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Expulsion and ‘Legal Otherness’ in Times of Growing Nationalism

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In times of growing nationalism, states increasingly revert to mechanisms of legal othering by drawing the demarcation line between ‘us’ and ‘them’ more sharply. The removal of foreigners from the national territory is a particularly visible and effective instrument of legal othering, as it physically excludes ‘the other’ and assures nationals of their special status. Even though this power has been curtailed not only by public international law, but also by European Union (EU) law, as it adversely affects EU citizens’ free movement and residence rights, EU Member States retain some discretion to expel non-nationals, including EU citizens, from their territory. This contribution maps the shifting limits of Member States’ capacity to distinguish between their own nationals and foreigners by analysing the protection against expulsion provided for by EU law against the background of a growing emphasis on national sovereignty and a rising fear of ‘the other’.

Introduction

Nationals and lawfully-residing foreigners often enjoy the same rights in everyday life. Differences between their legal statuses are not always obvious or noticeable, especially if the foreigner was born and raised in the ‘host’ state or has lived there for decades. Despite the apparently similar status of

nationals and lawfully-residing foreigners, a crucial difference between these two groups emerges when comparing their security of residence. No matter how equal nationals and foreigners appear on the surface, their security of residence markedly exposes the distinction between ‘insiders’ and ‘outsiders’. The law and practice of expulsion establishes a clear separation between nationals and foreigners, as the former, irrespective of their behaviour, are normally exempted from expulsion, whereas the latter, despite (life-) long residence on the territory of the ‘host’ state, can regularly be expelled. This differentiation has repeatedly been highlighted by the European Court of Justice (hereinafter: ECJ or Court), who stated that the public policy and public security exception allows Member States to adopt “measures which they cannot apply to their own nationals, inasmuch as they have no authority to expel the latter from the territory or to deny them access thereto”.¹ This prohibition is underpinned by the European Convention on Human Rights, more specifically by art.3 para.1 of Protocol No.4 to the Convention, which proscribes the expulsion of nationals.

The described dichotomy between nationals’ non-deportability and foreigners’ deportability is not absolute. Even though nationals are generally exempted from expulsion, they can be deprived of their citizenship, which in turn affects their deportability. Several European states have revitalised and expanded their powers to deprive citizens of their nationality,² which underpins the perception of nationality as a privilege, the continued enjoyment of which depends on (good) behaviour.³ At the same

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¹ *Adoui and Cornuaille v Belgium* (C-115/81 and 116/81) EU:C:1982:183 at [7]; *Criminal Proceedings against Donatella Calfa* (C-348/96) EU:C:1999:6 at [20]; *Ministre de l’Interieur v Aitor Oteiza Olazabal* (C-100/01) EU:C:2002:712 at [40].

² S. Mantu, “Citizenship Deprivation in the UK” (2014) 19 *Tilburg Law Review* 163-170; É. Fargues, “The revival of citizenship deprivation in France and the UK as an instance of citizenship renationalisation” (2017) 21 *Citizenship Studies* 984, L. Zedner, “Citizenship Deprivation, Security and Human Rights” (2016) 18 *European Journal of Migration and Law* 222-242.

³ É. Fargues, “The revival of citizenship deprivation” 984; M. Gibney, “‘A Very Transcendental Power’: Denaturalisation and the Liberalisation of Citizenship in the United Kingdom” (2013) 61 *Political Studies* 638.

time, a liberalisation of nationality laws is observable,⁴ which builds on the perception of citizenship “as an *entitlement* for some previously excluded groups”⁵ and which is said to have made states more inclusive.⁶ For almost two decades the UK has continuously expanded its executive’s powers to denaturalise its citizens, whereby this power has often been used with regard to suspected terrorists.⁷ While nationals are generally immune from expulsion, they can be deprived of their nationality, which transforms a state’s (former) nationals into deportable foreigners.

Conversely, the rule that foreigners can usually be expelled does not always hold true either. The Netherlands, for example, previously exempted certain categories of long-term resident foreigners from expulsion. This protection was afforded to foreigners who had resided in the Netherlands for more than 20 years and to those who were born in the Netherlands or lawfully resided there before the age of 10 and were residents for more than 15 years.⁸ These categories of non-nationals enjoyed an absolute protection against expulsion until 2012, when the *Vreemdelingenbesluit* was amended, which resulted in an abolition of their absolute protection against expulsion.⁹

⁴ For example, see the introduction of *ius soli* elements in German nationality law.

⁵ M. Gibney, “A Very Transcendental Power” 638, original emphasis. See also S. Pillai and G. Williams, “The Utility of Citizenship Stripping Laws in the UK, Canada and Australia” (2017) 41 *Melb. U.L. Rev.* 855.

⁶ É. Fargues, “The revival of citizenship deprivation” 987.

⁷ T. Choudhury, “The radicalisation of citizenship deprivation” (2017) 37 *Critical Social Policy* 227; <<https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06820> > (last visited on 1 November 2019); L. Zedner, “Citizenship Deprivation, Security and Human Rights” 229; European Court of Human Rights (ECtHR), *K 2 v United Kingdom*, Appl. No. 42387/13, judgment of 7 February 2017; see also the discussion regarding Shamima Begum’s denaturalisation.

⁸ Art.3.86 para.7 lit.c and art.3.86 para.8 lit.b of the *Vreemdelingenbesluit 2000* (the version that entered into force on 1 April 2001); art.3.86 para.10b and para.11b of the *Vreemdelingenbesluit 2000* (the version that was applicable on 18 April 2012).

⁹ By the ‘Besluit van 26 maart 2012, houdende wijziging van het Vreemdelingenbesluit 2000 in verband met aanscherping van de glijdende schaal’, *Staatsblad van het Koninkrijk der Nederlanden*, Jaargang 2012, 158. On 1 July 2012 this protection has been abolished.

These examples do not only demonstrate the non-absolute nature of the dichotomy between nationals' and foreigners' security of residence, they also reveal a more general shift in EU Member States' approaches to security of residence. Neither the abolition of the absolute protection against expulsion that was afforded to certain categories of long-term resident foreigners in the Netherlands, nor the increase in denaturalisations in the UK and other EU Member States remain isolated incidents. These changes are accompanying features of a broader development, which reflects the increasing focus on national sovereignty, the heightened importance of borders, border control and security, the fear of 'the other' and the growing rejection of transnational cooperation. Against the background of these developments, this contribution seeks to map the shift in the ECJ's case law concerning foreigners' protection against expulsion and the impact of this development on their level of legal otherness. While existing literature highlights the strengthening of Member States' discretion to expel EU citizens and explores the effects of this development on the promise of EU citizenship as a fundamental status,¹⁰ the present contribution differs from the current literature in two ways. First, it has a broader scope, as it contrasts the reduction of EU citizens' protection against expulsion with a simultaneously-occurring strengthening of third-country nationals' security of residence. Secondly, the analysis views these developments from a different angle by examining the resulting shifts in the landscape of legal otherness against the background of an increasingly prevalent nationalism at the Member State level and a rising fear of 'the other'. Even though EU citizens' decreasing security of residence seems to contradict the ECJ's previous case law and the aim and spirit of the Treaties and EU secondary legislation, this development becomes more logical if viewed through the lens of the increasing pressure exerted by nationalism.

The analysis is structured as follows: the next section highlights the different functions of deportability and links them to the conflicting interests of the EU and its Member States. The third section briefly outlines the different levels of legal otherness in the EU and addresses the problem of

¹⁰ See for example: D. Kostakopoulou, "When EU Citizens become Foreigners" (2014) 20 E.L.J. 462; N. Nic Shuibhne, "Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship" (2015) 52 C.M.L. Rev. 890.

legal othering within the group of non-nationals, which includes both EU citizens and third-country nationals. The subsequent sections expound the different levels of legal otherness that emerge from the EU provisions on expulsion and analyse their interpretation by the ECJ. To that end, the fourth section addresses EU citizens and contrasts their protection with the protection against expulsion that is afforded to Turkish citizens covered by the EEC-Turkey Association Agreement (fifth section) and the protection of long-term resident third-country nationals (sixth section). The results of the comparison between the different levels of protection against expulsion and their interpretation by the ECJ are summarised and contextualised in the concluding seventh section.

The different functions of deportability and the opposing interests of the EU and its Member States

Deportability yields inclusionary and exclusionary effects, depending on whether the individual is afforded a secure residence status or not. While both the European Union and its Member States seek to utilise the inclusionary and unifying effects of a secure residence status, the group of beneficiaries of a secure residence status at the European level differs from that at the Member State level.

Deportability is generally considered to be “one of the key markers of otherness”,¹¹ as it clearly outlines the “scope of those who are citizens of a polity as opposed to merely residents”.¹² It conveys the clear message to foreigners that they cannot take their continued residence for granted, as their residence right can unilaterally be withdrawn or terminated by the state. Deportability thus brands them as outsiders who do not fully belong to that state’s society. Simultaneously, deportation is said to be constitutive of citizenship, as it “reaffirms the formal and normative boundaries of membership”.¹³

¹¹ D. Kochenov and B. Pirker, “Deporting the Citizens within the European Union: A Counter-Intuitive Trend in Case C-348/09, P.I. v Oberbürgermeisterin der Stadt Remscheid” (2013) 19 Colum. J. Eur. L. 372-373.

¹² D. Kochenov and B. Pirker, “Deporting the Citizens within the European Union” 375.

¹³ See B. Anderson, M. Gibney, E. Paoletti, “Citizenship, deportation and the boundaries of belonging” (2011) 15 Citizenship Studies 547, with further references.

Anderson points out that immigration controls and enforcement measures remind migrants of their ‘deportability’ and assure citizens that they are not deportable.¹⁴ She argues that the highly visible enforcement measures that are presently conducted in the UK do “not only cause fear in migrant communities”, but serve the purpose of telling citizens that their citizenship has a value.¹⁵

Deportability thus operates as a marker of otherness and yields diametrically opposite effects on different groups of people. In relation to nationals, deportability works as a mechanism of inclusion, as it reassures them that their residence is unconditional and secure and that they enjoy rights unavailable to others. In relation to foreigners, however, deportability yields exclusionary effects, as it constitutes a constant reminder that their residence is conditional, insecure, and that they remain outsiders, even if they have contributed to the society of that state, sometimes even for decades. In its latter function, deportability estranges, marginalises, isolates and fosters inequalities. While the EU aims to overcome the exclusionary effects of deportability in relation to EU citizens by utilising the inclusionary effects of EU citizenship, the othering of foreigners, including EU citizens, proves to be a useful instrument for Member States to assure their nationals of their privileged status.

Interests of the EU

The abolition of the distinction between those who belong and those who are considered to be outsiders is particularly important for the EU, which seeks to create an ever-closer Union among the European peoples,¹⁶ and which seeks to eradicate the barriers that divide Europe.¹⁷ To that effect, the EU has endowed every national of its Member States with EU citizenship,¹⁸ a status that entails free movement

¹⁴ B. Anderson, “‘Heads I Win. Tails you Lose.’ Migration and the Worker Citizen” (2015) 68 C.L.P. 186.

¹⁵ B. Anderson, “Heads I Win. Tails you Lose” 186.

¹⁶ See recital 13 of the preamble to the Treaty on the European Union (TEU), recital 1 of the preamble to the Treaty on the Functioning of the European Union (TFEU), and art.1 TEU.

¹⁷ Recital 2 of the preamble to the TFEU.

¹⁸ Art.20 para.1 TFEU.

and residence rights in the entire territory of the EU. Moreover, EU law prohibits discrimination on grounds of nationality within the scope of application of the Treaties¹⁹ and limits EU Member States' powers to distinguish between their own nationals and other EU citizens to strictly defined exceptions.²⁰ EU citizens, who exercise their free movement and residence rights in accordance with Directive 2004/38/EC,²¹ in principle enjoy equal treatment with nationals,²² a right that also extends to their (third-country national) family members.²³ The EU strives to eliminate the exclusion and legal othering of EU citizens and their (third-country national) family members by improving, among other measures, their protection against expulsion. A strong protection against expulsion and equal treatment with nationals of the host Member State encourages EU citizens to exercise their free movement and residence rights, which, in turn, helps to dismantle barriers within the EU. By contrast, an insecure residence status, which results from a low level of protection against expulsion, discourages EU citizens from exercising their rights and is therefore diametrically opposed to the interests of the EU.

Interests of the Member States

For the Member States, by contrast, legal othering constitutes an expedient mechanism to demonstrate their sovereignty and to reassure their citizens of their privileged position. In times of growing nationalism, Member States increasingly draw demarcation lines between 'us' and 'them' more sharply and construe the inner circle of rights-holders more narrowly. This development does not only occur in relation to third-country nationals, it also manifests itself with regard to EU citizens. Despite the

¹⁹ Art.18 TFEU.

²⁰ Art.45 para.4 TFEU; art.24 para.2 of Directive 2004/38/EC.

²¹ 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 [2004] OJ L 158/77.

²² Art.24 para.1 of Directive 2004/38/EC.

²³ Art.2 point 2 of Directive 2004/38/EC defines the notion of 'family member'.

prohibition of discrimination on grounds of nationality in EU law,²⁴ Member States have gradually been expanding the remaining possibilities to differentiate between nationals and non-nationals, thereby redrawing borders that we thought we had overcome. The supranational status of EU citizenship is particularly vulnerable and likely to be curtailed by the Member States as it impinges on their sovereignty and limits their capacity to afford their own nationals a distinctive status. Therefore, it is crucial for EU citizens' rights to be interpreted restrictively, so to underline the legal differences between EU citizens and a Member State's own nationals. The need of legal othering primarily occurs in relation to EU citizens, as the status of third-country nationals is markedly distinct from that of nationals.

The legal othering of EU citizens by way of expulsion sends a strong signal to nationals and could explain the increasing use of this measure by several EU Member States. In recent years the UK has considerably enhanced its efforts to expel EU citizens, which might be owed to the shift in the political and societal climate before and after the EU membership referendum in June 2016. While the number of enforced returns of EU citizens amounted to 3,242 by the year ending March 2015, it had already reached 4,113 one year later and amounted to 5,230 by the year ending March 2017.²⁵ These numbers include returns of EU citizens on public policy or public security grounds, but they also cover returns for not exercising or abusing Treaty rights. The (UK) Home Office has previously given a broad interpretation to the latter notion by considering even rough sleeping an abuse of Treaty rights in terms of art.35 of Directive 2004/38/EC. Even though this extreme policy has been condemned by the High Court in December 2017, as it constitutes a violation of the freedom of movement and residence,²⁶ the policy illustrates the Home Office's determination to demonstrate its capacity to order the removal of onerous EU citizens. The transnational status of EU citizenship and its manifestations, which include, but are not limited to, equal treatment with nationals and the right of political participation, impact on Member States' sovereignty and limit their discretion to treat non-nationals differently from nationals.

²⁴ Art.18 TFEU.

²⁵ <<https://www.gov.uk/government/publications/immigration-statistics-january-to-march-2017/how-many-people-are-detained-or-returned>> (last visited 1 September 2019).

²⁶ R (Gureckis) v Secretary of State for the Home Department, [2017] EWHC 3298 (Admin), para.106.

Therefore, the weakening of EU citizenship and the concomitant othering of EU citizens constitutes a crucial instrument for Member States to assure their nationals of the value of their citizenship and of their exclusive status.

The different levels of legal otherness in EU law

The highlighted dichotomy between nationals' security of residence and foreigners' deportability deflects from the inhomogeneous nature of the latter group. EU law grants different levels of protection against expulsion to different groups of foreigners, but neither a foreigner's membership in one of these groups nor the level of protection that is granted to the members of a specific group is necessarily static. Despite this non-static nature, the existing differences in the level of protection and the resulting degree of legal otherness are capable of producing exclusionary effects not only vis-à-vis nationals, but also within the group of foreigners.

Non-static nature of the different levels of legal otherness

The group of foreigners that can be expelled on grounds of public policy, public security or public health is neither homogenous nor static. First, it is inhomogeneous, as different groups of foreigners enjoy different levels of protection against expulsion, which leads to different degrees of security of residence. Different rationales apply, and therefore different degrees of legal otherness emerge, depending on whether the foreigner is an EU, EEA or Swiss citizen, a third-country national family member of one of these groups, a Turkish national covered by the EEC-Turkey Association Agreement, a long-term resident third-country national or a third-country national who is not covered by a specific regime. According to Morano-Foadi and Andreadakis there is "a hierarchy of legal residents within the EU, with the Union citizens at the apex".²⁷ Secondly, the level of protection that is afforded to members of a

²⁷ S. Morano-Foadi and S. Andreadakis, "The Convergence of the European Legal System in the Treatment of Third-Country Nationals in Europe: The ECJ and ECtHR Jurisprudence" (2011) 22 E.J.I.L. 1076.

specific group of foreigners is not static, as the passage of time in relation to residence normally enhances the foreigner's protection against expulsion and his or her security of residence. Finally, the various groups of foreigners are not static, as a third-country national's acquisition of EU citizenship or Turkish nationality as well as marriage or registered partnership with a mobile EU citizen modifies his or her degree of legal otherness by enhancing the protection against expulsion.

Even though EU citizens are considered to be at the apex of the hierarchy, this statement does not necessarily hold true for the classification at the Member State level, as the protection against expulsion can be influenced by historic developments, as exemplified by the status of Irish citizens in the UK. Moreover, the hierarchy only covers non-nationals, as naturalisation elevates the individual from the sphere of an 'outsider' to the inner circle of those who 'belong'.

Legal othering within the group of foreigners

The hierarchy of legal residents in the EU, which depicts the different levels of legal otherness, simultaneously epitomises the othering within this group. The granting of enhanced rights to only a specific group of non-nationals accentuates differences between this group and the other groups of foreigners and is capable of creating a growing distance between them. EU law has considerably opened the national migration law systems to (mobile) EU citizens, by enabling them to claim rights that were previously reserved to nationals, including the right of political participation.²⁸ This legal development created a group of 'privileged migrants', who enjoy the benefits of a transnational citizenship. Simultaneously, it generated a group of 'non-privileged migrants', who are denied access to this status. Such a differentiation is not only capable of repudiating and estranging those excluded from this status, it can also create the impression that their (legal) position is deteriorating, even if it remains unaltered or is improved. While EU citizenship accords privileges to some, it simultaneously constitutes a differentiator and operates as a mechanism of exclusion of third-country nationals, a term that vividly denotes their otherness. EU citizenship constitutes a justification for unequal treatment of those who do

²⁸ Art.20 para.2 lit.b TFEU.

not hold this status. Even though the granting of rights to particular foreigners can have positive, enabling and encouraging effects on them, it can simultaneously have negative, discouraging and alienating repercussions on the non-privileged ones, the ‘outsiders’. The exclusionary effects or even purpose of citizenship is not limited to the national level, as highlighted by Kochenov. He notes that:

“... the majority of those who are not in possession of EU citizenship are thus excluded – and this is in line with the Court’s case law on the scope of non-discrimination on the basis of nationality: the core boundary between ‘us’ and ‘them’ in any citizenship law, including the supranational law in Europe.”²⁹

Despite these downsides, the introduction of free movement and residence rights for EU citizens and their family members has triggered a legal change that has opened EU Member States’ migration law systems to a certain extent. The reduction or elimination of barriers to migration was not confined to the aforementioned groups, it also had a spill-over effect on Turkish nationals and long-term resident third-country nationals, which will be addressed in more detail below.³⁰

EU citizens’ protection against expulsion

EU citizens are said to be at the apex of the hierarchy of legal residents in the EU.³¹ This statement is examined in the coming section by focusing on the legal provisions that govern EU citizens’ protection against expulsion, before addressing the interpretation of these provisions by the ECJ.

²⁹ D. Kochenov, “EU Citizenship as a Federal Denominator”, in D. Kochenov (ed), *EU Citizenship and Federalism, The Role of Rights* (Cambridge: Cambridge University Press, 2017), p.33.

³⁰ See the sections “Turkish Nationals covered by the EEC-Turkey Association Agreement” and “Long-Term Resident Third-Country Nationals”.

³¹ S. Morano-Foadi and S. Andreadakis, “The Convergence of the European Legal System in the Treatment of Third-Country Nationals in Europe” 1076.

Legal provisions

The protection against expulsion is specified by Directive 2004/38/EC, which applies to EU citizens and their (third-country national) family members who move to or reside in a Member State other than the EU citizen's Member State of nationality.³² During the drafting process of the Directive, the EU Commission proposed to grant EU citizens and their family members who had resided in the territory of the host Member State for five years, as well as family members who are minors, an absolute protection against expulsion.³³ The implementation of this proposal would have moved this group of non-nationals from the sphere of legal 'others' to the group of 'insiders'. The explanatory memorandum of the European Parliament's report endorsed this approach by stating that an absolute protection from expulsion after five years of lawful residence "puts an end to the historic sovereignty of the Member States in this area".³⁴ While acknowledging that the proposal is controversial, especially if there has been a serious breach of public security, it notes that:

"... this provision is a consequence of the 'Amsterdam objective', namely the creation of a border-free area of freedom, security and justice, in which expulsion is a thing of the past and freedom of movement has become a reality for all."³⁵

The Commission's proposal was too far-reaching for the Member States and was almost unanimously rejected by the Council.³⁶ Instead of considering expulsion a thing of the past, Member States wished to retain the option to expel EU citizen whom they deem a threat to their public policy,

³² See Art.3 of Directive 2004/38/EC.

³³ Commission, "Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States" COM(2001) 257 final, art.26 para.2.

³⁴ 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 within the territory of the Member States*, COM(2001) 257 – C5-0336/2001 – 2001/0111(COD), p.55.

³⁵ European Parliament, *Report on the proposal for directive on the right of citizens of the Union*, p.55.

³⁶ Council, Common Position (EC) No. 6/2004 of 5 December 2003 [2004] OJ C 54 E/12.

public security or public health. Despite the EU's endeavour to foster an ever closer Union among the peoples of Europe by granting EU citizens an absolute protection against expulsion after five years of residence, the difference between 'insiders' and 'outsiders' in relation to Member States' nationals and EU citizens continues to exist, due to the latter's lack of an absolute security of residence.

Even though the Commission's proposal was rejected, EU citizens were afforded an enhanced protection against expulsion, which is considered a "major innovation"³⁷ of Directive 2004/38/EC. The first stage of protection covers EU citizens and their (third-country national) family members who have resided in the host Member State for less than five years and who can be expelled on grounds of public policy, public security or public health.³⁸ The second stage of protection is afforded to EU citizens and their (third-country national) family members who have the right of permanent residence. The right of permanent residence is acquired after five years of lawful and continuous residence in the host Member State and prohibits expulsion, except on serious grounds of public policy or public security.³⁹ Art.28 para.3 of Directive 2004/38/EC provides for the most enhanced protection and bars expulsions unless justified by imperative grounds of public security. The provision can only be invoked by EU citizens who have resided on the territory of another Member State for more than 10 years and by EU citizens who are minors. It precludes Member States' recourse to the concept of public policy and excludes third-country national family members from its scope. By excluding the latter, the provision establishes different levels of protection against expulsion and thereby different levels of legal otherness whose demarcation lines pass through families.

Directive 2004/38/EC partially codifies the ECJ's previous case law and grants EU citizens a considerably enhanced protection against expulsion. By curtailing Member States' discretion to expel EU citizens, it has reduced their degree of legal otherness. The subsequent sections map the

³⁷ M. Meduna, "'Scelestus Europeus Sum': What Protection against Expulsion Does EU Citizenship Offer to European Offenders?", in Kochenov (ed), *EU Citizenship and Federalism, The Role of Rights* (Cambridge: Cambridge University Press, 2017), p.404.

³⁸ Art.27 para.1 of Directive 2004/38/EC.

³⁹ Art.28 para.2 of Directive 2004/38/EC.

interpretation of the provisions on expulsion by the ECJ and explore to what extent the Court's case law has modified Member States' capacity to increase EU citizens' level of otherness.

The ECJ's interpretation of the provisions on expulsion

Prior to the adoption of Directive 2004/38/EC, the ECJ limited Member States' powers to expel EU citizens and thereby thwarted, as Kostakopoulou points out, xenophobic discourses on "criminal outsiders".⁴⁰ However, after the adoption of Directive 2004/38/EC, the Court did not advance the rights of EU citizens in quite the same manner in which it had advanced them before the Directive was adopted. In this regard, Meduna observes that the Court

"has not only abandoned its vision for EU citizenship spelt out in Grzelczyk and the key legal principles of its pre-2004 case law, it has also dismantled the [...] protection against expulsion".⁴¹

Indeed, the Court's case law has weakened EU citizens' protection against expulsion in several steps and by different means. The erosion of EU citizens' protection was first effected through a dilution of the distinction between the concepts of public policy and public security, which is outlined in the first sub-section. Subsequently, the Court linked the protection against expulsion to the umbrella term of integration, which is demonstrated in the second sub-section. In addition, the ECJ allowed Member States to deny EU citizens the protection of Directive 2004/38/EC if the EU citizen was imprisoned prior to expulsion, which is addressed in the third sub-section.

The dilution of the difference between public policy and public security

⁴⁰ D. Kostakopoulou, "When EU Citizens become Foreigners" 457.

⁴¹ M. Meduna, "Scelestus Europeus Sum", p.404.

The Court's approach regarding EU citizens' protection against expulsion became evident in two preliminary references from German courts, which reached the Court in 2009. The Tsakouridis case⁴² concerned an expulsion decision following a conviction for dealing in narcotics as part of an organised group, while the P.I. case⁴³ concerned an expulsion triggered by a conviction for sexual abuse, sexual coercion and rape of a minor.⁴⁴ In their preliminary references, both domestic courts asked the ECJ for an interpretation of 'imperative grounds of public security' as per art.28 para.3 of Directive 2004/38/EC in order to ascertain whether the crimes committed by Tsakouridis and P.I. were covered by this notion. In cases unrelated to expulsion the ECJ had previously held that public security refers to the "Member State's internal and external security".⁴⁵ Given that both EU citizens had resided in Germany for more than 10 years, the wider concept of public policy could no longer serve as a valid justification for their expulsion, and they could only be expelled on imperative grounds of public security.

Interestingly, the referring German court was of the opinion that "there were no 'imperative grounds of public security'"⁴⁶ in Mr. Tsakouridis' case. Drawing on the ECJ's previous definition of public security, the national court recalled that:

"(p)ublic security covered only the internal and external security of a Member State, and was accordingly narrower than the concept of public policy, which also covered domestic criminal law".⁴⁷

Consequently, the national court found that:

⁴² *Land Baden-Württemberg v Panagiotis Tsakouridis* (C-145/09) EU:C:2010:708.

⁴³ *P.I. v Oberbürgermeisterin der Stadt Remscheid* (C-348/09) EU:C:2012:300.

⁴⁴ *P.I.* (C-348/09) at [17].

⁴⁵ *Aimé Richardt and Les Accessoires Scientifiques SNC* (C-367/89) EU:C:1991:376 at [22]; *Criminal Proceedings against Peter Leifer, Reinhold Otto Krauskopf and Otto Holzer* (C-83/94) EU:C:1995:329 at [26]. See: P. Koutrakos, "Public Security Exceptions and EU Free Movement Law", in P. Koutrakos, N. Nic Shuibhne, P. Sypris (eds), *Exceptions from EU Free Movement Law* (Oxford: Hart Publishing, 2016), pp.190-217.

⁴⁶ *Tsakouridis* (C-145/09) at [20].

⁴⁷ *Tsakouridis* (C-145/09) at [20].

“Mr 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”.⁴⁸

The ECJ, by contrast, departed from its previous definition of public security. Even though it acknowledged that “the European Union legislature clearly intended to limit measures based on art.28 para.3 to ‘exceptional circumstances’”,⁴⁹ it ruled that the crimes committed by Tsakouridis and P.I. were capable of being covered by the notion of public security. It left the final decision regarding the EU citizens’ expulsion to the referring national courts and constrained their power by listing several criteria that had to be met before the EU citizens could be expelled.⁵⁰

Both judgments attenuate the differences between the concepts of public policy and public security and therefore, as Koutrakos points out, are “by no means conducive to the clarification of these elusive concepts”.⁵¹ The erosion of the distinction between the wider concept of public policy and the narrower and more specific concept of public security has triggered substantial criticism,⁵² as it weakens EU citizens’ protection against expulsion after more than 10 years of residence. A further line of criticism highlights that the expansion of the scope of public security is difficult to reconcile with the aims of the Directive and the drafters’ intention.⁵³ Crucially, Kostakopoulou observes that the lowering

⁴⁸ *Tsakouridis* (C-145/09) at [20].

⁴⁹ *Tsakouridis* (C-145/09) at [40]; *P.I.* (C-348/09) at [19].

⁵⁰ *P.I.* (C-348/09) at [30-32]; *Tsakouridis* (C-145/09) at [46]-[53], [55].

⁵¹ P. Koutrakos, “Public Security Exceptions and EU Free Movement Law”, p.202.

⁵² G. Anagnostaras, “Enhanced protection of EU nationals against expulsion and the concept of internal public security: Comment on the *PI* case” (2012) 37 E.L. Rev. 630-636; D. Kostakopoulou-Douchery and N. Ferreira, “Testing Liberal Norms: The Public Policy and Public Security Derogations and the Cracks in European Union Citizenship” (2014) 20 Colum. J. Eur. L. 173; D. Kochenov and B. Pirker, “Deporting the Citizens within the European Union” 388; M. Meduna, “Scelestus Europeus Sum”, p.404.

⁵³ N. Nic Shuibhne, “Limits Rising, Duties Ascending” 923-924; D. Kostakopoulou, “When EU Citizens become Foreigners” 460; E. Spaventa, “Earned Citizenship – Understanding Union Citizenship through Its Scope”, in D. Kochenov (ed), *EU Citizenship and Federalism, The Role of Rights* (Cambridge: Cambridge University Press, 2017), p.216.

of the threshold of public security helps transforming long-term resident EU citizens into criminal aliens and constructs otherness.⁵⁴

Protection linked to integration

The next stage in the erosion of EU citizens' protection against expulsion is marked by the M.G. case⁵⁵ of January 2014. The case concerned a Portuguese national resident in the UK and primarily revolved around the calculation of the ten-year period of art.28 para.3 lit.a of Directive 2004/38/EC. The Court stated that the protection against expulsion granted by the Directive is "based on the degree of integration of the persons concerned in the host Member State".⁵⁶ Moreover, the Court emphasised that the "degree of integration (...) is a vital consideration underpinning (...) the system of protection against expulsion".⁵⁷ Meduna argues that the Court has deprived many EU citizens of their enhanced protection against expulsion

"by reading a genuine integration condition into the text of the Free Movement Directive which had not been contemplated by the EU legislator when opting for an abundantly clear rule of permanent residence acquired by passage of time and ten years of residence".⁵⁸

Indeed, a requirement of integration to be able to rely on the protection against expulsion is neither mentioned in art.27 nor in art.28 of Directive 2004/38/EC.⁵⁹ A further problem in this context arises from the vagueness inherent in the notion of integration. When elaborating on the concept of integration

⁵⁴ D. Kostakopoulou, "When EU Citizens become Foreigners" 460.

⁵⁵ *Secretary of State for the Home Department v M.G.* (C-400/12) EU:C:2014:9.

⁵⁶ *M.G.* (C-400/12) at [30].

⁵⁷ *M.G.* (C-400/12) at [32].

⁵⁸ M. Meduna, "Scelestus Europeus Sum", p.404.

⁵⁹ Art.28 para.1 of Directive 2004/38/EC merely lists social and cultural integration into the host Member States as a consideration that shall be taken into account before taking an expulsion decision.

in the M.G. case,⁶⁰ the Court referred to the Onuekwere judgment,⁶¹ which concerned a third-country national's acquisition of the right of permanent residence and was decided on the same day as M.G. In Onuekwere the Court held that:

“integration, which is a precondition of the acquisition of the right of permanent residence [...] is based not only on territorial and temporal factors but also on qualitative elements, relating to the level of integration in the host Member State”.⁶²

The ECJ continued by stating that:

“the imposition of a prison sentence by the national court is such as to show the non-compliance by the person concerned with the values expressed by the society of the host Member State in its criminal law”.⁶³

Given that the Court referred to this passage in its M.G.⁶⁴ judgment, it seems to inform the rationale of the Court's reasoning in the context of expulsion. However, defining integration as compliance with a state's penal provisions is highly problematic in the context of expulsion. Expulsion decisions on grounds of public policy or public security can only be based on the EU citizen's personal conduct, which in turn has to pose a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.⁶⁵ Such a conduct will typically involve a transgression of the 'host' Member State's penal provisions. If the transgression of a Member State's penal provisions were considered to prove the EU citizen's lack of integration, then the prerequisite of being integrated in order to be eligible for the protection against expulsion provided for by Directive 2004/38/EC would have a *Kafkaesque* dimension. Such an interpretation of integration would deprive those who are subject to

⁶⁰ *M.G.* (C-400/12) at [31].

⁶¹ *Nnamdi Onuekwere v Secretary of State of the Home Department* (C-378/12) EU:C:2014:13.

⁶² *Onuekwere* (C-378/12) at [25].

⁶³ *Onuekwere* (C-378/12) at [26].

⁶⁴ *M.G.* (C-400/12) at [31].

⁶⁵ See art.27 para.2 of Directive 2004/38/EC.

expulsion as a result of their criminal behaviour of the protection provided for by Directive 2004/38/EC, given their lack of integration.

Even if integration was not equated with the compliance with Member States' values as expressed in their penal provisions, the notion of integration is still sufficiently indeterminate to allow Member States' authorities to interpret it in light of their national policies in order to divest themselves of unwanted EU citizens. The vagueness of this term enables Member States to adjust the denial of protection against expulsion to their national needs and it allows them to create numerous new categories of unintegrated EU citizens that are excluded from the protection against expulsion provided for by Directive 2004/38/EC. Finally, linking the protection against expulsion to the notion of integration supports the narrative of the foreigner, who has never made an effort to integrate him-/herself into the society. It helps to portray the individual as the unintegrated 'other', which, in turn, is capable of fostering sentiments against foreigners in society.

The impact of imprisonment on EU citizens' protection against expulsion

The *M.G.* judgment provided Member States with a third mechanism to deny EU citizens the protection against expulsion by clarifying the effects of EU citizens' imprisonment on their continuity of residence and thereby on their ability to invoke the protection against expulsion. The Court stated that:

“periods of imprisonment cannot be taken into account for the purposes of granting the enhanced protection provided for in art. 28 para. 3 lit. a of Directive 2004/38 and ... in principle, such periods interrupt the continuity of the period of residence for the purposes of that provision.”⁶⁶

In the following paragraphs, the Court elaborated on the consequences of the interruption of the continuity of residence through imprisonment by stating that the ten-year period of residence “must, in principle, be continuous”.⁶⁷ Regarding the effects of the non-continuous nature of residence and whether

⁶⁶ *M.G.* (C-400/12) at [33].

⁶⁷ *M.G.* (C-400/12) at [34].

it prevents the individual from relying on the enhanced protection against expulsion, the Court held that “an overall assessment must be made”,⁶⁸ which considers “whether the integrating links previously forged with the host Member State have been broken”.⁶⁹ Despite the seemingly open-ended nature of this assessment, the ECJ continued by stipulating that:

“imprisonment is, in principle, capable both of interrupting the continuity of the period of residence [...] and of affecting the decision regarding the grant of the enhanced protection [...], even where the person concerned resided in the host Member State for the 10 years prior to imprisonment”.⁷⁰

This statement is crucial, as it strengthens Member States’ power to deny EU citizens the enhanced protection of art.28 para.3 of Directive 2004/38/EC even if the EU citizen had already resided for more than 10 years on their territory before being imprisoned.

Interestingly, the Court’s stance regarding the impact of EU citizens’ imprisonment on their protection against expulsion did not remain unchallenged and was at the heart of the joined cases of *B* and *Franco Vomero*.⁷¹ *B* had virtually resided all his life in Germany, had only rudimentary knowledge of the language of his home Member State, which he left at the age of three, and was deeply rooted in Germany.⁷² The referring national court ascertained that *B* had strong integrative links with the host Member State, which had not been broken by his imprisonment.⁷³ More generally, the national court argued that imprisonment, which is the consequence of the offence and “which constitutes the ground for expulsion from the host Member State should not, in any event, be taken into account” when

⁶⁸ *M.G.* (C-400/12) at [35].

⁶⁹ *M.G.* (C-400/12) at [36].

⁷⁰ *M.G.* (C-400/12) at [38].

⁷¹ *B v Land Baden-Württemberg and Secretary of State for the Home Department v Franco Vomero* (C-316/16 and C-424/16) EU:C:2018:256.

⁷² *B and Franco Vomero* (C-316/16 and C-424/16) at [12], [13], [21].

⁷³ *B and Franco Vomero* (C-316/16 and C-424/16) at [21].

determining whether the integrative links have been broken.⁷⁴ It noted that otherwise, according to German law, the individual would be excluded from relying on the protection granted by art.28 para.3 lit.a of Directive 2004/38/EC in certain constellations.⁷⁵ The referring court's reasoning is similar to the national court's approach in *Tsakouridis*, in that it aims at granting to the EU citizen the protection of art.28 para.3 lit.a of Directive 2004/38/EC. Particularly interesting is the national court's general statement by which it invites the ECJ to stipulate that in jurisdictions where the expulsion measure is adopted after the foreigner's imprisonment, imprisonment shall not be taken into account when assessing whether the integrative links have been broken.⁷⁶ Such a pronouncement would have required the ECJ to reconsider its approach in *M.G.*, where it had ruled that "imprisonment is, in principle, capable [...] of interrupting the continuity of the period of residence".⁷⁷

The ECJ did not follow the national court's suggestion. It merely softened its previous approach by ruling that the custodial sentence cannot be considered to automatically break the EU citizen's integrative links with the host Member State and thereby the continuity of residence for the purposes of art.28 para.3 of Directive 2004/38/EC.⁷⁸ Moreover, the ECJ stated that the "condition of having 'resided in the host Member State for the previous ten years' laid down in that provision may be satisfied"⁷⁹ depending on the outcome of an overall assessment that has to be conducted at the national level and for which the Court provided a non-exhaustive list of criteria.⁸⁰ The ECJ's stance in the case of *M.G.* and in the joined cases of *B* and *Franco Vomero* accommodates a variety of divergent domestic approaches. It caters to the needs of domestic decision makers and courts that wish to apply art.28 para.3 lit.a of Directive 2004/38/EC to the EU citizen's benefit, as, for instance, the referring national court in *B*'s

⁷⁴ *B and Franco Vomero* (C-316/16 and C-424/16) at [22].

⁷⁵ *B and Franco Vomero* (C-316/16 and C-424/16) at [22].

⁷⁶ *B and Franco Vomero* (C-316/16 and C-424/16) at [22].

⁷⁷ *M.G.* (C-400/12) at [38].

⁷⁸ *B and Franco Vomero* (C-316/16 and C-424/16) at [71].

⁷⁹ *B and Franco Vomero* (C-316/16 and C-424/16) at [83].

⁸⁰ *B and Franco Vomero* (C-316/16 and C-424/16) at [83].

case. Simultaneously, it provides sufficient flexibility to satisfy those national decision makers who seek to reach the opposite outcome. This flexibility comes at a price, as it weakens the uniform application of EU law, poses a threat to legal certainty, and ultimately undermines EU citizens' protection against expulsion.

In sum, EU citizens have been granted a “special membership status”,⁸¹ which affords them a considerably enhanced protection and equal treatment rights with nationals in several areas. However, in 2011 Anderson, Gibney and Paoletti rightly pointed to the shortcomings of this status, which were highlighted in 2010 by the Court's interpretation in *Tsakouridis* of the provisions governing EU citizens' protection against expulsion, by stating that expulsion or “deportation is a way of showing that the individual is not a citizen”.⁸² The Court's interpretation of the provisions on expulsion in *Tsakouridis* and in subsequent judgments not only underpins the differences between EU citizens and nationals, it even allows for an expansion of these differences. These judgments provide Member States with a variety of mechanisms to undermine EU citizens' protection against expulsion, thereby facilitating their legal othering by way of physical exclusion. For the Member States, these mechanisms constitute valuable instruments to underline their sovereignty and to reassure their nationals of their unique status. This assurance is particularly important in light of EU citizens' special membership status, which, in many respects, is similar or even equivalent to the status enjoyed by nationals.

Turkish Nationals covered by the EEC-Turkey Association Agreement

The legal status of Turkish nationals and their protection against expulsion is governed by the EEC-Turkey Association Agreement. For many years, Turkish nationals benefitted from the same standards of protection against expulsion that were applicable to workers who are nationals of a Member State. This privileged position was mainly the result of the ECJ's interpretation of art.14 para.1 of Association

⁸¹ B. Anderson, M. Gibney, E. Paoletti, “Citizenship, deportation and the boundaries of belonging” 545.

⁸² B. Anderson, M. Gibney, E. Paoletti, “Citizenship, deportation and the boundaries of belonging” 555.

Council Decision No.1/80, which regulates Turkish nationals' protection against expulsion. In its Nazli judgment the Court clarified the content of the public policy exception of art.14 by stating that:

“reference should be made to the interpretation given to that exception in the field of freedom of movement for workers who are nationals of a Member State of the Community”.⁸³

The Court held in several judgments that this parallel interpretation is justified, as the wording of art.14 of Association Council Decision No.1/80 and the wording of the relevant Treaty provision are almost identical.⁸⁴ According to the Court, a public policy or public security decision pursuant to art.14 para.1 requires that the personal conduct of the individual concerned pose a present, genuine and sufficiently serious threat to a fundamental interest of society.⁸⁵ This requirement replicates a general principle of EU citizens' protection against expulsion, which has also been codified in Directive 2004/38/EC.⁸⁶ After the adoption of Directive 2004/38/EC, the question arose of whether the additional safeguards contained in this Directive can also be invoked by Turkish citizens.

In the Ziebell case,⁸⁷ the Court addressed the question of whether art.28 para.3 lit.a of Directive 2004/38/EC “lends itself to application by analogy under the EEC-Turkey Association”. In reaching the conclusion that it cannot be applied to Turkish nationals by analogy, the Court had recourse to the “objective pursued by the Association Agreement and the context of which it forms a part” and

⁸³ *Ömer Nazli, Caglar Nazli and Melike Nazli v Stadt Nürnberg* (C-340/97) EU:C:2000:77 at [56].

⁸⁴ *Land Baden-Württemberg v Metin Bozkurt* (C-303/08) EU:C:2010:800 at [55]; *Murat Polat v Stadt Rüsselsheim* (C-349/06) EU:C:2007:581 at [30]; *Georg Dörr v Sicherheitsdirektion für das Bundesland Kärnten and Ibrahim Ünal v Sicherheitsdirektion für das Bundesland Vorarlberg* (C-136/03) EU:C:2005:340 at [63]; *Inan Cetinkaya v Land Baden-Württemberg* (C-467/02) EU:C:2004:708 at [43]; *Nazli* (C-340/97) EU:C:2000:77 at [56].

⁸⁵ *Metin Bozkurt* (C-303/08) at [61]; *Nural Ziebell v Land Baden-Württemberg* (C-371/08) EU:C:2011:809 at [82].

⁸⁶ See art.27 para.2 of Directive 2004/38/EC.

⁸⁷ *Ziebell* (C-371/08).

compared it to that of Directive 2004/38/EC.⁸⁸ It noted that, while the EEC-Turkey Association pursues a purely economic purpose,⁸⁹ Directive 2004/38/EC is “far from pursuing a purely economic objective”, as it “aims to facilitate the exercise of the primary and individual right to move and reside freely within the territory of the Member States”.⁹⁰ Moreover, the Court held that “the very concept of ‘imperative grounds’ of public security as set out in Article 28(3)(a) of Directive 2004/38/EC”, which limits expulsion decisions to exceptional circumstances, “has no equivalent in Article 14(1) of Decision 1/80”.⁹¹ The ECJ concluded that, in light of these differences between the EEC-Turkey Association Agreement and Directive 2004/38/EC, art.28 para.3 is not applicable to Turkish nationals who are covered by the EEC-Turkey Association Agreement.⁹² Nevertheless, the Court reiterated the already established safeguards of Turkish nationals’ protection against expulsion,⁹³ which, although originally developed by the Court in the context of the protection that is afforded to nationals of the Member States, were subsequently gradually transferred to Turkish nationals. Many of these safeguards are also reflected in the general principles of EU citizens’ protection against expulsion that are codified in art.27 of Directive 2004/38/EC. By summarising these safeguards, the Court clarified that the status quo of Turkish nationals’ protection against expulsion remains unaffected by this judgment.

This places Turkish nationals in a similar, albeit not identical, position to that enjoyed by EU citizens, as they are unable to invoke art.28 para.3 of Directive 2004/38/EC. Even though Turkish citizens’ degree of legal otherness is greater than that of EU citizens, their protection against expulsion has substantially been improved by the Court, who had recourse to the general principles of EU citizens’ protection against expulsion when interpreting art.14 of the Association Council Decision No.1/80. This

⁸⁸ *Ziebell* (C-371/08) at [62].

⁸⁹ *Ziebell* (C-371/08) at [64], [68], [72].

⁹⁰ *Ziebell* (C-371/08) at [69].

⁹¹ *Ziebell* (C-371/08) at [71].

⁹² *Ziebell* (C-371/08) at [74].

⁹³ *Ziebell* (C-371/08) at [81]-[84].

parallel interpretation has increased Turkish citizens' security of residence and reduced their degree of legal otherness.

Long-Term Resident Third-Country Nationals

The non-binding Presidency Conclusions of the 1999 European Council in Tampere postulate that the “legal status of third country nationals should be approximated to that of Member States’ nationals”. Therefore, the Presidency Conclusions called on Member States to grant third-country nationals who hold a long-term residence permit “a set of uniform rights which are as near as possible to those enjoyed by EU citizens”. This appeal is reiterated in the second recital of Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents.⁹⁴ The Directive applies to third-country nationals who are already lawfully resident in the respective EU Member State, but it remains silent on the conditions of entry. Art.4 of the Directive provides that third-country nationals who have legally and continuously resided in the territory of the host Member State for five years shall be granted long-term resident status. Long-term resident status entails equal treatment rights with nationals in selected areas⁹⁵ and accords its holder an enhanced protection against expulsion. Several scholars compared the legal regime applicable to long-term resident third-country nationals with the provisions that apply to EU citizens and highlighted the existence of a gap. Morano-Foadi and Andreadakis pointed out that free movement rights and EU citizenship on the one hand and EU immigration and asylum provisions on the other hand are mutually exclusive.⁹⁶ They argued that even though the gap between the two sets of rights has been diminished, it is still existent.⁹⁷ Similarly, Bast stated that Directive 2003/109/EC has to be

⁹⁴ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2004] OJ L16/44.

⁹⁵ Art.11 para.1 of Directive 2003/109/EC.

⁹⁶ S. Morano-Foadi and S. Andreadakis, “The Convergence of the European Legal System” 1075-1076.

⁹⁷ S. Morano-Foadi and S. Andreadakis, “The Convergence of the European Legal System” 1075, 1087.

considered as a decision of the legislature to adhere to the categorical differentiation between EU citizens and third-country nationals.⁹⁸

Long-term residents' protection against expulsion is governed by art.12 para.1 of Directive 2003/109/EC, which provides that:

“Member States may take a decision to expel a long-term resident solely where he/she constitutes an actual and sufficiently serious threat to public policy or public security.”

Thym rightly points out that, according to the ECJ's settled case law, ‘public policy’ refers to a “genuine and sufficiently serious threat ... affecting one of the fundamental interests of society” and that the requirement of a sufficiently serious threat (art.12 para.1 of Directive 2003/109/EC) is redundant, as it is inherent in the concept of public policy.⁹⁹ Different views were advanced as to whether the interpretation of art.12 of Directive 2003/109/EC should be aligned to the protection that is afforded to EU citizens. While several scholars supported such an approach,¹⁰⁰ others advanced arguments against an alignment.¹⁰¹

⁹⁸ J. Bast, “Transnationale Verwaltung des europäischen Migrationsraums” (2007) 46 *Der Staat* 18.

⁹⁹ D. Thym, “Directive 2003/109/EC”, in K. Hailbronner and D. Thym (eds), *EU Immigration and Asylum Law. Commentary*, 2nd edn. (München, Oxford, Baden-Baden: CH. Beck/Hart/Nomos, 2016), Article 12, MN. 4

¹⁰⁰ M. ter Steeg, *Das Einwanderungskonzept der EU, Zwischen politischem Anspruch, faktischen Regelungsbedürfnissen und den primärrechtlichen Grenzen des Title IV des EG-Vertrages* (Baden-Baden: Nomos, 2006), pp.391-392; S. Peers, “Implementing Equality? The Directive on long term resident third-country nationals” (2004) 29 *E.L. Rev.* 452; K. Groenendijk, “Long-Term Residents”, in S. Peer et al. (eds), *EU Immigration and Asylum Law (Text and Commentary)*, Volume 2, 2nd edn. (Leiden: Brill-Nijhoff, 2012) p.313.

¹⁰¹ C. Langenfeld, “Menschenrecht auf Aufenthalt?”, in M. Herdegen, H. Klein, H.-J. Papier, R. Scholz (eds), *Staatsrecht und Politik, Festschrift für Roman Herzog* (München: C.H. Beck, 2009) p.262; D. Thym, “Directive 2003/109/EC”, Article 12, MN. 2; K. Hailbronner, “Langfristig aufenthaltsberechtigte Drittstaatsangehörige” (2004) 24 *Zeitschrift für Ausländerrecht und Ausländerpolitik* 166.

In December 2017, the Court elaborated on the interpretation of art.12 of Directive 2003/109/EC in the case of *López Pastuzano*.¹⁰² The ECJ emphasised that an expulsion measure “may not be ordered automatically following a criminal conviction” and stipulated that an expulsion “requires a case-by-case assessment”.¹⁰³ Moreover, it referred to two paragraphs of its *Ziebell* judgment,¹⁰⁴ which contain core principles of Turkish nationals’ protection against expulsion. These principles were originally developed by the Court in the context of the protection against expulsion that is afforded to (economically active) nationals of the Member States. One of the paragraphs of the *Ziebell* judgment that the Court quoted in *López Pastuzano* contains the requirement that the personal conduct of the individual concerned constitutes at present a genuine and sufficiently serious threat to a fundamental interest of society.¹⁰⁵ This requirement has been mentioned in the previous section on Turkish nationals and is a foundational principle of EU citizens’ protection against expulsion. Another principle of Turkish nationals’ protection against expulsion quoted by the Court in *López Pastuzano*¹⁰⁶ stipulates that:

“[expulsion measures] cannot be ordered automatically on general preventive grounds following a criminal conviction or as a means of deterring other foreign nationals from committing offences”.¹⁰⁷

These paragraphs summarise the safeguards that guide Turkish nationals’ protection against expulsion¹⁰⁸ that originate from the protection afforded to nationals of the Member States.¹⁰⁹ Even though the Court did not refer to other paragraphs of the *Ziebell* judgment and the principles contained therein, its

¹⁰² *Wilber López Pastuzano v Delegación del Gobierno en Navarra* (C-636/16) EU:C:2017:949.

¹⁰³ *López Pastuzano* (C-636/16) at [27].

¹⁰⁴ *López Pastuzano* (C-636/16) at [27]; *Ziebell* (C-371/08) at [82]-[83].

¹⁰⁵ *López Pastuzano* (C-636/16) at [27]; *Ziebell* (C-371/08) at [82].

¹⁰⁶ *López Pastuzano* (C-636/16) at [27].

¹⁰⁷ *Ziebell* (C-371/08) at [83].

¹⁰⁸ See for example *Metin Bozkurt* (C-303/08) at [57]-[60].

¹⁰⁹ See *Calfa* (C-348/96) at [24]-[28]; *Georgios Orfanopoulos and Others and Raffaele Olivieri v Land Baden-Württemberg* (C-482/01 and C-493/01) EU:C:2004:262 at [66]-[70].

approach in López Pastuzano highlights the aim of synchronising Turkish nationals' and long-term resident third-country nationals' protection against expulsion and to align it to the foundational principles of EU citizens' protection. This enhances long-term resident third-country nationals' protection against expulsion and reduces their degree of legal otherness.

Conclusions

Deportability operates as a marker of otherness, as it clearly distinguishes between those who belong and those who are outsiders. The removal of foreigners from the national territory assures nationals of their privileged position, which in turn reinforces the perception that their nationality has a value. Simultaneously, deportability forcefully reminds foreigners that the foundation of their existence can unilaterally be terminated by the state. Deportability underlines the conditionality of their residence in the 'host' Member State, ultimately underpinning their legal otherness. The system of expulsion creates a hierarchy among individuals by distinguishing between those who normally enjoy an unfettered security of residence and those who lack such a security. The latter group, however, is heterogeneous, as different rationales apply depending on the foreigner's nationality.

The assessed EU Directives and Association Council Decision No.1/80 provide for different levels of protection against expulsion and thereby create different levels of legal otherness. Art.28 para.3 of Directive 2004/38/EC, which exclusively applies to EU citizens, provides for the strongest protection against expulsion that is available within the EU legal framework. Turkish nationals and long-term resident third-country nationals remain excluded from the ambit of art.28 para.3 of Directive 2004/38/EC, which is unsurprising, given that not even EU citizens' third-country national family members can invoke this provision. Despite the non-applicability of art.28 para.3 to these groups of foreigners, the ECJ has considerably enhanced their protection against expulsion by applying the general

principles of EU citizens' protection against expulsion when interpreting art.14 of Association Council Decision No.1/80 and art.12 of Directive 2003/109/EC, respectively.

This development may appear surprising against the background of a growing nationalism, an increasing fear of 'the other' and the creation of a hostile environment towards migrants in several EU Member States. If the aforementioned groups of third-country nationals were afforded a limited protection against expulsion, Member States' ability to draw the demarcation line between 'us' and 'them' more sharply would have been strengthened. In this regard, the Court's decision to reinforce their protection could be considered a countermeasure to the current political development and an attempt to undermine nationalistic tendencies. The enhancement of third-country nationals' rights could convey a clear message to the Member States that the Court is prepared to thwart any restrictive interpretation of the rights granted to individuals by EU law.

Such an interpretation, however, is refuted by the antithetical development regarding EU citizens. EU citizens are afforded a reinforced protection against expulsion by Directive 2004/38/EC, which directly impinges on Member States' capacity to distinguish between their own nationals and EU citizens. Nonetheless, the strict limitations that have been imposed by the EU legislature, notably by art.28 of Directive 2004/38/EC, have incrementally been loosened by the ECJ. The Court has gradually undermined EU citizens' protection against expulsion by blurring the distinction between the concepts of public policy and public security and by linking EU citizens' protection against expulsion to the indeterminate umbrella term of integration. Finally, the Court allowed Member States to deny EU citizens the protection of art.28 para.3 of Directive 2004/38/EC if they have been imprisoned prior to expulsion. The effects of the Court's case law reconfigure EU citizens' degree of belonging and provide Member States with the requisite mechanisms to turn them into outsiders.

The strengthening of third-country nationals' protection against expulsion and the parallel erosion of EU citizens' security of residence are striking against the background of EU citizens' considerably enhanced position in the EU legal system. EU citizens are vested with rights that are unavailable to third-country nationals, given that they can invoke the free movement and residence

right,¹¹⁰ the right of political participation,¹¹¹ and specific Charter rights.¹¹² However, the strong status of EU citizens might exactly be the reason for the described development. While there is no pressing need for EU Member States to differentiate between nationals and third-country nationals, as the latter's rights are clearly distinguishable from those of nationals, the need to distinguish between 'insiders' and 'outsiders' primarily arises in relation to EU citizens, who enjoy a status that is in many regards equivalent to that of nationals. Given the parallels between the rights enjoyed by nationals and those afforded to EU citizens, the latter's expulsion, more than the expulsion of any other group of foreigners, sends a particularly strong signal to nationals. The expulsion of EU citizens illustrates the privileged position of nationals and demonstrates them that they enjoy exclusive rights that are not even available to EU citizens.

The dismantling of EU citizens' protection might be reinforced by the absence of internal borders and border controls in the Schengen area and by the decreasing visibility and importance of territorial boundaries. Walters notes that "Schengen involves a downgrading and deprivileging of the status and function of existing borders."¹¹³ The expulsion of EU citizens, by contrast, highlights the expelling state's territorial sovereignty by annulling EU citizens' fundamental right of free movement and residence with regard to the state's territory.

The alignment of Turkish nationals' and long-term resident third-country nationals' protection against expulsion to that of EU citizens blurs the different degrees of legal otherness and points towards a convergence of statuses. The application of the same general principles to EU citizens, Turkish nationals and long-term resident third-country nationals generates several positive effects. It counteracts the legal othering within the group of foreigners,¹¹⁴ fosters a simplification of administrative processes, enhances clarity and possibly promotes legal certainty. While the strengthening of Turkish citizens' and

¹¹⁰ See art.20 para.2 lit.a TFEU; art.45 of the Charter of Fundamental Rights of the European Union.

¹¹¹ See art.20 para.2 lit.b TFEU; arts 39, 40 of the Charter of Fundamental Rights of the European Union.

¹¹² Chapter V of the Charter of Fundamental Rights of the European Union, which is entitled "Citizens' Rights".

¹¹³ W. Walters, "Mapping Schengenland: denaturalizing the border" (2002) 20 *Society and Space* 566.

¹¹⁴ See above, "Legal othering within the group of foreigners".

long-term resident third-country nationals' protection against expulsion has positive implications and is to welcome, the convergence of the different degrees of otherness also yields negative effects.

First, the described convergence coincides with a weakening of EU citizens' protection, which is a component of this very process. Despite the Court's clarification that art.28 para.3 of Directive 2004/38/EC is exclusively applicable to EU citizens and cannot be invoked by third-country nationals, the Court simultaneously undermined the protection that is afforded by this provision and thereby levelled its distinguishing characteristics. Instead of moving third-country nationals' protection against expulsion closer to the standards of protection that are contained in art.28 para.3 of Directive 2004/38/EC, the ECJ restricted EU citizens' possibilities to invoke art.28 para.3. While the legal status of EU citizens was previously close to that of nationals, the described development precipitates a shift in EU citizens' protection against expulsion, deepens the gap between nationals and EU citizens and increases the latter's level of legal otherness.

Secondly, the described convergence of the different levels of legal otherness and the expansion of the gap between nationals and EU citizens increases the visibility of the group of foreigners, highlights their distinctiveness and separates them more clearly from the group of nationals. The outlined shift in the Court's case law strengthens the differences between 'insiders' and 'outsiders' and emphasises the otherness of non-nationals, which negatively impacts all groups of foreigners.

Finally, and on a more abstract level, the amplification of EU citizens' legal otherness has much wider effects and reaches beyond the negative repercussions on EU citizens. The dismantling of EU citizens' rights is not only problematic for the individual rights-holder, but it can also yield negative ramifications for third-country nationals, as it impinges on the model function of EU citizenship. EU citizenship is said to have a transformative potential, as it has the capacity to call into question the traditional ways of thinking about membership and community.¹¹⁵ EU citizenship has operated as an intermediary between nationals and non-nationals and is vested with the potential to transgress the

¹¹⁵ For further information see: D. Kostakopoulou, "The Evolution of European Union Citizenship" (2008) 7 European Political Science 288.

boundaries of the insider/outsider dichotomy, as these categories are inapt to capture the special characteristics of this transnational status. The curtailment of EU citizenship incapacitates its transcending effects and halts a development that could have benefitted third-country nationals.

In sum, the described shift in the Court's case law impinges on EU citizens' security of residence, increases their legal otherness and broadens the gap between nationals and non-nationals. This development allows Member States to emphasise their sovereignty and to advance the legal othering of foreigners by drawing the demarcation line between 'us' and 'them' more clearly. The repercussions of this process are not necessarily confined to the legal sphere. The increasing legal gap between nationals and non-nationals is capable of fostering divisive societal and political developments and can trigger or consolidate a fear of 'the other'. Finally, this development can elevate topics such as security, borders and border controls to central issues in public debates, to the detriment of policies that are actually capable of enhancing social cohesion.