

**Case C-719/19****Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

30 September 2019

**Referring court:**

Raad van State (Netherlands)

**Date of the decision to refer:**

25 September 2019

**Appellant:**

FS

**Respondent:**Staatssecretaris van Justitie en Veiligheid**Subject of the action in the main proceedings**

In the main proceedings, a foreign national, an EU citizen, stated that he would voluntarily comply with an expulsion decision taken by the Netherlands as referred to in Article 15 of Directive 2004/38/EC. After his departure from the Netherlands, he re-entered that country and, after being arrested on suspicion of having committed a criminal offence, was placed in temporary custody. That was wrongful, according to the foreign national, since, under Article 6 of that directive, he was again entitled to reside in the Netherlands. The court at first instance, however, dismissed the action brought by the foreign national as unfounded. The foreign national subsequently lodged an appeal against that action with the referring court.

**Subject and legal basis of the request for a preliminary ruling**

The subject of the present request under Article 267 TFEU is the question of how long the legal effects of an expulsion decision under Article 15 of Directive 2004/38 persist after voluntary departure or expulsion from the host Member State and how long the foreign national must have actually resided outside the

Netherlands before being allowed to return under Articles 5 and 6 of that directive (right of entry and right of residence of up to three months).

### **Questions referred**

Question 1:

Must Article 15(1) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEG, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, corrected by OJ 2004 L 229, OJ 2005 L 30, OJ 2005 L 197 and OJ 2007 L 204) be interpreted as meaning that the decision to expel a Union citizen from the territory of the host Member State taken on the basis of that provision has been complied with and that that decision no longer has any legal effects once that Union citizen has demonstrably left the territory of that host Member State within the period for voluntary departure laid down in that decision?

Question 2:

If Question 1 must be answered in the affirmative, does that Union citizen, in the event of an immediate return to the host Member State, have the right of residence of up to three months referred to in Article 6(1) of Directive 2004/38/EC, or may the host Member State take a new expulsion decision in order to prevent the Union citizen from entering the host Member State for a short period of time?

Question 3:

If Question 1 must be answered in the negative, must that Union citizen in that case then reside outside the territory of the host Member State for a certain period of time and, if so, how long is that period?

### **Provisions of EU law cited**

Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEG, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC: Article 1(a), Article 2(1), Article 3(1), Article 5(1) and (4), Article 6(1), Article 7(1)(a), (b), (c), first and second indents, Article 14(1), (2) and (4)(a) and (b), Article 15

Judgments of the Court of Justice of 12 March 2014, *O & B* (C-456/12, EU:C:2014:135), and of 10 September 2019, *Chenchooliah* (C-94/18, EU:C:2019:693)

### **Provisions of national law cited**

Vreemdelingenwet 2000 (Law on Foreign Nationals 2000; 'Vw 2000'): Article 1, 1°, Article 8(e), Article 50(1) and (3), Article 59(1)(a), Article 61(1), Article 62(1), Article 63(1), Article 72(3), Article 106(1) and (2), and Article 112.

Vreemdelingenbesluit 2000 (Decree on Foreign Nationals 2000): Articles 8.7, 8.8, 8.11, 8.12 and 8.16

### **Brief summary of the facts and procedure in the main proceedings**

- 1 The foreign national, FS, was registered in the Netherlands on 9 November 2017. During his stay in the Netherlands, he had regular confrontations with the police due to various criminal offences. Moreover, by decision of 1 June 2018, the Staatssecretaris van Justitie en Veiligheid (State Secretary for Justice and Security; 'the Staatssecretaris') found that FS no longer satisfied the requirements for lawful residence for a period of longer than three months laid down in Article 7 of Directive 2004/38.
- 2 By decision of 25 September 2018, in response to the objection raised by the foreign national, the Staatssecretaris confirmed the decision of 1 June 2018, imposed a four-week period for voluntary departure and specified that the foreign national could be removed if he did not comply with that stipulation.
- 3 FS has demonstrated that in any event he left the Netherlands before or on 23 October 2018, having been arrested in Germany on that date on suspicion of shoplifting.
- 4 He has also stated that he entered the Netherlands on 21 November 2018 because he had been summoned to appear in court on 23 November 2018. On 22 November 2018, he was arrested in the Netherlands on suspicion of having committed a criminal offence and on 23 November 2018 was placed in temporary custody by the Staatssecretaris. That form of custody, under Article 59(1)(a) of the Vw 2000, is intended for foreign nationals who are residing illegally in the Netherlands and its objective is to remove those foreign nationals to their country of origin, Poland in FS' case.
- 5 According to the Staatssecretaris, detention was necessary due to the risk of FS evading surveillance and avoiding or impeding preparations for departure or expulsion.

- 6 FS brought an action against the temporary custody, which was dismissed as unfounded on 7 December 2018 by the Rechtbank Den Haag (District Court, The Hague), sitting in Groningen.
- 7 According to the Rechtbank, the Staatssecretaris rightly based the decision of 23 November 2018 on the fact that FS had previously received a decision indicating that he had to leave the Netherlands and that he had not done so of his own accord within the period prescribed therein. It had not been established that FS had left the Netherlands, justifying the presumption of the risk mentioned in paragraph 5. That judgment also rejected the claim for damages. FS lodged an appeal against that judgment.
- 8 On 18 December 2018, FS raised an objection against the envisaged removal to Poland and requested the voorzieningenrechter (court hearing applications for interim measures) of the Rechtbank Den Haag to prohibit the removal. That request was granted.
- 9 The removal to Poland having been prohibited on the basis of that judgment, the Staatssecretaris lifted the foreign national's detention on 20 December 2018. FS was arrested two further times after that date.

#### **Main submissions of the parties to the main proceedings**

- 10 FS complains that the Rechtbank failed to substantiate its decision of 7 December 2018 adequately, since he demonstrated that he had left the Netherlands within the four-week period for voluntary departure prescribed by the Staatssecretaris. He was therefore wrongfully detained since, under Article 6 of Directive 2004/38, he was entitled to reside once again in the Netherlands.
- 11 According to the Staatssecretaris, the foreign national has indeed demonstrated that he left the Netherlands within the period prescribed by the decision of 25 September 2018. That does not mean, however, that the legal effects of that decision, including his obligation to depart, ceased upon his departure to Germany. That is the case only if FS, in accordance with the judgment of the Court of Justice of 12 March 2014, *O. & B.* (C-456/12, EU:C:2014:135, paragraphs 53 and 56), pursuant to and in conformity with the requirements set out in Article 7(1) of Directive 2004/38, settled in Germany and is therefore genuinely resident in that country, as evidenced by a stay of more than three months. That is not the case. It is only through such an analogous application of the *O. & B.* judgment that abuse can, in the Staatssecretaris' view, be prevented. Otherwise, the foreign national can reverse the legal effects of the decision of 25 September 2018 simply by staying in Germany for one day and thereby return legally to the Netherlands and reside there.

**Brief summary of the reasons for the referral**

- 12 On the basis of settled national case-law, it can be assessed whether, at the time of his detention, FS had a declaratory right of residence under EU law, in which case his detention was unlawful and he is entitled to damages.
- 13 The decision of 25 September 2018 is a decision for the purposes of Article 15 of Directive 2004/38 (see the judgment of the Court of Justice of 10 September 2019, *Chenchooliah*, C-94/18, EU:C:2019:693, paragraphs 70-74) and was taken for reasons other than public policy, public security or public health. An obligation to leave was imposed by that decision, under threat of expulsion had FS not left after the prescribed period for departure.
- 14 Article 15 of Directive 2004/38 does not specify whether the expulsion decision is deemed to have been complied with and ceases to produce legal effects at the time of the Union citizen's voluntary departure or expulsion. The question is whether the legal effects of that decision continue for a certain period, as the Staatssecretaris contends.
- 15 The answer to that question is relevant to determining when FS may re-enter the host Member State after departure or expulsion. There are two scenarios, namely, the scenario that, by virtue of the voluntary departure or expulsion of the foreign national, the decision has been complied with, after which it no longer produces legal effects, and the scenario that the decision continues to produce legal effects even after the voluntary departure or expulsion.
- 16 In the **first** scenario, where, by virtue of the voluntary departure from the host Member State demonstrated by FS, the decision has been complied with, after which the decision no longer produces any legal effects, FS may re-enter the host Member State on the same day that he leaves the territory of that host Member State and reside there.
- 17 In that scenario, the expulsion decision referred to in Article 15 of Directive 2004/38 does not affect the right of the foreign national referred to in Article 5 of that directive to (re)enter the territory of that host Member State. Indeed, as the right referred to in Article 5 cannot be dissociated from the right of residence on the territory of a Member State for a period of up to three months referred to in Article 6, the expulsion decision taken by a host Member State does not affect that latter right, either.
- 18 FS has proved that he was in Germany on 23 October 2018, that is to say, within the prescribed period for departure and, therefore, under that scenario, he had the right to return to the Netherlands on or after that date by virtue of Article 5 of Directive 2004/38. After entry, he once again had the right of legal residence under Article 6 of Directive 2004/38, meaning that he was wrongfully detained on 23 November 2018.

- 19 In the **second** scenario, a decision to expel after voluntary departure or removal as referred to in Article 15 of Directive 2004/38 continues to produce legal effects until the foreign national resides permanently in the territory of his own Member State or a Member State other than the host Member State that took that decision. By the analogous application of the judgment in *O. & B.* (C-456/12, EU:C:2014:135), permanent residence in any event equates to a stay of more than three months.
- 20 The expulsion decision has consequences for the rights referred to in Articles 5 and 6 of Directive 2004/38. Those rights cannot be invoked against the host Member State that took the expulsion decision for at least three months after the voluntary departure or removal.
- 21 In that scenario, by analogy with the judgment in *O. & B.* (C-456/12, EU:C:2014:135), FS could return to the Netherlands only after 23 January 2019 and had no legal residence in the Netherlands on 23 November 2018. His detention was, in that case, well founded.
- 22 According to the referring court, there is no clear-cut answer to the question of when an expulsion decision as referred to in Article 15 of Directive 2004/38 has been complied with and ceases to produce legal effects. The answer cannot be immediately inferred from Article 15 itself or from the regime of that directive.
- 23 On the one hand, it can be argued that it follows from Article 15(3) of Directive 2004/38 that a Member State cannot, by virtue of an expulsion decision, compel a Union citizen, after his departure or expulsion, to reside outside the territory of that Member State for more than three months. If that is not the case, an expulsion decision effectively amounts to a ban on entering the territory of the Member State that took that decision. That is contrary to Article 15(3) of Directive 2004/38 (see, also, judgment in *Chenchooliah*, C-94/18, EU:C:2019:693, paragraph 88).
- 24 On the other hand, it could be argued that, with an expulsion, it is generally envisaged that the person removed reside permanently outside the territory of the Member State that took the expulsion decision. That does not occur if, on the same day that he left the territory of a Member State or was removed from that territory, the Union citizen can re-enter that territory under Article 5 of Directive 2004/38 and reside there under Article 6 of that directive. The question therefore arises as to the usefulness of an expulsion decision as referred to in Article 15 of Directive 2004/38.