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Pending Case C-438/14

**Nabiel Peter Bogendorff von
Wolffersdorff –**

**Or is it Peter Mark Emanuel Graf von
Wolffersdorff Freiherr von Bogendorff?**

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Pending Case C-438/14 Nabiel Peter Bogendorff von Wolffersdorff – Or is it Peter Mark Emanuel Graf von Wolffersdorff Freiherr von Bogendorff?

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Abstract

The Court of Justice of the European Union should decide in the case *Bogendorff von Wolffersdorff* that Articles 18 TFEU and 21 TFEU have to be interpreted as meaning that the authorities of a Member State are obliged to recognise the change of name of a national of that State if he is at the same time a national of another Member State and has acquired in that Member State during habitual residence any change of name in accordance with the law of that Member State.

Keywords

EU citizenship, Recognition, Names, Titles of nobility, dual nationality

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Contents

1	Introduction	5
2	Facts of the case	5
3	General Principle of Recognition of Names	6
4	Exceptions to the general rule	7
5	Differences between the pending case and previous case law	8
6	Application of the case law on the pending case	9
	6.1 'Future Substantial Link'	9
	6.2 Dual-Nationality and Articles 18 and 21 TFEU	10
	6.2.1 Restriction of Article 18 TFEU	10
	6.2.2 Restriction of Article 21 TFEU	11
	6.3 Objective consideration	12
	6.3.1 Constitutional value	13
	6.3.2 Length of the Name	14
	6.3.3 Singular name change	14
	6.3.4 Abus de Droit	15
	6.4 Proportionality and least restrictive measure	16
7	Conclusion	16
	References	17

1 Introduction

"What's in a *name*? That which we call a rose by any other *name* would smell as sweet."¹ This famous sentence from *Romeo and Juliet* is still a matter of discussion in the Court of Justice of the European Union (CJEU). The issue is not a new one and many a convention has been created to deal with the law applicable to name and their recognition.² After already having had several opportunities to deal with the issue, once again a case concerning the recognition of names is pending at the Court: the case *Bogendorff von Wolffersdorff*.³ The CJEU will have here the opportunity to deal with and clarify several issues concerning civil status⁴ recognition and dual nationality. Advocate General Wathelet delivered his Opinion on the 14th of January 2016⁵ and though the author agrees on many points with him, certain issues should be elaborated on and remarked.

In this contribution first an overview of the facts of the pending case will be presented whereupon an overview of the applicable case law will follow. This case law will then be applied and discussed based on the facts of the pending case followed by the conclusion derived from this.

2 Facts of the case

According to the facts⁶ Mr. Bogendorff von Wolffersdorff was born 1963 as a German national in Karlsruhe as Nabil Bagadi. Following an adoption his family name was changed to Bogendorff von Wolffersdorff.⁷ After having lived in the United Kingdom (UK) since 2001 he became a British citizen by naturalization in 2004⁸ and changed his name to Peter Mark Emanuel Graf von Wolffersdorff Freiherr von Bogendorff.⁹ As the change of name was not part of the naturalization process¹⁰ it concerned a 'singular name change'.¹¹ In 2005 he moves back to Germany and asks in

¹ William Shakespeare, *Romeo and Juliet* (II, ii, 1-2).

² For example: ICCS Convention No. 4 on changes of surnames and forenames, signed in Istanbul on 4 September 1958; ICCS Convention No. 19 on the law applicable to surnames and forenames, signed in Munich on 5 September 1980; ICCS Convention No. 31 on the recognition of surnames, signed in Antalya on 16 September 2005.

³ *Request for a preliminary ruling from the Amtsgericht Karlsruhe (Germany) lodged on 23 September 2014 – Nabil Peter Bogendorff von Wolffersdorff* OJ C 462, 22.12.2014, p. 13–14.

⁴ Civil status is defined as "the legal identity of a natural person – based on his life events – for the State." DE GROOT, Gerard-René; DE GROOT, David A.J.G., *Civil status and the freedom of movement in the EU*, in: STUMPF, Cordula; KAINER, Friedemann; BALDUS, Christian (Eds.), *Privatrecht, Wirtschaftsrecht, Verfassungsrecht, Privatinitiative und Gemeinwohlorizonte in der europäischen Integration, Festschrift für Peter-Christian Müller-Graff zum 70. Geburtstag am 29. September 2015*, Nomos, Baden-Baden: 2015, pp. 1420-1426, p. 1420.

⁵ Opinion of AG Wathelet of 16 January 2016 in Case C-438/14 *Nabil Peter Bogendorff von Wolffersdorff v. Standesamt of the city Karlsruhe and Zentraler Juristischer Dienst of the city Karlsruhe*.

⁶ See para. 10-23 of the AG Opinion; see also in more detail in Dutch on:

http://www.minbuza.nl/binaries/content/assets/ecer/ecer/import/hof_van_justitie/nieuwe_hofzaken_inclusief_verwijzingsuitspraak/2014/c-zakenummers/c-438-14-verwijzingsbeschikking.pdf.

⁷ In the later change of name in the UK the first name 'Peter' and noble title 'Freiherr' were already included in the original name, but it does not follow from the facts whether they were included at the adoption.

⁸ At naturalisation he did not lose the German nationality and became therefore a dual British-German national.

⁹ <https://www.thegazette.co.uk/notice/L-57458-1018>.

¹⁰ It is not clear whether the name change took place before or after the naturalization, as in the UK also a foreigner can change his name. This name change as such is, however, not part of the naturalization process. UK Home Office, *Change of Name Guidance*, para. 1-2, p. 3, available on:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/404748/Align_Change_of_Name_Guidance_-_v1_0.pdf.

2013 the civil status registry in Karlsruhe to register his name acquired in the UK based on Article 48 EGBGB.¹² The civil status registry refused to do this based on several grounds, one being that it goes against the international public policy as the name contains titles of nobility and that it is too long.

The court in Karlsruhe having to rule on the case decided to refer a preliminary question to the CJEU being

“[a]re Articles 18 TFEU and 21 TFEU to be interpreted as meaning that the authorities of a Member State are obliged to recognise the change of name of a national of that State if he is at the same time a national of another Member State and has acquired in that Member State during habitual residence, by means of a change of name not associated with a change of family law status, a freely chosen name including several tokens of nobility, where it is possible that a future substantial link with that State does not exist and in the first Member State the nobility has been abolished by constitutional law but the titles of nobility used at the time of abolition may continue to be used as a part of a name?”

3 General Principle of Recognition of Names

The general principle that a person who has the nationality of more than one Member State can choose which of these Member State’s law on names to apply follows from the CJEU ruling *Garcia Avello*.¹³ The Court stated in that case that if a person who is a dual national has to live in both Member States of which he is a national under different surnames based on the law of the Member State where he is present this would be liable to cause serious inconvenience for those concerned at both professional and private levels.¹⁴ Considering the ‘immutability of surnames’ the Court stated that it is

“not indispensable to the point that it could not adapt itself to a practice of allowing children who are nationals of one Member State and who also hold the nationality of another Member State to take a surname which is composed of elements other than

¹¹ A singular name change means a change of name which is not linked to the change of another civil status like would be the case when acquiring or adding the name of the spouse or of the adopting parent or changing the name at naturalization to a more ‘native’ name.

¹² Article 48 EGBGB states: “Where the name of a person is subject to German law, that person can, by declaration before the Registrar of Births, Marriages and Deaths, choose a name that he or she obtained when he or she had habitual residence in another Member State of the European Union, where that name was registered in a register of civil status, unless this is manifestly incompatible with the fundamental principles of German law. The choice of name shall have retroactive effect from the date of the registration in the register of civil status of the other Member State, unless the person explicitly declares that the choice of name shall be effective for the future only. The declaration must be publicly certified or authenticated. Article 47 subarticles 1 and 3 shall apply *mutatis mutandis*.” Translation from: http://www.gesetze-im-internet.de/englisch_bgbeg/.

¹³ C-148/02 *Carlos Garcia Avello v. État belge* [2003] ECR I-11613 ; see also : DE GROOT, Gerard-René ; RUTTEN, Susan, *Op weg naar een Europees IPR op het gebied van het personen- en familierecht*, NiPR 2004 afl. 3, p. 273-282, p. 275; DUTTA, Anatol; FRANK, Rainer; FREITAG, Robert; HELMS, Tobias; KRÖMER, Karl; PINTENS, Walter, *Ein Name in ganz Europa – Entwurf einer Europäischen Verordnung über das Internationale Namensrecht*, StAZ 2/2014, p. 33-44, p. 38.

¹⁴ *Garcia Avello*, para. 36.

*those provided for by the law of the first Member State and which has, moreover, been entered in an official register of the second Member State.*¹⁵

This was further elaborated on in the case *Grunkin Paul*¹⁶ where the Court stated that the refusal by the German authorities to recognise and register the surname of a child established by another Member State could not be justified on the ground that a different connecting factor had been used resulting in a different applicable law as would have been the case under German law.¹⁷ This principle of a duty to recognise a name established in another Member State for a child was, in the case at hand, applied to the recognition of the name of the daughter of Mr. Bogendorff von Wolffersdorff, whose name – including the titles of nobility – was established according to UK law and has already been recognised by the German authorities.¹⁸

Therefore, a general principle of a duty to recognise a name established in another Member State has been established by the Court. However, as to nearly any rule, there are exceptions.

4 Exceptions to the general rule

Whereas there might be a general principle of recognition of a name established abroad, the only previous case at the CJEU where such a name contained a title of nobility was the case *Ilonka Sayn-Wittgenstein*.¹⁹ In that case the Austrian authorities refused to recognise²⁰ the part “Fürstin von” in the name “Fürstin von Sayn-Wittgenstein” acquired by adoption by an Austrian national in Germany because it contained a title of nobility which is prohibited by the Austrian Constitution.²¹ According to Austria the name should therefore be “Sayn-Wittgenstein”. This could be a “serious inconvenience” to the applicant as she had lived for 15 years in Germany using the name including the title of nobility. The Court stated that a person’s forename and surname are to be considered a constituent element of his identity and of his private life. Due to this they fall within the protection of Article 7 of the Charter and Article 8 ECHR.²² When proving her identity using her Austrian passport with the shortened name in Germany there would be a risk of a suspicion of false declaration due to the divergence of the names.²³ Due to this a restriction of Article 21 TFEU could be established.

Constitutional identity could, according to the Court be accepted as an objective consideration relating to public policy which could justify such a restriction.²⁴ According to the Austrian

¹⁵ *Garcia Avello*, para. 42.

¹⁶ C-353/06 *Stefan Grunkin and Dorothee Regina Paul* [2008] ECR I-07639.

¹⁷ *Grunkin-Paul*, para. 31; see also AG Wathelet in *Bogendorff von Wolffersdorff*, para. 73-75.

¹⁸ AG Wathelet in *Bogendorff von Wolffersdorff*, para. 16-19; decision of *OLG Dresden* of 6 July 2011, 17 W 0465/11.

¹⁹ C-208/09 *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien* [2010] ECR I-13693.

²⁰ More precisely said, it concerned a rectification of a previous incorrect recognition of the name.

²¹ Article 149(1) Bundes-Verfassungsgesetz jo. Vollzugsanweisung des Staatsamtes für Inneres und Unterricht und des Staatsamtes für Justiz, im Einvernehmen mit den beteiligten Staatsämtern über die Aufhebung des Adels und gewisser Titel und Würden of 18 April 1919, StGBI. 237/1919.

²² *Sayn-Wittgenstein*, para. 52; AG Wathelet in *Bogendorff von Wolffersdorff*, para. 57 and 80. See also the judgement of the European Court of Human Rights in Application No. 16213/90 *Burghartz v. Switzerland* of 22 February 1994, Series A No 280-B, p.28, para. 24.

²³ *Sayn-Wittgenstein*, para. 68-69.

²⁴ *Sayn-Wittgenstein*, para. 84-85.

Government, and accepted by the Court, the Law of abolition of nobility constitutes an implementation of the general principle of equal treatment which is also enshrined in Article 20 Charter.²⁵ The Court did not consider the objective to protect the principle of equal treatment by prohibiting any acquisition or possession or use of titles of nobility or noble elements as disproportionate.²⁶ Therefore was the non-recognition of the part “Fürstin von” in the surname justifiable.

Also in the case *Runevič-Vardyn*²⁷ a constitutional principle, being the protection of the Lithuanian language²⁸, could be applied as an overriding reason of public policy.²⁹ The Court stated that while

*“the rules governing the way in which a person’s surname and forename are entered on certificates of civil status are matters coming within the competence of the Member States, the latter must none the less, when exercising that competence, comply with European Union law, and in particular with the Treaty provisions on the freedom of every citizen of the Union to move and reside in the territory of the Member States.”*³⁰

The Court stated that the Lithuanian authorities could refuse to change the forename and maiden name of Mrs. Runevič-Vardyn, who only had the Lithuanian nationality, to the Polish spelling as this did not constitute less favourable treatment than that which she had enjoyed before using her free movement rights.³¹ However, where it concerned applying those rules to the addition of the husband’s name to the surname, it was a different matter, for the Lithuanian authorities had to recognise the husband’s name as such and by changing it for the addition to the name of his wife, as established by the Polish authorities, it might cause serious inconvenience for the couple in proving the existence of their relationship before the authorities.³² If such inconvenience would be proven it would constitute a restriction of Article 21 TFEU which can only be justified based on “*objective considerations and is proportionate to the legitimate objective of the national provisions*”³³ and “*cannot be attained by less restrictive measures.*”³⁴ Although it was up to the national court to decide on this, the Court showed that it did not consider it proportionate.³⁵

5 Differences between the pending case and previous case law

Whereas many of the facts of the pending case seem quite similar to the *Ilonka Sayn-Wittgenstein* case there are some important differences.³⁶ First of all, in both cases there had been a name change

²⁵ *Sayn-Wittgenstein*, para. 88-89.

²⁶ *Sayn-Wittgenstein*, para. 93.

²⁷ C-931/09 *Malgožata Runevič-Vardyn and Lukasz Pawel Wardyn v Vilniaus miesto savivaldybės administracija and Others* [2011] ECR I-03787.

²⁸ Article 14 of the Lithuanian Constitution.

²⁹ Curiously the Court did mention in para. 86 Articles 22 Charter and 4(2) TEU on respect of cultural and linguistic diversity and national identity, but did not at all refer to the principle of non-discrimination of national minorities established in Article 21(1) Charter.

³⁰ *Runevič-Vardyn*, para. 63.

³¹ *Runevič-Vardyn*, para. 69-71.

³² *Runevič-Vardyn*, para. 73-78.

³³ *Runevič-Vardyn*, para. 83.

³⁴ *Runevič-Vardyn*, para. 88.

³⁵ *Runevič-Vardyn*, para. 93.

³⁶ See also AG Wathelet in *Bogendorff von Wolffersdorff*, para. 3.

based on an adoption in Germany. However, contrary to the *Sayn-Wittgenstein* case, in the pending case this name change as such is not at issue, but the singular name change adding ‘titles of nobility’ in the United Kingdom. Secondly, is the fact that contrary to Austria where titles of nobility have been constitutionally prohibited, in Germany the title of nobility has become a part of the family name.³⁷ Lastly, Ilonka Sayn-Wittgenstein only had the Austrian nationality, whereas in the case at hand we are dealing with a dual British-German national where the name was changed in a Member State of which he is a national. All these differences will have to be taken into account considering the pending case for the actual issue is ‘when may public policy be applied for the non-recognition of a name?’

6 Application of the case law on the pending case

In order to evaluate the case at hand several steps have to be taken. First of all has it to be established whether there is a duty for the German authorities to recognise Mr. Bogendorff von Wolffersdorff’s British nationality. Hereafter, if established that the British nationality has to be recognised, it has to be considered whether effect should be given to the name acquired in the UK and whether a restriction of Article 21 TFEU is present. If a restriction can be established it has to be decided whether it can be justified, is proportionate and attained by the least possible means.

6.1 ‘Future Substantial Link’

The Referring Court in his question states that it might be possible that a substantial link with the Member State of the second nationality might no longer exist in the future. The Advocate General ignored this part of the question in his Opinion.

It has to be stated that whether a “future substantial link” with the other Member State will exist or not, is irrelevant as the situation at the moment of recognition has to be assessed and, furthermore, is it not for the recognising Member State to decide whether there is a link between the person who has the nationality of another Member State and that Member State. This was established in the case *Micheletti*³⁸ where the Court stated that

*“[u]nder international law, it is for each Member State, having due regard to Community law [read EU law], to lay down the conditions for the acquisition and loss of nationality. However, it is not permissible for the legislation of a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty.”*³⁹

³⁷ Article 109 of the Weimar Constitution, which is still in force based on Article 123 GG; see also AG Wathelet in *Bogendorff von Wolffersdorff*, para. 92.

³⁸ C-369/90 *Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria* [1992] ECR I-4239.

³⁹ *Micheletti*, para. 10.

This has been reaffirmed by the Court in *Zhu and Chen*.⁴⁰ A Member State can therefore not question the nationality of a person, nor can it decide to ignore the possession of the nationality of another Member State based on the fact that the person might lose a link with that Member State in the future. There is therefore no doubt that the applicant in the case is a dual British-German national.

6.2 Dual-Nationality and Articles 18 and 21 TFEU

As was stated there is no discussion about the fact that Mr. Bogendorff von Wolfersdorff's British nationality has to be recognised by the German authorities based on the *Micheletti* case law. The question is now how to apply this dual-nationality in combination with the principle of non-discrimination based on nationality established in Article 18 TFEU and EU citizenship established in Articles 20 and 21 TFEU.

6.2.1 Restriction of Article 18 TFEU

According to settled case law the principle of non-discrimination means that “*comparable situations must not be treated differently and that different situations must not be treated in the same way.*”⁴¹ In *Garcia Avello* – and now restated by the Advocate General – the Court decided that dual-nationals are in a different situation compared to persons having only the nationality of one Member State, based on the fact that they are governed by multiple legal systems, which can create complications concerning different family names.⁴² The Advocate General added to this that the question whether a dual-national is in a different situation does not depend on the circumstances of acquisition of the name, but solely on the basis his name is governed by several legal systems.⁴³

Thus, apply this to German law; according to Article 10(1) EGBGB “[t]he name of a person is governed by the law of the country of which the person is a national.”⁴⁴ In the present case this would mean the name would be governed both by British and German law, which as stated before can have the effect that a person has simultaneously differing names. Therefore one has to apply this article in conjunction with Article 5(1) EGBGB which states

*“[i]f referral is made to the law of a country of which a person is a national and where this person is a bi- or multinational, the law applicable shall be that of the country with which the person has the closest connection, especially through his or her habitual residence or through the course of his or her life. If such person is also a German national, that legal status shall prevail.”*⁴⁵

This would thus mean that *in casu* the name would be subject to German law, based on which Article 48 EGBGB, which requires applicability of German law to the name, could be applied. This

⁴⁰ C-200/02 *Catherine Zhu and Man Lafette Chen v. Secretary of State for the Home Department* [2004] ECR I-9925, para. 37.

⁴¹ *Garcia Avello*, para. 31; AG Wathelet in *Bogendorff von Wolfersdorff*, para. 36 and 40.

⁴² *Garcia Avello*, para. 37; AG Wathelet in *Bogendorff von Wolfersdorff*, para. 43.

⁴³ AG Wathelet in *Bogendorff von Wolfersdorff*, para. 45.

⁴⁴ Translation from: http://www.gesetze-im-internet.de/englisch_bgbeg/.

⁴⁵ *Ibid.*

thus means that a German who also has the nationality of another Member State is treated the same as someone who only has the German nationality, as to both German law applies to the name. Therefore, this is a restriction of Article 18 TFEU as they are treated the same way while being in different situations.⁴⁶

6.2.2 Restriction of Article 21 TFEU

In accordance with settled case law and restated in the pending case by the Advocate General is

*“national legislation which places certain of the nationals of the Member State concerned at a disadvantage simply because they have exercised their freedom to move and to reside in another Member State [...] a restriction on the freedoms conferred by Article 21(1) TFEU on every citizen of the Union.”*⁴⁷

According to this case law and the Advocate General the condition that one has

“to use a surname, in the Member State of which the person concerned is a national, that is different from that conferred and registered in the Member State of birth and residence”

would be liable to hamper the exercise of this right.⁴⁸

Considering the case law on free movement and dual nationality especially the *McCarthy*⁴⁹ case, which was not discussed by the Advocate General, comes to mind. In that case it also concerned a dual national who, contrary to the present case, had never made use of her free movement rights. Based on this Directive 2004/38/EC⁵⁰ could not be applied, however, Article 21 TFEU could. According to the Court, in order to show a breach of Article 21 TFEU, the national measure had to have, as established in *Ruiz Zambrano*⁵¹,

“the effect of depriving her of the genuine enjoyment of the substance of the rights associated with her status as a Union citizen”.⁵²

In *McCarthy* this was not the case as Mrs. McCarthy was free to move to another Member State; however, the Court said this had been the case in *Garcia Avello* and *Grunkin Paul*. Thus, according to the Court, if

⁴⁶ See also: AG Wathelet in *Bogendorff von Wolffersdorff*, para. 47.

⁴⁷ AG Wathelet in *Bogendorff von Wolffersdorff*, para. 54 citing case C-406/04 *De Cuyper* [2006] ECR I-6947, para. 39; Case C-499/06 *Nerkowska* [2008] ECR I-03993, para. 32; *Grunkin Paul*, para. 21; *Runevič-Vardyn*, para. 67 and 68; *Sayn-Wittgenstein*, para. 53.

⁴⁸ AG Wathelet in *Bogendorff von Wolffersdorff*, para. 55 citing *Grunkin Paul*, para. 22 and *Sayn-Wittgenstein*, para. 54.

⁴⁹ C-434/09 *Shirely McCarthy v. Secretary of State for the Home Department* [2011] ECR I-3375.

⁵⁰ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L158.

⁵¹ C-34/09 *Ruiz Zambrano* [2011] ECR I-1177.

⁵² *Shirley McCarthy*, para. 47 and 49.

“the application of the law of one Member State to nationals of that Member State who [are] also nationals of another Member State [has] the effect that those Union citizens [have] different surnames under the two legal systems concerned”

this will be liable to cause serious inconvenience to them and will therefore have

*“the effect of depriving the Union citizen of the genuine enjoyment of the substance of the rights conferred by virtue of that status or of impeding the exercise of his right of free movement and of residence within the territory of the Member States”.*⁵³

Applying this to the present case it cannot be concluded in any different manner than that Germany has to recognise the name established in the UK, except if there can be serious reasons of public policy not to do so.

It should be noted that Ilonka Sayn-Wittgenstein and Mrs. Runevič-Vardyn both only had the nationality of the recognising Member State, which was also the only Member State that could issue the persons involved official documents. Due to this no conflict could arise with registers of other Member States.⁵⁴ Such a conflict, like would exist in the pending case, would, as stated before, be a restriction of Article 18 TFEU.

Before going to the objective consideration for justification it still has to be noted in this part that if Mr. Bogendorff von Wolffersdorff would renounce his German nationality, Germany would have no choice but to recognise the name established in the UK, as according to Article 10(1) EGBGB in conjunction with Article 5(1) EGBGB, British law would be the sole jurisdiction applicable to the name. It can, however, never be in the interest of European citizenship and European integration that a dual citizen has to renounce one nationality in order to claim rights in the Member State of which he was a national.

6.3 Objective consideration

Concerning the objective considerations for justification on the ground of public policy four issues have to be dealt with separately. First of all, the consideration that the breach can be justified based on the protection of a constitutional value; secondly, the length of the name; thirdly, that the case concerns a singular name change, meaning that name change has no link with the change of another civil status; and lastly whether there might be a case of abus de droit.

According to the Court’s case law *“the concept of public policy as justification for a derogation from a fundamental freedom must be interpreted strictly.”* Therefore, public policy may only be relied on if there is a *“genuine and sufficiently serious threat to a fundamental interest of society.”*⁵⁵ The Advocate General is of the opinion that the *“rules and values involved are among those breach of which cannot be tolerated by the legal order of the place in which recognition and enforcement*

⁵³ *Shirley McCarthy*, para. 51 and 53.

⁵⁴ *Sayn-Wittgenstein*, para. 60.

⁵⁵ *Sayn-Wittgenstein*, para. 86; AG Wathelet in *Bogendorff von Wolffersdorff*, para. 97.

are sought because such a breach would be unacceptable from the viewpoint of a free and democratic State governed by the rule of law.”⁵⁶ These values should therefore be that fundamental to the legal order in question, that not a single exception to the rule may be tolerated.⁵⁷

6.3.1 Constitutional value

As was shown before, up until today the Court has accepted only twice that a name established abroad did not necessarily have to be recognized by the authorities of another Member State on the ground of public policy, being the before mentioned cases *Ilonka Sayn-Wittgenstein* and *Runevič-Vardyn*. In both cases the justification for non-recognition was founded on the respective constitutions. Like was done in Austria also Germany abolished the institution of nobility in the Weimar Constitution. However, contrary to the Austrian prohibition of any use of a title of nobility in the name, the titles of nobility in Germany became part of the surname.⁵⁸ Therefore are there still persons in Germany, like the adoptive father of *Ilonka Sayn-Wittgenstein*, who have a title of nobility in their family name. In *Sayn-Wittgenstein* the Court stated concerning the part ‘Fürstin von’ of the name that in German law it had to be regarded

“not as a title of nobility but as a constituent element of the name”.⁵⁹

As mentioned before did the Austrian government in *Sayn-Wittgenstein* state that the Law on the abolition of the nobility constituted an implementation of the principle of equal treatment. In the German context this is impossible to argue as it does allow titles of nobility as part of the family name. Had Mr. Bogendorff von Wolffersdorff chosen in the UK to change his name to for example “Müller”, which is one of the most frequent names in Germany, the German authorities would most probably not have made any issue of recognising it.⁶⁰ However, as the new name contained a title of nobility there was an issue. This would mean that those persons that have a title of nobility in the name by birth or adoption are apparently ‘more equal’ than others.⁶¹ This thus means that certain exceptions are accepted to the rule on abolition of nobility, by accepting that only as part of certain family names one may carry such a former title of nobility. The Advocate General and the author therefore agree that such a discrepancy cannot be tolerated for the application of public policy.⁶² It should be noted that a title of nobility, just like any other title, gains authority only from the fact that others attribute a worth to it. If one stops doing so, it will become a name just like any other. By bringing cases to court due to the use of a ‘title of nobility’ a special prestige is still attributed to

⁵⁶ AG Wathelet in *Bogendorff von Wolffersdorff*, para. 99; see also his Opinion of 4 December 2014 concerning case C-536/13 *Gazprom* ECLI:EU:C:2014:2414, para. 177.

⁵⁷ AG Wathelet in *Bogendorff von Wolffersdorff*, para. 100.

⁵⁸ These titles of nobility are still adapted according to the gender of the person involved according to a decision of the *Reichsgericht*. Decision of the *Reichsgericht* of 10.03.1926, IV B7/26, RGZ 113, 107-115.

⁵⁹ *Sayn-Wittgenstein*, para. 65; see similar AG Wathelet in *Bogendorff von Wolffersdorff*, para. 94.

⁶⁰ It must be noted that the Zentrale Juristische Dienst of the city of Karlsruhe has stated, according to the AG in para. 77 of his Opinion, that they would also not have recognised the name change to such a more common name as it concerned a singular name change which according to them is not possible in German law. This is incorrect as it is possible, though on more restrictive grounds than in the UK, in accordance with the Gesetz über die Änderung von Familiennamen und Vornamen (NamÄndG) and *Allgemeine Verwaltungsvorschrift zum Gesetz über die Änderung von Familiennamen und Vornamen* (NamÄndVwV).

⁶¹ Reference to ORWELL, George, *Animal Farm*, 1945.

⁶² AG Wathelet in *Bogendorff von Wolffersdorff*, para. 103.

it, having thus the contrary effect to the one to be attained by Germany, being the abolishment of nobility.

The author furthermore agrees entirely with the Advocate General that the fact the *Oberlandesgericht Dresden* decided that it was not contrary to public policy that the name of Mr. Bogendorff von Wolffersdorff's daughter was registered as "Larissa Xenia Gräfin von Wolffersdorff Freiin von Bogendorff", while the German authorities say it is contrary to public policy concerning her father, is rather ridiculous.⁶³

6.3.2 Length of the Name

The German authorities considered that next to having titles of nobility the name should also not be recognised because it was too long. The Advocate General considered this a not sufficient ground for non-recognition as the Court had already established in *Grunkin Paul* that "*considerations of administrative convenience cannot suffice to justify an obstacle to freedom of movement*".⁶⁴

6.3.3 Singular name change

In the preliminary question the referring court also mentions that the "*change of name [is] not associated with a change of family law status*". There is in most states an obligation to recognize a name that has been changed abroad due to a change of another civil status.⁶⁵ Whether the name as such consists a civil status that can stand on its own is, however, unclear.⁶⁶ Had the name change been part of the naturalization process it most certainly would have been linked to a civil status change, being nationality.

Different to the private international law article on recognition of names established abroad in the Netherlands, the German Article 48 EGBGB which is at issue in the pending case does not mention that the change of name has to be associated with a change of another civil status, but gives as only condition that the person whose name had been changed abroad was also habitually resident there. Therefore, the question concerning singular name change is actually irrelevant as all the conditions necessary for Article 48 EGBGB are met.⁶⁷ It would be, however, favourable if the Court would deal with the issue of singular name changes as a civil status change.

⁶³ AG Wathelet in *Bogendorff von Wolffersdorff*, para. 105.

⁶⁴ AG Wathelet in *Bogendorff von Wolffersdorff*, para. 91 citing *Grunkin Paul*, para. 36.

⁶⁵ See for example Article 10:24 BW in the Netherlands which gives a duty to recognize a name that was established abroad at birth or after a change of the civil status.

⁶⁶ In the Netherlands in a judgment of the *rechtbank Almelo* concerning the recognition of a singular name change based on Article 10:24 BW, the court concluded that in the absence of a definition of '*persoonlijke staat*' (civil status) in *Boek 10 BW* other laws had to be consulted for a clear definition or distinction of the term. Consulting the word '*staat*' in Articles 1:209 and 211 BW it came to the conclusion that '*persoonlijke staat*' should only concern parentage and therefore a singular name change did not fall within the ambit of Article 10:24 BW. The author would like to note that it is not surprising that if one looks at '*staat*' in Articles 1:209 and 211 BW one has to come to the conclusion that it only concerns parentage as both articles are in Chapter 11 of *Boek 1* which only deals with parentage. Judgement of *Rechtbank Almelo*, 26-09-2012, 127625/FA, LJN BX8810, JPF 2013/25 with note I. Curry-Sumner.

⁶⁷ See also: MANSEL, Heinz-Peter; THORN, Karsten; WAGNER, Rolf, *Europäisches Kollisionsrecht 2014: Jahr des Umbruchs*, Praxis des Internationalen Privat- und Verfahrensrecht (IPRax) 2015, Heft 1, p. 1-32, p. 4.

6.3.4 Abus de Droit

One could of course wonder whether in the pending case an abus de droit might be present as this specific facilitated kind of singular name change would not have been possible in Germany. In *Torresi*⁶⁸ the Court stated a finding of abuse requires a combination of objective and subjective elements.⁶⁹ The objective element means that

*“it must be apparent from a combination of objective circumstances that, despite formal observance of the conditions laid down by EU rules, the purpose of those rules has not been achieved.”*⁷⁰

The subjective element means that there must have been an intention to obtain an improper advantage from the EU rules by artificially creating the conditions necessary to obtain it.⁷¹ The Court concluded in *Torresi* that

*“the fact that the national of a Member State has chosen to acquire a professional qualification in a Member State other than that in which he resides in order to benefit there from more favourable legislation is not, in itself [...] sufficient ground to conclude that there is an abuse of rights.”*⁷²

If it is not an abuse of rights that a national of a Member State moves to another Member State because of more favourable legislation to acquire a professional qualification – which is a title with effects – without residing there and then move back to his Member State of origin. How can it be an abuse if the national moves to another Member State, resides there and even acquires the nationality of that Member State if he subsequently changes his name and returns to his Member State of origin?

As was established before, Mr. Bogendorff von Wolffersdorff is a dual British-German national who in accordance with the legislation of the UK changed his name after naturalization. Stating that Mr. Bogendorff von Wolffersdorff only acquired the British nationality in order to have his name changed⁷³ and recognised sounds rather excessive.⁷⁴ As in the EU only the UK and Ireland offer the possibility for a ‘deed poll’ a non-recognition of a name established in such a deed poll could thus actually lead to discrimination based on nationality.

⁶⁸ Joined cases C-58/13 and C-59/13 *Angelo Alberto Torresi and Pierfrancesco Torresi v. Consiglio dell’Ordine degli Avvocati di Macerata* [2014] ECLI:EU:C:2014:2088

⁶⁹ *Torresi*, para. 44. See for the ‘Abuse test’ also: LENAERTS, Annekatrien, *The General Principle of the Prohibition of Abuse of Rights : A Critical Position on Its Role in a Codified European Contract Law*, European Review of Private Law 6-2010, p. 1121-1154, p. 1134.

⁷⁰ *Torresi*, para. 45; this is assessed by means of establishment of ‘purely formal’ circumstances or ‘wholly artificial arrangements’. Case C-110/99 *Emsland-Stärke* [2000] ECR I-1569, para. 50; Case C-196/04 *Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue* [2006] ECR I-7995, para. 57.

⁷¹ *Torresi*, para. 46.

⁷² *Torresi*, para. 50.

⁷³ The German delegation called it ‘name tourism’, AG Wathelet in *Bogendorff von Wolffersdorff*, para. 84.

⁷⁴ See similar by AG Wathelet in *Bogendorff von Wolffersdorff*, para. 86.

6.4 Proportionality and least restrictive measure

As the Advocate General considered the restriction not justifiable no proportionality test was done. For the sake of completion the author will do it here.

Even if it could be established that the measure might be justified, it also has to be established whether the non-recognition is proportionate and uses the least restrictive means. An absolute non-recognition is always the most restrictive measure that can be taken, so one should consider whether there could have been different options. For example, Germany could have decided to recognise the name established in the UK *in parte* by recognising it as a pseudonym, for it does allow this and also mentions them in the passport.⁷⁵ Another option would be that Germany, as was also proposed by Advocate General Sharpston in her Opinion in the case *Sayn-Wittgenstein*,⁷⁶ issue a ‘certificate of differing surnames’.⁷⁷ This would still be a restrictive measure as the surname would not be recognised as such, but it would still be a less restrictive measure than an absolute non-recognition. The assessment of proportionality is, however, for the referring court to decide upon.

7 Conclusion

It therefore has to be concluded that the German authorities should recognise, or at least give effect to, the name established in the UK as a non-recognition is a breach of Articles 18 and 21 TFEU which cannot be justified and is not proportionate as less restrictive means are available.

I would therefore like to advise the Court to follow the Advocate General and to decide that

Articles 18 TFEU and 21 TFEU have to be interpreted as meaning that the authorities of a Member State are obliged to recognise the change of name of a national of that State if he is at the same time a national of another Member State and has acquired in that Member State during habitual residence any change of name in accordance with the law of that Member State.

⁷⁵ Section 14 in a German passport is reserved for the ‘religious name or pseudonym’. Ironically, in the the ECtHR case *Heidecker-Tiemann* Germany argued for this possibility. Application No. 31745/02 *Heidecker-Tiemann v. Germany*, (2008) 47 E.H.R.R. SE9, p. 113-123, p. 119.

⁷⁶ Opinion of AG Sharpston of 14 October 2010 in Case C-208/09 *Ilonka Sayn-Wittgenstein*, para. 66

⁷⁷ ICCS Convention No 21 on the issue of a certificate of differing surnames, signed at The Hague on 8 September 1982. Germany is not a party to the Convention.

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