

RESEARCH ARTICLE

Tjebbes and Others v Minister van Buitenlandse Zaken: A Next Step in European Union Case Law on Nationality Matters?

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This article analyses the judgment of the Court of Justice of the EU in the *Tjebbes* case, which is an important case on nationality matters under EU law and has a clear link with the landmark case of *Rottmann*. As this article demonstrates, the Court confirms the applicability of EU law in nationality matters and elaborates on the nature of this influence. Furthermore, this contribution considers the influence of this case on our understanding of nationality and EU citizenship, as well as its relevance to addressing statelessness in the EU.

Keywords: Nationality; EU Citizenship; Statelessness; EU Law; Genuine Link

1 Introduction

In March 2019, the Court of Justice of the EU (CJEU) ruled on the case of *Tjebbes and Others v Minister van Buitenlandse Zaken* (hereinafter: *Tjebbes*).¹ The case is important for its confirmation of a role for EU law in nationality matters as well as its elaboration of the reasoning in the earlier case of *Rottmann v Freistaat Bayern* (hereinafter: *Rottmann*)² and interesting for its considerations regarding the concept of EU citizenship as well as nationality more broadly.

After shortly summarizing the facts of the case (2), this article considers the background to this case in EU case law (3) and the judgment of the CJEU in the *Tjebbes* case (4). This contribution then highlights interesting features of the judgment with regard to the two important and related legal concepts: nationality or citizenship³ (5) and statelessness (6). It concludes with some final reflections on the case (7).

2 Automatic Loss of Nationality Due to Residence Abroad: the Facts

The case concerns four applicants, all possessing both Dutch nationality and the nationality of a third country. The national proceedings lodged by these applicants concerned the Dutch Minister of Foreign Affairs' refusal to examine their respective applications for a passport because they no longer possessed the nationality of the Kingdom of the Netherlands.⁴ This loss of nationality is based on provisions in the Law on Netherlands Nationality.⁵ These provide, *inter alia*, for automatic loss of nationality for Dutch citizens in case of principal residence for an uninterrupted period of ten years outside the country or the EU.⁶ Furthermore, children of persons who lost their Dutch nationality based on this provision would also lose their Dutch nationality.⁷ In relation to the *Rottmann* case, the Council of State of the Netherlands⁸—the

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¹ Case C-221/17 *Tjebbes and Others v Minister van Buitenlandse Zaken* ECLI:EU:C:2019:189 [2019].

² Case C-135/08 *Janko Rottmann v Freistaat Bayern* EU:C:2009:588 [2010] ECR I-1449.

³ This contribution uses the concepts of 'nationality' and 'citizenship' interchangeably.

⁴ See also Opinion of AG Mengozzi in Case C-221/17 *Tjebbes and Others v Minister van Buitenlandse Zaken* ECLI:EU:C:2018:572 [2018] para 24.

⁵ Rijkswet op het Nederlanderschap, hereinafter: Law on Nationality.

⁶ Art 15(1)(c) Law on Nationality.

⁷ Art 16(1)(d) Law on Nationality.

⁸ Raad van State, hereinafter: Council of State.

national court that eventually had to consider the complaints of the applicants⁹—was confronted with the question whether EU law precluded the aforementioned provisions in the Law on Nationality in view of the absence of an individual assessment based on the principle of proportionality.¹⁰ Essentially, the Council of State was uncertain about the discretion that Member States have in their provisions on conditions for loss of nationality.¹¹ It therefore requested a preliminary ruling of the CJEU.

3 Background: *Rottmann*

To fully understand this case and the questions asked by the Council of State to the Court, we need to reconsider the case of *Rottmann*. This case concerned withdrawal of nationality by the German authorities because nationality was acquired by deception. In this case, the withdrawal of nationality would also result in *Rottmann* becoming stateless, thereby losing his EU citizenship. The CJEU's decision made clear that the situation of a citizen of the Union who could lose EU citizenship and the rights attached thereto falls within the ambit of EU law.¹² In particular, the Court held that it was not contrary to EU law or the concept of EU citizenship that a Member State withdraws nationality—even if this would result in statelessness of the person concerned—as long as the principle of proportionality is observed in the decision to withdraw.¹³ This means that it is necessary to take into account the consequences that the decision entails for the person concerned and, if relevant, for the members of his family with regard to the loss of the rights enjoyed by every EU citizen.¹⁴

In previous cases, the Court had already noted that Member States should have due regard to EU law when laying down the conditions for the acquisition and loss of nationality.¹⁵ *Rottmann* was considered a landmark case and next step in this line of reasoning because it raised, for the first time, the question of the extent of the discretion available to EU Member States to determine who their nationals are.¹⁶ Furthermore, the approach that the CJEU took in this case was characterized as 'active' and even as 'judicial *avant-gardism*', which demonstrated the Court is 'willing to challenge Member States' autonomy in nationality matters.¹⁷ At the same time, the case was criticized for not recognizing the autonomy of EU citizenship (in relation to national citizenship)¹⁸ and failing to protect an individual from being stripped of nationality and ensuing statelessness.¹⁹ Furthermore, it was noted that future cases would make clear whether the CJEU has indeed changed the roles of EU citizenship and Member State nationality.²⁰ *Tjebbes* provides a follow-up to *Rottmann*, in which the Court elaborates on the application of the proportionality test introduced in the latter case.

4 Genuine Link, EU Citizenship & Proportionality: the CJEU's Judgment in *Tjebbes*

In *Tjebbes*, the Court reaffirms that the situation of persons who face loss of nationality of a Member State and thereby loss of EU citizenship, like the applicants in this case, falls 'by reason of its nature and its consequences' within the ambit of EU law.²¹ This means that Member States must have due regard for EU law when exercising their powers in nationality matters. In particular, the CJEU holds that it is, in principle, legitimate to provide for loss of nationality after 10 years of residence in a third country as the Netherlands

⁹ See also *Tjebbes* (n 1) paras 17–19.

¹⁰ *Tjebbes* (n 1) para 26.

¹¹ See also Opinion of AG Mengozzi (n 4) para 2.

¹² *Rottmann* (n 2) para 42.

¹³ *ibid*, para 55.

¹⁴ *ibid*, para 56.

¹⁵ eg Case C-369/90 *Micheletti and Others* ECLI:EU:C:1992:295 [1992] ECR I-4329, para 10; Case C-192/99 *Kaur* ECLI:EU:C:2001:106 [2001] ECR I-1237, para 19; Case C-200/02 *Zhu and Chen* ECLI:EU:C:2004:639 [2004] ECR I-9925, para 37.

¹⁶ Opinion of AG Poiares Maduro in Case C-135/08 *Janko Rottmann v Freistaat Bayern* ECLI:EU:C:2009:588 [2009] para 1.

¹⁷ GR de Groot & A Seling, 'The Consequences of the Rottmann Judgment on Member State Autonomy – The European Court of Justice's *Avant-Gardism* in Nationality Matters' (2011) 7 *European Constitutional Law Review* 150.

¹⁸ eg D Kostakopoulou, 'European Union Citizenship and Member State Nationality: Updating or Upgrading the Link?' in J Shaw (ed), *Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law* (EUI Working Papers RSCAS 2011/62) 21ff.

¹⁹ eg D Kochenov, 'Two Sovereign States vs. a Human Being: CJEU as a Guardian of Arbitrariness in Citizenship Matters' in J Shaw, in J Shaw (ed), *Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law* (EUI Working Papers RSCAS 2011/62) 11ff.

²⁰ De Groot & Seling, 'The Consequences of the Rottmann Judgment on Member State Autonomy' (n 18) 160.

²¹ *Tjebbes* (n 1) para 32. See also *Rottmann* (n 2) paras 42, 45.

did, as this can be seen as an expression of lack of a genuine link between citizen and state which underlies the bond of nationality.²² However, such loss of nationality would be inconsistent with the principle of proportionality if the national rules do not allow for an individual examination of the consequences of that loss for the persons concerned under EU law at any time by the competent national authorities and courts, including—where appropriate—the possibility to recover nationality *ex tunc* for the person concerned.²³ The Court specifies that this examination entails an individual assessment of whether the loss of EU citizenship disproportionately affects normal development of his or her family and professional life according to EU law with regard to the objective pursued by the national authorities.²⁴ As part of this proportionality test, national authorities and courts must ensure that the loss of nationality is in line with the rights of the EU Charter of Fundamental Rights, in particular the right to respect for family life and the obligation to take into account the best interests of the child.²⁵ According to the CJEU, relevant circumstances for the proportionality test include whether

‘the person concerned 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 (...) [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. (...)’²⁶

On the question of the loss of nationality by a minor as a consequence of loss of nationality by a parent, the Court holds that it is in principle legitimate for a state to want to preserve unity of nationality within a family by way of a provision such as the Netherlands made.²⁷ However, the relevant national authorities should consider in an individual assessment possible circumstances that demonstrate that loss of nationality by the child fails to meet his or her best interests because of the consequences of that loss from an EU law perspective.²⁸

The judgment of the Court differed on a number of points from the Opinion of Advocate General (AG) Mengozzi. Whereas the CJEU held that an individual examination of proportionality under EU law is necessary in cases of automatic loss of nationality, AG Mengozzi felt that loss of nationality pursuant to a provision like Article 15(1)(c) of the Law on Nationality does not require an assessment of the consequences of such loss *in concreto*.²⁹ According to the AG, such an individual assessment of proportionality would ‘encroach too far on the competence of the Member States to lay down the conditions for loss of nationality.’³⁰ Yet, with regard to minors, the AG held that loss of nationality for children by virtue of loss of nationality of their parent(s) based on Article 15(1)(c) of the Law on Nationality was disproportionate in view of the aim of securing unity of nationality within the family and taking into account the best interests of the child.³¹

In comparison to the Court, AG Mengozzi thus seemed to be more careful not to interfere too much in nationality matters, which are often still considered to be at the heart of the national sovereignty of states,³² whilst at the same time prioritizing the best interests of the child.

5 Reflections on the Concepts of Nationality and EU Citizenship in *Tjebbes*

In *Tjebbes*, the CJEU gives us an insight in the concept of nationality and how loss of nationality should be considered in light of EU law and EU citizenship. Often, nationality is 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.’³³ As we saw, the Court held in *Tjebbes* that it is legitimate

²² *Tjebbes* (n 1) paras 35–39.

²³ *ibid*, paras 40–41.

²⁴ *ibid*, para 44.

²⁵ *ibid*, para 45. See also Art 7 & 24(2) of the EU Charter of Fundamental Rights.

²⁷ *ibid*, para 35.

²⁸ *ibid*, para 47.

²⁹ Opinion of AG Mengozzi (n 4) paras 117–118.

³⁰ *ibid*, paras 114.

³¹ *ibid*, paras 128–149.

³² See also S Coutts, ‘Bold and Thoughtful: The Court of Justice intervenes in Nationality Law – Case C-221/17 *Tjebbes*’ (*European Law Blog*, 25 March 2019) <<https://europeanlawblog.eu/2019/03/25/bold-and-thoughtful-the-court-of-justice-intervenes-in-nationality-law-case-c-221-17-tjebbes/>> accessed 16 April 2019.

³³ *Nottebohm Case (Liechtenstein v Guatemala)* (Second Phase) [1955] ICJ Rep 1955 General List No 18.

for Member States to view nationality as an expression of a genuine link between it and an individual and that absence of such link could result in loss of nationality.³⁴ In particular, the CJEU says that a criterion in nationality law based on habitual residence outside of a Member State and the territories of the EU for an uninterrupted period of 10 years ‘may be regarded as an indication that there is no such link.’³⁵ Furthermore, lack of a genuine link between the parent(s) of a minor and the Member State can also be viewed as lack of a genuine link between the child and the relevant state. The legitimacy of such considerations with regard to (loss of) nationality is further supported, according to the Court, by the fact no one could become stateless as a result of the nationality provisions in question and the fact that there was a possibility for retaining the genuine link if the individual concerned requests a travel document or similar document within said 10-year period.³⁶ With regard to the last point, it is concerning that the individual in question has to take action in order to retain the bond of nationality, whereas the state can just “sit back and relax” and provide for automatic loss of nationality after a certain period of time—almost as if they are ‘erasing’ you.³⁷

If nationality really were to be a reciprocal bond, the state would also have a role to play, for instance in terms of timely notification and information as regards loss of nationality in case of prolonged or permanent residence abroad. Even if the CJEU may have found it interfering too much in the competences of the Member States to make a comment on this, the fact that this type of automatic loss also resulted in loss of EU citizenship gave the Court the opportunity to comment on what EU citizenship means and what rights and duties are to be taken into account by both the individual and the state in case of loss of this status. The judgement in *Tjebbes*, therefore, does not help advocacy for autonomous EU citizenship as it proves that loss of a genuine link with one Member State justifies loss of EU citizenship.³⁸ Nonetheless, in case of absence of a genuine link between a person and a Member State, the Court did make clear that EU citizenship requires states to make an individual examination of the consequences of loss of nationality in view of EU law, which may in certain situations include the possibility of recovering a nationality that was erroneously lost.

6 Statelessness?

Unlike the *Rottmann* case, *Tjebbes* did not concern statelessness as such. However, the Court did make a point of examining whether the provisions of the Law on Nationality were in line with relevant provisions on the avoidance of statelessness in the 1961 Convention on the Reduction of Statelessness (1961 Convention) and the European Convention of Nationality (ECN).³⁹ Indeed, the CJEU held that

‘[t]he risk of becoming stateless is precluded, in the present case, by the national provisions at issue in the main proceedings, given that their application is conditional on the possession by the person concerned of the nationality of another State in addition to [the nationality of the Member State].’⁴⁰

This seems to point in the direction of some concern of the Court with avoidance of statelessness. Less promising with regard to the issue of statelessness is that we already saw that the *Tjebbes* case does not further the possible development of autonomous EU citizenship, which has in the past been considered as a potential avenue for addressing the situation of stateless persons in the EU.⁴¹ Still, the fact that the CJEU held that an individual assessment of the consequences of loss of nationality is required in all cases in view of the principle of proportionality could be relevant also to cases where loss of nationality results in statelessness, even if it will not necessarily prevent stateless—as *Rottmann* already demonstrated.

7 *Tjebbes*: a Next Step?

Considering past jurisprudence of the CJEU on nationality matters, *Tjebbes* certainly presents a next step in case law in this area. The case strongly affirms that loss of nationality of a Member State raises an issue under EU law because it entails loss of EU citizenship, regardless of whether the person(s) involved used free movement rights. In addition, it sheds light on the proportionality test with regard to loss of (EU) citizenship

³⁴ *Tjebbes* (n 1) para 35.

³⁵ *ibid*, para 36.

³⁶ *ibid*, paras 37–38.

³⁷ cf D Kochenov, ‘The *Tjebbes* Fail: Going Farcical about Bulgakovian Truths’ (*Verfassungsblog*, 5 April 2019) <<https://verfassungsblog.de/the-tjebbes-fail-going-farcical-about-bulgakovian-truths/>> accessed 17 April 2019.

³⁸ See also S Coutts, ‘Bold and Thoughtful’ (n 33).

³⁹ Art 7 1961 Convention; Art 7 ECN.

⁴⁰ *Tjebbes* (n 1) para 37.

⁴¹ eg M de Verneuil, ‘Nationality: Romani; Citizenship: European’ (2016) Statelessness Working Paper Series No. 2016/03.

introduced in *Rottmann*, notably adding that it should be ensured that loss of nationality is in line with the rights of the EU Charter of Fundamental Rights.

When taking another perspective, however, the case demonstrates that the Court was not prepared to take the concept of EU citizenship forward as a status independent from national citizenship. Viewing the case from an angle that is concerned with the issue of statelessness, the case also does not seem to bring much to the table. Thus, *Tjebbes* does not present an unexpected or spectacular next step in EU case law in nationality matters. Nonetheless, the case shows that the CJEU is not afraid to intervene in nationality laws and that EU law can provide an additional safeguard with regard to loss of nationality in certain circumstances – something that was traditionally solely within the competences of the Member States. As such, the case could be a promise for further development of EU (case) law on nationality matters.

Competing Interests

The author has no competing interests to declare.

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