

# The Tjebbes Fail: Going Farcical about Bulgakovian Truths

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“As you know well, without documents it is strictly prohibited for any person to exist”

[\*Poligraph Poligraphovich Sharikov\*](#)

In this note I explain how far the case of [Tjebbes](#), where the Court of Justice has agreed in principle with stripping EU citizens residing abroad of their EU citizenship status and EU democratic rights based on non-renewal of the passport, showcases the dangerous limits to the understanding of the concept of [citizenship](#) by the Grand Chamber of the Court of Justice. Absent any necessity to do so, the Court nevertheless managed to open the EU law door to endorsing the downgrade of EU integration to irrelevance for a large number of individuals selected, based on a combination of untenable logic denying citizenship's abstract legal nature and the operation of *foreign* – Iranian, Canadian, and Swiss – law in the context of depriving EU citizens themselves any agency, their dignity forgotten, since the holders of several citizenships are stigmatized in principle.

It is old news that the logic of apartheid *européen*, [to quote Balibar](#), is at the [core of the EU integration project](#), where the whole idea of the EU as a common working-living space is only open to those in possession of the formal status of citizenship. Unlike in any other constitutional system around the world the rights to reside, work, and not to be discriminated against are *de facto* and also *de jure* purely citizenship- as opposed to residence-based. Applying this same logic to dual national EU citizens is quite new, however.

To downgrade EU citizenship, while its significance is so absolutely all-encompassing, to an unfriendly subscription service under the pretext of respecting the separation of powers between the Member States and the EU is an unwelcome move. The fact that it has been done by the Court in an almost elegant fashion makes it tragically comical. Akin to Bulgakov's '[Poligraph Poligraphovich](#)' caring to acquire a passport and a municipal housing registration while failing to grasp the limits of own humanity – the proletarian was a laboratory dog turned semi-human – the Court steers clear of the core ideas underlying the issue at hand, as I explain below outlining a selection of ten tragic misunderstandings earning this case a solid place in the hall of fame of the most intricately dubious *tours de force* of the highest Court in Europe. A substantive issue of fundamental importance for the very essence of EU integration is misrepresented as a procedural discussion, where anything – especially the denial of legally-endorsed Europeanness, i.e. EU citizenship – is *in principle* allowed for no EU-law-compatible reasons. Proportionality is deployed to undermine the essence of the law: what the late Professor [Tsakirakis](#) was weary of and what [George Letsas](#) has problematized with splendid precision. Deaf to [Vicky](#)

[Jackson's](#) warning calls, the ECJ is not 'proportionate about proportionality'. *Tjebbes* is thus in line with the dubious case-law showcased best by Opinion 2/13, where the core substantive constitutional question is ignored in favour of largely irrelevant procedural considerations, as [Piet Eeckhout](#) has brilliantly demonstrated. By sacrificing the very legal nature of its citizenship while safeguarding no substantive interest EU law emerges, yet again, as [lacking the Rule of Law](#).

## Annihilating the 'fundamental' in the 'fundamental legal status'

I have been subscribed to the *New Yorker* for almost 20 years – it is a great periodical, but I sometimes end up reading *LRB* and *NYRB* instead, leaving the issue of the *New Yorker* unwrapped. The idea of having it is great: one day, during a trip far away, on board, say, of Air Calin, or Air Tahiti Nui, I will definitely read several issues at once. At least believing in this, coupled with the kindness of the publisher's dutiful reminders, make me keep the subscription. I take the decision. Great journals are cheap, so every time a reminder "your subscription is about to expire" comes from New York, I renew without hesitation.

This is not how Dutch and, by extension, European citizenship works, as we learned from *Tjebbes*. At issue was the fact that under the Dutch law the state does not remind you that you are about to be thrown out of the body of citizenry for no reason other than failure to submit non-self-evident paperwork. Somewhat similar to a well-known Slovenian example (see [Kurij and others](#)), the Dutch state simply erases you in some cases. Of course, your Europeanness goes too, together with your *Nederlanderschap*. All those residing outside of the EU, who got several citizenships and have not renewed the passport for ten years or have not filled in an online form that they are interested in remaining Dutch, as it were, are potentially affected. 'The right to have rights', as well as the very membership of the national political community – *pace Delvigne* – is thus made dependent on some kind of a renewal, which is new (the law has been effective since 2013), counterintuitive (other Member States do not require anything similar), and, crucially, of which the state does not remind you. At the deepest level *Tjebbes* is direct denial of both the 'sovereign citizen' logic, akin to the one formulated by the US Supreme Court in *Afroyim v Rusk* (the branches of government are but custodians of popular sovereignty, so undoing citizens is not in their power) and the 'citizenship as a human right' logic, as formulated, most recently, by [Peter Spiro](#). EU citizens emerge as hostages at the whim of those in power.

What makes the whole story trickier is that an ordinary Dutch passport is valid precisely for 10 years (unlike the 5 year term, in force when the law in question entered into effect). Not renewing your passport *ahead of expiration* can thus result in the annulment of citizenship *ex lege* if you reside abroad and have some other citizenship. This is a particularly low-threshold test for losing nationality, making Dutch citizenship easier to lose even than the British – one of the global leaders on [this count](#). In Brexit UK it is enough that the Secretary of State is of the opinion that your being a citizen is not in the interests of the UK: we all heard abundantly

about it in the recent cases of [ISIS wives](#) and other terrorists and terror-sympathizers (e.g. [Shamima Begum](#)). Cypriot citizenship is equally easy to lose as the Dutch: on Cyprus it is apparently enough [to sell a house](#) to lose citizenship. Compared with taking part in and actively supporting rape, pillage and killings by radical Islamists, or selling a house you promised to keep, the Dutch standard seems to be a joke, which is not funny: fail to renew the passport before the expiration date and your citizenship evaporates. **The ECJ has agreed in principle to allow the treatment of law-abiding EU citizens, which is worse than the treatment reserved for known terrorists.**

If citizenship's one right is the right to return home (and not to be [deported from there](#)) – in the case of EU citizenship, to return to the EU and remain in its [territory](#), as per [Ruiz Zambrano and its progeny](#) – after *Tjebbes* we now know that this right alongside with all the other rights of importance abroad, such as voting in [European elections](#) and, where available, [diplomatic protection](#), now can simply expire. That 'Article 20 TFEU, read in the light of Articles 7 and 24 of the Charter of Fundamental Rights of the European Union, must be interpreted as not precluding legislation of a Member State such as that at issue in the main proceedings' (the ruling in *Tjebbes*) is the new low of EU citizenship law, which will be difficult for the Court to beat in the future.

It is unquestionable, as the ECJ has underlined on numerous occasions (also *Tjebbes* para. 30), that EU citizenship's acquisition and possession must have due regard of EU law even though it follows a [ius tractum](#) – derivative – logic with the Member States themselves obviously responsible for the grant, both of the national and of European citizenship to those who do not have another EU nationality. As per *Micheletti*, *Rottmann* and the very logic of EU federalism, as [Daniel Sarmiento](#), among others, has explained in abundant detail and as has been discussed by the Court in depth in *Rottmann*, Member States' competences in this field, although of fundamental importance, are not absolute. The crucial lesson of *Rottmann* is that EU citizenship is maturing into a possible [trigger of the ECJ's jurisdiction](#). As reconfirmed in *Tjebbes*, those situations where EU citizenship status is potentially jeopardized by the issuing Member State fall, 'by reason of [their] nature and [their] consequences, within the ambit of EU law' (para. 32). ***Tjebbes* does not formally contradict the established case law. It renders it substantively irrelevant.** The far-reaching poisonous potential of *Tjebbes* is clear: EU citizenship made dependent on the renewal of a passport before its expiration is *NOT* a 'fundamental status of the nationals of the Member States'.

It is, in principle, OK, the Court of Justice tells us, to punish the non-renewal of a passport with the annulment of citizenship. In failing to build on the spirit of the law as it stands and *de facto* erasing the long-cherished fundamental nature of the legal status at issue, *Tjebbes* boasts humongous negative potential in our populist times: Only the 'real' Dutchmen will remain citizens. By definition instead of killing off EU citizenship as such, as the learned AG seemingly proposed in his Opinion marked by absolute deference to the Member States, the Court opted for vagueness poorly masking the absolute lack of principle. While the basic approaches outlined in *Rottmann*, *Eman and Sevinger* and *Micheletti* (which [Sir Richard Plender and I](#) have

critically analysed elsewhere) seemingly hold, the Court, by NOT making a principled stance against an indefensible discriminatory policy of a Member State well known from recent case-law of the same Court for its particularly untenable treatment of citizens and residents, turned all the possible arguments on their head. The disaster of losing EU citizenship based on an *ex lege* annulment, which comes without any warning and based on no wrong-doing, is presented as reasonable *per se*, since the form to retain citizenship is ‘so easy to fill in’ to remain a citizen: the fact, which the AG has so clearly and misguidedly underlined. The absurdity of a presumption that someone is less Dutch and less European as a result of staying outside of the Union if – and only if – that person has another citizenship and does not fill in some obscure form does not strike the Court as somewhat frivolous.

The Dutch submission concerning the lack of ‘genuine link’ with the state of those who do not reside in the EU is recited uncritically. This is a radical departure from *Eman and Sevinger*, where the same government deployed the same logic with the only difference that instead of discriminating against those with no ‘genuine link’ concerned the Dutch residing in the Dutch Caribbean, as opposed to anywhere else in the world. This approach to equality was not accepted by the Court, which deployed the general principle of equality between the Dutch on Aruba and Melbourne and New York, to strike down the absurd ‘genuine links’ logic. In *Tjebbes*, by contrast, the Court agrees that EU citizens with a Swiss citizenship residing abroad are radically different, from EU citizens without Swiss citizenship residing abroad, making the continuous enjoyment of the supranational status dependent on the lack of a foreign citizenship. **EU citizenship, thus, is not at all idiot-proof for an idiotic reason:** A Swiss-Dutch in Switzerland is apparently less European than a Dutch in Switzerland and the Court does not see any problem with this.

## 10 select absurdities underlying the fail

Defiance to national rules, however absurd, is the key guiding star of the Grand Chamber in *Tjebbes*. Not a behavior one would expect of a constitutional court caring about its system, if it leads to the denial of the *only thing* the EU legal order can offer a citizen: the status of citizenship with all its rights and protections.

The judgment raises a number of (interrelated) burning questions/problematic assumptions about the nature of citizenship, which are of immediate importance including (but not limited to, given its all-round disastrous impact) the following interrelated ten:

1. **Renewed ideological mischaracterization of citizenship as a ‘Special relationship of solidarity and good faith’** (para. 33): if EU citizens are those who are nationals of the Member States, it is clear that the status cannot depend, legally speaking, on any ‘bonds of solidarity’, since not feeling such a bond does not undo a nationality of a Member State, making the statement – an ideologically charged submission of the German government repeated from *Rottmann* – factually incorrect. What is at stake in *Tjebbes* is whether failing to renew a passport should undo one’s EU citizenship: The Court does not do the job of explaining how someone’s Swiss or Iranian citizenship undermines

solidarity and good faith anywhere in the Union. The answer why the Court does not go there is clear: because it is obvious that the possession of Swiss or Iranian nationality does not undermine any special legal relationship between the EU and its citizens. And if this is true, then it is precisely the task of the Court of Justice to defend EU citizens stripped of the status on a phony pretext, when the situation by 'its very nature and consequences' falls within the scope of EU law. The law is such, once again, that citizenship is an abstract legal bond: those who believe in solidarity are citizens and those who do not, are citizens as well.

2. **Regrettable goal of the protection of 'reciprocity of rights and duties'**

(para. 33): while it could be tenable in the context of some Member State nationalities, for instance the Greek one, given that Greece boasts one of the largest per capita conscript militaries in the world, this 19<sup>th</sup>-century-inspired 'reciprocity' cannot apply to EU citizenship, [which knows no duties](#) as per the text of Part II TFEU. In this context national claims to the existence of such 'reciprocities' should be seriously scrutinized: what if a Member State is simply willing to disenfranchise a particular group under this pretext (which was a classical deployment of citizenship duties since *Dred Scott*)? Even if the harmful legend is somehow convincing to some, it remains unclear how turning EU citizenship into a subscription operation would actually further such 'reciprocity'? If the only duty that arises in *Tjebbes* is the duty to renew the passport, can it be wholeheartedly argued that this duty really be commensurable with the rights of EU and national citizenship? And what if there were no such duties (consider the case of mono-national Dutch EU citizens abroad) – would the ECJ then exclude such 'duty-less' citizens from rights?

3. **Regrettable connection between enjoyment of EU citizenship and residence.**

Why does residence in a particular place suddenly come to be of crucial significance for the enjoyment of the status of EU citizenship? None of the relevant provisions in the Treaties makes such a connection, rendering it dubious from the outset; presupposing that EU law frowns at its citizens' travel and stays around the world would be equally unacceptable outright. The Court has already pointed at the legal difficulty relating to such framing of EU citizenship in *Eman and Sevinger*. In that case the Court has unconditionally confirmed that EU citizenship does *NOT* expire upon leaving the territory of the Union and continues as a fundamental legal status of the nationals of the Member States. In contrast, *Tjebbes* presents leaving the Union as potentially problematic in the light of the possession of the status of EU citizenship, which is untenable. The conceptual separation between the status of citizenship and the concept of residence unquestionably requires avoiding the confusion between the two. This is in particular due to the fact that many EU citizenship rights are not territorial in essence and can thus be enjoyed abroad too, including the right to benefit from the general principle of non-discrimination, as in *Eman and Sevinger*, which the Grand Chamber seems to have totally forgotten.

4. **Regrettable exclusion of those residing abroad from body politic.** Those residing abroad enjoy full membership of body politic – since, even in the Netherlands – voting from abroad is a citizenship right as well, thus extending to European Parliament elections. *Tjebbes'* silence on this matter is very



problematic, since the body politic is obviously not a fully territorial idea in EU law, while the deprivation of EU citizenship is now potentially territorialized.

5. **Regrettable misrepresentation of the link with the state.** Why is it that the legal link with the EU – EU citizenship – remains a legal bond only for those who do not have any other citizenship, turning into a check of residence for all the dual nationals? Should the ‘genuine link’ imply some cultural baggage – like the humiliating knowledge of the answers to the dull [Dutch naturalization tests](#) – the possession of a different nationality cannot matter: it follows that the ‘genuine link’ implied in *Tjebbes* is thus obviously not substantively cultural. This said – and given that the body politic is not necessarily territorial, just as the rights of EU citizenship are not – the claim of the Dutch government that the ‘genuine link’ connecting the Kingdom of the Netherlands with its citizens is in some way dependent on residence in a particular place in the world is not a logical conclusion. *Tjebbes* is an approving nod in the direction of an argument that does not stand, failing to capture the essence of citizenship.
6. **Direct discrimination based on second nationality as a starting point** emerges as a related problem. Why is direct discrimination between different groups of nationals of a particular Member State residing outside of the EU – the one outlawed in *Eman and Sevinger* – now allowed in principle? While *Micheletti* prohibited the undermining of EU rights of EU citizens with a third country nationality in the territory of the Union, the Court has reversed this in *Tjebbes* for those who are resident outside of EU territory, taking *discrimination*, rather than non-discrimination as the starting point, the soundness of which is dubious.
7. **Regrettable misrepresentation of the geography of European integration.** Why is the territory of rights confined to EU Treaty-based rights, as opposed to EU international agreements-based rights? Given that residence and work in Switzerland is one of the rights which EU citizens enjoy under the relevant bilateral agreement, to present Switzerland (or any EEA county with the sole exception of Liechtenstein) as radically different from an EU Member State on this count seems to amount to a misrepresentation of the legal-political reality on the ground, which is regrettable, given the depth of the level of integration achieved between Switzerland and the EU.
8. **Regrettable presumption of desirability of mono-nationality.** EU law is mute on the number of nationalities EU citizens should be allowed to hold to remain connected to the Union. While the Member States could have different ideas on this matter, the Court of Justice could be reasonably expected to protect the interests of the Union by ensuring that one does not face a situation of being forced to renounce other nationalities which have been acquired in full compliance with the law in order not to be subjected to unjustifiable, unnecessary, and discriminatory EU citizenship annulments. Para. 46 of *Tjebbes* thus sends a deeply problematic signal, especially given the growing toleration of the cumulation of nationalities [all around the world](#) and the solid nature of both human rights and sovereignty arguments in favour of such toleration as discussed above.
9. **Absurd reliance on foreign law.** Even accepting the problematic assumption of desirability of mono-national populations, why is the continuous possession of EU citizenship made dependent on the law of other states extending (or not)

and/or allowing to renounce (or not) their particular nationalities to the Dutchmen residing abroad? How is the autonomous supranational legal order come to be subject, in essence, to the law of the third countries? And if possessing a non-renounceable nationality has to be tolerated and is thus obviously not really harmful, how could the subjecting of a continued possession of EU citizenship to a renunciation requirement applied to a renounceable nationality be justified?

10. **Misconceived references to international law.** The Court refers to the Convention on the Reduction of Statelessness (Arts. 6 and 7(3) to 7(6)) and Convention on Nationality (Arts 7(1)(e) and (2)), in a most problematic fashion, while allowing for the loss of nationality in the contexts covered by the Dutch law, these have nothing to say about EU citizenship. The Court simply pretends as if EU citizenship is merely a couple of additional rights on top of the nationality of the Member State, denying it an independent status, thus saying goodbye to the prevalent characterization of the status in the literature, rooted in the Opinion of AG Poiares Maduro in *Rottmann*, where EU citizenship has rightly been characterized as 'autonomous'. Instead of critically engaging with the essential principled short-comings of the international law invoked by the Member State in defence of its policy having potentially harmful effects for the project of European unity, the Court simply restates the dubious provisions, which are by definition not designed to take EU citizenship into account. *Tjebbes* is thus in logical opposition to *Kadi* or *Micheletti*, representing a worrisome account of a truly uncritical reading of international law potentially at the expense of EU law's autonomy.

## **The puzzling nature of the ECJ's proportionality: individual circumstances of what?**

Unwilling to confront the unjustifiable assumptions behind the directly discriminatory subscription EU citizenship in principle, the Court opted for a humble questioning strictly confined to its effects. Para. 41 of the judgment is crucial in this regard. The Court stated that 'the loss of the nationality of a Member State by operation of law would be inconsistent with 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' (para. 41). But against which benchmarks? That not renewing your passport one day before it expired annuls one's mystical 'genuine link' with the Netherlands? From *Micheletti* we know that genuine links are not a tolerated part of EU law, which is in conformity with the framing of citizenship in International Law, as [Peter Spiro](#) has shown. Moreover, assessing 'genuine links' would not be acceptable, since this would deny EU citizenship its abstract legal nature. As [Christian Joppke](#) has outlined in detail, where citizenship is legalistic and procedural, the only 'link' one might have with a state is precisely the official decision granting citizenship, since residing in a particular place or speaking a particular language could not be framed as enforceable duties of citizenship outside of atrocious totalitarian regimes. The check of the personal circumstances in the context of proportionality assessment is thus bound to amount to looking at the reasons why someone who possesses other nationalities than the Dutch has not renewed the passport of the Netherlands before

the document expired. While seemingly elegant and forward looking, at its core the paragraph is thus devoid of substance at its best, since the Court failed to reaffirm any of the acceptable substantive principles in the context of *EU law* against which such individual assessment could possibly take place, thus undermining the very idea of a meaningful engagement. The fact that only dual nationals are presumed to have lost their ‘genuine link’ with the EU as a result of not renewing the passport immediately is not even mentioned, just as the abstract and legal nature of the link required, reinforcing the intellectually vacant rationalizing of the Dutch government at the expense of the idea of European unity and law.

That the Court sensed that this be the case cannot be doubted: para. 46, where it reaffirms discrimination between dual and single Member State nationals is the core element of the judgment. Among the ‘circumstances of the individual situation of the person concerned’ outlined by the Court are ‘limitations when exercising [the] 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 such 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 (ii) 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’.

Besides hinting at substantive conditions to be met for the enjoyment of the very EU citizenship status, the Court states also that ‘[t]hose consequences cannot be hypothetical or merely a possibility’ (para. 44), thus disqualifying the abstract nature of the citizenship status. Para. 46 with the list drafted by the Court, which seems so logical at the first glance is thus *absolutely irrelevant* in essence. **The very enjoyment of the legal status of EU citizenship is made dependent**, for a heterogeneous minority group (10% of the population) of dual Dutch nationals, **on the use of the rights the status brings**, thus, beyond discriminatory essence of the rule, denying in principle the abstract legal nature of a bond between the Union and its citizens.

## The untold story: Dual EU citizenship

The negative effects of possessing a number of nationalities, rather than one, are well known and have been, in the case of EU nationalities, excellently documented by [David de Groot](#) as far as the enjoyment of EU citizenship rights is concerned. To hear that even the *status* of citizenship can be in jeopardy as a result of having a Moroccan grandfather or an Iranian background – as one of the applicants in *Tjebbes* – is something new however. To make matters worse, the Court is silent on the loss of EU nationalities, while the AG endorses this *in principle* on a number of occasions (e.g. para. 93 of the Opinion), where he speaks about the fact that the operation of the same law, which is at issue in *Tjebbes* to the citizens of several



EU Member States simultaneously is not a problem. This approach, besides being deeply counterproductive from the point of view of EU values in that it disregards both the human rights and the sovereign citizen logic, is short of shocking for two key reasons.

Firstly, it is based on the assumption that acquiring a second EU nationality is not worthy *per se*, thus undermining the very logic of the Union as a supranational constitutional system ensuring, through the unity in diversity, that the citizens benefit from the supranational law, their *legal heritage*, to refer to the classical *van Gend en Loos* directly, taking crucial decisions about where and how to live their lives in the context of the whole territory of the internal market: Member State nationalities thus give access to rights in the whole territory of the EU not a particular Member State, forming an intricate web of ‘intercitizenships’ as I have argued [elsewhere](#). To imply that cumulation of Member State nationalities is somehow a hostile act on behalf of EU citizens, which should be acted upon contradicts the very logic of integration and cannot, thus, be endorsed by the highest Court, even *en passant*, as if it does not matter. It does, and [I explained](#) why in the pages of the *European Law Journal* several years ago.

Even worse, secondly, the endorsement of the loss of the original Member State nationality by EU citizens who make use of their free movement rights punishes those who chose to naturalize in a new Member State thus taking a decision to take full part in the political life of that Member State. Before the problem of [disenfranchisement of EU citizens](#) who use their free movement rights has not been solved and national elections are not within the realm of EU law – which might never happen of course – it is impossible to make a convincing argument for the toleration of the loss of the original nationality as a result of naturalizing elsewhere in the EU. Such toleration pushes EU citizens to make a choice between the original nationality and taking part in political life in the place where they reside. To make matters worse, EU citizens are presented with this choice for no defensible reason, which makes it unacceptable in principle.

## Back to Poligraph Poligraphovich

The true essence of things tends to reveal itself at a certain point. Just as Poligraph Poligraphovich in *The Heart of a Dog*, then already in possession of a passport and a municipal housing registration, turned back into a stray dog towards the end of the novella, EU citizenship’s abstract legal nature will unquestionably survive the regrettable absurdity of *Tjebbes*. Awaiting common sense one can only restate that punishing those who fail to renew a passport worse than known terrorists, jihadists and ISIS wives, denying them the legal connection with the EU and the rights to be enjoyed in the Internal Market, while opening a possibility to weigh this punishment against the *use* of the rights they are precisely being deprived of for no reason at all and in the interest of no stated EU-related common good, in the context where such use cannot be ‘hypothetical or merely a possibility’ is undoubtedly a moment significantly undermining the EU integration project. European citizens deserve better. Denying the abstract nature of citizenship, directly discriminatory and

stripping dual nationals of dignity as a starting assumption, *Tjebbes* is without any doubt among the high points of intellectual shame.

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