“Cause tramps like us, baby we were born to run”: Untangling the effects of the expulsion of “undesired” Union citizens: FS

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"Cause tramps like us, baby we were born to run": Untangling the effects of the expulsion of "undesired" Union citizens: *FS*

Case C-719/19, *FS* v. *Staatssecretaris van Justitie en Veiligheid (Effets d'une décision d'éloignement)*, judgment of the Court (Grand Chamber) of 22 June 2021, EU:C:2021:506

1. Introduction

The Grand Chamber ruling annotated here deals with the balance between Union citizens' right to move and the power of Member States to control who resides within their territory, in an area without border checks.[1] Unlike most rulings on expulsions, this one concerns the termination – pursuant to Article 15 Directive 2004/38[2] – of the illegal residence of a Union citizen in a host State[3] when they failed to comply with the conditions to reside under Directive 2004/38: what Kramer called "expulsion on grounds of poverty".[4]

It was the first time the Court was called to shed light on the role of Article 15 Directive 2004/38 as a tool to ensure that Union citizens reside legally in a host State's territory. Empirical research has shown that domestic authorities regarded expulsion under Article 15 as rather ineffective, since it was unclear

1. Kramer speaks of the "contradiction of a federalized free movement regime like that of the European Union, where advanced free movement rights and radically open borders are combined with the authority of Member States to expel undesired foreigners". Kramer, "On the futility of expelling poor Union citizens in an open border Europe", 6 *European Papers* (2021), 156. During the negotiations for the approval of Directive 2004/38, the European Parliament highlighted that in a borderless area, expulsion should be a thing of the past. Hamenstädt, "Expulsion and 'legal otherness' in times of growing nationalism", 45 EL Rev. (2020), 459.

2. 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, O.J. 2004, L 158/77 (hereinafter Directive 2004/38 or the Directive).

3. As Thym argued, this is when Union citizens become "illegal migrants". See Thym, "When Union citizens turn into illegal migrants: The *Dano* case", 40 EL Rev. (2015), 257.

4. Kramer op. cit. *supra* note 1, 156. Scholarship underlined how termination of residence for insufficient resources is a blatant example of economic derogation to free movement rights, which questions the traditional understanding that no economic justifications are acceptable in free movement law. Nic Shuibhne, "Derogating from the free movement of persons: When can EU citizens be deported?", 8 CYELS (2006), 209–210 and 222; Spaventa, "Citizenship: Reallocating welfare responsibilities to the State of origin" in Koutrakos and Nic Shuibhne (Eds.), *Exceptions from EU Free Movement Law: Derogation, Justification, and Proportionality* (Hart, 2016), p. 35 and pp. 42–43.

whether Union citizens could re-enter the host State immediately after expulsion and claim a new unconditional residence right pursuant to Article 6 Directive 2004/38.[5] Despite expulsion for failure to fulfil the conditions to reside under the Directive, the citizen would remain de facto permanently present in the host State: both expulsion and the conditions to reside would be ineffective. Hence, the first uncertainty concerned the extent to which Article 6 founds a new right to reside when a citizen comes back to the host State immediately after expulsion. The first part of this annotation will analyse the way the ruling in *FS* addressed this issue.

Expulsion under Article 15 is deeply intertwined not only with what happens after the citizen has left the territory of the host State and comes back, but also with the question of when and how citizens lose their entitlement to medium-term residence because they do not satisfy the conditions established in Article 7 Directive 2004/38, and hence can be expelled. The consensus so far has been that citizens who initially resided legally in the host State can only be subject to expulsion if the proportionality assessment of their situation shows that they represent an unreasonable burden on the host State's finances.[6] This comment (section 6.2) will examine how the ruling in *FS* – by not discussing the matter – has perhaps called this understanding into question.

Finally, another implication of the ruling concerns the complex relationship between deportation on grounds of public policy pursuant to Article 28 Directive 2004/38 of citizens whose residence would otherwise be legal, and expulsion under Article 15. The connection between the two types of expulsion results from the circumstances that gave rise to the preliminary reference in *FS*. At street level, domestic authorities tend to use the latter provision against "unwanted" EU citizens: poor, homeless, drug addicts, and petty criminals.[7] The present case concerned precisely such a citizen living on the margins of society. When a citizen is a "nuisance" in the eyes of public authorities, the simpler the expulsion under Article 15 for lack of residence conditions, the narrower the scope of application of Article 28 and its

5. Heindlmaier, "Mobile EU citizens and the 'unreasonable burden': How EU Member States deal with residence rights at the street level" in Mantu, Minderhoud and Guild (Eds.), *EU Citizenship and Free Movement Rights: Taking Supranational Citizenship Seriously* (Brill, 2020), pp. 141–142, concerning the practice in Austria.

6. Case C-184/99, *Grzelczyk*, EU:C:2001:458, paras. 42–44; Case C-140/12, *Brey*, EU:C:2013:565, para 69. Nic Shuibhne, op. cit. *supra* note 4, 221; Verschueren, "Preventing 'benefit tourism' in the EU: A narrow or broad interpretation of the possibilities offered by the ECJ in *Dano*?", 52 CML Rev. (2015), 384.

7. Mantu, Minderhoud and Grütters, "Legal approaches to 'unwanted' EU citizens in the Netherlands", 10 *Central and Eastern European Migration Review* (2021), 35.

substantive safeguards. This matter will be subject to analysis in the last section of this comment.

2. Legal framework

To explain the relevance of the case, we briefly recall the legal framework on the right to reside and the rules on expulsion stemming from EU law. First, in principle, there should be no border checks on persons crossing frontiers within the Schengen area.[8] Second, Directive 2004/38 governs both the conditions for entry and residence in a Member State other than that of nationality, and the requirements for the termination of those rights.[9]

Article 5 Directive 2004/38 grants a right to enter the host State with the sole prerequisite of holding a valid ID or passport. The Directive then foresees two distinct types of residence: temporary and permanent. Temporary residence for up to three months (short-term residence) is *unconditional* under Article 6 Directive 2004/38. Conversely, if a Union citizen resides for more than three months (medium-term residence), they have to meet the conditions established by Article 7. Economically active citizens and those who retained that status pursuant to Article 7(3) Directive 2004/38 do not have to satisfy other requirements.[10] Economically inactive citizens, on the other hand, must have comprehensive health insurance and sufficient resources "not to become *a burden* on the social assistance system of the host Member State".[11] Continuous *legal* residence for five years[12] leads to permanent residence, which is unconditional.[13] Permanent residence only accrues to those who reside in compliance with the conditions established in the Directive,[14] and expulsion measures duly enforced break the continuity of residence.[15] Permanent residents have a right to non-discriminatory access to the welfare system of the host State, and the derogations established in Article 24(2) Directive 2004/38 do not apply to them.

Article 14 Directive 2004/38 regulates the retention of the *temporary* right to reside, which terminates for short-term residents if they become an

8. Art. 22 Regulation 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), O.J. 2016, L 77/1.
9. Case C-94/18, *Chenchooliah*, EU:C:2019:693, paras. 70–71.
10. Art. 7(1)(a) Directive 2004/38.
11. Art. 7(1)(b) Directive 2004/38, emphasis added.
12. Or a shorter period pursuant to Art. 17 Directive 2004/38.
13. Art. 16 Directive 2004/38.
14. Case C-325/09, *Dias*, EU:C:2011:498, paras. 55, and 64–65.
15. Art. 21 Directive 2004/38.

unreasonable burden on the host State's system of social assistance.[16] Medium-term residents lose their entitlement to reside under the Directive if they no longer fulfil the conditions established therein.[17] While Article 24(2) excludes short-term residents from the right to social assistance,[18] economically inactive medium-term residents who fulfil the conditions to reside, can – in principle – claim social benefits under Article 24 Directive 2004/38. If they do so, however, domestic authorities may take the view that they no longer fulfil the conditions for residence; but, expulsion should not be the automatic consequence of recourse to social assistance, and it should not take place if the citizen is not an unreasonable burden on the host State's finances.[19] National authorities, in this sense, should consider the citizen's specific circumstances, the length of residence, and whether their economic hardship is only temporary.[20] Contrariwise, in light of *Dano,* no such individualized assessment is necessary if a citizen is illegally resident – i.e. does not fulfil the conditions to reside from the outset – as they have no right to social assistance under Article 24.[21]

This overview of the relationship between the right to reside for economically inactive citizens and the right to social assistance shows the importance of the concept of "burden" in the system of the Directive and especially in relation to expulsion. It should be noted, however, that the Directive refers to the concept of burden in various places and in different ways. In line with the case law,[22] Recitals 10 and 16 and Article 14 Directive 2004/38 speak of "unreasonable burden": to retain their right to reside and avoid being expelled, citizens should not become an unreasonable burden on the social assistance system of the host State. However, Article 7(1)(b) on the conditions to reside does not include the word "unreasonable" and merely refers to "burden", hence suggesting a stricter test for the acquisition of residence than its loss and laying bare the "mixed messages"[23] that the

16. Art. 14(1) Directive 2004/38.

17. Art. 14(2) Directive 2004/38.

18. Case C-299/14, *Garcia-Nieto*, EU:C:2016:114, paras. 43–46.

19. Case C-184/99, *Grzelczyk*, paras. 42–44. The Directive has codified this principle in Art. 14(3) and Recital 16. See also Case C-140/12, *Brey*, para 69.

20. Recital 16 Directive 2004/38.

21. Case C-333/13, *Dano*, EU:C:2014:2358, paras. 69 and 73–74.

22. The case law on equal treatment for economically inactive citizens refers to the "unreasonable burden": see Case C-184/99, *Grzelczyk*, para 44; Case C-140/12, *Brey*, para 69; and even Case C-333/13, *Dano*, para 74. As is known, however, the latter case pivoted around the conditions to reside (and the failure to fulfil them) under Art. 7(1)(b) Directive 2004/38.

23. Nic Shuibhne, "Limits rising, duties ascending: The changing legal shape of Union citizenship", 52 CML Rev. (2015), 904. In the same article, Nic Shuibhne underlined the stricter nature of the Art. 7 test, compared to the unreasonable burden test, highlighting that, for

Directive itself sends as to the conditions for residence. Section 6.2 will return to this difference further.

It should also be recalled that under Article 14(4) Directive 2004/38, the situation is different for economically active citizens. Member States cannot expel them, their families, or jobseekers who are actively looking for a job and have genuine chances of finding one, except for reasons of public health, public policy, or public security. This takes us to the Member States' power to limit Union citizens' free movement rights. Under Article 27 Directive 2004/38, Member States can restrict free movement rights on grounds of public policy, public security, or public health. In such cases, a host State can proceed to deportation, pursuant to the conditions under Article 27 and following, which foresee both procedural safeguards and substantive rules. National authorities can rely on Article 28, concerning deportation on grounds of public policy or public security, only when a citizen's conduct constitutes a present, genuine and sufficiently serious threat to the fundamental interests of society; previous criminal convictions cannot constitute *per se* ground for expulsion.[24] When applying Article 28, Member States have to respect the principle of proportionality, but they can adopt an entry ban against the expelled citizen.[25]

In all cases that do not involve public policy, public security, or public health concerns, Member States can limit free movement rights pursuant to Article 15 Directive 2004/38. This provision regulates the procedural safeguards for those circumstances, referring by analogy to Articles 30 and 31: it requires that any decision limiting free movement is duly notified and that there is a redress procedure,[26] to guarantee the right to an effective remedy.[27] Moreover, Article 15(3) precludes the adoption of entry bans.[28] The scope of Article 15 was uncertain until the ruling in *Chenchooliah*, where the Court specified that it covers *expulsion measures* based on grounds other than public policy, public security, and public health.[29] In particular, that provision governs expulsion based on loss of entitlement to residence under Article 14, which can only happen to economically inactive citizens.[30] Article 15, however, besides the procedural safeguards, does not set any rule as to the legality of the expulsion

instance, the German version of that provision refers to "recourse to welfare funds" rather than to the vaguer notion of "burden", 896.

24. Art. 27(2) Directive 2004/38.
25. Art. 32 Directive 2004/38.
26. Arts. 30 and 31 Directive 2004/38.
27. Case C-94/18, *Chenchooliah*, para 84.
28. Art. 15(3) Directive 2004/38.
29. Case C-94/18, *Chenchooliah*, paras. 73–74. See also judgment, para 65. See Ritleng, "Scope and meaning of Article 15 of Directive 2004/38: Yes but no: *Chenchooliah*", 57 CML Rev. (2020), 1195.
30. Art. 14(4) Directive 2004/38.

measure in substantive terms and it does not require that domestic authorities carry out a proportionality assessment of the personal circumstances of the citizen before expelling them.

3. Factual background

FS was a Polish national illegally residing in the Netherlands. He had worked there for five months, then became unemployed, and had several confrontations with the Dutch police for his minor criminal behaviour, such as shoplifting and pickpocketing.[31] The Dutch authorities adopted an expulsion decision under Article 15 because he did not meet the conditions of economic independence or activity provided by Directive 2004/38 for medium-term residence.[32]

After the expulsion, he certainly left the Dutch territory, as he was arrested in Germany, where he lived in a city just across the Dutch border. However, he travelled daily to the Netherlands to purchase marijuana, to which he was allegedly addicted.[33] While temporarily in the Netherlands, the Dutch police arrested him on suspicion of theft and placed him in administrative detention pending his expulsion – pursuant to the expulsion decision previously adopted.[34] FS claimed he had a right to reside under Article 6 Directive 2004/38 and hence his detention was unlawful. When his expulsion was provisionally suspended, and his detention terminated,[35] the referring court had to decide on FS's claim for compensation for unlawful detention. This depended on whether he had a right to reside in the Netherlands when the Dutch authorities placed him in custody, which, in turn, depended on the effects of the expulsion decision under Article 15.[36]

The referring court raised three questions. First, whether, for the expulsion decision to be effective, it is sufficient that the addressee physically leaves the host State. Second, if the answer to the first question is affirmative, whether the Union citizen has a right to short-term residence after having re-entered the host State's territory or can the Member State expel them again to avoid repeated entry and residence for short periods following expulsion. Finally, if the initial expulsion decision retains some effect after the citizen has

31. Judgment, paras. 34–35.
32. FS had no fixed abode, according to the Dutch authorities. See judgment, para 45.
33. Ibid., paras. 41–42.
34. Ibid., paras. 44–45.
35. Ibid., para 49.
36. Ibid., paras. 52–53.

physically left the host State, how long should these effects last before the citizen gains a new right to reside under the Directive.[37]

4. Advocate General's Opinion

Advocate General Rantos first noted that expulsion under Article 15 Directive 2004/38 is inherently connected to the rules on the right of residence. He analysed permanent and temporary residence and specified that Article 15 governs only situations where the latter type of residence right comes to an end.[38] However, the Advocate General highlighted that falling foul of residence conditions under the Directive does not always warrant expulsion. Member States should not expel Union citizens unless they become an unreasonable burden.[39] He underlined that – despite FS's criminal conduct – the Dutch authorities did not expel him based on public policy, but because he *risked* becoming an unreasonable burden on the host State's finances, as he lacked resources and was residing for longer than three months.[40]

Concerning the effects of the expulsion, if the citizen formally acquires residence in another Member State, the expulsion loses its legal force. This was not the case here.[41] The Advocate General then highlighted that neither Article 15 nor the procedural rules to which it refers define explicitly the temporal effects of an expulsion decision. A teleological interpretation is therefore necessary.[42] He held that Article 15 has a "dual purpose": the first is a procedural one; by the second, it aims at preserving the Member State's power to expel citizens who no longer comply with residence requirements. Hence, it is meant to ensure that those citizens do not become an unreasonable

37. Ibid., para 56. The referring court did not raise the question on the right to move in order to visit rather than to reside. Arguably, the focus on Art. 6 Directive 2004/38 – hence residence – was due to the argument raised by FS who claimed a right to reside under Art. 6 and, possibly, also to the fact that the Dutch authorities' expulsion measure was based on the lack of residence right for FS. See para 10 of the Summary of the request for a preliminary ruling, available at <curia.europa.eu/juris/showPdf.jsf?text=&docid=225746&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=2362152> (all websites last visited 16 March 2022), and judgment, paras. 35–36.

38. Opinion of A.G. Rantos in Case C-719/19, *FS* v. *Staatssecretaris van Justitie en Veiligheid,* EU:C:2021:104, paras. 35–40, 45–46, and footnote 22, referring to Case C-94/18, *Chenchooliah*, paras. 73-74.

39. Opinion, paras. 51 and 75.

40. Ibid., paras. 55–56.

41. Ibid., para 58. Kramer criticized this formalistic approach, which seems to imply that registration is always required, whereas not all Member States demand it. Moreover, administrative documents are not constitutive of free movement rights; see Case 48/75, *Royer*, EU:C:1976:57, paras. 32–33 and 38–40. Kramer, op. cit. *supra* note 1, 163.

42. Opinion, paras. 61–66 and 69–71.

burden on the host State's finances.[43] When a mobile citizen receives an expulsion decision because they have become an unreasonable burden, they do not cease to be so merely because they physically cross the border. Therefore, interpreting Article 15 as merely requiring physical departure from the host State would deprive that provision of its effectiveness, in light of that second objective.[44]

Of course, if, after the adoption of the expulsion decision, a material change of circumstances occurs, and the mobile citizen satisfies the conditions for residence under Article 7, the expulsion decision loses its rationale and its effects – though this is not the sole case in which that decision exhausts its legal force.[45] The Advocate General analysed two alternative solutions: a fixed period of absence from the expelling State's territory, at the end of which the decision loses effects automatically, or a case-by-case assessment.[46]

The Dutch Government had advocated a minimum period of absence, during which citizens would only enjoy a right to entry under Article 5 Directive 2004/38 if they duly justify their presence. The Advocate General rejected this view as it contradicts the spirit of the Directive and disproportionately limits the fundamental right to free movement. The exercise of the right of residence would be subject to a condition that neither the Directive nor the Treaties establish, in breach of Article 21 TFEU and the principle of institutional balance – as the judiciary would create a rule that the legislature has not foreseen.[47] Advocate General Rantos also dismissed the argument that such a predetermined period could prevent abuses of EU law. When it comes to expulsion and re-entry, the conditions for abuse do not occur, because the right whose exercise is at stake is precisely the freedom to move.[48]

The Advocate General, therefore, endorsed a case-by-case assessment. He specified that national authorities should consider a range of factors,[49] among which: the effective termination of previous residence, the fact that the citizen has ceased to be an unreasonable burden on the expelling State, and the genuine intention to leave that State. The Advocate General himself acknowledged that this latter criterion is possibly arbitrary and exceedingly

43. Ibid., para 72.
44. Ibid., paras. 73 and 76–77.
45. Ibid., paras. 81–83.
46. Ibid., para 84.
47. Ibid., paras. 87–92.
48. Ibid., paras. 94–97. Abuse consists in the exercise of free movement rights in order to obtain an advantage from EU law (e.g. family members' residence right) "by artificially creating the conditions laid down for obtaining it". Case C-456/12, *O and B*, EU:C:2014:135, para 58.
49. Opinion, para 99.

difficult to support with objective evidence.[50] As for the effective termination of earlier residence, the duration of the absence from the host State is relevant, but not decisive. The type of residence enjoyed before expulsion may also affect the factors to demonstrate that the citizen no longer resides in the host State. Residents under Article 6, normally, do not have the time to establish personal ties in the host State, so it may be easier for them to demonstrate that those links are severed. Whereas, for someone who resided under Article 7, producing such evidence might be more burdensome.[51]

Domestic authorities should also check whether the citizen, even when not complying with Article 7, has ceased to be an unreasonable burden on the host State's social assistance system. The Advocate General proposed to interpret the concept of social assistance broadly, including all benefits that the citizen has not contributed to and that are funded by the public finances. Remarkably, the Advocate General included in the definition of social assistance also significant police resources due to repeated criminal conduct, such as in the case in the main proceedings.[52]

5. Judgment of the Court

The Court largely followed the Advocate General's conclusions. Yet, the ruling diverged from the Opinion in three main regards: first, it did not analyse the relevance of being an unreasonable burden as a condition for legitimate expulsion; second, it specified that the case-by-case assessment of the effective departure should also consider factors concerning the citizen's residence in another State; finally, it analysed the consequences of the failure to comply with the expulsion order.

The Grand Chamber first reaffirmed that Article 15 covers expulsion based on grounds other than public policy, public security, and public health.[53] The Court also upheld the Advocate General's teleological approach.[54] Expulsion under Article 15 is meant to ensure that Union citizens reside in compliance

50. Ibid., para 102. It should be noted that intention is normally irrelevant in free movement law. See, among others, Case 53/81, *Levin*, EU:C:1982:105, paras. 21–22; Case C-109/01, *Akrich*, EU:C:2003:491, para 55. It is, nonetheless, possible to distinguish between relevant and irrelevant motives. In particular, relevant motives are significant in the context of abuse of rights. Yet in *FS*, there was no question of abuse. See Ziegler, "'Abuse of law' in the context of the free movement of workers" in de la Feria and Vogenauer (Eds.), *Prohibition of Abuse of Law: A New General Principle of EU Law?* (Hart Publishing, 2011), pp. 303–305; Nic Shuibhne, op. cit. *supra* note 23, 911.

51. Opinion, para 100.

52. Ibid., para 101 and footnote no. 49, referring to Case C-140/12, *Brey*, para 61.

53. Judgment, para 65.

54. Ibid., para 70.

with the conditions for temporary residence established in the Directive. That provision, hence, contributes to the fulfilment of "the specific objective of Directive 2004/38" which is to prevent mobile citizens and their families from becoming an unreasonable burden on the host State's finances.[55]

Mere physical departure from the host State is not enough to comply with the expulsion order. Otherwise, a citizen would just have to cross the border to enjoy a new unconditional residence, which would covertly become unlimited in time, thus circumventing the requirements for medium-term residence and abusing Article 6, which is meant to cover exclusively short periods of residence.[56] In this way, the distinction between permanent and temporary residence would become redundant, whereas an expulsion decision duly enforced interrupts the acquisition of permanent residence.[57] Such an interpretation of Article 15 would upset the balance between Union citizens' freedom to move and the protection of Member States' welfare systems.[58] Moreover, the Directive establishes that citizens who have been expelled must have at least one month to leave the host State's territory. This period is intended, *inter alia*, to allow them to prepare their departure, which cannot, therefore, consist in merely crossing a border.[59]

An expulsion decision under Article 15 exhausts its effects when the expelled person "genuinely and effectively" leaves the host territory. Only in this case will the mobile citizen have a new right to reside, since their return is not the continuation of previous illegal residence.[60] As for the criteria to determine genuine departure, the ECJ also rejected the idea that a certain period of absence could be a systematic condition to enjoy a new residence right.[61] However, the longer the absence, the stronger the indication that the citizen has truly left the host State.[62] The Court then specified that for the case-by-case assessment, the following elements may be relevant: termination of a lease contract, removal from the population register, if any, and breaking off relationships that *imply integration* in the host State.[63] National authorities should evaluate the relevance of those factors in light of the specific circumstances, considering the degree of integration in the host State, the length of residence, and the economic and personal situation of the expelled

55. Ibid., paras. 71–72.
56. Ibid., paras. 73–74.
57. Ibid., paras. 76–77.
58. Ibid., para 75.
59. Ibid., paras. 79–80.
60. Ibid., paras. 81.
61. Ibid., paras. 84–89.
62. Ibid., para 90.
63. Ibid., para 91. Those elements reproduce the ones mentioned in the Opinion, para 100.

citizen.[64] In addition to the elements concerning the links with the expelling State, it is also relevant whether the citizen has moved their centre of interests to another State, to evaluate whether they have "actually resided outside" the host State's territory.[65]

Regarding the implications of non-compliance with an expulsion decision, the ECJ held that when the citizen has not genuinely severed their links with the host State, their presence within the latter's territory is still unlawful. Thus, it is unnecessary to adopt a new expulsion decision as the previous one is still in force.[66] However, a Union citizen always has a right to reside if they comply with the Directive, due to a "material change in circumstances". In such cases, the expulsion decision loses effect.[67] Moreover, expulsion under Article 15 shall not thwart the right to entry for reasons other than residence under Article 5 Directive 2004/38.[68]

Finally, the ECJ acknowledged that in the Schengen area, it is difficult for national authorities to check compliance with an expulsion order. Nevertheless, the Directive allows Member States to ask mobile citizens to report their presence within a reasonable time upon entry and to register with the competent authorities for medium-term residence.[69] Those rules should enable Member States to control the observance of the Directive. Member States can also conduct checks on whether a citizen has a right to reside, provided that those checks are not systematic.[70]

6. Comments

The following sections will address three major themes that emerge from the ruling.[71] The first concerns the criteria to assess when an expelled citizen effectively leaves the host State and therefore gains a new unconditional right

64. Judgment, para 92.
65. Ibid., para 93.
66. Ibid., para 94.
67. Ibid., para 95.
68. Ibid., paras. 101–102.
69. Respectively under Arts. 5(5) and 8(1) Directive 2004/38.
70. Judgment, paras. 97–100.
71. This comment will not discuss the administrative detention of Union citizens. While its lawfulness was at stake in the main proceedings, it was not the subject of the preliminary reference. Moreover, the order of detention was invalidated in the course of the main proceedings, as the expulsion was suspended. On the same day as the judgment in *FS*, the Grand Chamber also adopted its ruling in Case C-718/19, *Ordre des barreaux francophones and germanophone and others (Mesures préventives en vue d'éloignement)*, EU:C:2021:505, which dealt with the legitimacy requirements of detention measures adopted against Union citizens. The A.G. was the same. Neier commented on both cases, focusing on detention: see

to reside under Article 6 Directive 2004/38. Second, the comment will analyse the relationship between the loss of the conditions for residence, the possibility that a citizen has become an unreasonable burden on the host State's finances, and the expulsion under Article 15 Directive 2004/38. Finally, the possibility will be considered that the interpretation of Article 15 that emerges from this ruling may end up conflating the expulsion based on public policy under Article 28 and termination of residence based on the failure to fulfil the conditions under Article 7 Directive 2004/38. Overall, the ruling in *FS* shows that the ambiguities emerging from the Directive run the risk of unleashing (another) wave of restrictive case law on the rights of EU inactive citizens.

6.1. *Assessing the genuine and effective compliance with the expulsion decision*

The ruling in *FS* constitutes a first step in shedding light on the criteria to safeguard the effectiveness of Article 15 Directive 2004/38. The judgment sought to give guidance to administrative and judicial authorities while striking a balance between the effectiveness of Member States' power to check that citizens reside legally and the right of the latter to move. Indeed, as the Opinion and the ruling in *FS* both underlined, Article 15 is not only a procedural rule,[72] but it also aims at safeguarding the effectiveness of the conditions for residing under the Directive.

Since new residence in compliance with Article 7 Directive 2004/38 always trumps the effects of the expulsion decision, and citizens always retain a right to entry under Article 5, it was only necessary to clarify the extent to which a citizen may enjoy a new right of residence under Article 6 after expulsion. The Court stressed that to accept that expelled citizens have a right to reside under Article 6 just because they have physically left the host State and re-entered straight afterwards, without genuinely terminating their previous residence, would wipe out the distinction between permanent and temporary residence, as it would allow citizens to remain indefinitely in the host territory just by crossing the border every three months.[73] This argument is disingenuous and disregards the Court's own case law on permanent residence since, even if

Neier, "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", 6 *European Papers* (2021), 941.

72. The scholarship tends to focus on the procedural dimension of Art. 15. See Guild, Peers and Tomkin, *The EU Citizenship Directive: A Commentary*, 2nd ed. (OUP, 2019), pp. 184–185; Ritleng, op. cit. *supra* note 29, 1183.

73. Judgment, paras. 76–77.

permanently *present*, Union citizens do not earn permanent residence if they reside without fulfilling the Directive's requirements.[74]

Whereas mere physical departure from the expelling Member State is not enough to establish a new residence right, a minimum period of absence is not necessary either. Indeed, while neither the Opinion nor the judgment mentioned the proportionality principle, both stressed the importance of a case-by-case assessment of the expelled person's circumstances.[75] Kramer argued that a minimum fixed period of absence, during which residence in the expelling State is presumed illegal, would have been more convenient for both citizens and domestic authorities: after that time has elapsed, citizens would automatically enjoy a new right to reside under Article 6.[76] The same author underlined that the Court has already upheld predetermined waiting periods.[77] For instance, the ECJ found that six months was a reasonable period for jobseekers to find work.[78] However, those cases clarified – for the benefit of Union citizens themselves – issues concerning concepts that the Court itself had developed.[79] In *FS*, upholding a minimum period of absence would have amounted to introducing judicially an entry ban, contrary to Article 15(3), and attaching a condition to reside to Article 6 which is explicitly unconditional. One may argue that the criteria to assess genuine absence are a (less straightforward) way to establish new conditions for lawful residence under Article 6.[80] Nevertheless, it is submitted here that a condition for residence is somewhat binary, especially a fixed period of absence, so that either one fulfils it or not. Conversely, the more flexible approach that the ECJ adopted does not rule out the possibility of a nuanced assessment that takes into account multiple factors, such as a request to be removed from the population register, the termination of a tenancy contract, or effective residence in another Member State.[81]

74. See, among others, Case C-325/09, *Dias*, paras. 55, and 64–65.

75. In line with the right to an individualized assessment. See O'Brien, "Real links, abstract rights and false alarms: The relationship between the ECJ's 'real link' case law and national solidarity", 33 EL Rev. (2008), 643; see also 661 et seq. Though the Court withdrew from the individualized assessment in Case C-67/14, *Alimanovic*, EU:C:2015:597 and Case C-299/14, *Garcia-Nieto*. See Iliopoulou-Penot, "Deconstructing the former edifice of Union citizenship? The *Alimanovic* judgment", 53 CML Rev. (2016), 1027.

76. Kramer op. cit. *supra* note 1, 165.

77. Ibid., 162–163.

78. To give effectiveness to Art. 45 TFEU, jobseekers have a right to reside during the reasonable period in which they actively look for work. Even after this period, however, Member States cannot expel jobseekers who have genuine chances of being employed and can prove it. Case C-710/19, *G.M.A.*, EU:C:2020:1037, paras. 41 and 44–46.

79. Concepts such as "reasonable period".

80. I am grateful to the anonymous reviewers for raising this valid point.

81. Judgment, para 91

The individualized appraisal that the ruling requires should focus on whether the citizen has effectively resided in another State and whether they have "genuinely and effectively" [82] terminated their previous residence. As is known, the use of those adverbs is not new for the Court: for a person to be a worker and fall within the scope of Article 45 TFEU, their activity needs to be "genuine and effective".[83] Likewise, family members of "circular migrants"[84] enjoy a right to reside under EU law in the citizen's home State if they have *genuinely* lived together in another Member State "pursuant to and in conformity with the conditions" under Article 7 Directive 2004/38.[85] This technique should ensure flexibility in applying the law,[86] but national bureaucrats normally prefer harder criteria.[87] Besides, the individual assessment risks introducing another layer of unpredictability in a field that is already overly complex.[88] At the end of the day, it is Union citizens that bear the costs of uncertainty.[89] True, in the case at hand, the Court specified the factors which national authorities should focus on.[90] Still, not all the guidance the Court offered is particularly clear or decisive, apart from the duration of the absence, which remains an indicative – though not sufficient – criterion.

For instance, the role of integration is puzzling. The Advocate General *descriptively* held that, for medium-term residents, providing evidence of genuine departure "may be more demanding".[91] The Grand Chamber, however, specified that when evaluating the effective termination of previous residence, domestic authorities should consider the citizen's *degree of*

82. Judgment, paras. 80–83 and 90–91, 94.

83. Case 53/81, *Levin*, para 17.

84. Spaventa, "Family rights for circular migrants and frontier workers: *O and B*, and *S and G*", 52 CML Rev. (2015), 753.

85. Case C-456/12, *O and B*, paras. 51, 53–53, and 56. A.G. Sharpston held that Member States cannot impose a minimum period of residence abroad, if such residence is habitual and genuine. See Opinion in Case C-456/12, *O and B*, EU:C:2013:837, paras. 100–101 and 110–111.

86. The choice made in *O and B* can hardly be described as "flexible", given the reference to the conditions under Art. 7. For a critique of that ruling's approach, see Spaventa, op. cit. *supra* note 84, 763–64 and 769–70.

87. Such vagueness leaves room for national authorities' discretion on the ground. For instance, some Member States have introduced presumptions that activities under a certain hourly threshold are not "work" under Art. 45 TFEU. O'Brien, Spaventa and De Conninck, "Comparative Report 2015: The concept of worker under Art. 45 TFEU and certain non-standard forms of employment", (2016), pp. 8–11 and pp. 24–27; Valcke, "Expulsion from the 'heart of Europe': The Belgian law and practice relating to the termination of EU residence rights" in Mantu, Minderhoud and Guild, op. cit. *supra* note 5, pp. 171–172.

88. Editorial Comments, "The free movement of persons in the European Union: Salvaging the dream while explaining the nightmare", 51 CML Rev. (2014), 733–736.

89. Iliopoulou-Penot, op. cit. *supra* note 75, 1026; Kramer op. cit. *supra* note 1, 162–163.

90. Judgment, paras. 90–93.

91. Opinion, para 100.

integration in the host State, looking at the length of their residence in the host State "immediately before the expulsion decision …, and his or her family and economic situation".[92] In this passage, the Court copy-pasted some of the elements listed in Article 28 Directive 2004/38 concerning expulsion based on public policy or public security.[93] Their application is logical when national authorities adopt a deportation decision, but their meaning in the context of re-entering the host State after expulsion is much less obvious, as – according to the ECJ – citizens should cut precisely the ties that presuppose integration in order, eventually, to get a new residence right. Despite the ambiguity of the reference to integration, the Court failed to explain it.

It is submitted that those references should mean that since integrated citizens might struggle more in proving that their absence is genuine when their personal bonds are still in the host State, presence to cultivate those relationships should not call into question the genuineness of new residence. The same should go for economic factors, such as attending jobs interviews.[94] This way, meaningful connections in the host State remain protected. Besides, since the more integrated the citizen, the more reasonable their burden on the host State's finances,[95] such an understanding would also square with the Advocate General's finding that the expulsion decision loses effects when the addressee is no longer an unreasonable burden. Any other interpretation would run counter to the incremental logic that underlies Union citizenship law, whereby the greater the integration, the higher the protection afforded to citizens' rights.[96]

Furthermore, elements like the duration of the lease contract or delisting from the population register are easy to check in most circumstances, while other criteria, such as having moved one's centre of interests to another (Member) State or integration-related markers, entail a more intrusive assessment of the Union citizen's life circumstances. Some factors even appear contradictory – for instance, deregistration from employment services.[97] Jobseekers have a strengthened right to reside since domestic authorities cannot expel them under Article 14(4)(b) Directive 2004/38 when

92. Judgment, para 92.

93. See Neier, op. cit. *supra* note 71, 953.

94. Art. 6 Directive 2004/38 covers the first three months of residence of a jobseeker (Case C-710/19, *G.M.A.*, para 35). Thus, from the ruling, it is unclear what the position would be of somebody entering the State as a jobseeker after having been expelled: looking for a job may be considered a material change in circumstances, warranting a right to reside under Art. 45 TFEU and Art. 14(4)(d) Directive 2004/38, as the A.G. held in Opinion, para 81, while the Court only referred to Art. 7 conditions.

95. Rennuy, "The trilemma of EU social benefits law: Seeing the wood and the trees", 56 CML Rev. (2019), 1553.

96. Case C-165/16, *Lounes*, EU:C:2017:862, paras. 56–59.

97. Judgment, para 91.

they are actively seeking a job.[98] It is, hence, unclear whether relying on employment services should be considered active search for work or not, if, registration to those services notwithstanding, the host State can proceed to expulsion. Despite the obscurity of this reference to placement services, it is an *obiter dictum*, therefore, it is not possible to infer any general rule from it.

Remarkably, most of those elements are especially tough to produce for homeless persons or marginalized communities.[99] Factors such as utility contracts or an apartment lease are of no use in those cases, and, typically, the absence of a physical address makes it difficult for homeless persons to show effective (termination of) residence as they may also struggle to establish residence in another (Member) State. In the case at hand, we only know that FS left the Netherlands because he was arrested in Germany. Due to the "social invisibility"[100] and the informal nature of the relationships that frequently characterize those situations, for those who are more likely to be expelled it is harder to demonstrate effective compliance with the expulsion decision. In practice, national authorities may end up systematically targeting rough sleepers and marginalized communities, as they might assume that those categories fail to comply with the Directive and that, after expulsion, their presence remains illegal.[101]

6.2. *Expulsion and the unreasonable burden: An unclear relationship*

Both the Advocate General and the ECJ emphasize that expulsion under Article 15 Directive 2004/38 aims at ensuring that Member States have a tool to terminate Union citizens' residence that violates the conditions under

98. Welsh, "A genuine chance of free movement? Clarifying the "reasonable period of time" and residence conditions for jobseekers in *G.M.A.*", 58 CML Rev. (2021), 1601.

99. Such as Roma and Sinti communities. See Dawson and Muir, "Individual, institutional, and collective vigilance in protecting fundamental rights in the EU: Lessons from the Roma", 48 CML Rev. (2011), 753, 768; European Commission and Regioplan, *Study on Mobility, Migration and Destitution in the European Union: Final Report* (Publications Office, 2014), p. 13, pp. 27–29.

100. "Invisibility" is a recurring word in relation to homelessness, laying bare the paradox that while rough sleeping is a manifest problem in all European countries, homeless persons are politically invisible due to severe social exclusion. On deprivation and social exclusion, see European Commission and Regioplan Study, cited previous footnote, pp. 2–10.

101. This is already the practice in several States, especially against Roma communities. See empirical research in Heindlmaier, op. cit. *supra* note 5, p. 144; Nyhlén, "'We should call them our friends' – Negotiations on welfare and social security entitlements for displaced EU citizens in Sweden" in Mantu, Minderhoud and Guild, op. cit. *supra* note 5; Juverdeanu, "Reversed free movement" in Mantu, Minderhoud and Guild, ibid. The UK, for instance, targeted rough sleeping as "abuse of rights" under Art. 35 Directive 2004/38. The High Court declared this policy unlawful in *R (Gureckis)* v. *Secretary of State for the Home Department* [2017] EWHC 3298 (Admin).

Article 7. These conditions, in turn, intend to guarantee that mobile citizens do not become unreasonable burdens on the host State's finances.[102] Expelled citizens can advance no claims to welfare benefits and expulsion breaks the continuity necessary for permanent residence.[103] This section analyses the way the concept of unreasonable burden affects the legality of the expulsion under Article 15, and in particular the role of the proportionality principle in the assessment of compliance with the conditions to reside under Article 7(1)(b) Directive 2004/38. It must be noted that the legality of the expulsion was not at stake in the preliminary reference.[104] Yet, the Advocate General specifically engaged with this issue, while the Court failed to elaborate on the point, even though it was not so obvious that the simple failure to fulfil the conditions to reside warranted expulsion. Furthermore, the answer to this question substantially affects the extent to which national authorities will use Article 15.

Before looking into this issue, a distinction should be drawn between the acquisition and the loss of rights: it is one thing to deny residence because an economically inactive Union citizen wishes to reside for longer than three months but is not economically independent, and quite another when a citizen's previously legal residence comes to an end under Article 14 Directive 2004/38.[105] We shall only focus on this second instance, which, as the law stood before the ruling in *FS*, gave rise to two different scenarios.[106]

A first possibility is that a citizen is "non-illegally resident" as long as they do not ask for social assistance.[107] Hence, only if they become an *unreasonable burden*, can they lose their right to reside and be expelled. Following *Grzelczyck*, citizens who have already obtained a right to reside should not be expelled if they are only a *reasonable* burden, in light of the length of their residence and the temporary nature of their need for financial support.[108] Concerning the way a claim to social assistance affects the appraisal of economic self-sufficiency, in *Brey*, the ECJ demanded a proportionality assessment of the individual circumstances and of the burden

102. Judgment, para 72, and Opinion, para 72.

103. Belgium (often illegitimately) uses expulsion precisely for this purpose, as permanent residents have the full right to equal treatment in respect of welfare. Valcke, op. cit. *supra* note 87, pp. 167 and 179 et seq. It is, however, uncertain what a "duly enforced" expulsion means under Art. 21 Directive 2004/38.

104. Judgment, paras. 60–62.

105. Nic Shuibhne, op. cit. *supra* note 4, 215. See *supra*, section 2.

106. Kramer, op. cit. *supra* note 1, 161–162.

107. See also Opinion of A.G. Wathelet in Case C-442/16, *Gusa*, EU:C:2017:607, paras. 34–35. In *Bajratari*, the Court somehow supported this view, see Case C-93/18, *Bajratari*, EU:C:2019:809, para 45. See also Guild, Peers and Tomkin, op. cit. *supra* note 72, p. 266.

108. Case C-184/99, *Grzelczyk*, paras. 42–44. Case C-140/12, *Brey*, para 69. See also Recital 16 Directive 2004/38 referred to *supra*, section 2.

the citizen would represent on the host State finances before concluding that they lack the right to reside due to insufficient resources because they asked for benefits.[109]

An alternative understanding is that domestic authorities can expel a citizen simply because they no longer have sufficient resources (and comprehensive health insurance?[110]), even when they advance no claim to benefits.[111] Such an interpretation requires two cognitive steps: a presumption that a citizen who is no longer economically self-sufficient will eventually become a burden on the host State's finances, and that any burden under Article 7 is unreasonable.[112] The ECJ had already stepped in the direction of reducing the scope for proportionality assessment of the residence conditions, when it found, in *Dano*, that mere non-compliance with the black-letter Article 7 requirements precludes the right to equal treatment in access to social assistance under Article 24(1) Directive 2004/38.[113] Since, in *Dano*, the Grand Chamber did not mention the principle of proportionality concerning the right to reside, the scholarship has inferred that that judgment severely limited – or made altogether unnecessary – a proportionality assessment of the observance of the residence requirements, in contrast to earlier case law, in particular *Baumbast*.[114] After *Dano,* it was still uncertain whether mere non-compliance also justified expulsion.

In *FS*, Advocate General Rantos opted for the first understanding, though not all his reasoning is satisfactory. He started from the premise that *only* when a citizen becomes an unreasonable burden, can their residence right be

109. Case C-140/12, *Brey*, paras. 72, 75, 77. *Brey* mixed up the proportionality assessment on acquisition and loss of the right to reside. See Thym, "The elusive limits of solidarity: Residence rights of and social benefits for economically inactive Union citizens", 52 CML Rev. (2015), 40 at footnote 152. Thym also stressed how *Brey* laid the ground for two alternative standards of proportionality (27 et seq.). The scholarship has underlined how unclear this ruling is. See Verschueren, op. cit. *supra* note 6, 367; Davies, "Migrant Union citizens and social assistance: Trying to be reasonable about self-sufficiency", College of Europe Research Papers in Law No. 2/2016, 9–10; O'Brien, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (Hart, 2017), pp. 47–48.

110. On comprehensive health insurance, see Case C-535/19, *A (Soins de santé publics)*, EU:C:2021:595.

111. There is evidence that some Member States have already adopted such a restrictive approach: see European Parliament and others, *Obstacles to the Right of Free Movement and Residence for EU Citizens and Their Families: Comparative Analysis* (European Parliament 2016), pp. 121–122.

112. Thym, op. cit. *supra* note 3, 253; Nic Shuibhne, op. cit. *supra* note 4, 214.

113. Case C-333/13, *Dano*, paras. 69, 73–74, and 80–82.

114. Case C-413/99, *Baumbast and R*, EU:C:2002:493, para 91. Among others, Verschueren, op. cit. *supra* note 6, 378; Nic Shuibhne, op. cit. *supra* note 23, 913 and 915; Spaventa, "Earned citizenship – Understanding Union citizenship through its scope" in Kochenov (Ed.), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press, 2017), p. 221; O'Brien, op. cit. *supra* note 109, pp. 51 et seq.

terminated under Articles 14 and 15.[115] He then turned the requirement of *actual* unreasonable burden into a *risk of* unreasonable burden.[116] This would still be in the domain of acceptable interpretations if one construes the possession of sufficient resources in a preventive fashion. What is more disputable is the way the Advocate General engaged with the concept of social assistance, as he adopted an overly broad notion of that concept that encompassed also substantial expenditures in police resources to react to the citizen's repeated criminal conduct.[117] This notion is outright wrong: the definition of social assistance that the Court provided in *Brey* refers to a *claim* by an individual who lacks the resources to meet their basic needs.[118] It is hard to imagine that police intervention responds to a claim of those who breach the law, lest imagining – quite cynically – that a destitute citizen longs for detention so that they can have free board and lodging. Regarding policing as social assistance overlooks the latter's nature, which implies material *support* to enable everybody to live a life in dignity.[119] In the Advocate General's understanding, social assistance would encompass any non-contributory expenditure paid by the public purse, even when there is no solidarity rationale in it.[120] Moreover, by muddling public policy concerns with the concept of unreasonable burden, the Opinion risks dissolving the difference between expulsion under Articles 28 and 15.[121]

The ECJ failed to discuss the matter and instead took for granted the expelling authorities' conclusion that FS no longer fulfilled the conditions to reside, even though it was unknown whether he had ever claimed social assistance. Though it is not for the ECJ to analyse the facts, the Court could have engaged with the (legal and not factual) theme of the requirements for

115. Opinion, paras. 51, 56, 72, 75.

116. Opinion, paras. 34, 56 and 101. Kramer, op. cit. *supra* note 1, 158, 160, and 163.

117. Opinion, para 101 and reference at footnote 49 to Opinion of A.G. Wahl in Case C-140/12, *Brey*, EU:C:2013:337, para 41, and Case C-140/12, *Brey*, para 61.

118. Case C-140/12, *Brey*, para 61. Kramer, op. cit. *supra* note 1, 160–161. A.G. Wahl in his Opinion in *Brey*, at para 68, speaks of compensation "for a lack of stable, regular and sufficient resources".

119. Case C-67/14, *Alimanovic*, para 45.

120. This understanding also conflicts with *Cowan*, as it would keep non-nationals from claiming damages for criminal assaults, since this compensation would constitute social assistance. The French Government in that case argued in vain that compensation for assaults was social solidarity, so non-nationals and non-residents could be excluded. See Case 186/87, *Cowan*, EU:C:1989:47, paras. 16–17. The list of similar benefits could be long, including e.g. museum entrance reduction, as in Case C-388/01, *Commission* v. *Italy,* EU:C:2003:30. See Dougan and Spaventa, "'Wish you weren't here...' New models of social solidarity in the European Union" in Dougan and Spaventa (Eds.), *Social Welfare and EU Law* (Hart, 2005), pp. 208–210.

121. The possible use of Art. 15 to circumvent the application of Art. 28 will be subject to specific analysis in the next section.

legitimate expulsion when a citizen does not ask for social assistance but, likely, does not have sufficient resources. It should be queried whether, in default of such an analysis, the Grand Chamber *tacitly* opted for the second scenario described above: that falling foul of the residence conditions amounts per se to becoming an unreasonable burden, since it held that the "possibility for the host Member State to expel a Union citizen who is no longer legally resident in its territory is consistent with the specific objective of Directive 2004/38, expressed in Articles 6 and 7 . . . which is to prevent Union citizens . . . from becoming an unreasonable burden" on the host State's welfare system.[122]

If this is what the judgment in *FS* covertly means, it would signify the unspoken acceptance that mere non-compliance with Article 7 warrants expulsion under Article 15 and in this regard, it would dive even deeper into *Dano*'s disregard for proportionality in the assessment of the residence conditions. In *Trojani*, the ECJ had already held that denying the right to reside to someone who does not have sufficient resources is not a disproportionate limitation, but, in that case, Mr Trojani had claimed social assistance because he was not economically independent.[123] The ruling in *FS*, if the Court's silence is to be interpreted for the worst,[124] would entail that a request for welfare benefits is not even necessary to conclude that someone who apparently fails the residence conditions can be expelled. National authorities would have leeway to expel citizens regardless of their specific circumstances even if they initially had a right to reside.[125] Since engagement with social solidarity is not a condition for expulsion, recourse to publicly funded emergency shelters for homeless persons, let alone "housing first" structures,[126] can *a fortiori* justify termination of residence.[127]

122. Judgment, para 72.

123. Case C-456/02, *Trojani*, EU:C:2004:488, para 36.

124. The concerns expressed in this annotation arise from a "worst case scenario" interpretation of the Court's silence on the relevance of the unreasonable burden in the context of expulsion under Art. 15 Directive 2004/38.

125. Spaventa, op. cit. *supra* note 4, p. 40; Heindlmaier, op. cit. *supra* note 5, p. 134; Mantu, Minderhoud and Grütters, op. cit. *supra* note 7, 40.

126. For a review of "housing first" strategies, see Commission Staff Working Document, "Confronting Homelessness in the European Union", SWD(2013)42 Final, 23; Baptista and Marlier, *Fighting Homelessness and Housing Exclusion in Europe: A Study of National Policies.* (European Social Policy Network (ESPN), European Commission, 2019), pp. 89 et seq.

127. The Court has not yet ruled on reception facilities for homeless persons. These could constitute social assistance, as they are meant to allow the recipient to meet their basic needs (Case C-140/12, *Brey*, para 61). On housing as social assistance, see Case C-571/10, *Kamberaj*, EU:C:2012:233, paras. 91–92, on the notion of social assistance for the purposes of Art. 34 CFR.

One might have hoped that in upholding the domestic authorities' strategic interpretation,[128] and – perhaps – implicitly redefining the boundaries of legal residence, the Grand Chamber would have been more overt in its reasoning. The ambiguity left by the judgment in *FS* is liable to bring the protection of Member States' finances forward to a point where it is unnecessary even to suggest that the public purse is in danger,[129] and a proportionality assessment is no longer required even when terminating a residence right previously conferred.

6.3. *Types of expulsion and control of unwanted-ness*

Another implication of the ruling in *FS* is that it risks conflating the expulsion based on Article 15, for a citizen's illegal residence, and the deportation on grounds of public policy under Article 28 Directive 2004/38. Both types of expulsion respond to the same question: how does a State reduce the number of undesired people in its territory?[130] Vagrant, homeless, petty criminals – more generally the outcasts – are "unwanted citizens",[131] along with those who commit more serious crimes. Their undesirability aligns along a spectrum: destitute EU citizens are depicted as a nuisance, because they wish to rely on the host State's welfare[132] or because their "visible poverty"[133] threatens the country's social tranquillity. Conversely, conduct that triggers higher societal alarm is a matter of public policy or even public security.

When a citizen's conduct is a threat to public policy or public security, Member States can deport them under Article 28 Directive 2004/38. This provision is more effective than Article 15 since it allows authorities to adopt an entry ban.[134] However, applying Article 28 is also more demanding: the

128. Valcke speaks of "strategic non-compliance" in relation to national authorities' restrictive practices that exploit the ambiguities of Directive 2004/38. Valcke, op. cit. *supra* note 87, p. 166.

129. Similarly to what O'Brien objected to in Case C-308/14, *Commission* v. *UK*, EU:C:2016:436. O'Brien, "The ECJ sacrifices EU citizenship in vain: *Commission* v. *United Kingdom*", 54 CML Rev. (2017), 226–228.

130. Mantu, Minderhoud and Grütters, op. cit. *supra* note 7, 36. Coutts speaks of Member States' discretion "to remove troublesome citizens". Coutts, "A contingent citizenship – Union citizenship and cxpulsion" in Mantu, Minderhoud and Guild, op. cit. supra note 5, p. 259.

131. Mantu, Minderhoud and Grütters, op. cit. *supra* note 7, 35.

132. To avert this risk, some local authorities in the Netherlands have minimized access to shelter for homeless Union citizens. Kramer, "In search of the law: Governing homeless EU citizens in a state of legal ambiguity", ACCESS EUROPE Research Paper no. 2017/04, available at <ssrn.com/abstract=3091539>, 14 et seq.; Mantu, Minderhoud and Grütters, op. cit. *supra* note 7, 49.

133. Nyhlén, op. cit. *supra* note 101, p. 219.

134. Re-entry may still be a problem, since there are no systematic border checks. Yet, in the case of an entry ban, presence would always be unlawful irrespective of the links with the host

person concerned must represent a *present, genuine and sufficiently serious threat to a fundamental interest of society*.[135] In light of the *Polat* doctrine, repeated minor criminal convictions only exceptionally warrant deportation under Article 28: when those offences, taken together, meet the threshold of a serious threat to the fundamental interests of society.[136] Moreover, Article 28 establishes an incrementally protective system against deportation, whereby the longer the residence, the greater the danger that a citizen should represent for the authorities to deport them. Permanent residents can only be deported on serious grounds of public policy or public security; if they have resided for longer than ten years, expulsion can only take place if there are imperative reasons of public security.[137]

As the scholarship has highlighted, the Court is adopting a restrictive approach to the protection that Article 28 affords to EU citizens.[138] The ECJ is equating the notions of public policy and public security, deeming the second only quantitatively more serious. This results in reducing the relevance of the enhanced protection under Article 28(3).[139] Moreover, the case law on the interaction between citizenship, residence, and criminal conduct displays the increasingly relevant role of integration as a prerequisite for enjoying rights.[140] The ruling in *Onuekwere* merged the conditions to acquire permanent residence with a normative understanding of integration, whereby a citizen has to respect the values of the host State society as expressed in its criminal law to become integrated.[141] True, the Court established in *B and Vomero* that the host State deciding on expulsion under Article 28(3) should assess the link of integration of the person who has committed a crime in light of the latter's path of rehabilitation undertaken while in detention.[142] Hence,

State. On the contrary, expulsion under Art. 15 does not preclude the right of entry and – in principle – mere presence does not endanger the rationale for termination of a residence right under the latter provision. However, in light of the conflation of public policy expulsion and Art. 15 termination of residence, even mere presence could be seen as undermining the effectiveness of Art. 15.

135. Art. 27(2) Directive 2004/38.

136. Case C-349/06, *Polat*, EU:C:2007:581, paras. 28 and 39. See also Opinion, para 55, footnote 27.

137. Art. 28(2) and (3) Directive 2004/38.

138. See Hamenstädt, op. cit. *supra* note 1, 462–465; Coutts, op. cit. *supra* note 130, p. 249; Spaventa, op. cit. *supra* note 114, pp. 216–219. This restrictive trend is taking place in several directions that fall outside the scope of this annotation.

139. Case C-348/09, *P.I.*, EU:C:2012:300, paras. 19–20 and 28. See Azoulai and Coutts, "Restricting Union citizens' residence rights on grounds of public security. Where Union citizenship and the AFSJ meet: *P.I.*", 50 CML Rev. (2013), 559, 561 and 568.

140. Azoulai and Coutts, ibid., 562; Thym, op. cit. *supra* note 109, 37–38; Coutts, "Union citizenship as probationary citizenship: *Onuekwere*", 52 CML Rev. (2015), 537–538.

141. Coutts, ibid., 539–543.

142. Case C-316/16, *B and Vomero*, EU:C:2018:256, paras. 75–76.

those who commit a crime and are sentenced to prison are not always doomed to a negative assessment of their integration into the host State's society. However, the safeguard against expulsion granted by Article 28 relies on the inextricable link between integration and the residence conditions, since the Court has established that permanent residence pursuant to Article 16 is a precondition for the enhanced protection under Article 28(3) Directive 2004/38.[143] In turn, EU nationals can only earn permanent residence if they fulfil the conditions for lawful residence under Article 7 Directive 2004/38. As a result, those conditions have become a proxy to demonstrate integration in the host State,[144] and the cornerstone of the entire system of the Directive.

The trend emerging from this case law was already that of mixing up public policy concerns, integration, and residence requirements, with the result of curtailing the protection afforded to Union citizens when they endanger the "calm . . . of the population".[145] Against this background, the judgment in *FS* seems to be another piece in this restrictive approach to marginality, when the latter intersects with Union citizenship.[146] Indeed, if this ruling is to mean that Article 15 Directive 2004/38 applies without a proportionality assessment of the conditions for residence, it can be used against those who, because they live on the fringes of society, represent a minor problem of public policy *and* do not meet the black-letter requirements for legal residence. The ruling in *FS* is likely to offer on a silver plate a tool to circumvent Article 28 when a citizen does not constitute a serious threat to public policy – let alone public security. Minor criminals cannot be deported under Article 28, with the safeguards that the latter entails and the proportionality assessment of personal circumstances such as length of stay, age, health state, family situation, social and cultural integration, and links with the State of nationality. Yet, they can be much more easily expelled pursuant to Article 15, which does not require that proportionality assessment – or any proportionality assessment for that matter. The paradoxical effect of the use of Article 15 to tackle public policy concerns is that despite the lower societal alarm those citizens conjure up, it is easier to curtail their fundamental right to free movement.

The lack of proportionality assessment in relation to expulsion pursuant to Article 15 is all the more questionable as the ECJ failed to refer to the protection of fundamental rights under the Charter, which applies when a situation falls within the scope of EU law, a notion that covers limitations to

143. Ibid., paras. 49–51 and 57. See also Benlolo Carabot, "Citizenship, integration, and the public policy exception: *B and Vomero* and *K. and H.F.*", 56 CML Rev. (2019), 789.

144. Nic Shuibhne, op. cit. *supra* note 23, 919–920.

145. Case C-348/09, *P.I.*, para 28.

146. Coutts, op. cit. *supra* note 140, 531.

free movement.[147] The Court could at least have mentioned Article 1 CFR on human dignity,[148] as it has recently done in *CG*, a case on access to social assistance for economically inactive citizens who fail to fulfil the conditions to reside under the Directive.[149] Had the ECJ considered the Charter, perhaps domestic authorities would have been prompted to adopt a fundamental rights-based approach, taking into account solutions that recentre intra-EU mobility on solidarity rather than otherness and security.

7. Concluding remarks

A clarification on Article 15 Directive 2004/38 was necessary, given its obscurity, its likely ineffectiveness, and the doubts concerning its relationship with the unconditional short-term residence under Article 6. This ruling, however, is arguably only a first step.

It is to be welcomed that the Court has indicated the criteria to establish a genuinely new residence right, especially since those criteria exclude automatic rules, but these benchmarks will not always be easy to operationalize. Moreover, given the conditions for expulsion under Article 15 that emerge from *FS*, it is likely that we will see an upsurge in the use of that provision by national authorities, especially if they are already interpreting the Directive restrictively, exploiting its complexities and the not-so-clear indications the Court has given over time.[150] This may lead to a proliferation of preliminary references that could cast some light on the several questions the Court has left unaddressed or has solved only superficially. For instance, one critical question concerns the limits to the power to expel a citizen who does not meet the conditions in the Directive but is not claiming social assistance.

147. See Case C-60/00, *Carpenter*, EU:C:2002:434, paras. 40–41. Dougan, "Judicial review of Member State action under the general principles and the Charter: Defining the scope of Union law", 52 CML Rev. (2015), 1211.

148. Or Art. 34 CFR on housing and social assistance, since FS had no fixed abode (as noted in judgment, para 45). See Verschueren, "Free movement of EU citizens: Including for the poor?", 22 MJ (2015), 28.

149. Case C-709/20, *CG*, EU:C:2021:602, paras. 85–86 and 89–92. *CG* concerned denial of equal treatment in matters of social assistance for persons enjoying the EU "pre-settled" status in the UK. The Court held that in this case, the refusal to grant social assistance should be assessed in light of the respect for fundamental rights. Conversely in *Dano*, the Court had ruled out the applicability of the Charter to the conditions for granting social benefits (Case C-333/13, *Dano*, paras. 88–91). For a critical comment on *CG* and its use of fundamental rights protection as a last resort option, after having excluded the right to equal treatment, see O'Brien, "The great EU citizenship illusion exposed: Equal treatment rights evaporate for the vulnerable (*CG* v. *The Department for Communities in Northern Ireland*)", 46 EL Rev. (2021), 811–813.

150. Shaw, "Between law and political truth? Member State preferences, EU free movement rules and national immigration law", 17 CYELS (2015), 261–262 and 265.

In the aftermath of *Dano,* Verschueren questioned the impact of that judgment on Member States' power to expel Union citizens.[151] After that ruling, citizens who do not reside legally under the Directive are barred from claiming social assistance. Hence, in principle, they cannot weigh on the host State's welfare, yet this could lead to poverty among mobile citizens.[152] From this perspective, it would not be an unthinkable leap to see the ruling in *FS* as an implicit suggestion that expulsion is the solution to that problem: national authorities should presume the unreasonable burden and proceed to expulsion. In this way, it will be somebody's else problem[153] and responsibility, notably that of the home State.[154] The power of free movement as a tool that allows citizens to choose their place of belonging and frees them from "nationality and state affiliation of the individual . . . as the principal referent for transnational human intercourse"[155] would be thus reduced for marginalized Union citizens.[156]

Nevertheless, in an area without internal borders, citizens expelled under Article 15 may still return to the host State, even more easily so if there is no registration requirement for medium-term residents. Citizens may also remain illegally, considering termination of residence does not necessarily entail forced removal. The fact that expelled citizens always enjoy a right to entry does not make things easier: if they are caught in the host State after having been expelled, they may always claim that they have just travelled there for reasons other than residence. The solutions that the Court indicated – imposing reporting and registration obligations[157] – are unlikely to change this. Hence, unwanted and unlawful presence is liable to remain an issue and not solely for national authorities. Since expulsion prevents lawful residence and any corollary claim while the decision is in force, it risks entrenching the legal limbo where marginalized citizens live, pushing them further into legally demanded social exclusion.[158] This may easily snowball into other serious

151. Verschueren, op. cit. *supra* note 6, 383; see also Spaventa, "Once a foreigner, always a foreigner. Who does not belong here anymore? Expulsion measures" in Verschueren (Ed.), *Residence, Employment and Social Rights of Mobile Persons: On How EU Law Defines Where They Belong* (Intersentia, 2016), p. 99.

152. Verschueren, op. cit. *supra* note 6, 384.

153. Nyhlén, op. cit. *supra* note 101, p. 235.

154. Spaventa, op. cit. *supra* note 4.

155. Weiler, "The transformation of Europe", 100 *Yale Law Journal* (1991), 2480–2481. Azoulai underlined how the key challenge for EU law will be precisely to offer a "shelter" – alternative to nationality affiliation – to individuals in "limbo situations" that are created by and inherently connected to EU (free movement) law. See Azoulai, "The madness of Europe, being attached to it", 21 GLJ (2020), 103.

156. Spaventa, op. cit. *supra* note 4, p. 52.

157. Respectively under Arts. 5(5) and 8(1) Directive 2004/38. Judgment, paras. 97–100.

158. Verschueren, op. cit. *supra* note 148, 28.

problems: citizens on the fringes of society risk ending up in exploitative work or crime.[159]

It would be ungenerous to say that this is only the Court's fault – though some problems arise from its rights-closing case law. This is an unavoidable combined effect of the Schengen *acquis* and the ambiguities of the Directive. This case, therefore, lays bare once again the tensions inherent to EU citizenship, which entrenches inequalities against a class of "unwanted" persons,[160] whose legal status is less fundamental and more precarious than that of other persons. For them, borders are still very much present as a mechanism of exclusion.

It is probably not free movement's task to tackle poverty by transferring the solidaristic burden between the Member States. But what is the role of fundamental rights and free movement if, in the exercise of the very core right of Union citizenship, one is not protected from the most serious forms of destitution?[161] Of course, poverty does not only affect mobile citizens. But when it hits the latter, it risks pushing them into a legal no man's land, Union citizenship notwithstanding. A change of approach is particularly urgent since, with the outbreak of Covid, homelessness and severe deprivation reached alarming levels in the EU.[162]

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159. Valcke, op. cit. *supra* note 87, p. 184.

160. In a parallel to what O'Brien argued concerning *Zambrano* residents in the UK (before Brexit). See O'Brien, "Civis capitalist sum: Class as the new guiding principle of EU free movement rights", 53 CML Rev. (2016), 944.

161. Verschueren discussed solutions based on the use of structural funds or the coordination of waiting periods for access to social assistance across Member States. Verschueren, op. cit. *supra* note 148, 30–32.

162. FEANTSA and Fondation Abbé Pierre, "Sixth Overview of Housing Exclusion in Europe" (2021), p. 15.

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