



INSIGHT

BOLD, BUT WITHOUT JUSTIFICATION? *TJEBBES*

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ABSTRACT: *Tjebbes* (Court of Justice, judgment of 12 March 2019, case C-221/17 [GC]) builds on and extends the scope of a line of existing cases that has started to redefine the relationship between EU citizenship and Member State nationality. This *Insight* inquires on which legal grounds the Court of Justice could justify its bold intervention in the domain of nationality law. The Court offered two justifications, saying that the Member States must "have due regard to EU law" when deciding on the attributions of nationality and that EU citizenship "is intended to be the fundamental status of nationals of the Member States". I argue that neither justification is persuasive and possible to square with the Treaties. The *Insight* also examines the requirement introduced by the Court of Justice that the rules on the loss of nationality must have due regard to the principle of proportionality and allow for an individual examination of the consequences of that loss. I argue that the desirability of such a proportionality requirement is not nearly as self-evident as the Court takes it to be.

KEYWORDS: loss of nationality – EU citizenship – Nationality Act – *Tjebbes* – *Rottman* – Brexit.

I. INTRODUCTION

Is the deprivation of Member State nationality – and hence EU citizenship – of individuals who are nationals of a third country and who have resided for a significant period of time outside the EU compatible with the Treaty provisions on EU citizenship? This was in essence the question the Raad van State (Council of State) of the Netherlands put before the Court of Justice and which was answered in the *Tjebbes* case. According to Art. 15, para. 1, let. c), of Netherlands Nationality Act, adults lose their Netherlands nationality if they have their principal residence outside the Netherlands for an uninterrupted period of 10 years. According to that same law, subject to certain exceptions, minors shall also lose their Netherlands nationality if their father or mother do so pursuant to Art. 15, para. 1, let. c). The Raad van State was interested in finding out whether conditioning loss of citizenship

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on a 10-year period and depriving minors of their nationality for the sake of preserving unity of nationality within the family was proportionate for the purposes of EU law.

II. BACKGROUND AND FACTS

Tjebbes builds on and extends the scope of a line of cases that redefined the relationship between EU citizenship and Member State nationality.¹ According to previous case law, "it is for each Member State, having due regard to EU law, to lay down the conditions for the acquisition and loss of nationality".² The proviso, "to have due regard to EU law", was interpreted in *Rottman* as entailing the obligation for national authorities to ensure that withdrawal decisions observe "the principle of proportionality so far as concerns the consequences it entails for the situation of the person concerned in the light of European Union law".³ *Tjebbes* lays out the requirements of the obligatory proportionality assessment. It must involve an individual assessment of the situation of the person concerned and that of his or her family in order to determine whether the consequences of losing the nationality of the Member State concerned, when it entails the loss of his or her citizenship of the Union, might, with regard to the objective pursued by the national legislature, disproportionately affect the normal development of his or her family and professional life from the point of view of EU law.⁴ "From the point of view of EU law" means "the fundamental rights guaranteed by the Charter [...] and specifically the right to respect for family life [...] read in conjunction with the obligation to take into consideration the best interests of the child".⁵ The Court noted that loss of EU citizenship may create "particular difficulties in continuing to travel [in the EU] in order to retain genuine and regular links with members of his or her family, to pursue his or her professional activity or to undertake the necessary steps to pursue that activity".⁶ As for minors, it was decided that Member States must consider "possible circumstances from which it is apparent that the loss of Netherlands nationality by the minor concerned [...] fails to meet the child's best interests".⁷

¹ For my normative take on the relationship between EU and national citizenship, M. VAN DEN BRINK, *A Qualified Defence of the Primacy of Nationality over European Union Citizenship*, in *International and Comparative Law Quarterly*, forthcoming.

² Court of Justice: judgment of 2 March 2010, case C-135/08 *Rottman* [GC], para. 39; judgment of 7 July 1992, case C-369/90 *Micheletti*, para. 10; judgment of 11 November 1999, case C-179/98 *Mesbah*, para. 29; judgment of 19 October 2004, case C-200/02 *Zhu and Chen*, para. 37.

³ *Rottman* [GC], cit., para 55.

⁴ Court of Justice, judgment of 12 March 2019, case C-221/17, *Tjebbes* [GC], para. 44.

⁵ *Ibid.*, para. 45.

⁶ *Ibid.*, para. 46.

⁷ *Ibid.*, para. 47.

III. COMMENT

Coutts is correct to point out that *Tjebbes* is bold,⁸ both in its reasoning and possible ramifications. While Art. 20, para. 1, TFEU stipulates that "Citizenship of the Union shall be additional to and not replace national citizenship", the Court expanded on previous efforts to deploy EU citizenship to challenge national citizenship law. *Rottman* pales in comparison to *Tjebbes*. In contrast to the applicants in *Tjebbes*, who retained the nationality of a third country, Mr Rottman was rendered stateless as a result of Germany's decision to withdraw his German nationality. This situation, arguably the result of an exceptional chain of events, was easily justified by Germany as being proportionate under EU law.⁹ Yet, while the applicants in *Tjebbes* did not risk statelessness, the Court seems to have significantly heightened the requirements of the proportionality examination. It is no longer legitimate to deprive individuals of their national and EU citizenship if that creates "particular difficulties" for them retaining genuine connections with their family or exercising their professional activities. The Court added that the consequences of losing EU citizenship "cannot be hypothetical or merely a possibility",¹⁰ but it is not difficult to imagine situations in which the consequences of losing EU citizenship and the right to move freely throughout the EU will satisfy this "particular difficulty requirement".

The decision may be far more intrusive than the judges deciding the case realised. The Dutch habitual residence requirement is legitimate in principle, so they decided, but the rules on the loss of nationality must have "due regard to the principle of proportionality" and allow for an individual examination of the consequences of that loss.¹¹ The Court further suggested that the Dutch legislation already contains a requirement to carry out "a full assessment based on the principle of proportionality enshrined in EU law".¹² However, this betrays a profound misunderstanding of the Netherlands Nationality Act on the part of the Court, as this Act does not establish this requirement. Therefore, while it seems that the Court sought to find a middle way between reaffirming its previous line of case law and respecting the competences of the Netherlands in the domain of nationality, the judges perhaps intruded deeply into the domain of nationality law *unintentionally*. Bear in mind though that the precise implications of *Tjebbes* are not fully evident at the moment. The Raad van State still needs to decide how to understand *Tjebbes*, which is by no means easy given the judgment's opaqueness. Still, it seems impossible to uphold the Dutch rules conditioning the loss of national citizenship in their entirety given the requirement of proportionality.

⁸ S. COUTTS, *Bold and Thoughtful: The Court of Justice Intervenes in Nationality Case Law: Case C-221/17 Tjebbes*, in *European Law Blog*, 25 March 2019, europeanlawblog.eu.

⁹ For an analysis of the decision of the German national court in *Rottman*, N. CAMBIEN, *Janko Rottman v Freistaat Bayern*, in *Columbia Journal of European Law*, 2011, p. 375 *et seq.*

¹⁰ *Tjebbes* [GC], cit., para. 44.

¹¹ *Ibid.*, paras 40-41.

¹² *Ibid.*, para. 43.

It is possible to examine *Tjebbes* from a range of different perspectives. The challenged provisions of the Netherlands Nationality Act are controversial and so is the general attitude the Netherlands displays towards citizenship, symbolized most clearly by its general prohibition of dual citizenship. Criticism of the decision is possible to the extent it endorses these practices.¹³ However, there is an important prior question, which EU citizenship scholars tend to take for granted these days. The Court is bound to respect the Treaties and it clearly is not its task to remedy every national injustice that exists. Unfortunately, *Tjebbes* should make us wonder whether the judges also feel obliged to act within the scope of the Treaties.¹⁴

Asking which legal grounds the Court could use to justify its bold interventions in the domain of nationality law is perhaps long overdue, given that *Tjebbes* is only the last in a line of decisions that intervene in the domain of nationality law. However, the more expansive the Court's decisions become, the harder it will be to ignore this question. And the more determined our search for an answer, the more disconcerting what we find may be: not a whole lot. The Court offered two justifications: the Member States must "have due regard to EU law" when deciding on attributions of nationality and EU citizenship "is intended to be the fundamental status of nationals of the Member States". These two statements, in paras 30 and 31 of the judgment, are a prelude to and act as the foundation of what follows. Neither is persuasive.

That "it is for each Member State, having due regard to [EU] law, to lay down the conditions for the acquisition and loss of nationality", the Court decided for the first time in *Michelletti* in 1992. Oddly, this case concerned the recognition of the attribution of nationality of one Member State by another, not the conditions for the attribution of nationality itself. The statement had thus no bearing on the case. Yet, it has been restated in the nationality case law ever since, notwithstanding the various reminders by the Member States that it was for them to define who their nationals are. "The question whether an individual possesses the nationality of a Member State will be settled *solely* by reference to the national law of the Member State concerned"¹⁵ and "EU citizenship shall be additional to and not replace national citizenship".¹⁶ *Tjebbes* simply violates these provisions without even mentioning them.

Perhaps the Court felt no need to discuss the place of Declaration no. 2 and the Edinburgh Declaration having already done so in *Rottman*. There it said that these decla-

¹³ See, for example, D. KOCHENOV, *The Tjebbes Fail*, in *European Papers – European Forum, Insight of 25 April 2019*, www.europeanpapers.eu.

¹⁴ It certainly is not the first time we can raise this concern. T. HORSLEY, *The Court of Justice of the European Union as an Institutional Actor: Judicial Lawmaking and its Limits*, Cambridge: Cambridge University Press, 2018.

¹⁵ Intergovernmental Conference of Edinburgh, declaration on the nationality of a Member State, and Declaration no. 2 annexed to the Maastricht Treaty.

¹⁶ Art. 20 TFEU.

rations "have to be taken into consideration as being instruments for the interpretation of the EC Treaty",¹⁷ but also that "in situations covered by European Union law, the national rules concerned must have due regard to the latter".¹⁸ This line of argumentation is questionable. For if the Court accepts the binding nature of these declarations, according to which the attribution of national citizenship "will be settled *solely* by reference" to the laws the Member States, national decisions on the attribution of national citizenship have due regard to EU law by definition.

What about the second justification, the proclamation that EU citizenship is "destined" or "intended to be the fundamental status of nationals of the Member States"? Intended by whom?, the person encountering EU citizenship law for the first time may wonder. Intended by us, the judges are likely to tell this uninformed person, "according to settled case law".¹⁹ But what then about Art. 20 TFEU, according to which EU citizenship is derivative from and additional to the nationalities of the Member States and shall not replace the latter, this person may wonder? Isn't it possible that the Court's intentions squarely contradict the "text, teleology and legislative history" of the Treaties?²⁰ And isn't it somewhat paradoxical that "[t]he Court derives rights from a fundamental status that does not yet exist"?²¹ The Court never even bothered answering these questions. For the consistency of its EU citizenship jurisprudence it may even be desirable if it never will, because an honest response would involve admitting that EU citizenship never was destined to become the fundamental status of Member State nationals. The Court's proclamations simply cannot serve to justify decisions like *Tjebbes*.

The Court decided differently and to call into question the relevant provisions of the Netherlands Nationality Act for their compatibility with the principle of proportionality. After *Tjebbes*, the Dutch authorities must carry out an individual assessment to determine whether the loss of nationality and EU citizenship "disproportionately affect the normal development of his or her family and professional life".²² The Court offers some clarification in subsequent paragraphs, but the proportionality assessment remains highly open-ended and leaves national authorities much discretion. For example, while *Tjebbes* obliges the Member States to ensure that the loss of nationality is consistent with the fundamental rights guaranteed by the Charter,²³ and does not create "particular difficulties in continuing to travel to the Netherlands or to another Member State",²⁴

¹⁷ *Rottman* [GC], cit., para. 40.

¹⁸ *Ibid.*, para. 41.

¹⁹ *Tjebbes* [GC], cit., para. 31.

²⁰ J.H.H. WEILER, *Epilogue: Judging the Judges – Apology and Critique*, in M. ADAMS, H. DE WAELE, G. STRAETMANS, J. MEEUSEN (eds), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice*, Oxford: Hart, 2013, p. 248.

²¹ P. ELEFThERiADIS, *The Content of EU Citizenship*, in *German Law Journal*, 2014, p. 780.

²² *Tjebbes* [GC], cit., para. 44.

²³ *Ibid.*, para. 45.

²⁴ *Ibid.*, para. 46.

it leaves open what this entails in practice. The degree of deference the Court still shows has been used in its defence. Peers has argued that given the 1992 Edinburgh Declaration and Declaration no. 2 on nationality, "there's a strong case that the Court's case law interfering with the national rules on the loss of national citizenship is unjustifiable in principle. However, this is vitiated by the great deference which the Court gives to Member States on this issue in its case law".²⁵

But surely, Treaty violations are not unproblematic merely because the Court does not ride roughshod over the Member States. Even if *Tjebbes* showed a great degree of deference to the Member States, a questionable conclusion seeing the decision's possible consequences for the Netherlands Nationality Act, the interference with the national rules on the attribution of national citizenship remains unjustifiable, not just in principle but also in practice.

The Court was careful not to oblige the Netherlands to ensure a proportionate application of its ten-year residence requirement in every individual case, by expecting an assessment of a whole range of individual circumstances to decide whether a genuine link exists, something the individual applicants had requested.²⁶ Thereby, it avoids making the mistake it still makes in its expulsion case law,²⁷ where it displaced rules of general application, which conditioned rights by residence periods, by assessments of individual circumstances.²⁸ As AG Mengozzi rightly notes in his Opinion, requiring national courts "to establish, without any specific guidance on the part of the national legislature, the relevant criteria showing a connection with the Member State [...] would expose individuals to situations of legal uncertainty [and] encroach too far on the competence of the Member States to lay down the conditions for loss of nationality".²⁹

However, by contrast to the AG's Opinion, the Court decided that such habitual residence requirements must satisfy "the principle of proportionality so far as concerns the consequences of that loss for the situation of the person concerned and, if relevant,

²⁵ S. PEERS, *Citizens of Somewhere Else? EU Citizenship and Loss of Member State Nationality*, in *EU Law Analysis*, 27 March 2019, eulawanalysis.blogspot.com.

²⁶ AG Mengozzi, opinion of 12 July 2018, case C-221/17, *Tjebbes* [GC], para. 104. See also, S. COUTTS *Bold and Thoughtful*, cit.

²⁷ Court of Justice: judgment of 16 January 2014, case C-378/12, *Onuekwere*; judgment of 16 January 2014, case C-400/12, *M.G.*

²⁸ For reflection on these decisions and the inconsistencies that exists between the social assistance and expulsion case law, M. VAN DEN BRINK, *Justice, Legitimacy and the Authority of Legislation Within the European Union*, in *Modern Law Review*, 2019, p. 293 *et seq.* For further criticism of the expulsion case law, see also, S. COUTTS, *Union Citizenship as Probationary Citizenship: Onuekwere*, in *Common Market Law Review*, 2015, p. 531 *et seq.*; D. KOCHENOV, U. BELAVUSAU, *Kirchberg Dispensing the Punishment: Inflicting "Civil Death" on Prisoners in Onuekwere (C-378/12) and M.G. (C-400/12)*, in *European Law Review*, 2016, p. 557 *et seq.*; D. KOSTAKOPOULOU, *When EU Citizens Become Foreigners*, in *European Law Journal*, 2014, p. 447 *et seq.*

²⁹ Opinion AG Mengozzi, *Tjebbes* [GC], cit., paras 104-114.

for that of the members of his or her family".³⁰ The Court appears to assume this is self-evident and fails to explain the reasons for introducing this requirement. It is not at all evident though why this requirement is needed or even desirable. Consider Art. 16, para. 4, of Directive 2004/38/EC, according to which EU citizens' "right to permanent residence shall be lost only through absence from the host Member State for a period exceeding two consecutive years". This provision is not subject to a further requirement to assess the consequences of the loss of this right in individual cases. And it is not obvious why it should be. To the contrary, one could make a strong argument that there are benefits to using such precise rules on specific occasions, as they remove discretion from law-enforcers, reduce administrative costs and provide clarity.

So the judgment is unjustified and question begging. It also raises the important question of how far the Court is willing to go in protecting the status of EU citizenship, particular in light of UK nationals' seemingly imminent loss of their EU citizenship after Brexit.³¹ This would indeed require another bold step, for as Coutts is correct to point out, "the judgment underlines the link between Member State and Union citizenship both in the operation of law (which really is obvious) but also in the underlying criterion of political membership".³² With a bit of clever lawyering, however, *Tjebbes* could easily be rewritten so as to be applicable in the case of UK nationals "faced with losing the status conferred by Art. 20 TFEU and the rights attaching thereto falls".³³ Such situations fall "by reason of its nature and its consequences, within the ambit of EU law".³⁴ EU law may 'not preclude, in principle' this loss,³⁵ but the relevant authorities must still have "due regard to the principle of proportionality so far as concerns the consequences of that loss for the situation of the person concerned and, if relevant, for that of the members of his or her family, from the point of view of EU law".³⁶ UK nationals interested in retaining their EU citizenship status could try persuading the Court that its case law supports this conclusion in case the deprivation of their EU citizenship produces disproportionate consequences. The Treaties confirm that such a move would be bold and without justification. But what makes us believe the Court is unwilling to act in such problematic fashion? *Tjebbes*?

³⁰ *Tjebbes* [GC], cit., para. 40.

³¹ See also, S. PEERS, *Citizens of Somewhere Else?*, cit.

³² S. COUTTS, *Bold and Thoughtful*, cit. For a general argument against associate EU citizenship after Brexit, M. VAN DEN BRINK, D. KOCHENOV, *Against Associate EU Citizenship*, in *The Journal of Common Market Studies*, forthcoming, available at papers.ssrn.com.

³³ *Tjebbes* [GC], cit., para. 32.

³⁴ *Ibid.*

³⁵ *Ibid.*, para. 39.

³⁶ *Ibid.*, para. 40.

