

## Tjebbes in Wonderland: On European Citizenship, Nationality and Fundamental Rights

ECJ 12 March 2019, Case C-221/17, *M.G. Tjebbes and others v Minister van Buitenlandse Zaken*, ECLI:EU:C:2019:189

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### INTRODUCTION

‘I wonder if I’ve been changed in the night. Let me think. Was I the same when I got up this morning? I almost think I can remember feeling a little different. But if I’m not the same, the next question is “Who in the world am I?” Ah, that’s the great puzzle!’ (Lewis Carroll, *Alice’s Adventures in Wonderland*).

Unlike Alice, the Dutch-Canadian national, Tjebbes, did not fall down a rabbit hole, shrink and grow into different sizes, nor did she have tea with the Mad Hatter. However, a similar feeling to that experienced by Alice, when a status is revoked overnight, and when one has lost one’s nationality, without any warning or notification whatsoever, might be what the claimants experienced when they applied for their Dutch passports and heard they had not been Dutch nationals for quite some time. Interestingly enough, this case concerned individuals who relied upon their status as EU citizens in order to keep their national citizenship and so, whereas

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EU citizenship is, sometimes, perceived as a threat to national identity, in this case EU citizenship was invoked by the applicants to protect their nationality and national identity. In the case of *Tjebbes* the Dutch Nationality Act, which provides that Dutch nationality ceases to exist by operation of law under certain circumstances, was the centre of discussion, because the applicants not only lost their Dutch nationality, but also their EU citizenship status, and the rights attached to that status. *Tjebbes* is interesting because it confirmed a broad reading of the previous case law of the Court of Justice of the European Union (the Court) on nationality and because the Court applied a specific proportionality test. First, the factual background is discussed, after which the judgment of the Court will be analysed. In the subsequent comments, some significant points of *Tjebbes* are further examined.

#### FACTUAL BACKGROUND TO THE PROCEEDINGS

The Dutch-Canadian, Tjebbes, was born in Canada and acquired both her nationalities by birth. She lived in Canada permanently. In May 2003 she applied for and was granted a Dutch passport, which was valid until 2008. She submitted a request for a new passport in April 2014. That request for a passport was rejected because Tjebbes had lost her Dutch nationality in the meantime, although she did not receive any notification of that fact; a bit of an unpleasant surprise for someone who for many years had believed herself to be a Dutch national. In the other joined cases similar situations had occurred. Ms Koopman was actually born in the Netherlands, she spent her childhood in the Netherlands, and moved to Switzerland when she was 18 years old, where she married a Swiss national three years later. Her last Dutch passport was valid from July 2000 to July 2005. When she requested renewal of her passport in 2014 she was refused, because she was no longer a Dutch national. Her minor child also lost its Dutch nationality because, according to Dutch legislation, children automatically lose their Dutch nationality if the Dutch nationality of their parent(s) is withdrawn because of residence outside the EU. The final case concerns Ms Saleh Abady who was born in Iran, but who acquired Dutch nationality by Royal Decree of 3 September 1999. On 6 October 1999 a Dutch passport, which was valid until 6 October 2004, was issued to her. Since December 2002 Ms Saleh Abady had clearly had her principal residence in Iran without interruption. In October 2014 she submitted a passport application to the Embassy of the Kingdom of the Netherlands in Iran. Her application was rejected too, because she no longer had the Dutch nationality.

Hence, although none of the applicants could be considered to be in a kind of 'Wonderland', what they do have in common with Alice is the fact that they

changed, in their case from being a Dutch national, and an EU citizen, into being the national of a third country, without any information or notification.

#### LEGAL FRAMEWORK AND BROADER CONTEXT OF THE CASE

In all these cases, the applicants' nationality had automatically been revoked because of the fact that they had lived outside the Kingdom of the Netherlands and the territory of the European Union for more than ten years. Based on the Dutch Nationality Act, Dutch nationality is withdrawn automatically when a Dutch national permanently resides outside the Kingdom of the Netherlands and the European Union for ten years. This period of ten years is reset if the Dutch national requests and receives a passport or a special declaration of his or her Dutch nationality before the ten-year period is over (Article 15(4) of the Dutch Nationality Act). Moreover, if the Dutch national resides for a continuous period of one year in the Kingdom of the Netherlands or on territory where EU law is applicable, the period of ten years is also reset (Article 15(3) of the Dutch Nationality Act). In such situations, the period of ten years restarts and is recalculated starting from the day of the issuing of the passport or the receiving of the special declaration.

According to the Dutch Passport Act only persons with the Dutch nationality are entitled to apply for a Dutch passport. The case of Tjebbes and the other applicants started when they applied for a Dutch passport. According to the Dutch Passport Act (Article 9) a passport is granted to individuals with Dutch nationality. Only at that moment did the applicants hear for the first time that they no longer had Dutch nationality. A passport as such is, however, not regarded as proof of nationality, but solely as a travel document.<sup>1</sup>

Article 20 TFEU provides that every national of one of the member states is an EU citizen. EU citizenship does not replace national citizenship, but is additional to it. As a consequence, EU citizenship status is dependent on the nationality of one of the member states. EU citizenship provides EU citizens with certain, specific rights under EU law. EU citizens have, amongst other things, the right to move and reside freely in the European Union (Article 21 TFEU), the right to equal treatment with regard to social benefits in other member states (Article 24 of Directive 2004/38), electoral rights for the European parliament and municipal elections in a member state other than the member state of nationality (Article 24 TFEU). In that light, nationality laws can be regarded as the ultimate 'gates' to EU citizenship and its rights. The competence to regulate nationality laws is an exclusive competence of the member states. Declaration 2,

<sup>1</sup>Dutch Supreme Court (Hoge Raad) 1 June 2012, Case 11/04736.

annexed to the Treaty of Maastricht, explicitly underlines that whenever the Treaty refers 'to nationals of the Member States, the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned'.

In earlier case law the Court had already held that the regulation of nationality was a matter for the member states, but that, at the same time, member states might not restrict free movement rights (in this case the freedom of establishment).<sup>2</sup> In 2001 the Court ruled that for a citizenship question to fall under EU law, there must have been revocation of an existing EU citizenship status.<sup>3</sup> In the case of *Kaur* it was decisive that Ms Kaur had never actually had the status of EU citizen, because she had the status of British Overseas Citizen, without the right to enter, remain or reside in the United Kingdom without special authorisation.<sup>4</sup>

In *Rottmann* the question was posed for the first time as to whether the *revocation* of nationality would fall under the scope of EU law. The Court ruled in that case that, although the member states are competent to regulate nationality rules, revocation of nationality of an EU citizen may fall 'by reason of its nature and its consequences, within the ambit of European Union law'.<sup>5</sup> According to the judgment in *Rottmann*, the authorities have to balance the interests of the member state to revoke nationality against the consequences at stake for the individual. So, in *Rottmann*, the Court pointed out that the gravity of the crime and the consequences for Rottmann had to be considered by the German authorities. The Court ruled that an individual proportionality test should be applied, taking into account the consequences which the withdrawal 'entails for the person concerned and, if relevant, for the members of his family'.<sup>6</sup>

#### JUDGMENT OF THE COURT OF JUSTICE OF THE EU IN *TJEBBES*

Referring to its previous case law on nationality and EU citizenship, especially to *Rottmann*, the Court repeated that it is for each member state to lay down the conditions for the acquisition and loss of nationality, while respecting international law, adding that in situations which fall within the scope of EU law, the nationality rules have to comply with EU law as well. The Court also underlined the fact that EU citizenship is designed to be the fundamental status of nationals of the member states which is a well-grounded phrase in the case law of the Court

<sup>2</sup>ECJ 7 July 1992, Case C-369/90, *Micheletti*.

<sup>3</sup>ECJ 20 February 2001, Case C-192/99, *Kaur*, para. 25.

<sup>4</sup>*Ibid.*, para. 11.

<sup>5</sup>ECJ 2 March 2010, Case C-135/08, *Rottmann*, para. 42.

<sup>6</sup>*Ibid.*, para. 56.

on EU citizenship.<sup>7</sup> The Court held that it is a legitimate aim to prevent multiple nationalities and to protect the special bond which a state has with its nationals. In that context the Court also referred to the Convention on the Reduction of Statelessness<sup>8</sup> and the Convention on Nationality,<sup>9</sup> and considered that neither instrument prevents a state from withdrawing the nationality of their nationals as such.

The Court in *Tjebbes* held that (automatic) loss, by operation of the law, of nationality leading to loss of EU citizenship is allowable, as long as this can, ‘as an ancillary issue’,<sup>10</sup> be subject to a proportionality test of ‘consequences of that loss for the situation of each person concerned and, if relevant, for that of the members of their family’ by national authorities and national courts, and those bodies can ‘where appropriate, . . . have the persons concerned recover their nationality *ex tunc* in the context of an application by those persons for a travel document or any other document showing their nationality’.<sup>11</sup> According to the Court, in such circumstances, the law complied with Article 20 TFEU, read in the light of the right to private and family life (Article 7 EU Charter of Fundamental Rights of the EU) and the rights of the child (Article 24 EU Charter), so that the child’s best interests must be considered in all acts relating to children, and the right to a ‘personal relationship and direct contact with both his or her parents’.

Just as in *Rottmann*, the Court in *Tjebbes* explained that a member state’s wish ‘to protect the special relationship of solidarity and good faith between it and its nationals and also the reciprocity of rights and duties, which form the bedrock of the bond of nationality’ was legitimate.<sup>12</sup> The Court also said that the aim of the Netherlands of countering ‘the undesirable consequences of one person having multiple nationalities’, of precluding ‘persons from obtaining or retaining Netherlands nationality where they do not, or no longer have, any link with the Kingdom of the Netherlands’ and of restoring ‘unity of nationality within the family’ was legitimate, because, just as the Advocate General had argued, requiring a ‘legitimate link’ between a member state and its nationals is legitimate for reasons of public interest.<sup>13</sup> This holds true as long as the person in question does not become stateless, contrary to the Convention on the Reduction of

<sup>7</sup>ECJ 20 September 2001, Case C-184/99, *Grzelczyk*, para. 31; ECJ 17 September 2002, Case C-413/99, *Baumbast and R*, para. 8; *Rottmann*, *supra* n. 5, para. 42 and codified now in the preamble to the Citizenship Directive 2004/38.

<sup>8</sup>Art. 6 and 7(3)–(6) specifically.

<sup>9</sup>Art. 7(1)e and (2) specifically.

<sup>10</sup>ECJ 12 March 2019, Case C-221/17, *Tjebbes*, para. 48.

<sup>11</sup>*Ibid.*, para. 48.

<sup>12</sup>*Ibid.*, para. 33.

<sup>13</sup>*Ibid.*, paras. 34–36, 39; ECJ 12 March 2019, Case C-221/17, *Tjebbes*, Opinion of Advocate General Mengozzi, paras. 53, 55.

Statelessness.<sup>14</sup> Support for this legitimacy can be found in the fact that a declaration of nationality, or the issuing of a passport or Dutch ID card is held to be a sign of such a 'genuine' link, because it interrupts the period of ten years required for nationality to be lost.<sup>15</sup>

As to the proportionality test, the Court required the possibility of an *ancillary individual examination* of the consequences of the loss of nationality for that person's situation and his or her family, and 'the normal development of his or her family and professional life' and '[t]hose consequences cannot be hypothetical or merely a possibility'.<sup>16</sup> Moreover, the person must, if necessary, have the opportunity to 'recover his or her nationality *ex tunc* in the context of an application by that person for a travel document or any other document showing his or her nationality', as is already possible under Dutch law.<sup>17</sup>

Relevant circumstances are whether the person:

'would be exposed to limitations when exercising his or her right to move and reside freely within the territory of the Member States, including, depending on the circumstances, particular difficulties in continuing to travel to the Netherlands or to another Member State 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. Also relevant are (i) the fact that the person concerned might not have been able to renounce the nationality of a third country and that person thus falls within the scope of Article 15(1)(c) of the Law on Nationality and (ii) the serious risk, to which the person concerned would be exposed, that his or her safety or freedom to come and go would substantially deteriorate because of the impossibility for that person to enjoy consular protection under Article 20(2)(c) TFEU in the territory of the third country in which that person resides'.<sup>18</sup>

In these considerations, the Court differed from the Advocate General, who was of the opinion that an individual examination was not necessarily required and proportionality could also be included in a legal provision and thus be tested *in abstracto*, referring to the cases of *Delvigne* and *Rottmann*.<sup>19</sup>

Advocate General Mengozzi argued that the review of proportionality in *Rottmann* requires that *all* circumstances must be considered in a proportionality test, but suggests that the direct and more indirect consequences must be

<sup>14</sup>Tjebbes, *supra* n. 10, para. 37.

<sup>15</sup>Ibid., para. 38.

<sup>16</sup>Ibid., paras. 40–41, 44.

<sup>17</sup>Ibid., paras. 42–43.

<sup>18</sup>Ibid., para. 46.

<sup>19</sup>Opinion of Advocate General Mengozzi, *supra* n. 13, paras. 61–91.

considered.<sup>20</sup> The Advocate General held that if, in *Rottmann*, even the immediate consequences of loss of EU citizenship and the fear that the person would become stateless were not necessarily deemed disproportionate, it is hard to see which other consequences of the loss of nationality must additionally be taken into account in a proportionality test.<sup>21</sup> According to the Advocate General, consequences for the person or his or her family, such as loss of social benefits or the right to reside in the EU or *Ruiz Zambrano*-like custody issues consequent on the loss of nationality are generally the results of subsequent administrative decisions, which are amenable to judicial review in the light of proportionality and EU law.<sup>22</sup> So, the Advocate General reasoned, he could not see why ‘such indirect, even hypothetical, consequences’ would have to be taken into account ‘if they cannot, in any event, cause it to annul that decision or to find that the national authorities should not have adopted that decision’.<sup>23</sup> So even in a *Ruiz Zambrano*-like case, the member state would have to ‘ensure that the person concerned can continue to reside in the territory of the European Union as a member of the family of citizens of the Union’, but not that that person has the nationality of the member state.<sup>24</sup> The Advocate General therefore argued that, following *Rottmann*, the proportionality test that requires that losing nationality must be proportionate and necessary to the public interest pursued, must be limited to the measure that has loss of EU citizenship as a direct consequence, and so to the grounds on the basis of which nationality has been lost, and not to ‘all the circumstances specific to each individual situation’ that could demonstrate a genuine link with the member state.<sup>25</sup> In such a context, according to the Advocate General, the question whether the loss of nationality is justified can perfectly be assessed *in abstracto*, not *in concreto*, and so can the question whether a person can ‘recover his original nationality’ and, although this is less clear, the ‘lapse of time between the naturalisation decision and the withdrawal decision’, according to *Rottmann*.<sup>26</sup> The Advocate General’s reasoning regarding the *in abstracto* assessment was not followed by the Court.

In the individual examination of minors, the Court briefly explained, as an addition to its proportionality test, that it must be considered whether the loss of nationality is in ‘the child’s best interests as enshrined in Article 24 of the Charter because of the consequences of that loss for the minor from the point

<sup>20</sup>Ibid., paras. 68–69.

<sup>21</sup>Ibid., paras. 72–75.

<sup>22</sup>Ibid., paras. 76–77.

<sup>23</sup>Ibid., para. 78.

<sup>24</sup>Ibid., para. 79.

<sup>25</sup>Ibid., paras. 81–82, 84, 86.

<sup>26</sup>Ibid., para. 88–90.

of view of EU law'.<sup>27</sup> As to the proportionality test, the consequences of the loss of nationality for that person's situation and his or her family must be considered.<sup>28</sup>

## COMMENTS

In *Tjebbes* the Court confirmed its previous case law that member states remain the ultimate gatekeepers to access to and exit from EU citizenship. However, the exercise of that competence has to be in conformity with the outer limits of EU law: namely that it has to comply with the principle of proportionality as one of the fences surrounding the competences of the member states in the field of nationality.

The Court performed a (common) two-step approach: it established first that member states are allowed to come up with a legitimate aim to revoke the nationality of an EU citizen, even if that has the consequence that this individual will no longer be an EU citizen. Secondly, however, that legitimate aim is subject to a proportionality test. A key issue in this case was whether the government could apply an abstract proportionality test, which it argued was already incorporated in Dutch legislation but which only applied under very specific circumstances, or should such a test be an individual, concrete and fully-fledged proportionality test? The case is interesting because although the Court held that the domain of nationality belongs to the member states, the Court at the same time imposed very detailed procedural requirements on the exercise of that competence.<sup>29</sup>

### *The legitimate aim*

Although this case differs from the *Rottmann* case in the sense that the loss of nationality is law-based rather than based on an individual decision, it is clear that loss of nationality must, if people lose their status as EU citizens as a consequence, be assessed by the yardstick of EU law. Hence, the law in the *Rottmann* case is not only applicable to individual decisions but also applies to general nationality schemes, confirming a broader reading of *Rottmann*.<sup>30</sup> *Tjebbes* also

<sup>27</sup>*Tjebbes*, *supra* n. 10, para. 47

<sup>28</sup>*Ibid.*, para. 40.

<sup>29</sup>S. Courtts, 'Bold and Thoughtful: the Court of Justice Intervenes in Nationality Law Case C-221/17 *Tjebbes*', *European Law Blog*, 25 March 2019, ([europeanlawblog.eu/2019/03/25/bold-and-thoughtful-the-court-of-justice-intervenes-in-nationality-law-case-c-221-17-tjebbes/](http://europeanlawblog.eu/2019/03/25/bold-and-thoughtful-the-court-of-justice-intervenes-in-nationality-law-case-c-221-17-tjebbes/)), visited 16 October 2019.

<sup>30</sup>As Steve Peers noted, such reasoning could potentially also be broadened to a situation of exit of a member state, like Brexit: S. Peers, 'Citizens of Somewhere Else? EU citizenship and loss of Member State nationality', *EU Law Analysis*, 27 March 2019, ([eulawanalysis.blogspot.com/2019/03/citizens-of-somewhere-else-eu.html](http://eulawanalysis.blogspot.com/2019/03/citizens-of-somewhere-else-eu.html)), visited 16 October 2019.



confirms that a legitimate aim, as such, does not have to be individualised. That was already implicitly held in *Rottmann*, but after the judgment in *Tjebbes* this is now made clear explicitly. The Court here repeated its consideration in *Rottmann* that member states may protect the ‘special relationship of solidarity and good faith between it and its nationals and also the reciprocity of rights and duties that form the bedrock of the bond of nationality’.<sup>31</sup> According to the famous *Nottebohm* case, decided by the International Court of Justice, nationality is broadly defined as ‘a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties’.<sup>32</sup> That such a special relationship can change is, in principle, not strange at all, and that member states may decide whether they still have such a connection with a national is, in that light, also understandable.

In *Tjebbes* the Dutch government argued that it aims to prevent undesirable consequences of multiple nationalities and also to prevent individuals from obtaining or retaining Dutch nationality if they do not have any link with the Kingdom of the Netherlands. Moreover, and this will be discussed in more depth below, the Dutch government submitted that it wants to protect the unity of nationality within the family through Article 16(1)(d) of the Dutch Nationality Act, which provides that minors will automatically lose their Dutch nationality when their parents lose their Dutch nationality. Therefore, the Dutch Council of State specifically asked the Court whether the rule concerning automatic loss of Dutch nationality due to residence for more than ten years outside the EU should be different in the case of adults and in the case of minors, in particular because minors have no option to hold on to their nationality, while adults have several possibilities for stopping the period of ten years.

It is interesting to see that the Court accepted a broad range of legitimate aims for justification of restrictions or violations of Article 20 TFEU, just as the rule of reason does for the free movement rights. That is nothing new, because the Court had already held in *Rendon Marin*<sup>33</sup> and in *CS*<sup>34</sup> that public policy and safeguarding public security (arising from Directive 2004/38) are legitimate aims to restrict the right(s) granted by Article 20 TFEU.<sup>35</sup> So, the legitimate aim formulated in *Rottmann* still stands, but is now much broader. The interests of the member states in maintaining a real link, and a sense of loyalty and belonging to the State had already been accepted by the Court in *Rottmann*. In that sense it is not a surprise

<sup>31</sup>*Rottmann*, *supra* n. 5, para. 51.

<sup>32</sup>ICJ 6 April 1955, I.C.J. Reports 1955, p. 4, *The Nottebohm Case (Liechtenstein v Guatemala)*.

<sup>33</sup>ECJ 13 September 2016, Case C-165/14, *Rendón Marín*.

<sup>34</sup>ECJ 13 September 2016, Case C-304/14, *CS*.

<sup>35</sup>P. Neuvoonen, ‘EU citizenship and its “very specific” essence: Rendón Marín and CS’, 54 *Common Market Law Review* (2017) p. 1201.

that the argument of the Dutch State that only persons with a special link to the Kingdom of the Netherlands should be its nationals was accepted by the Court in *Tjebbes*. One could pose the question whether a residence period is suitable to measure such belongingness, but the Court leaves that for the member states to decide. A new legitimate aim is to prevent families from having multiple nationalities and to preserve the unity of the family. By accepting this aim, the Court granted the member states a great degree of discretion to restrict Article 20 TFEU. That can be criticised in the sense that the unity of the family does not always benefit from the Dutch legislation, since it also creates different nationalities in one family: the children above 18 years old will keep their Dutch nationality, while their siblings who are not yet 18 years old will no longer be Dutch nationals. One could therefore question the suitability of this provision to its aim.

Although the Court granted this discretion, it took back control of the member states' discretion by using a detailed proportionality test. In that sense the Court operated in a way that ensured that member states have to comply with a detailed framework of the principle of proportionality.<sup>36</sup>

### *The proportionality test by the Court*

The Court ruled that EU law does not preclude the loss of nationality, including the loss of EU citizenship, for reasons of public interest. Nevertheless, the Court held that such loss would be in violation of the principle of proportionality 'if the relevant national rules did not permit at any time an individual examination of the consequences of that loss for the persons concerned from the point of view of EU law'.<sup>37</sup> The fact that the Dutch legislation is itself the result of a balancing of relevant interests is not sufficient, according to the Court. The Dutch government submitted several arguments as to why the automatic withdrawal would be proportional.

The proportionality test requires *a possibility for an individual assessment*, according to the Court, of the consequences for the individual and for the family. What needs to be assessed by the national authorities and the national courts is whether the aim of the national legislation under consideration might 'disproportionately affect the normal development of his or her family and professional life'.<sup>38</sup> It is remarkable that the Court formulated the proportionality test in these words. First of all, if one compares the proportionality test in the cases on EU

<sup>36</sup> See for a critical note M. van den Brink, 'Bold, but Without Justification? Tjebbes', *European Papers*, 25 April 2019, ([www.europeanpapers.eu/en/europeanforum/bold-without-justification-tjebbes](http://www.europeanpapers.eu/en/europeanforum/bold-without-justification-tjebbes)), visited 16 October 2019.

<sup>37</sup> *Tjebbes*, *supra* n. 10, para. 41.

<sup>38</sup> *Ibid.*, para. 44.

citizenship and social rights with *Tjebbes*, there is a significant difference in the intensity of the proportionality test. Whereas the Court accepted an abstract proportionality test embedded in the law in the social rights cases, such as *Dano*,<sup>39</sup> *Alimanovic*<sup>40</sup> and *Garcia-Nieto*,<sup>41</sup> the Court in *Tjebbes* ruled that there should be *the possibility* of an individual, concrete proportionality test.<sup>42</sup> In the previously mentioned cases on citizens and social rights, the Court repeatedly took a restrictive approach and allowed for a broad margin of discretion for member states. In *Dano*, Directive 2004/38 did not convey a right of residence on Ms Dano and her son, and thus the Court ruled that member states were allowed to refuse such people certain benefits as long as this was proportionate.<sup>43</sup> In *Alimanovic*, where again the right of residence had not been obtained under Directive 2004/38 by Ms Alimanovic and her daughter,<sup>44</sup> the Court concluded that member states could refuse job seekers social assistance, and that ‘no such individual assessment is necessary’.<sup>45</sup> The case of *Garcia-Nieto*, concerning an unmarried Spanish couple with children who had moved to Germany to work, confirmed the Court’s non-interventionist approach. The Court ruled that member states may refuse to give EU citizens social benefits without an individual assessment and without a proportionality review in those citizens’ first three months in the member state. In these cases, regarding social rights and EU citizenship, it might have been decisive that Directive 2004/38, Article 24, excludes equal treatment for social benefits in certain circumstances.

In the case of *Delvigne*, which was based on Article 20 TFEU and is therefore more comparable, the Court held that a systematic approach would not necessarily lead to disproportionality. The Court in that case held that a voting ban for prisoners ‘is proportionate in so far as it takes into account the nature and gravity of the criminal offence committed and the duration of the penalty’.<sup>46</sup> As the Advocate General argued in the *Delvigne* case, it was not the individual, concrete circumstances which were to be assessed, but merely whether the system of refusing voting rights to prisoners serving long sentences as such leads to disproportionate effects.<sup>47</sup> The Court in *Delvigne* considered, almost as an incidental remark, that in the particular French law at issue there were judicial remedies

<sup>39</sup>ECJ 11 November 2014, Case C-333/13, *Dano*.

<sup>40</sup>ECJ 15 September 2015, Case C-67/14, *Alimanovic*.

<sup>41</sup>ECJ 8 April 2016, Case C-299/14, *Garcia-Nieto*.

<sup>42</sup>N. Nic Shuibhne, ‘Limits rising, duties ascending: The changing legal shape of Union citizenship’, 52(4) *Common Market Law Review* (2015) p. 903.

<sup>43</sup>*Dano*, *supra* n. 39.

<sup>44</sup>*Alimanovic*, *supra* n. 40.

<sup>45</sup>*Ibid.*, para. 59.

<sup>46</sup>ECJ 6 October 2015, Case C-650/13, *Delvigne*, para. 49.

<sup>47</sup>Opinion of Advocate General Mengozzi, *supra* n. 13, para. 67.

available, which ‘paves the way for that person’s individual situation to be reassessed, including with regard to the duration of that ban’.<sup>48</sup> As in *Delvigne*, the Court in *Tjebbes* accepted the fact that the system can comply with proportionality in general. It went a (small) step further, however, ruling in *Tjebbes* that there should be an ancillary possibility for review. At the same time the Court gave discretion to the member states, since there is no need for a systematic proportionality test to be embedded in the law, but it should merely be possible to review the loss of nationality. In the examination of proportionality, a mere negative consequence for the individual at stake is not sufficient to claim that Article 20 TFEU has been violated. The Court established a higher threshold, ruling that the person concerned should be *seriously* restricted in the *normal development of family and professional life*.

The Court did not assess whether the period of ten years of residency outside the EU is adequate to prove that there is no genuine link with the nationals at stake. Rather it applied a less intrusive proportionality test, balancing the interests of the member state to define its nationals with the consequences of the loss of nationality of the applicants.<sup>49</sup> In that test the Court made sure not to overstep the fine line of the division of competences. It seems that the Court tried to bridge EU citizenship rights on the one hand and the discretion of the member states on the other, by using a light form of individual proportionality.<sup>50</sup>

A question that has so far been left unanswered is whether there is a time limit to challenge the loss of nationality, by bringing up arguments that the loss is a serious threat to the private or professional life of the person concerned. It follows from the judgment that the assessment of proportionality does not have to take into account hypothetical or indirect consequences of the loss of nationality.<sup>51</sup> That implies that the moment of review is restricted to the moment of loss of nationality, and not that of the discovery of the loss of nationality. So far, however, there is no indication of a restriction of time for Dutch nationals to invoke their EU citizenship and to demand a proportionality test.

### *The position of minors*

The Dutch Nationality Act, as discussed above, not only has consequences for adults who lose their nationality, but based on the same Dutch Act minors

<sup>48</sup> *Delvigne*, *supra* n. 46, para. 57.

<sup>49</sup> *Coutts*, *supra* n. 29.

<sup>50</sup> P. Van Elsuwege and H.H.C. Kroeze, ‘Het arrest Tjebbes: de evenredigheidstoets als complexe brug tussen nationaliteitswetgeving en Unieburgerschap’, *Nederlands tijdschrift voor Europees recht* (2019) p. 166.

<sup>51</sup> *Tjebbes*, *supra* n. 10, para. 44.

too may automatically lose their Dutch nationality if that of their parents is lost. The Dutch government argued in the national procedure that the Dutch Act on Nationality expresses the legislature's view that unity of nationality within the family is important. In the case of *Koopmans* this was precisely the situation: the daughter lost her Dutch nationality, because her mother had resided with her for in Switzerland for more than ten years and had not applied for a passport for at least ten years.

As observed above, the 'unity of the family' with regard to nationality has now been accepted as a legitimate aim by the Court. However, the Court also acknowledged that the unity of the family does not always equate with the best interests of the child. Here too there should be the possibility of an individual assessment. As the Court underlined,

'possible circumstances from which it is apparent that the loss of Netherlands nationality by the minor concerned, which the national legislature has attached to the loss of Netherlands nationality by one of his or her parents in order to preserve unity of nationality within the family, fails to meet the child's best interests as enshrined in Article 24 of the Charter because of the consequences of that loss for the minor from the point of view of EU law'.<sup>52</sup>

The ultimate and bizarre consequence of the Dutch Act is that there could be a child who actually resides in the Netherlands with a parent with a third country nationality, but who loses Dutch nationality, because the parent with Dutch nationality permanently resides abroad. In such a case *Ruiz Zambrano* could be invoked, but it is still remarkable that nationality can be revoked while the minor citizen in question is residing in that member state. The Court's considerations are surprisingly brief on the position of minors, considering the 30 paragraphs which the Advocate General devoted to the loss of nationality of minors. The Advocate General stated that the unity of family objective can be a legitimate aim if proportionate,<sup>53</sup> but considered that minors possess their EU citizenship autonomously from their parents, and loss of citizenship is never in the best interests of the child.<sup>54</sup> Importantly, he noted that children cannot avoid the loss of their nationality because they cannot apply for the necessary documents; only their parents can do that and it may be in the child's best interests to maintain EU citizenship, and he mentioned an example where parent and child live apart.<sup>55</sup> He concluded by stating:

<sup>52</sup>Ibid., para. 47.

<sup>53</sup>Opinion of Advocate General Mengozzi, *supra* n. 13, para. 126.

<sup>54</sup>Ibid., paras. 128–133, 143.

<sup>55</sup>Ibid., paras. 134–140.

‘Consequently, I consider that, by failing to provide that the best interests of a child who is a citizen of the Union should be taken into consideration *in any decision* that might lead to that child losing his citizenship of the Union, save in the few exceptional cases provided for by Article 16(2) of the Law on Netherlands nationality, the Netherlands legislature went beyond what is necessary in order to attain the objective of unity of nationality within the family whilst taking into account the best interests of the child’.<sup>56</sup>

The Advocate General proposed to rule that the Dutch legislation, because of a lack of consideration for the child’s best interests, is not in conformity with Article 20 TFEU. However, as he strongly underlined, this does not mean that *the system as such* is problematic, nor that the rule for loss of nationality of minors is a problem, but he pointed explicitly and solely to the fact that there is no assessment of proportionality in the specific context of the rights of the child. He suggested a general clause whereby the national courts could consider the interests of the child in these cases, or that a possibility should be created to interrupt the ten-year period solely for minors. Therefore, according to the Advocate General, the Dutch government went beyond what was necessary to protect the unity of the family. Hence, he argued that the provision that lays down the automatic loss of a minor’s nationality based on the loss of a parent’s nationality, does not comply with the proportionality test. The Court did not follow this reasoning, but the solution of the Court, that an individual assessment should be possible, does actually deal with the problem of such disproportionate effects for minors in specific cases.

### *Fundamental rights*

It is interesting to note that the Court referred explicitly to fundamental rights in its judgment. Whereas the Court did not take a human rights approach in *Rottmann*,<sup>57</sup> in more recent case law the Charter of Fundamental Rights has played a bigger role. In *Tjebbes* the Court firmly referred, as it did in *Chavez-Vilchez*,<sup>58</sup> to Articles 7 and 24 of the Charter. The reference to fundamental rights, which was lacking in *Rottmann*, has now been placed at the forefront by the Court.<sup>59</sup> With regard to minors the Court considered that within the proportionality assessment of the unity of the nationality of the family ‘the best interests

<sup>56</sup>Ibid., paras. 134–146.

<sup>57</sup>See also on the statelessness and proportionality in *Rottmann*: D. Kochenov, ‘Case C-135/08, Janko Rottman v. Freistaat Bayern, judgement of 2 March 2010 (Grand Chamber)’, 47 *Common Market Law Review* (2010) p. 1831.

<sup>58</sup>ECJ 10 May 2017, Case C-133/15, *Chavez*.

<sup>59</sup>Peers, *supra* n. 30.

of the child' have to be taken into account. The Court continued to hold that there could be:

'possible circumstances from which it is apparent that the loss of Netherlands nationality by the minor concerned, which the national legislature has attached to the loss of Netherlands nationality by one of his or her parents in order to preserve unity of nationality within the family, fails to meet the child's best interests as enshrined in Article 24 of the Charter because of the consequences of that loss for the minor from the point of view of EU law'.<sup>60</sup>

Hence, according to the Court, the unity of the nationality of the family does not always equate with the interests of the child. That is an accurate and interesting observation.<sup>61</sup> A subsequent question is whether depriving a minor of its EU citizenship would actually always run contrary to the best interests of the child.<sup>62</sup> *Tjebbes* confirmed the focus on fundamental rights in cases concerning EU citizenship and minors.<sup>63</sup>

A more critical note could be made on the principle of equality as one of the fundamental rights of EU citizens. Due to the fact that only persons with dual nationality are affected by the automatic withdrawal of nationality, the system creates inequality between EU citizens.<sup>64</sup> If the Dutch-Canadian national, *Tjebbes*, had one neighbour with sole Dutch nationality and one with Spanish-Dutch nationality, in such a scenario, only *Tjebbes* would lose her EU citizenship. This situation is not created by the Dutch system per se, but first and foremost by the fact that states may not (and rightly so) contribute to statelessness. One could also argue that the persons are actually in different situations, in the same sense that a third country national has different rights under EU law from EU citizens. Nevertheless, the Court could have raised and discussed this issue in *Tjebbes* much more clearly than it did. It did refer to the international conventions on statelessness, in the context of the legitimate aim, but it did not discuss the issue of inequality, as it actually did in *Eman and Sevinger*.<sup>65</sup>

<sup>60</sup>*Tjebbes*, *supra* n. 10, para. 47.

<sup>61</sup>V.M. Bex-Reimert and P.R. Rodrigues, 'Hof van Justitie: nationaliteit die van rechtswege vervalt, is onderworpen aan Unierechtelijke evenredigheidstoets', *AB Rechtspraak Bestuursrecht* (2019) p. 1243, *AB* 2019/180, at p. 1252.

<sup>62</sup>Peers, *supra* n. 30.

<sup>63</sup>H. van Eijken and P. Phoa, 'The scope of Article 20 TFEU clarified in Chavez-Vilchez: are the fundamental rights of minor EU citizens coming of age?', 43 *European Law Review* (2018) p. 949.

<sup>64</sup>D. Kochenov, 'The *Tjebbes* Fail: Going Farcical about Bulgakovian Truths', *Verfassungsblog*, 5 April 2019, ([verfassungsblog.de/the-tjebbes-fail-going-farcical-about-bulgakovian-truths/](https://verfassungsblog.de/the-tjebbes-fail-going-farcical-about-bulgakovian-truths/)), visited 16 October 2019.

<sup>65</sup>ECJ 12 September 2006, Case C-300/04, *Eman and Sevinger*.



## CONSEQUENCES AND CONCLUSION

The consequences of *Tjebbes* are not ground-breaking, in the sense that *Rottmann* had already held that the loss of member state nationality was subject to EU law. The judgment of the Court in *Tjebbes* can be applauded for its lenient approach to the proportionality test, in the sense that it does not question the specific period of ten years. By doing so the Court leaves much discretion to the member states, which suits the sensitivity of nationality laws. At the same time the Court does require that member states include the possibility of an individual proportionality test, thereby protecting the rights of these particular EU citizens. The fact that the Court, again, refers to fundamental rights in an EU citizenship case, and to the Charter specifically, is to be praised too. EU citizenship is dependent on nationality laws, and still has an internal market-origin but by focussing on fundamental rights, EU citizenship is enriched constitutionally.

For wider implications of *Tjebbes*, attention has been drawn by scholars to Brexit and EU citizenship.<sup>66</sup> In the case of Brexit, all UK nationals will lose their status as EU citizens. However, it has to be seen whether a situation of secession is comparable with the situation in *Tjebbes*. It would be more likely that British nationals could potentially retain their acquired rights, but they are unlikely to be able to successfully challenge the loss of their EU citizenship.

Another link can be made to Article 14 of the Dutch Nationality Act, introduced in 2017, to revoke the Dutch nationality of a person who joins an organisation that is on a list of terrorist organisations. The Dutch legislature introduced a specific option for judicial protection in Article 22a-22c. Basically, such a person who has lost his or her nationality may appeal within four weeks from the decision to withdraw Dutch nationality. If during that period the concerned national has not appealed, the District Court will review the decision automatically. In the light of *Tjebbes* there seems to be sufficient discretion for the Netherlands authorities to withdraw the nationality of suspected fighters, especially in the light of a mutual bond or special relationship with a national. Whether the aim of national security would be sufficient is definitely a matter for discussion, particularly because the attachment to a terrorist organisation does not have to be established by a national court under Dutch law.<sup>67</sup> In terms of proportionality there seems to be no substantive issue, since individuals can challenge the individual decisions of the withdrawal of their nationality before the national courts and, in that context, proportionality is reviewed. The fact that the national is unable to be at the hearing is probably acceptable, in the light of the judgment in *Sacko*,<sup>68</sup> under these

<sup>66</sup>Peers, *supra* n. 30.

<sup>67</sup>G.R. de Groot, 'Afdeling bestuursrechtspraak van de Raad van State, 17-04-2019, ECLI:NL:RVS:2019:990, 201806107/1/NVG', *Jurisprudentie Vreemdelingenrecht* (2019) p. 802, *JV* 2019/117.

<sup>68</sup>ECJ 26 July 2017, Case C-348/16, *Sacko*.



circumstances. The Council of State ruled, in a case decided after *Tjebbes*, on the withdrawal of the Dutch nationality of jihadist fighters, that in revoking Dutch nationality not only does proportionality have to be assessed, but so also do other fundamental rights of EU law, such as the right to be heard.<sup>69</sup> The Council of State first explicitly referred to *Tjebbes* in order to counter the reasoning of the State Secretary for Migration (*de Staatssecretaris voor Justitie en Veiligheid*) that EU law requires only a proportionality test.<sup>70</sup> Subsequently, since the situation fell within the scope of application of EU law, the Council of State fully tested the Dutch law in the light of EU law principles, namely the right to an effective remedy and a fair trial, enshrined in Article 47 of the Charter of Fundamental Rights, and concluded that the restriction of that right was proportionate.<sup>71</sup> The revocation in question was deemed to be unlawful because the law in question had been applied retroactively.<sup>72</sup> Because the situation fell within the scope of EU law, linked to *Tjebbes*, the Council of State could actually assess other Charter rights too.

The *Tjebbes* judgment is not surprising, but it does reflect the broad jurisdiction of the Court even in cases that are very sensitive. The judgment, however, struck an appropriate balance between the interests of the state and of the individuals, so that both interests are guaranteed. It also poses further questions, for instance on the time limits for challenging the withdrawal, and also how to assess the criteria which the Court has established. When is the ‘normal development’ of the applicant’s ‘family and professional life’ disproportionately affected? What does the Court mean by ‘serious risk to safety’ because of a lack of consular protection? For the Dutch Council of State and the Dutch legislature the judgment means that the Dutch Act can be upheld, but also that a possibility to assess the proportionality should be created and that denaturalisation *ex tunc* should be revised. Overall, the Court does accept a system of automatic revocation of nationality but it demands effective remedies for those who are disproportionately affected.

Whereas Alice, at the end of the book, wakes up from her fictional dream, after the court case the applicants in this case are affected in real life by the Dutch law. The Court showed in *Tjebbes* that it has eyes for the individual consequences, but it gives the member states sufficient discretion to define who their nationals are.



<sup>69</sup>Council of State, 17 April 2019, Case 201806107/1/V6, *see also* Council of State, 17 April 2019, ECLI:NL:RVS:2019:1246.

<sup>70</sup>Council of State, 17 April 2019, Case 201806107/1/V6, para. 8.1.

<sup>71</sup>*Ibid.*, paras. 8.2–8.4.

<sup>72</sup>*Ibid.*, paras. 10.2–10.4.