guaranteed by the ECN, ECHR and EU law.

4. Non-discrimination and proportionality

This chapter will examine the principles of non-discrimination and proportionality in more detail and link it to the revocation of nationality. It should be stressed first that non-discrimination and proportionality are different norms both in content and in effect.

Under the norm of non-discrimination it is investigated whether two or more comparable groups of persons are treated differently without justification. Once it is assessed that the differential treatment amounts to discrimination, it is also clear that such differentiation is forbidden in individual cases. The discrimination argument affects the Dutch legislation concerning revocation of nationality as such, and is not brought forward as a personal element in individual cases. Accordingly, if the assessment of a situation of discriminating legislation requires that the proportionality of this legislation is investigated, it is about a general proportionality of that legislation in relation to the distinctive character of the legislation. If the relevant Dutch legislation is discriminatory, it is forbidden to apply it.

Only if the legality of the applied legislative system has been established, the individual conduct of a dual national and the severity of the proposed measure for the dual national become relevant. It should be examined first whether the conduct of the individual is 'seriously prejudicial to the vital interests of the State Party', as is required by Article 7(d) ECN. If this is indeed the case, the national authorities should assess whether revocation of nationality is proportionate, taking into account all individual circumstances of the case.

Therefore, the first and most radical issue to be investigated is whether Dutch legislation is discriminatory. Only if discrimination is not found, the examination of individual conduct of the dual national and the proportionality of the revocation in his individual case come to the fore. The structure of this expert opinion is framed accordingly.

4.1 Dutch legislation on revocation of nationality and non-discrimination

Under the ECN, ECHR and EU law, the Dutch legislation to revoke nationality of dual nationals (and not of mono nationals) in case of jihadism is subject to a non-discrimination test. The ECN does not specify how discrimination must be assessed. The ECtHR and CJEU follow different approaches when assessing whether the right to non-discrimination has been violated in their case law. This section will therefore investigate both under the ECHR and under EU law whether the Dutch legislation complies with the non-discrimination principle. But first, it is necessary to narrow the scope of the research by answering the question which discrimination ground(s) is/are at issue here (nationality and/or on other grounds) and whether it concerns indirect or direct discrimination.

4.1.1 Discrimination ground

It was argued in section 2.3 of this expert opinion that it is clear that the Dutch legislation on the revocation of nationality makes a distinction between mono- and dual nationals, which is a distinction on grounds of nationality.

Further, there may also be a distinction on grounds of national origin, as the legislation mainly affects Dutch persons, who also have Moroccan nationality. Direct discrimination on the basis

of nationality may lead to indirect discrimination on the grounds of race and religion.[96] The Netherlands Institute for Human Rights (NIHR) has established that discrimination on the basis of nationality could amount to discrimination on race.[97] This is due to the fact that half of all dual nationals are Dutch nationals of Turkish or Moroccan origin and therefore are the ones primarily affected by this possibility of nationality revocation. Indeed in the ECtHR's first case on Article 1 of the 12th Protocol, the ECtHR found that 'discrimination on account of a person's ethnic origin is a form of racial discrimination'.[98] The ECtHR also linked this to religion (Judaism), thereby showing that discrimination on one ground may lead to discrimination on another ground. Similarly, it has held that *nationality,* language, culture and *religion* may be aspects of 'race'.[99] In multiple cases, the ECtHR has found instances of indirect race discrimination with regards to differential treatment suffered by Roma.[100] With regard to religion, it is worth noting that the Dutch government does not consider participation in *any* terrorist organisation liable to revocation of nationality. Only three terrorist organisations, all of which are Islamist organisations are placed on the list of organizations, which pose a threat to national security.[101]

4.1.2 Direct or indirect discrimination?

From the text of Article 14 of the Dutch Nationality Act it does not become immediately clear that the applicability of the grounds for revocation of nationality results in differential treatment. The subject of the revocation measure is consistently described in neutral terms as a 'person, who'. In paragraph 8 of this article, it is provided that, except in cases of fraud, Dutch nationality will not be lost if statelessness would be the consequence. It requires some background knowledge to understand that this amounts to a distinction between mono and multiple nationals. Article 14 of the Dutch Nationality Act could thus be labelled as an 'apparent neutral' provision, 'which does not refer to serious obvious or particularly significant cases of inequality, but denotes that it is particularly a [specific group of persons] who are at a disadvantage because of the provision, criterion or practice at issue', as the CJEU formulated indirect discrimination in the Roma case.[102]

Still, the 'hidden' distinction is easy to detect here and that distinction is direct and unambiguous as to its effect. While it is usually necessary to find statistical evidence to prove that one group is treated significantly worse than another as a result of a 'neutral' rule, the law on revocation of nationality in cases of terrorism *de facto* exclusively applies to dual nationals, as withdrawal of nationality is conditional upon not rendering an individual stateless.[103] Given the negative impact of withdrawing nationality, which has been outlined in Chapter 2 of this expert

[96] Commissioner for Human Rights, Letter to the Minister of Interior and Kingdom Relations and the Minister of Security of Justice of the Netherlands, *CommHR/NM/sf 045-2016* (2 November 2016), p 2.
[97] NIHR, 27 February 2014, 2014-21; ECT 2007-152.
[98] ECtHR 22 November 2009, *Sejdić and Finci v. Bosnia and Herzegovina* Appl nos 27996/06 and 34836/06, para 43.
[99] ECtHR 13 December 2005, *Timishev v Russia* Appl nos 55762/00 and 55974/00, para 55.
[100] ECtHR 13 November 2007, *D.H and Others v the Czech Republic* Appl no 57325, ECtHR 16 March 2010, *Oršuš and Others v. Croatia* Appl no 155766/03.
[101] Art 1 'Besluit van de Minister van Veiligheid en Justitie van 2 maart 2017, nr. 2050307, tot vaststelling van de lijst met organisaties die een bedreiging vormen voor de nationale veiligheid', Staatscourant (2017) accessed 20 May 2018.
[102] CJEU Case C-83/14, *CHEZ* [2015], para 109.
[103] Art 4(b) ECN.

opinion, it appears undeniable that revoking nationality places dual nationals 'at a particular disadvantage'.[104]

Mono-nationals, the large majority of the population of the Netherlands, are simply and consistently not affected by revocation measures.[105] When Article 14(2)(4) of the Dutch Nationality Act speaks about 'person' it consistently means: 'a person with more than one nationality'. Therefore, it seems appropriate to identify this distinction as a direct distinction on grounds of nationality. The disputed provision directly treats one group of Dutch nationals (nationals who also have the nationality of another state) essentially more disadvantageously than another group of Dutch nationals (mono-nations) in case of jihadism on the basis of the number if nationalities they have.

If the ground of distinction is sought in national origin, race or religion, then there may be a case of indirect discrimination. As it is beyond doubt that the ground 'nationality' applies, the focus in the following paragraphs of this expert opinion will be on the question whether the Dutch legislation amounts to prohibited direct discrimination on grounds of nationality under the ECHR or under EU law. However, the possibility of indirect discrimination on grounds of national origin, race or religion may play a role in the considerations.

4.1.3 Non-discrimination under the ECHR

According to the ECtHR's settled case-law, in order for an issue to arise under Article 14 there must be a difference in the treatment of persons in comparable situations (comparability test). Such a difference of treatment is discriminatory, if it has no objective and reasonable justification. This means that different treatment is discriminatory, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised (justification test). The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The notion of discrimination within the meaning of Article 14 ECHR also includes cases, where a person or group is treated, without proper justification, less favourably than another, even though the more favourable treatment is not called for by the Convention.[106]

Comparability

Applied to the Dutch legislation at hand, the ECtHR's approach means that first the comparability test must be pursued. This test scores positive. It is not difficult to conclude that Dutch citizens who engage in jihadism are comparable to other Dutch citizens who engage in jihadism. Actually they form one and the same group. For the material requirements of Article 14 Dutch Nationality Act enabling the government to revoke Dutch nationality of a 'person' (the commission of certain crimes or being member of a listed organisation) it is irrelevant whether this person has another nationality apart from the Dutch nationality to be revoked.

[104] Language taken from art 2(2)(b) of the Racial Equality Directive. European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European non-discrimination law* (March 2018), p 53.

[105] The most recent available statistics on dual nationals date from 1 January 2014. At the time, there were 1,3 million Dutch nationals who held a second nationality, 25% of them have Moroccan and 25% have Turkish nationality. See also Annex III.

[106] See for instance ECtHR 8 April 2014, *Dhahbi v Italy* Appl no 17120/09, para 45.

Justification

Next is the justification test. The difference in treatment of two groups of Dutch citizens engaging in jihadism is caused by making an exception for persons, who would become stateless as a result of the revocation measure. The vital question under Article 14 ECHR is therefore, whether the differentiation is objectively and reasonably justified by the – legitimate - wish to prevent Dutch citizens from becoming stateless. Some authors have argued that it is 'not deliberate discrimination, but an unavoidable consequence of abiding by international law'.[107] However, there is no evidence that the Dutch government could not have decided to treat dual nationals similar to mono-nationals, as happened in France.[108]

In the *Gaygusuz* judgment, the ECtHR stated that very weighty reasons would have to be put forward before the Court would regard a difference in treatment exclusively on the ground of nationality as compatible with the ECHR.[109] It could be argued that the difference in treatment in Article 14 of the Dutch Nationality Act is not 'exclusively' made on grounds of nationality, as the wish to prevent statelessness plays a prominent role. This is true but it does not necessarily lead to a reasonable and objective justification. In section 2.3 of this expert opinion it was already explained that the legitimate aim to prevent statelessness for mono-nationals engaged in jihadism, does not as such justify the deprivation of dual nationals from their Dutch nationality for the same behaviour.

Is there a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised', as required by the case law of the ECtHR? In other words, is applying the instrument of revoking Dutch nationality for reasons of jihadism only to dual nationals a proportionate means to the legitimate aim to prevent and curb terrorism? It is for the Dutch government to adduce reasons why the instruments used in reaction to jihadism for mono-nationals could not be used for dual nationals as well, and why it is necessary to single the group of dual nationals out and apply to them the more intrusive measure of deprivation of their Dutch nationality.

In this context, it is relevant to refer to the stated aims of Article 14 of the Dutch Nationality Act. The explanatory memorandum states that the revocation of nationality after conviction for terrorist acts aims to express that Dutch nationality should in no way facilitate persons to commit terrorist acts abroad, or prepare other persons for committing such acts.[110] The stated aim of the revocation of nationality of persons who are involved in a terrorist organisation abroad is to prevent terrorist attacks committed by such person. Moreover, the explanatory memorandum notes that participation in a terrorist organisation goes against Dutch values and is a threat to national security of the Netherlands and its allies.[111] The legislator does not provide any other justification for the different treatment of dual nationals than the obligation of the state to prevent statelessness.

The reasons for differential treatment on the basis of nationality must be compelling and very weighty, as 'a difference in treatment based exclusively on the ground of nationality is allowed only on the basis of compelling or very weighty reasons'[112] This quote from the Grand Chamber judgment in *Biao v Denmark,* which referred to the earlier *Gaygusuz* judgment, is relevant because that case was also about a distinction between persons of the same nationality. In that case

[107] C Joppke, 'Terror and the loss of citizenship' *Citizenship Studies* (2016), p 744.
[108] Le Monde, *Le Sénat enterre la déchéance de* nationalité (18 March 2016) accessed 20 May 2018.
[109] ECtHR 17 September 1996, *Gaygusuz v Austria* Appl no 17371/90, para 42.
[110] *Kamerstukken II* 2013/14, 34 016 (R2036), nr 3 p 2.
[111] *Kamerstukken II* 2015/16, 34 356 (R2064), nr 3, p 2.
[112] ECtHR 24 May 2016, *Biao v Denmark* Appl no 38590/10, para 114.

eventually a violation of Article 14 in connection with Article 8 ECHR was found, after the Chamber had earlier dismissed the claim of discrimination. The Grand Chamber found discrimination between Danish nationals of Danish ethnic origin and Danish nationals of another ethnic origin.

The ECtHR has not yet ruled in case concerning different treatment with regard to revocation of nationality. In the admissibility decision in *K2 v UK* the applicant complained about discrimination between British nationals with mono and dual nationality, who are considered a threat to national security. The ECtHR declared the complaint on the basis of Article 14 ECHR inadmissible, because the applicant had failed to exhaust the domestic remedies.[113] Currently a case against France concerning the revocation of nationality of persons convicted for terrorist crimes is pending before the ECtHR. The applicants complained about a violation of Article 8 and 14 ECHR. Moreover, they complained about a violation Article 4 of Protocol 7, arguing that the revocation of nationality violates the *ne bis in idem* principle because they were already convicted on the basis of the same terrorist offences.[114]

In some cases about differentiation in possibilities to *acquire* nationality, the ECtHR found a violation of Article 14 ECHR. In the *Genovese v Malta* case, the Court considered that despite relevant Maltese legislation which allowed the practice making a difference in the acquisition of Maltese citizenship between marital and non-marital off-spring, this amounted to differential treatment, which was not justified.[115] Further, in the *Kurić v Slovenia* case, the Court found that a differential treatment with regard to the possibility to acquire Slovenian nationality based on national origin constituted a violation of Article 14 in relation to Article 8 ECHR.[116]

Are the reasons provided by the Dutch government to justify legislation, which deprives only dual nationals from their Dutch nationality in case of terrorism related behaviour, 'compelling and weighty' as the ECtHR requires? So far, only the obligation to prevent statelessness has been brought forward. It was already shown in section 2.3 of this expert opinion that this argument alone cannot justify the distinction made.

4.1.4 Non-discrimination under EU law

This section will address the relevant CJEU's case law concerning non-discrimination. It should be noted in this context that the CJEU is not in a position to decide whether national law is discriminatory or not in the preliminary ruling procedure. It will only provide general answers to the questions referred to it. Furthermore, it must be remembered that the *Rottmann* case, referred to above, is the only point of reference so far which indicates that CJEU will take the standpoint that revoking EU citizenship must not only be proportionate but also non-discriminatory.

According to the CJEU's judgment in *Huber*, it is settled case law that the principle of non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated the same. Such treatment may be justified only if it is based on objective considerations independent of the nationality of the persons concerned and is proportionate to the objective being legitimately pursued.[117] Once differential treatment has been

[113] ECtHR 7 February 2017 *K2 v United Kingdom* Appl no 42387/13.
[114] ECtHR *Ghoumid and others v France* Appl nos 52273/16, 52285/16, 52290/16, 52294/16, 52302/16.
[115] ECtHR 11 January 2012, *Genovese v Malta* Appl no 53124/09.
[116] ECtHR 26 June 2012, *Kurić and others v Slovenia* Appl no 26828/06, para 394.
[117] CJEU Case C-524/06 *Huber* [2008].

identified, it will constitute discrimination if the Member State cannot prove that such treatment was justified. This implies a shift of the burden of proof from the applicant (who has to prove differential treatment) to the government (which must argue why the differential treatment is justified).

Objective considerations independent of nationality

Are there 'considerations independent of nationality' of the persons concerned, which may play a role in justifying the distinction made? The sole justification provided by the Dutch government is the obligation to prevent statelessness. This is in itself an objective and legitimate consideration. However, its application in Article 14 of the Dutch Nationality Act is closely linked to the nationality of the persons concerned. It creates a differentiation within a group of persons, Dutch nationals engaged in terroristic activities, on the basis of an inherent distinction between mono and multiple nationals. So it cannot by any means be seen as a 'consideration independent of the nationality of the persons concerned.'

Further, it is clear that the prevailing objective of the legislation at hand is to prevent and curb terrorism in the Netherlands. This is in itself a legitimate consideration, which is as such independent of the nationality of the persons concerned. However, the CJEU further requires that such considerations are proportionate to the objective pursued. So far, the Dutch government has not provided reasons how this objective justifies the application of the intrusive measure of revocation of nationality exclusively with regard to dual nationals, particularly persons who have acquired both Dutch and Moroccan nationality and cannot renounce Moroccan nationality. The proportionality assessment is hereunder further discussed under the 'necessity requirement.

Necessity of the measure

In the context of the proportionality test, it must be assessed whether revocation of nationality for dual nationals is necessary. This means that 'no reasonable alternative means exist which would cause less interference with the principle of equal treatment'.[118] The CJEU considered that this implies that 'the means chosen for achieving that objective correspond to a real need on the part of the undertaking, are appropriate with a view to achieving the objective in question and are necessary to that end'.[119]

It is unclear how withdrawing a terrorist's nationality will have a preventive effect and dissuade him from committing further terrorist acts in the Netherlands or abroad. It is important to remember that mono-nationals who are convicted for or suspected of terrorist acts are faced with sanctions, such as prison time, freezing of assets or travel bans. In this context, it is difficult to see why revocation of nationality is 'necessary' for dual nationals, while these other forms of punishment are sufficient for mono-nationals. Even scholars who believe withdrawal of nationality for terrorism is legitimate and a powerful symbolic act, agree that revoking nationality is not useful, and not necessary: 'through withdrawing citizenship one cannot combat terrorism.'[120] It is therefore questionable whether revoking nationality ensures the public safety of Dutch citizens.

Other countries such as Denmark offer returning jihadists medical and psychological aid and workshops to ensure their reintegration into society, in an effort to avoid excluding them again and

[118] European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European non-discrimination law* (March 2018), p 96.
[119] CJEU Case C-170/84 *Kaufhaus GmbH v Karin Weber von Hartz* [1986], para 37.
[120] C Joppke, 'Terror and the loss of citizenship' *Citizenship Studies* (2016), p 745.

prevent terrorist acts.[121] This alternative would be a preventative measure ensuring that returning jihadists are reintegrated into society and do not recruit more Dutch people within terrorist organisations. Indeed the 70's and 80's Dutch politicians found that terrorist acts on Dutch territory by Moluccans could be addressed by normal criminal law and that no special anti-terrorism legislation was necessary.[122]

The necessity of revoking nationality can be further called into question with regard to its symbolic effect, because less discriminatory alternatives exist to show that terrorist activities are contrary to Dutch values. For example, some scholars have argued to replace revocation of nationality with a suspension of civic, civil and family rights, which is an alternative which exists in France.[123] The Netherlands had a similar policy for people who collaborated with Nazi Germany.[124] Such alternative measure would have much of the same symbolic consequences as revocation of nationality. However, it would not create direct or indirect discrimination between mono- and dual nationals, and stigmatise dual nationals by linking them to withdrawal of nationality for committing terrorist acts.

It should be concluded that alternative and 'less intrusive' measures exist to attain both the (alleged) preventive and symbolic effect of the revocation measure. Hence, the Dutch government has so far not justified the differential treatment found in the relevant Dutch legislation by 'objective considerations independent of the nationality of the persons concerned, proportionate to the objective being legitimately pursued'.

4.1.5. Sub conclusion

In this section we have discussed the Dutch revocation of nationality measure for dual nationals involved in terrorist activities in the light of the non-discrimination principle guaranteed by the ECHR and EU law. It should be concluded that there are strong indications that the revocation of Dutch nationality on the basis of Article 14 of the Dutch Nationality Act is discriminatory towards dual nationals and therefore unlawful under the ECN, the ECHR and EU law. As yet, the justifying arguments brought forward by the Dutch government are not convincing.

As we have seen in this section the non-discrimination principle guaranteed by the ECHR and EU law entails a general proportionality test of the legislation at issue. However, we have not yet discussed the principle of proportionality guaranteed by the ECN, which should be carried out having regard to the individual circumstances of the case. This will be done in the next section. Because the ECN specifically requires a proportionality test in the context of the revocation of nationality, this convention will be taken as the starting point. The ECtHR's and CJEU's case law will be used as sources of inspiration.

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[121] G van Langendonck, 'Hudayfah wil niet terug naar Syrie: het succes van de zachte Deense aanpak' *NRC Handelsblad* (2014), as cited in B de Hart and AB Terlouw, 'Born here. Revocation and the automatic loss of Dutch nationality in case of terrorist activities', in: M van den Brink, S Burri and J Goldschmidt (eds), *Equality and human rights: nothing but trouble?: Liber Amicorum Titia Loenen* (Utrecht, SIM, 2015), p 322.

[122] M van der Woude, 'Over het verleden, het heden en de toekomst van strafrechtelijke terreurbestrijding in Nederland' *Proces* (2009), p 8.

[123] Art 131-26 of the French Criminal Code allows for a partial or total suspension of specific rights, such as the right to vote or the right to testify in court, for a maximum of 10 to fifteen years, depending on the offence, pursuant to art 422-3 Criminal Code.

[124] The practice of "national indignity" involved civic disqualifications and prohibitions to exercise specific types of activity; L Huyse, 'Belgian and Dutch Purges after World War II Compared', in: J Elster (ed), *Retribution and Reparation in the Transition to Democracy* (Cambridge, Cambridge University Press, 2006), p 265.

4.2 Vital interest and prejudicial conduct

The ECN sets a high threshold for the revocation of nationality in individual cases. Article 7(d) ECN reads:

> a 'State Party may not provide in its internal law for the loss of its nationality *ex lege* or at the initiative of the State Party except in the following cases: [..] d) conduct seriously prejudicial to the vital interests of the State Party'.[125]

Below this threshold, revoking nationality is not allowed.

It must be noted that the referral to 'conduct' clarifies that an individual assessment should take place and that the provision cannot be applied to categories of persons. The other grounds for loss of nationality mentioned in Article 7 also describe individual behaviour, like 'voluntary acquisition of another nationality', or 'concealment of any relevant fact attributable to the applicant'.

This means that, in applying Article 7(d) ECN, for each individual concerned the question must be posed whether his or her individual conduct is seriously prejudicial to the vital interests of the state. There is no official definition of what constitutes a 'vital interest' or 'prejudicial conduct' in the ECN. The Explanatory Report to the ECN provides more information on the types of acts considered as prejudicial, but remains rather vague.[126] It states that 'such conduct notably includes treason and other activities directed against the vital interests of the State concerned (for example work for a foreign secret service) but would not include criminal offences of a general nature, however serious they might be'.[127] The Explanatory Report clearly states that 'such conduct notably *includes* treason' indicating that acts other than treason can be considered as prejudicial conduct against the state's vital interests. Indeed, treason can fall under the category of an act of terrorism.[128] However, terrorist acts (as provided for in domestic legislation of EU Member States) can take many different forms.[129] The Explanatory Report thus does not shed light on whether all acts of a terrorist nature would always be considered as being prejudicial to the vital interests of the state.

Likewise, the Convention on Statelessness (from which Article 7 of the ECN is derived) offers no explanation of what is to be regarded as 'vital interests' or 'prejudicial conduct'. A state's vital interests are generally understood as 'centred on security as an independent nation, and the protection of its institutions, people and values, and are therefore those interests which have direct consequences for the practical survival of the state'.[130] Taking this into consideration, the term 'prejudicial conduct' can be considered as actions which thus threaten the institutions, people and values of the state. A similar line of reasoning is provided by the UNHCR who highlight that '"seriously prejudicial" and "vital interests" indicate that the conduct covered by this exception must threaten the foundations and organization of the State whose nationality is at issue'.[131]

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[125] Art 7(d) ECN.
[126] Ibid.
[127] Council of Europe - European Treaty Series - No. 166 Explanatory Report to the ECN, para 67
[128] K Eichensehr, 'Treason in the Age of Terrorism: An Explanation and Evaluation of Treason's Return in Democratic States' *Vanderbilt Journal of Transnational Law* (2009).
[129] See eg the UK Terrorism Act of 2006 for details of different terrorist offences
[130] G Buchan National Interests and the European Union, The Bruges Group (2012), p 6.
[131] UNHCR Expert Meeting Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality Summary Conclusions 31 October-1 November 2013, para 68

The Kingdom of the Netherlands equates threats to national security with vital interests of the state. A threat to the national security of the state is thus a threat to the vital interests of the state.[132] According to the 2014 Dutch National Safety and Security Strategy Findings Report, 'the five vital interests of the Netherlands are: territorial security, physical security, economic security, ecological security, and social and political stability.'[133] The Dutch authorities are of the opinion that terrorism-related convictions are 'almost always' considered as prejudicial to the vital interests of the state.[134]

It may be concluded that 'the vital interests' of the state and the concept of 'national security' have much in common. In both concepts, it is about safeguarding the foundations, institutions, people and values of a state. Further, it emerges from the above that the individual assessment of whether the conduct is seriously prejudicial to the vital interests of the state indeed, may be conceived in two manners: (a) departing from 'terrorism' as a general threat to security, which almost always precludes a decision in the favour of the individual once his conduct falls within the terms of 'terrorism' and (b) investigating in each case to what extent the personal conduct of the individual effectively threatens the vital interests of the state.

The second approach appears to be the most reasonable one, whereas the first approach risks reducing the individual assessment to a labelling exercise, leaving hardly any room for taking into account the factual circumstances of the case. Such circumstance could for example be that the dual national has committed a relatively minor offence, which is considered to constitute a terrorism-related crime, such as incitement via social media which only carried a 7 day sentence.

As there is no judicial organ competent to exclusively interpret the ECN, it may be helpful to look at the way the ECtHR and the CJEU dealt with related issues. The potentially relevant case law available of these Courts does not deal with revocation of nationality, but with withdrawal of residence rights, specifically when a threat to public/national security is at stake. This case law will be discussed in the next sections.

4.2.1 Assessment of a threat to national security under the ECtHR

In the judgments *C.G. v Bulgaria*[135], *Al Nashif v Bulgaria*[136] and *Lupsa v Romania*[137], the ECtHR emphasised that the quality of the law requirement under Article 8 ECHR protects persons against arbitrary interferences in the right to family life. This means that the scope of discretion conferred on the competent authorities and the manner of its exercise should be indicated with sufficient clarity. The foreseeability of law also prohibits a retroactive effect of law. In the *Del Rio Prada* judgment the ECtHR emphasised that it is of paramount importance that the law is foreseeable *at the time that the act was committed*.[138]

[132] Dutch National Safety and Security Strategy Findings Report 2014, p 2.
[133] Ibid.
[134] Art 14(2.2) Handbook on the Kingdom Act on the Netherlands Nationality.
[135] ECtHR 24 April 2008, *C.G. and others v Bulgaria* Appl no 1365/07, paras 39 and 40.
[136] ECtHR 20 June 2002, *Al-Nashif v Bulgaria* Appl no 50963/99.
[137] ECtHR 8 June 2006, *Lupsa v Romania* Appl no 10337/04.
[138] ECtHR 21 October 2013, *Del Rio Prada v Spain* Appl no 42750/09 and ECtHR 27 February 2001, *Ecer and Zeynek v Turkey* App nos 29295/95 and 29363/95.

Limits to the concept of national security

In the particular context of measures concerning national security, the requirement of foreseeability of the law does not go so far as to compel states to enact legal provisions listing in detail all conduct that may prompt a decision to expel an individual on national security grounds, the Court considered in the *C.G v Bulgaria* case that 'by the nature of things, threats to national security may vary in character and may be unanticipated or difficult to define in advance'. [139] However, this does not mean that national authorities have complete discretion in defining which conduct should be considered a threat to national security. In *C.G. v Bulgaria*, the ECtHR held that:

> It can hardly be said, on any reasonable definition of the term, that the acts alleged against the first applicant – as grave as they may be, regard being had to the devastating effects drugs have on people's lives – were capable of impinging on the national security of Bulgaria or could serve as a sound factual basis for the conclusion that, if not expelled, he would present a national security risk in the future.[140]

Effective remedy

The ECtHR requires that the national authorities' decision to take a measure on the basis of national security should be subjected to independent control:

> [E]ven where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that deportation measures affecting fundamental human rights be subject to some form of adversarial proceedings before an independent authority or a court competent to effectively scrutinise the reasons for them and review the relevant evidence, if need be with appropriate procedural limitations on the use of classified information.[141]

According to the judgment in *C.G. v Bulgaria*, the individual must be able to challenge the executive's assertion that national security is at stake. While the executive's assessment of what poses a threat to national security will naturally be of significant weight, the independent authority or court must be able to react in cases where the invocation of this concept has no reasonable basis in the facts or reveals an interpretation of "national security" that is unlawful or contrary to common sense and arbitrary.

The ECtHR in *C.G. v Bulgaria* also criticized the expulsion decision because it did not mention the factual grounds on which it was made. 'It simply cited the applicable legal provisions and stated that he "present[ed] a serious threat to national security"; this conclusion was based on unspecified information contained in a secret internal document.'[142]

In short, the ECtHR stresses the need for an effective and independent scrutiny of the reasons for a measure taken for the protection of national security, and of whether the invocation of 'national security' has a reasonable basis in the facts and is based on a lawful and sensible interpretation of 'national security'.

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[139] ECtHR 24 April 2008, *C.G. and others v Bulgaria* Appl no 1365/07, para 40.
[140] Ibid, para 43.
[141] Ibid, para 40.
[142] Ibid, para 46.

4.2.2 Assessment of a threat to national security under EU law

In *B and D,* the CJEU stated that there must be 'an assessment of the specific acts' before any decision is made to exclude a person from refugee status.[143] Likewise in *H.T* the CJEU pointed out that as a first step it must be verified 'whether the acts of the organisation in question can endanger national security or public order within the meaning of Article 24(1) of Directive 2004/83'.[144] After it had assessed the acts of the organisation, the CJEU proceeded to discuss the relevance of the act of the individual, who was involved in that organisation. The CJEU considered that Member States must conduct an assessment 'of the specific facts known to it, so as to determine whether support for the organisation concerned in the form of assisting in the collection of funds and regular participation in the events organised by that organisation' should be considered 'compelling reasons of national security or public order'.[145] The CJEU underlined that it must be assessed to what extent the individual in question supported the organisation

> by ascertaining in particular whether he himself has committed terrorist acts, whether and to what extent he was involved in planning, decision-making or directing other persons with a view to committing acts of that nature, and whether and to what extent he financed such acts or procured for other persons the means to commit them.[146]

Effective remedy

Also the CJEU requires that decisions in which a measure is taken in the interest of national security should be reasoned. In *ZZ* the CJEU held that the person concerned should be informed, in any event, of 'the essence of the grounds' on which a decision is based.[147] Moreover, the court reviewing the decision should be able to review 'all the grounds and the related evidence on the basis of which the decision was taken'.[148] The proceedings before the court should furthermore

> accommodate, on the one hand, legitimate State security considerations regarding the nature and sources of the information taken into account in the adoption of such a decision and, on the other hand, the need to ensure sufficient compliance with the person's procedural rights, such as the right to be heard and the adversarial principle.[149]

4.2.3 Sub conclusion

Art. 7(1) ECN sets a high threshold for the revocation of nationality: the conduct of the person concerned should be seriously prejudicial to the vital interests of the state. This implies an individual assessment of the facts and circumstances. However, it remains unclear how the terms 'prejudicial conduct' and 'vital interest of the state' should be interpreted. Therefore, the case law of the ECtHR and CJEU on withdrawal of residence rights for reasons of national security (which seems to be similar to the term 'vital interest of the state') was used to interpret Article 7(1) ECN.

[143] CJEU Joined Cases C-57/09 and C-101/09 09 *B and D* [2010].
[144] CJEU Case C-373/13 *H.T.* [2015], para 84.
[145] Ibid, para 86. See Art 24 Directive 2004/83/EC.
[146] Ibid, para 90.
[147] CJEU Case C-300/11 *ZZ* [2013], para 65.
[148] Ibid, para 59.
[149] Ibid, para 57.

The ECtHR's and CJEU's case law indicates that whether a certain conduct should be considered a threat to national security should be assessed on an individual basis, having regard to the role of a person in a (terrorist) organisation. According to the ECtHR the concept of 'national security' may not be stretched too far. Both the ECtHR and the CJEU require that the question whether a measure can be justified in the interest of national security should be subjected to independent (judicial) scrutiny. Both the ECtHR and the CJEU require that a decision to take an expulsion measure in the interest of national security be reasoned and that the person concerned have access to some form of adversarial proceedings.

4.3 Proportionality under the ECN

If it is established that the conduct of a dual national seriously prejudices the vital interests of the state, this does not automatically mean that the Dutch nationality may be revoked. The ECN requires a proportionality assessment, detailed in paragraph 36 of the Explanatory Report on the ECN.[150] It states: 'As regards the substantive grounds, the deprivation must in general be foreseeable, proportional and prescribed by law.' A proportionality test also follows from the principle laid down in Article 4(c) which prohibits arbitrary deprivation of nationality.

A proportionality assessment on the basis of the individual circumstances of the case is also required by the case law of the ECtHR and CJEU. In *Nada v Switzerland* for example the ECtHR found the enforcement by the Swiss authorities of an entry-and-transit ban resulting from the fact that the applicant was added to the Sanctions Committee's list of terrorist organisations and persons, violated Article 8 ECHR. Because of the entry-and-transit ban the applicant could not leave Campione d'Italia, an Italian enclave surrounded by Swiss territory. The ECtHR considered that the Swiss authorities did 'not sufficiently take into account the realities of the case, especially the unique geographical situation of Campione d'Italia, the considerable duration of the measures imposed or the applicant's nationality, age and health.'[151]

The CJEU also does not accept 'national security' as a blanket justification for expulsion measures. The CJEU highlights that the determination that acts can indeed endanger national security, which is exclusively based on the individual's support of a terrorist organisation, cannot automatically lead to withdrawal of a residence permit.[152] The CJEU underlines that a proportionality assessment should take place, which takes into account 'the degree of seriousness of danger to national security or public order of the acts committed', whether this danger still exists and the consequences of the measure taken.[153]

4.3.1 Relevant elements in the proportionality assessment

Elements which may plead in favour of abstaining from revoking the nationality, even if the basic requirements for applying the measure are met, may include: the length of sentence, the lapse of time since the conviction, the period of legal stay and the involvement of children. This section will briefly discuss these elements

[150] Council of Europe - European Treaty Series - No. 166 Explanatory Report to the ECN.
[151] ECtHR 12 September 2012, *Nada v Switzerland* Appl no 10593/08, para 195. See also ECtHR 18n October 2006 Appl no 46410/99 *Üner v the Netherlands*, paras 57, 62-67.
[152] CJEU Case C-373/13 *H.T.* [2015], para 87.
[153] Ibid, para 92-94.

The length of the criminal sentence

The length of the criminal sentence may provide a good indication of the severity of the danger that the individual poses. A short sentence may indicate that the crime is of a less severe nature. Belgium is one EU Member State, which considers the length of the sentence as a factor in the assessment of the proportionality of the decision to revoke Belgian nationality.[154] In order to revoke nationality, the conviction must be sufficiently serious, with a prison sentence of at least five years without a suspension of the sentence.

The time which has lapsed since the relevant conviction or (alleged) crime

The time which has lapsed since the relevant conviction has been committed may also be an indication of the danger constituted by the conduct of the individual. This is illustrated by the fact that under EU law 'measures justified on grounds of public policy or public security may be taken only if, following a case-by-case assessment by the competent national authorities, it is shown that the personal conduct of the individual concerned currently constitutes a genuine, present and sufficiently serious threat to a fundamental interest of society. This means that the threat must still be a risk at the current point in time, rather than merely in the past.[155] In this context the time which has lapsed since the (alleged) commission of a crime is relevant.[156]

The length of time spent in the Member State

The length of time spent in the Member State may also be taken into consideration. Article 25(1) of the French Civil Code considers the amount of time the individual has been a national of France in the assessment whether the French nationality may be revoked. This provision states '[f]orfeiture shall be incurred only where the facts of which the person concerned is accused and that are referred to in Article 25 occurred before the acquiring of French nationality or within ten years as from the date of that acquiring [..] where the facts of which the person concerned is accused are referred to in Article 25(1°), the periods referred to in the two preceding paragraphs shall be extended to fifteen years.'[157] Similarly, under Belgian law an individual must have committed the offence in the first ten years of being granted citizenship.[158]

The rights of children

The rights of children shall be a key consideration when making a decision regarding the parent. Article 3 of the UN Convention on the Rights of the Child (CRC) states '[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.' This norm is repeated in Article 24 of the Charter. Children are not able to exercise their free movement rights and rights of residence in the EU, if their parents are not able to supervise them. When their parent(s) are forced to leave the EU, the children may also be forced to leave the EU. This means that the children will be deprived of the genuine enjoyment of the

[154] Art 23 and 23(1) Belgian Nationality Code.
[155] CJEU Case C-249/11 *Byankov* [2012], para 40, CJEU Joined Cases C-331/16 and C-366/16 *K. and H.F.* [2018], para 52.
[156] CJEU Joined Cases C-331/16 and C-366/16 *K. and H.F.* [2018], paras 57-59.
[157] Art 25(1) French Civil Code, Ord. no 2005-759 of 4 July 2005.
[158] Art 23(1)(1°) Belgian Nationality Code.

substance of the rights attached to their status of European Union citizen, which is incompatible with EU law. This may oblige Member States to allow parents to stay with their Union citizen children.[159]

4.3.2 Sub conclusion

Even if it is clear that a person's conduct poses a danger to national security, it should be assessed whether a measure taken can be considered proportionate. The fact that a measure serves the interest of national security thus not automatically justifies that measure. It was argued that elements, which may be taken into account in the proportionality assessment, include the length of the criminal sentence, the time which has lapsed since the relevant conviction or (alleged) crime, the length of time spent in the Member State and the rights of children.

[159] CJEU Case C-133/15 *Chavez Vilchez and others* [2017], CJEU Case C-34/09 *Ruiz Zambrano* [2011].

5 Conclusion

According to Dutch legislation dual nationals can be deprived of the Dutch nationality if they have been convicted for a terrorism-related offence or if they have travelled abroad in order to combat for a terrorist organisation. In practice this legislation mainly targets Dutch-Moroccan nationals. These dual nationals are not able to renounce their Moroccan nationality. Dutch nationals who do not have another nationality cannot be deprived of their nationality, because it would render them stateless. This is not allowed under international law.

Given the fundamental importance of nationality as discussed in Chapter 2 of this expert opinion, it should ideally never be revoked. In matters of revocation of nationality, the Netherlands is simultaneously bound by three European jurisdictions: the European Convention on Nationality (ECN), the ECHR and EU law. The ECN allows a state to revoke nationality in exceptional circumstances, amongst others, when the conduct of the individual is seriously prejudicial to vital interests of the State Party. The ECN, ECHR and EU law require that the revocation of nationality complies with the principles of non-discrimination and proportionality.

In this expert opinion, it was first investigated whether this legislation violates the prohibition of discrimination, laid down in Article 5 ECN, Article 14 ECHR, the Twelfth Protocol ECHR and Article 18 TFEU. It was found that there are strong indications that the Dutch legislation at hand is indeed directly discriminating on grounds of nationality and that the justifications brought forward by the Dutch government so far are not convincing. Legislation violating the prohibition of discrimination is unlawful and may not be applied.

Further, the meaning of the term 'conduct seriously prejudicial to vital interests of the state' as mentioned in Article 7(1)(d) ECN was investigated. It term suggests a high threshold for the revocation of nationality, but its meaning is not clear. For that reason the case law of the ECtHR and CJEU concerning withdrawal of residence rights for reasons of national security was used as a source of interpretation for Article 7(1)(d) ECN. This case law shows that both Courts demand a precise scrutiny of the facts and of the alleged threat to national security, in order to come to a balanced judgment on the applicability of the impugned measure. According to the CJEU, Member States must ascertain in particular whether the person concerned himself has committed terrorist acts, whether and to what extent he was involved in planning, decision-making or directing other persons with a view to committing acts of that nature, and whether and to what extent he financed such acts or procured for other persons the means to commit them'.[160] Both the ECtHR and the CJEU require that the individual must be able to challenge the executive's assertion that national security is at stake.

Moreover, not all acts that can be labelled as prejudicial to the vital interests of the state or a threat to national security will automatically justify the revocation of nationality. The ECN requires an individual proportionality assessment. Apart from the seriousness of the individual conduct of the dual national, the following elements pleading in favour of abstaining from revoking the nationality must for example be taken into account in this proportionality assessment: the length of sentence, the lapse of time since the conviction, the period of legal stay and the involvement of children.

[160] CJEU case C-373/13 *H.T.* [2015], para 90

Annex I Revocation of nationality in other European states

This annex will examine different international initiatives relating to revocation of dual nationality as a consequence of terrorism-related acts to highlight the differences in conditions for this revocation. It will also present failed attempts to introduce such possibilities into domestic law.

United Kingdom

According to Section 40 of the British Nationality Act (BNA)[161], the Secretary of State may by order deprive a person of his nationality if satisfied that it would be conducive to the public good and would not lead to statelessness. For naturalised citizens conducting themselves in a manner seriously prejudicial to vital interests of the UK, deprivation of citizenship is possible, even if leading to statelessness. In both cases, no criminal conviction of the person concerned is required.

This regulation resulted from several amendments made between 2002 and 2015, which extended the power of the Secretary of State. By amending Section 40 BNA under the Nationality, Immigration and Asylum Act 2002, the Secretary of State received the power to deprive a British citizen of his nationality, if he is satisfied that the person had done anything seriously prejudicial to the vital interests of the UK or a British overseas territory.[162] However, except for cases of fraud, false representation, or concealment of a material fact, it was then only possible to deprive citizenship if it would not render the person stateless. As a consequence, only persons holding more than one nationality were affected by deprivation.[163] After the adoption of the Immigration, Asylum and Nationality Act 2006, the Secretary of State could issue a deprivation order if satisfied that the measure was 'conducive to the public good'. The Immigration Act 2014 amended Section 40 BNA to allow the Secretary of State to deprive citizenship, regardless if the person becomes stateless, under three conditions: Nationality was obtained by naturalization, the Secretary of State is satisfied that the person acted in a manner seriously prejudicial to the vital interests of the UK and reasonably believes that the person is able to acquire another nationality.[164] Thus, in contrast to native citizens by birth or descent, the prohibition of statelessness is not absolute for naturalised citizens.

In 2015, a law entered into force, under which a two-year entry ban can be imposed on all British nationals under certain conditions.[165]

France

The loss of French nationality is possible under Article 23 et seq of the Civil Code (CC)[166], which is applicable to all nationals. Nationality is lost in the case of acquiring a foreign nationality, under certain circumstances if not habitually residing in France and if taking on employment or providing assistance in a foreign army or public service. According to Article 25 CC, a national who acquired the French nationality may be deprived of it, if sentenced for an ordinary or serious offence constituting a violation of the nation's fundamental interests, or for acts of terrorism, unless he would become stateless.

[161] British Nationality Act 1981, as amended by the Act of 30 May 2018.
[162] Section 4(1) Nationality, Immigration and Asylum Act 2002 (c. 41), 7 November 2002.
[163] Ibid.
[164] Section 66(1) Immigration Act 2014 (c. 22), 14 May 2014.
[165] Counter Terrorism and Security Act 2015, Chapter 2, 12 February 2015.
[166] Code civil, as amended by the Act of 3 January 2018.

In the context of national anti-terrorism legislation, Article 25 CC had been amended in 1996.[167] At that time, deprivation could only take place if the person concerned had been convicted to at least five years of imprisonment, within 10 years following the acquisition of nationality. Since then the regulations regarding the deprivation of nationality have been amended several times. In 1998, the applicability of Article 25 CC was limited to cases in which deprivation would not lead to statelessness, in order to comply with the safeguards enshrined in the ECN.[168] Thus, deprivation is only possible for naturalised citizens possessing more than one nationality. According to the Constitutional Court (*Conseil Constitutionnel*), combating terrorism would justify such a different treatment of naturalised and native citizens and would therefore not violate the principle of equality. Moreover, it would not be disproportionate in the particular case.[169] In 2006, the period of time, in which naturalized citizens can be deprived of the French nationality for acts under Article 25 no 1 CC, was extended from 10 to 15 years between the date of acquisition and deprivation.[170] Further proposals to amend Article 25 CC have been made in 2014.[171]

In March 2016, a constitutional amendment[172] that would have allowed the deprivation of nationality of convicted terrorists, regardless of native or naturalized, even if they would become stateless, was rejected.

Belgium

According to the Belgian Nationality Code (BNC)[173], deprivation of nationality is not possible for citizens who have become Belgians at birth[174] and if deprivation would lead to statelessness. Before the legal framework for deprivation of nationality was substantially altered in 2012, nationals could only be deprived of their Belgian nationality in the case of fraud during acquisition of Belgian nationality and serious violation of their duties as Belgian citizens under Article 23 BNC.

With the Act of 4 December 2012[175], the provisions on deprivation have become broader. According to Article 23/1 BNC, introduced by the aforementioned Act, deprivation of Belgian citizenship is possible in case of a person found guilty of a terrorism-related crime and convicted to more than five years of imprisonment. Article 23/1 BNC linked deprivation to specific terrorist acts listed in the Belgian Criminal Code. Certain acts are excluded, eg recruitment of others in order to commit a terrorist crime, providing training instruction in relation to the use of weapons or spreading publicly a message inviting to commit terrorist acts.[176]

[167] Law no 96-647, Article 12, 22 July 1996.
[168] Law no 98-170, Article 23, 16 March 1998.
[169] Conseil Constitutionnel, Décision n° 2014-439 QPC, 23 January 2015.
[170] Law no 2006-64, Article 21, 23 January 2006.
[171] Constitutional Bill no 1948, 14 May 2014; Constitutional Bill no 2016, 11 June 2014.
[172] Constitutional Bill no 3381, Article 2, 23 December 2015; the bill was announced after the 2015 Paris attacks.
[173] Belgian Nationality Code, as amended by the Act of 6 July 2017.
[174] On account of one of their parents being a Belgian national (Article 8 BNC), who have become Belgian citizens by adoption (Article 9 BNC) or by acquisition of Belgian citizenship following birth in Belgium out of at least one parent born in Belgium (Article 11(1) BNC).
[175] Belgian Official Gazette, 2012-12-07/04, 14 December 2012; primary aim of the Act was to make acquisition of Belgian citizenship more difficult.
[176] Articles 140ter, 140quater and 140bis Belgian Criminal Code.

By adopting the Act of 20 July 2015[177], a new provision regarding the deprivation of nationality on the grounds of terrorism was introduced. The new Article 23/2 BNC makes it possible to deprive citizens of their nationality if sentenced for any terrorist act to at least five years of imprisonment and thus broadened the scope to include further terrorism-related acts. Contrary to Article 23/1 BNC, there is no specific time limit;[178] Article 23/2 could be applied regardless how long the person concerned has been in possession of Belgian citizenship.

Whereas only the Court of Appeal can impose deprivation under Article 23 BNC, any ordinary civil or criminal court can deprive Belgian nationality under Article 23/1 and 23/2 BNC.

Austria

Under Article 32 of the Austrian Nationality Act (ANA)[179], nationals shall be deprived of their nationality, if they voluntarily enter the military service of a foreign country. Unless Article 32 ANA already applies, a national in the services of a foreign country shall be deprived of nationality according to Article 33(1) ANA, if his behaviour severely damages the interests or the reputation of Austria.

With the Act of 29 December 2014[180], the Nationality Act was amended as part of a package of measures against terrorism and radicalization. According to the amended Article 33(2) ANA, a national who voluntarily takes an active part in combat operations abroad on behalf of an organized armed group in connection with an armed conflict shall be deprived of nationality; deprivation is only possible, if it does not lead to statelessness.[181]

The regulations do not only apply to naturalized nationals who have a further nationality or who would regain one if expatriated but equally to native Austrians who have acquired a second nationality.

Germany

Article 16(1) of the Basic Law imposes strict limits on the loss of citizenship. According to sentence 1, citizenship may not be revoked. According to sentence 2, loss of citizenship is only possible pursuant to a law, if the person concerned does not become stateless as a result.[182]

In the case of naturalised Germans, nationality can be withdrawn under Section 35(1) of the German Nationality Act (GNA)[183] if it was obtained under false pretences, by threat or bribery or by deliberately providing incorrect or incomplete information which determined the issuance of this administrative act.

A German shall lose his citizenship according to Section 17(1) no 5 in conjunction with Section 28 GNA, if he - without the consent of the Federal Ministry of Defence - voluntarily enlists with the armed forces or a comparable armed organization of a foreign state, whose nationality he

[177] Belgian Official Gazette, 2015-07-20/08, 5 August 2015; the act was introduced by the Belgian government following the attack of Charlie Hebdo in Paris aiming to refine the possibility of deprivation.
[178] Art 23/1(1) no 1 BNC: Deprivation at the latest ten years after acquisition of citizenship (except for international crimes: no time limit); Art 23/1(1) no 2 BNC (crimes facilitated by the possession of Belgian citizenship): Deprivation at the latest five years after acquisition of citizenship; Art 23/1(1) no 3 BNC: No time limit following annulment of marriage.
[179] 1985 Nationality Act, as amended by the Act of 20 April 2018.
[180] Law Gazette of the Republic of Austria, Part I no 104/2014, Artikel 2, 29 December 2014, p 2.
[181] In these Articles, deprivation is not a matter of discretion.
[182] Art 16(1) of the Basic Law.
[183] Nationality Act, as amended by the Act of 11 October 2016.

or she possesses. This provision applies both to naturalized citizens and person who received German nationals by birth of descend. The wording of the German law does not cover the entry into non-state armed units such as private armies. The regulation sanctions only the service in another home state, not in any other country. It can be inferred from the legislative reasons that the regulation is supposed to sanction a behaviour that constitutes an obvious departure from the Federal Republic of Germany to the other home state.[184]

Section 28 GNA is therefore not applicable to the loss of German citizenship because of involvement in hostilities of terrorist groups, neither by the wording nor by its intended meaning.

In the coalition agreement concluded in March 2018 between the CDU, the CSU and the SPD, the parties decided to enact a new regulation regarding the loss of nationality. According to this regulation, Germans who have dual nationality could lose their German nationality, if it is satisfied that they are involved in the hostilities of a terrorist militia abroad.[185]

Switzerland

According to Article 42 of the Swiss Citizenship Act (SCA)[186], the Swiss, cantonal and communal citizenship of a person holding more nationalities may be revoked by the State Secretariat for Migration (SEM) with consent of the authority in the canton of origin, if his or her conduct is seriously detrimental to the interest or the reputation of Switzerland.

Since 2006, various parliamentary initiatives regarding the withdrawal of Swiss citizenship have been introduced. In 2008, a parliamentary initiative, which required that citizenship of naturalized persons could - under certain circumstances – be withdrawn within a certain period of time, was rejected by the National council due to concerns regarding the requirements of equal treatment under Article 8 of the Federal Constitution.[187] A similar initiative was rejected by the Parliament on similar grounds.[188]

The National Council agreed on a motion tabled in 2014 in September 2016[189] and endorsed a renewed parliamentary initiative issued also in 2014 in December 2015.[190] In July 2016, the Council of States decided not to endorse the initiative; in February 2017 it rejected the motion.

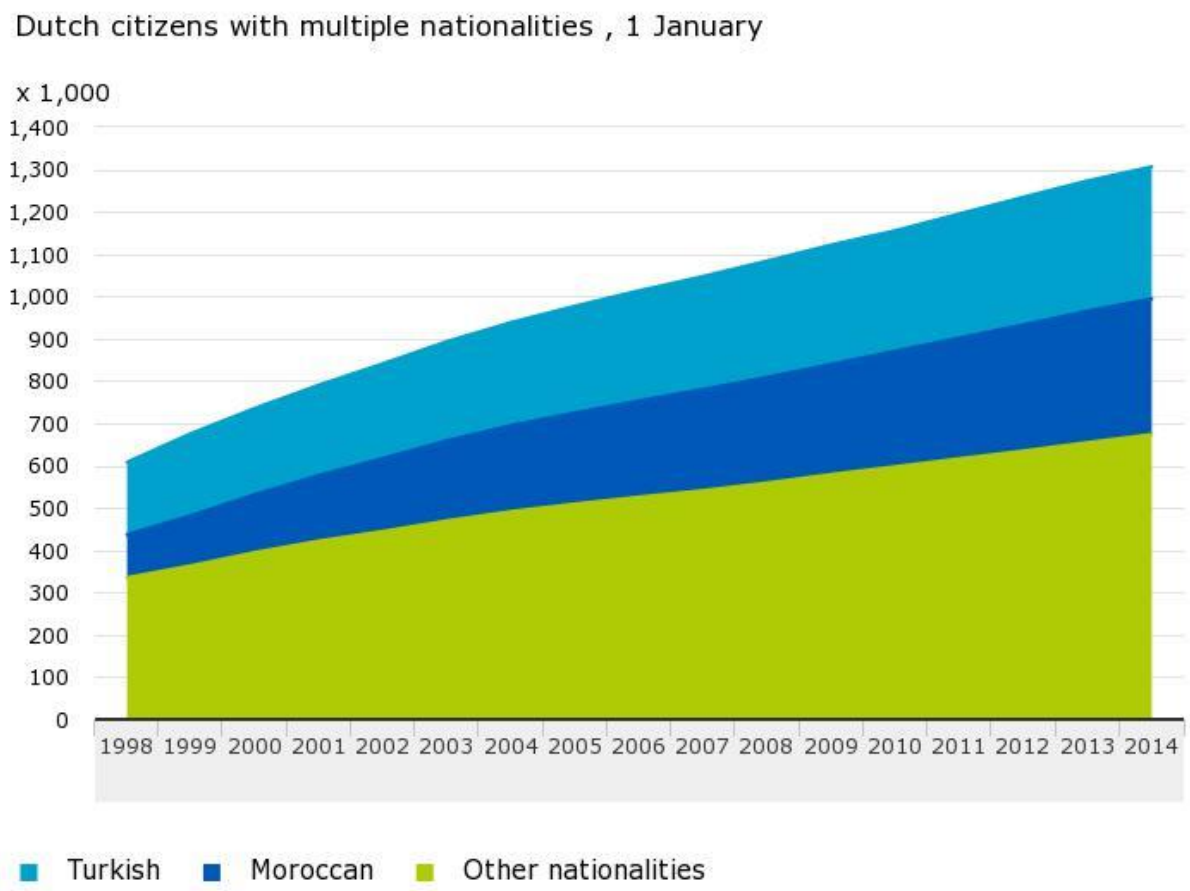
[184] Bundestag document 14/533, 16 March 1999, p 15.
[185] Coalition Agreement between CDU, CSU and SPD, 14 March 2018, p 126.
[186] Federal Act on Swiss Citizenship, as amended by the Act of 20 June 2014 (in force since 1 January 2018).
[187] Parliamentary Initiative 06.486, Withdrawal of Swiss citizenship, 15 September 2008.
[188] Parliamentary Initiative 08.409, Expatriation of naturalised criminals, 11 March 2009.
[189] Motion 14.3705, Withdrawal of Swiss citizenship from jihadists with dual citizenship, 14 September 2016.
[190] Parliamentary Initiative 14.450, Withdrawal of Swiss citizenship for mercenaries, 7 December 2015; in a Report of the National Council's Federal Commission the majority argued that the initiative called for a purely symbolic regulation that does not provide a noticeable gain in security for Switzerland and that the Swiss Penal Code provides sufficient instruments to prosecute a person who committed an offence abroad.

Annex II Nationalities, which cannot be renounced[191]

- Algeria
- Angola
- Argentine (only in case of acquisition by birth)
- Bangladesh
- Burkina Faso
- Costa Rica
- Cuba
- Ecuador
- Eritrea
- Greece
- Iran
- Jemen
- Libya
- Mali
- Morocco
- Mexico(only in case of acquisition by birth)
- Nicaragua
- Somalia
- Syria
- Taiwan
- Tonga
- Tunisia
- Uruguay (only in case of acquisition by birth)

[191] Source: IND, Landenlijst behoud nationaliteit accessed 28 May 2018.

Annex III Dutch citizens with multiple nationalities 1 January 2014[192]



[192] Source: Central Bureau of Statistics. There are no more recent statistics on the number of dual citizens, because the second nationality is no longer registered in the Basic Registration of Persons (BRP) since 31 January 2015.