



**Measures to enforce a decision to expel a Union citizen and family members on grounds of public policy or public security constitute restrictions on the right to movement and residence, which may be justified if they are based exclusively on the personal conduct of the individual concerned and comply with the principle of proportionality**

*In view of the systems of cooperation available to the Member States, the maximum detention period of eight months provided for by Belgian law does, however, go beyond what is necessary to establish an effective removal policy*

Two actions for annulment were brought before the Constitutional Court (Belgium) in respect of the Law of 24 February 2017 amending the Law of 15 December 1980 on the admission, residence, establishment and removal of foreign nationals in order to enhance protection of public policy and national security,<sup>1</sup> the first by Ordre des barreaux francophones et germanophone, and the second by four non-profit associations involved in the defence of migrants' rights and protection of human rights.

The national legislation provides, first, for the possibility of imposing on Union citizens and their family members, during the period allowed for them to leave the territory of Belgium following the adoption of an expulsion decision taken against them on grounds of public policy or during an extension of that period, preventive measures aimed at avoiding any risk of absconding, such as house arrest. Second, it allows Union citizens and their family members who have not complied with such an expulsion decision to be kept in detention, for a maximum period of eight months, in order to ensure that that decision is enforced. Those provisions are similar or identical to those which are applicable to illegally staying third-country nationals and which are intended to transpose the Return Directive<sup>2</sup> into Belgian law.

In those circumstances, the referring court asked the Court of Justice about the compatibility of that Belgian legislation with the freedom of movement guaranteed to Union citizens and their family members by Articles 20 and 21 TFEU and by the Residence Directive.<sup>3</sup>

### **Findings of the Court**

The Grand Chamber of the Court finds, as a preliminary point, that, in the absence of EU rules on the enforcement of a decision to expel Union citizens and their family members, the mere existence of rules provided for by the host Member State in the context of such enforcement that are based on those applicable to the return of third-country nationals **is not, in itself, contrary to EU law**. However, such rules must **comply with EU law**, in particular concerning the freedom of

<sup>1</sup> *Moniteur Belge* of 19 April 2017, p. 51890.

<sup>2</sup> Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third country nationals (OJ 2008 L 348, p. 98) ('the Return Directive').

<sup>3</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34) ('the Residence Directive').

movement and residence of Union citizens and their family members. The Court goes on to determine whether those rules constitute restrictions on that freedom and, if so, whether those rules are justified.

Thus, the Court finds, in the first place, that, in so far as the national provisions concerned limit the movements of the person concerned, they constitute **restrictions on the freedom of movement and residence**.

In the second place, as to whether there is any **justification** for such restrictions, the Court recalls first of all that the measures at issue are aimed at enforcing expulsion decisions adopted on **grounds of public policy or public security** and must therefore be assessed in the light of the requirements laid down in Article 27 of the Residence Directive.<sup>4</sup>

First, as regards the preventive measures aimed at avoiding the risk of absconding, the Court rules that Articles 20 and 21 TFEU and the Residence Directive do not preclude the application to Union citizens and their family members, during the period allowed for them to leave the territory of the host Member State following the adoption of such an expulsion decision, of provisions that are similar to provisions whose purpose is, as regards third-country nationals, to transpose the Return Directive into national law,<sup>5</sup> **provided that the former provisions respect the general principles relating to the restriction on the right of entry and the right of residence on grounds of public policy, public security or public health** laid down in the Residence Directive<sup>6</sup> and are **no less favourable** than the latter provisions.

Such preventive measures necessarily contribute to the **protection of public policy**, in so far as their purpose is to ensure that a person who represents a threat to public policy in the host Member State is expelled from the territory of that State. Those measures must therefore be regarded as restricting the freedom of movement and residence of that person 'on grounds of public policy' within the meaning of the Residence Directive,<sup>7</sup> and are therefore **capable, in principle, of being justified** under that directive.

Furthermore, those measures cannot be considered contrary to the Residence Directive solely on the ground that they are similar to the measures which are intended to transpose the Return Directive into national law. However, the Court points out that the beneficiaries of the Residence Directive enjoy a status and rights **entirely different** from those that may be relied upon by the beneficiaries of the Return Directive. Consequently, in view of the **fundamental status of Union citizens**, measures which may be imposed on them in order to avoid a risk of absconding cannot be **less favourable** than measures provided for under national law to avoid a risk of third-country nationals absconding, during the period for voluntary departure, where such **third-country nationals** are subject to a return procedure on grounds of public policy.

Second, as regards detention for the purpose of removal, the Court rules that Articles 20 and 21 TFEU and the Residence Directive **preclude** national legislation which applies to Union citizens and their family members who, after the expiry of the period allowed for them to leave the territory or an extension of that period, have not complied with an expulsion decision taken against them on grounds of public policy or public security, a detention measure for a maximum period of detention of eight months, that period being **identical to that applicable**, in national law, **to third-country nationals who have not complied with a return decision issued on such grounds** pursuant to the Return Directive.<sup>8</sup>

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<sup>4</sup> In accordance with paragraph 2 of that article, restrictive measures taken on grounds of public policy or public security are to comply with the principle of proportionality and are to be based exclusively on the personal conduct of the individual concerned.

<sup>5</sup> Article 7(3) of the Return Directive. According to that provision, 'certain obligations aimed at avoiding the risk of absconding, such as regular reporting to the authorities, deposit of an adequate financial guarantee, submission of documents or the obligation to stay at a certain place may be imposed for the duration of the period for voluntary departure'.

<sup>6</sup> Article 27 of the Residence Directive.

<sup>7</sup> Article 27(1) of the Residence Directive.

<sup>8</sup> Article 6(1) of the Return Directive.

In that regard, the Court states that the period of detention provided for by the national provision concerned, which is identical to that applicable to the removal of third-country nationals, must be **proportionate to the objective**, which is to establish an **effective removal policy** in respect of Union citizens and their family members. As regards specifically the duration of the removal procedure, Union citizens and their family members are **not in a comparable situation** to that of third-country nationals, with the result that there is **no justification** for treating all those individuals in the same way as regards the maximum period of detention.

In particular, the Member States have **systems of cooperation** and **facilities** in the context of the expulsion of Union citizens or their family members to another Member State that they do not necessarily have in the context of the removal of a third-country national to a third country. Since relations between Member States are based on the duty of sincere cooperation and the principle of mutual trust, they should not give rise to the same difficulties as those which may arise where there is cooperation between Member States and third countries. Nor should the practical difficulties involved in organising the return journey generally be the same for both categories of individual. Last, the return of a Union citizen to the territory of the Member State of origin is facilitated by the Residence Directive.<sup>9</sup>

According to the Court, it follows that a **maximum period of detention of eight months** for the purpose of removal for Union citizens and their family members goes **beyond what is necessary** to achieve the objective pursued.

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**NOTE:** A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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<sup>9</sup> Under Article 27(4), the Member State which issued the passport or identity card must allow the holder of such a document who has been expelled from another Member State to re-enter its territory without any formality.