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EXPERT OPINION
OF THE COUNCIL OF EUROPE
ON THE DRAFT LAW OF UKRAINE No. 6175 ON AMENDMENTS TO THE LAW
“ON CITIZENSHIP OF UKRAINE” CONCERNING THE REALISATION OF THE
RIGHT TO CHANGE THE CITIZENSHIP

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The objective of the opinion on Draft Law of Ukraine no. 6175 *On Amendments to the Law “On Citizenship Of Ukraine” concerning the realisation of the right to change the citizenship*, which was submitted by the President of Ukraine to Verkhovna Rada is to analyze the proposal and its consistency with existing duties of Ukraine under the binding norms of international treaties applicable on citizenship, in particular European Convention on Nationality.

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I. Introduction to applicable legal principles on nationality in legal system of Ukraine

1. Ukraine acceded as contracting Party to the European Convention on Nationality (hereinafter ECN) on **April 1st 2007**¹, thus its internal legislation applicable on nationality should be in conformity with the said instrument of international law.
2. In regard of operations in application of the ECN and its implications on transposition in internal law of Contracting Party, it needs to be underlined, that the convention itself is built on fundamental core values, acceptable by all parties as promulgated in the preamble.
3. Specifically, ECN highlights the recognition that in matters on nationality, both, the legitimate interest of a State and those of the individuals should be taken in account (see explanatory report of ECN, p. 16); awareness of the right to respect family life as contained in Art. 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms should be respected.
4. Furthermore, it emphasizes the recognition of the freedom of each State to decide which consequences it attaches in its internal law to the fact that a national acquires or possesses another nationality.
5. The Constitution of Ukraine in art. 4² stipulates the principle of single citizenship and contains the norm that the law on citizenship regulates acquisition and loss of citizenship.
6. Furthermore, the Constitution in art. 9 lays down the rule that the International Treaties adopted by Verkhovna Rada are a part of national legislation, conclusion of international treaties, if they contravene the Constitution, is possible only if the Constitution is amended.
7. When Ukraine acceded to the European Convention on Nationality, in the instrument of ratification deposited on 21st of December 2006, used the possibility of declaration in regard of art 8/2: “the term “nationals habitually resident abroad” is used in the meaning of “nationals of Ukraine habitually resident abroad in accordance with the national law which regulates the matters of travelling abroad for the citizens of Ukraine”; In accordance with Article 25, paragraph 1, of the Convention, “Ukraine declares that it

¹ http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/country/U?p_auth=RSedwh1H

² <http://www.legislationline.org/documents/section/constitutions/country/52>

excludes Chapter VII from the application of the Convention”.³ These two declarations are the only ones that Ukraine used when acceding to the ECN; the instrument, including the rules which might be a subject of reservation – e.g. procedural rules – are binding.

8. Pursuant to the obligations under ECN, Ukraine agreed also on definitions: art. 2 – Definitions, among which is the meaning of internal law, which means all types of provisions of the national legal system, including its constitution, legislation, regulations, decrees, case law, customary rules and practice as well as rules deriving from binding international instruments.
9. Such a comprehensive definition of internal law means therefore also anticipation of positive developments of international law – customary and case law, as well as principles and rules of other instruments, not necessary binding for the State.
10. In conformity with the said definition, the provisions of the CoE convention 157, The Framework Convention on National Minorities⁴ (Ukraine is a State party to it since 26 of January 1998) are applicable in correlation with art. 4 to 6, 10-13, and 18-20 (non-nationals) of ECN (see explanatory report to ECN, point 15) – prohibition of discrimination on the ground of belonging to national minority.
11. In this regard, it needs to be underlined that Chapter II of ECN contains the principles, where some of them are overtaken from other international instruments (e.g. Hague’s Convention on Certain Questions relating to the Conflict of Nationality laws – principle of the Competence of the State –art. 3, and the Convention for the Protection of Human Rights and Fundamental Freedoms, namely art. 3 – prohibition of torture or inhuman or degrading treatment or punishment, art 6. – right to a fair process and public hearing, art. 8 – right to family life. Art 14- non-discrimination, art. 4 of Protocol No. 4 – prohibition of the collective expulsion of aliens).
12. Specifically, ECN in art. 4 binds the State Parties to apply in their internal legislation the right of everyone to a nationality, avoidance of statelessness, **prohibition of arbitrary deprivation of his-her nationality**, neither marriage nor the dissolution of marriage between a national of a State party and an alien, nor the change of nationality by one of the spouses during marriage, shall automatically affect the nationality of the other spouse.

³ http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/country/U?p_auth=RSedwh1H

⁴ <http://www.coe.int/en/web/minorities/etats-partie>

13. And at last, art. 5 applies to non-discrimination on different grounds, also of national and ethnic origin, the principle of non-discrimination between its nationals, whether they are nationals by birth or have acquired nationality subsequently should be the guiding for Contracting Party.
14. In accordance with the Vienna Convention on the Law of the Treaties the chapters and provisions of the ECN have **ex nunc** legal effect, from entry into force of the Treaty onward, and do not apply retroactively, thus e.g. for the legal relations related to the status of residents who resided at the territory of Ukraine prior its independence, **no retroactive intervention, with new conditions, could be applied.**
15. The Law on citizenship of Ukraine⁵ in art. 2 lists the principles, which need to be considered when applying the rules of the law, among them: principle of single citizenship – the legal concept that applies in case of federal system of Ukraine and excludes simultaneous possession of the citizenship of federal unit, principle of prohibition of deprivation (denaturalization?) of citizenship **principle of the right of the citizen to change the citizen**, principle of equality before the law, principle of retention of Ukrainian citizenship regardless of place of residence.

II. Remarks related to the amendments in regard of their conformity with the ECN

1. General observations and remarks in regard of the draft law proposals

In general, in the light of overall policy in domain of nationality as stipulated by the legislation on citizenship of Ukraine, the amendments intend to reduce cases of dual-multiple citizenship which occurred since 1991 onward; they introduce more precise rules on proofs related to renunciation of foreign citizenship and introduce the deadlines for submission of the poofs, in addition to the amendments adopted in 2005 by that time reform of the law on citizenship for its harmonisation with ECN.

Furthermore, the amendments also aim to introduce legal consequences, the legal effect for non-cooperation or failure of the deadline for submission of proof on renunciation in some cases (not all): revocation of the citizenship of Ukraine for those Ukrainians who voluntary acquired citizenship(s) of foreign countries, irrespective of their place of residence, as well as foreigners, who acquired Ukrainian citizenship, but have not yet submitted proof of loss of foreign citizenship.

The amendments also foresee a special procedure for refugees who acquired citizenship of Ukraine: for them the draft law foresees an obligation to hand over their national passport to

⁵ <http://www.refworld.org/docid/44a280fa4.html>

the competent Ukrainian authority which will in accordance with the procedure adopted by the Cabinet of Ministers return passports to the competent authorities of the State of citizenship of the refugee.

In addition to the said proposals, the amendments introduce legal presumption of consent of individuals to express retroactively the will on voluntary change of citizenship when acquiring the foreign citizenship, irrespective of the time when they acquired foreign citizenship, the reasons and the mode (including e.g. if they acquired citizenship as a refugee originating from Ukraine).

In regard of State interpretation of the content of the free will, there exists different practice, described in comparative studies on nationality law of many renown Academics, where the recent, the most comprehensive, International Standards on Nationality Law – texts, cases and materials⁶, where the change of citizenship for economic reasons (labor migration) due to the fear of losing employment, or application for acquisition of citizenship in presence of military forces – may not be considered as an act of free will of an individual to which legal consequences of automatic loss of nationality may relate.

The proposal in Final provisions of the Law lays down general rule: for the whole a category of persons who are in possession of dual or multiple citizenship(s) simultaneously in parallel with Ukrainian, irrespective of their residence (in Ukraine or abroad): it introduces deadline of six months to initiate necessary steps with competent authorities of a foreign State to renounce the foreign citizenship and submit the foreign passports to the competent authorities of Ukraine. The legal consequences of failure to comply with the deadline, as defined by the proposal of the law, for submission of the proofs, are not foreseen, neither legal consequences for the residents of Ukraine who would lose foreign citizenship in regard of their status and to it related rights.

Within general remarks, another observation needs to be underlined: in art. 5, where new recital 9 should be added – it foresees exclusion of legal consequences for Ukrainian citizen in case that such a person has exercised electoral or any other rights or duties derived from foreign citizenship, a solution which presents rather unusual mode in citizenship legislations also in regard of the proofs and procedural safeguards and may also lead to arbitrary decision.

2. Concluding remarks and recommendations in regard of the specifics of the proposed amendments

1. Ukraine is a Contracting Party of numerous treaties, which deal with citizenship and human rights related to citizenship: ECN (form 2007), both UN convention on reduction and the status of stateless persons⁷ (March 2013), as well as one of the core UN instruments,

⁶ Gerard René de Groot and Oliver Willem Vonk- Published by Wolf Legal Publications, (WLP), b5060 AH Osterwijk, The Netherlands 2015

⁷ https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=V-4&chapter=5&clang=_en

Universal declaration on Human rights, which in art 15/2 prohibits arbitrary deprivation of nationality and stipulates the right of every person to change the nationality.

According to the ECN, the States are free whether to apply a system of single or multiple nationalities, but on another hand, if they apply restrictive regime of reduction of multiple nationality, they are bound by the principles of prohibition or discrimination and arbitrary deprivation.

In 2009, the Human Right Committee adopted resolution regarding; human rights and arbitrary deprivation of Nationality (Resolution 20/5 of 5th of July, 2012, A/HRC/20/L.9) where stands, that procedural safeguards are essential to prevent abuse of the law.

Indeed, the amendments appear in a form of special law: the Law on citizenship in regard to the right to the change of citizenship; as proposed, it would apply mostly to the cases of multiple nationalities, which occurred from 1991 onward, thus, **with retroactive legal effect.**

As it has been mentioned already, Ukraine acceded to the ECN in March 2007 – in conformity with Vienna Convention on the Law of Treaties, ECN has ex nunc legal effect. Thus, Ukraine may not impose the obligations, which are contrary to the basic principles of the convention: one of them is prohibition of arbitrary decisions.

The introduction of conditions, which were not known when decisions have been made, according to general practice of the States on nationality matters, may not be interpreted as **consent of persons for voluntary change of citizenship and to it related obligation of submission of the proof of loss of foreign citizenship which consequently lead to the loss of Ukrainian citizenship. The mode of proposal and its nature is rather a case of loss of citizenship.**

For the loss of citizenship, the ECN in art. 7 stipulates an exhaustive list of 8 different situations where the States may apply it – among them, there does not exist situation of retroactive loss of citizenship if the deadline for submission of proof could not be met.

The State practice in cases of limitation of effects of multiple nationality applies bilateral agreements, which provide a solid ground with transparent provisions about the modalities and technical questions e.g. like diplomatic channel of return of the passport as proof of acquisition of foreign citizenship also in accordance of data protection legal standards; there exist also multilateral treaties e.g. the Convention on Information regarding the Acquisition of Nationality adopted by the International Commission on Civil Status in 1964, which is due to the decreasing number of States which limit multiple citizenship, almost obsolete.

Study for the feasibility of a legal instrument in the field of nationality law and families,(2013) 35 out of 37 States replied that they more or less tolerate multiple

nationality⁸, a figure which demonstrates that the number of persons due to international mobility and migration significantly increased.

The principle of international law (the 1930 Hague Convention) on effectiveness of nationality, which is also stipulated in the Law on citizenship of Ukraine may serve as the tool to control and regulate consequences of multiple citizenship in the territory under jurisdiction of Ukraine. This means, to have an adequate accurate data base of the citizens of Ukraine – where new technologies with IT support are an excellent assistance if developed in accordance with data protection standards.

Furthermore, one of the most effective modes to limit the consequences of dual/multiple citizenship are Agreements on avoidance of double taxation.

2. The proposal foresees also that the persons who were granted citizenship of Ukraine on the ground of their status: refugee or asylum, should hand over their national passports to the competent authorities of Ukraine; the proposal does not anticipate frequent situation that the refugees many time lack of their national identity documents, for that very reason, according to art. 27 and 28 of 1951 Geneva Convention on status relating to refugees binds the contracting parties to issue documents on identity. In case that they still possess national identity documents: passports, it is equally contrary to applicable standards, the intention of return of their documents – to the respective state of their citizenship.

3. The rule of the proposal art. 9: Section VI “Final Provisions” shall be supplemented with sub-paragraph I-I, which foresees for all the citizens who hold also foreign citizenships an obligation – to take measures in six months to renounce such foreign citizenship and submit their foreign passports to competent authority of Ukraine that shall follow the procedure established by the Cabinet of Ministers of Ukraine to return the foreign passports to the competent authorities of the relevant foreign states.

The proposal does not specify whether such a measure means ex lege loss of citizenship with legal effect on the day of submission foreign passport, the decree of competent authorities of Ukraine on loss of citizenship; the deadline of six months, for all the acts, dissemination of information on consequences of loss of citizenship for the rights may affect large numbers. The lack of procedural safeguards (right to judicial review), in particular for those, who would not comply with proposed deadline, leaves the door opened for arbitrary decisions also in this case.

Ukraine is the State with the size of population: 42.547.5 77 in June 2016⁹, and 50.351.170 in 1990; according to the World Population Report (rev) 2015 Ukraine is one of the worst countries in regards of projection on demographics.¹⁰ Ukraine is listed as one of 48 countries

⁸ <https://rm.coe.int/1680700283>

⁹ http://ukrstat.org/en/operativ/operativ2016/ds/kn/kn_e/kn0516_e.html

¹⁰ https://esa.un.org/unpd/wpp/publications/files/key_findings_wpp_2015.pdf

globally, which will face decline of population, with lowest life expectancy in Europe, and projection of the size of population in 2050, 35.117.000.

The article about emigration from Ukraine, published by Migration Policy Institute in 2006¹¹ mentions an estimation, of about 2,5 million of Ukrainians who emigrated. The last eleven years have much likely contributed to even higher levels of Ukrainians who left.

The above figures could be an imperative for legislator to consider possible consequences for the citizens in case of further steps for adoption of the rules contained in the draft law on Amendments to the Law of Ukraine on Citizenship with regard to the rights to change citizenship; they are contrary to the very fundamental standards enshrined in international binding treaties for Ukraine, in particular European Convention on Nationality.

¹¹ <http://www.migrationpolicy.org/article/caught-between-east-and-west-ukraine-struggles-its-migration-policy>