CJEU Rules on the Recognition of Names in the EU: Bogendorff von Wolfersdorff

On 2 June 2016 the CJEU came down with its long awaited judgment in Nabiel Peter Bogendorff von Wolfersdorff v. Standesamt der Stadt Karlsruhe. Dealing (once more) with the question whether the freedoms conferred under Article 21 TFEU require Member States to recognize names of private individuals registered in another Member State the Court held that the refusal, by the authorities of a Member State, to recognise the forenames and surname of a national of that Member State, as determined and registered in another Member State of which he also holds the nationality, constitutes a restriction on the freedoms conferred under Article 21 TFEU on all citizens of the EU. However, the Court also found that such a restriction may be justified by considerations of public policy.

David de Groot from the University of Bern (Switzerland) has kindly prepared the following note:

Mr Bogendorff von Wolffersdorff was born as a German national named Nabiel Bagadi. After an adoption his name changed to Peter Nabiel Bogendorff von Wolffersdorff. He moved to Britain and acquired, while being habitually resident there, the British nationality and subsequently changed his name by deed poll to 'Peter Mark Emanuel Graf von Wolffersdorff Freiherr von Bogendorff'. The German authorities did not want to recognise his new name as it contained the words 'Graf' and 'Freiherr', which used to be titles of nobility in Germany. According to Article 109 of the Weimar Constitution – which is still applicable based on Article 123 Basic Law – any creation of new titles of nobility is prohibited in Germany. However, the titles of nobility at the time of abolition became an integral part of the surname. Thus in Germany there are still persons who have a former title of nobility in their name. The same issue his daughter had where the German authorities did not want to recognise her name 'Larissa Xenia Gräfin von Wolffersdorff Freiin von Bogendorff'. In that case, though, the *Oberlandesgericht Dresden* had decided that the German authorities had to recognise the name established in the United Kingdom.

The District Court of Karlsruhe referred the following question to the CJEU:

> *Are 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 part of a name?*

A refusal by the authorities of a Member State to recognise a name of its national established while the person exercised his free movement rights in another Member State is likely to hinder the exercise of the free movement rights enshrined in Article 21 TFEU. Furthermore confusion and serious inconvenience at administrative, professional and private levels are likely to occur. This is due to the fact that the divergence between documents gives rise to doubt to the person's identity and the authenticity of the documents and the necessity for the person to each time dispel doubts as to his identity. Therefore, it is a restriction of Article 21 TFEU which can only be justified by objective considerations which are proportionate to the legitimate objective of the national provisions.

The German authorities had brought several reasons to justify the restriction on the recognition of the name. The first justification brought forward was the immutability and continuity of names. The Court stated that although it is a legitimate principle, it is not a that important principle that it can justify a refusal to recognise a name established in another Member State. The second justification concerned the fact that it was a singular name change, meaning that the name changed independent of another civil status change. Therefore, the name change was dictated on personal reasons.

The Court referred to the case *Stjerna v. Finland* from the European Court of Human Rights of 1994 where it was stated that there may exist genuine reasons that might prompt an individual to wish to change his name, however that legal restriction on such a possibility could be justified in the public interest. The Court, however also stated that the voluntary nature of the name change does not in

itself undermine the public interest and can therefore not justify alone a restriction of Article 21 TFEU. Concerning the personal reasons to change the name the Court also referred to the *Centros* ruling on abuse of EU law, but did not state whether it actually applied to the case. Concerning the German argument that the name was too long, the Court stated that "such considerations of administrative convenience cannot suffice to justify an obstacle to freedom of movement."

The most important point made by the German authorities concerned the fact that the name established in the UK entailed former German titles of nobility. The Government argued that the rules on abolishment of nobility and therefore refusal to recognise new titles of nobility were a part of the German public policy and intended to ensure equal treatment of all German citizens. Such an objective consideration relating to public policy could be cable of justifying the restriction; however it must be interpreted strictly. This means that it can only apply when it is a genuine and sufficiently serious threat to a fundamental interest of society.

In *Sayn-Wittgenstein* the Court had held that it was not disproportionate for Austria to attain the objective of the principle of equal treatment "by prohibiting any acquisition, possession or use, by its nationals, of titles of nobility or noble elements which may create the impression that the bearer of the name is holder of such rank." However the German legal system is different in that there is not a strict prohibition on maintaining titles of nobility as a part of the family name and it is also possible to acquire it through adoption. It would though not be in the interest of the German legislature if German nationals could under application of the law of another Member State adopt abolished titles of nobility and that these would automatically have to be recognised by the German authorities.The Court was though not sure whether the practice of the German authorities to refuse a name including former titles of nobility, while allowing some persons in Germany to bear such a name, is appropriate and necessary to ensure the protection of the public policy and the principle of equality before the law of all German citizens. As this is a question of proportionality it would be for the referring court to decide upon this.

The Court however marked certain factors that have to be taken into consideration while not being justifications themselves. First of all that Mr Bogendorff von Wolffersdorff exercised his free movement rights and holds double German and British nationality. Secondly, that the elements at issue do not

formally constitute titles of nobility in either Germany or the United Kingdom. Thirdly, that the *Oberlandesgericht Dresden* in the case of the daughter of Mr Bogendorff von Wolffersdorff did not consider the recognition of a name including titles contrary to public policy. However, the court would also have to take into consideration that it concerned a singular name change which is based purely on personal choice and that the name gives impression of noble origins. The Court concluded, however, that even if the surname is not recognised based on the objective reason of public policy, it cannot apply to the forenames, which would have to be recognised.

As such it is not that much a surprise that the Court referred the case back as it concerned a matter of proportionality. But still the Court's judgment is a bit disappointing as some issues of the referred question are unsolved. For example the Court did never go into the part of the referred question concerning "the future substantial link" of the British nationality. The Court states that Mr Bogendorff von Wolffersdorff is dual German and British national, but it could also have stated that the future substantial link does not matter due to the *Micheletti* case. Also Article 18 TFEU got lost after the rephrasing of the question and the Court then only concentrated on Article 21 TFEU.

What is though very surprising is that the Court only mentions the case law on abuse of law, but then leaves it open whether it is applicable or not. Considering that Mr Bogendorff von Wolffersdorff lived in the United Kingdom for four years and even acquired British citizenship makes it rather doubtful whether one could consider it an abuse; especially if one compares it for example to the facts of the *Torresi* case.

It is thus now up to the national court to decide whether all German citizens are equal, or whether some are more equal than others – and all of these are former nobility.