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What's law got to do with it?! Dealing with unwanted EU citizens in the Netherlands

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Abstract

This contribution examines the Dutch legal response to unwanted EU citizens in terms of the powers to terminate residence, including measures that seek to expel and prevent such persons from re-entering the Netherlands. Although EU mobility has been politicized and securitized through its depiction as a source of crime and welfare abuse, the available data on the number of EU citizens who have been expelled from the Netherlands shows a different reality. We seek to disentangle the legal response of Dutch authorities to EU mobility from its politicized and mediatized versions that stress its unwanted character and explain the role of (EU) law in this process as constraining the margin for manoeuvre left to national authorities. The article examines from the perspective of EU law and its application at the national level the different scenarios in which the residence right of an EU citizen can be terminated, and in what situations such a termination can be accompanied by expulsion and exclusion from the Netherlands. The article shows how due to the legal constraints that stem from the protection enjoyed by mobile EU citizens against measures restricting their right of residence, Dutch authorities have developed alternatives that seek to ensure voluntary return as a pragmatic solution to the presence of unwanted EU citizens.

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1. Introduction

In the aftermath of the 2004 and 2007 EU enlargements, the opening of the Dutch labour market to workers and self-employed persons from Central and Eastern Europe (CEE) has led to public and political debates about the desirability and effects of such mobility. While officially Dutch authorities remain attached to the value of free movement of persons, the growing mobility of CEE citizens has led to concerns about an influx of cheap labour and its potential to undercut national workers and cause disturbances on the labour market. Moreover, the alleged CEE citizens' reliance on the Dutch welfare state and their criminality have equally caused concern among the Dutch public and politicians.

EU-wide research has shown that the impact of mobile EU citizens on national welfare states is minimal (ECAS 2014; ICF/GHK 2013). For the Netherlands, the increase in the number of EU citizens from Eastern Europe receiving unemployment benefits has been explained by their more vulnerable position in the Dutch labour market and their concentration in sectors where temporary contracts, job insecurity, and exploitative practices are more prevalent (Strockmeijer 2019). Job insecurity is not something that migrants choose themselves in order to draw benefits. Rather, employers in the sectors (agriculture, hospitality, transport, logistics, construction) where CEE workers are concentrated rely on job insecurity as a strategy to reduce labour costs. Moreover, when compared with inactive Dutch nationals, the percentage of inactive EU citizens who rely on the welfare system is lower (Strockmeijer 2019: 10). For its part, the Dutch government, through the voice of the Ministry of Social Affairs, sends mixed messages: it treats the number of EU citizens reliant on the welfare state as a problematic aspect of free movement and one in need of close scrutiny (Koolmees, Ollongren, Knoops, van Ark and Keijzer 2019; Asscher 2017; Kamp 2011), despite the fact that it acknowledges that in relative and absolute terms this number is minimal (Asscher 2014).

Research in several Member States confirms that poverty, ethnicity and criminality are common elements upon which unwantedness is constructed in public and political discourse (Karstens 2019; Mantu 2018: 182). In the Netherlands, the politicization of CEE mobility is based on the conflation of cheap labour with welfare tourism and criminality (Brouwer, van der Woude, van der Leun 2018: 457). Polish citizens fraudulently claiming Dutch social benefits sometimes as part of large organized schemes, or Romanian skimmers epitomize these debates in Dutch media and fuel the perception of CEE mobility as problematic and unwanted. Research by Brouwer et al. (2018) shows how Dutch border police officers rely on ethnic and nationality profiling when deciding to stop CEE citizens driving in the Dutch-German border area due to their perception of such citizens as 'dangerous others'. While the 'free' mobility of CEE citizens is frustrated by such profiling, it is nonetheless unclear if this amounts to discriminatory and illegal practices under Directive 2004/38. Thus, we emphasise that in trying to clarify

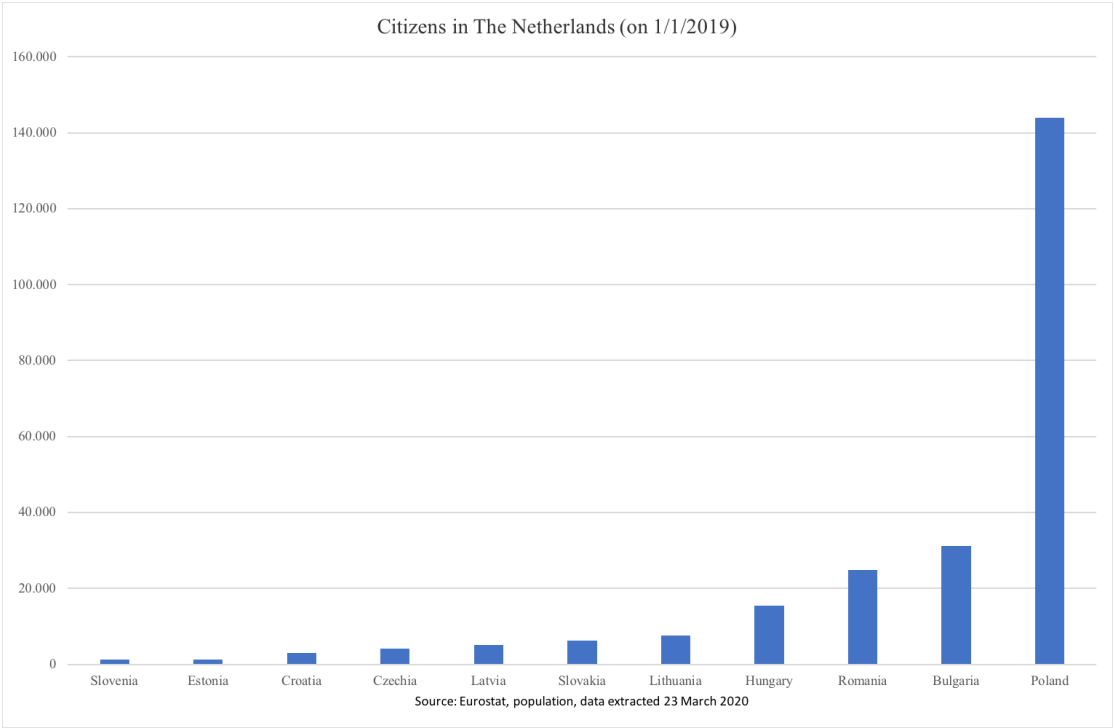
who fits the description of the 'unwanted' EU citizen, one must acknowledge the gulf between practice and perception, i.e. the difference between EU law, its practical application at the national level, the experiences of EU citizens on the ground, and the debates on this issue.

In this contribution we sketch the role of law in this process by focusing on what type of measures Dutch authorities can take to terminate the residence of unwanted EU citizens, including measures that seek to expel and prevent such persons from re-entering the Netherlands. We seek to disentangle the legal response of Dutch authorities to EU mobility from its politicized and mediatized versions that stress its unwanted character. To this end, we remind Bridget Anderson's (2012) cautionary words that the EU citizen in law and in data is not the same as the EU citizen of popular and political discourse.

Our contribution is structured as follows. Section 2 describes the methodology. Section 3 presents the relevant EU rules concerning the right of residence for mobile EU citizens. Section 4 discusses the termination of EU residence rights where the EU citizen no longer meets the relevant conditions from the perspective of both EU and Dutch law and practice. Section 5 focuses on termination and restriction of EU residence rights on grounds of public policy and public security; whereas section 6 examines the same issue in cases of abuse or fraud. Section 7 details the manner in which Dutch authorities have sought to deal with unwanted EU citizens against whom an exclusion order cannot be issued. Section 8 concludes with an overall assessment of the Dutch response to unwanted EU citizens.

2. Methodology

The Netherlands hosts 570 000 mobile EU citizens. 43% are nationals of a CEE state (245 000) and almost half of them (25%) are Polish nationals, the largest group of mobile EU citizens in the Netherlands (Eurostat 2019). Another 45% of mobile EU citizens in the Netherlands are made up of nationals from France, Spain, Belgium, Italy, UK and Germany. The remaining 12% consists of very small numbers of nationals from the remaining EU states. We stress that the available data reflects the number of EU citizens who are registered in the Netherlands and as such known to the authorities. This limitation of the existing data, including EUROSTAT data, is well known. Based on the assumption that a substantial number of mobile EU citizens do not register in the Netherlands, existing numbers should be seen as a relative indication rather than an absolute value. In the Netherlands, it is estimated that in 2017 some 90 000 Polish citizens resided unregistered in addition to the official number of 160 000 registered Polish citizens (Gijsberts, Andriessen, Nicolaas and Huijnk 2018). The majority of EU citizens are concentrated in the 4 biggest municipalities of the Netherlands (Amsterdam, the Hague, Rotterdam and Utrecht).

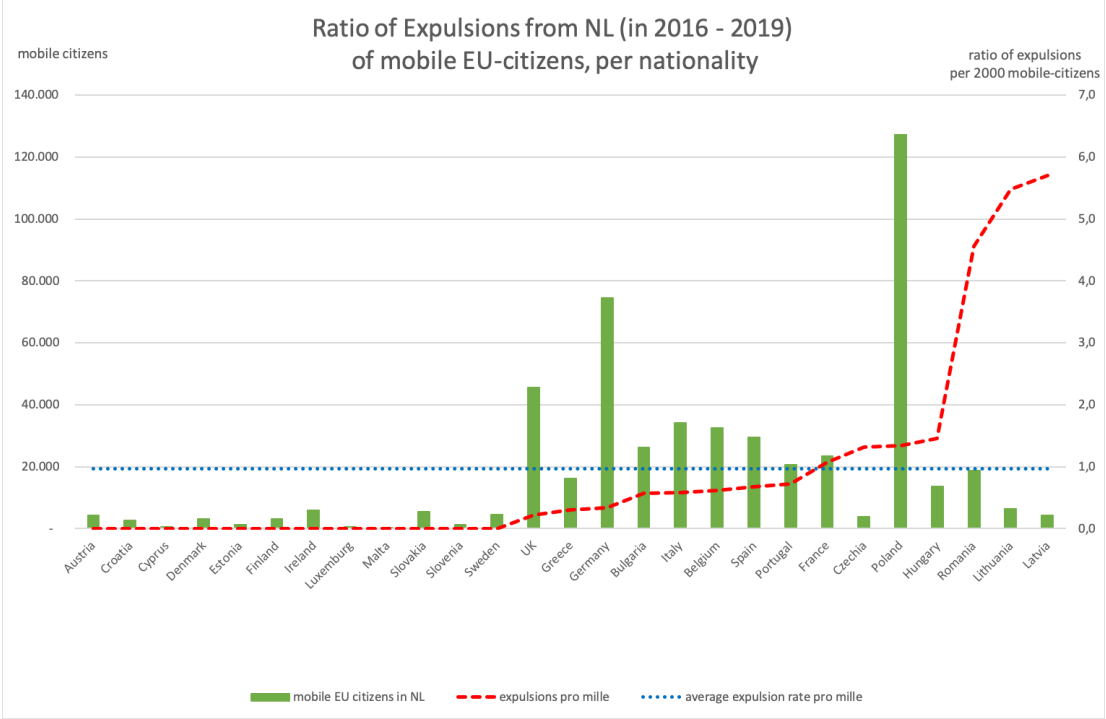


Graph 1

In light of the legal focus of this contribution, by 'unwanted EU citizens' we understand EU citizens whose right to reside stemming from EU law has been terminated, EU citizens against whom an expulsion decision has been adopted and EU citizens in respect of whom an exclusion order has been adopted. There is no centralized data on the number of EU citizens whose right of residence has been terminated. Kramer (2018) has presented some fragmented data on this issue that showed an increase in the number of EU citizens whose right of residence was terminated from 20 in 2012 to 680 in 2016. We have not been able to obtain such data from the Dutch immigration authorities - ideally differentiated upon grounds for termination. The only data we have received shows the number of EU citizens expelled, but not the ground upon which the expulsion measure was taken.

As far as the available statistics and data provided by the Dutch immigration authorities allow us to conclude, in the last 4 years, an average of 16,000 aliens per year had to leave the Netherlands, either voluntarily or forced. 16% of these aliens were forced to depart (2 500). The remaining 84% left unforced, meaning that 29% left demonstrable and 55% had left non-demonstrable. The latter is a euphemism for: "we do not know whether the alien has left the country but he is no longer staying at his latest official address". Of these 2 500 forced departures per year from the Netherlands, only 10% refer to EU citizens. Thus, an average of 250 EU citizens have been forced to depart each year, which is only 1 out of every 2 300 registered EU citizens. Interestingly, some nationalities appear more often in these statistics than others. The red dotted line in Graph 2 shows

the average expulsion rate: 1 per 2 000 citizens per EU state. This graph shows that in the last four years Romanians, Lithuanians and Latvians were five times more often than average forced to leave the Netherlands. Remarkably, Polish citizens, although the largest group of EU citizens in the Netherlands (indicated by the green bar in the graph), have an average expulsion rate, i.e. just over 1.



Graph 2

While existing data on expulsion is general and not broken down on grounds for expulsion, it does not support the politicized image of CEE mobility. Nonetheless, in our view the data reflects the higher level of protection that EU citizens enjoy in relation to their EU right to reside in the Netherlands. To capture the Dutch legal response to unwanted EU citizens, first we identify and discuss the limits posed by EU law to the termination of EU residence rights at the national level. Secondly, we follow their implementation in the national legal order and their practical application by the administration and Dutch courts. Our main empirical data stems from Dutch jurisprudence on the termination of EU residence rights and expulsion, supplemented by the examination of policy papers and briefs, reports, existing scholarship and general info on this issue. Finally, to explain the gap between law and practice, we explore alternatives to expulsion and exclusion orders that have been developed by Dutch authorities to deal with EU citizens who are perceived as problematic at the local level.

3. EU citizens' right to reside in another Member State based on EU law

EU citizens enjoy the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect (Article 21 TFEU). EU workers and self-employed persons enjoy a right to move and reside freely stemming from Articles 45 and 49 TFEU, respectively. The conditions for the exercise of the right to free movement are detailed in secondary legislation, the most relevant of which are Directive 2004/38 applicable to all EU citizens, and Regulation 492/2011 applicable only to workers. The case law of the Court of Justice (CJEU) constitutes the other important legal source of rights for EU citizens since the Court's interpretation of EU law is binding for national authorities.

Directive 2004/38 applies to EU citizens and their family members, irrespective of nationality or the performance of economic activities, who move to another EU state other than the state of nationality of the EU citizen. Depending on the length of residence, with three months and five years as the relevant thresholds, Directive 2004/38 provides for different residence rights, to which different conditions are attached. For residence shorter than 3 months, EU citizens must possess a valid ID or passport (Article 6). For residence longer than three months, Directive 2004/38 differentiates between EU citizens depending on whether they are economically active or not (Article 7). EU workers and self-employed persons must meet the definition of the notions of 'EU worker' and, respectively, 'self-employed' as detailed in the jurisprudence of the Court of Justice. Economically inactive EU citizens must have sufficient resources for themselves and their family members not to become a burden on the social assistance system of their host state and possess comprehensive sickness insurance. Moreover, students must be enrolled at an educational establishment for the principal purpose of following studies. Article 16 of Directive 2004/38 stipulates that Union citizens who have resided legally and for a continuous period of five years in a host Member State have a right of permanent residence there. Union citizens (and their family members) enjoy that right without any further conditions, thus even if they no longer have sufficient resources or comprehensive sickness insurance cover. The Court has clarified that residence under Directive 2004/38 constitutes an autonomous notion of EU law, which is to be interpreted as legal residence that meets the requirements of Article 7.[2]

Broadly speaking, Directive 2004/38 allows the host state to terminate a EU citizen's right of residence in three different scenarios. Firstly, where the EU citizen no longer meets the conditions attached to the exercise of the right of residence; secondly, on grounds of public policy, public security and public health, and

2 CJEU 21 December 2011, C-424/10 and C-425/10, *Ziolkowski* & *Szeja*, EU:C:2011:866, para 46.

thirdly, in case of fraud or abuse of rights. The Directive lays down procedural safeguards (Articles 30 & 31) to be observed by the Member States in respect of all scenarios. These are meant to ensure that EU citizens are notified of any decisions taken in respect of them, that those decisions are justified and open to judicial redress procedures.

4. Scenario 1: Terminating the EU right to free movement where the conditions attached to the exercise of the right of residence are not met

4.1. General rules under EU law on termination of rights

Based on Article 14(1) Directive 2004/38, EU citizens retain the right of residence for up to three months as long as they do not become an unreasonable burden on the host state's social assistance system. The main question here is what impact a request for social assistance has on the right to reside. Article 24(2) helps elucidate this issue as it allows the host state to exclude EU citizens from receiving social assistance during the first three months of residence, when no conditions as to self-sufficiency are imposed. EU jobseekers can be excluded from receiving social assistance for the entire period of their job seeking – this can be longer than three months, while students can be excluded from receiving maintenance aid for studies (study grants and student loans) prior to the acquisition of a right of permanent residence. Thus, the host state can see a request for social assistance made during the first three months of residence as placing an unreasonable burden on its social assistance system leading to a termination of the right to reside based on Article 6. However, this provision is relevant only for economically inactive EU citizens as EU workers will be able to rely on Article 45(2) TFEU and Article 7(2) of Regulation 492/2011 and claim equal treatment with nationals of the host state when it comes to social assistance. The possibility to terminate Article 6 rights is equally irrelevant for EU jobseekers who based on Article 14(4)(b) and its interpretation by the CJEU in the *Alimanovic* case enjoy a right of residence stemming from job seeking as long as they can show that they are looking for a job and have a reasonable chance of finding one.[3] Expulsion is equally not possible as long as job seeking is ongoing.

The right of residence for longer than three months is retained as long as the conditions set out in Article 7 concerning worker/self-employed status or sufficient resources and comprehensive sickness insurance continue to be met.[4] This aspect has become increasingly problematic for economically inactive and EU citizens with fragmented work-life histories plagued by unemployment and those working on short-term or zero-hour contracts (Mantu and Minderhoud 2019; FEANTSA

3 CJEU 15 September 2015, C-67/14, *Alimanovic*, EU:C:2015:597.
4 Article 14(2) Directive 2004/38.

2019; O'Brien, Spaventa and de Coninck 2016). This is the profile of a large part of CEE citizens working in the Netherlands. Such citizens have problems meeting the conditions attached to the status of EU worker or self-employed person, or alternatively the sufficient resource condition attached to Article 7. Asking for social benefits becomes a first step towards being considered by the administration as an unreasonable burden, which leads to the termination of EU residence rights (Mantu and Minderhoud 2019: 313).

A recurring issue in CJEU jurisprudence is whether sufficient resources can be derived from social benefits paid by the host state to economically inactive citizens or jobseekers and with what consequences for the right to reside. This is explained by several factors: the ambiguous rules contained by Directive 2004/38, including the lack of a clear definition of the notions of 'unreasonable burden' and 'sufficient resources', the trend towards restricting access to social assistance for EU citizens in several Member States, and the reclassification of mixed social security benefits as social assistance (Minderhoud and Mantu 2017). The CJEU has recognised the right of the host Member State to end the right of residence of the person concerned, but added that this should not be or become 'the automatic consequence of relying on the social assistance system'.[5] Between 2013 and 2016, five important CJEU judgments have been delivered on this topic (*Brey, Dano, Alimanovic, Garcia-Nieto* and *Commission v UK*), which are generally interpreted as minimizing the principle that there should be a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States resident there.[6] At the heart of these cases is the question whether a host state can consider an application for social assistance as indication that the EU citizen does not fulfil the condition as to sufficient resources and consider that no right to reside based on EU law exists, or whether the state must perform an individual assessment before reaching such a conclusion. The Court's responses have varied from individual assessment is necessary in *Brey*, to no individual assessment beyond the rules expressly contained in Directive 2004/38 in *Dano, Alimanovic* and *Garcia-Nieto*. The Court's recent jurisprudence equally shows a resurgence in cases discussing whether a person meets the conditions of the definition of EU worker or self-employment and the retention of such statuses under Article 7(3) of Directive 2004/38 since these categories of EU citizens enjoy equal treatment and cannot have their right of residence terminated or be expelled for claiming benefits.[7]

5 CJEU 20 September 2001, C-184/99, *Grzelczyk*, EU:C:2001:458, para 43; CJEU 7 September 2004, C-456/02, *Trojani*, EU:C:2004:488, para 3.

6 CJEU 19 September 2013, C-140/12, *Brey*, EU:C:2013:565; CJEU 11 November 2014, C-333/13, *Dano*, EU:C:2014:2358; CJEU 15 September 2015, C-67/14, *Alimanovic*, EU:C:2015:597; CJEU 25 February 2016, C-299/14, *Garcia-Nieto*, EU:C:2016:114; CJEU 14 June 2016, C-308/14, *Commission v. United Kingdom*, EU:C:2016:436.

7 CJEU 20 December 2017, C-442/16, *Gusa*, EU:C:2017:1004; CJEU 11 April 2019, C-483/17 *Tarola*, EU:C:2019:309.

EU citizens who have acquired a right of permanent residence can have that right terminated only in the situation expressly listed in Article 16(4), namely through absence from the host Member State for a period exceeding two consecutive years. Previous research has shown that several Member States are policing the acquisition of the right of permanent residence in light of its unconditional nature by checking more thoroughly the legality and continuity of residence leading to the acquisition of Article 16 rights. Such policing does not *per se* occur during the five years of initial residence; rather, as in the Netherlands, checks occur when the EU citizen claims social rights as a permanent resident entitled to full equal treatment with nationals of the host state (Minderhoud 2018).

4.2. Terminating residence followed by an expulsion order

Article 14 of Directive 2004/38 reflects the difference between the adoption of a decision to terminate the right to reside and the adoption of an expulsion measure or of an exclusion order. Besides setting the conditions for the retention of the right to reside, Article 14 lists situations in which the host state is not allowed to adopt an expulsion measure against workers, self-employed persons and jobseekers where no public policy, public security or public health considerations are at stake. *Per a contrario*, in cases of economically inactive citizens, the host state may adopt an expulsion measure because the EU citizen or her family members became an unreasonable burden on the social assistance system of the host state, provided that such a measure is not automatically adopted.

Conceptually, it is possible, and, not unthinkable, for a host state to adopt a measure terminating residence without adopting an expulsion measure, too. This seems to be the practice in Belgium, where large numbers of EU citizens had their residence rights terminated on grounds of failure to meet the self-sufficiency condition attached to Article 7 rights but no expulsion measure was adopted against them. They were invited to leave Belgium, while enforcement was not considered by the authorities (Valcke 2020). The explanation is linked with the fact that Directive 2004/38 allows the Member States to adopt an exclusion order only in respect of an EU citizen against whom an expulsion measure was adopted on grounds public policy or public security (Article 15(3)). Thus, an EU citizen who no longer meets the conditions of Article 7 can have her right of residence terminated, an expulsion measure can be adopted against her, but no exclusion order can be adopted leading to the situation where the EU citizen can re-enter the host state. Empirical research done by Heindlmaier on state practices in Austria and France shows that national authorities are aware of the limiting power of EU law and unwilling to waste their resources on EU citizens (Heindlmaier 2020). TCNs over whom national authorities retain more power and against whom entry bans can be issued are seen as a more suitable and acceptable target when it comes to justifying spending scarce resources.

4.3. Dutch legal rules and practices

After the implementation of Directive 2004/38 in the Dutch legislation, the Dutch Aliens Act Implementation Guidelines (Vc)[8] provide detailed information in the form of a sliding scale about when a demand on public funds - consisting of an application for social assistance in accordance with the Dutch Social Assistance Act (now called Participation Act) - results in the termination of the EU citizen's lawful residence by the immigration authorities (IND). The sliding scale constitutes the Dutch attempt to implement effectively the ambiguous nature of Directive 2004/38, balancing between the condition of sufficient resources and the possibility of access to social assistance benefits as long as this does not become an unreasonable burden on the Dutch social assistance system. The policy's central idea is that the longer an EU citizen is residing legally in The Netherlands, the longer she can ask for a social assistance benefit without losing her right of residence (see Table 1). The sliding scale is relevant only for economically inactive EU citizens. EU workers cannot have their right of residence terminated for asking supplementary social assistance, while EU jobseekers have no entitlement to social assistance benefits.

Each application for social assistance during the first two years of residence is considered unreasonable and, in principle, will result in termination of residence. In this scenario, the IND will assess the appropriateness of the request while considering the following circumstances of each case: the reason for the inability to make a living, its temporary or permanent nature, ties with the country of origin, family situation, medical situation, age, other applications for (social) services, the extent of previously paid social security contributions, the level of integration and the expectation for future social assistance needs. These circumstances refer partially to the circumstances mentioned in recital 16 of Directive 2004/38. The sliding scale reflects the fact that an application for social assistance can concern financial benefits to cover fully the EU citizen's living expenses or only to supplement insufficient resources.

8 Vreemdelingencirculaire B 10/2.3.

Table 1: Sliding scale as of 1 January 2020

Residence	More than supplementary	Supplementary
< 2 years	Any recourse	Any recourse
> 2 year	2 months or more	3 months or more
> 3 years	4 months or more	6 months or more
> 4 years	6 months or more	9 months or more
Entire period	During subsequent years	15 months within 3 years of residence

Source: Implementation Guidelines of the Dutch Aliens Act B 10/2.3 and Kramer (2017)

The Dutch government has explored the possibility of tightening the rules around social assistance to ensure that no benefits are paid out where doubts exist as to the legality of residence. In practice this issue can be complex: local authorities are responsible for deciding on entitlement to social assistance, while the IND decides on the legality of residence. In some cases, the municipalities decided themselves that the application for a benefit leads to the loss of the right of residence, and therefore did not provide any social assistance at all. According to the Central Appeals Tribunal (the highest court in social security cases) this is not correct.[9] While the municipality is competent to decide on the grant of a social assistance benefit, the competent authority to decide on the legality of residence is the IND. Municipalities have to assume the lawfulness of residence as long as the immigration authorities have not taken a decision on the lawfulness of residence in light of the request for social assistance. Municipalities are obliged to report to the IND the granting of social assistance benefits to EU citizens who reside between 3 months and 5 years in the Netherlands. Only from the moment the IND decides to withdraw the right of residence, the municipality can stop the social assistance benefit. Kramer's research has shown that to decide on the lawfulness of residence, the IND often sends a letter listing 26 questions concerning the personal situation of the EU citizen, ranging from their place of residence, family ties, medical situation etc. to the ultimate question: 'Why do you think that you are not an unreasonable burden on the public resources an why do you think that in your case termination of your right of residence is a disproportionate measure?' (Kramer 2016).

There is not much case law on this subject in the Netherlands. This might indicate that there are not many inactive EU citizens (staying less than 5 years in the Netherlands), who ask for a social assistance benefit or that the IND does not

9 Central Appeals Tribunal 18 March 2013, NL:CRVB:2013:BZ3853 and 20 January 2015, NL:CRVB:2015:57.

withdraw often the right of residence of these citizens or that EU citizens did not appeal against such a withdrawal. After the *Dano* judgment, there were some developments of a restrictive nature though. In an unpublished court case dating from September 2015, the IND used the *Dano* reasoning regarding an inactive EU citizen who had asked for a social assistance benefit, but had never searched for work.[10] According to the IND, it was current policy to consider such an EU citizen immediately as an unreasonable burden to the Dutch public funds, 'even if there was only an appeal on social assistance of one day'. Another case in which the *Dano* reasoning was used is a judgment by the District Court The Hague of 18 January 2016.[11] In this case, the Court followed the immigration authorities and ruled that the Bulgarian applicant never had a right of residence because she was unemployable due to her lack of knowledge of Dutch.

4.4. Dutch legal practice on termination of residence rights followed by expulsion

In the Netherlands, Article 14(3) Directive 2004/38 stating that 'an expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State' is implemented with a different wording. Article 8.16(1) Dutch Aliens Decree uses the words 'termination of the right of residence' instead of the words 'an expulsion measure'. The Council of State (the highest court in migration cases) has explicitly recognized this distinction in two recent judgments marking a radical change in the assessment of this right. According to the Council of State, in the Dutch implementation of Article 14(3) the decision to terminate the right of residence and the expulsion measure are interwoven. This is partly caused by the fact that in the system of the Dutch Aliens legislation the unlawfulness of residence gives the Dutch immigration authorities the competence to expel the EU citizen. In the eyes of the Council of State, the decision that there is no right of residence is therefore also an expulsion measure in the sense of Directive 2004/38. To do justice to the requirement laid down in Article 14(3) and recital 16 Directive 2004/38, a balancing of interest is therefore needed in all cases in which the immigration authorities take the decision that the right of residence of an inactive EU citizen has been terminated or had never existed.[12]

The rulings that clarified this issue concerned a Romanian and a Polish citizen, respectively, who never had sufficient means of subsistence and who were both homeless. The Romanian had appealed for a social assistance benefit, but the Polish citizen had not. Both cases are also illustrative of how the Dutch IND treats homelessness, which is not a special legal category. EU citizens who become

10 District Court The Hague 1 September 2015, case number AWB 15/4877.
11 District Court The Hague 18 January 2016, NL:RBDHA:2016:3075.
12 Council of State 7 November 2018, NL:RVS:2018:3584 and 3585

homeless fall under the regime of Article 7(1)(b) Directive 2004/38 and are treated as not having sufficient resources (any more). They can be expelled, but they do not fall under the public order regime of Article 27 (see section 5). In the above cases, the IND considered that the EU citizens had to leave the Netherlands because they never enjoyed lawful residence based on EU law. The Council of State found premature the decision of the IND to terminate the right of residence. It stated that even if there is no right of residence stemming from Article 7(1)(b) of Directive 2004/38 (anymore), an individual assessment must always be made as to whether or not the person concerned still has lawful residence, and can or cannot be expelled. This differs from the CJEU's position in the *Dano* judgment as well as from earlier Dutch jurisprudence. The Council of State's insistence on the need for individual assessment will also impact cases of EU citizens who have not met the residence conditions continuously, but only during certain periods of time. In those cases, too, there was often no balancing of interests because the IND simply stated that there was no right of residence, despite the policy rules in the Vc.

While the individual assessment is deemed essential by the Council of State, questions can be raised about how this will work in practice. In what situation would the balancing of interests be to the advantage of the EU citizen? The Council of State refers in this context to the CJEU cases in *Brey*, *Vomero* and *Garcia-Nieto*, but not to *Dano* and *Alimanovic*, where such a balancing of interests was expressly not considered necessary. According to a recent judgment of the District Court of Rotterdam, this balancing of interests means motivating that the EU citizen places an unreasonable burden on the social assistance system.[13] The Council of State argues that if the balancing of interests is in favour of the EU citizen, this means that he cannot be expelled and is still deemed to have lawful residence in the Netherlands. The question which then arises is what the nature and basis of that lawful residence is. Van Melle and Van Houwelingen (2019) propose that these inactive EU nationals be granted a right of residence based on Article 20 or 21 TFEU since Directive 2004/38 would not apply to them. We have doubts about this construction. In our view the right of residence in the situation outlined above is still derived from Directive 2004/38. Although the EU citizen qualifies as economically inactive, the given income is apparently sufficient because despite a stated shortage of it, the EU citizen may remain with those resources. This is a plausible solution because there is no fixed resource requirement in EU law (Art 8(4) Directive 2004/38). Another solution would be less logical, because if, according to the IND, 'the conditions were never met', then there is no analogous right of residence based on Article 21 TFEU as in the *O.&B.* case[14], nor does expulsion lead to the departure from the territory of the Union as a whole, as is required for a right of residence on the basis of Article 20 TFEU.

13 District Court The Hague 19 April 2019, AWB 18/4352.
14 CJEU 12 March 2014, C-456/12, *O&B*, EU:C:2014:135.

Another possibility would be residence based on Article 7 EU Charter by analogy with Article 8 ECHR. Except, this may reflect problems with the case law in *Dano* and *Alimanovic*, where EU citizens were considered to fall outside the scope of the Charter if they did not meet the conditions set out in the Directive. The legal basis upon which such EU citizens may nonetheless remain resident is relevant for the possibility to acquire permanent residence status under Directive 2004/38, which would then open the way towards full equal treatment in relation to social benefits and increased protection against expulsion as well as in relation to the treatment of their family members. For example, although the immigration authorities are authorised to review the application of Article 8 ECHR *ex officio* in the event of termination of residence as a Union citizen, a successful appeal to Article 8 ECHR does not result in the persons concerned having lawful residence as an EU citizen.[15]

In September 2019, the Dutch Council of State has asked the CJEU to clarify the effects of an expulsion decision on the right of an EU citizen to return to that state. The case concerns a Polish national who was expelled from the Netherlands in 2018 because he did not have sufficient resources and therefore did not have legal residence under Article 7(1)(b) Directive 2004/38.[16] The Polish citizen stayed with friends in Germany for less than 4 weeks and then returned to the Netherlands where he was arrested and detained. The Council of State had to judge on the lawfulness of this detention in light of Directive 2004/38 and decided to ask preliminary questions to the CJEU for clarification of the situation. In summary, the Council of State wants to know whether the decision that a EU citizen has to leave the Netherlands is complied with when the EU citizen leaves the Netherlands within the designated period. And if so, does the individual have a legal residence immediately upon return? Alternatively, how long should he stay outside of the Netherlands?[17]

5. Scenario 2: Restricting and terminating residence rights on grounds of public policy, public security and public health grounds

5.1. The EU rules

Directive 2004/38 allows the Member States to restrict the right of movement and residence of EU citizens on grounds of public policy, public security or public

15 Council of State 21 February 2019, NL:RVS:567.
16 Council of State 25 September 2019, NL:RVS:2019:3262.
17 Request for a preliminary ruling from the Dutch Council of State, lodged on 30 September 2019, Case C-719/19.

health (Article 27(1)). Restrictions are not limited to measures terminating residence rights, and can include the refusal to allow exit or entry, the refusal to issue/renew a residence certificate or card, expulsion measures as well as exclusion orders or entry bans that prevent the EU citizen from re-entering the host state. Article 27 prevents the Member States from legality conflating public policy or public security with economic concerns, for example by attempting to expel EU citizens claiming welfare rights or unemployed EU citizens as a matter of public policy or public security. Article 27 clearly states that 'these grounds shall not be invoked to serve economic ends.'[18] It further establishes a series of material guarantees that Member States must respect as a matter of EU law when restricting the right of residence. They include the principle of proportionality, the requirement that any measure should be based on the personal conduct of the person concerned, the threat posed by the individual must be genuine and present, previous criminal convictions are to be considered insofar as they are evidence of a personal conduct constituting a present threat to public policy and the ban on general preventive measures. The Court has further clarified that concepts of public policy and public security need to be interpreted strictly and cannot be determined unilaterally by the Member States, although they enjoy some flexibility in determining the meaning of the two terms. Public health is strictly defined in Directive 2004/38 as linked to illnesses with epidemic potential according to the World Health Organization or other infectious diseases or contagious parasitic diseases if restrictive measures are applicable to own national as well.

The strength of the protection enjoyed by EU citizens against expulsion is linked with the length of their residence and the level of integration in their host state. Concerning the length of residence, Article 28 of Directive 2004/38 provides for increased protection against expulsion after the acquisition of permanent residence – that is, after 5 years of continuous and legal residence in the host EU state. Permanent resident EU citizens and their family members can only be expelled on serious grounds of public policy and public security. Where the permanent resident EU citizen has resided for longer than 10 years in a host EU state, she can be expelled only on imperative grounds of public security – this level of protection is reserved for EU citizens only, TCN family members are excluded. Furthermore, the rules contained in Directive 2004/38 rely on the notion of 'integration' to link residence and protection from expulsion: the longer the EU citizen has resided in a host state, the better integrated she is, so that the greater the safeguards are that the citizen may rely on against expulsion.[19] The Court

18 The court has considered this issue explicitly in cases of restrictions placed on exit by the state of own nationality with a view to secure repayment of debts owed to the state (CJEU 17 November 2011, C-434/10 *Aladzhov*, EU:C:2011:750) or to a private entity (CJEU 4 October 2012, C-249/11, *Byankov*, EU:C:2012:608). Only in the latter case, the court found that such a measure clearly served purely economic ends and was prohibited by EU law, see Guild et al (2019: 266-267).

19 See for example, CJEU 23 November 2010, C-145/09, *Tsakouridis*, EU:C:2010:708, para 25.

has defined integration as based 'not only on territorial and temporal factors but also on qualitative elements, relating to the level of integration in the host member State'.[20] The commission of crimes and execution of prison sentences are examples of situations that affect negatively the integration of the EU citizen and have the potential to undermine the higher level of protection against expulsion that is reserved for permanent resident EU citizens.[21]

According to Article 32 of Directive 2004/38 the Member States can adopt an exclusion decision against an EU citizen on grounds of public policy or public security provided that the safeguards of Article 27 are also met.[22] The aim of an exclusion order is to prevent the EU citizen from re-entering the Member State that issued the order. The article does not specify if such a decision always follows an expulsion measure. The excluded EU citizen can apply to have the measure lifted at the earliest three years after the enforcement of the order validly adopted in accordance with EU law. Recital 27 of the Directive specifies that life-long exclusion bans are prohibited.[23] The EU citizen must show that there has been a material change in the circumstances which justified the exclusion decision and the Member State must reach a decision within six months of the submission. In the *Petrea* case[24], the Court has clarified that a Member State can adopt an expulsion order against an EU citizen who has returned to that state in spite of an existing exclusion order and who has seeking to have the latter order lifted as long as the examination of the application has been finally concluded. Furthermore, *Petrea* blurs the clear difference in treatment between EU citizens and TCNs in relation to removal following an expulsion measure. The Court found that the Member States might rely on the arrangements they have made to give effect to their obligations stemming from the Return Directive when it comes to removing EU citizens as long as the specific and stronger guarantees stemming from Directive 2004/38 have been respected.

5.2. Dutch rules on expulsion and exclusion on grounds of public policy, public security and public health

Articles 27, 28, 30 and 32 of Directive 2004/38 have been implemented in Article 8.22 of the Aliens Decree. The most relevant part states that the residence right can be withdrawn or terminated on grounds of public order or public security where the personal conduct of the alien forms a present, real and serious

20 CJEU 16 January 2014, C-378/12, *Onuekwere*, EU:C:2014:13, para 24.
21 See for example, CJEU 17 April 2018, C-316/16, *B.* and CJEU 17 April 2018, C-424/16, *Vomero*, EU:C:2018:256.
22 In CJEU 4 October 2012, C-249/11, *Byankov*, EU:C:2012:608, the Court has found that Article 32 applies also to national measures preventing the EU citizen from leaving his state of nationality.
23 The rule stems from CJEU 19 January 1999, C-348/96, *Calfa*, EU:C:1999:6 and was further elaborated on in CJEU 4 October 2012, C-249/11, *Byankov*, EU:C:2012:608.
24 CJEU 14 September 2017, C-184/16, *Petrea*, EU:C:2017:684.

threat to one of the fundamental interests of society. Before reaching a decision, the following issues must be considered: the duration of residence, age, health situation, the family and economic situation, the social and cultural integration in the Netherlands and the ties with the country of origin of the EU citizen. An EU citizen whose right to reside has been terminated on public order or public security grounds is obliged to leave the Netherlands independently. Where that does not happen, the Dutch authorities can seek to forcefully remove that person. Additionally, the EU citizen can be declared undesirable (Article 67 Dutch Alien Act). A pronouncement of undesirability is an administrative measure that aims to ban a person who is no longer allowed to stay in the Netherlands. In most cases a pronouncement of undesirability is imposed on someone who has committed a crime. Failure to comply with the obligation to leave stemming from the declaration of undesirability is a criminal offence (Article 197 Dutch Criminal Code).

To decide on the termination of the right to reside on public order or public security grounds, the immigration authorities rely on a sliding scale that is applicable to all aliens who have committed criminal offences in the Netherlands (Article 3.86 Aliens Decree). This scale takes the form of a table, and is used to determine whether a migrant's residence can be terminated on the basis of the conviction for a criminal offence. The table reflects the principle that migrants should enjoy greater protection against expulsion after a longer period of legal residence, and must have committed a more serious public order crime to justify termination of their legal residence. This system offers both migrants and policy makers a greater degree of legal certainty, while limiting the risk of arbitrary decisions. On the other hand, the sliding scale does not offer room to factor into the assessment changes in behaviour since the commission of the crime – and thus the present urgency of the public order threat (ACVZ 2018).

Concerning EU citizens, the sliding scale system is vulnerable to criticism in light of the principles of proportionality and effectiveness. The immigration authorities tend to skip assessing first whether the benchmarks listed in Articles 27 and 28 Directive 2004/38 (personal conduct, present and sufficiently serious threat, proportionality etc.) allow for termination of residence rights. Instead where the EU citizen has committed a crime, they often directly apply the national system of the sliding scale to terminate residence.

In practice, the legal treatment of petty criminality has raised issues. The Implementation Guidelines that are used by IND caseworkers when applying the Aliens Decree stipulate that the immigration authorities can terminate or withdraw the right to reside also on grounds of petty criminality where the EU citizen habitually commits small criminal offences that individually could not lead to the termination or withdrawal of the right to reside (VC B 10/2.3). In such cases, the nature and number of criminal offences, as well as the damage caused to society are taken into account. EU citizens who engage in petty criminality feature regularly in the information letters through which Dutch ministers inform the Dutch Parliament about the situation of EU citizens in the Netherlands. They are portrayed

as a small, but highly disruptive group of EU citizens over whom the Dutch authorities, including the municipalities in which such citizens are present, would prefer to have a much stronger grip in order to expel and remove them based on national, rather than EU law.

The current case law indicates that administrative decisions still fall short concerning the requirement of a present, real and sufficient serious threat to a fundamental interest of the society. In 2013 the Council of State gave an important judgment on how to approach the expulsion of habitual offenders.[25] In this case, the EU citizen was pronounced undesirable and therefore had to leave the country. He had committed a number of petty crimes, which individually were not enough to demonstrate that his behaviour constitutes a genuine and sufficiently serious threat to a fundamental interest of society, but taken together they fulfilled this condition. The Council of State declared the undesirability pronouncement in this case unjust, but left enough room for the immigration authorities to decide otherwise in other situations given the circumstances of the case. With a reference to the CJEU judgment in the *Polat* case,[26] EU citizens who are convicted for several petty crimes in a row can still be pronounced undesirable (and can therefore expelled) but the safeguards of Article 27 Directive 2004/38 must be applied beforehand.

6. Scenario 3: Fraud or abuse of rights

Article 35 of Directive 2004/38 allows Member States to adopt necessary measures to refuse, terminate or withdraw any right conferred by the Directive in case of abuse of rights or fraud, such as marriages of convenience. Any such measures must respect the procedural safeguards stemming from Articles 30 and 31 and the principle of proportionality. The latter requires the Member States to consider the gravity of the abuse before terminating rights, and where less restrictive measures are possible, these should be contemplated. Based on the Court's case law most cases where fraud or abuse of rights have been invoked by the Member States revolve around third country national family members who enjoy derived rights of residence or entry based on the EU citizen's exercise of free movement rights.[27] The Member States' sensitivity around marriages of convenience as a specific form of abuse or fraud has led the Commission to issue guidelines on this issue (COM(2014) 604 final). There is yet no case where an exercise of free movement rights coupled with a request for social assistance has

25 Council of State 18 June 2013, NL:RVS:2013:62.
26 CJEU 4 October 2007, C-349/06, *Polat*, EU:C:2007:581.
27 CJEU 19 October 2004, C-200/02, *Zhu and Chen*, EU:C:2004, 639; CJEU 25 July 2008, C-127/08, *Metock*, EU:C:2008:449; CJEU 18 December 2014, C-202/13, *McCarthy a.o.,* EU:C:2014:2450; CJEU 16 July 2015, C-218/14, *Singh*, EU:C:2015:476.

been addressed as a question of fraud or abuse of rights, although in some states 'welfare tourism' has been framed as abusive.

Based on the Court's interpretation of Article 35 issues, 'proof of an abuse requires first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the EU rules, the purpose has not been achieved, and, second, a subjective element consisting in the intention to obtain an advantage from the EU rules by artificially creating the conditions laid down for obtaining it.'[28] Moreover, the Court clarifies that any measure restricting rights based on Article 35 can only be justified in individual cases, no matter what the systemic concerns may be (Guild et al. 2019: 310). Measures taken on Article 35 grounds could be followed by an expulsion measure as long as the principle of proportionality is also respected.

Article 8.25 of the Dutch Aliens Decree, which implements Article 35 Directive 2004/38 uses a more general wording: 'the Minister may withdraw the right of residence if the alien has submitted wrongful information or has withheld information which should have had as a consequence the refusal of entry or residence'. This provision suggests that grounds for withdrawal of the right of residence may be used in cases that actually are not covered by Article 35 of the Directive. The policy rules on abuse of rights are set out in the Implementation Guidelines of the Aliens Act (Vc, B10/2.3). Residence permission can be withheld or withdrawn according to this section if (i) the EU citizen or his/her family member has provided incorrect information or withheld information that, if known, would have led to a refusal to grant entry or residence permission; or (ii) rights have been abused. Also listed in this enumeration is residence in another Member State as a family member of a Dutch citizen that does not qualify as genuine and effective, the so-called *Europe route*.[29] Following this enumeration, the Vc gives a description of what is meant by 'artificial behaviour', i.e. behaviour the sole purpose of which is to obtain a right of entry or residence under EU law. Although such behaviour strictly speaking satisfies conditions set out in EU law, it violates the purpose of those rules. A violation of EU law is, in any case, assumed by the IND if the sole purpose of obtaining a right of residence under Directive 2004/38 is to circumvent national laws and policy rules.

There is some Dutch case law in this respect which deals mainly with the issue of marriages of convenience. Most cases are on the establishment of conflicting statements which justify the conclusion that there were serious doubts as to the

28 *McCarthy*, para 54.

29 Under this construction a Dutch citizen resides for a consecutive period of minimal three months with a third country family member in another Member State to get upon return to the Netherlands a derived right of residence for the family member under Article 21 TFEU. This construction is of interest because the EU rules regarding this family reunification are more liberal than the Dutch national rules. See CJEU 12 March 2014, C-456/12, *O&B*, EU:C:2014:135.

nature of the marriage involved.[30] The Council of State refers in those cases usually to the 2014 European Commission's guidelines. It also emphasizes that the burden of proof is with the immigration authorities and that no systematic and random controls are allowed, referring to the *McCarthy* judgment of the CJEU.

7. Filling the gap between expulsion and effective removal

The previous sections have shown that the power to terminate the residence rights of EU citizens, to expel, and to remove such persons is limited by EU law and its operation in the Dutch legal order. The number of persons who are issued with an expulsion order and declared undesirable is relatively small. The existing data on removed EU citizens does not necessarily support the politicized and securitized discourses that circulate within the public sphere in relation to mobile EU citizens. It reflects the higher level of protection enjoyed by EU citizens in relation to expulsion and removal when compared with non-EU foreigners since Dutch authorities can issue exclusion orders only on grounds of public policy and security. It is worth stressing that the relevant part of the IND work instructions concerning the application of the rights of mobile EU citizens and their family members deals mainly with the expulsion and removal of TCN family members of EU citizens; only limited space is dedicated to the removal of EU citizens as such, reflecting their stronger position.[31]

Nonetheless, the more limited powers enjoyed by Dutch authorities in relation to EU citizens are seen as causing problems at the local level. To deal effectively with homeless EU citizens and repeat offenders, the Dutch authorities have developed an integrated approach on EU citizens who cause nuisance in public space that involves the cooperation of various central and local authorities from different departments (immigration, police, public health services etc.) with a view to take a decision on the legality of residence of the EU citizen concerned, followed by a decision to leave the Netherlands (Kramer 2017: 24). However, not all EU citizens who are issued with a decision leave and not in all cases is residence terminated. Thus, municipalities perceive as sources of nuisance EU citizens whose rights of residence have been terminated but who do not comply with the obligation to leave the Netherlands, EU citizens who are homeless or destitute, and EU citizens who engage in petty criminality but cannot be expelled. Such persons are seen as posing a threat to the security, wellbeing and cohesion of the local community.

30 See a. o. Dutch Council of State 19 October 2017, NL:RVS:2017:2847, Dutch Council of State 20 July 2016, NL:RVS:2016:2120 and 2006.

31 IND, Werkinstructies SUA, WI2018/4 Het Recht van de Europese Unie, pp. 34-35.

The general context in which this takes place is one where the Dutch government and some municipalities have minimized access to social support for EU citizens, including access to shelters for homeless EU citizens (Scholten, Engbersen, van Ostaijen and Snel 2018). Some Dutch local authorities have developed programmes to assist the voluntary return of homeless and destitute EU citizens to their states of origin as a more effective alternative to (forced) state removal, which would first require a decision terminating residence. Existing local initiatives and their relative success in removing 'unwanted' EU citizens from the street, prompted the Dutch government to set up a special fund accessible to NGOs that operate return and reintegration projects for EU citizens. This is the so-called 'subsidieregeling'[32] that mimics the policy that is pursued in relation to irregular TCNs. Its focus consists of EU citizens who although intended to reside in the Netherlands, lack sufficient resources to fend for themselves; equally, they lack resources to return on their own to their country of origin and need social support upon return. Among the better-known NGOs working with Dutch local municipalities in assisting the voluntary return of homeless EU citizens is *Stichting Barka*, a foundation that originally focused on Polish nationals in Utrecht. Currently, it cooperates with a number of municipalities in the Netherlands (Utrecht, Rotterdam and Den Haag) but it also operates nation-wide mobile intervention teams. The director of *Stichting Barka*, Magdalena Chwarścianek estimated that there are about 3000 homeless Polish nationals in the Netherlands. Based on its annual reports, the organisation helps more than 500 persons per year to return to their state of nationality.[33] About 70% of them are Polish and the rest from other CEE countries. The returns organised by Barka are voluntary, require the cooperation of the EU citizen concerned and include persons who have not yet lost their right to free movement, but whose integration in the Netherlands is deemed unsuccessful and lacking any chance. The organized return of a substantial number of Polish citizens could be interpreted as an explanation why the actual expulsion ratio for Polish nationals in Graph 2 is so low, since these EU citizens return 'just before' their residence is terminated and they are expelled. There is no information available on the effectiveness of these returns. The website of Barka provides anecdotal information about Polish returnees, living on 'care farms' in Poland. Whether Polish returnees come back to the Netherlands is unknown. As there is no information in the media, this could imply that it happens rarely.

32 Subsidieregeling ondersteuning zelfstandig vertrek 2019, Staatscourant Nr. 71321, 19 december 2018.

33 Reports are available at https://www.barkanl.org/anbi/. The following data is available: 2014 - 606 persons; 2015 – 698 persons; 2016 – 507 persons and 2017- 537 persons.

8. Conclusions

In this contribution we have presented the Dutch legal response to unwanted EU citizens. Although EU mobility has been politicized and securitized through its depiction as a source of crime and welfare abuse, the available data on the number of EU citizens who have been expelled shows a different reality. We have identified certain tensions between EU law and its transposition and application at the national level caused by the repeat attempts of Dutch administrative authorities to apply as strictly as possible EU rules. At this level of the analysis, in respect of termination of residence rights based on appeals to social assistance or on grounds of public policy and public security, we notice a constant search for the limits of the discretion left by EU law to national authorities to the detriment of the rights of mobile EU citizens. Dutch courts have played an ambiguous role, sometimes upholding the restrictive interpretation proposed by the immigration authorities, other times seeking to uphold the EU requirements of proportionality and effective rights by emphasizing the obligation of the administrative authorities to perform an individual assessment in all cases where the right to reside or the possibility to expel are questioned. The much higher number of EU citizens who are helped to return voluntarily via NGOs is in line with our view that the protection of the right to reside that mobile EU citizens enjoy is high. To terminate such a right, authorities must mobilize resources and ensure that the safeguards prescribed by EU law have been satisfied. Creating alternatives to the legal termination of residence is probably cheaper and more effective than enforcing return and has the advantage of not clogging up the administrative or the judicial systems with claims in respect of whom a higher threshold than the national one has to be met. This strategic approach to EU mobility that sees cooperation between different levels and across different branches of government and civic society deserves further investigation as it raises complex questions about the roles of law and policy in the governance of EU mobility, issues of responsibility stemming from the exercise of EU mobility rights and the best way to ensure that the rights of EU citizens are effectively respected in practice. Our analysis shows that the higher threshold of protection applicable to EU citizens has an impact on how the national authorities engage with their mobility despite its politicized image.

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