Hard Cases

Italian Citizenship by Marriage: Some Remarks on the Constitutional Court's Ruling no 195 of 2022

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Abstract

In July 2022, the Italian Constitutional Court handed down Judgment no 195 on the issue of citizenship by marriage. The Court held that foreign or stateless persons married to an Italian citizen cannot be denied Italian citizenship due to the death of their spouse pending the proceedings, provided that they fulfil the conditions to obtain Italian citizenship at the time of the application. Thus, the Court declared that Art 5 of the Italian Citizenship Act violated Art 3 of the Italian Constitution in so far as it included the death of the Italian spouse during the proceedings among the circumstances precluding the acquisition of citizenship. Against this backdrop, the present contribution investigates whether the pertinent rule violated international human rights law as well, an issue that the Constitutional Court left unaddressed. To this end, particular attention will be paid to the principle of non-discrimination under Protocol 12 to the European Convention on Human Rights.

I. Introduction

In July 2022, the Italian Constitutional Court handed down Judgment no 195 on the issue of citizenship by marriage.[1] The Court concluded that foreign or stateless persons married to an Italian citizen cannot be denied Italian citizenship due to the death of their spouse pending the proceedings for the recognition of their right, provided that they fulfil the conditions to obtain Italian citizenship at the time of the application. Thus, the Court declared that Art 5 of the Italian Citizenship Act[2] was in violation of Art 3 of the Italian Constitution in so far as it included the death of the Italian spouse during the proceedings among the circumstances precluding the acquisition of citizenship. The Court addressed the issue solely from the standpoint of the domestic legal system, without taking into account any international law instrument. Still, it is worth assessing whether the conclusion of the Court is consistent with the international human rights law obligations binding upon Italy.

Following a short overview of the legal regime governing the procedure for obtaining Italian citizenship by marriage (Section II), this paper summarises the facts of the case and the reasoning underpinning the ruling of the Constitutional

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[1] Corte costituzionale 26 July 2022 no 195, *Federalismi* (2022).

[2] Legge 5 febbraio 1992 no 91 (as amended) (hereinafter 'Italian Citizenship Act').

Court, and it provides some general considerations on the Court's judgment (Section III). It later explores if (and to what extent) the contested rule was also in contradiction with international law, notably with the principle of non-discrimination under Protocol 12 to the European Convention on Human Rights (Section IV). Section V draws some concluding remarks.

II. Italian Citizenship by Marriage

According to national law, there are five ways to obtain Italian Citizenship,[3] notably *jure sanguinis* (or nationality by descent), marriage or other family relationship, *jus soli* (as regards particular categories of foreign and stateless persons), naturalization,[4] and by decree of the President of the Republic 'when there is an exceptional interest of the State'.

To obtain citizenship by marriage with an Italian national, the foreign or stateless person must fulfil a set of requirements and must not fall under any of the circumstances precluding the granting of Italian citizenship.[5] In particular, Art 5 of the Italian Citizenship Act prescribes a qualifying period: the foreign or stateless person may acquire citizenship if he or she has resided in Italy for at least two years after the marriage, or after three years from the marriage if he or she has resided abroad. This qualifying period is reduced by half if the married couple has natural or adopted children.[6]

Circumstances precluding the granting of Italian citizenship by marriage include, on the one hand, events that affect the marriage bond and, on the other, the final conviction by a court of law for one of the crimes listed in Art 6(1)(a) and (b) of the Italian Citizenship Act.[7] Also, citizenship is denied if there are well-founded

[3] For an overview of the means to obtain nationality, see eg, O. Dörr, 'Nationality' *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2019), paras 12-23; C. Focarelli, *International Law* (Cheltenham: Edward Elgar, 2019), 42. On the means to be granted Italian citizenship, see eg, R. Bin and G. Pitruzzella, *Diritto costituzionale* (Torino: Giappichelli, 21st ed, 2020), 25; P. Pustorino, *Lezioni di tutela internazionale dei diritti umani* (Bari: Cacucci, 1st ed, 2019), 180-184; G. Minervini, 'Italian Citizenship Attribution to Patrick Zaki An International Law Perspective' *The Italian Review of International and Comparative Law*, 443, 445 (2021).

[4] Dörr defines naturalization as 'the conferment of nationality onto an alien by a formal individual act with the consent of (…) the person concerned' (O. Dörr, 'Nationality' n 3 above, para 12).

[5] Scholars also define these conditions as 'positive requirements' and 'negative requirements', respectively. See A. Rauti, 'Acquisto della cittadinanza italiana per matrimonio e morte del "coniuge" nella sent. cost. n. 195 del 2022' *Osservatorio Costituzionale*, 433 (2022).

[6] According to a recent amendment, in certain cases foreign or stateless persons must also prove their knowledge of the Italian language. See legge 1 dicembre 2018 no 132, Art 9(1) and decreto legislativo 25 luglio 1998 no 286 (as amended), Art 9(1).

[7] Notably, lett *a*) recall the offences provided for in Volume II, Title 1, Chapters I, II and III of the Criminal Code. These Chapters respectively govern offences against the international legal personality of the State, against the domestic legal personality of the State and against the political rights of citizenships. Lett *b*) mentions the case of convictions for an offence committed with criminal intent for which the law prescribes a statutory penalty of a maximum of at least three years imprisonment, or convictions by a foreign judicial authority for a non-political offence for which

reasons to consider the person concerned as a serious threat to national security.[8]

For the purpose of the present paper, the first set of circumstances is particularly relevant. Before the ruling of the Italian Constitutional Court, Art 5 of the Italian Citizenship Act prescribed that, at the time of issue of the decree by the Minister of Internal Affairs, the marriage must not have been dissolved or annulled, or the civil effects of the marriage must not have been terminated, and the spouses must not have legally separated.

On a procedural stance, the application for citizenship must be submitted to the *Prefettura*, one of the bodies of the Minister of Internal Affairs, which has up to thirty-six months to inform the applicant of the result of the procedure.[9]

Lastly, it must be pointed out that, according to Italian Supreme Court, the foreign or stateless person who submits the application for citizenship by marriage is entitled to a full-blown individual right (*diritto soggettivo*) to obtain Italian citizenship, as confirmed by the fact that the competence on dispute resolution lies on ordinary courts – and not on administrative ones, as it would have been the case if the applicant was only bestowed with a 'legitimate interest' (*interesse legittimo*).[10]

III. The Constitutional Court's Ruling no 195 of 2022

The case under comment was referred to the Constitutional Court by the Tribunal of Trieste, which was called to decide on the rejection by the administrative authorities of the application for citizenship submitted by a Ukrainian national.

The woman has resided in Italy since 6 September 2007, married an Italian citizen on 14 March 2009, and submitted the application for citizenship on 9 June 2011. On 27 July 2012, she became a widow pending the proceedings of citizenship. On 22 April 2013, the *Prefettura* notified her that her application was inadmissible: according to the administrative authorities, the death of the spouse dissolved the marriage and, thus, fell within one of the circumstances precluding the granting citizenship under Art 5 of the pertinent act. The woman filed a complaint before the Tribunal of Trieste, which identified three possible grounds of unconstitutionality. Notably, the Tribunal argued that the provision was in violation of Art 3 of the Italian Constitution (principle of equality and reasonableness), alone and together with Art 24 (right to judicial action) and Art 97 (principle of sound administration).[11]

According to the Tribunal of Trieste, the relevant norm led to an unjustified unequal treatment between, on the one hand, the foreign or stateless person

the law prescribes a custodial penalty of more than one year when the foreign sentence has been recognized in Italy. Rehabilitation of the offender ceases the preclusive effect of the conviction. See Italian Citizenship Act, Art 6(3).

[8] Italian Citizenship Act, Art 6(1)(c).

[9] ibid Art 9-*ter*.

[10] Corte di Cassazione-Sezioni Unite 21 ottobre 2021, para 4, available at www.questionegiustizia.it; legge 17 febbraio 2017 no 46, Art 3(2).

[11] Corte costituzionale 26 July 2022 no 195, para 5-5.3.

applying for citizenship before administrative authorities, who is entitled to an 'individual right' of obtaining the Italian nationality, and, on the other hand, other situations where persons may directly enforce their individual rights before the courts of law. In this latter scenario, the judicial rulings have retroactive effects. Conversely, in the case of the application for citizenship, the requirements must be met at the moment of the issuance of the decree, a circumstance that divests of any relevance the existence of the mandatory conditions upon submission of the application. Thus, according to the Tribunal, the administrative procedure constituted a limit to the assessment of the pertinent right before civil courts, in violation of Art 24 of the Italian Constitution. The referring Tribunal also contested that the length of the proceedings could negatively affect the applicant, in violation of the principle of sound administration under Art 97 of the Italian Constitution.

The third and last ground concerns the principle of reasonableness. The Tribunal pointed out the difference between the death of the Italian spouse and the other events precluding granting citizenship (annulment of marriage, cessation of its civil effects, legal separation, and other grounds for dissolution of marriage): whilst the former is an unforeseeable event, the latter are the consequences of voluntary decisions attributable to the applicant. The Tribunal also argued that the rationale of the relevant rules lies on the need to avoid fraudulent marriage to obtain Italian citizenship. In light of these observations, there was an intrinsic contradiction between the purpose of the norm and the means to pursue such an aim. Thus, the provision violated the principle of reasonableness under Art 3 of the Italian Constitution.

Both the Attorney General and the Italian Constitutional Court focused on this last ground. The Attorney General contested the rationale proposed by the Tribunal of Trieste on two main grounds. First, the regime governing citizenship by marriage is meant to protect the family unit stemming from the marriage between an Italian citizen and a foreign or stateless person. Second, Art 5 does not aim at granting an individual right to citizenship, rather its purpose is to ensure special protection to the foreign or stateless person with regard to the possibility of residing in Italy and to the right to enter and leave the country. Given these considerations, the Attorney General concluded in favour of the reasonableness of Art 5: citizenship by marriage aims at reinforcing the stability of the family unit, provided that this unit exists at the time of the issuance of the decree. Therefore, the disappearance of the family unit (due to the death of the spouse pending the proceedings) justifies the inadmissibility decision and, ultimately, constitutes a legitimate circumstance precluding the granting of citizenship.[12]

The Constitutional Court affirmed that the main rationale of the regime governing citizenship by marriage consists in offering a simplified means to obtain Italian citizenship to foreign or stateless persons due to their membership of a

[12] Corte costituzionale 26 July 2022 no 195, para 6 - *in fatto*.

family unit grounded on the marriage bond with an Italian citizen.[13] Subsequently, the Court did not clarify which of the two proposed rationales was the one underpinning circumstances precluding the granting of citizenship, but it analysed both alternatives and declared that the contested provision was unreasonable in relation to each of them.[14]

The Court, first, affirmed that the death of the spouse is a natural and random event, outside the control of the foreign or stateless person, which does not pertain to the grounds of the right to citizenship. This right is based on having been part of a family unit constituted through marriage, for the duration of the qualifying period prescribed by law and, following the submission of the application, until the death of the spouse. Against this backdrop, the denial of citizenship is unreasonable in so far as the person concerned meets all the required conditions upon submission of the application and the event occurs pending the procedure. According to the Court, this regime is even less reasonable in cases where a family unit exists between the widow and the couple's children, whether natural or adopted.[15]

Moving on to the second rationale, the Court highlighted the lack of a provision that specifically governs the consequences of fraudulent marriages in relation to the proceedings for granting citizenship.[16] Even assuming that the legislator tried to fight such phenomenon by requiring the absence of indicators pointing at fraudulent marriages (such as the legal separation or cessation of the civil effects) until the issuance of the decree conferring citizenship, the inclusion of the death of the spouse pending the proceedings among the circumstances listed in Art 5 is still unreasonable. In fact, fraudulent marriage requires a degree of intent and foreseeability on the part of the person who is willing to wed with the sole purpose of obtaining citizenship. According to the Constitutional Court, this is not the case of the death of the spouse pending the proceedings.[17]

The Court therefore recalled that a violation of the principle of reasonableness under Art 3 of the Italian Constitution occurs in cases of *intra legem* unreasonableness, *viz.* where there is an intrinsic contradiction between the overall purpose pursued by the legislator and the provision meant to achieve such goal. The assessment of reasonableness, thus, requires evaluating the consistency between a norm and its *ratio legis*.[18]

In conclusion, Art 5 of the Italian Citizenship Act is in violation of Art 3 of the Italian Constitution since it postpones the assessment of the dissolution of marriage, as a consequence of the death of the spouse, to the moment of the issuance of the decree. The provision is thus partly unconstitutional in so far as it does not exclude

[13] Corte costituzionale 26 July 2022 no 195, para 6 - *in diritto*.

[14] ibid para 7.

[15] ibid para 7.1.

[16] The Court noted that provisions on fraudulent marriage exist in relation to family reunification under decreto legislativo 25 luglio 1998 no 286 (as amended), Arts 29(9) and 30(1-*bis*).

[17] Corte costituzionale 26 July 2022 no 195, para 7.2.

[18] ibid para 8.

the death of the spouse, pending the proceedings to obtain citizenship, from the circumstances precluding the recognition of the right to citizenship.[19]

For reasons of judicial economy, the Court did not address the other grounds of unconstitutionality referred by the Tribunal of Trieste.

1. The Death of the Spouse and the Automatic Application of Circumstances Precluding Citizenship by Marriage

The ruling of the Constitutional Court should be welcomed, because it erased an unreasonable provision from the Italian legal system. Moreover, to some extent, it highlighted several critical aspects of the regime on citizenship by marriage – such as the excessive length of the administrative proceedings underlined by the Tribunal of Trieste. However, the line of reasoning of the judgment in itself and the legal regime governing the enforcement of the circumstances precluding the granting of citizenship by marriage are still controversial.

First, Rauti pointed out that the judges seemed to consider the death of the spouse (pending the proceedings for citizenship) as always being a natural and random event, completely devoid of any degree of intent or foreseeability on the part of the widow. This assumption is at least doubtful when it comes to marriage with elderly or terminally ill patients, because in these cases the death of the spouse in the near future hardly falls within the definition of a 'random event'.[20]

Secondly, Art 5 of the Italian Citizenship Act establishes an automatic mechanism under which the application for citizenship is declared inadmissible as soon as one of the precluding circumstances occurs. According to the same author,[21] the Constitutional Court lost the chance to criticise the automatic nature of this mechanism, which relies on the erroneous assumption that the other circumstances precluding the granting of citizenship (such as the legal separation or cessation of the civil effects) are always the consequence of voluntary decisions attributable to the applicants or their spouses. As a corollary of the automatic application of the circumstances under Art 5, foreign or stateless persons are required to remain wed even if the Italian spouses cheat on them, or in case of desertion – ie, in cases of blatant breaches of the obligation of fidelity and cohabitation under Art 143(1) of the Italian Civil Code.[22] This is highly questionable as it runs contrary to each of the proposed rationales underpinning Art 5: on the one hand, the occurrence of one of the precluding circumstances does not exclude, in and for itself, the persistent existence of a family unit (eg, between the former spouse and the children of the couple); on the other hand, forcing individuals to remain wed to

[19] Corte costituzionale 26 July 2022 no 195, para 9.

[20] A. Rauti, 'Acquisto della cittadinanza italiana' n 5 above, 446.

[21] ibid 446-447.

[22] Italian Civil Code, Art 143 (Reciprocal Rights and Duties of the Husband and Wife): '(1) Upon marrying, the husband and wife acquire the same rights and assume the same duties. The state of matrimony requires a reciprocal obligation to fidelity, to moral and material assistance, to collaboration in the interest of the family and to cohabitation. (…)'.

faulty spouse does not seem an adequate measure to fight against fraudulent marriages – it rather appears to encourage them, at least after the occurrence of the event pending the proceedings for citizenship.

We agree with Rauti that the legal regime on citizenship by marriage should require the applicant to meet the relevant conditions upon the submission of the request, whilst the occurrence of one of the precluding events that affect the marriage bond should be assessed on a case-by-case basis, by taking into account the continual existence of the family unit notwithstanding the dissolution of the marriage bond, the best interests of the child (if any) and the degree of intention on the part of the spouses. Such an approach may also avoid possible tensions with the principle of non-discrimination under Protocol 12 of the European Convention on Human Rights (ECHR). [23]

IV. The Right to Citizenship and International Law

It is generally accepted that questions of nationality fall within the reserved domain of States: these enjoy a general discretion in determining the criteria for the acquisition and loss of nationality, a matter which falls within domestic jurisdiction. Still, international law somehow limits this discretion, including through the obligations stemming from international human rights law.[24]

Even if a comprehensive body of rules relating to citizenship is still missing, some specific international rules govern both *horizontal* and *vertical* aspects linked to citizenship – ie, those related to inter-State relations and to individual-State relations, respectively. In fact, citizenship assumes significance in several scenarios governed by general rules of international law or treaty norms.

In greater detail, States have a general freedom to regulate the conferral and revocation of their nationality on the domestic level, whilst the few norms of

[23] Council of Europe, Protocol no 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 2000, entry into force 1 April 2005).

[24] O. Dörr, 'Nationality' n 3 above, para 4; J. Crawford, *Brownlie's Principles of International Law* (Oxford: Oxford University Press, 9th ed, 2019), 495-497. See also PCIJ, *Nationality Decrees Issued in Tunis and Morocco,* Advisory Opinion of the 7 February 1923, 23-24; ILC, 'Nationality, Including Statelessness. Report by Mr. Manley O. Hudson, Special Rapporteur', in *Yearbook of the International Law Commission*, 1952, II, 8. The relationship between citizenship and international law has been addressed by a wealth of literature, including eg, H.F. Van Panhuys, *The Role of Nationality in International Law. An Outline* (Leiden: A.W. Sijthoff, 1959); I. Brownlie, 'The Relations of Nationality in Public International Law' *British Yearbook of International Law*, 284 (1963); M.S. McDouglas et al, 'Nationality and Human rights: The Protection of the Individual in External Arenas' *The Yale Law Journal*, 900 (1974); A.F. Panzera, *Limiti internazionali in materia di cittadinanza* (Napoli: Jovene, 1984); R. Donner, *The Regulation of Nationality in International Law* (Leiden: Brill, 2nd ed, 1994); Y. Zilbershats, *The Human Right to Citizenship* (Leiden: Brill, 2002); L. Panella, *La cittadinanza e le cittadinanze nel diritto internazionale* (Napoli: Editoriale Scientifica, 2008); A. Annoni and S. Forlati eds, *The Changing Role of Nationality in International Law* (London: Routledge, 2013); K. Krūma, *EU Citizenship, Nationality and Migrant Status. An ongoing challenge* (Leiden: Brill, 2014).

general international law pertaining to this matter govern the consequences of a State's policy choices in this field *vis-à-vis* other States - eg, whether the latter may refuse to recognize the consequences of the attribution of nationality by the former. The International Court of Justice (ICJ) has affirmed this principle in the famous *Nottembohm* case on diplomatic protection. In its judgment, the Court clarified that 'international law leaves it to each State to lay down the rules governing the grant of its own nationality'[25] and that 'the wider concept of nationality is within the domestic jurisdiction' of each sovereign State.[26] In fact, the conferral of nationality determines who enjoys the rights and is bound by the duties that each State recognizes to and imposes on its citizens. However, it is for international law 'to determine whether a State is entitled to exercise protection' to the benefit of specific individuals, on the ground of nationality, in its horizontal relation with other sovereign States.[27] The ICJ concluded that a 'genuine connection' must exist between the State and its nationals for the attribution of citizenship to have consequences on the international level.[28] Subsequently, the International Law Commission (ILC) smoothed the ICJ's conclusion. The 2006 Articles on Diplomatic Protection do not mention the 'genuine link' for the purposes of diplomatic protection, as the ILC's work simply requires that the attribution of nationality is 'not inconsistent with international law'.[29] This more relaxed rule stems from the assumption that, according to the ILC, in the *Nottebohm* case 'the Court did not intend to expound a general rule applicable to all States, but only a relative rule' for the specific case at hand.[30] The most recent developments on diplomatic protection point out a shift from a mere *horizontal* dimension to a (at least partly) *vertical one*, according to which individuals have a legitimate interest (yet, not a right).

The development of the regime governing diplomatic protection at both the national and international level has led scholars to argue that individuals have at least a legitimate expectation to benefit from the protection of their country of nationality, which thus limits this latter discretion.[31] This shift from a *horizontal* perspective to a *vertical* one characterized also other fields of international law where nationality assumes significance. These fields include, for example, those

[25] *Nottebohm Case (second phase)*, Judgment of April 6th, 1955, ICJ Reports 1955, 4, 23.

[26] ibid 20.

[27] ibid 21.

[28] ibid 23.

[29] Art 4 'State of nationality of a natural person', in *Yearbook of the International Law Commission*. Report of the Commission to the General Assembly on the work of its fifty-eight session, II, Part two (Geneva: United Nations Publication, 2006): 'For the purposes of the diplomatic protection of a natural person, a State of nationality means a State whose nationality that person has acquired, in accordance with the law of that State, by birth, descent, naturalization, succession of States or in any other manner, not inconsistent with international law'.

[30] ibid para 5.

[31] See eg, A.M.H. Vermeer-Künzli, *The protection of individuals by means of diplomatic protection: diplomatic protection as a human rights instrument* (Leiden: Universiteit Leiden 2007), 176-205; E. Denza, 'Nationality and Diplomatic Protection' *Netherlands International Law Review*, 463 (2018).

concerning expulsions of aliens, where only the State of nationality has the obligation to re-admit them. The original rationale of this rule, which is currently enshrined in human rights treaties as well, pursued the objective of allowing States to remove third-country citizens from their territory.[32]

From the standpoint of States' discretion in the matter of nationality, if general international law limits the consequences of acquisition or revocation of citizenship in the *horizontal* relationships between States, international human rights law limits States' discretion to confer or revoke nationality in its *vertical* relationships with individuals claiming citizenship (or victim of a withdrawal decision). Such limitations are also imposed by other special regimes, such as the one on stateless persons, which seeks to prevent statelessness at birth or later in life by also requiring States to adopt specific criteria for the conferral of nationality.[33]

As for international human rights law, Art 15 of the Universal Declaration of Human Rights (UDHR) establishes the right of everyone to a nationality and to change nationality, alongside the prohibition of arbitrary deprivation of citizenship.[34] This provision has not been transposed in subsequent treaties of universal and regional scope, with only a few exceptions. In particular, the American Convention on Human Rights and the Arab Charter on Human Rights mirror Art 15 UDHR. Moreover, the former enshrines the right to acquire citizenship according to the *ius soli* criterion, to be applied if the person has no right to any other nationality;[35] the latter, on its part, affirms the *ius sanguinis* criterion based on the mother's citizenship and enshrines the right to have more than one nationality.[36]

[32] S. Marinai, *Perdita della cittadinanza e diritti fondamentali: profili internazionali ed europei* (Milano: Giuffrè, 2017), 2. For other fields in which such shift took place, see *id*, 4-7.

[33] eg, Art 1 of the Convention on the Reduction of Statelessness (28 September 1954, entry into force 6 June 1960) prescribes the *ius soli* criterion. On revocation of nationality, see S. Marinai, n 32 above.

[34] Universal Declaration of Human Rights (10 December 1948) Art 15: '1. Everyone has the right to a nationality. 2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.' On this provision, see eg, M. Adjami, J. Harrington, 'The Scope and Content of Article 15 of the Universal Declaration of Human Rights' 27 *Refugee Survey Quarterly*, 93 (2008). Other non-binding provisions enshrining the right to nationality are provided under regional systems of human rights: see eg, Organization of American States (OAS), American Declaration of Rights and Duties of Men (2 May 1948), Art 19; Association of Southeast Asian Nations (ASEAN), Human Rights Declaration (18 November 2012), Art 18.

[35] American Convention on Human Rights (22 November 1969, 18 July 1978), Art 20: '1. Every person has the right to a nationality. 2. Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality. 3. No one shall be arbitrarily deprived of his nationality or of the right to change it.' See also Inter-American Court of Human Rights, *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica*, Advisory Opinion of the 19 January 1984, available at https://www.refworld.org/cases, in which the judges affirmed that: 'nationality is an inherent right of all human beings' (para 32).

[36] Arab Charter on Human Rights (15 September 2004, entry into force 15 March 2008), Art 29: '1. Everyone has the right to nationality. No one shall be arbitrarily or unlawfully deprived of his nationality. 2. States parties shall take such measures as they deem appropriate, in accordance with their domestic laws on nationality, to allow a child to acquire the mother's nationality, having due regard, in all cases, to the best interests of the child. 3. Non one shall be denied the right to

Other provisions recognize the right of children to nationality.[37] Against this backdrop, it is doubtful that the right of everyone to a nationality stems from a norm of general international law.

Whilst only a few international human rights treaties prescribe the right to a nationality, a remarkable number of conventions restrict States' discretion in grating or withdrawing their citizenship. Notably, human rights law requires States to comply with the principle of non-discrimination in settling the rules governing the questions of nationality.[38] In this regard, Protocol 12 to the ECHR may provide a useful tool in assessing the compatibility of the (former) Art 5 of the Italian Citizenship Act with international human rights law.

Before addressing this specific topic, a few remarks on EU citizenship are due. As is well known, EU citizenship is granted automatically to anyone who holds the nationality of an EU Member State.[39] Besides the rights and duties under domestic law, EU citizens enjoy the rights and bear the duties provided for in EU law, including, eg, the right to move and reside freely within the EU and the right to vote and to stand as candidates in elections to the European Parliament.[40] In the same vein as under international law, the initial wide discretion on questions of citizenship under the EU has gradually reduced: in fact, although it still is for each EU Member State to lay down the conditions for the acquisition and loss of their citizenship, 'the Member States must, when exercising their powers in the sphere of nationality, have due regard to European Union law'.[41]

acquire another nationality, having due regard for the domestic legal procedures in his country.'

[37] See eg, International Covenant on Civil and Political Rights (16 December 1966, 23 March 1976), Art 24(3); Convention on the Rights of the Child (20 November 1989, 2 September 1990), Art 7(1).

[38] O. Dörr, n 3 above, para 6; L. Henenbel and H. Tigroudja, *Traitè de Droit International des Droits de l'Homme* (Paris: Pedone, 12th ed, 2018), 1192-1193. See also International Convention on the Elimination of All Forms of Racial Discrimination (21 December 1965, entry into force 4 January 1969), Art 5 (d) (iii); Convention on the Elimination of All Forms of Discrimination against Women (18 December 1979, entry into force 3 September 1981) Art 9 (1); Convention on the Rights of Persons with Disabilities (13 December 2006, entry into force 3 May 2008), Art 18 (1); European Convention on Nationality (6 November 1997, entry into force 1 March 2000), Art 5 (1).

[39] Treaty on the Functioning of the European Union (TFEU), Consolidated Version 2016, Art 20 (1).

[40] TFEU, Art 20 (2), lett a) and lett b).

[41] See eg, Case C-369/90, *Micheletti and Others* v *Delegación del Gobierno en Cantabria*, Judgment of 7 July 1992, para 10; Case C-179/98 *Belgian State* v *Fatna Mesbah,* Judgment of 11 November 1999, para 29; Case C-135/08, *Janko Rottmann* v *Freistaat Bayern*, Judgment of 2 March 2010, para 45. All the judgments are available at: www. curia.europa.eu. According to the case law of the Cout of Justice of the European Union (ECJ), for example, the legislation of an EU Member State cannot restrict the effects of the grant of the nationality of another EU Member State by imposing an additional condition (such as, eg, habitual residence of the person concerned in the territory of this latter Member State) for recognition of that nationality with a view to the exercise of the EU fundamental freedoms, such as freedom of establishment (see eg, Case C-369/90, *Micheletti and others*, *ibid*). The ECJ also clarified that Member States may revoke their citizenship by naturalization when that citizenship was obtained by deception, 'on condition that the decision to withdraw observes the principle of proportionality' (see eg, Case C-135/08,

1. The Principle of Non-Discrimination under Protocol 12 of the ECHR and the Right to Citizenship by Marriage under (former) Art 5 of the Italian Citizenship Act

Art 1 of Protocol 12 to the ECHR establishes that the 'enjoyment of any right set forth by law shall be secured without discrimination on any ground (…) or (…) status'. The additional protocol was adopted to plug the gap in the scope of the prohibition of discrimination under Art 14 ECHR, whose application is limited to the enjoyment of the rights and freedoms enshrined in the Convention. Even if the European Court of Human Rights (ECtHR) recognized since its early case-law that Art 14 has an autonomous field of application,[42] it has been reluctant to address a claim under this provision in the absence of an alleged breach of ECHR right.[43] In an attempt to verify the relevance of this prohibition with regard to nationality by marriage under (former) Art 5 of the Italian Citizenship Act, the following lines sketch the scope and content of Art 1, Protocol 12 to the ECHR by taking into account the ECtHR's case-law on Art 14 of the Convention due to the strict connection between the two provisions.

As it has just been noted, Art 1, Protocol 12, covers the enjoyment of 'any right set forth by law'. As clarified in the Explanatory Report to the Protocol, this expression refers to – among other situations – 'any right specifically granted to an individual under national law'.[44] According to the ECtHR's well-established case law, the ECHR concepts have an autonomous meaning, so that the interpretation under the domestic law of Contracting Parties has a relative value and, at best, only constitutes a starting point.[45] The ECtHR has constantly interpreted the term 'law'

Janko Rottmann, ibid). For other considerations on this topic, see eg, A. Del Vecchio ed, *La cittadinanza europea. Atti del Convegno - Roma, 26 marzo 1998* (Milano: Giuffrè, 1999); M. Condinanzi et al, *Citizenship of the Union and free movement of persons* (Leiden Boston: Martinus Nijhoff Publishers, 2008); A. Tizzano, 'Alle origini della cittadinanza europea' *Diritto dell'Unione europea*, 1031 (2010); B. Nascimbene and F. Rossi Dal Pozzo, *Diritti di cittadinanza e libertà di circolazione nell'Unione europea* (Padova: CEDAM, 2012); U. Villani, 'Riflessioni su cittadinanza europea e diritti fondamentali', in G. Caggiano ed, *I percorsi giuridici per l'integrazione. Migranti e titolari di protezione internazionale tra diritto dell'Unione e ordinamento italiano* (Torino: Giappichelli, 2014); S. Marinai, n 33 above, 9-13, and the literature reported thereby.

[42] Eur. Court H.R., *Case 'Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium' (Merits)*, Judgment of 23 July 1968 (available at www.hudoc.echr.coe.it), in which the Court recalls that: 'In its opinion of 24th June 1965, the Commission expressed the view that although Article 14 (Article 14) is not at all applicable to rights and freedoms not guaranteed by the Convention and Protocol, its applicability "is not limited to cases in which there is an accompanying violation of another Article" '.

[43] D.J. Harris et al, *Harris, O'Boyle and Warbrick. Law of the European Convention on Human Rights* (Oxford: Oxford University Press, 4th ed, 2018), 764-765.

[44] Explanatory Report to the Protocol no 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 2000, para 22.

[45] E. Bjorge, *Domestic Application of the ECHR: Courts as Faithful Trustees* (Oxford: Oxford University Press, 2015), 202-222; J. McBride, *The Doctrines and Methodology of Interpretation of the European Convention on Human Rights by The European Court of Human Rights*, 2021, available at www. rm.coe.int.

so as to encompass both legislation and case law: notably, the Court has accepted that 'law' is the (statute or lower rank) enactment in force as interpreted by the competent courts.[46]

Neither Art 14 of the Convention nor Art 1, Protocol 12 define 'discrimination'. According to the Court, direct discrimination identifies the 'difference in treatment of persons in analogous, or relevantly similar situations'[47] and 'based on an identifiable characteristic, or 'status'[48] protected by these two provisions. On the other hand, *indirect* discrimination occurs when a general policy or neutral rule has a disproportionately prejudicial effect on a particular group, even when the policy or rule has no discriminatory intent and is not specifically aimed or directed at that group.[49] The Court also developed a two-phase discrimination test in order to assess whether differences in treatment constitute discrimination. The first step of the test is meant to establish whether there has been a difference in the treatment of persons in analogous or similar situations. Should this be the case, the second step aims at assessing whether the difference has an objective and reasonable justification, notably whether the difference pursues a legitimate aim and is proportionate to the purpose pursued.[50]

Last but not least, States parties to the ECHR have both negative and positive obligations under the prohibition of discrimination: States are obliged not to discriminate (directly or indirectly) in their official acts and to adopt affirmative actions to prevent, stop, or punish discrimination in horizontal relationships, eg, those perpetrated by private actors against other private actors.[51]

Turning to the application of these general principles to the case at hand, as recalled in the introductory notes, the Italian Supreme Court has interpreted the Italian legal regime governing citizenship by marriage as conferring an *individual right* to obtain Italian citizenship upon the foreign or stateless person who submits the pertinent application.[52] Therefore, Art 5 of the Italian Citizenship Act falls within the *ratione materiae* scope of Art 1, Protocol 12 to the ECHR. Moreover,

[46] G. Lautenbach, *The Concept of the Rule of Law and the European Court of Human Rights* (Oxford: Oxford University Press, 2013), 84. See ibid 70 for references to the ECtHR's case-law.

[47] See eg, Eur. Court H.R., *Biao* v *Denmark*, Judgment of 24 May 2016, para 89; *D.H. and Others* v *The Czech Republic*, Judgment of 13 November 2007, para 175. Both judgments are available at www.hudoc.echr.coe.it.

[48] Eur. Court H.R., *Varnas* v *Lithuania*, Judgment of 9 July 2013, para 106 available at www.hudoc.echr.coe.it. On the definition of direct discrimination, see also D.J. Harris et al, n 43 above, 766.

[49] See eg, Eur. Court H.R., *Hugh Jordan* v *The United Kingdom*, Judgment of 4 May 2001, para 154; *D.H. and Others* v *The Czech Republic*, Judgment of 13 November 2007, para 183; *Sampanis and Others* v *Greece*, Judgment of 5 June 2008, para 67; *Biao* v *Denmark*, Judgment of 24 May 2016, para 103. All these judgments are available at www.hudoc.echr.coe.it. See also D.J. Harris et al, n 43 above, 766-767.

[50] See D.J. Harris et al, n 43 above, 772-776.

[51] ibid 799-801.

[52] Corte di Cassazione-Sezioni Unite 21 ottobre 2021 no 29297 n 10 above; legge 17 febbraio 2017 no 46, Art 3(2).

the former national provision constituted direct discrimination on the grounds of status, notably the marital status pending the application for citizenship. Former Art 5 required the marital status to exist upon the submission of the application and at the end of the procedure, which can take up to thirty-six months. This constituted a different treatment between foreign nationals who are still wed at the issuance of the decree conferring citizenship, and those who are not due to the death of their spouse. This different treatment has no objective and reasonable justification. In this regard, it is possible to recall the reasoning underpinning the judgment of the Italian Constitutional Court: the denial of citizenship due to the death of the spouse pending the proceedings does not pursue a legitimate aim (be it connecting the conferral of citizenship to the protection of a family unit or fighting fraudulent marriages). Therefore, former Art 5 constituted an unjustified form of direct discrimination by law and, thus, a violation of the negative obligation under Art 1, Protocol 12 ECHR.

V. Concluding Remarks

With Judgment no 195 of July 2022, the Italian Constitutional Court marked a step towards a more reasonable and less discriminatory regime on citizenship by marriage. Even if the Court only addressed the legitimacy of former Art 5 of the Italian Citizenship Act from the standpoint of intrinsic reasonableness under Art 3 of the Italian Constitution, this judgment has also contributed to eliminating an unjustified differential treatment in violation of the prohibition of discrimination under Art 1, Protocol 12 of the European Convention on Human Rights.

Still, the reasoning of the judgment is not without flaws. The main shortcoming is the lack of general disapproval of the automatic mechanism governing the application of precluding events that affect the marriage bond. Although the Court was bound to decide solely on the question referred by the Tribunal of Trieste, it could still have elaborated more on this issue (eg, in an *obiter dictum*). In our view, the lack of a case-by-case assessment of the specific situation of the applicant following the occurrence of one of these events may be contested on the grounds of reasonableness and the prohibition of discrimination, under both the Italian constitution and the ECHR. Indeed, even if States enjoy a general discretion in setting up the criteria for the conferral and loss of nationality, their sovereignty on this matter finds limits in their own legal regime (according to the hierarchy of sources) and in their international human rights obligations. It will not be a surprise, thus, if other applicants decide to litigate their right to obtain Italian nationality by marriage in front of judges up to the Italian Constitutional Court.