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Legitimizing precarity of EU citizenship: *Tjebbes*

Case C-221/17, *M.G. Tjebbes and Others* v. *Minister van Buitenlandse Zaken*, Judgment of the Court (Grand Chamber) of 12 March 2019, EU:C:2019:189

1. Introduction

By labelling EU citizenship as a "fundamental status",[1] the ECJ created an expectation that this status is stable and reliable. In the *Tjebbes* dispute, the Court was confronted with a challenge to these expectations, by having to rule on the acceptability of high precarity of EU citizenship. Unfortunately, the Court did not problematize national legislation creating this precarity, but instead clung to its earlier established strategy of developing the principle of proportionality. While clarification of the proportionality principle can be seen as the *Tjebbes* judgment's main contribution to EU case law on citizenship, this contribution is fairly limited in light of the importance of issues raised by the *Tjebbes* case. Far more significant are the opportunities missed by the Court to critically assess national legislation that caused the precarity of EU citizenship, and undermined the latter's claim to being a fundamental status.

2. Facts and legal background

The case combines the claims of four applicants who were dual nationals living outside the EU, and whose EU citizenship had expired without their knowledge. Ms Tjebbes was born and lived in Canada, and was a Dutch/Canadian dual national from birth. Ms Koopman was born in the Netherlands as a Dutch national. She later moved to Switzerland and acquired Swiss nationality. Ms Duboux was Ms Koopman's daughter, born in Switzerland as a dual Dutch/Swiss national. Ms Saleh Abady was born in Iran as an Iranian national, and acquired Dutch nationality through naturalization while living in the Netherlands. Later in life she moved to Iran.

All of the applicants except Ms Duboux lost their nationality on the basis of having lived outside the EU for over 10 years, and possessing an additional

1. Case C-184/99, *Grzelczyk* v. *Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, EU:C:2001:458, para 31; Case C-413/99, *Baumbast and R* v. *Secretary of State for the Home Department*, EU:C:2002:493, para 82.

nationality.[2] Ms Duboux lost her nationality on the basis that her mother, who was her sole Dutch parent, lost her Dutch nationality. All of the losses were automatic, by operation of law, thus not requiring any specific decisions or events for the loss to happen – the nationalities simply "expired".[3] It should also be noted that residence in a fellow EU Member State does not trigger the 10-year term after which Dutch nationality is lost, only residence in a third country.[4] The same law allows for the 10-year term to be reset if the applicants had been issued with new identity documents or a declaration of intention to retain Dutch nationality. The problem in *Tjebbes*, however, was that the applicants were unaware that they needed to take any action to retain their Dutch nationality.[5] The lack of proactive communication of the Dutch Government with its citizens living abroad about the risks of their nationality expiring was heavily criticized by scholars and the National Ombudsman.[6]

An earlier ECJ judgment – *Rottmann* – established that EU citizenship cannot be lost without considering the proportionality of the consequences of such loss in light of EU law.[7] The novelty of *Tjebbes* was the automatic nature of the loss, as opposed to loss that is caused by a decision of an administrative authority as was the case in *Rottmann*. If a competent State authority takes a decision to withdraw the nationality of a Member State from a specific individual, the EU proportionality test can be incorporated into that decision-making process, as well as into the judicial review of such decisions. One of the main tasks for the ECJ in *Tjebbes* was to decide whether, when, and

2. Rijkswet op het Nederlanderschap 1984 (Dutch Nationality Act), Art. 15(1)(c).

3. Kochenov compares Dutch citizenship to an "unfriendly subscription service" that does not send a reminder about a subscription expiring or the actions needed to remain a subscriber. See Kochenov, "The *Tjebbes* fail", 4 *European Papers* (2019), 319–336, at 328.

4. Dutch Nationality Act, cited *supra* note 2, Art. 15(1)(c).

5. The relevant loss provision came into force in 2003, causing the earliest losses of nationality on this ground in 2013. See more on the history of loss of Dutch nationality due to residence abroad in de Groot, "Beschouwingen over Tjebbes", (2019) *Asiel en Migrantenrecht*, 196–203, at 197–198.

6. De Nationale Ombudsman, "Rapport Verlies Nederlanderschap 'En toen was ik mijn Nederlanderschap kwijt …'" No. 2016/145, (10 May 2016). De Groot argues that the Dutch Government should reach out to its individual citizens living abroad as opposed to relying on general means of information, such as the government website. See de Groot, op. cit. *supra* note 5, 196–203, at 199 and 201. See also Jessurun D'Oliveira, "Automatisch verlies nationaliteit voor Nederlander buitenaf onhoudbaar. Het recht van de EU en het Europees Nationaliteitsverdrag verfrommelen artikel 15 lid 1 onder c RWN", (2016) N.J.B., 248–255; de Groot, "Towards a toolbox for nationality legislation", Valedictory Lecture, University of Maastricht (2016), 29–34.

7. Case C-135/08, *Rottmann* v. *Freistaat Bayern*, EU:C:2010:104. In terms of primary law, the *Tjebbes* judgment focused on compatibility with Arts. 20 and 21 TFEU, and Arts. 7 and 24 of the Charter of the Fundamental Rights.

how, EU-level proportionality should be tested in the context of a legal fact that is a result of a general legal provision, and not a specific administrative decision. The referring court – the Dutch Council of State (*Raad van State*) – asked the ECJ whether an automatic loss of nationality, such as at stake in the main proceedings, is compatible with EU law and, in particular, with the principle of proportionality.

3. The Opinion of the Advocate General

Advocate General Mengozzi declared that the provision on loss of nationality by adults was not precluded by EU law, but the provision on loss of nationality by children was precluded. Both provisions were tested as to whether they pursue legitimate aims,[8] which, according to the Advocate General, they do; and whether they are proportionate in light of EU law.[9] The Advocate General examined the proportionality of the law *in general*, because according to him requiring individual examination of proportionality where loss is automatic "would encroach too far on the competence of the Member States to lay down the conditions for loss of nationality".[10] He found that the Dutch ground for loss of nationality for adults was proportionate, while the ground for loss for children was not. In the case of children, according to the Advocate General, the Netherlands failed to ensure that the best interests of the child were always considered.[11] The ground for the loss of nationality for adults was according to the Advocate General unproblematic under EU law, due to the legitimacy of the aims it pursued, and the opportunities to retain Dutch nationality that were available to the applicants.

The central points of the Advocate General's Opinion were that proportionality cannot be tested at an individual level when nationality is lost automatically, and that the best interests of the child need to be taken into account when children lose nationality. He focused strongly on the position of children, discussing in particular that the unity of nationality within a family might not necessarily be in the best interests of the child,[12] that children cannot

8. In particular, whether the grounds for loss "pursue a public-interest objective, which means that the loss must be appropriate for attaining the objective pursued and that the deprivation stemming from that article cannot be considered to be an arbitrary act". Opinion of A.G. Mengozzi in Case C-221/17, *Tjebbes,* EU:C:2018:572, para 51. See also paras. 51–59 and paras. 120–127.

9. Ibid., paras. 60–118 and paras. 128–149.

10. Ibid., para 114. See also para 4.

11. Ibid., para 146.

12. Ibid., paras. 131–133.

independently act to prevent the loss,[13] and that children may be estranged from the relevant Dutch parent on whom their own EU citizenship depends.[14]

4. The Judgment

The ECJ did not follow the Advocate General's Opinion – it barely mentioned the particular position of children at all, and focused on requiring the *individual* examination of proportionality even where nationality is lost automatically. The judgment tested whether the relevant Dutch legislation pursues legitimate public interest objectives, and confirmed that it did. On that basis, it found that the legislation is not "generally" precluded by EU law, provided that "competent national authorities, including national courts where appropriate, are in a position to examine, as an ancillary issue, the consequences of the loss of that nationality and, where appropriate, to 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".[15] That examination should establish whether the loss "has due regard to the principle of proportionality … from the point of view of EU law".[16]

5. Analysis

This section analyses the criteria developed or confirmed by the ECJ in *Tjebbes* to test whether the loss of a Member State nationality that results in loss of EU citizenship is precluded by EU law. Firstly, the Court assesses general features of the national legislation, such as compatibility with international norms,[17] whether it pursues legitimate objectives (section 5.1), and allows for sufficient opportunity to prevent the loss (section 5.2). Secondly, the Court establishes that even in the context of automatic loss of nationality, an individual test of proportionality of the consequences of loss of EU citizenship needs to be possible (section 5.3). Finally, the Court declares that the lost nationality should be retroactively restorable in case the loss is found to be incompatible with the proportionality principle (section 5.4).

13. Ibid., para 136.
14. Ibid., para 140.
15. Judgment, para 48.
16. Ibid., para 48.
17. Ibid., para 37; and Case C-135/08, *Rottmann*, paras. 52–53. See also section 6 *infra* on the implications of this criterion.

5.1. *Legitimate public interest objectives*

In both *Tjebbes* and in its predecessor *Rottmann* the ECJ devoted considerable attention to confirming the legitimacy of the public interest objectives pursued by the relevant laws on loss of nationalities.[18] Even though the Court found nothing objectionable about the legitimacy of the objectives in either case, it signalled that compatibility with EU law is contingent on passing this legitimacy of objectives test. Interestingly, in *Tjebbes* the three public interest objectives considered were all highly controversial, but not seen as problems by the Court. The Court missed an opportunity to use the criterion of legitimacy of public interest objectives, which it found itself competent to examine both in *Rottmann* and *Tjebbes*, in order to address the source of the precarity challenge to EU citizenship. Each of the three public interest objectives which were legitimized by the Court without due scrutiny is briefly discussed below.

5.1.1. *Protecting a "genuine link" with nationals*

Advocate General Mengozzi in his Opinion stated that "a Member State is entitled to start from the premise that nationality is the expression of a genuine link between it and its nationals".[19] The ECJ followed this standpoint without questioning the content and origin of the highly questionable "genuine link" doctrine.

This doctrine is symptomatic of an unhelpful unscientific and "enigmatic"[20] understanding of nationality. There is very little empirical or theoretical basis for "starting from the premise" of there being any specific content or substantive link that comes with a given nationality. The relation of solidarity or good faith, which are often cited in reference to the genuine link, relate to personal subjective feelings of individuals. To the extent they have been formalized in nationality laws, for example in the form of an oath of loyalty during a naturalization ceremony, they are rather exceptions than systematic identifiers of how nationalities are acquired, retained and lived by a majority of nationals.[21] In terms of reciprocity of rights and duties, which are

18. Judgment, paras. 33–39; Case C-135/08, *Rottmann*, paras. 51–54.

19. Opinion, para 53.

20. Jessurun D'Oliveira, "*Tjebbes* en aanhangend nat: Brexit", (2019) N.J.B., 2784–2791, at 2788.

21. The majority of individuals do not acquire their nationality by naturalization, and not all naturalization procedures in fact require an oath or declaration that embeds related values. As Kochenov points out, citizens may feel solidarity to their State or not feel it, and in a vast majority of cases this does not (and should not) affect their citizenship status. See Kochenov, op. cit. *supra* note 3, 319–336, at 327.

also seen as part of the “genuine link”, there is tremendous variation across States as to what is offered to, and demanded of, nationals.[22]

The origins of the contemporary understanding of nationality as a “genuine link” can be traced to the famous International Court of Justice (ICJ) judgment *Nottebohm* from 1955.[23] Mr Nottebohm was originally a German national who naturalized in Lichtenstein in 1939, without having lived there before his naturalization. His naturalization in Lichtenstein resulted in automatic loss of his German citizenship. Mr Nottebohm’s main country of residence was Guatemala. He suffered detention and loss of his assets during World War II, having been considered a citizen of an enemy State, despite his prior citizenship change. In 1951, Lichtenstein brought a diplomatic protection case against Guatemala to the ICJ, which understandably resulted in highly politically charged proceedings. Lichtenstein was ultimately denied the right to protect Mr Nottebohm against Guatemala on the basis, that there was no “genuine link” between him and Lichtenstein. This was, and still is, a shocking finding. Prior to *Nottebohm*, the level of connection between a State and a person was only invoked in international law in the context of multiple nationalities, where the “dominant” nationality had to be determined,[24] but not to substantiate a content-based deficiency of the only nationality a person possessed.

There is a broad consensus among nationality experts that *Nottebohm’s* “genuine link” doctrine is unsuitable for generalizations on nationality outside the factual context of the dispute in Nottebohm.[25] The *Nottebohm* judgment itself states an explicit intention to not “go beyond the limited scope of the question which it has to decide”.[26] The controversial “genuine link” compromise in the complex and politically charged *Nottebohm* dilemma has

22. See more in Kochenov and Lindeboom (Eds.), *Kälin and Kochenov’s Quality of Nationality Index* (Hart 2020, forthcoming). See also de Groot, *Staatsangehörigkeitsrecht im Wandel: Eine Rechtsvergleichende Studie über Erwerbs- und Verlustgründe der Staatsangehörigkeit* (Asser Institute, 1988), pp. 13–14, where the author describes a nationality status as an “empty shell”.

23. Originally, the genuine link criterion was used in the context of multiple nationalities, to determine the dominant nationality for private international law purposes. See The Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws of 12 April 1930, Art. 5.

24. Ibid., Art. 5.

25. See Kunz, “The *Nottebohm* judgment”, 54 AJIL (1960), 536–571; Jones, “The *Nottebohm* case”, 5 ICLQ (1956), 234–235; Donner, *The Regulation of Nationality in International Law*, 2nd ed. (Transnational Publishers, 1994), p. 63–64, note 97; Sloane, “Breaking the genuine link: The contemporary international legal regulation of nationality”, 50 Harv.Int’l LJ (2009), 1–60. Spiro, “*Nottebohm* and a ‘genuine link’: Anatomy of a jurisprudential illusion”, in *Investment Migration Working Papers*, No. 1, (2019).

26. ICJ, *Nottebohm* judgment (*Lichtenstein* v. *Guatemala*), 6 April 1955, Second Phase, Judgments [1955] ICJ 1, *ICJ Reports 1955*, p. 4.

thus been subject to much criticism, including from three dissenting ICJ judges.[27]

Yet the doctrine's dubious legacy persists and thrives. The European Convention on Nationality mentions loss of "genuine link" as a ground for loss of nationality,[28] and the "genuine link" as a mystical essence of nationality is presumed in numerous nationality discussions.[29] It also features in the judgments in *Rottmann* and *Tjebbes* through the ECJ's uncritical acceptance of a "genuine link" as justification for depriving some individuals of their nationality, in order "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".[30]

Such standards as "solidarity and good faith", as well as "reciprocity of rights and duties" do not offer sufficient clarity to be predictably applied in practice, which is an inherent flaw in giving any legal effect to the genuine link doctrine. As a consequence, it is difficult to debate whether "the habitual residence [abroad] … for an uninterrupted period of 10 years may be regarded as an indication that there is no [genuine] link".[31] The Court simply accepts that this is one of the possible ways to test the mysterious "genuine link", but commentators, unsurprisingly, are far from convinced.[32]

5.1.2. *Safeguarding unity of nationality within a family*

Ms Duboux's loss of nationality was derivative:[33] it was not based on circumstances related to *her*, but on circumstances related to *her mother*. It was irrelevant whether Ms Duboux herself lived abroad or when her identity documents were last renewed. This ground for loss raised additional questions

27. See Dissenting Opinion of Judge Klaestad, Dissenting Opinion of Judge Read, and Dissenting Opinion of M. Guggenheim in ICJ, Judgment in *Nottebohm*, cited *supra* note 26.

28. Art. 7(1e) of the European Convention on Nationality (ECN). The concept of "genuine and effective link" also features in Art. 18(2a) of the ECN in the context of attribution of nationalities in the context of State succession.

29. See e.g. Edwards, "The meaning of nationality in international law in an era of human rights: Procedural and substantive aspects" in Edwards and van Waas (Eds.), *Nationality and Statelessness under International Law* (Cambridge University Press, 2014); Vlieks, Hirsch Ballin, and Recalde Vela, "Solving statelessness: Interpreting the right to nationality", 35 NQHR (2017), 158–175; Gauci and Aquilina, "The legal fiction of a genuine link as a requirement for the grant of nationality to ships and humans: The triumph of formality over substance?", 17 ICLQ (2017), 167–191.

30. Case C-135/08, *Rottmann*, para 51. Judgment, para 33.

31. Judgment, para 36.

32. Jessurun D'Oliveira, op. cit. *supra* note 20, 2784–2791, at 2787–2788; Kochenov, op. cit. *supra* note 3, 319–336, 326–327.

33. Based on Dutch Nationality Act, cited *supra* note 2, Art. 16(1)(2).

about the rights of the child to an autonomous EU citizenship status, discussed by the Advocate General,[34] but largely neglected by the ECJ.

The ECJ legitimized the ground for Ms Duboux's loss of nationality on the basis of the public interest objective of preserving unity of nationality within a family, which is another controversial principle within nationality law. "Derivative nationality" of wives and children, often justified by reference to unity of nationality within a family, was a central point of contestation in the struggle for gender equality in nationality law.[35] This principle, which is based on a "roseate view on family relations",[36] stood in the way of women's struggle against involuntary naturalization, loss of nationality as a result of marriage to a foreigner, inability to transfer nationality to their children, and so on.[37] Nowadays this same principle is sometimes invoked to hold back the rising awareness of the importance of autonomy of children's procedural and substantive rights to their own nationality.[38]

Gender equality and children's rights have distinct ethical and legal foundations, but the principle of unity of nationality within a family is a shared enemy. It leads to measures with disproportionate negative effect on the more vulnerable members of the family, especially when families do not function in accordance with traditional patriarchal models. As de Groot has pointed out, in the Dutch nationality provisions disputed in *Tjebbes*, the child loses his or her Dutch nationality if the parent loses that nationality regardless of whether the child factually resides abroad with the relevant parent or perhaps lives in the Netherlands in the care of others. It is equally irrelevant whether the Dutch parent enjoys parental custody or leads any form of family life with the affected child.[39]

Not only is unity of nationality within a family a questionable objective to pursue, it has already been rendered impossible to achieve by the principles of gender equality. Nowadays, spouses almost universally have equal rights to retain their nationalities after marriage and pass those on to their children, leading to more than one nationality within transnational families.[40]

34. Opinion, para 123.

35. Bredbenner, *A Nationality of Her Own: Women, Marriage, and the Law of Citizenship* (University of California Press, 1998).

36. Ibid., p. 43.

37. See more in Albarazi and van Waas, "Towards the abolition of gender discrimination in nationality laws", 46 *Forced Migration Review* (2014), 49–51.

38. Arnott, "Autonomy, standing, and children's rights", 33 *William Mitchell Law Review* (2007), 807–826. See also Council of Europe Recommendation on the Nationality of Children, CM/Rec(2009)13, Annex, paras. 19–22. See also the Opinion, which mentions the autonomy of children's rights, para 133.

39. de Groot, op. cit. *supra* note 5, 196–203, at 202.

40. Van Eijken also shows that applying this principle to the case of Ms Duboux led in fact to more divergence in the nationality statuses among the siblings in the same family. See van

Acceptance of multiple nationalities and focus on the autonomy of the nationality status of each family member is a strategy that is better aligned with contemporary human rights standards, and that allows transnational families to retain connections with their States in a manner suitable to the unique context of each such family.[41]

The ECJ, unfortunately, did not make use of the opportunity to declare that "to deprive a minor of citizenship of the Union and the rights attaching purely for the sake of preserving unity of nationality within the family"[42] are both at odds with international human rights principles; and that it is moreover unachievable due to the global prevalence of gender equality in nationality laws.

5.1.3. *Avoiding multiple nationalities*

The Court points out that avoidance of multiple nationalities is an objective pursued by the Dutch Government, but does not explicitly endorse or reject it.[43] This is noteworthy, as the avoidance of dual nationality is actually the only one of the three objectives that is explicitly formulated in the Dutch Nationality Law, and that is relatively well defined. Avoidance of multiple nationalities, just like the other public interest objectives discussed in *Tjebbes*, is an outdated and controversial goal. It is associated with unhelpful notions of (military) allegiance, suspicion against outsiders, poor integration practices, and gender discrimination.[44] Most States that had previously avoided multiple nationalities have reformed their laws to accommodate the changing norms, [45] and the international legal norms on nationality have modernized accordingly.[46]

Even though not addressed in great detail by the ECJ, avoidance of multiple nationalities is in fact at the core of the *Tjebbes* dispute. Only Dutch citizens

Eijken, "*Tjebbes* in Wonderland: On European citizenship, nationality and fundamental rights", 15 EuConst (2019), 714–730, at 723. The principle of unity of nationality is of course only harmful if it is used to justify loss of nationalities, not to offer opportunities for the acquisition of additional ones.

41. The EU legal order upholds the principle of respect for the autonomy of the status of dependent family members in the context of residence rights for third-country nationals who are family members of EU citizens. See e.g. Case C-218/14, *Singh*, EU:C:2015:476, para 60.

42. Opinion, para 20.

43. Judgment, paras. 34–35.

44. Vink and de Groot, "Citizenship attribution in Western Europe: International framework and domestic trends", (2010) *Journal of Ethnic and Migration Studies*, 713–734, at 723–727, 731. See also Vonk, *Dual Nationality in the European Union. A Study on Changing Norms in Public and Private International Law and in the Municipal Laws of Four EU Member States* (Brill Nijhoff, 2012).

45. Vink et al. "The international diffusion of expatriate dual citizenship", (2019) *Migration Studies*, 362–383.

46. Vink & de Groot, op. cit. *supra* note 44, 713–734, at 723–727.

with an additional nationality are affected by the relevant loss provision. This exclusive targeting of holders of multiple nationalities is explained by the prohibition on creating statelessness. However, it also undermines any claims to the effectiveness of the other two objectives. It is difficult to justify why Dutch mono-nationals are considered to have retained the "genuine link" with the Netherlands, while Dutch multiple-nationals in exactly the same circumstances are considered to have lost it. Similarly, safeguarding unity of nationality within a family only if both the relevant parent *and* the relevant child have two or more nationalities, but not targeting any of the other possible constellations of transnational families, appears to be selective and arbitrary. Therefore, avoidance of multiple nationalities is in fact the only objective that the Dutch Government can reasonably claim to pursue with the disputed provision on loss of nationality. This is clearly at odds with the fact that the phenomenon of multiple nationalities plays an important role in the EU integration project. Freedom of movement in the EU leads to many EU citizens qualifying for acquisition of a nationality in another Member State.[47] Naturalization and integration in the host State, while retaining the nationality of the home State, have been supported and protected by the ECJ,[48] and the Court has also taken a strong stance against discrimination of EU citizens with a third-country nationality in the context of access to EU rights.[49] This could perhaps explain the Court's reluctance to explicitly endorse the Dutch public interest objective of avoiding multiple nationalities.[50] An actual objection from the Court condemning the discrimination against EU citizens with more than one nationality would, however, have been more useful than its meaningful silence.

Generally, the Court did not elaborate on the criteria it uses to test the legitimacy of public interest objectives in *Tjebbes*. By uncritically accepting some of the most controversial and problematic principles in nationality law, the Court merely indicated that the relevant standards are very low, but did not explain what they are. There is no mention of what one could expect as basic ingredients in a legitimacy test, such as appropriateness or lack of

47. One of the main conditions for naturalization is a number of years of uninterrupted authorized residence.

48. Case C-165/16*, Toufik Lounes* v. *Secretary of State for the Home Department*, EU:C:2017:862, paras. 68–51.

49. Case C-369/90, *Micheletti and others* v. *Delegación del Gobierno en Cantabria*, EU:C:1992:295.

50. The Netherlands exempts those who live in other EU Member States from losing their Dutch nationality. However, EU citizens naturalizing in the Netherlands may still be required to renounce their former nationality, and Dutch nationals voluntarily acquiring the nationality of another EU Member State lose their Dutch nationality automatically in most cases. This could become a point of contestation in future ECJ jurisprudence on EU citizenship.

arbitrariness,[51] nor did the Court weigh whether the relevant public interest objectives are in fact "worthy of protection"[52] at the cost of the precarity of EU citizenship.

5.2. *The preventability of loss*

The ECJ stated that "legitimacy is further supported"[53] by the fact that individuals are able to "reset the clock" by being issued with a new identity document from the Netherlands within the 10-year time frame.[54] The Court thus certainly considered the preventability of loss as support for the legitimacy of the national legislation, but did not specify whether this is an essential requirement.

The unaddressed "elephant in the room" with regard to resetting the clock is, however, the lack of knowledge on the part of the applicants, and numerous other Dutch expats,[55] about the precarity of their situation and the actions required to remain Dutch. While it may indeed be true that "it is relatively simple to retain Netherlands nationality",[56] if affected individuals do not know about the forthcoming loss or how to prevent it, the level of complexity of actions they need to undertake is irrelevant. Failure to consider the predictability of the loss for the affected persons was rightfully one of the main points of criticism of the *Tjebbes* judgment by scholars.[57] The Advocate General has expressed the view that the loss of nationality was "sufficiently foreseeable",[58] disagreeing with the National Ombudsman on the matter. The ECJ, in turn, simply avoided engaging with this central concern.

5.3. *Individual proportionality test*

The main contribution of *Tjebbes* to EU law on citizenship is establishing that the principle of proportionality requires the possibility of an *individual* assessment,[59] even in the context of an automatic loss of Member State

51. While the A.G. in his Opinion mentions arbitrariness and appropriateness in the discussion of the legitimacy of public interest objectives, the Court does not mention those. See Opinion, para 51.
52. Ibid., para 48.
53. Ibid., para 38.
54. Ibid., para 38.
55. Report cited *supra* note 6, p. 36.
56. Opinion, para 18.
57. Jessurun D'Oliveira, op. cit. *supra* note 20, 2784–2791; Kochenov, op. cit. *supra* note 3, 319–336.
58. Opinion, para 58.
59. Judgment, para 44.

nationality. It elaborates in more detail than *Rottmann* on the factors relevant for assessing the proportionality of loss of EU citizenship.

According to *Tjebbes*, automatic loss of nationality that results in the loss of EU citizenship is not precluded by EU law only as long as there is a possibility to examine the proportionality of the consequences of that loss "for the situation of each person concerned".[60] The Court did not explain how this type of test could be reconciled with an automatic mode of loss of nationality. This is striking, as the main dilemma in *Tjebbes* was precisely the question of how to reconcile the EU proportionality requirement with the automatic nature of loss of nationality, involving no individual decision-making process whatsoever along the way. The Advocate General devoted considerable attention to this dilemma, concluding that the only way to reconcile the proportionality principle with the Member States' freedom to decide that their nationality can be lost automatically, would be to test the proportionality of the legislation on automatic loss as a whole, without requiring individual review.[61] The Court disagreed, stating that the proportionality needs to be tested on an individual basis, without, however, concluding that EU law precludes automatic modes of loss of nationality generally.[62] The Dutch Council of State, which was the national court that referred the preliminary question, concluded that the opportunity to test proportionality individually needs to be somehow created by the government directly on the basis of Article 20 TFEU.[63]

Failing to explain how exactly loss of nationality can remain automatic while also providing for a possibility of individual review, the Court proceeds to elaborate what factors are relevant when determining whether loss has been proportional. These can be summarized as follows:

- the "normal development" of "family and professional life",[64] and in particular the limitations on moving and residing freely within the territory of the Member States[65] that may affect family and professional life.
- consistency with the fundamental rights guaranteed by the Charter, specifically with the right to respect for family life.[66]

60. Ibid., para 48.
61. See further *supra* in section 3.
62. This same unresolved paradox affects the coherence of the Court's reasoning with regard to the restoration of the lost nationality, discussed *infra* in section 5.4.
63. Raad van State (Dutch Council of State), decision of 12 Feb. 2020, Case Nos. 201504577/2/A3, 201507057/2/A3, 201508588/2/A3, 201601993/2/A3, 201604943/1/A3 and 201608752/1/A3, NL:RVS:2020:423.
64. Judgment, para 44.
65. Ibid., para 46.
66. Ibid., para 45.

– the fact that the person concerned might not have been able to renounce the nationality of a third country and therefore is not at fault for being a dual national.
– a serious risk because of the impossibility to enjoy consular protection under Article 20(2)(c) TFEU in the territory of the third country of residence.
– in case of loss of nationality by children, compliance with the principle of best interests of the child.[67]

It is interesting to note that the ECJ did not propose to test whether, under the individual circumstances of affected persons, the loss of nationality of a Member State in fact contributes to achieving the public interest objectives pursued by the relevant law. The applicants argued that the loss of their Dutch nationality and their EU citizenship was disproportionate because, among other reasons, they retained a strong genuine link with the Netherlands.[68] Testing the presence of genuine link on an individual basis was characterized as having "particularly dangerous consequences, inter alia as regards the allocation of competences between the Member States and the European Union"[69] by the Advocate General. The Court silently omitted the "loss of genuine link" from the list of relevant factors when assessing proportionality. This omission was, however, very significant. It was emphasized by the referring national court in its post-*Tjebbes* decision, when it explicitly ordered the responsible Minister not to take into consideration whether the applicants retained a genuine link with the Netherlands when testing EU-level proportionality.[70]

The Court left "for the competent national authorities and, where appropriate, for the national courts"[71] to apply proportionality criteria to the applicants' individual circumstances. Some applicants are clearly more directly addressed by the listed criteria than others. Firstly, Ms Duboux, who was a minor when she lost her Dutch nationality, is the addressee of the standards related to the best interests of the child. Secondly, the applicant who is left with an Iranian nationality after the loss of her EU citizenship, is the one presumably more likely to experience serious issues moving and residing freely in the EU than the Canadian and Swiss nationals, and is more likely to run into serious risks due to impossibility of enjoying EU consular protection. It is, moreover, impossible to renounce Iranian nationality,[72] which is another

67. Ibid., paras. 45 and 47.
68. See Opinion, para 104.
69. Ibid., paras. 105–107.
70. Decision Raad van State cited *supra* note 63, para 11(2).
71. Ibid., para 45.
72. See also de Groot, op. cit. *supra* note 5, at 200–201.

criterion suggested by the Court when assessing proportionality of loss. As a result, after *Tjebbes*, the Dutch authorities indicated in the follow-up national hearing that they saw "sufficient grounds for requesting additional information and reconsidering complaints"[73] only concerning Ms Saleh Abady, as well as one other applicant within the national proceedings who was left stranded in the US with the Moroccan nationality, after she lost her Dutch nationality on the basis of the same legal provision.

The Dutch Council of State nevertheless ordered the authorities to reconsider complaints of all the applicants, not just the Moroccan and Iranian nationals, on the basis that everyone was entitled to present new arguments after the *Tjebbes* judgment clarified the applicable proportionality principle. However, the Government's singling out of those two cases indicates that the *Tjebbes* proportionality test came across as protecting those precarious EU citizens who are at risk of being left with a more problematic nationality status after losing their EU citizenship, rather than ensuring the overall stability and predictability of EU citizenship. There is, indeed, a strong humanitarian component to the Court's proportionality criteria, which is uncharacteristic in nationality laws, and belongs rather in the domain of forced migration. Interestingly, the Council of State was faced, as a result of *Tjebbes*, with a typical asylum-like dilemma as to the temporal scope of the proportionality test – whether the circumstances at the time of the automatic loss of nationality should be relevant, or rather at the time of the review.[74] This humanitarian discourse is perhaps more familiar to the Court than questions of membership in a polity, but this turn towards humanitarianism in constructing EU citizenship is problematic. The sense of political unity among EU citizens that the Court, among other actors, has been highly successful at achieving in the past decades, is not supported by the message that stability and reliability of one's membership in the EU depends on how objectively devastating one's life would be if the citizenship is lost.

5.4. *Retroactive reacquisition requirement*

Another condition for compliance with EU law established in *Tjebbes* is the possibility to "recover [the] nationality *ex tunc*".[75] The ECJ has understood that "under national law both the Minister and the competent courts are required to examine the possibility of retaining Netherlands nationality in the procedure governing applications for passport renewal",[76] thus implying that

73. Decision Raad van State cited *supra* note 63, para 11(3).
74. Decision Raad van State cited *supra* note 63, para 11(2).
75. Judgment, para 42.
76. Ibid., para 43.

the condition of retroactive restoration of nationality is fulfilled in the Netherlands. It is, however, not entirely clear how, in legal technical terms, Dutch nationality could be retained in an automatic mode of loss.

When loss of nationality is automatic, there is no administrative decision causing the loss which can be later reviewed or annulled. A decision not to issue an identity document does not cause the loss of nationality – it is merely a consequence of that loss, where the authorities who refuse to issue identity documents are not competent to take nationality decisions. Allowing the "undoing" of an instance of automatic loss due to individual incompatibility with EU proportionality entails a significant amendment to Dutch nationality law. Considering that EU proportionality can only be established in light of personal circumstances, it is unclear how the loss provision can effectively remain automatic.[77] The Advocate General refers to the possibility of reacquiring Dutch nationality through a facilitated procedure that exists under Dutch law for ex-nationals,[78] but the latter is conditional upon re-establishing residence in the Netherlands for at least one year and possessing a permanent residence permit, and it is not retroactive,[79] thus not fulfilling the *Tjebbes* standard.

By not objecting against the automatic nature of the loss of nationality, though insisting on the possibility of individually testing EU proportionality and restoring lost nationalities, the judgment results in a paradox. It almost looks like a failure to understand the mechanism of an automatic loss of a nationality. In more practical terms, it shifts the burden of dealing with a problematic nationality law away from the legislature and towards the judiciary and the civil service, where the latter often have limited capacity and competence to resolve such issues. Judicial and administrative solutions for such significant structural problems are unfeasible, which may of course ultimately motivate the legislature to seek structural solutions. This could perhaps be the outcome the judges of the ECJ were hoping for, while feeling unable to create a more transparent and legally solid foundation to that effect.

The referring national court has concluded after the ECJ's judgment that if an instance of automatic loss of Dutch nationality is found to be incompatible with the EU principle of proportionality, the relevant loss provision would need to be declared inapplicable to that specific individual case on the basis of Article 20 TFEU directly.[80] It remains to be seen how this odd legal construction, which de facto amends Dutch nationality law, would find its implementation in practice.

77. See also de Groot, op. cit. *supra* note 5, at 202.
78. Opinion, para 101.
79. See Dutch Nationality Act, cited *supra* note 2, Art. 6(1)f . See also Opinion, para 9.
80. Decision Raad van State cited *supra* note 63, para 11(3).

6. Implications on the nationality regimes of Member States

6.1. *Laws and practice on loss*

The Netherlands is rather exceptional in its drastic approach to cutting ties with its dual nationals living abroad. Other Member States that provide for loss of nationality due to residence abroad often limit it to a very narrow set of highly estranged nationals who have been born abroad and have not lived in the relevant Member State for any significant period of time.[81] Based on *Tjebbes*, it is unlikely that such provisions of other Member States would fail the general legitimacy test in light of EU law. Cyprus, Malta, and Ireland may have a more problematic ground for withdrawal of nationality on the basis of residence abroad, since it applies exclusively to naturalized citizens.[82] Discrimination between naturalized and "native" nationals violates Article 5(2) of the European Convention on Nationality,[83] and may thus be seen as precluded by international norms on nationality. Compliance with international legal standards was cited in both *Rottmann* and *Tjebbes* as a criterion for the legitimacy of nationality legislation on the EU level,[84] but it is unclear whether it would also apply to Member States who have not ratified the relevant international legal instrument. None of these three States ratified the European Convention on Nationality, but Malta did sign it in 2003.

While the general test of legitimacy in *Tjebbes* seems to leave a wide margin for the type of nationality legislation Member States can have, it also leaves all Member States with a disruptive message that anyone who loses (or possibly has ever lost) EU citizenship under any circumstances, now has a confirmed right to personalized proportionality review.[85] This can potentially have

81. Spain limits it to persons born abroad whose Spanish parent was also born abroad. Swedish nationality can be lost due to residence abroad only by those who were born abroad and never resided in Sweden. France has a procedure for withdrawal of nationality (thus not automatic but through a decision of a State authority) for individuals who have never resided in France or possessed French identity documents, and whose parents and grandparents have also not resided in France or possessed French documents for the past 50 years. Belgium limits its loss due to residence abroad provision to those born abroad, and who have uninterruptedly resided abroad between the age of 18 and 28. Residence in Finland or other Nordic country for at least 7 years before reaching the age of 22 prevents the loss of Finnish nationality due to residence abroad. Information obtained from GLOBALCIT Observatory, Global Database on Modes of Loss of Citizenship, <globalcit.eu/loss-of-citizenship/>.

82. This withdrawal is not automatic, but requires an individual decision by a State authority.

83. Art. 5(2) ECN reads: "Each State Party shall be guided by the principle of non-discrimination between its nationals, whether they are nationals by birth or have acquired its nationality subsequently".

84. Judgment, para 37; and Case C-135/08, *Rottmann*, paras. 52–53.

85. See more in de Groot, op. cit. *supra* note 5, at 197–198.

dramatic effects, allowing individuals to dispute the proportionality of their loss of EU citizenship, whether they were deprived of a Member State's nationality through an administrative decision, or lost their nationality automatically. Some governments are already pre-emptively responding with policy documents indicating how they are planning to implement *Tjebbes*. Denmark, for example, issued a briefing in October 2019 on the possibility to reopen decided cases on the possession of Danish nationality purely on the basis of *Tjebbes*.[86]

Thus, while on the surface the laws on nationalities of Member States seem safe from any significant EU scrutiny, the effects of the requirement of individualized proportionality tests may cause a number of established nationality laws and practices to implode, and may consequently require legislative amendments in order to give a feasible and consistent implementation to the *Tjebbes* judgment.

6.2. *Laws and practice on acquisition*

While the *Tjebbes* judgment is primarily concerned with loss of nationality, it also requires Member States to ensure that nationality can be reacquired retroactively if the loss is found not to comply with the EU principle of proportionality. The Dutch Council of State in the national proceedings after *Tjebbes* concluded that while the relevant Dutch provision on loss of nationality was in principle in line with EU law, provisions on acquisition of Dutch nationality would need to be amended as a result of *Tjebbes*.[87]

It raises interesting considerations on the extent to which EU law can and should have an effect on the *acquisition* of EU Member State nationalities. Already in 1992, the Court ruled that Member States must have due regard to EU law when regulating both "the acquisition and loss of nationality".[88] In *Rottmann*, the Court made reference to the potential decision on restoring the applicant's lost nationality, stating that the national "courts will, if necessary, have to determine whether [the decision] is valid in the light of the principles referred to in this judgment".[89] The principles developed in the context of loss of a Member State nationality thus apply in the context of (re)acquisition. Subsequently, in *Tjebbes* the Court has imposed an obligation to offer the restoration of a nationality that was lost in violation of EU law. There has so far been no judgment that clarified in what way the developed standards and

86. Udlændinge- og Integrationsministeriet, Orientering om behandlingen af ansøgninger om bevis for bevarelse af dansk indfødsret efter EU-Domstolens dom i sag C-221/17, *Tjebbes*, 11 Oct. 2019.

87. Decision Raad van State cited *supra* note 63, para 11(1).

88. Case C-369/90, *Micheletti*, para 10.

89. Case C-135/08, *Rottmann*, para 63.

principles could apply when EU citizenship is acquired for the first time. Cases may arise where EU citizenship has not been acquired due to a bureaucratic failure in violation of international law. This is, for example, fairly common in cases of children who are at risk of statelessness, born in the EU and entitled to the nationality of a Member State by operation of national law as well as according to applicable international standards, but whose birth might not have been properly registered, or the relevant administrative procedures are malfunctioning.[90] The fact that the ECJ does not shy away from mentioning the acquisition alongside the loss of nationality in formulating the relevant principles indicates a potential for assessing not only unlawful or disproportionate loss of EU citizenship, but also unlawful or disproportionate non-acquisition.

7. Conclusion

Tjebbes can generally be characterized as throwing out an experimental life preserver in the shape of the "proportionality test" to individual precarious EU citizens, while failing to defend the fundamental status of EU citizenship from the challenge of precarity more generally.

The possibility to test the proportionality of consequences of general measures for specific individuals is not objectionable in principle. However, for such a proportionality test to be efficient and feasible, the relevant general measures need to be held to an adequate standard, so that they do not implode from the prospect of individual reviews. Testing proportionality of effects of general rules on individual cases is not a remedy for the structural problems with those rules. An individualized proportionality test is essentially a fail-safe mechanism – it cannot replace a solid legislative foundation of general application that should in principle lead to coherent, legitimate, and proportionate outcomes.

Perhaps the focus on an individualized proportionality test is the only way the Court saw a possibility to "encourage", or perhaps blackmail into existence, general legislative measures that avoid rendering EU citizenship so precarious, without having to take the politically controversial step of explicitly ordering a Member State to fundamentally change the ways in which its nationality is lost.[91] This commentary argued that both the

90. See more Swider and de Groot, "Litigating strategically: Stateless children born in the EU", European Network on Statelessness Blog, 12 Nov. 2014, accessible at <www.statelessness.eu/blog/litigating-strategically-stateless-children-born-eu>.

91. Division of competence was one of the main concerns of A.G. Mengozzi. See Opinion, paras. 4, 105 and 114.

requirement of an individual proportionality test, as well as the requirement to restore a nationality that was lost disproportionately, technically preclude legislation on automatic loss of nationality – even if the ECJ refuses to acknowledge this fact. The post-*Tjebbes* decision of the referring national Dutch Court confirms this by concluding that Dutch nationality legislation on the automatic loss was de facto amended by Article 20 TFEU.[92]

While carefully avoiding being explicitly critical of Member States' nationality laws, the ECJ did find itself competent to scrutinize the legislation generally, and to assess whether it pursued legitimate objectives. With this competence, however, the Court proceeded to legitimize highly controversial objectives, such as the preservation of the genuine link, the unity of nationality within a family, and avoidance of multiple nationalities, without considering whether such objectives are worth pursuing at the expense of stability and predictability of EU citizenship. The Court also failed to consider whether the national measures were in fact appropriate, and not arbitrary.

As a result, *Tjebbes* sends a mixed message to Member States. Formally, it sanctions automatic loss of nationality as long as this pursues legitimate objectives; it proceeds to declare highly problematic objectives, and questionable measures pursuing them, to be perfectly legitimate in light of EU law. Subsequently, it requires an opportunity for an individualized EU proportionality test and a possibility to retroactively restore the lost nationality. In practice, this renders an automatic loss of a Member State nationality that results in the loss of EU citizenship impossible.

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92. Decision of the Raad van State cited *supra* note 63, paras. 11(1)–(3).

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