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EXPULSION AND EU CITIZENSHIP

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Abstract
Although EU citizenship is described as destined to become the fundamental status of the nationals of the Member States, EU law allows the expulsion of EU citizens and their family members from their host Member State, if certain conditions are met. The working paper is divided into three parts. Part I starts by looking at the relationship between EU citizenship and expulsion in the context of Directive 2004/38 and its underlying understanding of citizenship as incremental acquisition of rights. It then goes to discuss the trend toward restrictive interpretations of the notions of public policy and public security. Finally, the first part questions the manner in which the Court of Justice has relied on fundamental rights considerations in its expulsion and EU citizenship case law. The second part of the working paper focuses on the national level. It starts by identifying an implementation and information gap in relation to the exercise of free movement rights by EU citizens. A closer look at what happens in practice in Belgium, the UK and Italy highlights the problematic use of expulsion at the Member States level to deal not only with criminal behavior but increasingly to remove and detain EU citizens who fail to meet the residence conditions set out in Directive 2004/38. The use of entry bans in Germany and the UK is also briefly addressed. The final part places expulsion in relation to Brexit and questions the relevance of EU citizenship as offering increased protection.

Key words
National policy, national security, imperative grounds, removal, entry bans, free movement, residence

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Part I
General Considerations on Expulsion and EU Citizenship

1. Introduction

This working paper is based on a workshop organized by the Centre for Migration Law on 16 June 2017 that aimed to explore the legal practice of expelling EU citizens from another EU state in light of EU citizenship and fundamental rights standards. This workshop was part of the EXPULCIT project that seeks to generate knowledge on the topical issue of expulsion of EU citizens and promote debate among academics, practitioners, and civil society concerning the meaning of expulsion practices in the context of EU citizenship by drawing together theoretical, practical and interdisciplinary perspectives.[3]

Although EU citizenship is described as destined to become the fundamental status of the nationals of the Member States, EU law allows the expulsion of EU citizens and their family members from their host Member State, if certain conditions are met. The working paper is divided into three parts. Part I starts by looking at the relationship between EU citizenship and expulsion in the context of Directive 2004/38 and its underlying understanding of citizenship as incremental acquisition of rights. It then goes to discuss the trend toward restrictive interpretations of the notions of public policy and public security. Finally, the first part questions the manner in which the Court of Justice has relied on fundamental rights considerations in its expulsion and EU citizenship case law. The second part of the working paper focuses on the national level. It starts by identifying an implementation and information gap in relation to the exercise of free movement rights by EU citizens. A closer look at what happens in practice in Belgium, the UK and Italy highlights the use of expulsion at the Member States level to deal not only with criminal behavior, but increasingly to remove and detain EU citizens who fail to meet the residence conditions set out in Directive 2004/38. The use of entry bans in Germany and the UK is also briefly addressed. The final part places expulsion in relation to Brexit and questions the relevance of EU citizenship as offering increased protection in the context of residence rights and social justice.

3 EXPULCIT is funded by the European Commission through its Erasmus+ Programme (project identification 574912-EPP-1-2016-1-NL-EPPJMO-PROJECT).

2. What has EU Citizenship done to the Notion of Expulsion? (Elspeth Guild)

Expulsion remains a challenging issue in the context of EU citizenship as it raises a number of questions around the solidity of the notion of 'citizenship' itself. The power to expel EU citizens has been an integral part of the right to move and reside freely prior to the introduction of the legal status of EU citizenship. The EU treaties have contained a limit on expulsion and re-entry bans on nationals of the Member States exercising treaty rights since 1957. The grounds are public policy, public security and public health. In practice, the Court of Justice has been presented with a substantial number of scenarios where Member States have sought to expel EU citizens from their territory and since the late 1970s has developed a constant jurisprudence, which has been considered as particularly protective of EU citizens' rights and restrictive of Member States' grounds for expelling EU citizens. Until the adoption of Directive 2004/38[4], Directive 64/221[5] detailed the manner in which expulsion and restrictions placed on the right to move and reside operated. Its longevity and stability speak of reluctance and unwillingness to reconsider and revisit the issue of expulsion. The legislator has also been active in developing greater protections for EU citizens from expulsion. From Directive 64/221 applying to workers and the self-employed to the establishment of EU citizenship in 1993 and to the Citizenship Directive (2004/38) there has been a single direction. Nonetheless, as this working paper discusses in subsequent sections, we can question whether the trend toward protection is changing.

The introduction of EU citizenship by the Maastricht Treaty and its coexistence with expulsion brought a series of intellectual and theoretical problems that remain unresolved. The fact that EU citizens can be expelled forces us to (re)consider what European citizenship is and what its core elements are. Expulsion is the most categorical exercise of state sovereign powers regarding border controls. It is the ultimate dividing line between the citizen and the alien – who has the right to enter and who is excluded. It is the antithesis of citizenship in liberal democracies.

There are several ways in which citizenship can be conceptualized: a way of describing the relationship of a human being to a state; it can

4 Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, O.J. 30.04.2004, L 158, p. 77.

5 Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, O.J. 04.04.1964, L 56, p. 0850-0857.

be about the content of citizenship that is formulated in a constitution, thus defining what a polity is; or one can focus on the differences between citizenship and human rights. International law has few references to citizenship, except for the right to enter one's own state, which is explicable since public international law is a reflection of the interest of the international community. Thus, once the right to enter one's state is acknowledged, international law has little interest in what happens to that person within the state, which becomes a matter for constitutional law. This traditional view of international law builds on two inter-related aspects: a state has the right to send a person back to his state of nationality and the citizen has a right to enter his own country – the state of nationality should not prevent the efforts of the first state to expel that person. The implications of this stand for EU citizenship are that the EU could be re-thought as a single polity within which the expulsion of the EU citizen should be seen as equivalent of an internal order on residence. This would make expulsion an internal issue to the EU.

Going back to the theoretical puzzles brought along by EU citizenship, one must consider whether the notions we use – 'expulsion' and/or 'EU citizenship' – are correct descriptions of what we are observing. The question remains which of the two notions means something else (is expulsion an internal order? is EU citizenship a citizenship status?). The answer we give to the question is informed by the various ways in which the EU and its nature are understood and conceptualized. It is worth remembering that Directive 2004/38, which was negotiated prior to the 'big bang' enlargement of 2004, has brought along a different way of thinking about citizenship that links citizenship with the incremental acquisition of rights over time. Thus, it could be argued that EU citizenship is a status dependent on time and activities, rather than an inherent status. The original Commission proposal, which aimed at granting EU citizens and family members with permanent residence status, as well as family members who are minors, absolute protection against expulsion,[6] was almost unanimously rejected by the Council.[7] Instead, Article 28 of the Citizenship Directive (Directive 2004/38/EC) accords EU citizens and their family members a layered protection against expulsion depending on the duration of their (lawful) residence. The current rules in the Directive link expulsion with the accumulation of rights: the longer one has resided, the more difficult it becomes to be expelled. The Directive introduces a three-step approach to protection:

- 0 – 5 years – public policy, public security;

6 Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2001) 257 final, Article 26 (2).

7 Common Position (EC) No. 6/2004, adopted by the Council on 5 December 2003, O.J. C 54E, p. 32.

- 5 years – 10 years – serious grounds of public policy and security (including third-country national family members)
- 10 years residence/minors – imperative grounds of public security (only EU citizens).

The case law of the Court of Justice illustrates the practical issues that are relevant for expulsion cases as well as new situations in which expulsion intersects with the notion of EU citizenship. Since the introduction of Directive 2004/38, a number of cases have revolved around the correct way of counting the time that leads to increased protection against expulsion: should time be calculated from the moment the person entered the host state or backwards from the event/action that prompts the host state to expel? The Court has taken the view that time runs from the commission of the act that warrants expulsion, which can be interpreted as a move toward a qualified idea of citizenship that limits the right of the EU citizen to protection. Breaks in residence, in employment without sickness insurance, or time spent in prison can break the accumulation of rights and increased protection. The Court is set to answer again questions concerning the impact of imprisonment for the acquisition of increased protection against expulsion after 10 years of residence in two joined cases.[8] Another direction opened by recent case law, especially after *Ruiz Zambrano,*[9] concerns cases where EU citizens are to be expelled outside of the EU, bringing new questions about what the limits of expulsion are and where can EU citizens be expelled. In addition to '*Ruiz Zambrano*' children and TCN family members who wish to remain in the EU, although the EU citizen is static, EU citizens suspected of terrorism are another category who may seek protection from expulsion and state border practices by invoking their EU citizenship rights.

3. Toward a Stricter Interpretation of Public Policy and Public Security (Kathrin Hamenstädt and Elspeth Guild)

The interpretation of the notions of public policy and public security plays a crucial role for the protection enjoyed by EU citizens and their (third-country) family members against expulsion. Even though the ECJ's case law is neither homogeneous nor linear,[10] a restrictive line of judgments on EU citizenship has emerged, which is also present in cases

8 Opinion of AG Szpunar in Joint Cases C-316/16 *Vomero* and C-424/16 *B*, EU:C:2017:797.

9 Case C-34/09 *Ruiz Zambrano*, EU:C:2011:124.

10 P. Hilpold, 'Die Unionsbürgerschaft – Entwicklung und Probleme', 50 *EuR* 2/2015, p. 133-147, at 135.

concerning expulsion.[11] The Court addressed the notion of public security in *Tsakouridis* and *P.I.*.[12] These cases concerned EU citizens who had resided in the host Member State for more than ten years and could therefore only be expelled on imperative grounds of public security. In both cases, the Court adopted a wide interpretation of the notion of public security. This approach did not only blur the distinction between the notion of public policy and the notion of public security, but it also increased Member States' discretion to expel EU citizens and thereby undermined the latter's protection. More recently the Court had recourse to the notion of integration[13], which resulted in a further impairment of EU citizens' protection against expulsion. Public security was initially understood to be about state security, but after the *Tsakouridis* and *P.I.* cases it covers also serious criminality. While it is clear that public policy remains about criminality, there is no clear answer to how serious criminality should be to justify a measure of expulsion: is petty criminality enough to justify expulsion? can suspended sentences or fines justify expulsion? etc. The Member States have different answers to such questions. An unsettled issue concerns the need for a conviction before taking an expulsion measure as in some states suspicion may be enough to justify expulsion.

It should be stressed that the interpretation given to the notions of public policy and public security is relevant not only for EU citizens, but also for third-country nationals (TCNs). TCN family members of EU citizens enjoy a reinforced protection against expulsion, which is close, but not equivalent to the protection granted to EU citizens.[14] Moreover, the Court has recently adapted the *Ruiz Zambrano* formula to cases concerning third-country nationals, who are sole caretakers of static minor EU citizens and who are subject to expulsions following a criminal conviction.[15] The rules applicable to Turkish nationals covered by the EU-

11 See: E. Spaventa, 'Earned Citizenship – Understanding EU Citizenship through Its Scope', in: D. Kochenov (ed.), *EU Citizenship and Federalism, The Role of Rights*, Cambridge: Cambridge University Press 2017, p. 204-225, at 208, 209, refers to a 'reactionary phase'; D. Thym, 'When Union citizens turn into illegal migrants: the Dano case', *E.L. Rev.* 2015, p. 252, observes that the case law exhibits a 'doctrinal conservatism'.

12 Case C-145/09, *Tsakouridis*, EU:C:2010:708, para. 56; Case C-348/09, *P.I.*, EU:C:2012:300.

13 Case C-400/12, *M.G.*, EU:C:2014:9, para. 32.

14 Third-country family members can rely on Article 27 and Article 28(1) and (2), but they are not covered by the scope of Article 28(3) of Directive 2004/38/EC.

15 Case C-304/14, *CS*, EU:C:2016:674. Similar Case C-165/14, *Rendón Marín*, EU:C:2016:675, concerning a residence permit.

Turkey Association Agreement were for a long time interpreted by analogy with the rules covering nationals of the Member States.[16] After the introduction of the Citizenship Directive it was disputed whether the reinforced protection against expulsion provided for by Article 28(3)(a) is applicable to Turkish nationals, too. In *Ziebell,* the ECJ rejected an analogous application and stated that the protection against expulsion granted by the relevant provision of the Association Council Decision[17] does not have the same scope as Article 28(3)(a).[18] Long-term resident third-country nationals also enjoy reinforced protection against expulsion according to Article 12 of Directive 2003/109/EC. Irrespective of whether the protection granted to long-term resident third-country nationals is comparable to that of EU citizens,[19] the protection granted by Article 28(3)(a) of the Citizenship Directive does not seem to extend to them. Finally, there is a group of third-country nationals not covered by EU law at all; instead, this group is regulated by national immigration law.

4. What Role for Fundamental Rights in Expulsion Cases? (Eleanor Spaventa)

The relationship between fundamental rights and EU citizenship is one of constitutional importance that bears great relevance for how citizenship is understood in the EU. The application of fundamental rights considerations (or lack thereof) in expulsion cases tells us something about Union citizenship and the role of fundamental rights themselves. One of the first things to remark upon is the variable application of fundamental rights in EU law, more generally: the stronger the link with the internal market, the more fundamental rights considerations will be taken into account and the more protection will be drawn from their application. In the field of EU citizenship, the application of fundamental rights remains problematic, especially after the recent *Dano* case.[20] In EU citizenship case law, a number of scenarios can be sketched in which fundamental rights considerations are applicable. These include expulsion on public policy and public security grounds; termination of residence (as in *Dano*); in *Ruiz Zambrano* type issues; in cases concerning the pro-

16 See for example Case C-340/97, *Nazli*, EU:C:2000:77; Case C-467/02 *Cetinkaya*, EU:C:2004:708; Case C-303/08, *Metin Bozkurt*, EU:C:2010:800.

17 Article 14 of Decision 1/80.

18 Case C-371/08, *Ziebell*, EU:C:2011:809, para. 86.

19 See, S. Peers, 'Implementing Equality? The Directive on long-term resident third-country nationals', *European Law Review*, 29(4), p. 437-460, at 452; Chr. Hauschild, 'Neues europäisches Einwanderungsrecht: Das Daueraufenthaltsrecht von Drittstaatsangehörigen', *Zeitschrift für Ausländerrecht* 2003/23, p. 350-353, at 352.

20 Case C-333/13 *Dano*, EU:C:2014:2358.

cedural rules of the Member States (the EU principle of procedural autonomy); in case of extradition and the European Arrest Warrant, and in cases concerning the family members of Union citizens.

Focusing on the role of fundamental rights in cases of expulsion on grounds of public policy and public security, the first question that should be raised is whether such considerations are automatically applicable. The Directive proposes an incremental approach to protection, which is linked to the length of residence in the host state, and which to a certain extent relies on fundamental rights considerations since the longer one resides, the more the right to private and family life will be engaged. Yet, an analysis of the case law does not support the view that fundamental rights concerns are automatically applicable; the Court does not seem perceptive to their application. In *P.I.* for example, the fundamental rights of the offender are not mentioned, only those of the victim (the child), which begs the question as to whether fundamental rights are there only to protect the 'good citizen'.

National courts are not always instructed to take fundamental rights into account when reaching a final decision, although in theory they are free to use the Charter and national fundamental rights standards when adjudicating. However, there is very little empirical research done on what is the effect of the failure to incorporate fundamental rights concerns. Theoretically, one could argue that there is a muddying of the notion of the 'foreigner', since the EU citizen should never be treated or imagined as the 'foreigner'. Secondly, the relationship between Article 8 ECHR, Article 7 Charter and EU citizenship is in need of clarification, especially since Article 8 ECHR leaves a broad margin of appreciation for state parties in immigration cases. This begs the question as to what is the minimum standard of protection in cases of expulsion of EU citizens: if Article 7 Charter should be the relevant standard and offer more protection for the individual and a lesser margin of appreciation for the state, the fact that the Court of Justice does not rely on Article 7 Charter is problematic. The reason for the Court's failure to use Article 7 is baffling since when taking measures on grounds of public policy and public security, the Member States are implementing EU law. It cannot be argued that they are outside the scope of application of the Charter; on the contrary, the Charter should be applicable. One can come up with explanations why the Court is reluctant to use the Charter: it could be argued that the Court is worried about the harmonizing effect that using EU fundamental rights may have on national standards or that it fears cross-fertilization with the field of immigration of TCNs. However, such explanations remain problematic from the perspective of EU citizenship and fundamental rights discourse, more generally.

The *Dano*[21] case illustrates some of the problems stemming from the failure to incorporate fundamental rights into EU citizenship case law. *Dano* puts forward the following dilemma – when do fundamental rights apply: in relation to the termination of residence rights or in relation to social benefits? Prior to *Dano*, the conditions that EU citizens have to meet in order to reside in a host state were understood as limits to a Treaty right. Thus, when the state tries to limit that Treaty right by denying residence, the state has to respect fundamental rights as general principles of EU law. Fundamental rights are in theory applicable in such cases, although *Carpenter*[22] remains one of the few cases in which the Court actually applied them.

In the *Dano* case, the Court argued that if the conditions of the right to reside are not met, the EU citizen is not within the scope of the Treaty raising the question whether this applies only to the right to equal treatment in relation to social assistance or also to the right of residence? Based on *Dano*, there are different options for interpreting the role of fundamental rights in the application of EU citizenship rules:

1) The measure terminating the residence of an EU citizen is a decision concerning Article 7 of Directive 2004/38, thus a measure that falls under the notion of implementation of EU law, which would make the Charter applicable.
2) The EU citizen is protected by Article 21 TFEU even if s/he is no longer protected by Directive 2004/38, which would again mean that the issue is within the scope of EU law leading to the application of the Charter.
3) If *Dano* should be interpreted as meaning that the Directive exhausts the rights one has as an EU citizen, than the Charter is not applicable since an EU citizen who does not meet the conditions of the right to reside is outside the scope of the Directive and of EU law.

The *Ruiz Zambrano* case puts forward a different way of legally engaging with fundamental rights and the expulsion of EU citizens: while fundamental EU rights are not used by the Court of Justice that preferred to rely on a narrative of EU citizenship rights, the national courts are instructed to take fundamental rights into consideration (in the form of respect for private and family life and the best interest of the child).

However, it is clear that the mantra about the application of fundamental rights in free movement cases no longer holds true, while the difficulty of striking a balance between protecting fundamental rights and the state's regulatory autonomy opens up new difficult questions. Researchers have not paid enough attention to the fact that expulsion decisions are regulated by national procedural rules. The interaction

21 Case C-333/13 *Dano*, EU:C:2014:2358.
22 Case C-60/00 Carpenter, EU:C:2002:434.

between such national rules and fundamental rights needs more investigation as well as more empirical research into how courts use EU fundamental rights in respect of procedural rules.

Part II
Expulsion on the ground

5. Expulsion and the Implementation Gap: Lessons from Belgium (Anthony Valcke)

Directive 2004/38 has now been in force for over ten years. Despite its stated objective of simplifying and strengthening the free movement rights of EU citizens, a decade later, those fine ideals still appear like an unfulfilled promise for a significant proportion of the 16 million citizens who reside in a European country other than their own.[23] If the results of the 2012 EU Citizenship consultation still hold true today, almost one in five EU citizens have encountered difficulties when making use of their right of free movement in the EU.[24]

Despite the Commission's acknowledgement that the free movement of persons is 'one of the pillars of EU integration' which warrants a 'rigorous enforcement policy',[25] the progress made in improving the situation in certain Member States has been disappointing and warrants more robust and targeted enforcement. As the Commission rightly claims, some progress has been achieved in persuading some of the Member States to address problems in the implementation of Directive 2004/38.[26] The Commission's strategy to attempt to resolve instances of the incorrect application of EU law through dialogue with the Member States has certainly had a positive role to play.[27]

Nonetheless, the situation as experienced by citizens on the ground tells a somewhat different story, including in cases where host states try to expel EU citizens or their family members. Although the closure of infringement cases might suggest that the implementation of the Di-

23 Eurostat, Migration and migrant population statistics, dataset [migr_pop1ctz] for 2016.

24 Commission, *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee: EU Citizenship Report 2013 - EU citizens: your rights, your future*, COM(2013) 269 final, para 2.2.

25 Commission, *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee under Article 25 TFEU: On progress toward effective EU Citizenship 2011-2013*, COM(2013) 270 final, para 2.3.1.

26 Ibid, para 2.3.1.

27 Commission, Communication 'A Europe of Results - Applying Community Law', COM(2007) 502 final, 7-8.

rective has improved since 2008, many of the problems that were identified at the time of the Commission's report on the implementation of the Directive continue to plague citizens who choose to exercise their fundamental right to free movement within the EU. This state of disconnect between the ways in which we might expect the Citizens' Directive to be applied in theory and the way the rules are applied in practice by the Member States is a manifestation of the so-called 'implementation gap'.[28]

In political science literature, the supervision of the implementation of directives in the EU has been described as consisting in

> 'both centralized, active, and direct "police-patrol" supervision, conducted by the EU's supranational institutions, and decentralized, reactive, and indirect "fire-alarm" supervision, where national courts and societal watchdogs are engaged to induce state compliance.'[29]

The Commission's recent enforcement strategy could be considered as having been relatively light-touch when compared to previous decades as a result of the emphasis place on seeking out-of-court resolution through the EU Pilot scheme.[30] The Commission has effectively tried to shift the burden of enforcement of free movement of EU citizens onto alternative forms of dispute resolution and national courts, despite the EU institutions continuing to receive significant numbers of complaints and petitions from individuals and civil society organizations.[31] Although such a strategy might be seen as an effective strategy to make the best use of scarce resources, such an approach is not without significant risk, given that it appears to have encouraged Member States to engage in 'strategic non-compliance'.

Instances of non-compliant implementation of directives may be detected through a variety of channels. Non-compliance may come

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28 The Commission has coined the term 'implementation gap' to refer to the divide 'between the EU legal framework and the way it is implemented and applied in practice'. European Commission, *The Single Market through the eyes of the people: a snapshot of citizens' and businesses' views and concerns*, Press Release IP/11/1074 (26 September 2011).

29 J. Tallberg, 'Paths to Compliance: Enforcement, Management, and the European Union', (2002) 56 *International Organization*, p. 609-643, at 610.

30 The EU Pilot Scheme is an informal dialogue between the Commission and the Member State concerned on issues related to potential non-compliance with EU law, prior to launching a formal infringement procedure. The Commission and national governments use an online database and communication tool to share information on the details of particular cases. See http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/eu_pilot/index_en.htm.

31 Commission, *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee under Article 25 TFEU: On progress toward effective EU Citizenship 2013-2016*, COM(2017) 32 final, para 5.1.

to light through the Commission's monitoring of transposition or its discovery might result from complaints submitted by individuals and interest groups, as well as when citizens have recourse to one of several EU assistance services. These can serve to identify the various forms that both centralized and decentralized enforcement can take and which together point toward the continued existence of the implementation gap that besets Directive 2004/38. Reports from EU assistance services, such as Your Europe Advice[32] and SOLVIT[33], are an important source of information on how EU citizenship is implemented on the ground. These services face almost yearly increases in reported problems. For example, Your Europe Advice data show that most cases they deal with concern residence and entry and that there is a steady increase in cases since 2011 (in 2011, 391 cases on residence and 262 on entry; in 2016, 563 on residence and 524 on entry). Solvit data are more difficult to place since not all cases will be accepted under Solvit rules. Most cases concern the UK followed by France, Spain, Cyprus and Belgium. It is important to highlight that in addition to an 'implementation gap', there is also an 'information gap', namely the lack of statistical data on cases involving EU citizens that come before national courts as well as the lack of any obligation on the Member States to collect data on the application of the Citizenship Directive. Thus, Solvit and Your Europe Advice data are not sufficient to get a clear and full picture of how EU rules on free movement are implemented. This makes it difficult to assess how many EU citizens face problems in relation to expulsion and/or entry bans. One suggestion for tackling this issue would be to amend Regulation 862/2007 on Community statistics on migration and international protection[34] to oblige the Member States to collect data also on EU citizens.

The above discussion on the lack of data is relevant when trying to place expulsion practices in national contexts. It is worth keeping in mind that public policy and public security are not the only instances when an EU citizen can have his rights terminated. Based on existing rules an EU citizen may face expulsion and/or removal:

a) when s/he engages in conduct contrary to public policy or public security (Articles 27 and 28 of Directive 2004/38). In addition, an EU

32 See, http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/youreurope_advice/index_en.htm.

33 See, http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/solvit/index_en.htm.

34 Regulation (EC) No 862/2007 of the European Parliament and of the Council of 11 July 2007 on Community statistics on migration and international protection and repealing Council Regulation (EEC) No 311/76 on the compilation of statistics on foreign workers, O.J. 199, 31.07.2007, p. 0023-0029.

citizen can be refused entry into a host state on grounds of public health (Article 29 Directive 2004/38);

b) when a citizen commits fraud or abuse based on a joint reading of Article 35 and recital 28 of Directive 2004/38, which allow the host state to take necessary measures to refuse, terminate or withdraw any right conferred by the Directive;
c) when an EU citizen ceases to meet the conditions of residency under Article 7 of Directive 2004/38 pursuant to Article 14(2) of the Directive;[35]
d) when a citizen becomes an unreasonable burden on social assistance (based on a joint reading of Article 14 and recital 16 of Directive 2004/38).

In practice, most cases concern terminating residence rather than expulsion on public policy or public security *per se*. To illustrate this, Belgium is a good example of a state that has been pursuing a policy of "strategic non-compliance" seeking to break continuity of residence – thereby hampering the acquisition of permanent residence – through its policy of ordering the expulsion of EU citizens from the national territory on grounds other than public policy or public security.[36]

Most affected have been self-employed EU citizens, EU workers, jobseekers – which is surprising given that Article 14(4) of Directive 2004/38 is intended to prevent the expulsion of such categories of EU citizens – as well as others not meeting the residence requirements set out in Article 7 of Directive 2004/38.[37] The number of expulsion orders[38] issued against EU citizens increased from 343 in 2010, to 1542 in 2011, 2407 in 2012 and peaked at 2712 in 2013. The data for 2014 (2042 orders) and 2015 (1702 orders) show a decrease in the number of orders issued. However, in 2016, expulsion orders rose to 1918. Most affected were EU citizens of Romanian nationality, followed by Bulgarians, Dutch, Italians and Spaniards.

From a legal perspective, the increase in expulsion orders issued is linked to a questionable interpretation of the conditions attached to

35 In case C-408/03 *Commission v Belgium,* EU:C:2006:192 the court stated that 'only if a national of a Member State is not able to prove that those conditions [governing the right of residence] are fulfilled may the host Member State undertake deportation subject to the limits imposed by Community law' (para 66).

36 Data on removals sourced from EU Rights Clinic: 2007- 934 cases; 2008 – 877 cases; 2009 – 969 cases; 2010 – 834 cases; 2011 – 465 cases; 2012 – 443 cases; 2013 – 491 cases; 2015 – 434 cases.

37 Belgian Immigration Office (*Office des Etrangers / Dienst Vreemdelingenzaken*), Annual Reports for the years 2010 to 2016.

38 *Ordre de quitter le territoire / bevel om het grondgebied te verlaten*.

the right to reside under EU law. The Belgian authorities have adopted a strict interpretation of the notion of 'EU worker', for example by considering that EU citizens who were employed through employment programmes subsidized by the Belgian state were not EU workers. Although subsidized public employment confers the status of EU worker,[39] the Belgian authorities took about five years to recognize that this is the case before overturning their practice following the Commission's intervention.[40] In a similar vein, the Belgian authorities do not consider that an employment contract shorter than 6 months is evidence that the person is engaging in genuine and effective work and as a result municipalities have refused to register EU citizens on short-term contracts as legal residents.[41] Another tactic has been to interpret in a restrictive manner the conditions that allow an EU citizen who has lost his job to retain worker status under Article 7(3) of Directive 2004/38. Where an EU citizen has been unable to find work within 4 or 5 months after becoming involuntarily unemployed, the Belgian authorities consider that they had no genuine chance of finding employment and would thus no longer meet the residence conditions of Article 7; a questionable approach considering the Court of Justice's *Antonissen* line of case law.[42] Data from the EU Rights Clinic – the first legal clinic to focus on EU citizens – show that other cases have involved family members being refused the registration of their applications for residence, but relatively few cases involving marriages of convenience.

When it comes to challenging the administrative practices of the Belgian authorities, a number of obstacles need to be mentioned which hinder enforcement of EU law and help to entrench instances of non-compliance. One option available to EU citizens who have received an expulsion order is to seek judicial review, which in Belgium is entrusted to a specialized immigration tribunal, the *Conseil du Contentieux des Etrangers/ Raad voor Vreemdelingenbetwistingen*. However, such judicial appeals only involve a control of legality of the contested measure - the decision to terminate a right of residence and to order expulsion – to ensure it complies with the law and has followed national procedural

39 See for example, Case C-1/97 *Birden* EU:C:1998:568, paras 28-32; Case C-229/14 *Balkaya* EU:C:2015:455, para 51.

40 *Chambre des Représentants de Belgique, 'Note de Politique Générale – Asile et Migration'* (Belgian Chamber of Representatives, *General Policy Note – Asylum and Migration*), 28 November 2014, Doc 54 0588/026, 27-28.

41 See for example, complaint filed on 4 November 2014 by INCA CGIL, ABVV-FGTB, EU Rights Clinic and Bruxelles Laïque, 'Expulsions de citoyens européens de Belgique. Violation des articles 7 et 14 de la Directive 2004/38 sur le droit de séjour des citoyens UE et des articles 4 et 61 du Règlement n° 883/2004 sur la coordination de la sécurité sociale', CHAP(2014) 3546.

42 Case C-292/89 *Antonissen*, EU:C:1991:80; C-171/91 *Tsiotras*, EU:C:1993:215; C-171/95 *Tetik*, EU:C:1997:31; C-344/95 *Commission v Belgium*, EU:C:1997:81.

safeguards, without the power of the tribunal to remake the decision. Such a judicial review involves making an assessment of the legality of the decision on the date on which it was made; in practice, this means that no new evidence can be presented that was not already submitted to the Immigration Office before it made its decision. This may be contrary to ECJ case law in *Orfanopoulos* and *Cetinkaya*.[43] When a case is pending before the tribunal, if the EU citizen concerned makes a fresh application and is issued a residence certificate, the appeal against the measure terminating his residence will be declared inadmissible for lack of legal interest. This solution will have an impact on the residence record of that citizen and will pose problems when it comes to securing the continuity of residence, which should eventually lead to the acquisition of the right to permanent residence under Directive 2004/38 and trigger increased protections against expulsion.

Relying on individual complaints to ensure that EU law is respected and applied correctly at the national level is one option for enforcement but it places a high burden on the individual citizen who may lack the resources to start and pursue judicial proceedings. EU-funded assistance services can do only so much since they lack both a mandate and standing to start judicial proceedings on behalf of their clients. Judicial enforcement at the national level may also be hampered by national procedural rules that fail to provide a possibility for NGOs to intervene in judicial review cases brought before the national courts in residence cases, which besides fall outside the scope of Directive 2014/54 on the free movement of workers.[44] This state of affairs raises questions as to what enforcement strategies should be pursued besides judicial appeals to ensure that non-compliance can be effectively addressed.

6. How did EU Citizens Experience Belgium's Policy of Expulsion and Removal? (Jean-Michel Lafleur & Elsa Mescoli)

This section explores how EU citizens affected by Belgium's policy on expulsion experience illegality by focusing on the case of Italians in Belgium who saw their residence permit removed by state authorities. Data have been collected through ethnographic fieldwork including semi-structured interviews with workers in associations and trade unions, and narrative interviews with Italian migrants who received an OQT (*ordre de quitter le territoire* or order to leave the country).

43 Case C-482/01 *Orfanopoulos*, EU:C:2004:262; Case C-467/02 *Cetinkaya*, EU:C:2004:708.

44 Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers, O.J. 30.04.2014, L 128, p. 0008-0014.

Italians still constitute one of the largest migrant populations in Belgium, and whereas arrivals decreased from the 1970s and throughout the early 2000s, annual flows multiplied by three in the two years following the economic crisis in 2008. The profile of these new Italian migrants greatly varies from their guest worker predecessors, who came within the framework of the well-known bilateral agreement settled after World War II. The first wave of Italians came at a time when Belgium needed workers for its industries and when welfare policies were less divisive. New Italian migrants have been particularly affected by the strict application of the 'Citizenship Directive' (Directive 2004/38) that has resulted in orders to leave the territory if constituting a 'burden[s] on the social assistance system in the host state'. It is worth mentioning that within the Italian community the policy of removing/ expelling Italian migrants was sometimes portrayed as neglect on the part of Belgium to recognize the role played by Italian migrants in the reconstruction of the Belgian state.

The fieldwork carried out with Italian migrants helped identify three profiles among those Italians who received an OQT, namely free movers, second generation Italians, and relocated migrants (eg Moroccans with Italian nationality). Economic reasons constitute the most frequent driver of migration. Besides this, personal and family reasons can also be associated with the decision to leave Italy and move to Belgium. Upon trying to enter the Belgian labour market, Italian migrants found with great surprise that some issues were similar to what they thought they had left behind them, i.e. labour market segmentation consisting of a large spread of undeclared work ('black' work), in particular in the hospitality sector, and the lack of adequate contracts. The difficulty in having skills recognized, language issues, and the complexity of Belgian bureaucracy are further issues to take into consideration. These factors cause a difficult integration in the job market and put newcomers at risk of further social exclusion, bringing them either to turn to undeclared work or to access social assistance. The latter option in particular will indeed place migrants on the radar of the migration office, and lead to the removal of their residence document.

Receiving an OQT can be experienced in quite conflicting terms. It ranged from being seen as a simple bureaucratic annoyance for the wealthier migrants, to causing a significant break in the migration project for the more vulnerable ones. Confronted with the unexpected situation of being undocumented EU citizens, new Italian migrants can follow four different routes to comply formally or informally with the state's injunction to stop being a burden on the Belgian welfare system: (a) return to Italy, (b) resistance, (c) downward social mobility and (d) upward social mobility. Resistance involved turning for help to the trade

union, starting legal procedures to challenge the order to leave or trying to raise awareness about the situation that migrants face

> 'I fought to get back what I had worked for and also out of a sense of civism. For me it was important, it is not possible that things go this way, society does not protect you, they must!' (Sonia, WU, fieldnotes, 28 April 2016).

Some migrants engaged in the gig economy, for example by taking up work as an online language professor in order to remain invisible to the Belgian state. Insecurity in relation to their migration project was another feature of migrant experience

> 'After the OQT, I no long knew what my project was in Belgium, a country that had made me precarious and sanctioned me. I was thinking for a year: should I stay, should I go, what do I do?' (Sonia, WU, field notes, 28 April 2016).

For some migrants, interaction with the local authorities was experienced negatively, as a form of symbolic violence

> 'A woman from the Municipality told me; why did you have to come here to take money from the Belgian state, take the money from the Italian state instead!' (Carlo, MO, field notes 20 April 2016).

Others experienced the Belgian welfare state as schizophrenic

> 'If you offer a service [like the social integration income] to everyone because we are all European, if you allow me, then you cannot tell me six months later that you remove it and send me away! You can put limits, restrictions or stricter conditions [if you like] but otherwise change your attitude. […] This system is wrong, why do you make things even more complicated for me?!' (Rossella, WU, field notes, 23 May 2016).

The experiences of the Italian migrants in Belgium can be placed within the larger literature that highlights how becoming undocumented is the result of 'a legal production of illegality'.[45] Originally conceived as instruments of protection for groups at risk of social exclusion, social policies are now the means though which on one hand individuals – migrants in this case – are encouraged to participate in the labour market

45 N.P. De Genova, 'Migrant "Illegality" and Deportability in Everyday Life', (2002) *Annual Review of Anthropology* 31(1), p 419-447.

and, on the other hand, they are rejected from the social system if considered 'unproductive'.[46] The notion of 'deservingness' highlights that the restriction of the mobility of the poor shapes here the right to freedom of movement and determines further stratifications among migrants. EU citizenship and freedom of movement within Member States is questioned and conditioned to some other socio-economic issues. Strategies are developed to this aim within an emerging discourse of a 'moral economy of deservingness' and they respond to the individuals' precarious statuses.[47]

7. Expulsion of EU Citizens in the UK (Matthew Evans)

The detention and expulsion of EU citizens from the UK is a developing trend; one that ought to concern not just EU citizens and their family members in the UK but anyone who considers that the UK ought to respect international treaty obligations into which it has entered in the exercise of its sovereign power. The Home Office policy and practice as regards the detention and expulsion of EU citizens[48] displays scant regard for the EU Treaties, the need to give effect to their object and purpose, or for the rights that arise under them. It empties the content out of EU citizenship and of rights of free movement by militating against both and confining them in an over-determined system of immigration control which seems contrary to EU law.

In 2015, 3,699 EU citizens were detained under UK immigration powers, an increase of over 500% from the 768 detained in 2010. In 2015, EU citizens formed 11.4% of detainees; in 2010, it was 2.7%. The third quarter of 2016 saw further evidence of a developing upward trend as 1,227 EU citizens were detained, amounting to 17% of all new detentions. In the same quarter, 1,000 EU citizens were removed from the UK, amounting to 31% of all enforced removals.[49]

46 J-M. Lafleur & M. Stanek, 'Restrictions on Access to Social Protection by New Southern European Migrants in Belgium', in: J-M. Lafleur & M. Stanek, *South-North Migration of EU Citizens in Times of Crisis*. Dordrecht: Springer 2017, p. 99-121.

47 S. Chauvin & B. Garcés-Mascareñas, 'Beyond Informal Citizenship: The New Moral Economy of Migrant Illegality', (2012) *International Political Sociology* 6(3), p. 241-259; S. Chauvin & B. Garces-Mascareñas, 'Becoming less illegal: Deservingness frames and undocumented migrant incorporation', (2014) *Sociology Compass* 8(4), p. 422–432.

48 Home Office, *Enforcement Instructions and Guidance on EEA administrative removal*, London 2016 and *Modernised Guidance on Misuse of rights and verification of EEA rights of residence*, London 2017.

49 Bail for Immigration Detainees, http://www.biduk.org/.

The Legal Framework

EU citizens have free movement rights that perforate the immigration control otherwise exercised by an EU Member State. EU citizens and their family members enjoy rights of free movement in the UK under the EU Treaties (the Citizenship and free movement provisions of Articles 20 and 21 of the TFEU); EU Directive 2004/38/EC and – as a matter of UK law – under the European Communities Act 1972, the Immigration Act 1988 and the Immigration (European Economic Area) Regulations 2016.[50] In contrast, other persons seeking to enter and reside in the UK are subject to the control imposed by the UK Immigration Acts and the UK Immigration Rules. EU citizens and their family members enjoy the right of admission to the UK and thereafter, rights of residence, by operation of law and on satisfaction of certain prescribed conditions. A right of permanent residence may be acquired after a period of continuous residence in the UK, usually five years although a shorter period suffices in particular cases.

As a general rule, EU citizens *acquire* rights and do not require permission to exercise those rights from the UK Home Office in order to exercise these rights, though they can of course vindicate their position by applying to the Home Office for residence documentation. Other persons will require the UK Home Office to *grant* permission to enter and reside in the UK and it will be mandatory for them to possess immigration documentation (visas, entry clearance certificates, residence permits, etc.). EU citizens have the right to be admitted to the UK for an initial period, to seek work, and to reside as workers, self-employed persons (Articles 45 and 49 TFEU respectively), students, or as persons who are self-sufficient. Buttressing these rights are provisions for rights for family members, as well as for retained rights of residence (on death, divorce or departure of the principal EU citizen family member), and rights derived from the need to render effective the rights of others etc.

Administrative Removal rather than Expulsion *per se*

Similar to other states, the UK distinguishes between deportation/expulsion which normally involve grounds of public policy and public security linked to the commission of a crime and removal/return where the state wishes to remove a foreigner from its territory. A noticeable trend in the UK is the increasing reliance on administrative removal of EU citizens and their family members for lack of a right to reside or on grounds of 'misuse' of rights.

50 The Citizens Directive was initially transposed into UK law by the Immigration (European Economic Area) Regulations 2006, SI 2006/1003 (EEA Regs 2006), which came into force from 30 April 2006. The EEA Regs 2006 have been revoked and replaced from 1 February 2017 by the Immigration (European Economic Area) Regulations 2016, SI 2016/1052 (EEA Regs 2016).

Where not exercising a right of residence, it has always been the case that an EU citizen is liable to administrative removal from the UK and to detention for removal purposes - see reg 19(3)(a) of the Immigration (European Economic Area) Regulations 2006, SI 2006/1003 (EEA Regs 2006), which came into force from 30 April 2006 and initially transposed the Citizens Directive into UK law. However until recently such power was rarely exercised. This power is, as we are now seeing, being exercised more frequently.

The toolkit that allows for detention and administrative removal of EU citizens comprises of several pieces of legislation:

a) The Immigration (European Economic Area) Regulations 2016;
b) Directive 2004/38;
c) Civil procedures Rules – part 54, Practice Direction 54;
d) European Economic Area: administrative removals (version 3) 1 February 2017;
e) European Economic Area nationals: misuse of rights and veryfications of EEA rights of residence (version 2) 1 February 2017.

Administrative removal is envisaged in three scenarios (Reg 23)

a) where there is no longer a right to reside;
b) implementing public policy, public security or public health expulsion decisions;
c) where rights have been misused.

A person subject to a removal decision can be detained. Three different cases can be distinguished:

a) under the Immigration Act 1971 for those facing public policy expulsion;
b) under the Immigration and Asylum Act 1999 for those facing removal on other grounds, and
c) some cases previously subject to administrative removal now proceed via public policy provisions.

The Home Office policy and practice of seeking to detain and remove EU citizens has led it to override rights arising under EU law and in a way that treats EU citizens as if they were third-country nationals. A case in point concerned the unlawful detention of a Polish citizen, who had been in and out of work while in the UK. When not working he had been seeking work. From time to time he found himself without a roof over his head and was found by the police rough sleeping. He was detained for over 5 months under UK immigration powers, with no attempt to remove him. This prevented him from exercising his treaty rights, which the UK Home Office had said justified their removal of him in the first place. Under the applicable Home Office policy, EU citizens were only to be

detained for removal when removal was immanent, that is when the person needed to be taken to the airport following the service of removal directions. The High Court found that it would have been reasonable to detain him for a maximum of a week to effect removal (as opposed to deport). However, any period of over a week amounted to his being unlawfully detained and he was awarded damages.[51] The case highlights that EU citizens are better placed to resist detention for the purposes of administrative removal from the UK than third country nationals (without a connection to EU law) because, as EU citizens, they can still invoke rights of free movement arising under the EU Treaties.

It is worth remembering that EU law prohibits the detention of EU citizens unless their detention is necessary. In *Oulane*, the Court of Justice stated that

> 'A detention order can only be based on an express derogating provision such as Article 8 of Directive 73/148, which allows Member States to place restrictions on the right of residence of nationals of other Member States in so far as such restrictions are justified on grounds of public policy, public security or public health'.[52]

Thus, UK policy of detaining EU citizens with a view to carry out a forced removal solely on grounds that the person is no longer exercising residence rights is problematic in light of EU law. Moreover, under applicable UK legislation, a person who is released from detention is prohibited to work or engage in self-employment, which in practice has the effect of making it (almost) impossible for such a person to meet the conditions of a right to reside under EU law. If not allowed to work, it is unlikely that such an EU citizen will be able to be self-sufficient. The effect is a spiraling into destitution leading to further detention and forced removal.

Who is Affected? Who is Removed?

In recent years, the Home Office has been detaining rough-sleeping EU citizens and removing them from the UK (now Regulation 26 of 2016 EEA Regulations). Instead of starting from the assumption that they are citizens of a common European home entitled to be working, self-employed, seeking work etc in the UK, or to be the family member of such a person, the Home Office has proceeded to automatically detain, and then administratively remove them (through 'voluntary agreement' ideally). This is notwithstanding that they have neither sought access to social assistance, nor reached the public policy threshold risk to the public

51 *R (Kondrak) v The Secretary of State for the Home Department* [2015] EWHC 639 (Admin).

52 Case C-215/03 Oulane, EU:C:2005:95, para 41.

so as to warrant being deported (where deportation carries an automatic ban on re-entry). As shown by Operation Nexus statistics (obtained through a Freedom of Information request), EU citizens targeted have tended to be from Poland, Romania and the Baltic States, that joined the EU in 2004 and 2007. Many of these EU citizens are vulnerable, either economically (through working in sectors such as the building trade, hospitality, or catering, where they may be paid cash in hand), or due to being the victims of organized crime (women trafficked to the UK for the purposes of sexual exploitation).

It is not just homeless EU citizens who are at risk of detention and expulsion, other EU citizens leading lives in precarious circumstances in the UK are vulnerable to the same risk, where unable to prove with ease that they have a right to reside. Among them are those whose documents are incomplete or which have gone astray, family members estranged from their principal EU citizen family member, the otherwise self-sufficient who lack comprehensive sickness insurance, and the small-scale self-employed trader or service provider (such as a cleaner) without well-ordered records of her business.

There are a number of cases which highlight the Home Office' egregious policies. In one such case, a Nigerian national family member of a German national was detained under immigration powers following the Secretary of State's refusal of a permanent residence card. It was held that he had been unlawfully detained from the point he proved he had acquired the right of permanent residence, as from that point he could not lawfully be removed from the United Kingdom.[53] In another case, a Brazilian national family member of a Portuguese citizen suffered unlawful immigration detention as a prelude to his expulsion, and following the Secretary of State's unlawful failure to issue him with a residence card.[54]

The Home Office policy and practice demonstrates a failure, conscious or otherwise, to recognize EU citizenship and free movement rights. By treating such rights as narrowly drawn immigration entitlements and by introducing policies and practices seemingly incompatible with EU law, it has put the UK in the position of breaching international treaty obligations. Were British citizens, resident elsewhere in the EU, maybe retired in Spain, working in Germany, or studying in Italy,

53 *R(Imation) v Secretary of State* [2015] EWHC 1790 (Admin).

54 *R (Santos) v Secretary of State for the Home Department* [2016] EWHC 609 (Admin). The High Court found that Mr Santos had been falsely imprisoned for six months and awarded £ 136,048 by way of damages, of which £ 59,470 was expressly for the breach of EU law.

treated similarly, there would be understandable upset and even outrage. The United Kingdom should treat its neighbours' citizens as it would expect its own citizens to be treated.

8. Italy's Approach to Expelling EU Citizens (Alessandra Lang)

General Legal Framework

Entry, residence, and expulsion of EU nationals and their family members are regulated by Legislative Decree 2007 no. 30, transposing Directive 2004/38/EC into the Italian legal system. Italy has therefore chosen to enact a specific law and not to regulate the matter within the legislation on immigration, even though the latter was taken as a model to draft the rules on expulsion. Legislative Decree 2007 no. 30 has been subsequently modified in 2008, 2011, 2013, and 2017. The amendments can be gathered into three groups:

1) those aimed at facilitating adoption and enforcement of expulsion orders of EU nationals who have committed serious crimes or are not economically self-sufficient;
2) those intended to correct provisions not in line with the Directive, in order to put an end to infringement procedures launched by the European Commission;
3) those necessary to align with other reforms, mainly those on procedural law.

Overall the transposition is of mixed quality. In some parts, the Legislative Decree follows the Directive to the letter (definition of the beneficiaries), in other parts, it adapts it to the Italian legal order (residence for more than three months and permanent residence), in other parts, it is quite far from the Directive (expulsion).

Provisions on the Expulsion of EU Nationals

These provisions have been changed more often and to a wider extent than others. At the beginning, making expulsions easier was a sort of politically driven response to the social unease caused by the enlargement of the Union. The entry into force of Legislative Decree 2007 no. 30 occurred a few months after Romania's EU accession, which caused the population of EU nationals in Italy to more than double overnight, without any move, just because of a change in legal status. At the time, more expulsions was the only answer the Government succeeded to devise to objective social problems that it was unable or unwilling to tackle otherwise. From 2011 onward, after the very vocal anti-immigrants center-right Government resigned, the attitude of public opinion changed and EU nationals disappeared from top headlines and the

Government's agenda. The subsequent amendments of the law tried to correct the main defects of the expulsion regime then in place, without changing its cardinal features. It is worth pointing out that the Italian system operates two different types of expulsion: administrative expulsion (Articles 20 and 21 of Legislative Decree 2007 no. 30) and judicial expulsion imposed by a judge, both of which should comply with EU rules in this area of law.

Administrative Expulsion

Applicable Rules from 2007 to 2008

In its original version, the Legislative Decree gave the Ministry of the Interior the power to expel EU nationals on grounds of public order, public security and public health (Article 20 of Legislative Decree 2007 no. 30), and the Prefect (that is, the government's representative in each Province) the power to order expulsion if the conditions for the right of residence ceased to exist (Article 21 of Legislative Decree 2007 no. 30). Against the decision of the Ministry of the Interior, an appeal might be lodged to the administrative tribunal of Rome, irrespective of the place where the person concerned resided. The decisions of the Prefect could be challenged in front of the ordinary court of the place where the Prefect, which issued the decision, was located. Legal scholars criticized these rules. They believed that the administrative court was not the best suited to hear an appeal against an expulsion order, because it did not meet the requirements of Directive 2004/38. In addition to that, concentrating all the appeals in the court of Rome could not guarantee a rapid examination of each case. The opposition party was critical and argued that the Ministry of the Interior could hardly be in the position to enact prompt decisions, because it was too far from the place where the EU citizen lived and where the relevant conduct took place.

From 2008 to 2011

The rules changed extensively in 2008. The competence to decide on expulsion where the Union citizen does not satisfy the conditions for residence (Article 21) remained with the Prefect, but a peculiar arrangement was set up to make sure that the decision was properly enforced. The person who was expelled for not satisfying the conditions for residence was provided with a document to be signed by an Italian consulate abroad. If the person was found in Italy again and failed to show the duly signed document, according to the 2008 changes the person was liable of a minor criminal offence, punished by a term of imprisonment and a fine. Returning to Italy was not an offence, but not being able to show the document was, because the person was presumed not to have complied with the expulsion decision.

The most significant 2008 amendments regarded the rules on expulsion on grounds of public order and public security (Article 20). Since 2008, there are four grounds for expulsion: State security, imperative grounds of public security, public order, and public security. The Ministry of the Interior is empowered to enact expulsion decisions against Union citizens who have resided in Italy for over ten years or are minors, and in case of decisions grounded on public order or State security. The Prefect has competence for all other cases. The ordinary court (Tribunal) became the judge to which an appeal against expulsion orders founded on reasons of public security or on imperative grounds of public security may be lodged, while the administrative tribunal in Rome remains competent to hear appeals against expulsion orders grounded on State security or on public order.

The law defines what '*grounds of State security*' and '*imperative grounds of public security*' mean. '*Grounds of State security'* can apply to a person who is part of a terrorist organization or when there are reasonable grounds for believing that his/her stay in Italy could favor a national or international terrorist organization or its activities in any way. '*Imperative grounds of public security'* subsist when the behavior of the person to expel amounts to a real, effective and serious threat affecting fundamental human rights or to public safety, making his/her expulsion urgent because his/her further stay is irreconcilable with orderly society.

Between 2008 – 2011, when the expulsion was founded on these two grounds, the decision was immediately enforceable by the police. The person concerned could be detained in a detention center pending ratification of the decision by the judge, and the application for judicial review did not have automatic suspensive effect.

The problems do not lie in the letter of the law, rather in its application. Prefects have relied on imperative grounds of public security to justify expulsion orders concerning a Union citizen who was allegedly a prostitute, citizens convicted for minor offences, and in cases where only police charges were made against EU citizens without them leading to convictions. It is true that most of the decisions do not survive judicial review, but it is impossible to know how many of them are not challenged. The other two grounds listed in Article 20 of Legislative Decree 2007 no. 30, namely '*grounds of public policy*' and '*grounds of public security*' are not defined by law.

From 2011 to Present

After the 2011 amendments, the definitions of '*grounds of security of the State*' and '*imperative grounds of public security*' become less ambiguous. Expulsion orders founded on 'grounds of security of the State' or 'imperative grounds of public security' cannot be immediately enforced any more, but only if the police demonstrates, on a case-by-

case basis, that the presence of the concerned person in the country is irreconcilable with the notion of an orderly society. Not complying with the expulsion order for not satisfying the conditions for residence is no longer a criminal offence, but it allows the Prefect to issue an expulsion order, immediately enforced by the Police. The competence of the Prefect has been extended to encompass the adoption of expulsion decisions on grounds of public order, which can still be challenged before the administrative court.

The compatibility of administrative removal, which always leads to the imposition of an entry ban, with EU law has been challenged before national courts and even led to a preliminary question before the European Court of Justice (Case C-228/15 *Velikova*).[55] The case was dismissed as manifestly inadmissible but its facts show the operation of expulsion in practice. Ms Velikova was a Bulgarian national who worked as a prostitute. She was issued with an administrative removal order on 'imperative grounds of public security' and a re-entry ban. Because she failed to respect the expulsion order by not leaving the country, at that time (2008-2011) the re-entry ban was immediately enforceable. Once found in Italy she was seen as having committed a criminal offence punishable with detention up to one year. The Court of Justice dismissed the case on grounds that the Italian legislation had been modified removing the criminal effects associated with the failure to respect the order to leave.

Judicial Expulsion

In addition to administrative expulsion, judges can also order the expulsion of EU nationals, if found guilty of particular offences (crimes against the State or serious crimes related to drugs) or sentenced to a term of imprisonment of more than two years, after having served the term of imprisonment. Even if the law reads as if the Union citizen has to be expelled, this kind of expulsion is a security measure, which can be enacted by the judge only after having ascertained that the person concerned still constitutes a public danger. Any automatic decision is therefore avoided, which is in line with ECJ jurisprudence and the provisions of Directive 2004/38 on this issue (Article 33 of the Citizenship Directive).

Although on paper, Italian law seems to comply with EU law a number of inconsistencies still exist. For example, decisions are not motivated if state security so requires. This may seem in line with Directive 2004/38 but the Italian notion of 'state security' does not match that used in Directive 2004/38 since, in fact, it concerns public policy. When it comes to challenging expulsion decisions in court, the review performed by Italian courts does not match the standards required by Directive 2004/38 since they lack the power to review the substance of the case.

[55] Case C-228/15 *Velikova*, EU:C:2016:641.

Moreover, the adoption of an expulsion decision will lead to an interruption of the continuity of residence since it will lead to the cancellation of the registration into the population registry. In practice, few expulsion decisions are issued. The most common ground used is public security (Article 20 of Legislative Decree 2007 no. 30) but no clear distinction seems to exist between imperative and non-imperative grounds of public security, which is partly due to poorly motivated decisions. The typical recipients of an expulsion decision are participants in violent demonstrations/hooligans, prostitutes, Roma EU citizens, and family members of Italian nationals whose residence card expired or who lack a card. In the case of prostitutes and Roma, expulsion decisions seem randomly motivated on Article 21, on public security or on imperative grounds of public security, suggesting that while the law may be in line with the EU rules, its application is not always respectful of those rules.

5. Expulsion and Re-entry Bans: Two Contrasting Approaches? Germany and the UK (Kathrin Hamenstädt and Matthew Evans)

An expulsion measure can be accompanied by an order preventing the person expelled from entering the territory of the expelling state for a certain period of time. Such an order can be referred to as an entry ban or an exclusion order.[56] If the scope of an expulsion measure is to remove the person from state territory, the scope of an entry ban is to prevent that person from re-entering that state territory. Article 15(3) of Directive 2004/38 provides that entry bans cannot be imposed in the context of an expulsion decision based on grounds other than public policy, public security or public health. At the EU level, Article 14(3) of the Citizenship Directive bars an automatic expulsion of EU citizens who have recourse to social benefits. Accordingly, EU law is clear on the fact that EU citizens expelled because they have become an unreasonable burden on the host state's social assistance cannot be issued with an entry ban. An entry ban can be coupled only with an expulsion order adopted on grounds of public policy and public security. Finally, Article 32(1) of the Citizenship Directive refers to the duration of exclusion orders issued on grounds of public policy or public security. Bans for life are not allowed under EU law.[57] Moreover, the Directive stipulates that an EU citizen should have the possibility to apply for the lifting of the

56 Article 15(3) of Directive 2004/38 refers to 'a ban on entry', whereas Article 32 of Directive 2004/38 is titled 'Duration of exclusion orders'.

57 Case C-348/96 *Calfa*, EU:C:1999:6, in which the Court of Justice has ruled that national rules that allow for expulsion for life in case of conviction for drugs are not compatible with Community law.

entry ban after a reasonable period and depending on the circumstances of the case. In any event, such an application should be possible after three years after the enforcement of the final exclusion order.

National entry bans can be given a European dimension by an entry of an alert into the Schengen Information System (SIS) for the purpose of refusing entry. It is important to clarify the position of EU citizens and their family members in respect of such alerts. The requirements for entering an alert into the SIS are stipulated by the SIS II Regulation[58] and the Returns Directive.[59] The SIS II Regulation applies to third-country nationals,[60] whereby third-country national is defined in 'negative terms'. According to Article 3 (d), the following persons are excluded: EU citizens and nationals of a third country who, under agreements between the Community and its Member States enjoy rights of free movement equivalent to those of EU citizens. It is important to stress that national expulsion decisions and entry bans against EU citizens cannot lead to an alert in to SIS. In contrast, third-country family members of EU citizens can be subject to a SIS alert. However, the ECJ stipulated safeguards that have to be met before a third-country family member of an EU citizen can be entered into the SIS or refused entry on the basis of an SIS alert.[61] Another instrument to give a European effect to a national entry ban is the Returns Directive (Directive 2008/115). However, according to the Returns Directive third-country family members of EU citizens who exercised their right to free movement, are excluded from the scope of the Returns Directive.[62] It can be concluded that EU citizens enjoy a privileged position when it comes to alerts in the SIS system.

Expulsion decisions and entry bans can only be issued at the national level but they have to be adopted in accordance with EU law, including the safeguards established by the Citizens' Directive in Articles 27 and 28. In Germany, the Freedom of Movement Act/EU (*Freizügigkeitsgesetz/EU*[63]) specifies the requirements for expulsion decisions and exclusion orders (entry bans) against EU citizens and their (third-country)

58 Regulation (EC) No 1987/2006 of the European Parliament and the Council on the establishment, operation and use of the second generation Schengen Information System (SIS II), O.J. 28.12.2006, L 381, p. 4.

59 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, O.J. 24.12.2008, L 348, p. 98.

60 See Article 2 of the SIS-II-Regulation

61 Case C-503/03, *Commission v. Spain*, EU:C:2006:74, paras. 52, 55, 59.

62 Article 3 (1) of the Returns Directive in conjunction with Article 2(5) of the Schengen Borders Code.

63 Gesetz über die allgemeine Freizügigkeit von Unionsbürgern (Freizügigkeitsgesetz/EU-FreizügG/EU) vom 30. Juli 2004, *Federal Law Gazette*, Part I, p. 1950.

family members. The Residence Act[64] is applicable to third-country nationals. Germany amended the Freedom of Movement Act/EU[65] in 2014 to tackle issues such as the unjustified recourse to childcare benefits by EU citizens.[66] The old provisions on expulsion of third-country nationals in the Residence Act provided in § 55 (2) no. 6 that a person can be expelled if s/he has recourse to social benefits. With the entry into force of the new provisions on expulsion in the Residence Act, this provision has been removed and recourse to social benefits no longer constitutes a ground for expulsion. A third-country national who has recourse to social benefits does not pose a threat to public policy, and therefore it seems difficult to argue that a Union citizen who does not fulfil the requirements of residence in Directive 2004/38 and/or has recourse to social benefits poses a threat to public policy. However, the amended Freedom of Movement Act/EU provides that an exclusion order shall be issued against an EU citizen in very serious cases, in particular if the person repeatedly pretends that s/he fulfills the requirements for entry and residence, or if his or her presence considerably impedes public policy or public security.[67] The duration of the entry ban has to be limited.[68] The legislature justified this amendment by arguing that it is in line with EU law as it aims at preventing an abuse of rights in terms of Article 35 of the Citizenship Directive.[69]

In the UK, one of the aims of current policy is to prevent re-entry in case of administrative removal. The Home Office policy and practice of removing EU citizens and their family members, simply for not exercising EU rights of residence, faced a practical obstacle in that administrative removal, as compared to deportation, does not by itself impose a ban on re-entry to the UK. An EU citizen administratively removed from the UK is free to return to the UK the same day and exercise her right of admission on arrival. Accordingly, the Home Office introduced measures (found in regulation 26 the 2016 Regulations), to characterize a return to the UK within a 12-month period of removal as a misuse of rights and refuse admission to the UK. Such a person will not be considered to have a right of admission and an initial right of residence for up to three months, but must instead provide evidence that s/he is a job-seeker, worker, self-employed person, etc. in order to be admitted to the UK. A

64 Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet (Aufenthaltsgesetz-AufenthG) vom 25.2.2008, *Federal Law Gazette*, Part I, p. 162.

65 See: Gesetz zur Änderung des Freizügigkeitsgesetzes/EU und weiterer Vorschriften vom 02.12.2014, *Federal Law Gazette*, Part I, 2014 Nr. 56, 8.12.2014, p. 1922.

66 See Bundestagsdrucksache 18/2581, p. 11.

67 See § 7 (2) third sentence Freizügigkeitsgesetz/EU.

68 See § 7 (2) fifth sentence Freizügigkeitsgesetz/EU.

69 See Bundestagsdrucksache 18/2581, p. 17.

misuse of rights occurs, the Home Office argue, even where the requirement of the Regulations are met but in circumstances where, it is said, that their *purpose* is not met and assessment, the person concerned intends to obtain an advantage through conduct artificially creating the conditions necessary to satisfy the criteria. These are often subjective and evaluative assessments which seek to subvert and undermine plainly expressed rights conferred under EU law.

Part III
Concluding remarks – from Brexit to understanding vulnerability to expulsion (Annette Schrauwen, Egle Dagilyte and Sandra Mantu)

With Brexit looming in the background, about 56 to 60 million UK citizens are set to lose their status as EU citizens and become TCNs. While this is not the image once may necessarily conjure when thinking about expulsion as a practice, Brexit can be seen as a test case for EU citizenship since it brings into sharper focus questions about the added value of EU citizenship.

Traditionally, EU citizens and TCNs were seen as different, since they enjoy different sets of rights under EU law. This is not simply a legal issue, since the TCN label remains one that conjures foreignness in a manner that EU citizenship should not. The mantra of EU citizenship as fundamental status seems to be disintegrating once we reach the national level: the distinction made at the EU level through law concerning the rights and treatment to which EU citizens and TCNs are entitled to disappears at the national level; even more so, when it comes to issues concerning expulsion. The correct transposition and enforcement of EU rights remain salient issues, despite these rights existing for long periods of time and efforts put into ensuring compliance. Brexit will add another layer of complexity to these issues, bringing home the fact that persons previously entitled to EU citizenship rights will become foreigners.

Public debates on immigration and state power to send migrants back to where they came from (be it an EU state or not) increasingly rely on economic arguments that distinguish between high level income and low level income migrants. Such arguments played an important role in the Brexit vote and its aftermath, as the UK authorities have started to engage in an administrative policy that makes it difficult for EU citizens to document their EU rights thus opening the way for terminating those rights. In its EU citizenship jurisprudence, the Court of Justice seems to embrace similar thinking, especially since the *Dano case*. Along such lines of reasoning, a cost-benefit analysis of EU migration becomes possible and justifiable, allowing the host state to end residence and potentially remove the EU citizen.

The practical difficulties of ensuring removal and preventing return by the host state in an area without border controls have been mentioned previously. The Member States discussed in this paper have all taken steps at the national level to deal with removal and to prevent EU citizens from re-entering their territories. The *Petrea* case[70] illustrates both the difficulties of preventing return but also the possibility of effacing further differences between the treatment of EU citizens and TCNs. The Court was asked if the Returns Directive (applicable only to illegally staying TCNs) could be applied to the EU citizen in question who had been issued with an order to leave Greece but was found to work there in violation of that order. AG Szpunar argued that this was possible, as

> 'Directive 2004/38 does not preclude the use of the content of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third country nationals for the purposes of laying down detailed rules governing the procedures applying to an order to return a citizen of a Member State who has entered the territory of another Member State, notwithstanding the existence of an exclusion order adopted by the latter, provided that the protective measures and procedural safeguards set out in Directive 2004/38, particularly in Chapter VI thereof, as well as the principles of equivalence and effectiveness are observed, this being a matter for the national court to assess.'[71]

The ECJ upheld the view of AG Szpunar and confirmed that Member States may designate the same authorities and rely on the same procedure to return an illegally staying EU citizen as in the case of returning an illegally staying TCN on the basis of the Returns Directive. The court stressed the procedural autonomy of the Member States to designate the authorities responsible for return in respect of EU citizens since Directive 2004/38 does not set special rules in this regard.[72] Concerning the procedure to be followed, Member States may draw inspiration from the Returns Directive and use the same procedure in as much as the safeguards provided for in Directive 2004/38 which are more favorable to the EU citizen are respected.[73] This approach tries to maintain the difference in legal treatment enjoyed by EU citizens and TCNs by emphasizing that the more favorable treatment enjoyed by EU citizens based on Directive 2004/38 continues to be relevant: in fact, it is this

70 Case C-184/16 *Petrea*, Request for a preliminary ruling from the Dioikitiko Protodikeio Thessalonikis (Greece) lodged on 1 April 2016 – *Ovidiu-Mihaita Petrea v Ypourgos Esoterikon kai Dioikitikis Anasygrotisis* (Ministry of Interior and Administrative Reconstruction), OJ C 211 from 13.06.2016, p. 33.
71 Opinion AG Szpunar in *Petrea* delivered on 27 April 2017, EU:C:2017:324.
72 Case C-184/16 *Petrea*, EU:C:2017:684, para. 53.
73 Ibid., paras. 55 and 56.

distinction that justifies the use of the same procedure for both illegally staying EU citizens and TCNs. While from a practical point of view, the Court's approach makes sense – it may be too difficult to ask the Member States to design different return procedures applicable to different categories of illegally staying migrants - at a normative level, the distinction between EU citizens and TCNs becomes less relevant. Moreover, it remains to be seen if in practice national administrations and courts will apply different standards within the same procedure. The remarks made in Section 4 on the importance of understanding and empirically examining the intersection of fundamental rights considerations with the procedural autonomy of the Member States seem all the more relevant.

The FIDE report issued in 2014 – that is, prior to the *Dano* case and before Belgium's attempts to remove economically inactive EU citizens became public knowledge - argued that the Member States had a reasonable approach to evaluating self-sufficiency and that they rarely relied on expulsion measures to deal with economically inactive EU citizens. It is now clear that the trend is toward restrictive application of EU law not only where poor EU citizens are concerned, but also in relation to expulsion and the issuing of entry bans. EU law allows for such decisions to be challenged and it could be argued that judicial review and the application of procedural rules can soften or correct, where necessary, measures that restrict the rights of EU citizens. However, given the access to justice concerns examined in this working paper, the larger question is whether this should be the correct way forward (given that it disproportionally affects EU citizens on low incomes), or whether it is more desirable to have proper decision making in the first place, thus limiting the need for later judicial intervention.

It is also clear from the national cases discussed above that often the purpose behind detention and expulsion is for national governments to show to their electorate that Member States are indeed in control of their borders and migration flows. Increasingly, this control is portrayed to be about the welfare state and the redistribution of national resources, since in practice states are more likely to terminate rights for those who no longer meet residence requirements. Asking for a social benefit is used by national administrations as a red flag and sets into motion an investigation of one's right to reside. In all the states discussed here, there is evidence that such treatment affects disproportionally Roma citizens and other vulnerable persons, including dependent family members of EU citizens.[74] It is this group of EU citizens that appears as a new target of expulsion, removal and detention practices.

74 E. Dagilyte & M. Greenfields, 'United Kingdom welfare benefit reforms in 2013-2014: Roma between the pillory, the precipice and the slippery rope', (2015) *Journal of Social Welfare and Family Law* 37:4, p. 476-495.

This points to the ethnic and gender dimension of such practices and the need to examine EU citizenship from the perspective of vulnerable EU citizens who under national practices may end up framed as 'illegals' and 'criminals'.

Given that the nexus between ending residence rights, expulsion, removal policies and re-entry bans can be seen to (legally) produce the EU 'undesirables', such treatment of EU citizens raises questions of social justice not only at the national, but also at the European level. For these reasons, the protection of EU citizens' residence and welfare rights is likely to present complex European challenges in the years to come, even after Brexit.