DEVELOPMENTS IN EUROPEAN LAW

Expulsion of EU Citizens from Another EU Member State in the Recent Case Law of the CJEU*

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Abstract

The concept of a territorially united Europe is a necessary corollary to the completion of the Area of Freedom, Security and Justice (AFSJ). While the case law of the CJEU on EU citizenship in many respects aims to strengthen this status (and, at the same time, to weaken Member States' regulatory power) there is at least a partly opposite trend in the assessment of Member States' expulsion policy under EU law. This line of cases emphasizes not only the traditional role of the Janus-faced concept of social integration, which bolsters the exercise of rights, but also its role as a justification for the restriction of rights. This article examines how the CJEU can reconcile the federalizing concept of a new citizenship with an expulsion policy based on sovereignty and how all of this impacts the unifying and expanding concept of EU citizenship.

Keywords: EU citizenship, public security, social integration, good market citizen, Area of Freedom Security and Justice.

1. Introduction

The expulsion of EU citizens and their family members from an EU Member State other than their own Member State has always been a delicate issue of EU law. This is entirely understandable in a field of law which, although pertaining to the competence of the Member States, as part of the internal market, is in fact in the buffer zone between the Member States' values and European interests. The jurisdictional tension in this area, which has been well-defined from the outset, has only been exacerbated by the case law of the CJEU following the adoption of

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Directive 2004/38/EC[1] in which the concept of social integration is more pronounced in public policy and public security related decisions than before.

This case law, characterized as a restrictive one, is, from time to time, criticized in legal literature. This is because the CJEU, by blurring the previously clear boundaries of public policy and public security in its case law, and now requiring compliance with the host Member State's criminal law standards, as well as compliance with the category of good market citizen in order to enjoy enhanced protection against expulsion, not only undermines the previous system of protection for EU citizens, but also jeopardizes legal certainty.[2]

Critics rightly refer to the fact that, in addition to the classic grounds for expulsion under public policy, public security and public health laid down in Directive 2004/38/EC, the CJEU created another legal basis for expulsion in its 2014 *Dano* judgment.[3] According to this new doctrine, EU citizens who are essentially excluded from the scope and safety net of the Directive due to non-compliance with the condition of sufficient financial resources set out in Article 7 of the 2004/38/EC and their application for social assistance, are now vulnerable to expulsion.[4]

Indeed, it may be concluded from the CJEU's recent case law on expulsion that the main drivers of integration remain fundamentally economic in nature, centered on the idea of a good market citizen.[5] The CJEU's increased emphasis on the requirement of social inclusion merely reflects the fact that, due to its 'unfinished nature',[6] the legal institution of EU citizenship may not yet act as a catalyst in the field of expulsion policy. When adopting Directive 2004/38/EC, Member States made it clear that they did not wish to grant the right to absolute protection against expulsion even to EU citizens who are permanent residents.[7]

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.

2 Michal Meduna, 'Scelestus Europeus Sum: What Protection against Expulsion Does EU Citizenship Offer to European Offenders?', *in* Dimitry Kochenov (ed.), *EU Citizenship and Federalism,* Cambridge University Press, Cambridge, 2017, p. 405.

3 Judgment of 11 November 2014, *Case C-333/13, Dano,* ECLI:EU:C:2014:2358.

4 According to the CJEU's ruling in *Chenchooliah*, Article 15 of the Citizenship Directive serves as a legal basis for the expulsion of EU citizens for reasons other than public policy, public security or public health if the Union citizen no longer fulfills the conditions for residence under the Directive. Judgment of 10 September 2019, *Case C-94/18, Chenchooliah,* ECLI:EU:C:2019:693, paras. 74-75.

5 This suggestion is not entirely unfounded, given that the CJEU's case law on expulsion refers only once to EU citizenship as a fundamental status, and there are no indications yet as to why this would change in the future.

6 Meduna 2017, pp. 411-413; Sandra Mantu, 'Concepts of Time and European Citizenship', *European Journal of Migration and Law,* Vol. 15, Issue 4, 2013, p. 447.

7 According to the proposed directive, EU citizens and their family members who have acquired permanent resident status would still have enjoyed absolute protection against expulsion on grounds of public policy or public security. Although the European Parliament supported this absolute defense construct in its report on the draft, it failed in the Council in light of the almost unanimous opposition by the Member States. European Parliament, Report on the proposal for directive on the right of citizens of the Union and their family members to move and reside freely on the territory of the Member States, COM(2001) 257 final.

The relative nature of the protection means that as one of the last bastions of national sovereignty Member States still retain their power of expulsion in case of the most serious breaches. This does not mean, of course, that the CJEU's recent case law does not take into account the long-term federalizing effect of the institutions of EU citizenship and free movement. As will be shown below, the emergence of common European values in the relevant CJEU case law, or the emphasis on the social rehabilitation of the Union citizen as a common European interest, may over time dilute the importance of sovereign state power.

Based on recent case law, this article seeks to unpack the long-term challenges that will shape the CJEU's jurisprudence on expulsion measures in the Member States. In this context, the theoretical issues and practical difficulties involved in the gradual establishment of an Area of Freedom, Security and Justice (AFSJ) will be discussed. If we consider the Union as a single area of freedom, security and justice, the expulsion of citizens who commit a criminal offence is nothing more than the 'transfer' of offending EU citizens from one corner of this borderless area to another.[8] If we accept that the Union is an area without frontiers, the open nature of the Union necessarily implies that the legal institution of expulsion is meaningless. In practice, expulsion decisions, or even entry bans in the Schengen area are difficult to enforce and apply. Even if a national of a Member State is expelled from the territory of a host Member State, there is no guarantee that he or she will not turn up later in the same Member State. A good example is the CJEU's 2021 ruling in *F.S.*[9] in which the CJEU examined the question when an expulsion decision of a Member State may be regarded as having been enforced and in which circumstances an actual departure from the territory of the Member State in question may be justified.

Ensuring the coherence of case law on the expulsion or residence of EU citizens[10] may be a similar challenge in the future. While the CJEU applies a typically restrictive approach to the expulsion of citizens moving within the EU, referring to the fundamental nature of the legal status, based on the *Zambrano* doctrine,[11] it already guarantees a very high level of protection where there is a risk that static citizens are forced to leave the EU. Although the difference between official decisions on expulsion from one Member State to another and forcing specific persons to leave the entire territory of the Union is clear, the case law is currently divergent on this point, which in my view is not in itself justified by the geographical difference between the two expulsions.

8 Elspeth Guild *et al.* (eds.), *The EU Citizenship Directive: A Commentary,* 2nd edition, Oxford University Press, Oxford, 2019, p. 289.

9 Judgment of 22 June 2021, *Case C-719/19, F.S.*, ECLI:EU:C:2021:506.

10 Meduna uses the term constructive deportation which is not entirely correct in law as the expulsion of one's own citizen is not legally possible under international law, and it is not the EU citizens themselves who are the subject of the dispute. However, this term makes it clear that a negative decision affecting parents also indirectly affects the residence of the EU citizen as there is the risk of leaving the territory of the Union.

11 As regards the EU citizenship under Article 20 TFEU, the CJEU ruled in *Zambrano* that EU law "precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union". Judgment of 8 March 2011, *Case C-34/09, Zambrano,* ECLI:EU:C:2011:124.

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The article below provides a brief overview of the legal framework for the expulsion of EU citizens and their family members. It then outlines the main elements of the current case law, highlighting the emergence of the concept of social integration in expulsion policy. Finally, some of the future challenges of expulsion policy will be discussed.

2. The Relevant Provisions of Directive 2004/38/EC

The right of EU citizens to free movement is guaranteed by Article 21 TFEU. Although fundamental, this right is very limited and conditional. As Meduna puts it very aptly, free movement is neither free for all, nor free-for-all,' that is, free movement is not guaranteed to everyone, but it is not even free.[12] Primary law and Directive 2004/38/EC, on the one hand, lay down the conditions for residence and, on the other hand, give power to the Member States to expel nationals of other Member States and their family members on grounds of public policy, public security or public health.[13]

However, Directive 2004/38/EC has also reinforced the protection of EU citizens and their family members against expulsion by establishing a system of gradual protection proportionate to the length of stay.[14] Under this system, protection against expulsion will gradually increase depending on the degree of integration of the EU citizen concerned in the host Member State, as set out below.[15] *(i)* The first level of the system is the protection of EU citizens and their third-country family members without a right of permanent residence: Member States may, in addition to the protection provided for under Article 15 of the Directive,[16] restrict their entry or residence only on grounds of public policy, public security or public health. *(ii)* The second level of protection may be enjoyed by EU citizens and their third-country family members who have already acquired a permanent right of residence in the host state, since the ground for expulsion provided for in Article 15 of the Directive no longer applies to them. Under Article 28(2) of the Directive, the host state may decide to expel them only on the more serious grounds of public policy or public security. *(iii)* Finally, Article 28(3) of the Directive provides the highest, third level of protection as it only allows expulsion on the imperative grounds of public security. However, this 'enhanced

12 Meduna 2017, p. 395.

13 Since 2014 the CJEU has developed a new ground for expulsion under Article 15 of the Citizenship Directive which applies when an EU citizen no longer has a right of residence under the Directive in question.

14 As mentioned in the introduction, this protection is only relative as opposed to the original Commission draft.

15 As the CJEU has already stated in *Tsakouridis* in 2009, "the greater the degree of integration of Union citizens and their family members in the host Member State, the greater the degree of protection against expulsion should be." Judgment of 23 November 2010, *Case C-145/09, Tsakouridis*, ECLI:EU:C:2010:708, para. 25.

16 According to Article 15(1) of the Citizenship Directive, the procedures provided for by Articles 15 and 31 shall apply by analogy to all decisions restricting free movement of Union citizens and their family members on grounds other than public policy, public security or public health.

protection' is only guaranteed to EU citizens who have been in the territory of the host Member State for 'the previous ten' years,[17] or to minors.

3. Some Elements of the CJEU's Restrictive Approach in its Recent Expulsion Case Law

In its case law following the entry into force of the Directive, the CJEU has sought to avoid, with regard to financial guarantees[18] even the impression that legislation may provide absolute or even close to absolute protection to citizens moving freely.

Thus, first, by blurring the previously seemingly clear boundaries between public policy and public security in *Tsakouridis* and *P.I.*,[19] the CJEU left it essentially up to the Member States to decide whether perpetrators of certain exceptionally serious offences could enjoy enhanced protection under the relevant provisions of the Directive. By further narrowing the potential scope of EU citizens under enhanced protection in *M.G.*,[20] the CJEU also ruled that the ten years required for such protection should be counted backwards from the expulsion decision[21] and that period of imprisonment interrupt the continuity of that stay as a general rule. With this, the CJEU essentially created a new qualitative condition not expressly provided for in the legislation. The CJEU took a similar view in *B. and Vomero*[22] when it stated that enhanced protection could only be obtained through the acquisition of permanent residence status, notwithstanding the fact that such a restriction is not provided for in the Directive.

Scholars trace this restrictive trend back to a wide variety of reasons. While some see the roots of this change in the changed political environment itself,[23] others see the CJEU's role in reversing the federal bargaining process behind the

17 This clause, which was inaccurately worded by the EU legislature, was subsequently the subject of the CJEU's interpretative decision in *M.G.*

18 The CJEU has still taken a strong position on the enforcement of the procedural guarantees provided for in the Directive.

19 Judgment of 22 May 2012, *Case C-348/09, P.I.*, ECLI:EU:C:2012:300.

20 Judgment of 16 January 2014, *Case C-400/12, M.G.*, ECLI:EU:C:2014:9.

21 Another condition is that these ten years must be continuous.

22 Judgment of 17 April 2018, *Joined cases C-316/16 and C-424/16, B. and Vomero*, ECLI:EU:C:2018:256.

23 The arguments for a changing political environment, which is closely linked to fears surrounding immigration, is clearly lending itself, as we tend to reinforce the distinction between 'we' and 'others' in a crisis situation. According to some authors, the expulsion of foreign offenders in this case is a kind of message from the Member States to their citizens that the government does control foreigners. This is especially true in a period of global crisis where nation-state frameworks are an essential source of security, reinforcing the importance of national affiliation and identity. Kathrin Hamenstadt, 'Expulsion and "Legal Otherness" in Times of Growing Nationalism', *European Law Review*, Vol. 45, Issue 4, 2020, pp. 453-470.

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jurisprudence.[24] Still others, with somewhat idealistic overtones, believe that national authorities have been applying EU law with such confidence for many decades of integration that the CJEU can be much more flexible in shaping EU rules.[25] Even if the reasons behind the CJEU's approach cannot be clearly identified, it is in any event certain that the CJEU has upheld the concept of social integration (rooted in the right to free movement) in its recent case law on expulsion.[26] The CJEU does all this in such a way that in its jurisprudence it now emphasizes not only the traditional role of this Janus-faced concept, which also strengthens the exercise of rights, but also its role both as a precondition for the exercise, and as a justification for the restriction of rights. This may even lead to keeping out or removing EU citizens from the territory of the Member State in question, instead of admitting them.

This approach also implies a sense of responsibility on the side of the citizens who move freely. While the traditional rights based approach[27] to the integration process treats the free mover as a passive actor in social inclusion,[28] the new case law of the CJEU imposes a much greater responsibility on the EU citizen by defining EU citizenship as a set of rights and obligations. Consequently, EU citizens must bear the consequences of a possible lack of social integration, including the loss of their right of residence and thus their expulsion from the territory of a Member State. This responsibility therefore imposes a double requirement on the EU citizen moving freely. On the one hand, the EU citizen must refrain from breaching the criminal law standards of the host Member State (moreover, in addition to the criminal law of the Member States, in its recent case law, the CJEU imposed this obligation also in respect of EU values). On the other hand, in order to enjoy enhanced protection through permanent residence, an EU citizen must also meet the economic criteria set out in the Directive.

3.1. Blending the Concepts of Public Order and Public Security

According to legal literature, the CJEU's decisions in *Tsakouridis* and *P.I.* were the first step in this restrictive interpretation and practice. In the cases in question, the national courts turned to the CJEU to interpret, inter alia, the concept of imperative grounds of public security within the meaning of Article 28(3) of the Directive.[29] *Tsakouridis* and *P.I.* were based on expulsion decisions adopted

24 *See also* Niamh Nic Shuibhne, 'Recasting EU Citizenship as Federal Citizenship: What Are the Implication for the Citizen When the Political Bargain Is Privileged?', *in* Kochenov (ed.) 2017, p. 153.

25 Dimitry Kochenov & Sir Richard Plender, 'EU Citizenship: From an Incipient Form to an Incipient Substance?', *European Law Review,* Vol. 37, Issue 4, 2012, p. 388.

26 Daniel Thym, 'The Evolution of Citizens' Rights', *in* Daniel Thym (ed.), *Questioning EU Citizenship,* Hart Publishing, 2017, p. 125.

27 According to that view, integration takes place essentially automatically by reason of the residence in the Member State concerned and the lapse of time.

28 Stephen Coutts, 'The Absence of Integration and the Responsibilisation of Union Citizenship', *European Papers,* Vol. 3, Issue 2, 2018, p. 765.

29 The two cases concerned EU citizens who had resided in the territory of the host Member State, Germany, for more than ten years, so that only an imperative ground of public security could justify their expulsion.

following convictions for particularly serious crimes committed by the individuals concerned (dealing in narcotics as part of an organized group and sexual exploitation of children).

It is apparent from the case file in *Tsakouridis* that the referring German court itself, regardless of the seriousness of the offence, did not consider it appropriate to establish a category of imperative public security, if any, which would otherwise have resulted from the relevant German legislation. The question was significant since Tsakouridis had resided in the territory of the host Member State for more than 10 years, so that only this legal ground could have served as a basis for expulsion. Based on the CJEU's earlier case law, the German judicial forum found that public security covered only the external and internal security of a Member State and was therefore narrower than the concept of public policy which included internal criminal law. Consequently, Tsakouridis might possibly represent a substantial threat to public policy, but not to the existence of the state and its institutions or the survival of the population.[30]

However, the CJEU did not share the German court's approach and departed from its own previous jurisprudence. While emphasizing that EU legislature intended to *limit measures based on Article 28(3) of the Directive to 'exceptional circumstances'*, the CJEU nevertheless ruled that the fight against crime in connection with dealing in narcotics as part of an organized group was capable of being covered by the concept of *'imperative grounds of public security'*, that is, the CJEU did not consider it necessary to separate the two concepts.[31] Moreover, the CJEU held that a threat to public security may be established in the event of any threat to the fundamental interests of society or to the host Member State that might directly threaten the calm and physical security of the population as a whole or a large part of it.[32] With this decision, the CJEU clearly intended to reflect its social value judgment in relation to certain exceptionally serious crimes. However, because of its devastating effect on society, dealing in narcotics may undoubtedly be particularly likely to *undermine the moral convictions of the population*.

30 *Case C-145/09, Tsakouridis*, para. 20.

31 Although there is some overlap between the concepts of public policy and public security, that is, the two concepts are not rigidly separated, public security usually constitutes an attack on state institutions or their basic infrastructure, or a significant security threat to the public due to the magnitude of the risk, for example in the form of a terrorist act. Public policy, on the other hand, is traditionally interpreted to involve the maintenance of peaceful social coexistence, and thus the protection of personal rights by criminal law.

32 Ultimately, however, the CJEU left it to the national court to decide whether Tsakouridis's conduct fell within the 'serious grounds of public policy or public security' or the 'imperative grounds of public security' within the meaning of Article 28(3) of the Directive.

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3.2. Emphasizing the Exceptional Nature of an Act Committed in the Past rather than a Future Threat

The CJEU followed the above logic also in *K. and H.F.*[33] in 2018 in which, in relation to the expulsion of persons convicted of war crimes[34] from the Netherlands and Belgium, set out the finding already well-known from *Tsakouridis* and *P.I.* According to this, internal security may be affected by the risk of a serious disturbance to the foreign relations of that Member State or to the peaceful coexistence of nations.[35] However, as long as dealers in narcotics or sex offenders may indeed have a tendency to perpetuate such behavior and thus pose a genuine and present threat to a fundamental interest of society, this is highly doubtful for war criminals. In *K. and H.F.*, however, the CJEU felt it necessary to reaffirm *the concept of a threat that passed from the past to the future,* that is, that an act committed in the past could, because of its exceptional gravity, pose a permanent threat to a fundamental interest of society in the future. Incidentally, the case is remarkable only because it is the first to deal with the relationship between EU refugee law and the free movement of EU citizens.[36] In my view, this approach of the CJEU is at least debatable: there is no threat to society years or decades after the commission of an earlier, serious crime. Nevertheless, the material gravity of the crime itself can be regarded as such that no immunity may be granted from the consequences of the commission of that crime. It therefore seems more appropriate to take into account both the risk of recidivism (which may be an assessment criterion for any offender, regardless of the material gravity of the offence) and the substantive weight of that offence, bearing in mind that *the mere fact of committing a particularly serious crime in itself creates the possibility of expulsion,* regardless of a possible risk of recidivism. This approach is essentially the same as when a convicted person cannot be absolved *ex post facto* from the adverse legal consequences of a conviction.

K. was a Croatian war criminal[37] living in the Netherlands since 2001, whose application for asylum was repeatedly rejected by the authorities under Article F(1) of the 1951 Geneva Convention on the grounds that he had been personally involved in war crimes and crimes against humanity in the former Yugoslavia. Subsequently, in view of these war crimes, the Dutch authorities

33 Judgment of 2 May 2018, *Joined cases C-331/16 and C-366/16, K. and H.F.*, ECLI:EU:C:2018:296.

34 About the relevance of war crimes at national level, *see e.g.* Réka Varga, 'Háborús bűncselekményekkel kapcsolatos eljárások nemzeti bíróságok előtt', *in* Eszter Kirs (ed.), *Egységesedés és széttagolódás a nemzetközi büntetőjogban,* Bíbor, Miskolc, 2009, pp. 91-111. From the Hungarian state practice, *see e.g.* Réka Varga, 'A nemzetközi jog által büntetni rendelt cselekmények magyarországi alkalmazása (a Biszku-ügy margójára)', *Iustum Aequum Salutare,* Vol. 7, Issue 4, 2011, pp. 19-24.

35 Id. para. 42.

36 Coutts 2018, p. 775.

37 About the violation of international humanitarian law during the Yugoslav wars, *see e.g.* Réka Varga, 'A nemzetközi humanitárius jog alkalmazhatósága a délszláv-válság idején: a horvátországi háború', *in* Vanda Lamm (ed.), *Dayton 10 év után,* MTA, Budapest, 2006. From the relevance of the Rome Statute of the ICC, *see e.g.* Réka Varga, 'A Római Statútum jelentősége a nemzetközi jogban és a nemzetközi büntetőjogban', *Iustum Aequum Salutare,* Vol. 2, Issue 1-2, 2006, pp. 95-98.

declared K. to be an undesirable person on grounds of public policy and public security. The facts in *H.F.* were very similar to those in *K.* An Afghan national arrived in the Netherlands back in 2000 where his asylum application was rejected by the authorities. The applicant later settled in Belgium with his Dutch national daughter, where he wished to obtain a right of residence as a family member of an EU citizen. However, his application was rejected by the Belgian authorities on the grounds of his case file in the Dutch asylum procedure, namely because he was involved in war crimes or crimes against humanity. In both cases, the CJEU had to answer the question whether a restriction on freedom of movement based on acts or events that had occurred decades ago or in a specific historical or social context is compatible with EU law and unlikely to recur in the Member State in question.

In its judgment, the CJEU acknowledged, first of all, that the grounds relied on by a Member State, including the protection of fundamental values under Articles 2 and 3 TEU, may justify the application of the public policy and public security exception. However, it emphasized that *the refusal of asylum* by the authorities *alone could not automatically lead to a restriction on freedom of movement* in which case an individual assessment of the circumstances was required.[38] To that extent, the approach set out in the judgment cannot, in any way, be described as restrictive.

The real significance of the case consists in the CJEU's novel approach to how an act committed in the past is to be assessed, that is, whether a threat to a fundamental interest of society can be regarded as permanently immediate because of its particularly serious nature. Referring to its earlier decision in *Bouchereau*,[39] the CJEU confirmed that *the time elapsed* since the offence may indeed be *an important factor* in the assessment, but that the *exceptionally serious nature of a past act* (according to the CJEU's above-mentioned approach) may, even after a relatively long period of time, *justify such a risk*.[40]

It is surprising that an act committed in the past can in itself pose a threat to public order or public security, given that the concept of threat usually carries a risk for the future. While the finding of a risk of recidivism in relation to the perpetrator in question has been a particularly important element of the CJEU's earlier case law, according to the reasoning in *K. and H.F.* (questionable in my view), the mere physical presence, and therefore the presence in the same geographical and social area with the nationals of the host Member State, may jeopardize one of the fundamental interests of society owing to an act committed in the past.

By emphasizing the exceptional gravity of an act committed in the past, which does not necessarily jeopardize the physical security of the population but rather the moral order of the Member State or the Union as a whole and the fundamental interest of the peace of society, the exclusion of the application of

38 In that regard, the CJEU emphasized the different purpose of point F of the 1951 Geneva Convention and Article 27(2) of the Citizenship Directive. *K. and H.F.*, para. 48-64.

39 Judgment of 27 October 1977, *Case C-30/77, Bouchereau*, ECLI:EU:C:1977:172.

40 *Joined cases C-331/16 and C-366/16, K. and H.F.*, para. 58.

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public policy or public security becomes morally charged.[41] In addition to the CJEU's earlier and specifically forward-looking, harm-based case law,[42] there is now an *offence-based case law*[43] that focuses on past action and its compatibility with Member State and societal values.

3.3. Increased Importance of the Concept of Integration in the Field of Expulsion

The requirement of social integration in connection with expulsion is reflected in Directive 2004/38/EC itself, in the form of a proportionality test, which takes into account the degree of integration into the host Member State of the person to be expelled and even through the gradual system of protection against expulsion described above.[44] Under that system, therefore, protection against expulsion is progressively increased in the light of the length of residence by the EU citizen concerned in the host Member State and his or her parallel social integration. Although the conditions imposed by the Directive appear to be clear, the CJEU's recent case law that integration into the society of the host Member State is based not only on quantitative (temporal) but also on qualitative factors seems to rewrite the CJEU's earlier case law on expulsion. Thus, respect for the social values enshrined in the criminal law norms of the host Member State, and moreover, compliance with *the concept of good market citizen*, is now a precondition for obtaining enhanced protection against expulsion. Recent CJEU rulings therefore confirm the central nature of the two-faced concept of social integration in the field of expulsion, which no longer merely seeks to promote the exercise of rights deriving from EU citizenship but may also serve as a justification for restricting those rights where the citizen in question is unable, or does not want to integrate into the society of the host Member State.

3.3.1. Respect for Member States' Criminal Law Standards

The integration requirement in relation to the expulsion of EU citizens was first set out in *M.G.* in 2014 where the main question was whether the custodial sentence interrupts the continuity of the ten-year period of residence which is a condition for enhanced protection against expulsion.[45] In its judgment, the CJEU stated that

41 Stephen Coutts, 'The Expressive Dimension of the Union Citizenship Expulsion Regime: Joined Cases C-331/16 and C-366/16, K and HF', *European Papers,* Vol. 3, Issue 2, 2018, pp. 838-841.

42 Judgment of 26 February 1975, *Case C-67/74, Bonsignore*, ECLI:EU:C:1975:34; Judgment of 29 April 2004, *Joined cases C-482/01 and C-493/01, Orfanopoulos and Oliveri,* ECLI:EU:C:2004:262.

43 The value-based approach was already implicitly present in *Tsakouridis* and in *B. and Vomero* which will be described below.

44 In the Directive, integration emerged as a concept through the case law of the CJEU. This concept first appeared in case law in *Orfanopoulos and Oliveri*.

45 Judgment of 16 January 2014, *Case C-400/12, M.G.*, ECLI:EU:C:2004:9.

> "the degree of integration of the persons concerned is a vital consideration underpinning both the right of permanent residence and the system of protection against expulsion measures established by Directive 2004/38."[46]

In its judgment on the concept of integration, the CJEU refers to the decision in *Onuekwere*,[47] delivered on the same day. The central issue in this case was the effect of the custodial sentence on the acquisition of permanent resident status in respect of which the CJEU briefly held that the custodial sentence reflected a lack of social integration. The CJEU ruled in the case serving also as a line of reasoning in *M.G.* that the penalty of imprisonment imposed by a national court demonstrates that the person concerned did not respect the values expressed in the criminal law of the society of the host Member State.[48] It has been argued by the CJEU that *a breach of the host country's criminal law constitutes a refusal of integration*. On that basis, the CJEU ruled in *M.G.* that the custodial sentence interrupted, as a general rule, the continuity of the stay and, where appropriate, the acquisition of the enhanced protection under Article 28(3) of Directive 2004/38/EC. Moreover, the CJEU stated in that judgment that *the duration of the custodial sentence could not be taken into account in calculating the period of residence*.

The decision cited by the CJEU is strongly criticized in scholarly literature given that most crimes involve imprisonment (or at least the threat of imprisonment), making it extremely easy to deprive EU citizens of effective protection against expulsion.[49] It is true that simplifying the requirement of social inclusion to comply with criminal law standards may easily be misleading. An expulsion decision based on public policy or public security is in most cases based on personal conduct which presupposes a breach of the host Member State's criminal law.

Therefore, the CJEU in *M.G.* left a loophole by imposing a comprehensive obligation to assess the extent to which the interruption of the continuity of residence by deprivation of liberty precluded the acquisition of enhanced protection. According to the CJEU, an overall assessment of the individual's situation is therefore necessary in each individual case where the question of expulsion arises. In making that overall assessment, which is therefore necessary in order to determine whether that person's social links and integration have in fact been interrupted, the national authorities may take into account both the relevant circumstances of the custodial sentence and the person's stay in the host Member State during the ten years preceding the custodial sentence.

In the above-mentioned *M.G.* case, the half sentences formulated by the CJEU raise very important questions about the definition of social inclusion, especially for persons who have lived in the territory of the host Member State for several decades. First of all, the question arises whether and how the time

46 Id. para. 32.

47 Judgment of 16 January 2014, *Case C-378/12, Onuekwere*, ECLI:EU:C:2014:13.

48 Id. para. 26.

49 Hamenstadt argues that if a violation of criminal law norms mediates a lack of integration, as the CJEU held in *M.G.*, the precondition for integration in order to obtain protection against expulsion has a Kafkian dimension. Hamenstadt 2020, p. 463.

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spent in the Member State before imprisonment should be assessed, if at all. Similarly, it must be raised whether periods spent in prison may be taken into account for social inclusion or excluded from the assessment, especially given that rehabilitation, which is closely linked to social reintegration, is the objective in the case of imprisonment. The CJEU answered just these questions in its 2018-year judgment in *B. and Vomero* which concerned two EU citizens who had lived in the host country for decades prior to their expulsion.

In *B. and Vomero* the CJEU confirmed the effect of the imprisonment on the relationship between the individual and the host State, namely that although prison years interrupt the continuity of residence as a general rule, an overall assessment of the individual's situation is required in each specific case when the issue of expulsion arises.[50] This assessment may cover, where appropriate, the fact that the person concerned has resided in the host Member State for the ten years preceding the custodial sentence. However, the CJEU emphasized, unlike in the past, that if a Union citizen has fulfilled the condition of ten years' continuous residence prior to the offence leading to his imprisonment, the custodial sentence shall not be deemed to automatically interrupt that person's integrative links previously forged with the host Member State and the continuity of his or her stay in the territory of that Member State. Thus, in *B. and Vomero*, the CJEU assessed the strict requirement of social integration in a much more balanced way, *rejecting* the view that *deprivation of liberty automatically and necessarily has a negative effect* on the relationship between the host state and a national of another Member State.

While the CJEU's earlier rulings focused on the conduct of the person concerned and the nature/circumstances of the act committed, the decision in *B. and Vomero* now places particular emphasis on consolidating the relationship with the host Member State in the period preceding the imprisonment. According to this approach, EU citizens may integrate into the society of the host Member State before their deprivation of liberty. The closer this relationship is in the pre-custodial period, the less likely it is to be broken by the custodial sentence. Focusing on the period prior to detention is thus in any case an innovative element of the CJEU's recent case law, as opposed to earlier case law where the act itself was sufficient evidence for a violation of the values of the host State to be established. Similarly, a novelty in the CJEU's decision in *B. and Vomero* is the answer to whether a Member State must also take into account the conduct followed by a prisoner during the period of imprisonment when assessing whether an EU citizen has finally moved away from social values by committing the offence or whether this connection may still be restored.[51] In essence, an answer is given also to the question of how the period before deprivation of liberty and the sentence itself should be taken into account when assessing the social integration of an EU citizen. By emphasizing the reintegrating role of deprivation of liberty in addition to the punitive nature of imprisonment in its

50 *Joined cases C-316/16 and C-424/16, B. and Vomero*, para. 70.
51 Id. para. 74.

latest judgment in *B. and Vomero*, the CJEU clearly dampens the rigor of its earlier case law with regard to the requirement of social integration.

In my view, in cases where the EU citizen concerned has been in the territory of the Member State in question for several decades, it must be expressly acknowledged that the CJEU has shifted from its approach laid down in its earlier case law, in particular in *M.G.* which was strict and in many cases, albeit formally legitimate, in fact led to extremely unfair results.

3.3.2. Meeting the Requirement of Good Market Citizen

As we have seen in the recent case law of the CJEU on expulsion and EU citizenship in general, another national of a Member State, who is staying in the host state, is no longer merely an object but a subject of social inclusion, a responsible actor who shapes his or her personal destiny through his or her actions or omissions. This responsibility is not an abstract responsibility, but it imposes very specific obligations on citizens. EU citizens must therefore, above all, respect the fundamental social norms expressed in the criminal law of the host Member State, and even EU values according to *K. and H.F.* Moreover, not only the values expressed in criminal law but also economic activity itself plays a role in the CJEU's case law on the expulsion of EU citizens. That is, citizens must not only be law-abiding citizens but also 'good market citizens' in order to retain their right of residence. This is well reflected in the CJEU's statement in *B. and Vomero*, cited above, that enhanced protection under Article 28(3) of the Directive exists only if permanent resident status has been acquired. An interpretation to the contrary, at least according to the CJEU's reading, would lead to the paradoxical and incoherent conclusion that an EU citizen who does not yet have permanent resident status could be expelled only if he or she had committed an act against the imperative of public security. On the other hand, according to the case law of the CJEU, such an EU citizen may in fact be expelled if he or she becomes an unjustified burden on the social security system.

The CJEU adds to that the rule already well known from *Onuekwere* that integration, which determines the acquisition of the right of permanent residence under Directive 2004/38/EC, is based not only on territorial and time factors, but also *on qualitative elements, relating to the level of integration in the host Member State*.[52] It can be inferred from all this that enhanced protection against expulsion is granted only to those who fulfil the conditions laid down in Article 7 of the Directive, that is to say, are covered by the concept of good market citizen.[53]

52 Id. para. 58.

53 Myriam Benlolo Carabot, 'Citizenship, Integration, and the Public Policy Exception: B. and Vomero and K. and HF', *Common Market Law Review,* Vol. 56, Issue 3, 2019, p. 789.

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3.4. The Theoretical and Practical Considerations Behind the Case Law of the CJEU

As Coutts points out, the above-mentioned requirements actually meet the criteria of 'good citizen',[54] thereby placing normative expectations on EU citizens to be law-abiding, economically useful members of the society in the host state.[55]

I believe that the CJEU in its approach does not necessarily seek to establish some kind of ideal, but simply follows pragmatic considerations. The functioning of the internal market is much more served by economically active, law-abiding citizens than by those who do not work, even becoming a burden on the state budget (through the public authorities or the operation of the care system) with their unlawful behavior for example. Although a little exaggerated, the former is well illustrated by the position of Advocate General Rantos in *F.S.* which will be detailed below:

> "[…] the concept of 'social assistance' is broad and covers all the benefits that the Union citizen has not contributed towards and which are funded by the public purse. For instance, where a person […] engages in repeated criminal conduct following his or her expulsion, that conduct could be relevant because it could reflect the risk of him or her representing an unreasonable burden on account of the mobilization, as a result of the conduct of the person in question, of a significant amount of police resources."[56]

However, the above approach is problematic[57] in that the mobilization of police resources for shoplifting and other petty crimes does burden the budget but in no way can it be considered to be aids meeting individual needs and, in the classical sense, putting a burden on the budget under 2004/38/EC Directive which may justify expulsion according to Article 15 of that Directive.[58] We must also not forget that the long-term goal of the Union is to create a general community of values and solidarity, even if this goal sometimes seems a little difficult to achieve due to the current political and economic circumstances.

However, in its recent case law, the CJEU has taken into account the *long-term federalizing effect of the institution of EU citizenship and freedom of movement:* for example, in *K. and H.F.*, in addition to the values of the Member States, it also referred to common EU values in relation to the commission of war crimes. Ideally, of course, national and supranational interests and values coexist and reinforce each other. These common values have already been referred to in the earlier case law of the CJEU, such as in *Tsakouridis* where the CJEU stated,

54 However, Coutts also emphasizes that there is already a serious risk of non-compliance with those criteria in this case, namely, the loss of the right of residence in the host state.

55 Coutts 2018, p. 779.

56 Opinion of Advocate General Rantos Delivered on 10 February 2021, *Case C-719/19, F.S.*, ECLI:EU:C:2021:104, para. 101.

57 In that case, the AG considered that Article 15 of the Directive was applicable even if there was merely a risk that the person concerned might place an unjustified burden on the social assistance system of the host Member State.

58 Even if it may have an indirect effect on the overall level of aid that may be granted by the state. *Case C-209/03, Bidar*, ECLI:EU:C:2005:169, para. 56.

referring to Council Framework Decision 2004/757/JHA,[59] that illicit drug trafficking poses a threat to health, safety and the quality of life of citizens of the Union, and to the legal economy, stability and security of the Member States.[60] Similarly, in *P.I.* the CJEU also emphasized that, in accordance with Article 83(1) TFEU, the sexual exploitation of children is one of the areas of particularly serious crime with a cross-border dimension in which the EU legislature may intervene.[61] The CJEU's 'moralizing' practice of expulsion,[62] as described above, therefore not only serves as a means of expressing Member States' values, but increasingly also certain EU values.

At the same time, the CJEU's emphasis not only on common values but also on the social rehabilitation of a person serving a custodial sentence as a common European interest points towards federalization. The CJEU has already emphasized in its judgment in *Tsakouridis* that the perpetrator's social reintegration is not only in the interest of the Member State concerned but also of the EU in general.[63]

The gradual development of an AFSJ could lead to an even stronger emergence of EU interests, undermining the importance of Member States' borders and promoting the right to free movement beyond the concept of the internal market. This is likely to be exacerbated by the growing role of EU criminal law, which, in addition to sanctioning socially undesirable behavior, no longer necessarily requires the expulsion of EU citizens from the territory of the host state.[64] As the legal literature increasingly holds, Directive 2004/38/EC does not in any way prevent Member States from punishing serious crimes with imprisonment, but deportation does not have to be a necessary consequence of imprisonment.[65]

4. Future Challenges in Expulsion Policy

4.1. Challenges to the Development of AFSJ

As already mentioned in the introduction to this article, the development of an AFSJ will, over time, raise not only theoretical dilemmas but also serious practical difficulties. This includes the question of whether it is worth expelling citizens who can return to the host Member State without particular difficulty in a Europe of open borders.

All of this is well illustrated by *F.S.* rendered in 2021, which concerned a Polish national who was expelled from the Netherlands and returned there within

59 Council Framework Decision 2004/757/JHA laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, as regards the definition of drug.

60 *Case C-145/09, Tsakouridis*, para. 46.

61 *Case C-348/09, P.I.*, para. 25.

62 Coutts 2018, p. 775.

63 *Case C-145/09, Tsakouiridis*, para. 50.

64 Dora Kostakopoulou, 'When EU Citizens Become Foreigners', *European Law Journal,* Vol. 20, Issue 4, 2014, p. 459.

65 Guild *et al.* 2019, p. 289.

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a month. In the context of that case, the national court (and ultimately the CJEU) had to consider how to assess the situation where a person expelled due to lack of sufficient resources formally leaves the country but also returns there shortly thereafter. In his Opinion, Advocate General Rantos stated that the case was based on a somewhat unusual factual background.[66] In reality, however, it is becoming increasingly common for foreigners to be expelled from the territory of a Member State, in this case the Netherlands, due to a lack of sufficient financial resources, especially if they also present some kind of 'inconvenience'.[67] It should be pointed out that the expulsion decision was issued against F.S. not on grounds of public policy but on the ground that he did not fulfil the conditions for a stay of more than three months. However, certain public policy considerations also arose in connection with the case.[68] This case focuses on how to deal with the internal contradictions of the federalized system of free movement, according to which the concept of free movement rights and open borders, widely granted to EU citizens, is accompanied by the prerogative of Member States to expel undesirable foreigners from their territories.[69]

In *F.S.*, the referring forum essentially asks the CJEU in case an expulsion decision is taken against an EU citizen for failing to fulfil the conditions for residence laid down in Article 7 of the Directive, it can be considered as enforced upon the demonstrable (physical) departure of the expelled person from the host Member State. If so, does the returning EU citizen have a three-month right of residence under Article 6 of the Directive, thus preventing the host state from expelling him or her again? If the answer is no, must the expelled EU citizen remain outside the territory of the host Member State for a certain period before returning, and if so, for how long.

In answering the first question, the CJEU concluded that if an EU citizen *had to cross only the border of the host Member State only to return immediately* to that Member State and invoke a new right of residence under Article 6 of the Directive, he or she could essentially circumvent the conditions set out in Article 7, *undermining the distinction between temporary and long-term residence*.[70] According to the CJEU, an interpretation to the contrary would jeopardize the dual purpose of the Directive: the exercise of the right to freedom of movement and residence and the protection of the social assistance systems of the Member States.

66 *Case C-719/19, F.S.*, AG Opinion, para. 34.

67 Dion Kramer, 'In Search of the Law': Governing Homeless EU Citizens in a State of Legal Ambiguity', *Access Europe Research Paper,* 2017/04.

68 According to Ristuccia, another implication of the ruling in *F.S.* 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. Fulvia Ristuccia, '"Cause tramps like us, baby we were born to run": Untangling the effects of the expulsion of "undesired" Union citizens: FS', *Common Market Law Review,* Vol. 59, Issue 3, 2022, p. 909.

69 Dion Kramer, 'On the Futility of Expelling Poor Union Citizens in an Open Border Europe', *European Papers,* Vol. 6, Issue 1, 2021, p. 156.

70 Adopting that would allow such an EU citizen to rely on several consecutive temporary stays in that Member State in order to reside there permanently, while not fulfilling the conditions for the right of permanent residence laid down in that Directive. *Case C-719/19, F.S.*, para. 77.

Consequently, physical departure from the territory of the host Member State is not in itself sufficient to fully enforce a return decision taken under Article 15 of the Directive. In order for an expelled EU citizen to be able to rely on a new right of residence under Article 6, his or her *previous residence must de facto end,* in such a way that his or her *return may not be considered as a continuation of his previous residence*. Although the CJEU left it to the Member State court to examine these aspects in an individual case, it sought to provide criteria for the national court to make an assessment. The CJEU stated, first of all, that the length of time an expelled citizen spends outside the territory of the host Member State is not in itself decisive but may be an important element in the overall assessment of whether the person concerned has actually ended his or her residence in that territory. In addition, the circumstances justifying the interruption of the relationship between the EU citizen in question and the host Member State must be taken into account. For the case-by-case assessment of the factors evidencing a break in the links between the citizen and the host member state, 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. In assessing these factors, particular attention shall be paid to the degree of integration of the EU citizen into the host Member State, the duration of the stay prior to his/her expulsion from the territory of the host Member State and his/her family and economic situation.[71] If the EU citizen has not actually terminated his/her stay in the host Member State, the expulsion decision cannot be considered enforced, so the EU citizen's stay remains unlawful and the host Member State is not obliged to issue a new expulsion decision to enforce the previous decision (again).

It is clear from the above that the issue of social integration also plays an important role in this case, only with the opposite effect to the earlier cases. It is, in essence, the 'flip side' of the integration criteria under Article 28(1) of Directive 2004/38/EC which must be considered in a decision on expulsion based on public policy or public security. In *F.S.*, the primary question is what may justify the actual termination of the links and factors indicating integration in the host Member State. These newly developed criteria do not serve integration, but serve as proof that the person concerned has taken all the necessary steps to terminate his or her relations with the host State. It is, of course, not an easy task to prove that an EU citizen has ceased to reside in the Member State concerned, especially in the case of a short stay where his or her relations with the host State have not yet deepened. According to Neier, it may therefore be particularly important to examine the duration of residence in another Member State in connection with the matter.[72] This brings us to the classic question, already raised by Advocate General Sharpston in her famous *Zambrano* opinion: what constitutes a genuine cross-border movement, the extent to which movement is

71 Id. paras. 91-93.

72 Christina Neier, 'New Clarifications on Ending the Union Citizen's Right of Residence: The Grand Chamber Decisions of the European CJEU of 22 June 2021 in C-718/19 and C-719/19', *European Papers,* Vol. 6, Issue 2, 2021, p. 953.

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required in order to be able to invoke EU citizens' rights of residence when crossing the border of another Member State.[73] Even if the legal situation is different in the two cases, the question is essentially the same: under what circumstances may residence in the territory of another Member State be regarded as genuine residence?[74] *Zambrano* also raises another, novel issue in case law, namely, ensuring the coherence of EU law with regard to the right of residence of EU citizens.

4.2. Ensuring the Coherence of EU Law in Respect of the Right of Residence

As we have seen in *F.S., B. and Vomero,* and *K. and H.F.*, the CJEU places particular emphasis on ensuring the coherence of the Directive in its interpretative work. Of course, legal certainty is not only based to the coherent interpretation of the Directive itself, but also the uniform interpretation by the CJEU of the EU citizens' right of residence enjoyed based on various legal bases, including Articles 20 and 21 TFEU.

However, in the present situation, cleavages are appearing, starting with the case law of the CJEU interpreting the impact of EU citizenship on the right of residence.[75] While the CJEU is not particularly determined to protect free-movers in the event of their expulsion within the Union, in its case law following *Zambrano*, envisioning a federal Union, it seeks to provide stronger protection against the 'expulsion' of static citizens from the Union. While it is clear that the impact of expulsion decisions on the fate of EU citizens cannot be equated,[76] it is questionable *how a coherent system can be established for EU citizens when case law in this area is highly fragmented.*[77] This question is increasingly thematized in light of the CJEU's recent case law on static citizens in which the CJEU places much greater emphasis on the application of fundamental rights.

In its early case law on the *Zambrano* doctrine, the CJEU even held that the desire to maintain family unity within the Union is not sufficient to obtain a derivative residence in accordance with Article 20 TFEU, however, in *Chavez Vilchez* it has already explicitly linked family life with Article 20 TFEU. In the above judgment, the CJEU emphasized that the question of whether the EU citizen concerned was in fact forced to leave the territory of a Member State depriving him of the enjoyment of the essence of the rights under Article 20 TFEU, must in all cases be assessed in the light of the right to family life, including Articles 7 and 24 EU CFR. The former provides for the right to respect for family life, the latter for the best interests of the child. Van Eijken concludes from this that Article 20 TFEU already includes the right to family life and to the

73 Opinion of Advocate General Sharpston Delivered on 30 September 2010, *Case C-34/09, Zambrano*, ECLI:EU:C:2010:560, para. 86.

74 Neier considers that these criteria, laid down by the CJEU, should be incorporated into the text of the Directive over time. Neier 2021, p. 952.

75 Dimitry Kochenov & Benedikt Pirker, 'Deporting EU Citizens: A Counter-Intuitive Trend', *Columbia Journal of European Law*, Vol. 19, 2013, p. 369.

76 The situation is different in the case of the expulsion of an offending EU citizen to another Member State, and again when the EU citizen is forced to leave the territory of the Union.

77 Meduna 2017, p. 407.

best interests of the child, but at least the fundamental rights must be taken into account when assessing the right of residence under Article 20 TFEU in the Member States.[78]

The divergent nature characterizing the substance of the right of residence relating to the institution of EU citizenship has been somewhat mitigated by the CJEU in the interpretative decisions rendered in *Rendon Marin*[79] and *CS*.[80] In these cases it concluded that the rights of residence under Article 20 TFEU are not absolute rights, they may be restricted on grounds of public policy or public security like the rights ensured by Article 21 TFEU and the Directive. The CJEU, on the other hand, has already expressly ruled out such an analogous interpretation as regards the requirement of sufficient financial resources, when it stated in *RH*[81] that the requirement of sufficient financial resources could not be a condition for the application of Article 20 TFEU. In that judgment, the CJEU referred to the effectiveness of EU citizenship and the principle of proportionality, stating that a disqualification based solely on the objective to preserve public finances in the Member States (such as reference to the lack of necessary resources) cannot, because of its disproportionate nature, justify a serious breach of the substance of the rights attached to EU citizenship.

In its case law on Article 20 TFEU, the CJEU therefore relaxes the requirements of the internal market by removing both the requirement of the cross-border element and the economic aspects as obstacles to the exercise of EU citizens' rights. Moreover, in its related case law, the CJEU also confirms the exercise of fundamental rights, in particular the right to family life and the rights of the child. This could lead to a serious incoherence within the case law of the CJEU on EU citizenship on the long run.

5. Closing Remarks

Over the last decade, there has been significant criticism of the CJEU's case law on expulsion, mainly because it has put the interests of Member States ahead of the protection of the rights of individuals by gradually abolishing the earlier system of protection. In this way, EU citizens may feel that no matter how long they have lived in the host state, they will remain foreigners forever in the eyes of the authorities. This trend is essentially in line with the CJEU's general case law on EU citizenship in which *the cross-border element is increasingly being replaced by an additional requirement of social inclusion*.[82] However, while this requirement is only implicit in the right to equal treatment in relation to the right of residence

78 Hanneke van Eijken, 'Connecting the Dots Backwards, What did Ruiz Zambrano Mean for EU Citizenship and Fundamental Rights in EU Law?', *European Journal of Migration and Law,* Vol. 23, Issue 1, 2021, p. 66.

79 Judgment of 13 September 2016, *Case C-165/14, Rendon Marin*, ECLI:EU:C:2016:675.

80 Judgment of 13 September 2016, *Case C-304/14, CS,* ECLI:EU:C:2016:674, para. 36.

81 Judgment of 27 February 2020, *Case C-836/18, RH*, ECLI:EU:C:2020:119.

82 'Editorial Comments: EU Law as a Way of Life', *Common Market Law Review*. Vol. 54, Issue 2, 2017, p. 360.

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and the related social benefits (*Dano*), it is already much more obvious in the field of expulsion.

It is often argued that freedom of movement comes at a price, so another important objective of EU law, namely, the security of the citizens of the host country must be weighed against this fundamental interest. That consideration should be based on nationality before all other aspects of belonging may, of course, seem a bit 'reactionist'[83] in the light of integration goals and the ideal of EU citizenship. At the same time, we need to see that expulsion policy is likely to remain one of the last bastions of national sovereignty for a long time to come. The vast majority of EU citizens feel that they are primarily citizens of a nation, and it seems that the social embeddedness of EU citizenship is not yet strong enough to have significant potential for federalization in this sensitive area. That is why, with one exception,[84] the CJEU does not refer to EU citizenship as a fundamental status in its case law on expulsion. A good example of this is the recent ruling of the CJEU in *Ordre des barreaux francophones et germanophone*[85] in which it ultimately intended to give a decisive role to the proportionality test in determining whether the detention of EU citizens to be expelled, as required by Belgian law, for a maximum period of eight months, which is the same as the period applicable to third-country nationals, is compatible with EU law. Although the CJEU made a distinction between the categories of EU citizens and third-country nationals in the reasoning for its decision, it was not the privileged status of the former and the exercise of the resulting rights that led the Luxembourg forum, but rather pragmatic considerations. The CJEU found that, as EU citizens are much easier to expel than third-country nationals, they cannot be subject to the same conditions of detention. At the same time, it is precisely these practical considerations that could lead to a future decline in the importance of state borders within the AFSJ. Not only can the expulsion of EU citizens from the territory of the host Member State be facilitated, but also their subsequent return to that Member State, as shown in *F.S.*

The concept of a territorially united Europe has already emerged in the case law on EU citizenship, at least as regards the risk of static citizens being forced out of the Union. Although the CJEU applies the *Zambrano* doctrine only in exceptional circumstances, it must also be seen that fundamental right considerations, in particular the need to respect family life and the protection of the best interests of the child, play an increasingly important role in these cases. The only question is how to ensure (or even whether to ensure) the coherence of these two sets of rules on EU citizenship in the future, depending on whether or not the citizen in question is exercising his or her right to free movement.

83 Katarina Hyltén-Cavallius, *EU Citizenship at the Edges of Freedom of Movement,* Hart Publishing, 2020, p. 54.

84 *Joined cases C-482/01 and C-493/01, Orfanopoulos and Oliveri.*

85 Judgment of 22 June 2021, *Case C-718/19, Ordre des barreaux francophones and germanophone and others*, ECLI:EU:C:2021:505.