INSIGHT

New Clarifications on Ending the Union Citizen's Right of Residence: The Grand Chamber Decisions of the European Court of Justice of 22 June 2021 in C-718/19 and C-719/19

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Abstract: In two Grand Chamber decisions of 22 June 2021 (case C-718/19 *Ordre des barreaux francophones and germanophone and Others* ECLI:EU:C:2021:505; and case C-719/19 *Staatssecretaris van Justitie en Veiligheid* ECLI:EU:C:2021:506), the European Court of Justice (ECJ) delivered new clarifications on ending the Union citizen's right of residence. The ECJ clarified, on the one hand, what measures EU Member States can take to effectively enforce an expulsion order against Union citizens and, on the other hand, in which cases they must grant a returning Union citizen a new right of residence. In addition, the Court confirmed its view expressed in the *Petrea* case, according to which national law implementing EU migration rules for third-country nationals may also apply to Union citizens, provided that their situation is comparable.

Keywords: European Court of Justice – Union citizenship – right to free movement – Directive 2004/38 – Directive 2008/115 – expulsion order.

I. Introduction

Even more than 15 years after the adoption of the Directive 2004/38,[1] questions about its interpretation and application continue to arise, calling the European Court of Justice (ECJ) to the bench. The numerous questions referred to the Court for preliminary rulings illustrate not only the importance of this Directive for many Union citizens, but also the complexity of their right to move and reside freely within the European Union (EU).

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[1] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

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Many prominent decisions of the ECJ on the right to free movement of Union citizens as laid down in art. 21 of the Treaty on the Functioning of the European Union (TFEU) and concretised in the Directive 2004/38 concern the conditions that must be met in order to obtain a residence right,[2] as well as associated rights, in particular the right to family reunification[3] and access to social benefits.[4] In contrast, the two decisions of the Grand Chamber of the ECJ of 22 June 2021, which are to be discussed here, provide answers to referred questions with regard to ending the right of residence. Union citizens may lose their right of residence if they no longer satisfy the conditions set out in the Directive 2004/38 or if they are deprived of this right on grounds of public policy, public security or public health. The former situation is covered by art. 15(1) of Directive 2004/38,[5] the latter by art. 27 of that Directive.[6]

For both cases, in which the right of residence ends, the ECJ judgments analysed here provide new clarifications. Case C-718/19 *Ordre des barreaux francophones and germanophone and Others*[7] concerns the termination of a Union citizen's right to reside on grounds of public policy pursuant to art. 27 of the Directive 2004/38, in particular with regard to measures to ensure the enforcement of such an expulsion order as provided for in Belgian law since 2017.[8] The second judgment, in case C-719/19 *Staatssecretaris van Justitie en Veiligheid*,[9] gives answers to the question on the temporal effects of an expulsion order under art. 15(1) of the Directive 2004/38 and the related question on the possibility for the Union citizen to return after such a decision and enjoy a new right of residence in that host Member State.[10] In particular with regard to the latter aspect, the ECJ has clarified an important issue for migration authorities, namely how to deal with returning Union citizens. However, in the absence of internal border controls in the

[2] See *e.g.* case C-333/13 *Dano* ECLI:EU:C:2014:2358; as regards the right of permanent residence *e.g.* case C-162/09 *Lassal* ECLI:EU:C:2010:592.

[3] See *e.g.* case C-200/02 *Zhu and Chen* ECLI:EU:C:2004:639; case C-34/09 *Ruiz Zambrano* ECLI:EU:C:2011:124; case C-256/11 *Dereci and Others* ECLI:EU:C:2011:734; case C-673/16 *Coman and Others* ECLI:EU:C:2018:385.

[4] See *e.g. Dano* cit.; case C-67/14 *Alimanovic* ECLI:EU:C:2015:597.

[5] See case C-94/18 *Chenchooliah* ECLI:EU:C:2019:693 para. 74.

[6] Cf. case C-719/19 *Staatssecretaris van Justitie en Veiligheid (Effets d'une décision d'éloignement)* ECLI:EU:C:2021:104, opinion of AG Rantos, para. 44.

[7] Case C-718/19 *Ordre des barreaux francophones and germanophone and Others (Mesures préventives en vue d'éloignement)* ECLI:EU:C:2021:505.

[8] For a general critical analysis of Belgian law and practice of issuing expulsion orders against EU citizens see A Valcke, 'Expulsion from the "Heart of Europe": The Belgian Law and Practice Relating to the Termination of EU Residence Rights' in S Mantu, P Minderhoud and E Guild (eds), *EU Citizenship and Free Movement: Taking Supranational Citizenship Seriously* (Brill Nijhoff 2020) 155-189.

[9] *Staatssecretaris van Justitie en Veiligheid (Effets d'une décision d'éloignement)* cit.

[10] See for a detailed critique of the opinion of Advocate General Rantos in this case D Kramer, 'On the Futility of Expelling Poor Union Citizens in an Open Border Europe' (2021) European Papers www.europeanpapers.eu155-165.

EU, it is generally difficult to track the individual cross-border movements of Union citizens. The present case came before the courts because the Union citizen in question did not disappear under the radar of the authorities due to his criminal activities. The factual background and the decision of the ECJ in C-718/19 will be outlined (section II) before presenting this second to case (section III). Subsequently, both judgments will be commented on together (section IV).

II. Case C-718/19

II.1. Legal and factual background

Case C-718/19 concerns a preliminary ruling handed down in response to two questions referred by the Belgian Constitutional Court (*Cour constitutionnelle*).[11] The questions arose in judicial proceedings of two actions for annulment in whole or in part of the Belgian law of 24 February 2017 amending the Law of 15 December 1980 on the admission, residence, establishment and removal of foreign nationals in order to enhance protection of public policy and national security. The law contains provisions for both third-country nationals and Union citizens and their family members. As regards the former, the Belgian law implements the Directive 2008/115 (also known as "the Return Directive").[12] Art. 7(3) of this Directive allows Member States to impose measures on third-country nationals aimed at avoiding the risk of absconding after a return decision has been issued, such as reporting to the authorities, depositing a financial guarantee, submitting documents or staying at a certain location. Unless other, less far-reaching measures are effective, Member States may detain third-country nationals in accordance with art. 15 of the Directive 2008/115 in order to prepare their return and carry out their removal for a maximum period of six months, and in very special circumstances for a maximum period of 12 months. The Belgian law of 24 February 2017 introduced similar provisions for Union citizens and their family members.

The organisations *Ordre des barreaux francophones and germanophone* and *Association pour le droit des Étrangers* fought the 2017 law before the Belgian Constitutional Court, arguing that it conflicts with Union law. They challenged, first, the measures to avoid the risk of Union citizens absconding during the period allotted to them to leave the territory of the host Member State or during any extension of that period and, second, the provisions that allow Union citizens who have not complied with an expulsion decision taken on grounds of public policy or public security to be detained for a maximum period of eight months in order to ensure the enforcement of that decision.

[11] For the factual background see *Ordre des barreaux francophones and germanophone and Others* cit. paras 17-29.

[12] 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.

The Belgian Constitutional Court pointed out in its request for a preliminary ruling that these new provisions correspond to those for third-country nationals in implementing the Directive 2008/115. However, it had doubts as to whether these new rules were compatible with the right of free movement of Union citizens. The Constitutional Court therefore first asked whether arts 20 and 21 TFEU and the Directive 2004/38 preclude a national provision that – similar to one transposing art. 7(3) of the Directive 2008/115 – provides that measures to prevent the risk of absconding may be taken in respect of Union citizens and their family members in the period allowed for them to leave the territory after an expulsion order on grounds of public policy has been issued. The second question concerned the compatibility of the 2017 Belgian law with arts 20 and 21 TFEU and the Directive 2004/38 with regard to the possibility of detaining Union citizens and their family members who have not complied with an expulsion order for the purpose of enforcing that decision, with a maximum detention period of eight months.

II.2. Judgment of the Grand Chamber

In the Grand Chamber judgment of 22 June 2021, the ECJ combined the two questions raised by the Belgian Constitutional Court and, referring to art. 27 of the Directive 2004/38, stated at the outset that they did not concern the expulsion order as such, but rather the measures provided for its enforcement.[13] The Court emphasised that the Directive 2004/38 does not contain any provisions on whether Member States may provide for measures to ensure expulsion within the time limit set, or whether detention may be provided for after the expiry of that period.[14] In the absence of relevant Union law, it is for the Member States to adopt rules on measures to ensure the execution of an expulsion order based on art. 27 of the Directive 2004/38. While the ECJ accepts the alignment of national rules for Union citizens with those for third-country nationals, as has been done in Belgium, it also pointed out that Union law must be respected.

Against this background, the Court examined in a second step whether the Belgian provisions introduced by the 2017 act are contrary to Union law. In line with the opinion of Advocate General (AG) Rantos,[15] the Court first held that both the Belgian rules on the possibility of imposing preventive measures to avoid the risk of Union citizens absconding and the rules on the detention of Union citizens for the purpose of their removal from the host Member State constitute restrictions on the Union citizen's right to move and reside freely as laid down in arts 20 and 21 TFEU and concretised in the Directive 2004/38.[16] Although Union citizens in such situations no longer have a right of

[13] *Ordre des barreaux francophones and germanophone and Others* cit. para. 31.

[14] *Ibid*. para. 33 ff.

[15] Case C-718/19 *Ordre des barreaux francophones and germanophone and Others* ECLI:EU:C:2021:103, opinion of AG Rantos, paras 68-72 and 88.

[16] *Ordre des barreaux francophones and germanophone and Others* cit. paras 40-44.

residence in that host Member State, the Court recognised a restriction on freedom of movement in other EU Member States.

In the main part of the judgment, the Court examined whether the restrictions on the right of free movement imposed by Belgian law were justified.[17] Since the expulsion order itself is based on art. 27 of the Directive 2004/38, the Court also reviewed the justification of the measures taken to enforce such a decision in the light of that provision, so that such measures must be based on grounds of public policy or public security and comply with the principle of proportionality. Turning first to the Belgian provision on measures to avoid the risk of the citizen absconding during the period guaranteed for voluntary departure, the Court acknowledged that these measures, like the expulsion order itself, may be justified on grounds of public policy.[18] Elaborating further on this issue, the ECJ emphasised that the Directive 2004/38 and the Directive 2008/115 concern different beneficiaries. While the latter addresses third-country nationals, the former concretises freedom of movement for Union citizens, which, as the Court pointed out, is "one of the fundamental freedoms of the internal market, as affirmed in Article 45 of the Charter of Fundamental Rights".[19] Therefore, measures to prevent Union citizens from absconding must not be less favourable than the measures applicable to third-country nationals in the implementation of the Directive 2008/115. The ECJ left it to the referring court to determine whether this is the case under Belgian law, while pointing out that the principle of proportionality must be followed when imposing such measures.

Next,[20] the ECJ turned to the Belgian provision under which a Union citizen or his or her family members may be detained for a maximum period of eight months for the purpose of expulsion if they have not left Belgium within the permitted time limit, while noting that these correspond to the rules for third-country nationals. If the detention measure is for security reasons, the Court affirms a legitimate reason for such restriction of freedom of movement. However, the Court denied the proportionality of the Belgian regulation. In its reasoning, the Grand Chamber distinguished between the situation of a Union citizen and that of a third-country national. Referring to the opinion of AG Rantos,[21] the Court stated that Member States have mechanisms for cooperation in place and, due to the principle of loyal cooperation and mutual trust, do not face the same difficulties as in a case of expulsion to a third country. Further, the practical difficulties in organising the return journey are, according to the Court, not comparable. Finally, in the case of Union citizens – in contrast to third-country nationals – the nationality is known, otherwise they would have not been able to invoke the free movement

[17] *Ibid*. paras 45-72.
[18] *Ibid*. paras 48-58.
[19] *Ibid*. para. 54.
[20] *Ibid*. paras 59-72.
[21] *Ordre des barreaux francophones and germanophone and Others*, opinion of AG Rantos, cit. para. 94.

right. Based on these considerations, the ECJ held that Union citizens and third-country nationals cannot be treated equally with regard to the duration of detention.[22]

In conclusion,[23] the Grand Chamber of the ECJ decided that measures provided for in national law to prevent the risk of a Union citizen and his or her family members absconding during the period allowed for that person to leave the territory of the host Member State are in line with arts 20 and 21 TFEU and the Directive 2004/38, provided that such measures comply with art. 27 of the Directive 2004/38 and are no less favourable than those provided for in the Directive 2008/115. By contrast, the Court declared incompatible with Union law those Belgian provisions which impose on Union citizens and their family members who do not comply with an expulsion order a detention of the same duration as laid down in the Directive 2008/115.

III. Case C-719/19

III.1. Factual background

Case C-719/19 also concerned the expulsion of a Union citizen but was based on a specific case.[24] On 25 September 2018, the State Secretary for Justice and Security of the Netherlands issued a decision to expel FS, a Polish national, as he no longer fulfilled the requirements for a right of residence of more than three months under art. 7 of the Directive 2004/38. The expulsion order granted a period of four weeks for voluntary departure. FS thus had until 23 October 2018 to leave the Netherlands. FS might have left the Netherlands on 23 October at the latest, as the German police arrested him for shoplifting that day. He claimed that he was staying in Germany near the Dutch border but was travelling to the Netherlands every day to buy marijuana. On 21 November 2018, FS entered the Netherlands to comply with a court summons for 23 November 2018. On the day before the court hearing, FS was arrested and taken into custody for theft at a supermarket in the Netherlands. The State Secretary placed FS in administrative detention on grounds of public policy, as there was a risk that FS would evade immigration control and prevent the preparation of his departure or expulsion procedure. FS filed a complaint against the detention decision, which was dismissed as unfounded in a judgment of 7 December 2018. FS appealed against this judgment. In addition, FS filed an objection against his expulsion to Poland on 21 December 2018. FS's expulsion was provisionally prohibited, and the custodial measure lifted.

[22] In contrast, AG Rantos concluded, although he too assumed that the expulsion of a Union citizen is easier than that of a third-country national, that in general the same maximum period of detention may be applied, provided that the principle of proportionality is respected in the individual case (*ibid.,* para. 94 ff.).

[23] *Ordre des barreaux francophones and germanophone and Others* cit. para. 73.

[24] For the factual background see *Staatssecretaris van Justitie en Veiligheid and Others* cit. paras 34-56.

With FS's appeal still pending and the question of a right to compensation in the event of unlawful detention arising, the Dutch Council of State (*Raad van State*) referred the following questions to the ECJ for a preliminary ruling: is art. 15 of the Directive 2004/38 to be interpreted as meaning that an expulsion order issued pursuant to that provision is fully enforced and thus no longer has any legal effect if the Union citizen has left the territory within the set time limit? If the ECJ answered this question in the affirmative, the referring court wanted to know whether the Union citizen had a right of residence under art. 6(1) of the Directive 2004/38 after returning to the host Member State, or whether the host Member State may issue a new expulsion order. If the ECJ answered the first question in the negative, the referring court asked whether the Union citizen must stay outside the territory of the host Member State for a certain period of time, and how long that period must be.

III.2. Judgment of the Grand Chamber

In the second Grand Chamber decision of 22 June 2021, the ECJ noted in its preliminary remarks that the relevant question was under what circumstances a Union citizen who has been subject to an expulsion order pursuant to art. 15(1) of the Directive 2004/38 may claim a new right of residence pursuant to art. 6 of that Directive in the same host Member State.[25] In answering this question, the Court focused on three aspects: first, is the mere physical departure of the Union citizen from the host Member State sufficient for the expulsion order issued against him or her to be considered fully enforced so that it can no longer be relied upon; second, if physical departure alone is not sufficient, what are the criteria for verifying the Union citizen's absence; and third, what are the consequences of non-enforcement of an expulsion order.[26]

As regards the first question,[27] the Court held that neither the wording of art. 15(1) of the Directive 2004/38 nor that of other provisions provide an answer. Consequently, the Court examined the objective of the former provision and its context, as well as the overall aim of the Directive. In its view, the mere physical departure of the Union citizen cannot be sufficient for him or her to be deemed to have complied with an expulsion order under art. 15 of the Directive 2014/38, in light of the aim and purpose of that Directive, in particular its arts 6 and 7 in conjunction with art. 14 and the 10th recital. If mere physical departure were sufficient, the Union citizen could invoke art. 6 of the Directive 2004/38 continuously and without time limit, thereby circumventing the conditions of art. 7 of the Directive, as the Court emphasised. In support of this interpretation, the Court also invoked the balance sought by the Directive between: on the one hand, the right of free movement and residence of Union citizens and their family

[25] *Ibid*. para. 62.
[26] *Ibid*.
[27] *Ibid*. paras 64-82.

members and, on the other hand, the protection of the host Member State's social assistance system, insofar as Union citizens shall not become an unreasonable burden to the host Member State. Finally, the Court brought into play the effectiveness of the right of permanent residence pursuant to art. 16 of the Directive 2004/38, which could be undermined if Union citizens are able to reside permanently after several temporary stays without having satisfied the conditions for such permanent residence.

In addition to these arguments concerning the gradual system of residence rights under the Directive 2004/38, the Court followed the argumentation of the Netherlands government, which pointed out that the provision of art. 30(3) of the Directive requiring a minimum period of one month from notification of the expulsion order to comply with that decision can only be understood as meaning that mere physical departure from the host Member State is not sufficient to comply with the expulsion decision. The Grand Chamber of the ECJ then concluded: "[The] Union citizen must not only physically leave that territory, but also have genuinely and effectively terminated his or her residence on that territory, with the result that, upon his or her return to the territory of the host Member State, his or her residence cannot be regarded as constituting in fact a continuation of his or her preceding residence in that territory".[28]

Although the ECJ left it to the referring court to decide on the case at hand, it went on to identify some criteria for assessing whether an expulsion order has been complied with.[29] In this regard, the Court did not follow the opinion of the Netherlands government, which asked for a period of three months outside the host Member State to be considered as having genuinely and effectively terminated residence there. Instead, the Court took the same view as the Advocate General,[30] namely that this would constitute a condition for the right to free movement that is not required by either the Treaties or the Directive 2004/38. For this reason, the Court held that the length of time spent outside the host Member State cannot itself be decisive but can only be considered as one of the factors relevant for assessing whether the Union citizen has "genuinely and effectively terminated" his or her residence. The Court went on to elaborate on the "factors evidencing a break in the links between the Union citizen concerned and the host Member State",[31] such as organisational steps in the host Member State, *i.e*. removal from the population register or the termination of contracts, as well as evidence that the Union citizen has moved the "centre of his or her personal, occupational or family interests to another State".[32]

[28] *Ibid*. para. 81.

[29] *Ibid*. paras 83-93.

[30] Case C-719/19 *Staatssecretaris van Justitie en Veiligheid and Others* ECLI:EU:C:2021:104, opinion of AG Rantos, paras 88-93; see the critique by D Kramer, 'On the Futility of Expelling Poor Union Citizens in an Open Border Europe' cit. 162 ff.

[31] *Staatssecretaris van Justitie en Veiligheid and Others* cit. para. 91.

[32] *Ibid*. para. 93.

In the last section of its judgment,[33] the Court dealt with the consequences of a Union citizen's failure to comply with an expulsion decision by not terminating genuinely and effectively his or her residence in the host Member State. In such a case, the Member State is not, as the ECJ concluded, obliged to issue a new expulsion decision but may rely on the existing one. However, if circumstances have changed, the Member State must reassess whether a right of residence under art. 7 of the Directive 2004/38 is to be granted.[34]

IV. New clarifications on ending the Union citizen's right of residence

The judgments under review deal with ending the Union citizen's right of residence. A related issue, on which the ECJ has already ruled several times, is the concept of public policy and public security as legitimate grounds to expel Union citizens and their family members under arts 27 and 28 of the Directive 2004/38.[35] According to this settled case law, although the concept of public policy is in principle to be determined "in accordance with the Member State's national needs and may vary from Member States to another", it requires "a genuine, present and sufficiently serious threat to one of the fundamental interests of society", with the personal conduct of the individual concerned being the only relevant factor, so that general prevention arguments do not apply.[36] With regard to the expulsion ground of public security, the Court clarified that it "covers both a Member State's internal and its external security".[37] Moreover, the Court has already had the opportunity to rule on the question of how the duration of residence, *e.g.* in a case concerning periods of detention, is to be counted for the purpose of granting enhanced protection under art. 28(3) of the Directive 2004/38.[38]

Less attention has been paid so far in ECJ case law to art. 15 of the Directive 2004/38, which contains rules on the termination of the right of residence for reasons

[33] *Ibid*. paras 94-103.

[34] Cf. *Staatssecretaris van Justitie en Veiligheid and Others*, opinion of AG Rantos, cit. para. 80 ff.

[35] See further *e.g.* S Coutts, 'The Absence of Integration and the Responsibilisation of Union Citizenship' (2018) European Papers www.europeanpapers.eu 772-778; D Kostakopoulou, 'When EU Citizens become Foreigners' (2014) ELJ 458-460; M Meduna, '"Scelestus Europeus Sum": What Protection against Expulsion Does EU Citizenship Offer to European Offenders?' in D Kochenov (ed.), *EU Citizenship and Federalism. The Role of Rights* (Cambridge University Press 2017) 402-407; N Nic Shuibhne, 'Limits rising, Duties Ascending: The Changing Legal Shape of Union Citizenship' (2015) CMLRev 921-926.

[36] See *e.g.* case C-33/07 *Jipa* ECLI:EU:C:2008:396 para. 23 ff.; case C-348/09 *P.I.* ECLI:EU:C:2012:300 para. 33 ff.; case C-430/10 *Gaydarov* ECLI:EU:C:2011:749 paras 32-43; case C-249/11 *Byankov* ECLI:EU:C:2012:608 para. 40 ff.; case C-373/13 *T.* ECLI:EU:C:2014:2218 para. 77; case C-331/16 *K. (Right of residence and alleged war crimes)* ECLI:EU:C:2018:296 para. 40 ff.; see further E Guild, S Peers and J Tomkin, *The EU Citizenship Directive: A Commentary* (Oxford University Press 2017) 258-274.

[37] See *e.g.* case C-145/09 *Tsakouridis* ECLI:EU:C:2010:708 para. 43; *T.* cit. para. 78; *K. (Right of residence and alleged war crimes*) cit. para. 42.

[38] Case C-400/12 *G* ECLI:EU:C:2014:9.

other than public policy, public security or public health, *i.e*. in the event that a Union citizen no longer meets the requirements of arts 6 and 7 of the Directive 2004/38. In recent years, however, questions related to this provision have also been referred to the ECJ. Hence, in the 2018 *Banger* case, the Court clarified that this provision applies not only to Union citizens but also to their family members.[39] Two years ago, the Court ruled in the *Chenchooliah* case that the provisions of arts 30 and 31 of the Directive 2004/38 are applicable by analogy in the context of art. 15 only to the extent that, by their nature, they can actually be applied to decisions not based on grounds of public policy, public security or public health, with the consequence that art. 30(2), the third indent of art. 31(2) and art. 31(4) are not applicable in such cases.[40]

This very brief overview of ECJ case law on ending the Union citizen's right of residence under the Directive 2004/38 reveals the gaps that the Court has now filled with the judgments discussed here: first, how an expulsion order issued on grounds of public order or public security can be effectively enforced; and second, how long a Union citizen must reside outside the host Member State in order to regain his or her right of residence there. The bottom line of the first issue is whether the restriction on the right to free movement – "one of the fundamental freedoms of the internal market, as affirmed by art. 45 of the Charter of Fundamental Rights"[41] – caused by the enforcement of the expulsion order is justified. The Court indeed found a restriction of the right to free movement if measures to secure expulsion, such as preventive measures or imprisonment, are imposed. In its reasoning on the conformity of such measures with Union law, the principle of proportionality then played a central role.

With regard to preventive measures to secure the enforcement of an expulsion order under art. 27 of the Directive 2004/38, the Court concluded that the same measures for the expulsion of third-country nationals in accordance with art. 7 of the Directive 2008/115 are also proportionate for Union citizens. The latter should certainly not be treated less favourably than the former. Apart from that, however, the same preventive measures may be taken to avoid the risk of the citizen absconding during the period of voluntary departure following an expulsion order on grounds of public policy or public security pursuant to art. 27 of the Directive 2004/38. Consequently, by analogy with art. 7(3) of the Directive 2008/115, Member States are allowed to require Union citizens in such cases to report regularly to the authorities, to deposit a financial guarantee, to submit documents or to stay at a certain location. However, in the Court's view, the general principles as laid down in art. 27 of the Directive 2004/38 must be respected, so that each case is examined individually with respect to the threat to public policy or

[39] Case C-89/17 *Banger* ECLI:EU:C:2018:570 paras 44-49.

[40] Case C-94/18 *Chenchooliah* ECLI:EU:C:2019:693 paras 81-83; cf. D Ritleng, 'Scope and meaning of Article 15 of Directive 2004/38: Yes but no: Chenchooliah' (2020) CMLRev 1183-1200; E Guild, S Peers and J Tomkin, *The EU Citizenship Directive* cit. 186.

[41] *Ordre des barreaux francophones and germanophone and Others* cit. para. 54.

public security and the proportionality of the measures, which must not go beyond what is necessary to achieve the objective pursued. Regarding the proportionality of preventive measures, AG Rantos stated in his opinion in case C-718/19 that, for example, an obligation to stay at a certain place would only be justified in the case of a citizen at particularly high risk of absconding.[42]

Second, the principle of proportionality played the decisive role in determining whether the detention period of eight months (maximum) provided for in Belgian law in the event of non-compliance with an expulsion order is compatible with Union law. On this point, the Court distinguished between the situation of third-country nationals and that of Union citizens. However – and this must be emphasised – the ECJ did not refer here to Union citizenship as a "fundamental status" or to any other ideological understanding of Union citizenship and the rights associated with it. Rather, in its view, the difference lies in the practical difficulties of enforcing the respective expulsion order. Since the expulsion of Union citizens is easier than for third-country nationals for various reasons (the ECJ mentioned here the cooperation of Member States due to their obligation of loyal cooperation and the principle of mutual trust, the easier return journey within Europe and the citizen's nationality already having been determined, as well as the right to re-entry according to art. 27(4) of the Directive 2004/38) the same detention conditions cannot be imposed on them.[43] In the Court's view, therefore, the difference lies in the fact that the expulsion of Union citizens is easier in practice. It is striking that the ECJ argues here with practical considerations and does not declare the migration law that is applicable to third-country nationals inapplicable to Union citizens because of their status as Member State nationals. Regardless, the consequence of the Court's decision is that a maximum detention period of eight months may be lawful for third-country nationals in the application of art. 15 of the Directive 2008/115, while such a period for EU citizens is not in line with arts 20 and 21 TFEU and of the Directive 2004/38.

These two key statements of the ECJ in case C-718/19 can therefore be summarised as follows: Member States may also apply rules similar to EU migration law provisions for third-country nationals to EU citizens in areas not governed by EU law, provided that the situation of the latter is comparable to that of the former. This approach was already proposed by AG Szpunar in the 2017 *Petrea* case:

> "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

[42] *Ordre des barreaux francophones and germanophone and Others*, opinion of AG Rantos, cit. para. 80.
[43] Cf. *ibid*. para. 94.

> 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".[44]

The Court followed this view in its *Petrea* judgment, concluding that Member States may designate the same authorities and procedures for an expulsion order in the case of Union citizens as those provided for in the national implementation law of the Directive 2008/115.[45] However, it must be kept in mind that this only applies to the extent that the situation of a third-country national and EU citizen is actually comparable. In many cases, the situation of a Union citizen will require less far-reaching measures to achieve the objective pursued, such as the enforcement of an expulsion order.

In the second judgment under review, the ECJ clarified for the first time the circumstances under which a Union citizen must have terminated his or her right of residence in the host Member State with the consequence that he or she may acquire a new right of residence in that state upon return. The Court thus addressed an aspect reminiscent of the reflections of AG Sharpston in her opinion in the legendary *Ruiz Zambrano* case, in which she asked in what way Union citizens have to cross the border in order to enjoy the right to free movement and related rights such as the right of residence for family members. She wondered whether, for example, it is sufficient for EU citizens from Belgium to visit Parc Astérix in Paris once or twice, whether a day trip abroad is all it takes, or whether one or two nights must be spent in another Member State.[46] Even if the legal situation is different in the present case, the decisive question is under which circumstances one can assume an actual stay in another Member State.

Arguing by reference to the aim and context of the Directive, in particular its gradual system of residence rights, the ECJ ruled that, following an expulsion order, Union citizens must first "genuinely and effectively" terminate their stay in the host Member State in order to regain a right of residence in that State upon return. In the Court's view, the following factors are – in the context of an overall assessment taking into account all circumstances of the individual case – particularly relevant in determining whether the stay was actually and effectively terminated:

– the duration of the Union citizen's stay outside the territory of the host Member State (a few hours or days are insufficient);[47]

– the circumstances of the previous stay in the host Member State, in particular the duration of residence, the degree of integration and the Union citizen's family and economic situation there;[48]

[44] Case C-184/16 *Petrea* ECLI:EU:C:2017:324, opinion of AG Szpunar, para. 114.

[45] Case C-184/16 *Petrea* ECLI:EU:C:2017:684 paras 50-56.

[46] Case C-34/09 *Ruiz Zambrano* ECLI:EU:C:2010:560, opinion of AG Sharpston, para. 86.

[47] *Staatssecretaris van Justitie en Veiligheid and Others* cit. para. 90; cf. *Staatssecretaris van Justitie en Veiligheid and Others*, opinion of AG Rantos, cit. para. 100.

– the steps taken by the Union citizen to break his or her ties with the host Member State, such as a request to be removed from the population register, the termination of a lease contract or a contract for the provision of public services such as water or electricity (or telecommunication services), moving house or flat, deregistration from a job placement service or terminating other relationships indicating integration in that state;[49] and

– the residence status in a Member State other than the previous host state, in particular whether the Union citizen has moved the "centre of his or her personal, occupational or family interests".[50]

These criteria are relevant for assessing whether the Union citizen has genuinely and effectively ended his or her stay in the host Member State. They are therefore the flip side of the integration criteria set out in art. 28(1) of the Directive 2004/38, which are to be applied when deciding on expulsion on grounds of public policy or public security.[51] These newly developed criteria are not aimed at protecting integration, as the latter are, but at proving that the Union citizen has taken the necessary steps to end his or her stay in the previous host Member State. In the case of a revision of the Directive, it would be advisable to include these factors developed by the Court. However, the present decision already provides national authorities with concrete assessment standard to verify that an EU citizen has severed all ties with the host Member State and to decide whether they are entitled to a new right of residence. In other Union citizenship cases, the Court has not, from the outset, successfully provided clear and precise criteria for examining individual situations.[52] In this context, however, it may be difficult for the Union citizen in the individual case to prove that he or she has ended his or her stay in the host Member State, especially if he or she has only enjoyed a short stay in accordance with art. 6 of the Directive and has thus not deepened his or her ties with the host Member State. National authorities are therefore advised not to be too strict, and in particular examine the duration of the stay outside the host Member State, which should, however, exceed a few days.

V. Conclusion

Union citizenship and the rights associated with it, especially the right to free movement as laid down in art. 21 TFEU and concretised in the Directive 2004/38, are an ongoing subject in ECJ case law. With the two Grand Chamber decisions in C-718/19 and C-

[48] *Staatssecretaris van Justitie en Veiligheid and Others* cit. para. 92.

[49] *Ibid*. para. 91; cf. *Staatssecretaris van Justitie en Veiligheid and Others*, opinion of AG Rantos, cit. para. 100.

[50] *Staatssecretaris van Justitie en Veiligheid and Others* cit. para. 93.

[51] As regards the latter see further E Guild, S Peers and J Tomkin, *The EU Citizenship Directive* cit. 274-279.

[52] See for example as regards the dependency criteria in the context of the substance of rights doctrine C Neier, 'Residence right under Article 20 TFEU not dependent on sufficient resources: *Subdelegación en Ciudad Reals*' (2021) CMLRev 549-570; C Neier, *Der Kernbestandsschutz der Unionsbürgerschaft* (Nomos-Nomos 2019) 139-172.

719/19 from June of this year, the Court delivered new clarifications on ending the right of residence in the host Member State. The EU Member States now know, on the one hand, which measures they can take to effectively enforce an expulsion order against Union citizens and, on the other hand, in which cases they must grant a returning Union citizen a new right of residence.

Moreover, the ECJ confirmed its approach in the *Petrea* judgment, according to which Member States may declare their national law implementing EU migration law for third-country nationals applicable to Union citizens as well, provided that there are no explicit EU law provisions for the respective situation, and the provisions for the former are also justified with regard to the latter. Consequently, the right of free movement of EU citizens and migration law for third-country nationals converge at the national level. In some cases – and from a practical point of view – this approach may be justified and reasonable in order to facilitate the processing of residence rights by national authorities. Nevertheless, it should not be generally overlooked that nationals of EU Member States and nationals of third countries are subject to a different conception in the context of EU law: the former enjoy Union citizenship as a "fundamental status"[53] and, through the rights it confers, have a special bond not only with the EU but also with the EU Member States of which they are not nationals; while the legal status of the latter must be seen in the context of the area of freedom, security and justice and its migration law, whose ultimate purpose is to establish a common immigration policy and not – as in the case of Union citizens – the integration of EU Member States and their nationals into an ever closer union.

Finally, with the criteria for proving that a Union national has terminated his or her stay in the host Member State, the ECJ has developed a new concept, which – in contrast to previous case law on free movement rights – does not focus on integration in the host state, but on proving the severance of ties with that state. However, the point here is not to restrict the right to free movement beyond what is necessary, but to put into effect the gradual system of residence rights provided for in the Directive 2004/38. It is a fact that there is no unconditional right to free movement for Union citizens in the EU. The right to free movement is subject to conditions and restrictions. The ECJ does justice to this political decision by trying to prevent its circumvention and requiring Union citizens to have genuinely and effectively terminated their stay before they can be granted a new right of residence.

[53] This formula goes back to case C-184/99 *Grzelczyk* ECLI:EU:C:2001:458 para. 31.