The Right to Free Movement of EU citizens:
Leaving and Re-entering after an Expulsion Order

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1. Introduction

This expert opinion has been written at the request of lawyer V. Senczuk, who represents the applicant in case C-719/19. The case was referred to the Court of Justice of the European Union (henceforth: CJEU) for preliminary ruling. It concerns the legality of a detention measure taken to enforce the expulsion of a Union citizen from the Netherlands. It raises questions regarding the relationship between Union citizenship, the right to free movement and the legal practice of expulsion in the context of Directive 2004/38/EC (henceforth: the Directive).[1] The expulsion of a Union citizen from a host Member State's territory is a serious restriction of the right to free movement and as such it is only allowed within boundaries set by EU law.[2]

1.1 The facts of the case

On 1 June 2018, the Dutch Government issued an administrative decision in the form of an expulsion order addressed to a Polish citizen (henceforth: the applicant), stating that he no longer had a legal right to reside in the Netherlands on the basis of Directive 2004/38. The applicant had stayed in the Netherlands for almost a year. The expulsion order was based on Article 15(1) of Directive 2004/38. Although the applicant had engaged in employment at one stage, he was no longer fulfilling the requirements of Article 7 of the Directive to lawfully reside in the host Member State. The legal implication of an expulsion order is that the addressee is forced to leave the Member State's territory.

Following this initial expulsion order, the applicant left the Netherlands within the voluntary period of departure. The applicant's departure was proven by an incident with the German police in October 2018. However, in November 2018 the applicant re-entered the Netherlands. He was subsequently arrested on suspicion of shoplifting and put into aliens detention. Under national law, a decision was issued against him, ordering him to leave the Netherlands within four weeks.

The applicant argued before the national court that the detention measure, which was imposed in order to enforce his expulsion, was not legal. In this context, the Dutch authorities initially argued that the applicant still had to leave the territory, following the first expulsion order. The Dutch District Court also held that the applicant had not yet left the Netherlands. It was only clarified in the case before the Administrative Jurisdiction Division of the Council of State (henceforth: the Council of State), that the applicant had indeed left the Netherlands.

1.2 Preliminary questions

Based on this finding the Council of State referred the following questions to the CJEU:

1. Should Article 15(1) of Directive 2004/38/EC to be interpreted as meaning that the decision to expel a Union citizen from the territory of the host Member State, taken on the basis of

[1] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance) [2004] OJ L 158.

[2] S Maslowski 'The Expulsion of European Union Citizens from the Host Member State: Legal Grounds and Practice' *Central and Eastern European Migration Review* 2015) p 62.

that provision has been complied with and no longer produces legal effects, once that Union citizen has demonstrably left the territory of the respective host Member State within the period for voluntary departure laid down in that decision?

2. If the answer to Question 1 is in the affirmative, does that Union citizen have the right of residence under Article 6(1) of Directive 2004/38/EC in the event of immediate return to the host Member State? May the host Member State take a new expulsion decision in order to prevent the Union citizen from entering the host Member State for a short period of time in each case?
3. If the first question were to be answered in the negative, should this citizen of the Union have stayed outside of the territory of the host state for a certain period and if so how long should this period have been?[3]

These preliminary questions highlight the delicate balance between preserving a Union citizen's fundamental right to free movement within the Union, and the right of Member States to control their national borders. This expert opinion explores these issues and will chronologically address the questions referred to the CJEU.

1.3 Outline of the expert opinion

This expert opinion will begin by providing a history and overview of the fundamental right to free movement and the Directive in question in section 2. This overview provides an understanding of the underlying fundamental rights at stake in relation to the preliminary questions asked and demonstrates that an unjustified restriction of freedom of movement would violate the Directive and EU primary law.

The expert opinion will then go on to address the first preliminary question: whether the initial expulsion order under Article 15(1) immediately ceases to have legal effect, once a Union citizen has left the territory. It will discuss the legal grounds for expulsion under EU law and highlight the differences between an expulsion order made under grounds of public policy, public security and public health, and one made on other grounds, as is relevant to this case. The term 'ban on entry' and 'exclusion order' are both mentioned in the Directive, namely in Articles 15(3) and 32. These terms have the same legal meaning. Therefore, this opinion will normally use the term 'exclusion order' to address this type of measure for the sake of consistency and clarity. The nature and scope of Articles 5, 6 and 7 of the Directive are analysed in light of the parallel free movement rights directly deriving from Articles 45, 58 and 56 of the Treaty on the Functioning of the EU (henceforth: TFEU).

Section 3 will also address the main argument of the Dutch state, according to which the obligation to 'leave' a Member State after a removal order would imply an obligation to settle in another Member State and acquire 'genuine residence' in that state, as pictured in the case of *O and B.*[4] This proposition will be rejected as being far-fetched and irreconcilable with the fundamental right to free movement. The expert opinion will conclude that the first question should be answered in the affirmative.

[3] Council of State 25 September 2019, ECLI:NL:RVS:2019:3262.

[4] CJEU Case C-456/12 *O v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v B* [2014].

Section 4 of this expert opinion will address the second preliminary question: may the host Member State take a new expulsion decision, if the Union Citizen immediately returns after having left, in order to prevent him from re-entering the host Member State even for a short period of time? Basically, the answer of this expert opinion is that all depends on what the Union citizen will do after his re-entry. This may vary on the one hand from effectively exerting the right to work, such that he will have legal residence *ex lege*, to on the other hand to constituting a genuine, present and sufficiently serious threat to public policy, such that that expulsion and even exclusion may be justified. Section 4.3 of the expert opinion examines the circumstances in which residence under Article 6 might be restricted, with particular consideration to the 'abuse of rights' doctrine. It is concluded that Article 6 of the Directive cannot be abused, unless the Union citizen is artificially making use of free movement law to receive a benefit other than the right to reside.

As the first preliminary question is answered in the affirmative, this expert opinion does not address the third preliminary question. Finally, we conclude the expert opinion by summarising our findings and answering the preliminary questions in section 5.

2. The fundamental importance of the right to free movement in EU law

The preliminary questions revolve around one of the four founding freedoms of the European Union: the right of European Union citizens to move and reside in any Member State of their choice. This section will provide a brief background to this fundamental right to free movement under EU law.

2.1. EU Primary law

The right to free movement is accorded to Union Citizens by Article 20(2)(*a*) TFEU, which provides every European citizen with the 'right to move and reside freely within the territory of the Member States'. Article 21(1) TFEU further specifies this provision, providing that 'every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect'. In addition, the right to free movement derives from Articles 45-48 TFEU (free movement of workers), 49-55 TFEU (freedom of establishment) and 56-62 TFEU (freedom to provide services). These rights are also given effect via Directive 2004/38 and are at the core of the preliminary questions referred.

Initially, the right to freedom of movement was only reserved for workers, self-employed persons and service-providers/recipients. In the nineties of last century, the right to freedom of movement was extended to additional categories of people, such as students and economically inactive citizens via new directives.[5] However, the establishment of Union citizenship by the Maastricht Treaty of 1992 was a decisive factor in extending the right to freedom of movement to all Union citizens. Freedom of movement is now recognized as a right directly deriving from the status of citizen of the European Union.

The implications of such an extension, as well as the fact that such a right has acquired direct effect, have been clarified by the CJEU in *Baumbast*.[6] First, the CJEU affirmed in *Baumbast* that a Union citizen, who no longer enjoys a right of residence as a migrant worker, nonetheless enjoys a right of residence on the basis of Article 21(1) TFEU. Thereby, purely as a national of a Member State and a citizen of the Union, an individual may invoke Article 21(1) TFEU against national law restricting movement rights. Second, the CJEU held in *Baumbast* that the personal scope of citizenship rights does not depend on the economic status of an individual. Union citizens enjoy free movement rights as a part of their citizenship rights, since citizenship is a 'fundamental status' independent of someone's economic position.[7] Third, the fact that these rights are subject to limitations and conditions does not constitute a barrier to their direct effect. Finally, any limitation on citizenship rights through domestic legislation should be subject to judicial review and comply with the limits imposed by Union law and in accordance with its general principles, in particular the principle of proportionality.[8]

This finding was already underlined by Advocate General Cosmas three years previously. He pointed out that each of the free movement of persons provisions is now 'a right, in the true meaning

[5] Directive 90/364/EC, Directive 90/365/EC and Directive 93/96/EC.

[6] CJEU Case C-413/99 *Baumbast and R v. Secretary of State for the Home Department* [2002].

[7] See also CJEU Case C-184/99 *Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001], where the CJEU held that: 'Union citizenship is destined to be the fundamental status of nationals of the Member States'.

[8] CEJU Case C-413/99 *Baumbast and R v. Secretary of State for the Home Department* [2002] paras 82-94.

of the word, which exists with a view to the autonomous pursuit of a goal, to the benefit of the holder of that right and not to the benefit of the Community and the attainment of its objectives'.[9] Accordingly, the rights provided by the free movement of persons provisions are now accorded to Union citizens without any ulterior motive (such as the creation of an EU-wide labour market). On the contrary, they are granted to them solely based on Union citizenship and, thus, can be regarded as fundamental (citizenship) rights.[10]

Further, the importance of the freedom of movement of EU law is demonstrated by its inclusion in the Charter of Fundamental Rights (henceforth: the Charter). Indeed, Article 45 of the Charter provides that the rights contained in Article 20(2)(a) TFEU and Article 21 TFEU are fundamental rights. It follows that any restriction placed on them should be subject to the principles set out in Article 52 of the Charter, namely being provided by law and respecting the principle of proportionality and necessity. In addition, any restriction must genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

2.2. EU secondary law

The proceedings relate to provisions under Directive 2004/38, which regulate the right of Union citizens and their family members to reside freely within the territory of the Member States. Directive 2004/38 gives direct expression to the right of free movement and residence conferred by EU primary law.

The right to entry is secured in Article 5 of the Directive. Member States shall grant Union citizens and their third country national family members leave to enter their territory with a valid passport or identity card. If an identity card or passport is missing, the Member State concerned shall, before turning them back, give such persons every reasonable opportunity to obtain the necessary documents or have them brought to them within a reasonable period of time or to corroborate or prove by other means that they are covered by the right of free movement and residence. Thus the right to entry is linked to the right to stay, emerging after the passing of the borders.

In this regard, the Directive lays down different regimes of residence depending on the duration of stay in the relevant Member State. Article 6 confers Union citizens and their family members the right to reside in any Member State of their choice for a period up to three months. This right is only subject to the requirement of holding a valid identity card or passport. Notably, the right of residence conferred by this provision, does not require a Union citizen to demonstrate a sufficient level of resources. However, this right is recognized only, insofar as the Union citizens in question and their family members do not become an unreasonable burden on the social system of the host Member State.[11] Accordingly, Article 24(2) of the Directive allows host Member States to limit access to social assistance during the first three months of residence. Therefore, the right of residence conferred by Article 6 of the Directive is in practice only conditional on the presentation of a valid identity card or passport. With regard to the present case, the applicant's identity was not

[9] CJEU Case C-378/97 *Wijsenbeek* [1999] Opinion AG Cosmas.
[10] M Andenas, T Bekkedal & L Pantaleo (eds.) *The Reach of Free Movement* (2017, TMC Asser Press) p 76.
[11] Art 14(1) Directive 2004/38. See also CJEU Case C-299/14 *Vestische Arbeit Jobcenter Kreis Recklinghausen v. Jovanna García-Nieto and Others* [2016] para 42 and CJEU Joined Cases C-424/10 and C-425/10 *Ziolkowski and Szeja v. Land Berlin* [2011] para 39.

disputed by the Netherlands, implying that he is 'covered by the right of free movement and residence' as formulated in Article 5 of the Directive.

Article 7 of the Directive enshrines a right to reside for a period of time longer than three months. Accordingly, this provision requires additional criteria, which Union citizens must meet in order to enjoy this right: being a worker or self-employed; having enough resources for themselves and their family members not to become a burden on the social assistance system of the host Member State; or being enrolled at an official education establishment and being covered by sickness insurance.

The relationship between Articles 5, 6 and 7 of the Directive is complicated by the circumstance that a right to entry or a right to residence may also directly be inferred from the economic freedoms laid down in Article 45, 49 TFEU[12] and 56 TFEU[13]. Thus, a job seeker may lawfully stay in a 'foreign' Member State for a period of six months - or even more -, as long as he is genuinely seeking for work.[14] In the same vein, it could be argued that a self-employed person may lawfully claim a right to residence during the period in which he is setting up his business, even if that takes more than three months. Further, in judgments prior to the adoption of the Directive, the CJEU accepted that lawful residence is also attached to the exertion of the right to receive services – as a tourist, a patient, a business traveller or in any other quality – without any maximum period being set.[15]

Thus, the right to enter and stay as regulated in the Directive is somehow interwoven with similar, but not identical rights directly deriving from freedom of movement of economically active persons under the TFEU. This means that lawful free movement cannot always schematically be framed in subsequent stages. It would not be accurate to state that free movement always starts with a short stay limited to a period of three months and that long stay could only start after such period of short stay.

Further, free movement is liberal in the sense that a Union citizen may always start looking for work or start a business all over again, even after a long period of unemployment, a series of lay-offs, bankruptcy or mismanagement. The right to make a fresh start is engrained in the fundamental freedoms of the TFEU. Thus, the mere fact that a Union citizen does not comply with the conditions of Article 7 of the Directive, does not prohibit him from trying again.

Now that the relationship between Articles 5, 6 and 7 of the Directive has been outlined in light of the Treaty, the expert opinion will relate an Union citizen's right to freedom of movement under Articles 6 and 7 of the Directive to expulsion and exclusion orders imposed by the Member State. Namely, when an individual leaves the territory on the basis of an expulsion order, one must determine what effect this has on an individual's right to residence on the basis of Directive 2004/38, if the individual returns.

2.3. Practical considerations: a caveat

To a great extent, the questions of the Council of State bear a theoretical character. It should be kept in mind that the borders between the Member States are open. When an expelled Union citizen

[12] Also referred to in Article 7(1)(a)(b) of the Directive.
[13] Not referred to in the Directive.
[14] CJEU Case C-292/89 *Regina v Immigration Appeal Tribunal, ex parte Antonissen* [1991] paras 11-12. See also CJEU Case C-138/02 *Collins* [2004].
[15] CJEU Joined Cases 386/82 and 26/8331 *Luisi and Carbone* [1984] and CJEU Case 186/97 *Cowan* [1998].

wants to return from a neighbouring Member State to the expelling Member State, he will not be discovered and arrested by a border guard, as there are no border guards. Normally, the issue of whether his re-entry was legitimate, will be addressed at a later stage. This may happen for example, when he is arrested on the territory and when the expelling Member state considers to detain and expel him, as it happened with the Polish citizen in the case at hand.

Moreover, detention of Union citizens is rarely allowed.[16] Thus, detention measures to enforce the Union citizen's expulsion may not be available, once re-entry is discovered by the internal authorities. In other words, when discussing whether certain limitations to re-entry of Union citizens would be allowed, one should realise that it will be extremely difficult to attach practical effect to such limitations.

[16] In CJEU Case C-215/03 *Oulane* [2005], issued before the Citizens' Directive existed, the Court stated that a detention order with a view to deportation in respect of a national of another Member State, imposed on the basis of failure to present a valid identity card or passport constitutes an unjustified restriction on the freedom to provide or receive services, when there is no threat to public policy.

3. First Preliminary Question: The legal effects of expulsion orders under Article 15 and the "demonstrably left" requirement

This section deals with the first preliminary question. It will argue that Article 15(1) of Directive 2004/38 should be interpreted as meaning that the decision to expel a Union citizen from the territory of the host Member State, taken on the basis of that provision, has been complied with and no longer produces legal effects, once that Union citizen has left the territory of the respective host Member State within the period for voluntary departure laid down in that decision.

3.1. Interpretation of Article 15 of the Directive

The CJEU has clarified that free movement can only be restricted on a ground provided for by the Directive.[17] Accordingly, preserving the right to free movement must be the general rule and its restrictions must be interpreted narrowly[18] and in accordance to the principle of proportionality[19].

Article 15(1) of the Directive refers to procedural safeguards and the principle of proportionality in relation to 'all decisions restricting free movement of Union citizens and their family members on grounds other than public policy, public security or public health'. It follows from this provision that the Directive separately addresses expulsions on these three specific grounds, as the basis for the exceptional removal of a Union citizen and expulsions, which may occur in other circumstances.

Importantly, the expulsion order imposed in the current proceedings giving rise to the present preliminary questions was grounded on a justification *other* than public policy, public security or public health. Article 15(3) of the Directive explicitly states that a ban on entry[20] is not lawful, if the expulsion decision is not issued on grounds of public policy, public security or public health. The CJEU recently confirmed that it is not possible, *under any circumstances*, for such a decision to impose a ban on entry into the territory.[21] Accordingly, the first question asked by the Dutch Council of State narrows down to a more confined question:

> Does Article 15(3) of the Directive leave any space for a Member State to attach legal consequences to an expulsion decision, which have effect after the moment the Union citizen has complied with this decision? In other words, can a member state prohibit re-entry without essentially issuing a forbidden exclusion order?

There may be two tentative grounds limiting the right to re-entry, that need to be examined. In substantiating the first preliminary question, the Council of State suggests a scenario according to which re-entry would only be possible, once it has been established that the Union citizen has 'genuinely' left the territory. This issue will be examined in the following section on 'the meaning of leaving'.

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[17] CJEU Case C-202/13 *The Queen, on the application of Sean Ambrose McCarthy, Helena Patricia McCarthy Rodriguez, Natasha Caley McCarthy Rodriguez v. Secretary of State for the Home Department* [2014] para. 45.
[18] CJEU Case 67/74 *Carmelo Angelo Bonsignore v Oberstadtdirektor der Stadt Köln* [1975] para 6.
[19] CJEU Case C-413/99 *Baumbast and R v. Secretary of State for the Home Department* [2002] para 91.
[20] This is the same as an exclusion order in the wording of Article 32 of the Directive.
[21] CJEU Case C-94/18 *Nalini Chenchooliah v. Minister for Justice and Equality* [2019] para. 88.

In the second preliminary question, the Council of State wishes to know whether there could be inherent obstacles to enter the Member State flowing from Articles 5 and 6 of the Directive. This will be examined in section 4 on 'the right to re-entry'.

3.2. The meaning of 'leaving'

The first preliminary question implicitly asks what the meaning is of the obligation to 'leave' the Member State. What does it mean that the Union citizen is required to have 'demonstrably left' the territory of the Member State?

The Council of State distinguishes two 'scenarios', one according to which re-entry would be always possible, and another scenario, in essence introducing a system comparable with that of Article 6(1) the Schengen Borders Code (henceforth: SBC) for third country nationals, which is limiting the right to short stay to a duration of no more than 90 days in any 180-day period. According to that second scenario, the Union citizen must have stayed outside the expelling Member State for a period of (at least) three months. The Council of State does not base this on any analogy with the system of the SBC. It follows from the suggestion (proposed by the Dutch government) that a person can only be considered to have genuinely left a state, if he has genuinely stayed (that is: settled) in another state.

Such a restriction – for which the text of the Directive provides no point of reference - would seriously impact on the freedom of movement, as it would deprive Union citizens of the self-evidence of their freedom to come and go to any Member State and would probably require complicating implementing rules, like those of the SBC.[22] Moreover, it would only be effective if a system monitoring movement of Union citizens would be installed. Most importantly, it is not a natural consequence of an expulsion decision that the Union citizen concerned could be obliged to settle in the neighbouring Member State, like in this case Germany.

The referral to the *O and B* case by the Dutch government is highly artificial, as the topic of that judgment can only remotely be associated to the issue at hand.[23] In that judgment, the question was whether the spouse of a Union citizen can claim a derived right of residence from Directive 2004/38 in the Union citizen's own Member State, if the couple returns from a temporary stay in another Member State. The CJEU found decisive in this case, whether the Union citizen would be *deterred from exercising his right to free movement*. The CJEU held that the Member State of the Union citizen is only obliged to grant a derived residence right to the spouse of the Union citizen after their return, if they have stayed sufficiently long in another Member State to have *created or strengthened their family life* during genuine residence in accordance with the Directive. In that context, the judgment elaborates on what is to be understood as 'genuine residence'. The CJEU considered that 'genuine residence' means residence pursuant to and in conformity with Article 7 of the Directive.[24] This implies a longer stay than the three months of Article 6 of the Directive.

The *O and B* judgment thus in essence secures that Union citizens are not deterred from using their right to free movement. It cannot be inferred from this judgment that a Union citizen,

[22] Like the explanation of 'first day' and 'last 'day' in Art 6(2) SBC and the exceptions for transit in Article 6(5)(a) SBC.
[23] CJEU Case C-456/12 *O v Minister voor Immigratie, Integratie en Asiel and B v Minister voor Immigratie, Integratie en Asiel* [2014].
[24] Ibid para 53 and 56.

who is ordered to leave a Member State because he does not or no longer meet the conditions of Article 7 of the Directive, should be obliged to settle in the neighbouring Member State or any other Member State, before being allowed to re-enter. Furthermore, such obligation would have the effect of an entry ban which is under any circumstances prohibited by Article 15(3) of the Directive.

3.3 Concluding remarks

It follows from this reasoning that the first preliminary question must be answered in the affirmative. Article 15(1) of the Directive should be interpreted as meaning that the decision to expel a Union citizen from the territory of the host Member State no longer produces legal effects, once the Union citizen has demonstrably left the territory of the host Member State within the period for voluntary departure laid down in that decision. An ordinary reading of Article 15(3) of the Directive explicitly precludes States from imposing a ban on entry to those who have been expelled from the State under grounds other than public security, public policy and public health. Moreover, it was argued that the reasoning in the *O and B* judgment does not apply to the situation at hand.

An affirmative answer to the first preliminary question, renders the answer to the third preliminary question unnecessary. In addition, such question refers to a potential requirement for Union citizens to spend a minimum period of time outside the first host Member State. We have explained that such requirement would constitute an unlawful and *de facto* exclusion order.

4. Second Preliminary Question: the right to re-entry

The purpose of this section is to provide an answer to the question whether a Union citizen has the right of residence under Article 6(1) of the Directive, in the event of immediate return to the host Member State – a return that is presumably allowed seeing our answer to the first question. May the host Member State than take a new expulsion decision in order to prevent the Union citizen from entering the host Member State time and again?

4.1 Background of the preliminary questions

In its referring judgment, the Council of State explains its concerns, which underlie the questions posed to the Court of Justice:

> On the other hand it can be held that the general aim of an expulsion is, that the person who has been expelled continually stays outside the territory of the Member State that decided to remove him. That aim cannot be attained when the citizen of the Union could re-enter the territory of that Member State based on Article 5 of the Citizens Directive on the same day on which he left the territory of that Member State or was removed from that territory and could stay on that territory based on Article 6. Thus the question can be asked what is then the use of an expulsion decision as meant in Article 15 of the Citizens' Directive.[25]

It seems reasonable to put these remarks in perspective of the underlying case, dealing with a Union citizen, who lost his identity card, had worked for five months in the past, but did not work or study ever since, did not have sufficient own means to live independently, was regularly arrested on suspicion of shop lifting and pick pocketing, trespassing, violently resisting a police officer and insulting. Furthermore, he had stated that he was addicted to marihuana and regularly came from Germany to the Netherlands to buy marihuana. Even though he does not really meet the ideal picture of a hard-working and decent citizen, it must be borne in mind that fundamental freedoms apply to every Union citizen, irrespective of their unsympathetic behaviour.

In this case, the sole reason to impose an expulsion measure on the Union citizen was that he did not comply with Article 7 of the Directive. The Dutch authorities have not examined whether he was a sufficient threat to public policy. Furthermore, it appears that the Dutch authorities have used the possibility to institute criminal proceedings against him, as he declared, according to the referring judge, to have been summoned to appear before a court.

4.2 The right to re-entry

In light of the proposed answer to the first preliminary question, it must be presupposed that an expulsion measure is complied with, as soon as the Union Citizen has left the territory of the expelling Member State and that re-entry may – under no circumstance – be prohibited or prevented. Therefore, the principal approach to the second question should be that it is dependent on the behaviour of the Union citizen whether a new expulsion decision may be taken. For instance, if the personal behaviour of the Union Citizen would, after his re-entry, be deemed to pose a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, a new

[25] Council of State 25 September 2019, ECLI:NL:RVS:2019:3262 para 11.2 (unofficial translation).

expulsion order could be taken. In that situation, Article 15 of the Directive would also allow an exclusion order, to the effect that the Union citizen can be required to 'continually' stay outside the Dutch territory.

But, if the sole objection against the Union citizen is that he did not comply with the requirements of Article 7 of the Directive in the past, he may in no way be prevented from trying to comply with these conditions, after his re-entry in the Member State. For instance, he cannot be prevented from genuinely seeking work, in compliance with the *Antonissen* and *Collins* judgments.[26] Moreover, according to the *Luisi and Carbone* judgment, he cannot be prevented from receiving services, such as medical treatment.[27] Furthermore, he must have the right to register as a student, or to start living in the Member State on a newly acquired source of income.

Only if none of these circumstances apply, the question comes to the fore whether the Union citizen may stay for another three months in the Member State based on Article 6 of the Directive. In that situation, the fact that the Union citizen has no valid Identity document may be reason to expel him. However, it can be inferred from Article 5(4) of the Directive that Union citizens without ID or passport can nevertheless be covered by the right of free movement and residence, if their identity and nationality is sufficiently proven by other means.[28]

In the present case, Article 5 of the Directive poses no obstacle for the Union citizen to enjoy a right to residence of a period of three months again. In section 3.2 of this expert opinion it was already concluded that a Union citizen cannot be required to stay away for a certain period of time before coming back, before he has again the right to residence during three months in accordance with Article 6 of the Directive.

Accordingly, a picture arises of an extensive freedom for Union citizens to re-enter and to start again in a Member State after a decision to expel him from the territory. This picture must be seen in connection with the absence of internal border controls. Article 22 SBC states that internal borders may be crossed on any point without a border check on persons being carried out, irrespective of their nationality. Only in case of sufficient objections based on public policy or public security, a Union citizen may be expelled and prohibited entry.

4.3 Abuse?

The Dutch government states that immediate return after removal would amount to 'abuse' of the freedom of movement.[29] Is that assumption correct?

The CJEU has expressly applied the doctrine of abuse of rights to the freedom of movement provisions.[30] It has been unwilling to find an abuse of rights with regard to freedom of movement provisions.[31] On the contrary, the Court has always interpreted the right to free movement and residence of Union citizens and their third country family members in a broad manner. Indeed, the

[26] CJEU Case C-292/89 *Antonissen* [1991] and CJEU Case C-138/02 *Collins* [2004].
[27] CJEU Case C-286/82 [1984].
[28] See also CJEU Case C-459/99 *MRAX* [2002] and CJEU Case C-215/03 *Oulane* [2005].
[29] Council of State 25 September 2019, ECLI:NL:RVS:2019:3262 para 4.
[30] CJEU Case C-202/13 *The Queen, on the application of Sean Ambrose McCarthy, Helena Patricia McCarthy Rodriguez, Natasha Caley McCarthy Rodriguez v. Secretary of State for the Home Department* [2014] para 54.
[31] T. Szabados 'National Courts in the Frontline: Abuse of Rights under the Citizens' Rights Directive' *Utrecht Journal of International and European Law* (2017) pp 33 and 84.

CJEU has yet to find a situation, in which the use of free movement has constituted a violation of Article 35 of the Directive.

Article 35 of the Directive provides that 'Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure should be proportionate and subject to procedural safeguards provided for in Articles 30 and 31.' The principle is also recalled in Recital 28 of the Preamble to the Directive, which states: '[T]o guard against abuse of rights or fraud, notably marriages of convenience or any other form of relationships contracted for the sole purpose of enjoying the right of free movement and residence, Member States should have the possibility to adopt the necessary measures.' The prohibition of abuse of rights codifies a general principle of EU law, which was first affirmed by the CJEU in the *Van Binsbergen* judgment in 1974.[32] It has since developed and is now a doctrine that applies to many different fields of EU law.[33]

With regard to its nature, the CJEU referred to the prohibition of abusive practices as a principle in *Halifax*[34] and as a 'general Community law principle' in *Kofoed*[35]. In *Emsland-Stärke*, the CJEU developed a general test to assess whether a certain conduct constitutes abuse of EU law.[36] This test first entails the analysis of objective circumstances, in which 'despite formal observance of the conditions laid down by the Community rules, the purpose of those rules has not been achieved'.[37] A subjective element must also be considered, consisting of 'the intention to obtain an advantage from the Community rules by creating artificially the conditions laid down for obtaining it'.[38]

Is the renewed use of the three months' residence under Article 6 of the Directive in one Member State, after having been expelled or removed on ground of not-fulfilling the requirement of Article 7 of the Directive, an abuse of rights? The CJEU's case law does not provide a definitive answer to this issue. Domestic case law may give guidance in interpreting Article 35 of the Directive. In this regard, the doctrine of abuse of rights has been applied in France to refuse the right of residence to Romanian and Bulgarian citizens of Roma origin. A series of cases arose in which the French courts tried to address the issue of Union citizens claiming social assistance benefits in France whilst using their free movement right to cross the border and then return before a period of three months residence. This ensured that the Union citizens were constantly renewing their Article 6 rights, rather than their right of residence progressing to the more onerous obligations of Article 7 of the Directive. It is worth highlighting here that French law allowed for social assistance to be provided already during the first three months of stay in France, while it was not obliged to do so. Article 24(2) of the Directive states that Member States are not required to provide Union citizens any recourse to social

[32] *Johannes Henricus Maria van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*, Case 33/74 [1974] para. 13.
[33] T Szabados 'National Courts in the Frontline: Abuse of Rights under the Citizens' Rights Directive Utrecht Journal of International and European Law (2017) pp 33 and 84.
[34] CJEU Case C-255/02 *Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v Commissioners of Customs & Excise* [2006] para 70.
[35] CJEU Case C-321/05 *Hans Markus Kofoed v Skatteministeriet* [2007] para 38.
[36] CJEU Case C-110/99 *Emsland-Stärke GmbH v. Hauptzollamt Hamburg-Jonas* [2000].
[37] Ibid. para 52.
[38] Ibid. para 53.

assistance during the first three months of residence.[39] Consequently, Article L. 511-3-1 of the *Code de l'entrée et du séjour des étrangers et du droit d'asile* provides that:

> the competent administrative authority can, by reasoned decision, oblige a national of a Member State of the European Union or that of another state party to the Agreement on the European Economic Area or that of the Swiss Confederation, or his family members to leave the French territory once it establishes that: […] 2° Their residence constitutes an abuse of rights. The fact of the renewal of a residence of less than three months for the purpose of remaining in that territory constitutes an abuse of rights, if the conditions for residence for a period of more than three months are not satisfied. Residence in France for the essential purpose of benefiting from the social assistance system constitutes equally an abuse of rights.[40]

In this regard, the French courts held that renewing the three months residence rights under Article 6 of the Directive with the purpose of benefiting from the social assistance system, while avoiding satisfying the requirements of Article 7 of the Directive, constituted an abuse of rights. However, it was made clear that it was not the renewal of Article 6 of the Directive itself that constituted abuse. Rather, it was the renewal aimed at benefiting from the advantages granted to residents staying for more than three months (such as the social assistance system) without ever having to fulfil Article 7 conditions that was regarded as such.[41]

We conclude that Article 6 of the Directive cannot be abused unless the Union citizen is artificially making use of free movement law to receive a benefit other than the right to reside.

[39] T Szabados 'National Courts in the Frontline: Abuse of Rights under the Citizens' Rights Directive Utrecht Journal of International and European Law (2017) pp 33 and 84.

[40] T Szabados 'National Courts in the Frontline: Abuse of Rights under the Citizens' Rights Directive' Utrecht Journal of International and European Law (2017) pp 33, 84.

[41] Ibid, commenting on: Cour administrative d'appel de Douai 3ème chambre, Nº 12DA00772, 29 novembre 2012; Cour administrative d'appel de Douai 3ème chambre, Nº 12DA00773, 29 novembre 2012; Cour administrative d'appel de Douai 3ème chambre, Nº 12DA00774, 29 novembre 2012; Cour administrative d'appel de Bordeaux 3ème chambre, Nº 12BX00601 30 octobre 2012; Cour administrative d'appel de Bordeaux 3ème chambre, Nº 12BX00602, 30 octobre 2012; Cour administrative d'appel de Bordeaux 3ème chambre, Nº 12BX00603, 30 octobre 2012; Cour administrative d'appel de Bordeaux 3ème chambre, Nº 12BX00604, 30 octobre 2012; Cour administrative d'appel de Bordeaux 3ème chambre, Nº 12BX00605, 30 octobre 2012; Cour administrative d'appel de Bordeaux 6ème chambre, Nº 12BX00493, 13 novembre 2012; Cour administrative d'appel de Douai 2e chambre, Nº 14DA00779, 3 février 2015; Cour administrative d'appel de Douai 2e chambre, Nº 13DA0072 2e chambre, 28 mai 2013; Cour administrative d'appel de Douai 2e chambre, Nº 13DA0073 2e chambre, 28 mai 2013; Cour administrative d'appel de Douai 2e chambre, Nº 13DA0074 2e chambre, 28 mai 2013; Cour administrative d'appel de Douai 2e chambre, Nº 13DA0076 2e chambre, 28 mai 2013; Cour administrative d'appel de Douai 2e chambre, Nº 13DA0077 2e chambre, 28 mai 2013; Cour administrative d'appel de Douai 2e chambre, Nº 13DA0078 2e chambre, 28 mai 2013; Cour administrative d'appel de Douai 2e chambre, Nº 13DA0080 2e chambre, 28 mai 2013.

5. Conclusions and answers to the preliminary questions

This expert opinion concerns the case of a Union citizen, who was detained in order to enforce his expulsion from the Netherlands, after he had left in compliance with an expulsion decision and re-entered the Netherlands. It has sought to examine the legal practice of expulsion in light of Directive 2004/38, in order to address the preliminary questions referred to the CJEU by the Dutch Council of State in case C-719/10.

In section 2, this expert opinion showed the importance of the fundamental right to free movement and the extensive measures taken to preserve and promote this right. It was highlighted that expulsion of a Union citizen is a serious measure, which restricts his right to free movement. Such restriction must be in accordance with the legal and procedural safeguards, as stipulated by the Directive. It should have a legal ground provided for by the Directive and fulfil the principle of proportionality. The expert opinion also pointed out that an expelled Union citizen, who returns from a neighbouring Member State to the expelling Member State will not be discovered, as a result of the lack of border control. Moreover, detention may not be possible in order to enforce the Union citizen's expulsion, once re-entry is discovered by the internal authorities.

Moreover, the expert opinion examined the provisions, which prescribe in what circumstances an expulsion can lead to an exclusion order as set out in the Directive. If these provisions are not upheld, this will risk narrowing the scope of free movement rights in a manner that goes far beyond the circumstances of this particular case.

In the context of the first preliminary question, section 3 examined the legal grounds for expulsion under the Directive were examined. The Directive clearly provides for two circumstances in which Member States have the ability to expel Union citizens from their territory. One ground is reasons of public order, security and health as stated in Article 27 of the Directive. Expulsion decisions made under this ground must reach high threshold and adhere to certain procedural safeguards.[42] An expulsion order in these circumstances may contain an exclusion order.

However, an expulsion order made on grounds *other* than public policy, health and security, may not contain an exclusion order as stated in clear terms in Article 15(3) of the Directive. If an expulsion order continued to have legal effects after it has been complied with, we believe this would constitute an exclusion order. We therefore conclude from a literal interpretation of Article 15 of the Directive, that, once a Union citizen has left the territory of the host Member State in compliance with an expulsion order, the provision no longer produces legal effects.

The suggestion, that the obligation to 'leave' after an expulsion order would entail an obligation to settle in another Member State, and acquire 'genuine residence' as meant in the *O and B* judgment, before re-entry in the expelling Member State would be allowable, was investigated and rejected as being far-fetched and irreconcilable with the fundamental right of free movement.

Section 4 subsequently examined the second preliminary question, based on our finding that an expulsion order based on non-compliance with the conditions of Article 7 cannot prevent immediate re-entry. The expert opinion underlined that the right to free movement implies a right to start again after failing to comply with the conditions for legal residence under the TFEU and the Directive. The principal approach to the second question should be that it is dependent on the behaviour of the Union Citizen after his re-entry, whether a new expulsion decision may be taken.

[42] Art 31 Directive 2004/38.

The mere fact that the Directive provides for a short-term right to stay for three months in Article 6 does not prevent a Union Citizen from immediately exerting his residence rights laid down in Article 7 and the TFEU.

Section 4.3 examined whether there may be an abuse of rights, if the Union citizen immediately returns to the expelling Member State on the basis of Article 6 of the Directive, after having complied with an expulsion order. It was argued that the fact that the Union citizen was expelled on the ground that Article 7 of the Directive was not complied with, cannot be considered as abuse, if the Union citizen does not receive any undue benefits. A new expulsion decision cannot be taken on the basis of the previous one.

5.1 Answers to the preliminary questions

We respectfully propose the CJEU to answer the preliminary questions as follows:

1. Article 15(1) of Directive 2004/38/EC is to be interpreted as meaning that the decision to expel a Union citizen from the territory of the host Member State, issued on the sole ground that his stay is not or no longer lawful under articles 6 or 7 of the Directive, has been complied with and no longer produces legal effect, once that Union citizen has left the territory of the respective host Member State.

2. If a Union Citizen, who was ordered to leave the territory of the host Member State on the sole ground that his stay is not or no longer lawful under articles 6 or 7 of the Directive, returns to the host Member State after having left its territory, the host Member State cannot on that sole ground take a new expulsion decision in order to prevent the Union citizen from re-entering the host Member State. Whether this Union citizen has the right of residence under Article 6(1) of Directive 2004/38/EC or under the TFEU in the event of immediate return to the host Member State, will depend on his behaviour after his re-entry. The Union citizen may only be expelled if he poses a threat to public order, public security or public health or if he does not fulfil the conditions for residence of the Directive and the TFEU.

It is not necessary to provide an answer to question 3.