

CITIZENSHIP DEPRIVATION UNDER THE EUROPEAN CONVENTION-SYSTEM: A CASE STUDY OF BELGIUM

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In response to Islamic-inspired terrorism and the growing trend of foreign fighters, European governments are increasingly relying on citizenship deprivation as a security tool. This paper will focus on the question of how the fundamental rights of individuals deprived of their citizenship are affected and which protection is offered for them by the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR'). In many countries, these new and broader deprivation powers were left unaccompanied by stronger (procedural) safeguards that protect the human rights they might affect. Unlike the Universal Declaration of Human Rights or the International Covenant on Civil and Political Rights, the ECHR does not provide for an explicit right to citizenship. The question therefore rises what protection, if any, is offered by the ECHR system against citizenship deprivation and for the right to citizenship. Through a case study of the Belgian measure of citizenship deprivation, the (implicit) protection provided by the Convention-system is demonstrated.

TABLE OF CONTENTS

I	Introduction.....	263
II	The Right to a Nationality under the <i>ECHR</i>	266
	A The Case of <i>Ramadan v Malta</i>	266
	B Article 8 <i>ECHR</i> : A (Mere) Protection against Expulsion.....	269
III	Belgium: A Case Study.....	270
	A Three Grounds for Citizenship Deprivation	270
	B <i>Ratione personae</i>	272
IV	The ECtHR's Interpretation of the Right to Private and Family Life in Citizenship Deprivation Cases: Creating Incoherence at the National Level	273
V	The Prohibition of Discrimination	277
	A Comparability of the Different Categories	277
	B Objective Justification	278
	C Legitimate Aim and Proportionality	280
VI	Conclusion	281

I INTRODUCTION

European governments are increasingly relying on citizenship deprivation as a security tool in response to Islamic-inspired terrorism and the growing trend of foreign fighters.¹ This development fits within a broader securitisation of immigration, where the terrorist threat is perceived as emanating from abroad.² As

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¹ Lucia Zedner, 'Citizenship Deprivation, Security and Human Rights' (2016) 18(2) *European Journal of Migration and Law* 222; Matthew Gibney, 'Denationalization' in Ayelet Shachar et al (eds), *The Oxford Handbook on Citizenship* (Oxford University Press 2017).

² Daniel Moeckli, 'The Selective "War on Terror": Executive Detention of Foreign Nationals and the Principle of Non-Discrimination' (2006) 31(2) *Brooklyn Journal of International Law* 495.

a result, immigration law became more and more ‘securitised’. In fact, immediately after the 9/11 attacks, the United Nations Security Council adopted *Resolution 1373* stressing the need for states to:

Take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts ...³

This resolution institutionalised the link between immigration and security. Where 9/11 sparked this development in the United States of America, the European migration crisis did the same for Europe’s mainland;⁴ the combination of large numbers of refugees entering Europe and the streak of recent terrorist attacks across its territory has pushed public opinion and policy as seeing the two phenomena as intertwined.⁵ Citizens possessing a migrant background, such as naturalised citizens or dual nationals, have become the target of broad citizenship deprivation powers.⁶

This paper will focus on the question of how the fundamental rights of denationalised individuals are affected and which protection is offered for them by the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (‘ECHR’).⁷ In many countries, these new broader deprivation powers were left unaccompanied by stronger (procedural) safeguards that protect the

³ *Resolution 1373*, SC Res 1373, UN SCOR, 4385th mtg, UN Doc S/RES/1373 (28 September 2001) s 3(f).

⁴ See, eg, the recent changes made in *Modifiant la loi du 15 décembre 1980 sur l’accès au territoire, le séjour, l’établissement et l’éloignement des étrangers afin de renforcer la protection de l’ordre public et de la sécurité nationale* [Bill to Modify the Law of 15 December 1980 on Access to Territory, Residency, Settlement and Removal of Foreigners to Reinforce the Protection of Public Order and National Security] (Belgium) Chamber des Représentants, Doc 54 2215/01, 12 December 2016, 3 [tr Michael McArdle] <<https://www.dekamer.be/FLWB/PDF/54/2215/54K2215001.pdf>>: by which the immigration authorities were granted broader powers and the safeguards protecting the individual(s) rights) were reduced. The legislative amendments were made with the specific goal of strengthening public order and national security. The goal of this amendment was the creation of a: ‘more coherent, transparent and effective deportation policy. Together, the proposed changes should make it possible to take the required measures more easily and quickly when public order or national security are threatened’.

⁵ See, eg, *Visant à renforcer la lutte contre le terrorisme* [Act to Reinforce the Fight against Terrorism] (Belgium) Chamber des Représentants, Doc 54 1198/001, 22 June 2015, 4–8 (‘Act to Reinforce the Fight against Terrorism’) <<https://www.dekamer.be/FLWB/PDF/54/1198/54K1198001.pdf>> [tr author], which outlines amendments to *Le code de la nationalité belge* [Code of Belgian Nationality] (Belgium) [tr author] (‘CBN’), was introduced immediately after the attacks on the headquarters of the satirical journal, Charlie Hebdo, in Paris on 7 January 2015:

The recent events (referring to the attacks in Paris and the foiled attack in Belgium) attest to the significant terrorist danger in Europe and our country ... the particular nature of terrorist crimes, which are, moreover, committed with special intent, justifies a more severe and specific approach, including in relation to the possibility of revocation of Belgian nationality.

⁶ In Belgium, only dual nationals who have acquired Belgian citizenship (ie who are migrants, either first or second generation) are subjected to citizenship deprivation powers: *CBN* (n 5) arts 23–23/2. In the United Kingdom, only naturalised citizens are subjected to citizenship deprivation powers, even if they possess only one nationality: *Immigration Act 2014* (UK) s 66.

⁷ *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, ETS No.005 (entered into force 3 September 1953) (‘ECHR’).

human rights they might affect.⁸ Unlike the *Universal Declaration of Human Rights* ('UDHR')⁹ or the *International Covenant on Civil and Political Rights* ('ICCPR'),¹⁰ the *ECHR* does not provide for an explicit right to citizenship. The question therefore arises whether the *ECHR* system provides for sufficient protection against citizenship deprivation and the right to citizenship. To answer this question, this article will first outline the European Court of Human Rights' ('ECtHR') take on citizenship deprivation. As will be demonstrated by the case of *Ramadan v Malta* ('*Ramadan*'),¹¹ the Court evaluates citizenship deprivation as an art 8 issue. However, the Court's interpretation of private and family life in the context of citizenship deprivation seems narrow, offering little protection for the individual in question, apart from protection against expulsion. Such an interpretation seems problematic, as will be demonstrated through a case study of the Belgian measure of citizenship deprivation. Lastly, this contribution will evaluate the Belgian measure from the perspective of the prohibition of discrimination. Although not evaluated so explicitly as a discrimination issue by the ECtHR, many countries have nationality legislation in place that differentiates between different groups of nationals,¹² thereby opening the door for an examination under art 14 *ECHR*,¹³ most often in combination with art 8 *ECHR*.¹⁴ Unlike the *ECHR* system's protection in the context of private and family life, the prohibition of discrimination seems to offer more redress.

⁸ For example, in Belgium, the time-limitation that guarded the proportionality between denationalisation and the individual's ties to Belgium was abolished with a 2015 legislative amendment. Before the 2015 amendment, denationalisation based on an explicit terrorism conviction was only possible 'to the extent that [they have] committed the charges against [them] within ten years from the day on which [they] acquired Belgian nationality': *CBN* (n 5) art 23/1. This limitation evidently limited the scope of denationalisation, but it also guarded the protection for the individual's private and family life. Its abolishment entailed a considerable broadening of denationalisation's scope, with a potential infringement on the individual's fundamental rights as a consequence. In a similar manner, the *Immigration Act 2014* (UK) also entailed an extension of citizenship deprivation powers, with a (potentially significant) infringement of the individual's fundamental rights such as the right to private and family life. Since the 2014 amendment, deprivation of citizenship is permitted even if this results in statelessness. This entailed a significant departure from the UK's historic commitment to prevent and reduce statelessness. See Zedner (n 1) 233.

⁹ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) ('UDHR').

¹⁰ *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR').

¹¹ *Ramadan v Malta* (2017) 65 EHRR 32 ('*Ramadan*').

¹² For example, in the United Kingdom, only *naturalized* citizens are subjected to citizenship deprivation powers. See *Immigration Act 2014* (UK) s 66. Or, in Belgium, only citizens who *acquired* the Belgian nationality (as the opposite of being *born* with it) are subjected to denationalisation powers (with the exception of *CBN* (n 5) art 11 bis). See at arts 21–21/2. See also at arts 8, 9, 11, 11 bis.

¹³ *ECHR* (n 7) art 14.

¹⁴ *ibid* art 8.

II THE RIGHT TO A NATIONALITY UNDER THE *ECHR*

For many years, the ECtHR consistently rejected cases concerning loss of citizenship, because of its incompatibility *ratione materiae*, in the absence of such a right being guaranteed by the *ECHR* or its protocols.¹⁵

In recent years however, the ECtHR has recognised that, even though the right to nationality as such is not guaranteed by the *ECHR* or its protocols, the arbitrary denial of citizenship as well as its loss might, in certain circumstances, raise an issue under art 8 because of its impact on the private and family life of the individual.¹⁶ The issue of citizenship deprivation is thus evaluated under art 8 *ECHR*.

In determining whether citizenship deprivation is in breach of art 8, the ECtHR considers two issues: the arbitrariness of the decision, and its consequences for the applicant.¹⁷ The arbitrariness test consists of several parts: the Court has regard to whether the deprivation measure has a clear legal basis in the national legal order, whether it was accompanied by sufficient procedural safeguards, whether the person involved is allowed to challenge the decision before a court of law, and whether the authorities acted swiftly and diligently.¹⁸

Currently, the Court has delivered one judgment and two decisions on the topic.¹⁹ Two cases are pending.²⁰ The case of *Ramadan* provides a clear illustration of the Court's take on the protection of private and family life in the context of citizenship deprivation. For this reason, *Ramadan* was chosen as a leading case for the purpose of this article, with referrals to the two other decisions where necessary.

A *The Case of Ramadan v Malta*

The applicant, originally an Egyptian national, acquired Maltese citizenship pursuant to his marriage to a Maltese citizen in 1993.²¹ The marriage was annulled several years later.²² Subsequently, he remarried a Russian national in Malta with whom he had two children.²³ As a result, both children were born Maltese citizens.²⁴ In 2007 the applicant's citizenship was revoked after the Maltese authorities learned about the annulment of the first marriage.²⁵ The decision of revocation was based on the ground that his marriage was presumed to have been

¹⁵ See, eg, *X v Austria* (European Court of Human Rights, Grand Chamber, Application No 5212/71, 15 October 1972); *Said Abdul Salam Mubarak v Denmark* (European Court of Human Rights, Second Section, Application No 74411/16, 22 January 2019) ('*Said Abdul Salam Mubarak*').

¹⁶ *Ramadan* (n 11) 1118 [84]–[85]; *Said Abdul Salam Mubarak* (n 15) 21 [62]–[63].

¹⁷ *Ramadan* (n 11) 1118 [85]; *Said Abdul Salam Mubarak* (n 15) 21 [62].

¹⁸ *Ramadan* (n 11) 1118–19 [86]–[89].

¹⁹ *ibid*; *Said Abdul Salam Mubarak* (n 15); *K2 v United Kingdom* (European Court of Human Rights, First Section, Application No 42387/13, 9 March 2017).

²⁰ *El Aroud v Belgium* (European Court of Human Rights, Second Section, Application Nos 25491/18 and 27629/18, 5 November 2018); *Ghoumid v France* (European Court of Human Rights, Fifth Section, Application Nos 52273/16, 52285/16, 52290/16, 52294/16 and 52302/16, 23 May 2017).

²¹ *Ramadan* (n 11) 1101 [8].

²² *ibid* 1101–12 [14].

²³ *ibid* 1102 [16], [19].

²⁴ *ibid* 1105–7 [32]–[35].

²⁵ *ibid* 1102 [18].

simulated.²⁶ According to the authorities, the only reason he married his first wife was in order to stay in Malta and acquire citizenship there.²⁷

In its consideration of the alleged breach of the applicant's right to private and family life, the ECtHR took into account the arbitrariness of the decision and its consequences.²⁸

With regard to the arbitrariness test, the Court noted that Maltese legislation was sufficiently clear and thus in accordance with the law.²⁹ In general, states are quite precise in determining who, and under which circumstances, a citizen can be deprived of their nationality.³⁰ Moreover, the Court was satisfied that Maltese law provided the possibility to challenge the deprivation decision before a court.³¹ However, as noted in the dissenting opinion of Judge Paulo Pinto De Albuquerque, even though an appeal procedure was in place, the Minister's original deprivation lacked procedural safeguards.³² First of all, the Minister failed to take into account the necessity of the decision for the public good, which is required by art 14(3) of the *Maltese Citizenship Act*.³³ The Minister mechanically and automatically applied the relevant provision in Maltese law, without considering the public good necessity, since, paradoxically, Maltese law does not require the Minister's decision to be motivated by any particular reason.³⁴ Further, the committee's final recommendations to the Minister were not made available to the applicant, despite multiple requests in that respect.³⁵ The Court's satisfaction with regard to the procedural safeguards of deprivation decisions might have to be nuanced, given these elements.

Concerning the consequences of the decision, the Court took into account two elements: the consequence of statelessness, which was a direct result of the deprivation decision, and the potential expulsion of the applicant.³⁶ Even though the Court itself was not entirely consistent in its judgement,³⁷ it seems that the

²⁶ *ibid.*

²⁷ *ibid* 1099 [H8].

²⁸ *ibid* 1118 [85];

²⁹ *ibid* 1118–19 [86].

³⁰ The United Kingdom is a bit of an exception here, considering that a UK citizen can be deprived of their nationality if this is 'conducive to the public good', a rather vague and undefined term. However, this falls outside of the topic of contribution: *Immigration Act 2014* (UK) s 66.

³¹ *Ramadan* (n 11) 1119 [87].

³² *ibid* 1134 (OI-25).

³³ *ibid* 1131–2 (OI-19), citing *Maltese Citizenship Act* (Malta) (1965) Ch 188 of the *Laws of Malta* ('*Maltese Citizenship Act*').

³⁴ *ibid*; see *Maltese Citizenship Act* (n 33) arts 14(3), 19. Article 19 provides that 'the Minister shall not be required to assign any reason for the grant or refusal of any application under this *Act*'.

³⁵ *Ramadan* (n 11) 1131–2 (OI-19).

³⁶ *ibid* 1119–20 [89]–[92].

³⁷ See *ibid* 1113 [56], 1120 [92]: on the one hand, the Court seems to acknowledge the applicant's statelessness, stating that 'it appears that the applicant is currently stateless': at [56]. On the other hand, the Court argues that:

although, according to a letter by the Consul of the Embassy of the Arab Republic of Egypt, the applicant's request to renounce his Egyptian nationality was approved and his Egyptian passport withdrawn, he has not provided the Court with any official document (such as a presidential decree, which appears to be issued in such circumstances) confirming such renunciation. Nor has the applicant provided any information as to the possibilities of reacquiring Egyptian nationality ...

at [92] (citations omitted).

majority admitted that the applicant was stateless at the time of the proceedings.³⁸ When the applicant obtained Maltese citizenship, he renounced his Egyptian citizenship.³⁹ The Court seemed to suggest that the applicant's statelessness does not constitute a problem because he is not threatened with expulsion from Malta and that, 'to date he has been able to pursue his business and continues to reside in Malta'.⁴⁰ In other words, the effects on the applicant's private and family life were not deemed serious enough to justify a violation because he was not expelled from Malta, even though he was rendered stateless.⁴¹

As pointed out by Judge Pinto De Albuquerque in his dissenting opinion, citizenship is

a core element of a person's identity ... any decision pertaining to the acquisition, change, denial, or revocation of citizenship should not depend on the degree of the risk of expulsion ... The identity of an individual is determined by much more than his or her place of work or residence. The quintessential question of a person's identity should not be decided on the basis of a prediction of uncertain, future risks, but on the past and present-day relationship that he or she maintains with the State and its people.⁴²

In its most recent decision of 22 January 2019, *Said Abdul Salam Mubarak v Denmark* ('*Said Abdul Salam Mubarak*'),⁴³ the ECtHR was confronted with an expulsion decision that followed the deprivation decision. Therefore, unlike in *Ramadan*, the Court was obliged to consider the consequence of expulsion in its evaluation of art 8.⁴⁴ The *Consolidated Act on Danish Nationality* required weighing the deprivation decision against the severity of the offence and the impact on the person concerned.⁴⁵ The Danish Courts took into account:

[T]he fact that he had been born and raised in Morocco, where he spent all of his school years and that he came to Denmark when he was 24. He had lived in Denmark for 32 years. Furthermore, he spoke Arabic and some Danish. He had not achieved a permanent attachment to the Danish labour market and had received social benefits since 1994.⁴⁶

From 1988 to 1999, the applicant was married to a woman in Denmark with whom he had four children.⁴⁷ They all have Danish nationality.⁴⁸ In 2013, under Islamic law, the applicant married a Danish national of Moroccan origin.⁴⁹ They had a daughter in 2015.⁵⁰ Having considered the impact of the deprivation decision, 'including his ties with Denmark and Morocco, his current family situation and

³⁸ *ibid* 1120 [92].

³⁹ *ibid* 1101 [10].

⁴⁰ *ibid* 1119 [90].

⁴¹ Marie-Bénédicte Dembour, '*Ramadan v Malta: When Will the Strasbourg Court Understand that Nationality is a Core Human Rights Issue?*' *Strasbourg Observers* (Blog, 22 July 2016) <<https://strasbourgothers.com/2016/07/22/ramadan-v-malta-when-will-the-strasbourg-court-understand-that-nationality-is-a-core-human-rights-issue/>>, citing *Ramadan* (n 11).

⁴² *Ramadan* (n 11) 1133 [OI-22].

⁴³ *Said Abdul Salam Mubarak* (n 15).

⁴⁴ *ibid* 18–23 [61]–[73].

⁴⁵ *ibid* 8 [31]–[32], citing *Indfødsretloven* [*Consolidated Act on Danish Nationality*] (Denmark) No 422 of 7 June 2004.

⁴⁶ *Said Abdul Salam Mubarak* (n 15) 70.

⁴⁷ *ibid* 2 [7].

⁴⁸ *ibid*.

⁴⁹ *ibid* 2 [9].

⁵⁰ *ibid* 2 [9], 20 [70].

his language skills',⁵¹ the Court found that depriving the applicant of his Danish nationality would not be in breach of art 8 *ECHR*.⁵²

B *Article 8 ECHR: A (Mere) Protection against Expulsion*

Concerning the ECtHR's evaluation of the consequences of citizenship deprivation, it seems that the Court considers art 8 to be mainly a protection against expulsion. Having citizenship status will protect an individual against expulsion, because countries are prohibited to expel their own nationals, as enshrined in art 3, *Protocol No 4 to the Convention for the Protection of Human Rights ('Protocol 4')*.⁵³ When expulsion is off the table, as was the case in *Ramadan*, the Court does not seem to have an issue with citizenship deprivation (even if this leads to statelessness). In the event that expulsion *is* at stake, the impact on the person is weighed against the original deprivation decision.

Such an interpretation of the right to private and family life in the context of citizenship deprivation can be called into question, as was already pointed out by Judge Pinto De Albuquerque in his dissenting opinion in *Ramadan*.⁵⁴ It seems that the ECtHR fails to recognise the importance of having a nationality for an individual's (private) life by reducing the protection offered by art 8 to a mere protection against expulsion when it entails much more than that. For example, a fundamental importance of having a nationality is that it matters for the effective enjoyment of human rights. Human rights were originally constructed as claims belonging to the individual against the state.⁵⁵

⁵¹ *ibid* 20 [70].

⁵² *ibid*.

⁵³ *Protocol No 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 16 September 1963, ETS No 46 (entered into force 2 May 1968) ('*Protocol 4*'). That is, of course, if states have signed and ratified *Protocol 4*. Belgium has done both, it entered into force on the 21st of September 1970. See Council of Europe, 'Chart of Signatures and Ratifications of Treaty 046', *Council of Europe Portal* (Web Page) <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/046/signatures?p_auth=TzQXFXbs>. In the absence of *ECHR* protection, the right to freedom of movement, as enshrined on the universal level by the *ICCPR* (n 10) art 12 and the *UDHR* (n 9) art 13, (although not legally binding) can provide protection against expulsion. Unlike the *ECHR*, no international human rights instrument explicitly mentions a similar prohibition. A number of human rights instruments prohibit mass expulsion of aliens, as well as nationals, but this scenario must be differentiated from an individual case of expulsion. However, the protection needed might be found in the term 'freedom of movement' in international law. Such freedom of movement includes multiple rights, such as the freedom to move in one's own country, as well as from one country to another, such as the right to move freely on the territory of the home country; the right to choose a place of residence; the right to leave a country and the right to re-enter the home country. The right not to be expelled from the home country can be seen as the logical counterpart to the rights comprised in the term 'freedom of movement'; namely the right not to be moved, such as expulsion or forceful displacement. See also Eckart Klein, 'Movement, Freedom of, International Protection' in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2012).

⁵⁴ *Ramadan* (n 11) 1121–31 (OH-1)–(10-18).

⁵⁵ Lucy Fiske, *Human Rights, Refugee Protest and Immigration Detention* (Palgrave Mcmillan 2016) 25.

Paradoxically though, it is precisely at the moment when the relationship between individual and state ruptures ... that human rights are both most needed and cease to exist in any enforceable, tangible form of protection for human life.⁵⁶

Or, as the UN Secretary-General stated, while human rights are granted because of one's quality of being human, '[i]n practice, however, those who enjoy the right to a nationality have greater access to the enjoyment of various other human rights'.⁵⁷ Having a nationality also has important legal and non-legal consequences, such as the right to full democratic participation,⁵⁸ eligibility for many public sector jobs,⁵⁹ etc.

However, this article does not intend to discuss the many reasons why citizenship status is important and why the ECtHR's narrow interpretation of art 8 in the context of citizenship deprivation is flawed. Instead, it will demonstrate that the current interpretation of the right to private and family life in this context is problematic, not because of fundamental arguments, but because it creates a discrepancy in the Court's own case law on art 8, causing incoherence at the national level. This will be demonstrated by means of a case study of Belgium. In what follows, a brief overview of the Belgian nationality legislation is given. The focus here lies not on the *ratione materiae* of the law, but on the *ratione personae*, because it is exactly this limited application of the law that raises fundamental questions with regard to the right to private and family life.

III BELGIUM: A CASE STUDY

A Three Grounds for Citizenship Deprivation⁶⁰

The possibility to deprive someone of their citizenship has been enshrined in Belgian law from the beginning of the twentieth century.⁶¹ In 1984, it was

⁵⁶ *ibid*, citing Hannah Arendt, *The Origins of Totalitarianism* (Harcourt Brace Jovanovich, new ed, 1976) 302, reflecting Arendt's well-known 'right to have rights'. See also David Owen, 'Citizenship and Human Rights' in Ayelet Shachar et al (eds), *The Oxford Handbook on Citizenship* (Oxford University Press 2017); Irene Bloemraad, 'Does Citizenship Matter?' in Ayelet Shachar et al (eds), *The Oxford Handbook on Citizenship* (Oxford University Press 2017).

⁵⁷ *Impact of the Arbitrary Deprivation of Nationality on the Enjoyment of the Rights of Children Concerned, and Existing Laws and Practices on Accessibility for Children to Acquire Nationality, inter alia, of the Country in Which They Are Born, If They Otherwise Would Be Stateless*, UN Doc A/HRC/31/29 (16 December 2015) 9 [27].

⁵⁸ For example, while in Belgium non-citizens can participate in municipal elections, they are still excluded from federal or regional elections. See *La loi de 19 mars 2004 visant à octroyer le droit de vote aux élections communales à des étrangers* [The Law of 19 March 2004 Allocating Voting Rights to Aliens in Municipal Elections] (Belgium) [tr author].

⁵⁹ In 2014, access to public sector jobs was very limited for non-(EU)citizens in ten European countries. See 'Labour Market Mobility', *Migrant Integration Policy Index* (Web Page, 2015) <<http://www.mipex.eu/labour-market-mobility>>, cited in Irene Bloemraad and Alicia Sheares, 'Understanding Membership in a World of Global Migration: (How) Does Citizenship Matter?' (2017) 51(4) *International Migration Review* 823, 844.

⁶⁰ The terms 'citizenship deprivation' and 'denationalisation' are used as synonyms in this article. They are sometimes associated with different rights and obligations, but this distinction is irrelevant for the purposes of this article. See Gibney (n 1).

⁶¹ Patrick Wautelet, 'Deprivation of Citizenship for "Jihadists": Analysis of Belgian and French Practice and Policy in Light of the Principle of Equal Treatment' (Research Paper, CITE 2016) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2713742>.

incorporated into the *Code of Belgian Nationality* ('*CBN*').⁶² Currently, the *CBN* provides three different provisions under which an individual can be deprived of their Belgian nationality. Article 23 provides for the possibility to deprive an individual of their nationality if they seriously fall short of their responsibilities as a Belgian.⁶³ Committing a terrorist attack or being involved in terrorist activities evidently falls under this definition. In 2012, a new art 23/1 was added to the *CBN*.⁶⁴ This gives rise to a second ground of deprivation: where there is a conviction for certain terrorist offences under art 23/1(1).⁶⁵ For example, a person who has committed manslaughter with a terrorist objective for which they are sentenced to five years imprisonment or more, can be deprived of their Belgian nationality under art 23/1. On the other hand, persons who are convicted for recruiting or motivating others to commit terrorist offences are excluded from the scope of art 23/1. Additionally, art 23/1 is equipped with a time-limit:⁶⁶ citizenship deprivation is only possible if the person involved has acquired their nationality less than ten years before the terrorist offences were committed.⁶⁷ Both restrictions, the limited number of offences and the ten-year time limit, significantly limit the scope of the measure. After the attack on the headquarters of the satirical journal, *Charlie Hebdo*, in Paris on 7 January 2015, a second wave of legislative initiatives followed.

The recent events [attacks in Paris, foiled attack in Belgium] show that the terrorist threat in Europe and in our country has a considerable amount. ... The special nature of terrorist crimes, which are, moreover, committed with special intent, justifies a stricter and specific approach, also with regard to the possibility of revocation of Belgian nationality.⁶⁸

With the 2015 legislative amendment, *all* terrorist convictions of more than five years were incorporated into a new art 23/2 as deprivation grounds.⁶⁹ Taking into account the Belgian *Code Penal*, a five year conviction is not particularly high, since the sentences for terrorist crimes only start at three years imprisonment.⁷⁰ Terrorist crimes involving physical victims will always be punishable by criminal sentences beyond three year convictions.⁷¹ Moreover, the ten year time-limitation of art 23/1 was left out from the new art 23/2, considerably broadening the applicability of this measure.⁷²

⁶² *CBN* (n 5). See also Michel Verwilghen, *Le code de la nationalité belge: la loi de 1984* (Bruylant 1985) 27; Wautelet (n 61).

⁶³ *CBN* (n 2) art 23(1) 2°.

⁶⁴ *ibid* art 23/1.

⁶⁵ *ibid* art 23/1(1).

⁶⁶ *ibid* art 23/1.

⁶⁷ Wautelet (n 62).

⁶⁸ *Act to Reinforce the Fight against Terrorism* (n 5). Original text:

Les événements récents (attentats de Paris, attaque déjouée en Belgique) attestent de l'importance de la menace terroriste en Europe et dans notre pays. ... La nature particulière des infractions terroristes, qui sont d'ailleurs commises dans un but particulier, justifie une approche plus sévère et spécifique que, y compris sur le plan de la possibilité de déchéance de la nationalité belge.

At 8.

⁶⁹ *CBN* (n 5) art 23/2.

⁷⁰ See *Code penal* (Belgium) Law of 8 June 1867, art 138(1).

⁷¹ See, eg, *ibid* art 137(1)–(3), art 138.

⁷² *CBN* (n 5) art 23/1, 23/2.

B *Ratione personae*

Interestingly, under these different deprivation grounds, only certain Belgian nationals can be deprived of their citizenship. Belgian legislation installs a double protection mechanism. First, only *dual* nationals fall under the scope of the different deprivation possibilities.⁷³ This protection mechanism was installed to avoid people being rendered stateless.⁷⁴ Within this group of dual nationals, a second division is made: Belgian legislation installs a category of (dual) nationals who are never at risk of being deprived of their citizenship. According to the Belgian Constitutional Court, this is justified because they supposedly have strong links with the national community.⁷⁵ Conversely, a category of (dual) nationals is installed, who *are* at risk of being deprived of their nationality because they lack such links to the community.⁷⁶ To determine who has such links with the national community and thus, who is eligible for deprivation, one must look to the mode of acquisition of one's nationality. Unlike what might be expected, there is no case-by-case evaluation of the individual's situation. Instead, depending on the mode of acquisition of one's nationality, Belgian nationals are divided into one of two pre-set categories: subjected to citizenship deprivation or protected from it.

Those protected from deprivation are threefold. Firstly, this category involves persons who are born from Belgian parents.⁷⁷ Secondly, it involves persons who are born in Belgium and whose parents were also born in Belgium and had their principal residence there during the ten years preceding the birth or adoption of the child.⁷⁸ These children are 'native-born' Belgians, ie they are born with the Belgian nationality as an automatic consequence of the law. Finally, the protected category involves persons who are born in Belgium and have always had their principal residence there. They can acquire Belgian nationality before the age of twelve, following a declaration of one of their parents, who were themselves not born in Belgium but who have had their principal residence there during the ten years preceding the declaration and of whom at least one is permitted to stay in Belgium for an unlimited period.⁷⁹ According to the Belgian Constitutional Court, these persons are considered to have particularly strong links with the national community, given their birth in Belgium and their descent from Belgian parents or parents who were born in Belgium, or given their own birth and long residency on the territory, as well as that of their parents.⁸⁰

On the other hand, there are (dual) Belgian nationals who are subjected to deprivation powers. This concerns persons who have *acquired* the Belgian nationality (as the opposite of being *born* with it), apart from the specific category of those falling within the scope of the *CBN*, art 11 bis.⁸¹ On the basis of *CBN* art

⁷³ *ibid* art 23–23/2.

⁷⁴ In the case of fraud, this protection mechanism collapses. See *ibid* art 23(1).

⁷⁵ *De prejudiciële vragen betreffende artikel 23 van het Wetboek van de Belgische nationaliteit, gesteld door het Hof van Beroep te Antwerpen* [The Questions Referred for a Preliminary Ruling Concerning Article 23 of the Code of Belgian Nationality, Set by the Court of Appeal in Antwerp] Cour Constitutionnelle, App No 16/2018, 7 February 2018 [B.6]–[B.7] ('*Preliminary Question No 16/2018*').

⁷⁶ *ibid*.

⁷⁷ *CBN* (n 5) art 8, 9. Throughout this article the term 'parents' is inclusive of adoptive parents.

⁷⁸ *ibid* art 11(1).

⁷⁹ *ibid* art 11 bis.

⁸⁰ *Preliminary Question No 16/2018* (n 75) [B.6].

⁸¹ *CBN* (n 5) art 11 bis.

12, a person can acquire Belgian nationality when one of their parents voluntarily (re)acquires Belgian nationality, before they reach the age of 18.⁸² According to the Belgian Constitutional Court, these people have acquired the Belgian nationality during their childhood as a result of the mere fact of the (re)acquisition of the Belgian nationality by a parent, without there being any other condition of connection with the national community.⁸³ For this reason, or better yet, lack thereof, they can be deprived of their nationality.

The fact that only a limited category of Belgian citizens is subjected to deprivation powers raises questions regarding the right to private and family life, as well as the prohibition of discrimination. Those subjected to citizenship deprivation are namely assumed to lack strong community ties, which begs the question: what if this assumption is wrong? What if an individual falling under the subjected category does instead have strong roots in the Belgian community? Would this withstand the art 8 test? Furthermore, one can wonder whether states may, under the general principle of the prohibition of discrimination, distinguish between different types of nationals?

IV THE ECtHR'S INTERPRETATION OF THE RIGHT TO PRIVATE AND FAMILY LIFE IN CITIZENSHIP DEPRIVATION CASES: CREATING INCOHERENCE AT THE NATIONAL LEVEL

The second protection mechanism in the *CBN* allows for the deprivation of Belgian nationality where, according to pre-set legislative categories, a person lacks strong links with national communities. It is inherently problematic. As mentioned above, Belgians who have acquired the Belgian nationality on the basis of *CBN* art 12 (excluding the art 11 bis category, which is also a form of acquirement)⁸⁴ are assumed to lack such strong links because they acquired the Belgian nationality as a result of the acquirement of said nationality by a parent, without having to show any other connection with the national community.⁸⁵ The Belgian Constitutional Court was asked to rule on the question of whether this arrangement was discriminatory, because 'native-born' Belgians and Belgians falling under *CBN* art 11 bis are excluded from the scope of citizenship deprivation.⁸⁶ It found that it was not.⁸⁷ The difference in treatment between both categories of Belgians was not discriminatory according to the Court, because it was based on a legitimate criterion: the connection 'native-born' Belgians and Belgians falling under *CBN* art 11 bis have with their home country.⁸⁸

A strong counter-argument can, however, be made against this: the pre-set categories associated with 'community ties' assume that, by virtue of being born into a certain nationality, a determination can be made upon the community ties of an individual. In doing so, they fail to consider holistically the origin of these ties. Imagine a person born in Belgium from Belgian parents, but who moves to another country at a young age. They and their parents build an entire life there

⁸² *ibid* art 12.

⁸³ *Preliminary Question No 16/2018* (n 75) [B.7].

⁸⁴ *CBN* (n 5) art 12, 11 bis.

⁸⁵ *Preliminary Question No 16/2018* (n 75) [B.7], discussing *CBN* (n 5) art 12.

⁸⁶ *Preliminary Question No 16/2018* (n 75) [B.7].

⁸⁷ *ibid* [B.18.2].

⁸⁸ *ibid* [B.6], [B.8].

and, ultimately, acquire the nationality of their new home. Such a person will generally have stronger community ties with their country of residence, rather than Belgium.

And yet, the art 12 category does not take into account the many people with strong community ties that may otherwise fall under this provision, and thus may potentially be deprived of citizenship. Consider a Belgian national who was born in Belgium, residing and working there uninterrupted for 30 years, but who only received Belgian nationality in their teenage years, following the implementation of CBN art 12. For example, on 23 October 2018, the Antwerp Court of Appeal deprived Fouad Belkacem, a Belgian–Moroccan convicted terrorist leader, of his Belgian nationality.⁸⁹ Mr Belkacem’s parents are both Moroccan nationals who came to Belgium when they were teenagers.⁹⁰ He was born in Belgium and received Belgian nationality at the age of fourteen when his mother acquired Belgian nationality.⁹¹ Belkacem has a wife and children in Belgium who are, in turn, Belgian nationals as well.⁹² He will most likely have stronger ties with the Belgian community than the first-mentioned example. In such scenarios, the current interpretation of strong links with the national community seems flawed; the pre-set categories of *CBN* do not allow for an effective assessment of individual situations.

This approach results in the ‘wrong’ group of people being subjected to the law. The argument of having strong community ties is a valid one, but the Belgian legislature and courts apply it incorrectly: the sole fact of being born into a certain nationality does not necessarily lead to having such strong community ties, just as acquiring the Belgian nationality on the basis of *CBN* art 12 does not exclude an individual from having strong ties with the community. The development of social, professional, cultural and family ties does create community ties, irrespective of the manner in which the person has acquired said nationality. The interpretation of the criterion must thus be revised and, *a fortiori*, the group of people subjected to denationalisation legislation as well. In and of itself, the criterion of strong community ties is a valid one, because citizenship deprivation enables expulsion. Without it, governments would see themselves restrained by the prohibition to expel their own nationals, as enshrined in, among others, art 3 of *Protocol 4*.⁹³ From a security perspective, to denationalise an individual without subsequently expelling them does not make sense. The individual will still be able to stay on Belgian territory, albeit as a non-Belgian. From the preparatory works of recent legislative initiatives strengthening denationalisation legislation, we clearly learn that the goal is to ‘*lutter plus efficacement contre le terrorisme*’, which translates to ‘to fight more effectively against terrorism’.⁹⁴ If the underlying motivation is indeed the protection of national security and the fight against terrorism, the status of the individual is irrelevant. The most recent cases of denationalisation in Belgium teach us that, following a decision to deprive a

⁸⁹ *Cour d'Appel Antwerpen* [Antwerp Court of Appeal] Judgment App No 2016/AR/2072, 23 October 2018 (*‘Belkacem’*). Copy on hand with the author.

⁹⁰ *ibid.*

⁹¹ *Preliminary Question No 16/2018* (n 75) [A.1.3.].

⁹² *ibid.*

⁹³ *Protocol 4* (n 53) art 3.

⁹⁴ *Act to Reinforce the Fight against Terrorism* (n 5).

person of their nationality, the person is typically expelled from Belgium — though this is a separate measure.⁹⁵

Because citizenship deprivation potentially leads to expulsion from the territory, putting *ECHR* art 8 under pressure,⁹⁶ it would be wise to provide protection for this fundamental right in the measures leading up to the expulsion. After all, it would not be coherent policy to denationalise an individual who has strong ties with the national community — a scenario which could happen in Belgium because of the rigid pre-set legislative categories — to then see the expulsion decision blocked exactly because of the individual's strong community ties. Therefore, if the Belgian Government truly wants to implement a coherent counterterrorism policy, including a denationalisation policy, it would be wise to review the interpretation of the criterion 'strong community ties' and install a more realistic interpretation of community ties in the Belgian measure of deprivation, so as not to create a discrepancy between the interpretation of such ties under the measure of deprivation on the one hand, and expulsion as a consequence on the other. Because currently, this is the case. When looking at the ECtHR's case law on art 8 in expulsion cases, we see that it takes into account:

[T]he specific ties that these immigrants have forged with their host country, where they have spent the better part of their lives. They have received their education there, have established most of their social ties there and have developed their own identity there. Born or arrived in the host country because of the emigration of their parents, most often they have their main family ties there. Indeed, the only link some of these immigrants kept with their country of origin is that of nationality.⁹⁷

Or, in the case of *Mehemi v France*:

The Court notes that the applicant was born in France, received all his schooling there and lived there until the age of 33, before the permanent exclusion order was enforced. His parents and his four brothers and sisters live there, as do his wife and his three minor children, who were born in France and have French nationality ... Moreover, it has not been established that the applicant had links with Algeria other than his nationality.⁹⁸

⁹⁵ The case of Malika El Aroud and the case of Fouad Belkacem. For Malika El Aroud, see: *Cour d'Appel Bruxelles* [Brussels Court of Appeal] Judgment App No 2014/AR/267, 30 November 2017 ('*El Aroud*'); Judgment App No 217 248 (Immigration Appeal Court, 21 February 2019). Copies of these decisions are on hand with the author. For Fouad Belkacem, see: *Belkacem Case* (n 89). Concerning his expulsion, there has not yet been a judgment since he is currently still detained in Belgium. The State-Secretary for Immigration has nonetheless multiple times stressed that he would do everything in his power to arrange expulsion to Morocco.

⁹⁶ *ECHR* (n 7) art 8.

⁹⁷ The original text reads:

S'ajoutent toutefois à ces différents critères, les liens particuliers que ces immigrés ont tissés avec leur pays d'accueil où ils ont passé l'essentiel de leur existence. Ils y ont reçu leur éducation, y ont noué la plupart de leurs attaches sociales et y ont donc développé leur identité propre. Nés ou arrivés dans le pays d'accueil du fait de l'émigration de leurs parents, ils y ont le plus souvent leurs principales attaches familiales. Certains de ces immigrés n'ont même conservé avec leurs pays natal que le seul lien de la nationalité.

Benhebba v France (European Court of Human Rights, Third Section, Application No 53441/99, 10 July 2003) 33 ('*Benhebba*') [tr author].

⁹⁸ *Mehemi v France* (European Court of Human Rights, Chamber, Application No 85/1996/704/896, 26 September 1997) 11 [36].

In *Biao v Denmark*, the ECtHR rephrased its holding in *Abdulaziz, Cabales and Balkandali v United Kingdom* ('*Abdulaziz*'), stating that:

[T]here are in general persuasive social reasons for giving special treatment to those who have strong ties with a country, whether stemming from birth within it or from being a national or long-term resident.⁹⁹

This demonstrates that the ECtHR does not attach much weight to the method of acquisition, but rather to the ties with the community one possesses.

There is a discrepancy between the interpretation of community ties by the ECtHR in its art 8 case law on expulsion, and the Belgian authorities in the targeting of their deprivation powers. Although it concerns different acts, an expulsion and deprivation of citizenship, the former is almost always followed by expulsion, which in turn is taken into account as a consequence of citizenship deprivation in the ECtHR's evaluation under art 8. It therefore does not make sense to interpret the same concept differently under measures so closely connected. On the other hand, the ECtHR's current interpretation of art 8 in the context of citizenship deprivation seems problematic, because the Court only evaluates the impact on the individual's community ties when considering the consequences of citizenship deprivation, as the case of *Said Abdul Salam Mubarak* demonstrated.¹⁰⁰ Instead, the Court should evaluate this in the step prior; the classification of persons eligible for citizenship deprivation. People with strong roots in the national community should not be subjected to citizenship deprivation in the first place. Firstly, because this enables situations like the Belgian example, where a 'wrong' group of people is subjected to the measure. Since 'community ties' are not considered at this level, a subsequent expulsion decision can easily be blocked because of the (previously improperly or not considered) individual's art 8 ties. Having the ECtHR consider community ties in the measure potentially leading up to expulsion, might avoid such situations at the national level. The Court's art 8 case law in expulsion cases demonstrates their realistic interpretation of community ties.¹⁰¹ Provided that this interpretation extends to citizenship deprivation's targeted group, such case law could provide redress for flawed situations at the national level. But more fundamentally, such a consideration would also indicate that the ECtHR acknowledges citizenship deprivation in all its consequences.

Expulsion is only *one* such consequence. Citizenship status grants access to many other rights and benefits, such as the right to politically participate or to enjoy certain economic and social benefits. Losing citizenship status entails losing these rights and benefits. By disregarding these consequences, the ECtHR has not only reduced art 8 to a mere expulsion protection — something that this right was not intended for — but it has also disregarded the 'private life' in the 'right to private and family life'. Expulsion will indeed put an individual's family life in jeopardy (their private life as well), but it is wrong to assume one's art 8 rights are not affected when expulsion is off the table: private life — as democratic agency, employment availability and public service — is disrupted and, ultimately, preserved only for the citizen.

⁹⁹ *Biao v Denmark* (2017) 64 EHRR 1, 60 [OH-29] ('*Biao*'); *Abdulaziz v United Kingdom* (1985) 7 EHRR 471 505–6 [88] ('*Abdulaziz*').

¹⁰⁰ *Abdulaziz* (n 99) 495 [60].

¹⁰¹ *Benhebbba* (n 97) 11.

V THE PROHIBITION OF DISCRIMINATION

Although the ECtHR does not consider citizenship deprivation as an explicit discrimination issue, nationality legislation is a field of law where many ‘differences’ are installed. For example, the *CBN* installs a difference between children who are *born* Belgian as a consequence of the Belgian nationality of their parents versus children who *became* Belgian as a consequence of acquiring Belgian nationality from their parents later in life.¹⁰² Or, a difference between children who *acquired* the Belgian nationality on the basis of *CBN* art 11 bis,¹⁰³ versus those who *acquired* it based on *CBN* art 12.¹⁰⁴ Other differences, such as a difference between single and dual nationals are installed as well,¹⁰⁵ although this difference can be justified by the idea that single nationals would become stateless when subjected to deprivation. Alternatively, consider the difference between two groups of dual nationals: one unable to give up their second nationality, while the other is able to do so. The first group is capable of protecting themselves from the realities of citizenship deprivation.¹⁰⁶ One can wonder whether states may, under the general principle of the prohibition of discrimination, distinguish between different types of nationals. Evidently, installing such differences does not necessarily imply that this constitutes discrimination in the legal sense. The following paragraphs will examine how the ECtHR evaluates such a difference from the point of view of the prohibition of discrimination.

This article will not address all the differences installed by Belgian nationality legislation. It will instead focus on a very specific one: the one installed between children *born* Belgian as a consequence of the Belgian nationality of their parents versus children who *became* Belgian as a consequence of acquiring Belgian nationality from their parents later in life.¹⁰⁷ This provision installs a difference in treatment between children, not on the basis of their own character or behaviour, but on the basis of the status of their parents. Based on the parent’s status, an assumption is then made about the *child’s* connectedness with the national community, to which major consequences are tied. Not only is such a provision questionable from the idea that a person is but the master of their own faith, but from a legal point of view, one can wonder whether this difference is maintainable from the perspective of the prohibition of discrimination? What protection is offered by the *ECHR* system for people subjected to such an installed difference? And is such a difference maintainable from the perspective of the prohibition of discrimination?

A *Comparability of the Different Categories*

Equal protection is, of course, only granted to people who are in equal positions. Therefore, a necessary first question to examine is whether the different categories of nationals are comparable in situation. As mentioned, denationalisation in its

¹⁰² *CBN* (n 5) art 8(1) 1°, 12, 23–23/2(1).

¹⁰³ *ibid* art 11 bis.

¹⁰⁴ *ibid* art 12.

¹⁰⁵ See *CBN* (n 5) art 23(1), 23/1(2), 23/2(2).

¹⁰⁶ See Wautelet (n 61).

¹⁰⁷ *CBN* (n 5) art 8(1) 1°, 12, 23–23/2(1).

current form is mainly used as a counterterrorism tool.¹⁰⁸ This is reflected quite clearly not only in states' legislation, but more particularly in the preparatory works. For example, the name of the 2015 Belgian legislative amendment to the CBN is called *Visant à renforcer la lutte contre le terrorisme*, in English: *Act to Reinforce the Fight against Terrorism*.¹⁰⁹ In the preparatory works, it reads that the act was adopted to '*lutter plus efficacement contre le terrorisme*', which translates to 'to fight more effectively against terrorism'.¹¹⁰ From the perspective of national security, individuals born into a nationality, and individuals who acquire this later in life, seem to find themselves in a comparable situation. The argument that those who acquired nationality at birth pose less of a threat to their country than those who acquired nationality by naturalisation or conferral is questionable. Consequently, one can argue they are entitled to equal treatment, unless otherwise objectively justified.

B Objective Justification

Two cases are relevant when discussing the objective justification for the installed difference: *Genovese v Malta*¹¹¹ and *Biao v Denmark*.¹¹² Although the case of *Genovese v Malta* did not concern denationalisation as such, the ECtHR installed an important rule regarding the treatment of different types of nationals. The applicant was a child born out of wedlock of a British mother and a Maltese father.¹¹³ The applicant's mother filed a request for her son to be granted Maltese citizenship, after establishing with a paternity test that the said father was indeed the father of the child.¹¹⁴ The application was rejected at first instance, because Maltese citizenship could not be granted to an illegitimate child whose mother was not Maltese.¹¹⁵ *A contrario*, had the child been born in wedlock and would it thus not have been considered 'illegitimate', it would have acquired Maltese citizenship.¹¹⁶ The Court ruled that such a law was discriminatory because the applicant was in a situation analogous to that of children born from married parents, one of whom was a foreigner.¹¹⁷ The argument that children born in wedlock had a link with their parents resulting from the marriage, which supposedly was absent for children born out of wedlock, was put aside by the Court.

However, it is precisely a distinction based on such a link which art 14 of the *Convention* protects against. The status of an illegitimate child derives from the fact that his or her parents were not married at the time of their child's birth. It is therefore a distinction based on such a status which the *Convention* prohibits, unless it is otherwise objectively justified.¹¹⁸

¹⁰⁸ Zedner (n 1) 222. See, eg, the preparatory works of the 2015 legislative amendment to the CBN (n 5), which was introduced immediately after the attacks on the headquarters of the satirical journal, Charlie Hebdo, in Paris on 7 January 2015: *Act to Reinforce the Fight against Terrorism* (n 5). See also (n 5).

¹⁰⁹ *Act to Reinforce the Fight against Terrorism* (n 5).

¹¹⁰ *ibid* 4.

¹¹¹ *Genovese v Malta* (2014) 58 EHRR 25 ('*Genovese*').

¹¹² *Biao* (n 99).

¹¹³ *Genovese* (n 111) 704 [8].

¹¹⁴ *ibid*.

¹¹⁵ *ibid* 704 [14].

¹¹⁶ *ibid*.

¹¹⁷ *ibid* 711 [45].

¹¹⁸ *ibid* 711 [46].

In other words, the ECtHR ruled that no distinction ought to be tolerated between child and parent on the basis of the latter's nationality acquisition status, unless objectively justified. Such was not the case here.¹¹⁹

The same reasoning can be applied to circumstances such as a law that installs a difference between those born with a nationality and those who acquire nationality, an example of which is the *CBN*. As highlighted above, the *CBN* promotes a difference between those who are born with Belgian nationality at birth as a result of having Belgian parents, and those who acquire it later as a result of a parent obtaining Belgian nationality.¹²⁰ The first can never be deprived of their nationality under Belgian law.¹²¹ The second category *can* be deprived of their nationality, provided they possess a second nationality, so as not to render them stateless.¹²² The difference installed is based on the mode of acquisition of their nationality, which in turn is based on the status of their parents: if the parent possesses the Belgian nationality at the time of the child's birth in the sense of *CBN* art 8, the latter will be protected against the possibility of deprivation. If the parent was a foreigner (resident on the Belgian territory) at the time of the child's birth, the latter will be subjected to the deprivation possibility (if they acquired Belgian nationality in the first place according to *CBN* art 12). The Belgian Constitutional Court justifies this legislative position by contending that the first group has stronger community ties with their country, considering their descent from Belgian parents.¹²³ This group is protected from denationalisation by the supposed importance of these 'ties'; a criterion used to justify the legislative position regardless of a person's actual ties to Belgium. In contrast, being born in another country suffices in this context to quash this criterion, regardless of any acquisition of Belgian citizenship or any 'genuine' ties. The ECtHR on the other hand, does not attach much weight to the method of acquisition, but rather to the actual ties with the community one possesses. In *Biao v Denmark*, the ECtHR rephrased its holding in *Abdulaziz*, stating that:

[T]here are in general persuasive social reasons for giving special treatment to those who have strong ties with a country, whether stemming from birth within it or from being a national or long-term resident.¹²⁴

In light of this case law, the difference installed between nationals who are born into a nationality because of their parents being nationals at time of birth and those who acquired said nationality as a consequence of its acquirement by one of their parents cannot be maintained. Justifying protection from denationalisation for the first category on the basis of having stronger community ties seems invalid. Where

¹¹⁹ *ibid* 711 [45]. According to the Court

the applicant was in an analogous situation to other children with a father of Maltese nationality and a mother of foreign nationality. The only distinguishing factor, which rendered him ineligible to acquire citizenship, was the fact that he had been born out of wedlock.

¹²⁰ *CBN* (n 5) art 8(1) provides that a child is Belgian by birth if they are born from Belgian parents. Article 12 provides that a child which has not yet reached the age of eighteen, will acquire Belgian nationality if one of its parents voluntarily acquires or reacquires the Belgian nationality, provided the child has its principle residence in Belgium.

¹²¹ *CBN* (n 5) arts 23–23/2.

¹²² *ibid*.

¹²³ *Preliminary Question No 16/2018* (n 75) [B.6]–[B.7].

¹²⁴ *Biao* (n 99) 60 [OH-29]; *Abdulaziz* (n 99) 505–6 [88].

the ECtHR seems to fail in offering protection under art 8 *ECHR*, it adopts a more nuanced position.

C *Legitimate Aim and Proportionality*

It can be questioned whether there is a legitimate aim to install such differences and whether the measures taken to attain such aim are proportional

It is generally accepted that the fight against terrorism constitutes a legitimate aim. National security is also explicitly mentioned in most *ECHR* articles allowing for restrictions.¹²⁵ However, the question remains what the link is between deprivation of nationality and counterterrorism? States adopt and adapt nationality legislation under the notion of national security, but is this an effective counterterrorism instrument? Proportionality entails that restrictions are permissible if they are necessary in pursuit of one of the legitimate aims stated.¹²⁶ If an instrument, which restricts a fundamental right, is incapable of attaining such aim, it will not be necessary and proportional. As already explained, depriving someone of their nationality allows states to expel former nationals who they deem to be a threat. Nevertheless, one may call into question the capability of such measure to protect national security. First of all, as the case of *Ramadan* made clear, expulsion is not an automatic consequence of deprivation of nationality.¹²⁷ This decision remains at the discretion of the expelling state. The individual may, in theory, still remain in the territory of the state of their former nationality. What the individual's status is at that point, national or non-national, is of little importance from the viewpoint of national security. Furthermore, even if expulsion would systematically be applied, would this, especially in a European Schengen-zone with no internal borders, really prevent an individual from re-entering the territory? The problem of illegal migration demonstrates as no other that borders are porous.

Secondly, where behaviour is subjected to denationalisation, it will generally also be covered by criminal law. For example, in Belgium, art 23 of the *CBN* provides denationalisation for conduct that represents 'serious short fallings of one's duties as a Belgian'.¹²⁸ From the few cases of denationalisation there have been in Belgium, it seems that this provision is generally applied in cases of terrorism, which is — naturally — also governed by criminal law.¹²⁹ The question then remains what the added value of the deprivation measure is; 'removal' by means of formal criminal justice procedures and imprisonment already separates the individual from society. One can wonder whether depriving an individual of their citizenship constitutes nothing more or nothing less than a purely symbolic punishment? An expression that a state wishes to cut its ties, legal and moral, with a particular citizen because they are no longer 'worthy'. From the perspective of national security however, the symbolic characteristic of the measure is insufficient to provide in the aim pursued.

¹²⁵ See, eg, *ECHR* (n 7) art 8(2), 10(2).

¹²⁶ David Harris, Michael O'Boyle and Colin Warbrick, *Law of the European Convention on Human Rights* (Oxford University Press 2018) 12; Conor Gearty, 'The *European Convention on Human Rights* and the Protection of Civil Liberties: An Overview' (1993) 52(1) *Cambridge Law Journal* 89.

¹²⁷ *Ramadan* (n 11) 113 [56].

¹²⁸ *CBN* (n 5) art 23.

¹²⁹ See, eg, the cases of *El Aroud* (n 95); *Belkacem* (n 95).

Proportionality, evidently, also entails that a balance must be struck between the general interest, the prevention or countering of terrorism and the individual's interests.¹³⁰ In this regard, the lapse of time between the deprivation measure and the conferral or acquiring of citizenship is important.¹³¹ The consequences on one's private and family life will be greater when a person has lived there for 15 years, rather than those who have lived there for three. How this time limit is determined is unclear, as no advice has been given by the ECtHR on its determination. However, the effective community ties doctrine from *Biao v Denmark* might overcome this problem of proportionality altogether.¹³² This is because the relevant matter at stake here, is that consideration should be given to people who have lived in a certain country for many years and have built strong ties with its community. If countries would grant protection to this category of nationals, instead of 'nationals *born* as nationals' (who may very well fall under the first category as well, granted they possess effective community ties), this particular issue of proportionality would dissolve.

To conclude, in light of the ECtHR jurisprudence, the difference installed between children born Belgian and those who became Belgian, because of the status of their parents, seems difficult to maintain.

VI CONCLUSION

Citizenship deprivation is increasingly being used as a security tool. From recent legislative initiatives, such as in Belgium, we learn that denationalisation legislation is strengthened in order 'to fight more effectively against terrorism'.¹³³ This article considered the impact on the fundamental rights of the individuals targeted by such legislation. What protection is offered for them by the *ECHR* system?

The ECtHR evaluates the issue of citizenship deprivation under art 8 of the *ECHR*. As was demonstrated by the judgment of *Ramadan*, the Court considers art 8 to be mainly a protection against expulsion.¹³⁴ When expulsion is off the table, as was the case in *Ramadan*, the Court does not seem to have an issue with citizenship deprivation (even if this leads to statelessness).¹³⁵ In other words, the examination of the impact of the decision on the right to private and family life only happens when a subsequent expulsion decision is taken, as was the case in the decision of *Said Abdul Salam Mubarak*.¹³⁶ At such a point, the ties the individual possesses with the community in question, as well as their country of origin, are weighed in the proportionality test.¹³⁷ However, such case law ignores the impact of citizenship deprivation on a person's private life in the event that expulsion does not happen. Expulsion is only *one* consequence of the former, together with many other rights and benefits which are dependent on citizenship status. The Belgian situation demonstrates policy discrepancies, as it allows for

¹³⁰ See, eg, *Klass v Germany* (1979) 2 EHRR 214, 237 [59].

¹³¹ In its landmark Rottman ruling, the European Court of Justice stressed the importance of 'the lapse of time between the naturalization decision and withdrawal decision': *Rottman v Fraistaat Bayern* (C-135/08) [2010] ECR 1467, 1490 [56].

¹³² *Biao* (n 99) 45–6 [138]–140].

¹³³ *Act to Reinforce the Fight against Terrorism* (n 5).

¹³⁴ *Ramadan* (n 11) 113 [56].

¹³⁵ *ibid.*

¹³⁶ *Said Abdul Salam Mubarak* (n 15) 18–23.

¹³⁷ *ibid* 22 [78].

the ‘wrong’ group of people to be subjected to citizenship deprivation. Since ‘community ties’ are not considered or wrongly considered at this level, a subsequent expulsion decision can easily be blocked because of the (previously not considered) individual’s art 8 ties. Experience teaches us that subsequent expulsion decisions will generally happen, because denationalising an individual without subsequently expelling them will allow the individual to stay on the territory, albeit as a non-citizen. However, from security perspectives, the citizenship status of an individual is irrelevant. Having the ECtHR consider the applicant’s community ties already at the level of the measure potentially leading up to expulsion, might avoid such discrepancies. The Court’s established case law on art 8 in the context of expulsion has taught us that they hold a ‘realistic’ view of community ties — unlike the Belgian authorities — which they could then extend to the level of the deprivation decision.

Although the ECtHR does not consider citizenship deprivation as an explicit discrimination issue, nationality legislation is a field of law where many differences are installed. This opens the door for an examination under art 14 *ECHR*, most often in combination with art 8 *ECHR*. For example, Belgian legislation installs a difference between children *born* Belgian as a consequence of being born to Belgian parents, and children who *became* Belgian as a consequence of their parents acquiring Belgian citizenship.¹³⁸ Is such a difference maintainable from the perspective of the prohibition of discrimination? From analysing the ECtHR’s case law we learn that it is not. No objective justification could be found for treating both categories of Belgian nationals differently. Unlike the *ECHR*’s (current) protection in the context of private and family life,¹³⁹ its case law on the prohibition of discrimination in the context of nationality issues seems to offer more redress for the individuals targeted by denationalisation policies.

¹³⁸ *CBN* (n 5) arts 8(1) 1°, 12, 23–23/2(1).

¹³⁹ *ECHR* (n 7) art 8.