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THE POSITION OF CHILDREN IN RESPECT OF DECISIONS MADE BY THEIR PARENTS REGARDING THEIR NATIONALITY[3]

I. General remarks

This report will try to give an answer to the question of whether children should have the right to remedy a decision made by their parents regarding the child's change of nationality. In order to answer to this question, it will be necessary to make an inventory of the influence which parents have in respect of the nationality of their children. The report will therefore give a general description of the acquisition of a nationality by minors via naturalisation or declaration of an option on the one hand and the loss of nationality by minors on the other. Special attention will be paid to the rules regarding the representation of minors in nationality matters. Of particular importance in this context are the rules regarding the extension of the acquisition of a nationality by a parent via naturalisation or declaration of an option, respectively the extension of the loss of a nationality by a parent to his/her (minor) children. Attention will also be given to the possibilities which children have of renouncing or respectively reacquiring a nationality acquired, respectively lost, during their minority.

However, before dealing with these issues some introductory remarks must be made.

Article 7 of the Convention on the Rights of the Child (New York, 20 November 1989) states that a child 'shall have the right from birth (...) to acquire a nationality'. However, this provision does not indicate to which nationality a child should be entitled. In Europe, almost all states provide for – in principle – an acquisition of their nationality at the moment of birth if the *mother* of a child possesses the nationality involved at that moment. However, in the case of birth abroad some states make an exception to this rule. Some states require registration of the child at the embassy or consulate of the state involved for the acquisition of the nationality[4]. This type of exception is accepted by Article 6 (1) European Convention on Nationality (Strasbourg, 6 November 1997, ETS 166; hereinafter abbreviated as ECN), but sometimes causes difficulties if the mother for various reasons refuses to register her child within the due time. This behaviour of the mother may cause statelessness for her children. Statelessness may also be the consequence if a state does not provide for the possibility for a child of a national born abroad to acquire the nationality by registration, because the parent was already born abroad. These difficulties were noted by the drafters of the ECN. Therefore, the explanatory report (No. 65) on Article 6 already emphasises that any provisions limiting the transmission of the nationality of a parent to a child born abroad should not apply if the child would become stateless. This is also stressed by Recommendation R (99) 18 of the Committee of Ministers of the Council of Europe on avoidance and the reduction of statelessness, adopted on 15 September 1999, in rule II A, sub

[3] In the footnotes to this report references will be made to the following publications: *De Groot, Acquisition*: Gerard-René de Groot, The acquisition of nationality by operation of the law ex lege or by lodging a declaration of option, Report for the 2nd European Conference on Nationality: "Challenges to national and international law on nationality at the beginning of the new millennium", Council of Europe, Strasbourg 2001, 65-93 (see also: Maastricht Journal of European and Comparative Law 2002, 121-160; *De Groot, Loss*: Gerard-René de Groot, Loss of nationality: a critical inventory, in: David Martin/ Kay Hailbronner, Rights and Duties of Dual Nationals: Evolution and Prospects, Kluwer Law International, The Hague/London/Boston 2003, 201-299; *De Groot, Staatsangehörigkeitsrecht*: Gerard-René de Groot, Staatsangehörigkeitsrecht im Wandel, Köln: Heymanns 1989.

[4] De Groot, Acquisition, 70-73.

a. The explanatory report on Article 6 takes another small but important step by underlining: 'It must be added that the acquisition of the nationality of one of the parents at birth on the basis of the *ius sanguinis* principle, by children born abroad should be automatic and not made conditional upon registration or option, the absence of which would make them stateless.' It would be important, if an additional protocol to the ECN should provide that the requirement of registration were not acceptable if the child involved would otherwise be stateless: in that case the acquisition of nationality *iure sanguinis* should be automatic.

In many cases a child will also acquire *iure sanguinis* the nationality of his/her *father*. If the father and mother are married to each other this is – in principle – the case in all European countries, but some states again make an exception in case of birth abroad. If the parents are not married to each other, the situation is different. Recognition by the father, legitimation or judicial establishment of paternity are grounds for acquisition of nationality *ex lege* in many European countries, but exceptions are frequent.[5] In perspective of Article 7 (1) of the Convention on the Rights of the Child, it must be submitted that the establishment of a family relationship between a child and a man (by recognition, judicial decision, legitimation) during the minority of the child should lead to the immediate acquisition of the nationality of the father without any other condition, at least if the child would otherwise be stateless. It is desirable that this rule also be added to the ECN in an additional protocol.

Problematic is the position of children who can not acquire *iure sanguinis* any nationality of a parent. Special rules are necessary for such cases because no European country applies *ius soli* as a general ground for acquisition of nationality.[6] Article 6 (1) (b) of the ECN prescribes such a special rule for foundlings found on the territory of a state: such a child must acquire the nationality of the state where he/she was found, if he/she would otherwise be stateless.[7] Article 6 (2) of the ECN states that each State Party shall provide in its internal law for its nationality to be acquired by other persons born on its territory who would otherwise be stateless. This rule is repeated in Recommendation R (99) 18, in Part II A, sub b. The nationality of the country of birth must be attributed either *ex lege* at birth or subsequently to children who remain stateless upon application. Most European countries opted for the first possibility mentioned, but a remarkable number of countries provide for other solutions.[8] In respect of these rules for avoiding statelessness, a new development can be observed. Article 9 (4) of the new Finnish Nationality Act 359/2003 is an example: A child acquires Finnish nationality by birth if 'the child is born in Finland and does not acquire the nationality of any foreign state at birth, and does not even have a secondary right to acquire the nationality of any other foreign state.'[9]

A similar step was taken by the French legislator in 2003.[10] The reason for both modifications is obvious: sometimes a foreign parent does not make use of the possibility to

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[5] The different exceptions were described and criticised in Gerard-René de Groot, Acquisition, para. II b, p. 73-77.

[6] In 2001 even Ireland abolished *ius soli* as a general ground for acquisition of nationality. The Irish Nationality and Citizenship Act provides that 'every person born on the island of Ireland is entitled to be an Irish citizen.'

[7] This provision was analysed in De Groot, Acquisition, para. 4 (p. 80, 81), where critical remarks on the nationality legislation of some countries were also added.

[8] The different national rules are described in De Groot, Acquisition, para. II 3 (b) (p. 78, 79) and para. III 2.

[9] Unofficial English translation provided by the Ministry of the Interior of Finland, available on http://www.uvi.fi/download.asp?id=Nationality+Act;609;{E792540D-5E25-4282-BAF9-13FB9CA64E12} (last visited on 14 June 2004).

[10] Article 19-1 Code civil was amended by Act 2003/1119 of 26 November 2003, Joural Officiel Nr. 274 of 27 November 2003 and provides now: "*Est français* :

register a child in the consulate of his state in order to avoid the acquisition of the foreign nationality by the child involved, and does this to activate the rules avoiding statelessness of the country of birth of the child. Finland and France refuse to accept this tactical behaviour by parents of a child born on their territory. That is understandable, but makes it – in perspective of Article 7 (1) of the Convention on the Rights of the Child - even more important to stimulate the creation of international instruments which oblige States to confer the nationality *ex lege* at birth to children of their nationals born abroad if these children would otherwise be stateless.

The problems just mentioned show that parents sometimes have considerable power to determine the nationality position of their children. This is in particular the case if the acquisition of nationality by a child depends on an action to be undertaken by a parent (for example, registration). The desirability of this is questionable. Similar problems will be discussed in further paragraphs of this report.

Another issue must be briefly touched on in relation to Article 7 of the Convention on the Rights of the Child and to Article 6 (1) of the ECN. Children frequently acquire at birth *ex lege iure sanguinis* the nationality of a parent. It is exceptional for a child also to be able to acquire the nationality which was lost by the parent before the birth of the child. Such an exception is observed in the Spanish legislation, where the child of a father or mother who was born in Spain as a Spanish national can acquire Spanish nationality by declaration of option (Article 20 (1) (b) *Codigo civil*)[11]. Until now no international legal instrument has paid attention to the position of a child whose parent lost a certain nationality after the conception of the child involved but before its birth. Does the principle '*nasciturus pro iam nato habetur quotiens de commodis eius agitur*' (the unborn child is deemed to be already born in all circumstances in which this is to his/her advantage), recognised as a general principle of law in numerous legal systems, also apply for the acquisition of a nationality *iure sanguinis*? Several countries expressly ruled that a child of a national who died before the birth of the child acquires the nationality of the parent. But the position of the *nasciturus* in case of loss of nationality is uncertain. We would like to submit that there is in principle no reason not to apply the *nasciturus* rule in nationality matters.

Not to regulate the nationality position of a *nasciturus* may be understandable where under the national law of the country of the parent, the child would have lost the nationality involved as a consequence of the loss of nationality by the parent if he/she had already been born. In this case the *nasciturus*-status is exclusively interesting if the nationality legislation of the state involved provides for a facilitated reacquisition of the nationality lost during minority. The *nasciturus*-issue is really important in those countries where a child during his/her minority can only lose his/her nationality in exceptional circumstances (e.g. with the consent of a court).

Article 8 of the Convention on the Rights of the Child has consequences for nationality regulations as well. States have to respect 'the rights of the child to preserve his or her identity, including nationality, (...), without unlawful interference.' From the second paragraph of this provision it can be concluded, that 'where a child is illegally deprived of

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1° *L'enfant né en France de parents apatrides* ;
2° *L'enfant né en France de parents étrangers pour lequel les lois étrangères de nationalité ne permettent en aucune façon qu'il se voie transmettre la nationalité de l'un ou l'autre de ses parents.*"

[11] As modified by Act 36 of 8 October 2002, BOE of 9 October 2002, pp. 35638-35640, in force since 9 January 2003.

[his or her nationality], States Parties shall provide appropriate assistance and protection, with a view to speedily re-establishing his or her nationality.'

Of course, it will often prove difficult to decide whether the loss of nationality happened with unlawful interference, or was illegal. This question certainly has to be answered in the affirmative if the deprivation of nationality can also be classified as arbitrary (in the sense of Article 15 (2) of the Universal Declaration of Human Rights). However, we would submit that there are more cases where the loss of nationality by a minor is unlawful or illegal. Article 12 of the Convention on the Rights of the Child provides:

> '1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.'

It is arguable that the non-observation of the right of a child to be heard in cases of acquisition or loss of nationality could lead to the conclusion that Article 8 of the Convention is also violated. Hereinafter we will analyse this problem in more detail.

In the following paragraphs references to the legislation of the different jurisdictions are made by using abbreviations. For example '15 (1) (b) NET' means 'Article 15 paragraph 1, lit. b of the Nationality Act[12] of the Netherlands'. The abbreviations correspond with those used in the European Bulletin on Nationality (English edition).

II. The acquisition of a nationality by minors

1. Introductory remarks

This part of the report will deal with the question of whether children should have the right to challenge a decision made by their parents regarding the acquisition of a nationality by the child. Special attention will be given to the position of children in respect of the extension of the acquisition of the nationality of a state by a parent to minor children. It is necessary to study also briefly whether children can acquire another nationality independently of their parents in order to demonstrate the ability and powers parents have to influence acquisition of nationality by their children.

[12] This abbreviation is also used for countries where the nationality provisions are included in the civil code, such as France and Spain.

2. Acquisition by naturalisation, registration or declaration of option

In many states one of the conditions for naturalisation is to be of full age.[13]

But in spite of this condition an independent naturalisation in these countries is often nevertheless possible by the application of special provisions. In the Netherlands for example a minor can be naturalised via the application of Article 10 NET, which allows the Minister to waive most of the normal conditions for naturalisation after having requested the Opinion of the Council of State. Moreover, under specified circumstances Article 11 (4 and 5) NET also allows naturalisation of a minor. In the United Kingdom minors can be registered as British citizens at the discretion of the Secretary of State (3 (1) UK), which makes a provision regarding naturalisation of minors superfluous.

In certain other countries no provisions are found on the exclusion of minors in respect of naturalisation. Obviously naturalisation of a minor is possible in those countries (if it is understood correctly, this is the case in, for example, Hungary, Italy and Latvia).

In comparison, some other countries provide expressly for the possibility of naturalisation of minors.

In Spain Article 21 of the SPA allows the naturalisation of a minor aged 14 years or older represented by his/her legal representative.

In Germany minors can apply for naturalisation (§ 8 GER; 68 (1) *Ausländergesetz*[14]). Although, if the minor has not yet reached the age of 16 years[15], an application must be lodged by a legal representative. Minors of 16 or 17 years can make the application themselves with the consent of their legal representative.

Switzerland also allows for the naturalisation of minors (Article 34 SWI), but the application must be made by a legal representative. Even if the minor is under custody (*Vormundschaft*) it is not necessary to request the consent of the custody court for the application of naturalisation. Article 34 (2) SWI provides that minors of 16 and 17 years must submit a written declaration that they agree with the application of naturalisation.

Austria has an even more elaborate regulation: § 19 (2) 2 AUS provides that the application of naturalisation for a minor must be made by the legal representative or with the written consent of the legal representative. A minor who has already reached the age of 14 must give his/her consent to the application in a written declaration.[16] Article 19 (3) AUS provides that the consent of the legal representative or the minor of 14 years or older may be replaced by consent of the court, if the acquisition of nationality is in the interest of the minor on educational, professional or other important grounds (*'aus erzieherischen, beruflichen oder anderen wichtigen Gründen dem Wohl des Fremden dient'*). The same applies if the minor does not have

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[13] Gerard-René de Groot, *Staatsangehörigkeitsrecht*, 237. An example is Article 21-22 F: '*nul ne peut être naturalisé s'il n'a atteint l'âge de dix-huit ans.*' Compare furthermore: 9 (1) ALB; 19 (1) BEL; 6 CYP; 7 (1) FYR; 6 (1) GRE; 15 (1) (a) IRL; 6 LUX; 10 (1) MAL; 6 (1) NOR; 8 (1) (a) NET; 6 POR (*maiores ou emancipados*); 9 (c) ROM; 10 (1) SLN; 22 SPA; 6 UK

[14] The German Immigration Act.

[15] Compare 15 MOL.

[16] Compare 8 (7) POL; 16 UKR.

a legal representative or if the legal representative cannot be reached and the appointment of another legal representative would be very difficult. This procedure also applies if the residence of the minor is unknown or the minor cannot be reached for other reasons.

3. Acquisition by extension of the acquisition of nationality by a parent[17]

Most countries provide that - under certain conditions - children of a person who acquires the nationality of the country acquire this nationality as well if they are still minors. An enormous variety of conditions for an extension of acquisition may be observed. The content of the provisions on extension of the acquisition of nationality depends, inter alia, on the power that a state gives to parents in respect of the determination of the nationality position of their minor children. Some examples are useful.

An unconditioned extension of naturalisation of a parent to the minor children exists in Greece (10 (1) GRE)

An extremely wide extension also exists in Italy (if the child lives with the naturalised parent: 14 ITA); in France an extension must be mentioned in the naturalisation decree of the parent and this will normally happen if the child lives with the naturalised parent (22-1 FR). Compare also 6 NOR; 7 (4) SLK (consent of the other parent).

The Belgian and Luxembourg legislation provide for extension on the condition that the naturalised parent exercises parental authority (12 BEL; 2 (3) LUX; compare also 8 POL).

Like France, some countries provide for an extension to minor children unless the contrary is mentioned in the naturalisation decree of the parent involved. This is the case in Denmark (if the parent has parental authority and the child is a resident of Denmark: 5 and 6 (2) DEN), Liechtenstein (6 (2) LIE), Germany (if under parental authority; older children must make a declaration of loyalty (*'Loyalitätserklärung'*: 16 (2) GER; 85 (2) *Ausländergesetz*), Iceland (5 ICE).

Some countries make a distinction between cases where only one parent of a minor child is naturalised and cases where both parents are naturalised. This happens in Albania (11 ALB); FYR Macedonia (12 FYR); Latvia (15 LAT: if the child is under 16 years) and Lithuania (24/25 LIT: if child is under 14 years); Moldova (16 MOL; if child is under 16 years); Romania (10 ROM); Slovenia (14 SLN). If both parents are naturalised, the naturalisation is extended to the minor children; otherwise this is not always the case.

A very elaborate regulation on the extension of naturalisation is to be found in the Netherlands: on request of the parent who applies for naturalisation an extension of this naturalisation to a child younger than 16 years will be mentioned in the naturalisation decree if the child has an unlimited residence permit and its main residence in the Netherlands (11 (3) NET). If the child is already 16 or 17 years old, three additional conditions must be fulfilled (11 (4) NET): a) the child must have had his/her main residence in the Netherlands for the period of three years before the lodging of the application for naturalisation by the parent; b) he/she must not constitute a danger to public order, good morals or the safety of the Kingdom; c) he/she must have given his consent to the extension. From Article 2 (4) NET it can be concluded that a child of 12 years or older, the legal representative of the child and the

[17] See Gerard-René de Groot, Staatsangehörigkeitsrecht, 271-273.

other parent will have the opportunity to give their opinion on the extension *on their request.* If the child and the other parent/legal representative are both against an extension, the naturalisation of the (other) parent will not be extended to the child (compare 17-19 AUS).

Under the legislation of some other countries there is no extension of the naturalisation to the minor children. This is, for instance, the case in Hungary (although naturalisation of a minor is possible), Ireland (but naturalisation is facilitates: 16 (c) IRE), Malta (but registration is possible: 11 (1) MAL), United Kingdom (but registration is possible).

In countries where minor children do not (or not always) acquire the nationality of the country if one of their parents acquires this nationality, they may have a right of option on the nationality involved if certain requirements are met. See e.g. 12bis (1) (2) BEL; 2 POR.[18]

4. A right for the child to remedy the decision of the parent?

After this brief survey, the question must first of all be raised of why so many countries require full age for naturalisation. It is likely that in the countries involved there is a relation with the ease of extension of the naturalisation of a parent to the minor children. Consequently, the need for an independent naturalisation is limited to very special cases. An independent naturalisation of a minor is, for instance, necessary if a parent dies after having applied for naturalisation for himself/herself and his/her minor children. In such cases the children can no longer acquire the nationality by extension of the naturalisation of the parent. A certain need for an independent naturalisation also occurs in cases where certain children were originally excluded from the extension of the naturalisation of a parent and later on - but before the majority of the child - the acquisition of the nationality of the state involved nevertheless seems to be appropriate.

Furthermore, it is obvious that a close relationship exists between the condition of full age and other, alternative ways, of conferring the nationality of a state on minor children. Sect. 3 (1) UK (the Secretary of State may register minors at his discretion) is the most obvious example; option rights which may be used by or on behalf of minor children also reduce the need for naturalisation of minors considerably.[19]

The opinion that acquiring another nationality is such an important act that a person should make his/her own decision could be another ground for requiring full age as a condition for naturalisation. In that view, representation by a legal representative is less desirable in respect of such an important decision. This is particularly true if the acquisition of the new nationality implies the loss of the previous one. However, this argument is not very convincing if several alternative ways (extension, registration or lodging a declaration of option) exist for acquiring the nationality involved on behalf of the minor. It is - of course - completely true that the acquisition of a new nationality is an important act and, in particular, in cases of loss of the previous nationality through the voluntary acquisition of another nationality, it should be ascertained that this loss does not detract from the acquisition of the new nationality. An adult must decide on the attractiveness of the acquisition of a new nationality on his/her own responsibility. For minors the legal representatives must do this and - in line with Article 12 of the Convention on the Rights of the Child - they must pay careful attention to the opinion of the older minor. This is not only the case if an independent naturalisation is requested on behalf of the child, but also if a new nationality is requested for the child in alternative ways (application

[18] See De Groot, Acquisition, 87.
[19] See De Groot, Acquistion, 84-90.

for extension of the naturalisation of a parent; application for registration of a minor as national; use of an option right). In respect of this issue, there is no relevant difference between either way of acquisition of another nationality by the minor.

Based on the best practices described above, we would like to submit that the following rules should be followed in order to come to a decision in the best interest of a minor, paying due attention to the opinion of the minor himself/herself. At least in cases of an application for naturalisation by or on behalf of the minor and in cases of a request for extension of a naturalisation of a parent, the naturalisation authorities must provide the child with the opportunity to be heard on the application for naturalisation or extension before a decision is taken. In order to obtain a good picture of the interests of the child it is also appropriate to listen to the opinion of the other parent, in particular if the child would lose the nationality of this other parent by the naturalisation or extension. We have seen already that some jurisdictions prescribe giving the other legal representative or parent of the child the right to be heard on the application of naturalisation or extension.

We submit that the child and the other parent should not only be given an opportunity to be heard on their request, but that the child (at least a child older than twelve) and the other parent should be summoned to give their opinion. If a naturalisation or an extension is granted against the will of the child involved, the child will in many legal systems be able to request administrative review, or the right of administrative appeal against the administrative decision involved, because the child is without any doubt an interested party.[20] The other parent or other legal representative will have the same possibility as an interested party. In that perspective, it is essential for the authorities who decide on the application for naturalisation or extension to hear these interested parties before they take a decision on an application. It must be stressed that the right for the child and the other parent or legal representative to request administrative or judicial review is also a consequence of Article 12 of the ECN:

"Each State Party shall ensure that decisions relating to the acquisition, retention, loss, recovery or certification of its nationality be open to an administrative or judicial review in conformity with its internal law."

At first sight, one would perhaps assume that nobody would appeal against a conferral of a nationality, but the position of a minor child represented by a parent or another legal representative shows that such a child may have well founded reasons to disagree with the acquisition of the nationality involved. And this applies *a fortiori* for the other parent of the child.

The rule of Article 12 of the ECN is in our opinion a strong rule because there is a direct link with Article 6 (1) of the European Convention on Human Rights (ECHR), which guarantees access to a judge. Consequently, if the nationality legislation or the general administrative law of a country does not offer access to a judge for a child who was naturalised against his/her will or acquired a nationality by extension of the naturalisation of a parent against his/her will, this would violate not only Article 12 of the ECN but also Article 6 (1) of the ECHR.

The consequence of this argumentation is that a child should have the right to appeal against a conferral of a nationality against his/her will on application of his/her legal representative and

[20] In some countries this is regulated expressly in the law of nationality, in other jurisdictions this possibility exists pursuant to general administrative law.

that he/she can enforce this right on the basis of Article 6 (1) of the ECHR, which guarantees his/her *locus standi*. If necessary a special guardian *ad litem* must be appointed in order to represent or to assist the minor in such a procedure.

Another connected question concerns the criteria a judge should use in a procedure in order to decide whether or not the naturalisation, respectively extension, should be annulled. The general criterion should be the best interest of the child. In order to estimate what is in the best interest of the child attention should be paid to - at least[21] - the following aspects:

a) What are the most important legal consequences of the acquisition of the new nationality?
b) Why is it unattractive to withhold the application for acquisition of this new nationality until the child has reached the age of majority and can make his/her own decision?
c) Is loss of the old nationality a consequence of the naturalisation or extension?
d) If question c) is answered in the affirmative, which rights and duties are lost as a consequence of the loss of the old nationality?
e) If question c) is answered in the affirmative, does the child involved have the right to reacquire the old nationality by registration or simple declaration of option after he/she reaches the age of majority?
f) Does the child have an unconditional right to renounce the new nationality after he/she attains the age of majority? If the right of renunciation is conditional, the judge should be attentive to the content of these conditions.[22]

It is obvious that if the old nationality is not lost and the new nationality can be renounced again after majority the judge can focus completely on the pros and cons of the immediate (i.e. before attaining the age of majority) acquisition of certain rights and duties by the minor which are linked to possession of the nationality involved. To focus on these pros and cons is acceptable also in cases where the old nationality is lost, but can be reacquired by registration or simple declaration of option after majority, provided that the new nationality is either lost by the reacquisition of the old nationality or can unconditionally be renounced after the reacquisition of the old nationality.

In all other cases the judge must make a careful inventory of the advantages and disadvantages of the acquisition of the new nationality and the loss of the old one in order to come to a decision in the best interest of the child. This will not be an easy job for the judge involved. In that respect, it is desirable, that legislators provide for - at least - the right to reacquire a nationality lost during the minority of a child by simple declaration of option within a certain term after the age of majority. On the other hand, legislators should make it possible for a young adult to renounce a nationality acquired by naturalisation, extension, registration or declaration of option during his minority.

It is self-evident that the administrative authorities who must take the decision on the naturalisation or request for extension should pay attention to these consequences in a similar way and that a parent or legal representative acting earlier on behalf of the child should do the same.

[21] It must be stressed that the list is certainly not exhaustive nor is the order of the questions imperative.
[22] See on the different regulations on renunciation De Groot, Loss, 261-268.

Another point must be raised in this context. Would it not be wiser to replace the possibility of judicial review *ex post* (i.e. after the naturalisation or extension has been granted) by the requirement of judicial consent *ex ante*? In some jurisdictions an obligation to request the *ex ante* consent of a court exists in cases of the alienation of immovable property owned by a minor by his/her legal representatives.[23] We submit that the acquisition of a new nationality has at least the same importance as selling a piece of land if, as a consequence of the acquisition of the new nationality, the old one (the other '*patria*') is lost. Consequently it seems to be appropriate to require *ex ante* consent if the acquisition of the new nationality causes the loss of the old one.

The foregoing observations focus on the legal position of a minor in respect of the acquisition of a nationality by naturalisation or extension. The situation is even more complicated in cases of the acquisition of nationality by a minor via registration on request of the legal representative or via a declaration of option lodged by the legal representative. If the competent authorities have a discretion to register or accept the declaration the legal situation is in fact similar to that of a naturalisation or extension on application by the legal representative. But, if the minor is entitled to be registered as a national or possesses an unconditional option right to acquire the nationality involved, it will not be possible to request judicial review of the decision of the authorities to register the child on the application of his/her legal representative or to accept the declaration of option. The same applies if the competent authorities can refuse the registration of the declaration of option only if the conditions for the exercise of the right are not fulfilled or in cases of danger for public order or the security of the country involved. Nevertheless, in view of Article 12 of the ECN we submit that the child and the other parent should also be able in these cases to request administrative or judicial review. A way of guaranteeing that right is to require as a condition for registration or declaration of option on behalf of a minor the consent of the child involved (if he/she has already reached a certain age, for example 12 years) and the consent of the other parent. It should be possible to replace the required consent by permission of the court in the best interest of the child.

III. Loss of nationality by minors

1. Introductory remarks

This part of the report will deal with the question of whether a child should have the right to remedy a decision made by its parent leading to the loss of a nationality by the child. Special attention will be given to the position of children when the loss of the nationality of a state by a parent extends to minor children. However, in order to gain a good picture of the power possessed by parents to influence the nationality of their children, it is also necessary to study other ways in which a child can lose his/her nationality. In respect of these other ways of loss of nationality, two groups can be distinguished: a) grounds for loss only applicable to minors; b) grounds for loss which also apply to adults. Hereinafter we focus on the grounds for loss of nationality which are acceptable under Articles 7 and 8 of the ECN. Different grounds for loss will not be considered.

[23] See for example Par. 1643 and 1821 German Civil Code.

2. Grounds for loss applicable only to minors

2.1 Loss of family relationship[24]

According to Article 7 (f) of the ECN, nationality may be lost where it is established during the minority of the child that the preconditions laid down by internal law which led to the *ex lege* acquisition of the nationality of the State Party are no longer fulfilled. The most important example of this category is loss of nationality because the family relationship that led to the acquisition of the nationality *iure sanguinis* no longer exists, for example because of a successful denial of paternity.

Article 7 (f) covers also some cases where a child acquired a conditional nationality. If in such a case the (negative) condition is fulfilled, the nationality is often lost. Examples of an acquisition of a conditional nationality can be observed a) if a foundling acquires the nationality of a country; b) if a person born on the territory of a country acquires the nationality because otherwise he would be stateless. In both cases legislators tend to provide that the nationality acquired in this way is lost, if it is discovered later that the child possesses another nationality.[25]

In all these cases covered by Article 7 (f) of the ECN the loss of nationality by the minor involved does not have a direct link to acts of representation by the legal representative on behalf of the minor involved. These cases of loss are – therefore – less interesting for this report.

2.2 Adoption[26]

According to Article 7 (g) of the ECN a nationality act may provide that the nationality is lost if an adopted child acquires the nationality of the adopting parents. The interest of the child is in case of adoption normally already controlled by the court which decided on the adoption issue as such. Furthermore, several legal systems provide for the possibility that the adoptive child requests the annulment of the adoption during a certain period after he/she has reached the age of majority.[27] This possibility can be seen as a correction of the decision of the natural parents to give their consent to the adoption. As a result of such an annulment the previous, lost nationality should be reacquired.

2.3 Extension of the loss of nationality by a parent to minor children

According to Article 7 (2) of the ECN a State Party may provide for the loss of their nationality by children whose parents lose that nationality under paragraph 1 of Article 7, except in cases where the nationality is lost by the parent because of voluntary service in a foreign military force (sub c) or because of conduct seriously prejudicial to the vital interests of the State Party (sub d). However children shall not lose that nationality if one of the parents retains his/her nationality.

The national provisions on the extension of the loss of nationality by parents to their minor children vary considerably. It is again useful to study some examples.

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[24] De Groot, Loss, 252-254; see also De Groot, Staatsangehörigkeitsrecht, 301-303.
[25] De Groot, Loss, 272-274.
[26] De Groot, Loss, 254-257.
[27] See e.g. Article 1: 231 Netherlands Civil Code.

Article 16 NL provides that a minor shall, inter alia, lose his Netherlands nationality if his/her father or mother acquires another nationality of his/her own free will and the minor thereby also acquires the foreign nationality or already possesses it. The same applies if the father or mother loses his/her Netherlands nationality pursuant to renunciation, permanent residence abroad or revocation of the naturalisation decree.

The Belgian and Luxembourg provisions (Article 22 (3), (4) and (6) B and 25 (3) L) follow the same approach, but add as a condition that the relevant parent(s) must exercise the parental authority in respect to the child.

In contrast with the Netherlands and Belgian regulations, the child of a Luxembourg national does not lose Luxembourg nationality, if his Luxembourg parents lose this nationality because of permanent residence abroad.

In the Scandinavian countries, children also lose in principle their nationality, if their parents do so. In Denmark, for example, Article 7 (3) states, that Danish citizenship is forfeited by an unmarried child under the age of eighteen years who acquires foreign citizenship because one of its parents, who has custody or any part thereof, acquires a foreign nationality, unless the other parent remains Danish and also has custody. Comparable regulations can be found in 7 IS, 7 N.[28] Compare also Article 44 (1) SWIT; 13 (3) POL (if the other parent is a Polish citizen and has parental authority, that parent has to give consent, which can be replaced by the permission of the court; children of 16 years and older have to express their consent to the extension); 7 (4) SLK; 22 SLN (children older than 14 years have to give their consent).

In Austria para. 29 provides that the loss of nationality by a national because of voluntary acquisition of another nationality, also extends to his/her children born in wedlock and his/her adopted children, if they are minors and unmarried and they also acquire the foreign nationality by law or would acquire it if they did not already possess that nationality, except in the case that the other parent remains an Austrian national. A minor who has already reached the age of fourteen years only loses Austrian nationality in that case if he/she has given his/her consent in respect of the acquisition of the foreign nationality. The loss of nationality also extends to the national's minor children if they are unmarried and born out of wedlock and would acquire the foreign nationality by law if their legal representative has explicitly given his/her consent to the acquisition of the foreign nationality in advance. This applies to children of a man only if his paternity has been established or recognized and he is in charge of care and custody of the children.

In this context one also has to pay attention to the provision of para. 27 (2) and (3) AUS according to which a national not enjoying full legal capacity loses the nationality only if the declaration of will intended to acquire a foreign nationality was expressed on his behalf either by his/her legal representative or, with the legal representative's consent, by himself/herself or a third person. The consent of the legal representative has to be given before the foreign nationality can be acquired. If neither the parents nor the foster parents are the legal representative, the loss of nationality only occurs if the court competent in guardianship or custody matters approves the declaration of will (consent) of the legal representative before the foreign nationality is acquired. Furthermore, a minor national over the age of fourteen shall lose the nationality only under the condition that he/she has expressly consented to the declaration

[28] Compare also 8 (2) DK, 8 IS, 8 N and 9A (3) DK, 9 IS, 9A N.

of will of his/her legal representative or a third person before the acquisition of the foreign nationality.

For Germany para. 19 determines that a legal representative may only apply for release ('*Entlassung*') from citizenship of a person under parental authority or guardianship with the consent of the guardianship court ("*Vormundschaftsgericht*"). In addition to the applicants, the State attorney's office is also entitled to appeal against the decision of the court; the decision of the court of appeals is not subject to further appeals. The consent of the guardianship court is not necessary if the father or the mother applies for dismissal for himself/herself and simultaneously applies for the dismissal of the child by virtue of his/her parental authority and if the applicant is responsible for the custody of the child. If the duties of a special advisor ("*Beistand*") to the mother extend to the care of the child ("*Sorge für die Person des Kindes*"), the application of the mother for the child's dismissal requires the consent of the special advisor.

A completely different approach can be noticed in some other countries, where loss of nationality by a parent does not have consequences for the nationality of his/her children. This is the case in Ireland, where Sect. 22 (2) provides:

> " 2. Loss of Irish citizenship by a person shall not of itself affect the citizenship of his or her spouse or children."

3. Grounds for loss which also apply to adults

Of the grounds of loss of nationality accepted by Articles 7 and 8 of the ECN, Article 7 (1) (f and g) of the ECN only apply to minors. Article 7 (1) (a-e) and 8 (1) of the ECN can apply to both adults and minors. In respect of these grounds for loss one can distinguish between a) voluntary acts which cause the loss of nationality and b) other acts or facts which cause loss of nationality.

3.1 Voluntary acts

Article 7 of the ECN does not prohibit that a minor loses his nationality because of a voluntary acquisition of another nationality[29]. This is for example the case, according to Article 16 (1) (f) NET, which provides for the loss of nationality by a minor who acquires the same nationality as his/her father or mother in his/her own right. For the application of this provision it does not seem to make a difference whether the acquisition involved happened on application of the legal representative or on application of the minor (with or without the consent of the legal representative). The loss does not depend on consent of the minor, even in cases where the minor is already able to form his/her own views on his/her nationality position.

An other ground for loss that could apply to minors is voluntary service in a foreign military force.[30] In order to protect minors against a loss of nationality on this ground some jurisdictions require in that case the consent of the legal representative or consent of the court. This is for example the case in Austria, where para. 32 provides that a minor only loses Austrian nationality, if he enters the foreign military with the previous consent of his/her legal representative. If the legal representative is not the minor's parent previous permission of the

[29] De Groot, Loss, 205-215.
[30] De Groot, 225-228.

court is necessary (see also para. 27 (2) A). In the Netherlands for instance the corresponding ground for loss (Article 15 (1) (e) NET) does not apply to minors.

Article 8 of the ECN does not exclude a declaration of renunciation of nationality[31] by or on behalf of a minor. In such a case the minor should be represented by his/her legal representative or should act with his legal representative's consent. Since 2003, Article 16 (1) (b) NET provides for the possibility of renunciation of Netherlands nationality by or on behalf of the minor, if the minor involved also possesses another nationality. It is remarkable that the Netherlands nationality act does not require that the minor involved - if he/she is already able to form his/her own views on his nationality position - has to give his/her consent for a renunciation. Furthermore, the competent Netherlands authorities do not have any discretion to refuse a declaration of renunciation made by a legal representative on behalf of a minor who also possesses another nationality. In such a case the loss of nationality can occur without or even against the will of the minor involved. If the minor involved is already capable of forming his/her own views this might violate Article 12 of the Convention on the Rights of the Child. The loss in question may be qualified as 'arbitrary' in the sense of Article 15 (2) of the Universal Declaration of Human Rights and Article 4 (c) of the ECN.

3.2 Other acts and facts

Article 7 (1) (e) of the ECN allows for a nationality to be lost where a genuine link is lacking between the State and a national habitually residing abroad. As far as we can see, nearly all States which apply this ground for loss exclusively apply it to adults.[32]

Furthermore, Article 7 (1) (b) of the ECN allows for loss of nationality in case of acquisition of the nationality of the State by means of fraudulent conduct, false information or concealment of any relevant fact attributable to the applicant[33] and Article 7 (1) (d) of the ECN makes loss possible because of conduct seriously prejudicial to the vital interests of the State[34]. In both cases the decision to deprive a person of the nationality has to be taken by a judge or judicial review of the decision taken by a competent authorities must be possible. In such a procedure the child is beyond any doubt an interested party and has therefore as such access to the judge.

4. A right for the child to remedy the decision of the parent?

We saw above, that some grounds for loss of nationality by minors do not have a direct link to the representation of children by their parents or other legal representatives. This is in particular the case if a nationality is lost because of loss of a family relationship or in case of loss of a conditional nationality granted in order to avoid statelessness. In respect of loss of nationality because of adoption, we refer to the remarks already made above.

In respect of the other grounds for loss three categories have to be distinguished:

a. Loss resulting from voluntary acts by or on behalf of the minor (in particular voluntary acquisition of a foreign nationality or renunciation of nationality). It is in our opinion difficult to accept the loss of nationality as a consequence of acts of a legal representative. In any case, due attention has to be paid to the view of

[31] De Groot, Loss, 261-268.
[32] De Groot, Loss, 240-246; an exception is Article 23-6 F
[33] De Groot, Loss, 215-225.
[34] De Groot, Loss, 233-240.

the minor involved. One should realis e, that abuse of the power of representation is possible. In view of Article 12 of the ECN the minor involved should in respect of these ground for loss always have access to a judge, and preferably be represented by a special guardian *ad litem.* It is desirable to make the loss of nationality on these ground depend on the prior consent of a court, which has to use as criteria the best interest of the child involved.

b. Loss as a result of extension of the loss of nationality by the parents because of voluntary acts of those parents (voluntary acquisition of another nationality; renunciation) to the child. This loss of nationality by children is sometimes defended with the argument, that children will not build up a genuine link with the country, the nationality of which has already been lost by the parent. Often, this may be true, but it is not difficult to imagine cases where a child maintains a serious link with a State in spite of the fact that a parent has lost this link. Moreover, the construction of the extension implies directly or indirectly a dimension of representation of the children by the parents. There is, therefore, no serious difference with the cases mentioned above under a). Thus again, the child should at least have access to a judge. But it is preferable to make an extension dependent on the prior permission of the court which is to be given in the best interest of the child.

c. Loss as a result of extension of the loss of nationality by the parents because of other facts (lack of a genuine link; fraud) to the child. Article 7 (2) of the ECN allows this extension in those cases, but one should realis e that such an extension also implies that the child's nationality position is dependent on the behaviour of the parents. This is not always justified. If a parent loses his nationality because of lack of a genuine link, a child may still maintain relevant ties with the country involved, e.g. if the child lives in that country. Again, access to a judge has to be given. If a parent loses a nationality because this status is acquired by fraud, misrepresentation or concealment of relevant facts, it may be problematic to extend this loss to children if no fraud etc. was committed in respect of the information relating to the children. This is in particular true, if a child acquired the nationality involved at a very young age and the fraud involved was only discovered after a very long period. Once again, the child involved should have access to a court, which has to take into account the best interest of the child (in particular the period which the child possessed the nationality involved) and the seriousness of the fraud before deciding that the loss of nationality by the parent due to his/her fraudulent behaviour also has as consequence that the nationality is lost by the child.