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Procedural Guarantees for EU Citizens against Expulsion in the Light of Directive 2004/38/EC¹

Introduction

Protection against the expulsion of EU citizens and their family members is enshrined in 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 amending Regulation (EEC) no. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC². This regulation lays down the conditions governing the exercise of the right of free movement and residence within the territory of Member States by EU citizens and their family members, the right of permanent residence in the territory of the Member States for EU citizens and their family members, and protection against expulsion. The Directive applies to all EU citizens who move to or reside in a Member State other than that of which they are a national, and to their family members who “accompany or join” them.

However, it should be noted that EU citizens are entitled to protection against expulsion guaranteed under the international human rights treaties, as applicable to the territories of the Member States of the European Union.³ All EU Member States are members of the Council of Europe. Therefore, States Parties to the European Convention on Human Rights (ECHR) no longer enjoy absolute and uncontrolled discretion in

1 This article is based on the research project entitled “The Alien’s Access to the File in Expulsion Proceedings in the light of Polish and European law” (No 2015/17/D/HS5/00406) financed by the National Science Centre in Poland.

2 *Official Journal of the European Union* of 2004, L 158/77. This Directive replaced the Directive 64/221/CEE of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health.

3 P. Boeles, M. den Heijer, G. Lodder, K. Wouters, *European Migration Law*, Antwerp-Oxford-Portland, 2009, p. 36.

immigration policy and have to exercise it consistently with the obligations expressed in the Convention. The ECHR requires that State Parties tailor their immigration laws to respect human rights.⁴ In the jurisprudence of the Court of Justice of the EU, human rights treaties play a significant role as a source of inspiration for the fundamental principles of European law.⁵ According to Article 6 para. 3 of the Treaty on the European Union (TEU): “Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law”.

This paper examines the scope of protection of EU citizens against expulsion under Directive 2004/38/EC and in the case law of the Court of Justice of the European Union (CJEU). It aims to provide the reader with an overview of the current state of law on the expulsion of EU citizens.

General Rules Governing the Protection against Expulsion

Under Article 2(1) of the Directive 2004/38/EC the term “EU citizen” is defined as a person who holds the citizenship of one EU Member State. According to Article 20 of the Treaty on the functioning of the European Union (TFEU): “Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship”.⁶ Needless to say, the right to move freely shall be exercised in compliance with the legal order of each Member State. For that reason, pursuant to Article 27(1) of Directive 2004/38/EC, a Member State may limit the freedom of movement and residence of EU citizens on the grounds of public policy, public security or health. The expulsion decision taken on the grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned.⁷ In other words, the principle of proportionality has fundamental significance in assessing whether the

4 J. Wojnowska-Radzińska, *The access to secret evidence in expulsion proceedings under the European Convention on Human Rights*, “Netherlands Quarterly of Human Rights” 2017, Vol. 35(4), p. 231.

5 J. Nold, *Kohlen und Baustoffgroßhandlung v. Commission of the European Communities*, Case no. C-4/73, Judgment of the Court of Justice of the EU of 14 May 1974, para. 13: “International treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law”.

6 *Official Journal of the European Union* of 2012, C 326/1 (consolidated version).

7 Art. 27(2) of Directive 2004/38/EC.

expulsion is arbitrary or not. The personal conduct of the individual must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, “which implies, in general, the existence in the individual concerned of a propensity to act in the same way in the future”.⁸ Under Article 27(2) of the Directive, justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted. The European legislator guarantees that previous criminal convictions shall not in themselves constitute grounds for taking such a decision. Pursuant to the discussed provisions, it is granted that expulsion proceedings against EU citizens or their non-EU family members are carried out after examining each case individually.

Protection against expulsion depends on the length of residence in the host EU Member State. In the expulsion proceedings, the domestic authorities need to take into account how long an EU citizen has resided in the territory of the Member State, his/her age and state of health, family and economic situation, social and cultural integration into the Member State, and the extent of his/her links with the country of origin.⁹ Member States are obliged to follow these provisions. Article 28(2) stipulates that an individual who has the right of permanent residence in the host EU Member State’s territory can be expelled only on serious grounds of public policy or public security.

Nevertheless, Directive 2004/38/EC states that the greater the degree of integration of EU citizens and their family members in the host Member State, the greater the protection against expulsion should be. Only in exceptional circumstances, where there are imperative grounds of public security, should an expulsion measure be taken against EU citizens who have resided for many years in the territory of the host Member State, particularly when they were born and have resided there throughout their life.¹⁰

The Court of Justice of the EU took the view that the concept of “imperative grounds of public security” presupposes not only the existence of a threat to public security, but also that such a threat is of a particularly high degree of seriousness, as is reflected by the use of the words “imperative grounds”.¹¹ According to the Court, there must be a particularly serious threat to one of the fundamental interests of society, which might pose a direct threat to the peace and physical security of the population.¹² Article 28(3) of Directive 2004/38 provides that imperative grounds of public security are to be defined by the Member States. The Commission, in its Report on the application of Directive

8 *P.I. v. Oberbürgermeisterin der Stadt Remscheid*, Case no. C-348/09, Judgment of 22 May 2012 of the Court of Justice of the EU, para. 34.

9 Art. 28(1) of Directive 2004/38/EC.

10 Item 24 of Directive 2004/38/EC.

11 *P.I. v. Oberbürgermeisterin der Stadt Remscheid*, Case no. C-348/09, Judgment of 22 May 2012 of the Court of Justice of the EU, para. 20.

12 *Ibidem*, para. 28.

2004/38, states that the difference between the scope of Articles 28(2) and Articles 28(3) of the Directive cannot be trivialized, and nor should the concept of public security be extended to measures that should be covered by public policy.¹³

A decision to expel an EU citizen or a non-EU family member should be issued in an individualized due process. First of all, an individual shall be notified in writing of the expulsion decision, which needs to be properly justified in such a way that he is able to comprehend its content and possible implications. Article 30(3) of the Directive stipulates that “the notification shall specify the court or administrative authority with which the person concerned may lodge an appeal, the time limit for the appeal and, where applicable, the time allowed for the person to leave the territory of the Member State”.

Procedural Safeguards

The general rule is that, according to Article 30(2) of Directive 2004/38/EC, an EU citizen who is the subject of a measure restricting his/her freedom of movement and of residence on public policy, public security or public health grounds should be informed, precisely and fully, of the grounds for such a measure. By way of exception, only the interests of State security can preclude him/her from being informed. The Court of Justice of the EU has recognized that “Community law precludes the deportation of a national of a Member State based on reasons of a general preventive nature, that is one which has been ordered for the purpose of deterring other aliens, in particular where such measure automatically follows a criminal conviction, without any account being taken of the personal conduct of the offender or of the danger which that person represents for the requirements of public policy”.¹⁴ The domestic courts have to take account of facts which occurred after the final expulsion decision was made, since the evidence may point to cessation or a substantial diminution of the threat the person concerned poses to public policy.¹⁵

However, there appears a question as to what extent Member States under Article 30(2) of Directive 2004/38/EC can derogate from the right to inform an EU citizen, precisely and fully, of the grounds for an expulsion decision without unduly affecting the

13 Report from the Commission to the European Parliament and the Council on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States of 10 December 2008, Com(2008) 840, p. 8, <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0840:FIN:pl:PDF>> accessed 25 June 2018.

14 *Georgios Orfanopoulos and Others and Raffaele Oliveri v. Land Baden-Württemberg*, Case no. C-482/01 and C-493/01, Judgment of 29 April 2004 of the Court of Justice of the EU, para. 68.

15 *Ibidem*, para. 82.

procedural rights he/she may rely on. Without a doubt, the obligation to present reasons is closely linked to the principle of respect for the rights of the defence and the guarantee of effective judicial protection. The purpose of the aforementioned obligation is to enable those concerned to ascertain the reasons for the measure so that they can assess whether it is well-founded, and to enable the competent court to exercise its power of review.¹⁶ Nevertheless, those who face expulsion will be treated unfairly if they do not have access to the information that has caused a government to issue an expulsion decision. Without this information, an EU citizen may not be in a position to contradict errors, identify omissions, challenge the credibility of informants or refute false allegations.¹⁷ This problem is serious in itself. According to the principle of fundamental justice, a fair hearing in immigration law requires that the affected person should be informed of the case against him or her and should be permitted to respond to that case¹⁸. Effective defence is impossible or at least extremely difficult if an EU citizen, as a party of expulsion proceedings, is deprived of access to the classified evidence in the expulsion proceedings.

Despite the fact that Article 346(1)(a) of TFEU stipulates that “no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security”, it does not rule out the application of EU law, and its fundamental rights in particular. The Court of Justice of the EU stressed that although this “article refers to measures which a Member State may consider necessary for the protection of the essential interests of its security or of information the disclosure of which it considers contrary to those interests, [this] article cannot, however, be read in such a way as to confer on Member States a power to deport from the provisions of the TFEU based on no more than reliance on those interests”.¹⁹ Consequently, it is for the Member State which seeks to take advantage of Article 346 TFEU to prove that it is necessary to have recourse to that derogation in order to protect its essential security interests. The opinion of Y. Bot, Advocate General, concerning Case no. C-300/11 is worth mentioning here.²⁰ He took the view that: “[if a] Member State wishes to invoke interests of State security to prevent the grounds of public security justifying the expulsion of an EU citizen being disclosed to him, (...) it must (...) provide proof that legitimate security concerns about the nature and sources of intelligence information taken into account in the adoption of the decision concerned militate in favour of a restriction or non-disclosure of the grounds. In the absence of such proof, the national court must always uphold the principle that the EU citizen must be informed, precisely and in full,

16 Judgment of 29 June 2010 of the Court of Justice of the EU, no. C-550/09, para. 54.

17 J. Wojnowska-Radzińska, op. cit., p. 235.

18 Ibidem.

19 *European Commission v. Finland*, Case no. C-284/05, Judgment of 15 December 2009 of the Court of Justice of the EU, para. 23.

20 Opinion of the Advocate General, Y. Bota, delivered on 12 September 2012 concerning Case no. C-300/11, *ZZ v. Secretary of State for the Home Department*.

of the grounds justifying his expulsion”.²¹ What is more, in its assessment of the merits of the decision taken by a competent national authority not to disclose, precisely and fully, the grounds for an expulsion measure, the national court must bear in mind that the derogation provided for in Article 30(2) of Directive 2004/38 “must be interpreted strictly, but without depriving it of its effectiveness”.²² The grounds of public security justifying an EU citizen’s expulsion should be forwarded to him/her in compliance with the duty to protect national security.

As. Y. Bot noted “to be consistent with Article 47 of the Charter²³, the infringement of the [EU citizen’s] right of the defense and effective judicial protection caused by the application of the derogation under Article 30(2) of Directive 2004/38 must be counterbalanced by appropriate procedural mechanisms capable of guaranteeing a satisfactory degree of fairness in the procedure. It is only on this condition that the infringement of the Union citizen’s procedural rights could be regarded as proportionate to the objective for a Member State to protect the essential interests of its security”.²⁴

The European Court of Justice recognized that even within the context of national security, States have a core minimum obligation to disclose Union citizens the “essence” of the grounds of the expulsion decision.²⁵ The CJEU indicates that throughout the judicial review proceedings, restrictions on access to documents and evidence should go no further than strictly necessary to protect State security interests and balance the right to effective judicial protection. In the light of the need to comply with Article 47 of the Charter of Fundamental Rights of the EU, that procedure must ensure, to the greatest possible extent, that the adversarial principle is complied with, in order to enable the person to challenge the grounds on which the expulsion decision is based and to make submissions on the evidence relating to this decision and, therefore, to put forward an effective defence. In particular, the EU citizen must be informed, in any event, of the essence of the grounds on which a decision taken under Article 27 of Directive 2004/38/EC is based, as the necessary protection of State security cannot have the ef-

21 Ibidem, para. 74.

22 *ZZ v. Secretary of State for the Home Department*, Case no. C-300/11, Judgment of 4 June 2013 of the Court of Justice of the EU, para. 49.

23 Art. 47 of the Charter of Fundamental Rights of the European Union states: “Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice”.

24 Opinion of the Advocate General, Y. Bota, delivered on 12 September 2012 concerning Case no. C-300/11, *ZZ v. Secretary of State for the Home Department*, para. 83.

25 *ZZ v. Secretary of State for the Home Department*, Case no. C-300/11, Judgment of 4 June 2013 of the Court of Justice of the EU, para. 65.

fect of denying the person concerned of his/her right to be heard.²⁶ Hence, it should be explicitly highlighted that whenever a Member State invokes the derogation provided for in Article 30(2) of Directive 2004/38/EC, it must be decided whether a fair balance has been guaranteed between the EU citizen's right to effective judicial protection and the grounds of State security.

Nevertheless, the CJEU does not give much guidance on how the conflicting interests of State security and the protection of due process rights are to be reconciled by domestic courts.²⁷ The relevant procedural mechanisms are within the procedural autonomy of the Member States. The institution of "special advocate" adopted by British law seems to satisfy the requirements outlined by the CJEU as it may provide for the maintenance of confidential State security data and the EU citizen's due process rights.²⁸ Simultaneously, it is worth mentioning that the European Court of Human Rights also referred to the solution of appointing special advocates.²⁹ The role of a special advocate is to protect the interests of a foreign national in immigration proceedings when information or other evidence is heard, in the absence of the person concerned and their counsel.³⁰ Special advocates have the required government security clearance that enables them to access confidential information. This person is provided with a copy of all information that is provided to the judge but is not disclosed to the foreign national and his or her counsel. One of the main goals of a special advocate is to challenge the reliability of charges against the alien as well as arguments forwarded by proper bodies to keep certain information confidential. He or she also participates in the proceedings held in camera, during which they may cross-examine witnesses, and are present when evidence is verified. However, special advocates are unable to communicate with the affected alien after having received classified information unless they gain special permission from the

26 Ibidem

27 N. de Boer, *Secret Evidence and Due Process Rights under EU Law: ZZ Case C-300/11, ZZ v Secretary of State for the Home Department. Judgment of the Court (Grand Chamber) of 4 June 2013*, "Common Market Law Review" 2014, Vol. 51, pp. 1235–1262.

28 The UK Parliament enacted the Special Immigration Appeals Commission Act of 1997, which provided, in part, for the use of a special advocate in immigration proceedings to represent the interests of a complainant on appeal where classified materials were relied upon by the State. Section 6 of the SIAC Act provides for the appointment of special advocates.

29 J. Wojnowska-Radzińska, *op. cit.*, pp. 230–246.

30 See J. Ip, *The Rise and Spread of the Special Advocate*, Public Law 2008, pp. 717–741; C.C Murphy, *Counter-Terrorism and the Culture of Legality: The Case of Special Advocates*, King's Law Journal 2013, no. 23, pp. 19–37; C. Forcese, L. Waldman, *Seeking Justice in an Unfair Process. Lessons from Canada, the United Kingdom, and New Zealand on the Use of "Special Advocates" in National Security Proceedings*, 2007. This study was commissioned by the Canadian Centre for Intelligence and Security Studies, with the support of the Courts Administration Service, <<http://aix1.uottawa.ca/~cforcese/other/sastudy.pdf>> accessed 20 June 2018; Opinion of the Advocate General, Y. Bota, delivered on 12 September 2012 concerning Case no. C-300/11, *ZZ v. Secretary of State for the Home Department*, para. 89.

court.³¹ Therefore, in light of the principle of proportionality the special advocates could perform a crucial role in counterbalancing the lack of full disclosure and the lack of full, open adversarial hearing in expulsion procedures by testing the secret evidence.

According to Article 31(1) of Directive 2004/38/EC, an EU citizen has the right to appeal against the expulsion decision. However, there is no indication that judicial review of such a decision is required. It does not require the appeal to have a suspensive effect unless the expulsion decision is accompanied by an application for an interim order to suspend the enforcement of that decision.³² In such circumstances, actual removal from the territory of the Member State may not take place until the decision on the interim order has been taken, except: “where the expulsion decision is based on a previous judicial decision; where the persons concerned have had previous access to judicial review; or where the expulsion decision is based on imperative grounds of public security under Article 28(3) of Directive”.³³ Member States are obliged not only to provide an individual with the possibility of taking legal action before an expulsion decision is executed, but also to let such a person apply to a competent court.³⁴ The Court of Justice of the EU expressed the view that Member States must take all steps to ensure that safeguard of the right of appeal is in fact available to anyone against whom an expulsion measure has been adopted. Otherwise, according to the Court “this guarantee would become illusory if the Member States could, by the immediate execution of a decision ordering expulsion, deprive the person concerned of the opportunity of effectively making use of the remedies which he is guaranteed”.³⁵

Moreover, the provisions of Directive 2004/38/EC prescribe that the review procedure shall allow for an examination of the legality of the expulsion decision, as well as of the facts and circumstances on which the proposed measure is based. Member States shall ensure that the expulsion decision is not disproportionate, particularly in view of the requirements laid down in Article 28. However, Member States may exclude the EU citizen from their territory pending the review procedure, but they may not prevent the individual from submitting his/her defence in person, except when his/her appearance may cause serious trouble to public policy or public security, or when the appeal or judicial review concerns a denial of entry to the territory.³⁶

31 Ibidem

32 Art. 31(2) of Directive 2004/38/EC.

33 Ibidem.

34 Item 26 of Directive 2004/38/EC.

35 *Jean Noel Royer*, Case no. C-48/75, Judgment of 8 April 1976 of the Court of Justice of the European Communities, paras. 55 and 56.

36 Art. 31(3) of Directive 2004/38/EC.

Conclusions

When analysing Directive 2004/38/EC, one may draw the conclusion that the provisions stipulated by this regulation are more favourable to this group of foreign nationals as they differ from the provisions relating to all foreign nationals. Its preferential nature lies in freedom of movement, on the one hand, and in European citizenship, which grants every EU member a right to move and stay within the territory of Member States, on the other. For holders of a right of permanent residence, the expulsion criteria are even stricter than those to be applied to holders of short-term residence rights. While EU citizens having a right of residence can be expelled on the grounds of public policy or public security, those having a right of permanent residence can be expelled only on serious grounds of public policy or public security. Those having resided in the host Member State for the previous ten years can be expelled only on imperative grounds of public security.

When a State invokes national security or public order as a reason for expelling an EU citizen, it is obliged to submit any material or evidence capable of corroborating that the interests of national security or public order are at stake. Full disclosure of secret evidence in expulsion proceedings is not obligatory, but the affected person must be informed of a core of information sufficient to challenge the allegations against him or her in expulsion proceedings. The institution of “special advocate” adopted by British law seems to satisfy the requirements outlined by the CJEU on the procedural safeguards which must accompany the expulsion of EU citizens.

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SUMMARY

**Procedural Guarantees for EU Citizens against Expulsion
in the Light of Directive 2004/38/EC**

The present paper analyses the scope of protection of EU citizens against expulsion under Directive 2004/38/EC and in the case-law of the Court of Justice of the European Union. According to the provision of this Directive, an EU citizen threatened with expulsion must have access to relevant documents and accessible information on the legal procedures to be followed in his/her case. Even if the government claims that national security interests keep courts from disclosing the evidence to the EU citizen, it is obliged to submit any material or evidence capable of corroborating that the interests of national security or public order are at stake. The CJEU requires that the evidence has to be scrutinised by the adversarial proceedings. In particular, the EU citizen must be informed, in any event, of the essence of the grounds on which an expulsion decision is based, as the necessary protection of State security cannot have the effect of denying the person concerned of his/her right to be heard.

Keywords: procedural guarantees, EU citizen, due process rights, expulsion

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