

NOU 2015:4 *Tap av norsk statsborgerskap* [Official Norwegian Report 2015:4 Loss of Norwegian nationality]

Report from the examining body appointed by the Ministry of Children, Equality and Social Inclusion on 5 September 2014

Submitted to the Ministry of Children, Equality and Social Inclusion on 24 March 2015

2 The main points of the report

2.1 Summary

2.1.1 General overview

Nationality connects legal and sociological bonds between states and individuals. The legal effects of nationality will include the fact that any person with Norwegian nationality has an unconditional right to legal residence in Norway. Such persons will also have the right to vote in political elections, as well as the right to hold a post in our three branches of government as, respectively, a member of the Norwegian national assembly (the *Storting*), cabinet minister or supreme court judge. Similar requirements for nationality also apply to some other posts. Compulsory military service is the most explicit of the legal obligations resting on Norwegian nationals.

In Norway, nationality is acquired pursuant to the rules and provisions under the Norwegian Nationality Act. This Act correspondingly regulates the loss and revocation of nationality. Currently no provisions in the Norwegian Nationality Act or other legislation regulate loss of Norwegian nationality due to serving in a foreign military force or due to causing harm to the nation's vital interests. If such rules are to be introduced, this must be done in accordance with the legal framework laid down by the Norwegian Constitution or in international conventions that Norway has ratified. A summarising overview of the legal framework follows immediately below in Section 2.1.2.

Within the framework that is formed by the Constitution and international conventions, it will be legally feasible to change the current rules and provisions and introduce rules and provisions governing the loss of Norwegian nationality as a consequence of serving in a foreign military force or causing harm to the nation's vital interests. Whether this framework *should* be fully exploited is a completely different matter. To some extent the assessment of which rules and provisions one *should* adopt in a society hinges on legal arguments, but this assessment will also comprise arguments and considerations of a sociological, societal and foreign-policy nature. A summarising overview of this assessment and its conclusions will be given in Section 2.1.3 below.

2.1.2 Summary: The legal framework

The legal framework established by the Constitution and international conventions in this field forms the external framework for the assessment. Within this framework it is legally possible to adopt rules and provisions relating to the loss of Norwegian nationality. If one should step outside the bounds of the legal frameworks, any decisions made may be found invalid or could bring comprehensive compensatory liabilities upon the public authorities.

The Constitution and the international conventions specify some absolute requirements for rules and provisions relating to the loss of Norwegian nationality for serving in a foreign military force and in the event of causing serious harm to the nation's vital interests. First, pursuant to Article 7 of the European Convention on Nationality of 1997, a state may provide for the loss of nationality for serving in a foreign military or for committing acts seriously prejudicial to the nation's vital interests if the person has another nationality. It is thus a requirement in the formulation of the national rules that the person at risk of losing his or her nationality will not become stateless.

Second, pursuant to Article 7 of the European Convention on Nationality of 1997, minors may not lose their nationality as a consequence of their parents serving in a foreign military force or causing harm to the nation's vital interests. Even if a minor may lose its nationality due to the actions of its parents in other contexts, such as when parents actively seek another nationality, states which have acceded to this Convention are prevented from removing the nationality from minors when one or both parents have served in a foreign military force or have caused harm to the nation's vital interests.

Third, Article 7 and Article 8 of the UN Convention on the Rights of the Child, section 8 of the European Convention on Human Rights, and Article 102 and Article 104 of the Norwegian Constitution lay down some legal impediments to depriving minors of their nationality if the child in question has served in a foreign military force or caused harm to the nation's vital interests. It has not been legally established whether these impediments must be understood as absolute, i.e. whether a minor cannot under any circumstance lose its nationality due to such actions. Even if this has not been legally resolved, there is reason to believe that international bodies and the Norwegian Supreme Court will deduce a strong, perhaps absolute, protection for minors in such situations.

Fourth, it follows from Article 98 of the Norwegian Constitution and a number of convention provisions that rules and decisions made by the public authorities must not be formulated in a discriminatory way. This means that rules and provisions relating to the loss of nationality in general may not include or concern persons because of their ethnicity, religious conviction, gender, skin colour, sexual orientation or similar. Rather, the rules and provisions must be formulated in such a way that they do not open for any unfair or disproportionate differential treatment of some groups in society.

Fifth, rules relating to the loss of nationality for serving in a foreign military force and causing harm to the nation's vital interests must be considered to be "punishment" pursuant to the Norwegian Constitution and the European Convention for the Protection of Human Rights. There are a number of reasons for this. The key in this assessment is the argument that loss of nationality does not have a direct causal relationship to the act the person in question has committed, while the reaction is of a very serious and lifelong nature.

That the loss of nationality is to be considered as punishment in these situations means that the rules and provisions in the Constitution and the international conventions relating to punishment lay down clear guidelines for the formulation and execution of any rules and provisions on loss of nationality after serving in a foreign military force or causing harm to the nation's vital interests. In brief, the requirements may be listed as follows. Penal provisions must be formulated clearly and precisely so that each individual can comply with the rules. Provisions must not be given retroactive effect. The individual must be considered innocent until proven guilty. Any case against an individual must be conducted in the ordinary courts according to public and fair due process of law, where the individual in question will have the right to enter Norway to defend himself/herself in the criminal case. Criminal proceedings cannot be instituted against an individual for the same action more than once,

which means that loss of nationality must be included in the court's calculation of the concrete sentence.

Finally, pursuant to Article 8 of the European Convention for the Protection of Human Rights and Article 102 of the Constitution, there is a right to respect for private and family life. From these provisions it may be deduced that if an individual has strong connections to the realm, he or she cannot lose his or her Norwegian nationality against his or her will. However, this impediment has a discretionary nature in the sense that the courts must make concrete decisions relating to the criterion "connections to the realm" in cases where loss of nationality may be relevant. The right to respect for private and family life may therefore constitute legal impediments to the loss of nationality for some persons, but not for others.

2.1.3 Summary: Assessment and recommendation

Within the legal framework presented in the preceding section, rules and provisions may be given for the loss of nationality after serving in a foreign military force or causing serious harm to the nation's vital interests. The assessment should therefore start with whether the legal framework that gives room to act on this matter, as explained in the preceding section, *should* be fully exploited.

In this assessment, some arguments and considerations are of a legal nature, while other arguments are of a sociological, societal and foreign-policy nature. The assessment is especially grounded on the consequences a possible change in the rules and provisions may have in preventing individuals from serving in a foreign military force or causing harm to the nation's vital interests, as well as the consequences for the integration process in general, for the danger of terror and radicalization, and for various foreign-policy implications.

In this assessment it is pointed out that the general deterrent or individually deterrent effects of such a change of the rules and provisions will most likely be moderate. Serving in a foreign military force or causing harm to the nation's vital interests will normally be linked to a deep religious or ideological persuasion, where any threat of punishment or loss of nationality will probably not have any noticeable deterrent effect. To some extent it may be envisioned that rules and provisions relating to loss of nationality may prevent individuals who intend to carry out acts of terror in Norway from entering the country, thus preventing acts of terror in Norway. The danger is, however, greater that persons who have lost their nationality either cannot be transported out of Norway ("unreturnable persons") or that they – after being transported out – will constitute an increased danger of terror against Norwegian interests abroad both as a stage in acts of revenge and because they are familiar with Norwegian conditions and interests. There is also the danger that the state the persons are returned to will counter the deportation with foreign-policy reactions against Norway, primarily because in serving in a foreign military force or causing serious harm to the nation's vital interests the persons transported out of Norway are not very welcome in most parts of the world. Thus loss of nationality may be perceived as a game of "Old Maid" among national states, with states aiming to be the first to deprive these persons of their nationality.

In many situations it may also appear to be a severe reaction to deprive someone of their nationality for participation in a foreign military force, both because it will often be young persons who participate in such forces for ideological and religious reasons, and because foreign forces not rarely might have the support of the Norwegian people, for example because they are fighting for freedom. This makes it difficult to distinguish between conflicts that justify the loss of nationality and those that should not come under such rules and provisions. It will also be difficult to formulate general rules which distinguish between

various conflicts without this differentiation being perceived as biased or disproportionately differential treatment, or being perceived as a stage in a political strategy.

These points of departure nevertheless appear in a different light if rules and provisions relating to loss of nationality are connected to concrete acts committed by an individual, whether as an act of war or as a civilian. Persons who serve in a foreign military service may for example be guilty of genocide or war crimes. If so, these persons have undoubtedly stepped over a threshold which far exceeds general warfare. Loss of nationality should therefore be connected to the person's acts, not to the participation in a foreign military force *per se*.

The same applies to the persons who in another way have caused serious harm to national interests through acts of terror or attacks on state authorities or the state government. This could for example be persons who first and foremost utilise their Norwegian or other European nationality to build terror networks or carry out acts of terror in Europe. Such persons may normally be resident outside the Schengen area, but would use their Norwegian passport as an entry ticket to the Schengen area with the intention of carrying out acts of terror. If such situations were to arise, there should be sufficient authority under the law to remove these persons of their Norwegian nationality.

Bearing this assessment in mind, it is recommended that rules and provisions should be made relating to the loss of nationality for those who have caused serious harm to the nation's vital interests, but not as a consequence of serving in a foreign military force *per se*. It is recommended that loss of nationality should be connected to section 131 of the Norwegian General Civil Penal Code of 2005, relating to acts of terror, as well as the rules and provisions concerning crimes against the state which may lead to imprisonment for 21 years, in Chapter 17 of the Norwegian General Civil Penal Code from 2005, and the rules and provisions concerning genocide, war crimes and crimes against humanity which may lead to imprisonment for 21 years or more, in Chapter 16 of the Norwegian General Civil Penal Code of 2005.

Due to the limitations laid down by the UN Convention on the Rights of the Child and the Norwegian Constitution, it is recommended that the rules and provisions should be formulated so that no person can lose his or her nationality based on acts committed before the person in question has turned 18 years of age.

It is proposed that a provision with such content should be included in a new section 26a of the Norwegian Nationality Act. Additionally, it is proposed that the possibility of losing nationality as a loss of rights pursuant to the Norwegian General Civil Penal Code should be embedded in section 29 first paragraph f) of the Norwegian General Civil Penal Code of 2005.

2.2 Chapter overview

The report is divided into five parts. Part I is an introduction to the report, Part II offers an overview of the current law, Part III proposes assessments and recommendations, Part IV highlights financial, administrative and other consequences of amending legislation and Part V offers proposals for amendments to the law with remarks.

Part I *Introduction of the report* comprises Chapter 1, which provides a brief introduction to the mandate and work of the report. The present Chapter 2 provides a summary of the report, as well as this chapter overview.

Part II of the report, *Current Law*, includes Chapters 3 to 8. This part presents the current law in Norway in the field of nationality law and in other fields impacting nationality law. There is also an overview of foreign law relating to such issues as loss of nationality due to service in a foreign military force or due to causing harm to the nation's vital interests.

Chapter 3 examines in more detail the current legal situation pursuant to the Norwegian Nationality Act. The introduction points out the rights and obligations that ensue from having Norwegian nationality. The subsequent sections examine the current rules and provisions governing the acquisition and loss of nationality. The administration of and case processing relating to the Norwegian Nationality Act are also explained. The chapter closes with an explanation of the legal consequences of losing one's nationality.

Chapter 4 gives a brief overview of today's rules relating to criminal liability after serving in a foreign military force and for causing harm to the nation's vital interests. This chapter explains in more detail the proposal from the Ministry of Justice and Public Security on criminalising participation in a foreign military force.

Chapter 5 outlines Norway's international obligations in the field of nationality law. The chapter examines convention provisions directly concerning nationality and which may have impact on any future rules relating to loss of nationality for serving in a foreign military force or causing harm to the nation's vital interests. The chapter devotes particular attention to the European Convention on Nationality from 1997 and the UN Convention on the Rights of the Child from 1989, but also highlights other convention obligations in the field of nationality law.

Chapter 6 outlines the general international obligations that impact national rules and provisions relating to loss of nationality, but without nationality being directly regulated in the convention provisions. Particular mention is made of the European Convention on Human Rights from 1950, the International Covenant on Civil and Political Rights from 1966 and the UN Convention on the Rights of the Child, but other conventions are also mentioned. This chapter in particular refers to how international provisions on punishment may influence rules and provisions relating to loss of nationality. A similar examination is undertaken of the international provisions to protect against discrimination and to protect privacy and family life.

Chapter 7 gives an overview and assessment of the legal importance of the Norwegian Constitution in the nationality law field. Brief mention is made of provisions in the Constitution which directly regulate the legal effects of nationality. Furthermore, an assessment is made of which legal impediments are established by some key constitution provisions for rules relating to loss of nationality. Similarly, as the protection provided by conventions, as explained in Chapter 6, the Constitution lays down rules and provisions about punishment, fair legal due process and the prohibition against retroactive legislation in Articles 95-97. Reference is also made to Article 98 with protection against discrimination, as well as protection of private and family life in Article 102 and Article 104.

Chapter 8 provides an overview of foreign law relating to the issue of loss of nationality after serving in a foreign military force or due to causing harm to the nation's vital interests. This chapter refers to rules and experiences from other Western European countries which as of today have rules and provisions for the loss of nationality, either due to serving in a foreign military force or due to causing harm to the nation's vital interests.

Part III *Assessment and recommendation* comprises Chapters 9 and 10. Here an assessment is made of the various considerations that have a bearing on the issue of how far one should go in laying down rules and provisions about the loss of nationality. Furthermore, the issue of

which situations and which individuals should come under such rules and provisions is discussed, as is where in the legislation they should be placed and how they should be formulated.

Chapter 9 offers a broad assessment of whether rules and provisions should be introduced for the loss of nationality after serving in a foreign military force or causing harm to the nation's vital interests. The introduction draws conclusions from Part II as to which legal framework the Constitution and international convention obligations impose on Norway. The more detailed assessment of whether rules and provisions should be made for the loss of nationality in these situations and if so, how, must be undertaken within the legal framework presented in Part II. In Chapter 9, a range of differing considerations are referred to, including considerations of a legal, sociological, societal and foreign-policy nature. The chapter concludes with the recommendation that rules and provisions should be introduced relating to loss of nationality in the event of causing serious harm to the nation's vital interests, but not for serving in a foreign military force *per se*.

Chapter 10 takes a more detailed stance on which concrete situations ought to lead to loss of nationality and who should come under these rules and provisions. Finally, in this chapter an assessment is made of the actual placement in legislation and the formulation of a provision relating to the loss of nationality due to causing harm to the nation's vital interests.

Part IV has one chapter, Chapter 11, dealing with financial and administrative consequences of the proposal.

Part V comprises Chapters 12 and 13. In Chapter 12, some remarks are made relating to the proposed legislation. In Chapter 13 the concrete legislation proposals are provided.