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Provisional text

JUDGMENT OF THE COURT (Grand Chamber)

22 June 2021 (\*)

(Reference for a preliminary ruling – Citizenship of the Union – Directive 2004/38/EC – Right of citizens of the Union and their family members to move and reside freely within the territory of the Member States – Article 15 – End of a Union citizen’s temporary residence in the territory of the host Member State – Expulsion decision – Physical departure of that Union citizen from that territory – Temporal effects of that expulsion decision – Article 6 – Possibility for that Union citizen to enjoy a new right of residence on his or her return to that territory)

In Case C-719/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Raad van State (Council of State, Netherlands), made by decision of 25 September 2019, received at the Court on 30 September 2019, in the proceedings

**FS**

v

**Staatssecretaris van Justitie en Veiligheid**

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, A. Prechal, M. Vilaras, E. Regan (Rapporteur) and N. Piçarra, Presidents of Chambers, M. Safjan, D. Šváby, S. Rodin, F. Biltgen, K. Jürimäe, C. Lycourgos, P.G. Xuereb, L.S. Rossi and I. Jarukaitis, Judges,

Advocate General: A. Rantos,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 16 November 2020,

after considering the observations submitted on behalf of:

- FS, by V. Senczuk, advocaat,
- the Netherlands Government, by M.K. Bulterman and J. Langer, acting as Agents,

- the Belgian Government, by M. Van Regemorter and M. Jacobs, acting as Agents,
- the Czech Government, by M. Smolek, J. Vláčil and A. Pagáčová, acting as Agents,
- the Danish Government, by J. Nymann-Lindegren, P. Jespersen and M.S. Wolff, acting as Agents,
- the European Commission, by G. Wils and E. Montaguti, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 10 February 2021,

gives the following

## **Judgment**

1 This request for a preliminary ruling concerns the interpretation of Article 6(1) and 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) 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).

2 The request has been made in proceedings between FS, a Union citizen who left the territory of the Netherlands following the adoption of an expulsion decision against him, and the Staatssecretaris van Justitie en Veiligheid (State Secretary for Justice and Security, Netherlands; ‘the State Secretary’), concerning a decision by which that Union citizen was placed in administrative detention after having returned to the host Member State.

## **Legal context**

### ***European Union law***

#### *The Schengen Borders Code*

3 Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2016 L 77, p. 1) provides, in Article 22 thereof, entitled ‘Crossing internal borders’:

‘Internal borders may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out.’

#### *Directive 2004/38*

4 Recitals 1 to 3, 10 and 16 of Directive 2004/38 state:

‘(1) Citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the [TFEU] and to the measures adopted to give it effect.

(2) The free movement of persons constitutes one of the fundamental freedoms of the internal market, which comprises an area without internal frontiers, in which freedom is ensured in accordance with the provisions of the [TFEU].

(3) Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence. It is therefore necessary to codify and review the existing Community instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons in order to simplify and strengthen the right of free movement and residence of all Union citizens.

...

(10) Persons exercising their right of residence should not, however, become an unreasonable burden on the social assistance system of the host Member State during an initial period of residence. Therefore, the right of residence for Union citizens and their family members for periods in excess of three months should be subject to conditions.

...

(16) As long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host Member State they should not be expelled. ...'

5 Article 3 of that directive, entitled 'Beneficiaries', provides, in paragraph 1 thereof:

'This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.'

6 Article 5 of Directive 2004/38, headed 'Right of entry', states:

'1. Without prejudice to the provisions on travel documents applicable to national border controls, Member States shall grant Union citizens leave to enter their territory with a valid identity card or passport and shall grant family members who are not nationals of a Member State leave to enter their territory with a valid passport.

...

5. The Member State may require the person concerned to report his/her presence within its territory within a reasonable and non-discriminatory period of time. Failure to comply with this requirement may make the person concerned liable to proportionate and non-discriminatory sanctions.'

7 Article 6 of that directive, entitled 'Right of residence for up to three months', provides in paragraph 1 thereof:

'Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.'

8 Article 7 of that directive, entitled 'Right of residence for more than three months', states, in paragraph 1 thereof:

‘All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

- (a) are workers or self-employed persons in the host Member State; or
- (b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or
- (c) are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and
- (d) have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or

...’

9 Article 8 of that directive, headed ‘Administrative formalities for Union citizens’, provides, in paragraph 1 thereof:

‘Without prejudice to Article 5(5), for periods of residence longer than three months, the host Member State may require Union citizens to register with the relevant authorities.’

10 Article 14 of Directive 2004/38, entitled ‘Retention of the right of residence’, states:

‘1. Union citizens and their family members shall have the right of residence provided for in Article 6, as long as they do not become an unreasonable burden on the social assistance system of the host Member State.

2. Union citizens and their family members shall have the right of residence provided for in Articles 7, 12 and 13 as long as they meet the conditions set out therein.

In specific cases where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfies the conditions set out in Articles 7, 12 and 13, Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically.

3. An expulsion measure shall not be the automatic consequence of a Union citizen’s or his or her family member’s recourse to the social assistance system of the host Member State.

4. By way of derogation from paragraphs 1 and 2 and without prejudice to the provisions of Chapter VI, an expulsion measure may in no case be adopted against Union citizens or their family members if:

...

(b) the Union citizens entered the territory of the host Member State in order to seek employment. In this case, the Union citizens and their family members may not be expelled for as

long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.’

11 Article 15 of that directive, entitled ‘Procedural safeguards’, is worded as follows:

‘1. The procedures provided for by Articles 30 and 31 shall apply by analogy to all decisions restricting free movement of Union citizens and their family members on grounds other than public policy, public security or public health.

...

3. The host Member State may not impose a ban on entry in the context of an expulsion decision to which paragraph 1 applies.’

12 Article 16 of the directive, entitled ‘General rule for Union citizens and their family members’, states, in paragraph 1 thereof:

‘Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. ...’

13 Article 17 of Directive 2004/38, entitled ‘Exemptions for persons no longer working in the host Member State and their family members’, provides inter alia for exemptions from the general eligibility rule laid down in Article 16 of that directive for the purposes of acquiring the right of permanent residence.

14 Article 21 of that directive, entitled ‘Continuity of residence’, provides:

‘For the purposes of this Directive, continuity of residence may be attested by any means of proof in use in the host Member State. Continuity of residence is broken by any expulsion decision duly enforced against the person concerned.’

15 Article 24 of Directive 2004/38, which is entitled ‘Equal treatment’, provides, in paragraph 2 thereof:

‘By way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b), nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.’

16 Article 27 of that directive, entitled ‘General principles’, provides, in paragraph 1 thereof:

‘Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.’

17 Under Article 30 of Directive 2004/38, entitled ‘Notification of decisions’:

‘1. The persons concerned shall be notified in writing of any decision taken under Article 27(1), in such a way that they are able to comprehend its content and the implications for them.

...

3. The notification shall specify the court or administrative authority with which the person concerned may lodge an appeal, the time limit for the appeal and, where applicable, the time allowed for the person to leave the territory of the Member State. Save in duly substantiated cases of urgency, the time allowed to leave the territory shall be not less than one month from the date of notification.’

18 Article 31 of that directive, entitled ‘Procedural safeguards’, provides, in paragraph 4 thereof:

‘Member States may exclude the individual concerned from their territory pending the redress procedure, but they may not prevent the individual from submitting his/her defence in person, except when his/her appearance may cause serious troubles to public policy or public security or when the appeal or judicial review concerns a denial of entry to the territory.’

19 Article 32 of that directive, entitled ‘Duration of exclusion orders’, is worded as follows:

‘1. Persons excluded on grounds of public policy or public security may submit an application for lifting of the exclusion order after a reasonable period, depending on the circumstances, and in any event after three years from enforcement of the final exclusion order which has been validly adopted in accordance with [Union] law, by putting forward arguments to establish that there has been a material change in the circumstances which justified the decision ordering their exclusion.

The Member State concerned shall reach a decision on this application within six months of its submission.

2. The persons referred to in paragraph 1 shall have no right of entry to the territory of the Member State concerned while their application is being considered.’

### *Netherlands law*

#### *The Vw 2000*

20 Article 1 of the Wet tot algehele herziening van de Vreemdelingenwet (Vreemdelingenwet 2000) (Law of 2000 on Foreign nationals), of 23 November 2000 (Stb. 2000, No 495), in the version applicable to the dispute in the main proceedings (‘the Vw 2000’), is worded as follows:

‘Within the meaning of the present Law and of the provisions adopted on the basis thereof:

...

[Union nationals] shall mean:

1° [nationals of the Member States of the European Union] who, under the TFEU, have the right to enter and reside on the territory of another Member State;

...

foreign national shall mean: a person who does not possess Netherlands nationality and who is not to be treated as a Netherlands national under a statutory provision.’

21 Article 8 of the Vw 2000 provides:

‘Foreign nationals are not legally resident in the Netherlands:

...

e. as a Union national, except where their residence in the Netherlands is based on a rule adopted under the TFEU or the Agreement on the European Economic Area (EEA).’

22 Article 50 of the Vw 2000 provides:

‘1. The officials responsible for border surveillance and monitoring of foreign nationals are entitled either by reason of facts and circumstances which, according to objective criteria, give rise to a reasonable presumption of illegal residence or in the context of the struggle against illegal residence after the crossing of borders, to apprehend persons in order to verify their identity, nationality and the conditions of their residence. Any person claiming to be of Netherlands nationality without being able to establish such, may be subject to the coercive measures referred to in paragraphs 2 to 5. A decree of general application shall state the documents which a foreign national must possess for the purposes of the verification of his or her identity, nationality, and the conditions of his or her residence.

...

3. If the identity of the person apprehended can be verified immediately and if it transpires that he or she does not have a legal right of residence, or if it is not immediately apparent that he or she has a legal right of residence, he or she may be transferred to a place scheduled for a hearing. He or she may be detained there for not more than six hours, not counting the time between midnight and 9.00. ...’

...’

23 Under Article 59 of the Vw 2000:

‘1. If required in the interests of public order or national security, Our Minister may detain, with a view to his or her expulsion, a foreign national who

a. is not legally resident;

...’

24 Article 61 of the Vw 2000 is worded as follows:

‘1. A foreign national who is not, or is no longer, legally resident must leave the territory of the Netherlands on his or her own initiative within the period laid down in Article 62.

...’

25 Article 62 of the Vw 2000 provides:

‘1. After a return decision has been adopted in respect of a foreign national or, in the case of a Union national, after the end of his or her legal residence, the person concerned must leave the territory of the Netherlands on his or her own initiative within four weeks.

...’

26 Pursuant to Article 63 of the Vw 2000:

‘1. A foreign national who is not legally resident and who has not left the territory of the Netherlands on his or her own initiative within the period laid down in the present Law may be expelled.

...’

27 Under Article 72 of the Vw 2000:

‘...’

3. For the purposes of this Section, the act of an administrative authority in respect of a foreign national as such shall also be treated as a decision ...

...’

28 Article 106 of the Vw 2000 is worded as follows:

‘1. If the rechtbank (District Court) orders the lifting of a measure involving deprivation or restriction of liberty, or if the deprivation or restriction of liberty is already lifted before the application for the lifting of that measure is examined, that court may award the foreign national compensation at the expense of the State. ...

2. Paragraph 1 shall apply mutatis mutandis where the Afdeling bestuursrechtspraak van de Raad van State (Administrative Law Division of the Council of State, Netherlands) orders the lifting of the measure involving deprivation or restriction of liberty.’

29 Article 112 of the Vw 2000 provides:

‘Pursuant to an international treaty or to the decision of an international organisation binding on the Kingdom of the Netherlands, rules on the legal residence of foreign nationals may be laid down, by or pursuant to a decree of general application, which may derogate, in favour of such nationals, from the present Law.’

#### *The Vreemdelingenbesluit 2000*

30 Article 8.7 of the Besluit tot uitvoering van de Vreemdelingenwet 2000 (Vreemdelingenbesluit 2000) (Decree of 2000 on Foreign nationals), of 23 November 2000 (Stb. 2000, No 497), in the version applicable to the dispute in the main proceedings, is included in the second sub-section of the second section of Chapter 8 of that decree, which contains, inter alia, Articles 8.8, 8.11, 8.12 and 8.16. It provides:



‘1. This subsection shall apply to foreign nationals who are nationals of a Member State of the European Union or a party to the EEA Agreement or of Swiss nationality who travel to or reside in the Netherlands.

...’

31 Under Article 8.11 of that decree:

‘1. The foreign national referred to in Article 8.7(1), is legally resident for a period of three months from his or her entry if he or she:

- a. has a valid identity card or passport; or
- b. by other means unequivocally provides evidence of his or her identity and nationality.

...’

32 Article 8.12 of that decree is worded as follows:

‘1. The foreign national referred to in Article 8.7(1), is legally resident in the territory of the Netherlands for a period longer than three months from his or her entry if:

- a. he or she is employed or self-employed in the Netherlands or has entered the Netherlands in order to seek employment there, he or she is able to provide evidence of this and he or she has a genuine chance of being engaged;
- b. he or she has sufficient resources and comprehensive sickness insurance cover for him or herself and his or her family members in the Netherlands;
- c. he or she is enrolled for a course which is set out in the Centraal register opleidingen hoger onderwijs (Central Register of Higher Education Courses, Netherlands) ...;

...’

2. The legal residence of the foreign national referred to in paragraph 1(a) shall not end solely on the ground that that national is no longer in an employed or self-employed capacity:

- a. in the event that he or she is temporarily unable to work as the result of an illness or accident;
- b. if he or she is in involuntary unemployment after having worked as an employed or self-employed person for at least one year and has registered as a job-seeker with the Uitvoeringsinstituut werknemersverzekeringen (Employees Insurance Institute, Netherlands);
- c. for a period of at least six months, after becoming involuntarily unemployed at the end of an employment contract of less than one year’s duration, or after having become involuntarily unemployed during the first 12 months, if he or she has registered as a job-seeker with the Employees Insurance Institute;
- d. if he or she embarks on vocational training which must, except in cases of involuntary unemployment, have a link with his or her previous employment.

...’

33 Article 8.16(1) of the Decree of 2000 on Foreign nationals provides:

‘Without prejudice to Articles 8.22 and 8.23, the legal residence shall not end as long as the foreign national fulfils the conditions referred to in Articles 8.12 to 8.15. In certain specific cases, where this may be considered doubtful, Our Minister can examine whether the conditions are fulfilled. This examination shall not be carried out systematically. Recourse to public assistance shall not automatically terminate legal residence.

...’

### **The dispute in the main proceedings and the questions referred for a preliminary ruling**

34 By decision of 1 June 2018, the State Secretary found that FS, a Polish national, was residing illegally in the territory of the Netherlands.

35 The State Secretary based that decision on the fact that it was apparent from an investigation that, although FS had worked for a period of five months in the Netherlands, he was no longer in paid employment or self-employment, had not shown that he was involuntarily unemployed or seeking employment and was not following a course of study. In addition, that investigation had revealed that FS had not demonstrated that he had sufficient resources to meet his needs. Finally, account was taken of the fact that FS had been arrested by the police on a regular basis on suspicion of shoplifting and pickpocketing.

36 The State Secretary therefore considered in that decision that FS did not satisfy the conditions laid down in Article 7 of Directive 2004/38.

37 By decision of 25 September 2018 (‘the decision to expel FS’), the State Secretary rejected as unfounded the objection which FS had lodged against the State Secretary’s decision of 1 June 2018.

38 The State Secretary based the decision to expel FS on the fact that the factors relied on by the person concerned in his objection did not call for an assessment different from that which had led to the adoption of his decision of 1 June 2018. The State Secretary considered, *inter alia*, that FS had also failed to demonstrate in his objection that he was involuntarily unemployed or seeking employment. The Secretary of State found in addition that there had been no examination of whether FS’s conduct constituted a present, genuine and serious threat affecting one of the fundamental interests of society. Thus, the decision to expel FS was not based on Article 27 of Directive 2004/38.

39 In the decision to expel FS, the State Secretary set a period of four weeks from the date of notification of that decision for FS’s voluntary departure and stated that he could be deported if he did not comply with that time limit. In view of the date of notification of that decision, that period expired on 23 October 2018.

40 FS did not appeal that expulsion decision, with the result that that decision has become final.

41 According to the referring court, FS left the territory of the Netherlands, in any event, no later than 23 October 2018, since the German police arrested him on that date on suspicion of shoplifting.

42 FS declared that he was resident with friends in Kaldenkirchen (Germany) since leaving the territory of the Netherlands. That locality is located just beyond the frontier between those two Member States. FS also stated that he was dependent on marijuana and travelled daily to the Netherlands to purchase it.

43 Lastly, FS declared that he entered the territory of the Netherlands on 21 November 2018 because he had been summoned to appear before a court on 23 November 2018. On 22 November 2018, FS was apprehended in a supermarket in Venlo (Netherlands) on suspicion of theft. Since he was unable to produce an identity document, FS was arrested by the Netherlands police and detained for the purposes of a hearing, pursuant to Article 50 of the Vw 2000.

44 The State Secretary decided to place FS in administrative detention, pursuant to Article 59(1), introductory part and subparagraph(a), of the Vw 2000. Such administrative detention is intended for foreign nationals residing illegally in the territory of the Netherlands, pending their expulsion to their country of origin.

45 The State Secretary based that decision on the fact that a detention measure was required in the interests of public policy, given the risk that FS might evade the monitoring of foreign nationals and that he might impede the preparation of his departure or of his expulsion procedure. The State Secretary found that (i) in breach of the Netherlands legislation on foreign nationals, for a certain period of time FS had evaded the monitoring of foreign nationals, (ii) FS had previously been notified of a decision from which it is apparent that he had been under an obligation to leave the territory of the Netherlands and had failed to act within the period prescribed, (iii) FS has no fixed abode or residence, (iv) FS does not have sufficient resources and, (v) FS is suspected of having committed a crime or offence or has already been convicted of doing so.

46 By judgment of 7 December 2018, the rechtbank Den Haag, zittingsplaats Groningen (District Court, The Hague, sitting in Groningen, Netherlands) dismissed as unfounded the action brought by FS against the detention decision, in particular the claim for compensation which accompanied that action.

47 FS lodged an appeal against that judgment before the Raad van State (Council of State, Netherlands).

48 On 18 December 2018, FS lodged an objection, on the basis of Article 72(3) of the Vw 2000, against his expulsion to Poland on 21 December 2018. He also applied to the voorzieningenrechter van de rechtbank Den Haag (court hearing applications for interim measures at the District Court, The Hague, Netherlands) seeking an order suspending his expulsion.

49 By decision of 20 December 2018, the voorzieningenrechter van de rechtbank Den Haag (court hearing applications for interim measures at the District Court, the Hague) granted FS's application for interim measures and thus prohibited his expulsion to Poland before the expiry of a four-week period running from the date of notification of the decision taken on FS's objection. The same day, since, on the basis of that decision ordering interim measures, FS's expulsion to Poland had been provisionally prohibited, the State Secretary rescinded FS's placement in administrative detention.

50 According to the referring court, even though the State Secretary has rescinded the detention measure, FS still has an interest in the appeal currently pending before that court, since, under Article 106 of the Vw 2000, FS is entitled to compensation if it is established that he has been unlawfully detained.

51 The referring court observes that the decision to expel FS, by which the State Secretary took the view that FS had no right of residence in the territory of the Netherlands since he did not satisfy the conditions laid down in Article 7 of Directive 2004/38 and imposed on him an obligation to leave that territory within four weeks of the date of notification to him of that decision, failing which he would be expelled, is an expulsion decision within the meaning of Article 15 of that directive. The referring court states that it is now common ground in the context of the dispute before it that FS voluntarily left the territory of the Netherlands within the period prescribed.

52 According to that court, the question whether FS was rightly placed in detention on 23 November 2018, following his return to the Netherlands, depends on whether he had a right of residence in the Netherlands once again on that date, which requires the legal effects of the decision to expel FS to be determined.

53 It is not apparent either from the wording of Article 15 of Directive 2004/38 or from the scheme of that directive that an expulsion decision continues to have legal effects for a certain period after the person concerned has left the territory of the host Member State or, on the other hand, that such a decision must be regarded as having been complied with fully from the date on which that person left that territory.

54 The referring court observes, on the one hand, that it follows from Article 15(3) of Directive 2004/38 that a Member State cannot, by an expulsion decision, compel a Union citizen, after the departure or expulsion of the person concerned from its territory, to reside outside that territory for more than three months. If that were not the case, a removal decision would effectively amount to a ban on entering the territory of the Member State that took that decision, which would be contrary to that provision, as interpreted by the Court in the case which gave rise to the judgment of 10 September 2019, *Chenchooliah* (C-94/18, EU:C:2019:693).

55 On the other hand, the general aim of an expulsion decision is to ensure that the Union citizen who is the subject of that decision resides permanently outside the territory of the host Member State. Such an objective could not be achieved if on the very day on which that Union citizen leaves that territory he could re-enter that territory under Article 5 of Directive 2004/38 and reside there under Article 6 of that directive. In such a case, it would be permissible to question the effectiveness of an expulsion decision taken under Article 15 of that directive.

56 In those circumstances, the Raad van State (Council of State) decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

‘(1) Must Article 15(1) of [Directive 2004/38] 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?’

(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], or may the host Member State take a new expulsion decision in order to prevent the Union citizen from [repeatedly] entering the host Member State for a short period of time?’

(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?’

### **Consideration of the questions referred**

57 By its questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 15(1) of Directive 2004/38 must be interpreted as meaning that a decision to expel a Union citizen from the territory of the host Member State, adopted on the basis of that provision, on the ground that that Union citizen no longer enjoys a temporary right of residence on that territory under that directive, is complied with in full merely because that Union citizen has physically left that territory within the period prescribed by that expulsion decision for his or her voluntary departure and, if so, whether, on one hand, in the event of an immediate return to the same territory, the Union citizen concerned may enjoy a new right of residence under Article 6(1) of that directive or whether, on the other hand, the host Member State may adopt a new expulsion decision to prevent the repeated entry of that Union citizen to its territory for a short period of time. If the answer is in the negative, the referring court asks whether that Union citizen must reside for a specified minimum period outside the territory of the host Member State in order to be able to rely on a new right of residence in that State under the latter provision and, if so, what the length of that period is.

58 It should be observed at the outset that, in accordance with Article 3(1) of Directive 2004/38, Union citizens who move to or reside in a Member State other than that of which they are a national, and their family members, as defined in Article 2(2) of that directive, who accompany or join them, fall within the scope of the directive and are beneficiaries of the rights conferred by it (judgment of 10 September 2019, *Chenchooliah*, C-94/18, EU:C:2019:693, paragraph 54 and the case-law cited).

59 In the present case, it is common ground that FS, who is a Polish national and, consequently, a Union citizen, has exercised his freedom of movement by moving to and residing in a Member State other than that of which he is a national, namely the Netherlands. In particular, it is apparent from the order for reference that FS worked for a period of five months in the Netherlands before being the subject of the expulsion decision. That decision was based on the fact that, on the date of its adoption, FS no longer satisfied the conditions laid down in Article 7 of Directive 2004/38 and was therefore illegally resident in the territory of the Netherlands.

60 It is apparent from the documents before the Court that, in the context of the single complaint which he raises before the referring court, FS claims that, given that he demonstrated that he voluntarily left the Netherlands within the four-week period prescribed for him to leave that territory, which expired on 23 October 2018, he could rely on a new right of residence under Article 6 of Directive 2004/38 as soon as he returned to that territory. According to FS, the State Secretary was therefore wrong to place him in administrative detention on 23 November 2018 for the purpose of his expulsion.

61 Thus, although the issue of the lawfulness of that administrative detention arises before the referring court, it is apparent from the information in the file before the Court that neither the lawfulness of the decision to expel FS itself, which has become final, nor the fact that FS voluntarily acted upon that decision within the prescribed period is contested in the main proceedings.

62 It follows that the Court is asked to rule only on the circumstances in which a Union citizen who has been the subject of an expulsion decision, pursuant to Article 15(1) of Directive 2004/38, may rely on a new right of residence, under Article 6(1) of that directive, in the host Member State.

63 Having made those preliminary observations, it is necessary to examine, in the first place, whether the mere physical departure of the Union citizen from the host Member State is sufficient for an expulsion decision taken against him or her by that Member State to be regarded as having been complied with in full, with the result that that decision can no longer be enforced against that Union citizen upon his or her immediate return to the territory of that Member State. Were the physical departure of the Union citizen alone not to be sufficient for that purpose, it would be necessary to assess, in the second place, the relevance of the length of the absence of that Union citizen from the host Member State and the other criteria which might be relevant in that context. In the third and last place, it is necessary to examine the consequences of failure to comply with an expulsion decision.

### *The physical departure of the Union citizen from the territory of the host Member State*

64 It should be noted that Directive 2004/38 does not contain only rules governing the conditions under which one of the various types of residence rights it makes provision for may be obtained and the conditions to be met in order to be able to continue to enjoy the rights concerned. That directive also lays down a set of rules intended to govern the situation arising in which entitlement to one of those rights is lost (judgment of 10 September 2019, *Chenchooliah*, C-94/18, EU:C:2019:693, paragraph 70).

65 In that regard, Article 15 of Directive 2004/38, entitled ‘Procedural safeguards’, applies to an expulsion decision made, as in the case in the main proceedings, on grounds wholly unrelated to any danger to public policy, public security or public health (see, to that effect, judgment of 10 September 2019, *Chenchooliah*, C-94/18, EU:C:2019:693, paragraph 73).

66 Indeed, that provision, which is in Chapter III of Directive 2004/38, entitled ‘Right of residence’, lays down the rules applicable when a temporary right of residence under the directive comes to an end, in particular where a Union citizen or one of his or her family members who, in the past, had a right of residence of up to three months, or longer than three months, by virtue of Article 6 of that directive or Article 7 thereof respectively, no longer satisfies the requirements for the grant of the right of residence concerned and may therefore, in principle, be expelled by the host Member State (judgment of 10 September 2019, *Chenchooliah*, C-94/18, EU:C:2019:693, paragraph 74).

67 In particular, in accordance with Article 15(1) of Directive 2004/38, the procedures provided for by Articles 30 and 31 thereof are to apply by analogy to such an expulsion decision.

68 Furthermore, Article 15(3) of that directive provides that the host Member State may not impose a ban on entry in the context of an expulsion decision to which paragraph 1 of that article applies.

69 However, it must be observed that the temporal effects of an expulsion decision adopted under Article 15(1) of that directive are not apparent either from the wording of the latter provision or from that of the other provisions of that directive.

70 Since the wording of Directive 2004/38 does not, in itself, enable an answer to be given to the questions referred, it is necessary, for the purposes of interpreting Article 15(1) of that directive, to

have regard to the objective of that provision and its context, and to the aim of the directive itself (see, by analogy, judgment of 12 November 2019, *Haqbin*, C-233/18, EU:C:2019:956, paragraph 42 and the case-law cited).

71 In that regard, Article 15(1) of Directive 2004/38 offers the host Member State, *inter alia*, the possibility of expelling from its territory a Union citizen who no longer enjoys a right of residence under Article 6 of that directive or Article 7 thereof. It follows that Article 15(1) of Directive 2004/38 is intended, in particular, to enable the host Member State to ensure that the residence in its territory of Union citizens who do not enjoy a right of permanent residence in that territory is carried out in compliance with the scope of the temporary rights of residence provided for in that directive.

72 It should be noted that that possibility for the host Member State to expel a Union citizen who is no longer legally resident in its territory is consistent with the specific objective of Directive 2004/38, expressed in Articles 6 and 7, read in conjunction with Article 14 thereof, and in recital 10 thereof, which is to prevent Union citizens and their family members exercising a right of residence under that directive from becoming an unreasonable burden on the social assistance system of the host Member State during their temporary residence.

73 If Article 15(1) of Directive 2004/38 were interpreted as meaning that the mere physical departure of the Union citizen is sufficient for the purposes of complying with an expulsion decision taken against him or her under that provision, that Union citizen would only have to cross the border of the host Member State in order to be able to return immediately to the territory of that Member State and to rely on a new right of residence under Article 6 of that directive. Acting repeatedly in that way, that Union citizen could be granted numerous rights of residence successively in the territory of a single Member State under the latter article, even though, in reality, those various rights would be granted for the purposes of the same single actual residence.

74 Such an interpretation would be tantamount to rendering redundant the possibility for the host Member State to terminate the residence of a Union citizen, pursuant to Article 6 of Directive 2004/38, where that citizen reaches the end of his or her three-month residence on the territory of that Member State, by allowing him or her, in practice, to reside on that territory for more than three months despite the fact that an expulsion decision has been adopted against him or her and that the conditions laid down in Article 7 of that directive are not fulfilled. Under that interpretation, by the mere fact of crossing the border of the host Member State every three months, that Union citizen would be granted a right of residence in fact of an unlimited duration, even though, first, he or she might not comply with the conditions laid down in Article 7 of that directive and, secondly, Article 6 of that directive, on which he or she relies for the purposes of that period of residence without any actual temporal limit, was for its part designed only for periods of residence of up to three months, as follows from the very title of the latter article.

75 That interpretation, which does not require the Union citizen concerned to genuinely and effectively terminate his or her residence in the host Member State, would also risk undermining the balance which Directive 2004/38 seeks to establish between, on the one hand, the right to freedom of movement and residence of Union citizens and their family members and, on the other hand, the protection of the social assistance system of the host Member State with regard to the unreasonable burden that the persons concerned may become during a period of temporary residence on the territory of that Member State.

76 It should also be noted that, for the purposes of acquiring a right of permanent residence in the host Member State, the Union citizen must, according to Article 16(1) of Directive 2004/38,

have resided legally there for a continuous period of five years, subject to the derogations provided for in Article 17 of that directive for workers who have ceased their activity in that Member State. It is clear from Article 21 of that directive that continuity of residence is broken by any expulsion decision duly enforced against the person concerned.

77 Therefore, to regard the mere physical departure of a Union citizen from the host Member State as being sufficient for the purpose of the enforcement of an expulsion decision taken against the person concerned would also partly render redundant the distinction clearly established by Directive 2004/38 between temporary residence and permanent residence. Indeed, that view would allow such a Union citizen to rely on multiple successive temporary periods of residence in that Member State in order, in fact, to reside there permanently, even though he or she did not satisfy the conditions for a right of permanent residence laid down in that directive.

78 The interpretation set out in paragraph 73 above is therefore inconsistent with the overall context of Directive 2004/38 which, as the Court has repeatedly held, introduced a gradual system as regards the right of residence in the host Member State which reproduces, in essence, the stages and conditions set out in the various instruments of EU law and case-law preceding that directive and culminates in the right of permanent residence (judgment of 22 January 2020, *Pensionsversicherungsanstalt (Cessation of activity after reaching retirement age)*, C-32/19, EU:C:2020:25, paragraph 33 and the case-law cited).

79 Moreover, it must be borne in mind that, under Article 30(3) of Directive 2004/38, the time allowed to the person concerned to leave the territory of the host Member State may not be less than one month from the date of the notification to him or her of the expulsion decision, save in duly justified cases of urgency. Since that provision is, as is apparent from paragraph 67 above, applicable ‘by analogy’ to a decision taken on the basis of Article 15 of that directive, that time limit is also intended to apply to expulsion decisions, such as that at issue in the main proceedings, taken on grounds other than those of public policy, public security or public health.

80 As the Netherlands Government submits, the grant of a minimum period of one month from notification of the expulsion decision to comply with that decision, in so far as it enables the person concerned, inter alia, to prepare his or her departure, supports the interpretation that an expulsion decision is not complied with solely by the physical departure of the person concerned from the host Member State, but by the fact that that person has terminated genuinely and effectively his or her residence in that Member State.

81 Having regard to the foregoing, it must be held that, as the Advocate General also observed in point 77 of his Opinion, the mere physical departure of the Union citizen from the territory of the host Member State is not sufficient to fully comply with an expulsion decision adopted against him or her under Article 15(1) of Directive 2004/38. In order to be able to claim a new right of residence on that territory under Article 6(1) of that directive, that Union citizen must not only physically leave that territory, but also have genuinely and effectively terminated his or her residence on that territory, with the result that, upon his or her return to the territory of the host Member State, his or her residence cannot be regarded as constituting in fact a continuation of his or her preceding residence on that territory.

82 It is for the referring court to ascertain, on the basis of an overall assessment of all the circumstances of the dispute before it, whether the Union citizen in question has genuinely and effectively terminated his or her residence in the host Member State, in such a way that the expulsion decision to which he or she was subject has been complied with in full. However, it is appropriate for the Court to provide some useful indications in that regard to enable the referring



court to determine the case before it (see, by analogy, judgment of 4 July 2017, *Kirschstein*, C-393/17, EU:C:2019:563, paragraph 32 and the case-law cited).

***The factors relevant to the assessment of whether an expulsion decision has been complied with***

83 In the first place, it is necessary to determine whether, in order for a Union citizen to be regarded as having genuinely and effectively terminated his or her temporary residence in the host Member State, he or she must reside outside that Member State for a certain minimum period, such as, for example, a period of three months, as the Netherlands Government recommends.

84 It is true that, as follows from paragraphs 66 and 74 of the present judgment, the three-month period already plays an important role in the context of Directive 2004/38, in particular in so far as that period makes it possible to distinguish between the two types of temporary right of residence provided for in Articles 6 and 7 of that directive.

85 However, that consideration does not justify interpreting Article 15(1) of Directive 2004/38 as laying down a condition for compliance with an expulsion decision, such as that envisaged in paragraph 83 above.

86 In particular, as the Court has held on numerous occasions and as is apparent from recitals 1 and 2 of Directive 2004/38, citizenship of the Union confers on each Union citizen a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and restrictions laid down by the Treaties and to the measures adopted for their implementation, freedom of movement for persons being, moreover, one of the fundamental freedoms of the internal market enshrined in Article 45 of the Charter of Fundamental Rights of the European Union (see, to that effect, judgment of 5 May 2011, *McCarthy*, C-434/09, EU:C:2011:277, paragraph 27 and the case-law cited).

87 Moreover, as is apparent from recital 3 of Directive 2004/38, that directive aims to facilitate the exercise of the primary and individual right to move and reside freely within the territory of the Member States that is conferred directly on Union citizens by the FEU Treaty and that it aims, in particular, to strengthen that right (see, to that effect, judgment of 5 May 2011, *McCarthy*, C-434/09, EU:C:2011:277, paragraph 28 and the case-law cited).

88 Furthermore, since freedom of movement for persons forms one of the foundations of the European Union, the provisions laying down that freedom must be given a broad interpretation, whereas exceptions and derogations from it must, on the contrary, be interpreted strictly (see, to that effect, judgments of 3 June 1986, *Kempf*, 139/85, EU:C:1986:223, paragraph 13, and of 10 July 2008, *Jipa*, C-33/07, EU:C:2008:396, paragraph 23).

89 As the Advocate General observed, in essence, in points 91 and 93 of his Opinion, to interpret Article 15(1) of Directive 2004/38 as meaning that a Union citizen who has been the subject of an expulsion decision taken under that provision would be obliged, in all cases, to leave the host Member State for a minimum period, for example three months, in order to be able to rely on a new right of residence on the territory of that Member State, under Article 6(1) of that directive, would be to render the exercise of that fundamental right subject to a limitation not provided for either by the Treaties or by Directive 2004/38.

90 However, even if the length of the period spent by the Union citizen outside the territory of the host Member State following the adoption of an expulsion decision taken against him or her under Article 15(1) of Directive 2004/38 is not, in itself, decisive for the purposes of assessing

whether the person concerned has genuinely and effectively terminated his or her residence in that territory, that period may be of some importance in the context of the overall assessment referred to in paragraph 82 above. The longer the person concerned is absent from the host Member State, the more that absence attests to the genuine and effective nature of the end of his or her residence. By contrast, merely a very brief absence, of a few days or even a few hours, tends rather to establish that the residence relied on by the Union citizen, under Article 6(1) of that directive, upon his or her return to the host Member State, is in fact part of the same period of residence in that territory.

91 In the second place, as the European Commission submits, in order to ascertain whether a Union citizen has genuinely and effectively terminated his or her residence pursuant to Article 7 of Directive 2004/38, account must be taken, first, of all the factors evidencing a break in the links between the Union citizen concerned and the host Member State. A request for removal from a population register, the termination of a lease contract or a contract for the provision of public services, such as water or electricity, moving house or flat, de-registration from a job placement service or the termination of other relationships which presuppose some integration of that Union citizen in that Member State may, *inter alia*, be of some relevance in that regard.

92 Further, it must be pointed out that the relevance of such factors, which may vary according to the circumstances, must be assessed by the competent national authority in the light of all the specific circumstances characterising the particular situation of the Union citizen concerned. Especially, account should be taken of the extent to which he or she is integrated in the host Member State, the length of his or her residence in the territory of that State immediately before the expulsion decision taken against him or her, and his or her family and economic situation.

93 In addition to the foregoing factors, relating to a possible break in the links between the Union citizen concerned and the host Member State, it is necessary, secondly, to take into account all factors relating to the period of absence of that citizen from the territory of that Member State after the adoption of an expulsion decision taken against him or her, with a view to shedding light on the question whether that Union citizen may be regarded as having actually resided outside that territory during that period. In this connection, it is necessary to take into consideration, in any event where the residence of that Union citizen in the host Member State was based on Article 7(1) of Directive 2004/38, the evidence suggesting that he or she moved the centre of his or her personal, occupational or family interests to another State during that period.

### ***The consequences of failing to comply with an expulsion decision***

94 It follows from the foregoing that the decision to expel a Union citizen has not been complied with as long as, having regard to all the circumstances of that citizen's situation, he or she cannot be regarded as having genuinely and effectively terminated his or her temporary residence in the host Member State. If his or her expulsion decision has not been complied with, that Union citizen therefore is still illegally resident on that territory, even when, after having temporarily left it, he or she returns to it again. Consequently, in such a case, that Member State is not obliged to adopt a new expulsion decision on the basis of the same facts which gave rise to the expulsion decision already taken against that Union citizen under Article 15(1) of Directive 2004/38, but may rely on that latter decision in order to oblige him or her to leave its territory.

95 That being said, it must be held that a material change in circumstances enabling the Union citizen to satisfy the conditions laid down in Article 7 of that directive would deprive the expulsion decision of which he or she is the subject of any effect and would require, notwithstanding the failure to comply with that decision, that his or her residence on the territory of the Member State concerned be regarded as legal.

96 Admittedly, the fact that, within the Schengen area, internal border controls are, in principle, prohibited under Article 22 of the Schengen Borders Code makes it more difficult for the authorities of the host Member State to check whether the Union citizen who has been the subject of an expulsion decision adopted under Article 15(1) of Directive 2004/38 has fully complied with that decision.

97 It is also true that, under Article 5(1) of Directive 2004/38, without prejudice to the provisions on travel documents applicable to national border controls, Member States are to grant Union citizens leave to enter their territory with a valid identity card or passport. Similarly, the right of a Union citizen to reside for up to three months in the territory of another Member State, under Article 6(1) of that directive, is not subject to any condition or formality other than the requirement to hold such a document.

98 However, certain other provisions of Directive 2004/38 are intended to enable the host Member State to ensure that the temporary residence of nationals of other Member States in its territory is carried out in a manner consistent with that directive.

99 In particular, as the Commission submitted at the hearing, although, under Article 8(1) of Directive 2004/38, the possibility for the host Member State to require Union citizens to register with the competent authorities applies, according to the very wording of that provision, only to periods of residence longer than three months, Article 5(5) of that directive provides that the Member State may require the person concerned to report his or her presence within its territory within a reasonable and non-discriminatory period and that any failure to comply with that requirement, just like a failure to comply with the registration obligation, may be punishable by proportionate and non-discriminatory sanctions.

100 Similarly, it should be noted that, in a situation such as that at issue in the main proceedings, where the Union citizen comes into contact with the authorities of the host Member State shortly after the expiry of the period laid down for his or her voluntary departure from that territory, that Member State may check whether the presence of that Union citizen in its territory is justified under that directive.

101 Finally, it should be added that an expulsion decision taken pursuant to Article 15(1) of Directive 2004/38 which has not yet been complied with is not a bar to the right of the Union citizen concerned to enter the territory of the host Member State under Article 5 of Directive 2004/38.

102 Although the right of entry provided for in Article 5 of Directive 2004/38 allows a Union citizen to be admitted to the territory of a Member State other than that of which he or she is a national in order to reside there on the basis of another provision of that directive, that right of entry may also be exercised autonomously where that Union citizen, who does not have a right of residence on that territory under that directive, nevertheless wishes to travel to that territory on an ad hoc basis for purposes other than to reside there. As is apparent from paragraph 68 above, Article 15(3) of Directive 2004/38 provides that the host Member State may not impose a ban on entry in the context of an expulsion decision to which paragraph 1 of that article applies.

103 It follows that an expulsion decision taken against a Union citizen under Article 15(1) of Directive 2004/38 cannot be enforced against him or her as long as his or her presence in the host Member State is justified under Article 5 of that directive.

104 In the light of all the foregoing considerations, the answer to the questions referred is that Article 15(1) of Directive 2004/38 must be interpreted as meaning that a decision to expel a Union citizen from the territory of the host Member State, adopted on the basis of that provision, on the ground that that Union citizen no longer enjoys a temporary right of residence in that territory under that directive, cannot be deemed to have been complied with in full merely because that Union citizen has physically left that territory within the period prescribed by that decision for his or her voluntary departure. In order to enjoy a new right of residence under Article 6(1) of that directive in the same territory, a Union citizen who has been the subject of such an expulsion decision must not only have physically left the territory of the host Member State, but must also have genuinely and effectively terminated his or her residence there, with the result that, upon his or her return to that territory, his or her residence cannot be regarded as constituting in fact a continuation of his or her previous residence in that territory. It is for the referring court to verify whether that is the case, having regard to all the specific circumstances characterising the particular situation of the Union citizen concerned. If it follows from such a verification that the Union citizen has not genuinely and effectively terminated his or her temporary residence in the territory of the host Member State, that Member State is not obliged to adopt a new expulsion decision on the basis of the same facts which gave rise to the expulsion decision already taken against that Union citizen, but may rely on that latter decision in order to oblige him or her to leave its territory.

### **Costs**

105 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

**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) 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 must be interpreted as meaning that a decision to expel a Union citizen from the territory of the host Member State, adopted on the basis of that provision, on the ground that that Union citizen no longer enjoys a temporary right of residence in that territory under that directive, cannot be deemed to have been complied with in full merely because that Union citizen has physically left that territory within the period prescribed by that decision for his or her voluntary departure. In order to enjoy a new right of residence under Article 6(1) of that directive in the same territory, a Union citizen who has been the subject of such an expulsion decision must not only have physically left the territory of the host Member State, but must also have genuinely and effectively terminated his or her residence there, with the result that, upon his or her return to that territory, his or her residence cannot be regarded as constituting in fact a continuation of his or her previous residence in that territory. It is for the referring court to verify whether that is the case, having regard to all the specific circumstances characterising the particular situation of the Union citizen concerned. If it follows from such a verification that the Union citizen has not genuinely and effectively terminated his or her temporary residence in the territory of the host Member State, that Member State is not obliged to adopt a new expulsion decision on the basis of the same facts which gave rise to the expulsion decision already taken against that Union citizen, but may rely on that latter decision in order to oblige him or her to leave its territory.**

[Signatures]

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\* Language of the case: Dutch.

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