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Concluding remarks - from Brexit to understanding vulnerability to expulsion

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Expulsion and
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misuse of rights occurs, the Home Office argue, even where the requirement of the Regulations are met but in circumstances where, it is said, that their *purpose* is not met and assessment, the person concerned intends to obtain an advantage through conduct artificially creating the conditions necessary to satisfy the criteria. These are often subjective and evaluative assessments which seek to subvert and undermine plainly expressed rights conferred under EU law.

Part III

Concluding remarks – from Brexit to understanding vulnerability to expulsion (Annette Schrauwen, Egle Dagilyte and Sandra Mantu)

With Brexit looming in the background, about 56 to 60 million UK citizens are set to lose their status as EU citizens and become TCNs. While this is not the image one may necessarily conjure when thinking about expulsion as a practice, Brexit can be seen as a test case for EU citizenship since it brings into sharper focus questions about the added value of EU citizenship.

Traditionally, EU citizens and TCNs were seen as different, since they enjoy different sets of rights under EU law. This is not simply a legal issue, since the TCN label remains one that conjures foreignness in a manner that EU citizenship should not. The mantra of EU citizenship as fundamental status seems to be disintegrating once we reach the national level: the distinction made at the EU level through law concerning the rights and treatment to which EU citizens and TCNs are entitled to disappears at the national level; even more so, when it comes to issues concerning expulsion. The correct transposition and enforcement of EU rights remain salient issues, despite these rights existing for long periods of time and efforts put into ensuring compliance. Brexit will add another layer of complexity to these issues, bringing home the fact that persons previously entitled to EU citizenship rights will become foreigners.

Public debates on immigration and state power to send migrants back to where they came from (be it an EU state or not) increasingly rely on economic arguments that distinguish between high level income and low level income migrants. Such arguments played an important role in the Brexit vote and its aftermath, as the UK authorities have started to engage in an administrative policy that makes it difficult for EU citizens to document their EU rights thus opening the way for terminating those rights. In its EU citizenship jurisprudence, the Court of Justice seems to embrace similar thinking, especially since the *Dano* case. Along such lines of reasoning, a cost-benefit analysis of EU migration becomes possible and justifiable, allowing the host state to end residence and potentially remove the EU citizen.

The practical difficulties of ensuring removal and preventing return by the host state in an area without border controls have been mentioned previously. The Member States discussed in this paper have all taken steps at the national level to deal with removal and to prevent EU citizens from re-entering their territories. The *Petrea* case⁷⁰ illustrates both the difficulties of preventing return but also the possibility of effacing further differences between the treatment of EU citizens and TCNs. The Court was asked if the Returns Directive (applicable only to illegally staying TCNs) could be applied to the EU citizen in question who had been issued with an order to leave Greece but was found to work there in violation of that order. AG Szpunar argued that this was possible, as

'Directive 2004/38 does not preclude the use of the content of 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 for the purposes of laying down detailed rules governing the procedures applying to an order to return a citizen of a Member State who has entered the territory of another Member State, notwithstanding the existence of an exclusion order adopted by the latter, provided that the protective measures and procedural safeguards set out in Directive 2004/38, particularly in Chapter VI thereof, as well as the principles of equivalence and effectiveness are observed, this being a matter for the national court to assess.'⁷¹

The ECJ upheld the view of AG Szpunar and confirmed that Member States may designate the same authorities and rely on the same procedure to return an illegally staying EU citizen as in the case of returning an illegally staying TCN on the basis of the Returns Directive. The court stressed the procedural autonomy of the Member States to designate the authorities responsible for return in respect of EU citizens since Directive 2004/38 does not set special rules in this regard.⁷² Concerning the procedure to be followed, Member States may draw inspiration from the Returns Directive and use the same procedure in as much as the safeguards provided for in Directive 2004/38 which are more favorable to the EU citizen are respected.⁷³ This approach tries to maintain the difference in legal treatment enjoyed by EU citizens and TCNs by emphasizing that the more favorable treatment enjoyed by EU citizens based on Directive 2004/38 continues to be relevant: in fact, it is this

70 Case C-184/16 *Petrea*, Request for a preliminary ruling from the Dioikitiko Protodikeio Thessalonikis (Greece) lodged on 1 April 2016 – *Ovidiu-Mihaita Petrea v Ypourgos Esoterikon kai Dioikitikis Anasygrotisis* (Ministry of Interior and Administrative Reconstruction), OJ C 211 from 13.06.2016, p. 33.

71 Opinion AG Szpunar in *Petrea* delivered on 27 April 2017, EU:C:2017:324.

72 Case C-184/16 *Petrea*, EU:C:2017:684, para. 53.

73 *Ibid.*, paras. 55 and 56.

distinction that justifies the use of the same procedure for both illegally staying EU citizens and TCNs. While from a practical point of view, the Court's approach makes sense – it may be too difficult to ask the Member States to design different return procedures applicable to different categories of illegally staying migrants - at a normative level, the distinction between EU citizens and TCNs becomes less relevant. Moreover, it remains to be seen if in practice national administrations and courts will apply different standards within the same procedure. The remarks made in Section 4 on the importance of understanding and empirically examining the intersection of fundamental rights considerations with the procedural autonomy of the Member States seem all the more relevant.

The FIDE report issued in 2014 – that is, prior to the *Dano* case and before Belgium's attempts to remove economically inactive EU citizens became public knowledge - argued that the Member States had a reasonable approach to evaluating self-sufficiency and that they rarely relied on expulsion measures to deal with economically inactive EU citizens. It is now clear that the trend is toward restrictive application of EU law not only where poor EU citizens are concerned, but also in relation to expulsion and the issuing of entry bans. EU law allows for such decisions to be challenged and it could be argued that judicial review and the application of procedural rules can soften or correct, where necessary, measures that restrict the rights of EU citizens. However, given the access to justice concerns examined in this working paper, the larger question is whether this should be the correct way forward (given that it disproportionately affects EU citizens on low incomes), or whether it is more desirable to have proper decision making in the first place, thus limiting the need for later judicial intervention.

It is also clear from the national cases discussed above that often the purpose behind detention and expulsion is for national governments to show to their electorate that Member States are indeed in control of their borders and migration flows. Increasingly, this control is portrayed to be about the welfare state and the redistribution of national resources, since in practice states are more likely to terminate rights for those who no longer meet residence requirements. Asking for a social benefit is used by national administrations as a red flag and sets into motion an investigation of one's right to reside. In all the states discussed here, there is evidence that such treatment affects disproportionately Roma citizens and other vulnerable persons, including dependent family members of EU citizens.⁷⁴ It is this group of EU citizens that appears as a new target of expulsion, removal and detention practices.

74 E. Dagilyte & M. Greenfields, 'United Kingdom welfare benefit reforms in 2013-2014: Roma between the pillory, the precipice and the slippery rope', (2015) *Journal of Social Welfare and Family Law* 37:4, p. 476-495.

This points to the ethnic and gender dimension of such practices and the need to examine EU citizenship from the perspective of vulnerable EU citizens who under national practices may end up framed as 'illegals' and 'criminals'.

Given that the nexus between ending residence rights, expulsion, removal policies and re-entry bans can be seen to (legally) produce the EU 'undesirables', such treatment of EU citizens raises questions of social justice not only at the national, but also at the European level. For these reasons, the protection of EU citizens' residence and welfare rights is likely to present complex European challenges in the years to come, even after Brexit.