

FREE MOVEMENT OF EU CITIZENS: LIMITATIONS ON GROUNDS OF PUBLIC POLICY, PUBLIC SECURITY AND PUBLIC HEALTH

OTILIA-EVELINA RISTEA*

Abstract

Free movement of persons represents one of the four essential freedoms of the internal market. At the beginning the rights attached to this freedom were granted only to economically active persons. Nowadays, according to Article 21 of the Treaty on the Functioning of the European Union (former Article 18 of the Treaty establishing the European Community), all Union citizens are entitled to move and reside freely within the territory of the Member States "subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect". The purpose of this study is to analyze the distinct category of limitations on the free movement of persons based on grounds of public policy, public security or public health. The main objectives pursued to this end consist of outlining the legal basis for these derogations, including primary and secondary legislation of the European Union, describing the circumstances in which Member States may legitimately impose restrictions on free movement rights, as well as presenting the safeguards provided for individuals when such measures are taken against them. In order to achieve the above mentioned aim the important role of European Court of Justice's case-law will be considered, emphasizing the fact that most of the principles held in its decisions concerning this topic are presently incorporated in the secondary legislation in force.

Keywords: *free movement of person, restrictions, public policy, safeguards, serious threat*

1. Introduction

Although they enjoy stipulation in EU primary law, becoming, by successive amendments to the Treaty establishing the European Economic Community¹, rights of "constitutional" nature of all EU citizens², from rights of "economic nature" of certain restricted categories of persons, the right to free movement and the right of residence on the territory of EU Member States are subject to Treaty and secondary legislation limitations and conditions.

The object of this paper is represented by the exceptions to the principle of free movement of persons, consisting of restrictions grounded on reasons of public policy, public security and public health, that can be determined by Member States, originally provided in the Treaty of Rome, and kept in the modified versions of the above mentioned treaty, including in the Treaty on the Functioning of the European Union.

The importance of our scientific study lies in revealing the balance that the primary and secondary law of the European Union, and especially the jurisprudence of the Luxembourg Court

* Counselor at Legislative Council, Ph.D. candidate, associated teaching assistant at Faculty of Law, University of Bucharest, (E-mail: evelinaristea@yahoo.co.uk).

¹ The Treaty establishing the European Economic Community was signed at Rome in 1957 and came into force in 1958. Throughout this paper, the references made to the Treaty of Rome, the EEC Treaty and the TEEC Treaty concern the originating treaty, above mentioned. After the entry into force of the Treaty of Maastricht (the Treaty on the European Union - TEU), the name of the same treaty was changed into the Treaty establishing the European Community, abbreviated in this paper as the EC Treaty and TEC Treaty. From December 1st, 2009, the date of entry into force of the Treaty of Lisbon, TEC was renamed the *Treaty on the Functioning of the European Union* (TFEU), under article 2, paragraph 1 of the Treaty of Lisbon. The Treaty of Lisbon amending the Treaty on the European Union and the Treaty establishing the European Community, signed on December 13, 2007 is also known as the *Reform Treaty*.

² See A. Iliopoulou, *Le nouveau droit de séjour des citoyens de l' Union et des membres de leur famille : la directive 2004/38/CE*, Revue du Droit de L'Union européenne, no.4/2003 p.525.

were able to establish between the exercise, by EU citizens and their families, of the right to free movement and the limitations that Member States would want to impose³ in order to hold back the excessive flow of foreign nationals on their territory.

We shall approach the issue of derogations based on grounds of public policy, public security and public health aiming, mainly at: synthesizing the legal framework and clarifying the meaning of some terms and phrases, such as “justified restrictions” or “public policy”; analyzing the reasons for which Member States would be entitled to restrict the freedom of movement; presenting the material and procedural safeguards established in favour of holders of entry, exit and residence rights, as well as highlighting the role of the European Court of Justice, whose principles formulated in some of the decisions on the free movement of persons have been, in time, incorporated in the secondary legislation.

To get a clearer picture of restrictions arising from the limitation of public policy, public security and public health, we intend, in the present work, to capitalize on the doctrine related to the topic, presenting analyses and points of view expressed in the studied specialized literature.

1.2. The legal framework. Rights covered by derogation. What are the *justified restrictions*?

2.1. The legal framework for derogations from the free movement of persons justified on grounds of public policy, public security and public health is represented, in terms of primary law, by the provisions of the Treaty on the Functioning of the European Union - article 21 paragraph (1) (former article 18 TEC) targeting all EU citizens, as well as article 45 paragraph (3)⁴, article 52 paragraph (1)⁵ and article 62⁶ - keeping the same wording of rules previously contained in articles 39, 46 and 55 TEC, and initially in articles 48, 56 and 66 TEEC.

Under article 21 TFEU, the right to free movement and to reside on the territory of another Member State knows exceptions and may be subject to limitations and conditions provided by Treaties and by the secondary legislation adopted in order to implement them.

N. Foster⁷ noticed that the restrictions and their scope need to be determined, because the Treaty makes reference to limitations, without expressly formulating them. For the author, it is clear that the provisions on restrictive measures for reasons of public policy, public security and public health contained in article 39 TEC (now article 45 TFEU) are applicable to limitations referred to in article 21 TFEU. We agree with the previously expressed view and we appreciate that the scope of exceptions under consideration can be correctly determined, only by the corroborated reading of articles: 21 paragraph (1), 45 paragraph (3), 52 paragraph (1) and 62 TFEU.

C. Barnard reported that the “derogations list”, the same for free movement of workers, freedom of establishment and free movement of services, “is exhaustive and the Court is not prepared to add any further headings to it”. However, “derogations will not apply where Community directives provide for exhaustive harmonization of the field”⁸.

The notions of public policy, public security and public health being insufficiently clear, were therefore, susceptible to divergent interpretations, which could vary, depending on the time or place.

³ Usually for economic reasons or for reasons related to social protection.

⁴ „3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health ...”.

⁵ “1. The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.”

⁶ “The provisions of Articles 51 to 54 shall apply to the matters covered by this Chapter.”

⁷ In *Foster on EU Law*, second edition, Oxford University Press, 2009, p. 344.

⁸ In *The substantive law of the EU. The four freedoms*, Oxford University Press, 2007, p.461.

The Council adopted Directive 64/221/EEC⁹ in order to specify the scope of those derogations. Currently, its text was repealed by Directive 2004/38/EC of April 29, 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States¹⁰, in order to ensure a more strict definition of conditions and procedural guarantees established for Union citizens and their family members in cases of refusal of rights of free movement in another Member State.

Therefore, as for the secondary legislation, the essential texts are currently to be found in Chapter VI¹¹ of Directive 2004/38/EC entitled *Restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health*.

2.2. Concerning the field of rights covered by the derogation under review, the Court of Justice stated that it is composed, among others, from rights of entry and residence on the territory of a Member State, and from their inherent rights, such as the right to respond to real offers for employment and the right to travel freely for that purpose¹².

In this context, it is necessary to remind the preliminary ruling delivered at the request of Dambovitza Tribunal, in *Jipa* case¹³. From the analysis of the reasoning expressed in paragraph 18¹⁴ of the decision according to which “the right of freedom of movement includes both the right for citizens of the European Union to enter a Member State other than the one of origin and the right to leave the State of origin” and “the fundamental freedoms guaranteed by the EC Treaty would be rendered meaningless if the Member State of origin could, without valid justification, prohibit its own nationals from leaving its territory in order to enter the territory of another Member State” it results that the provisions of the secondary legislation contained in Chapter VI of Directive 2004/38/EC shall also apply to the right of exit from the home state, in order to exercise the fundamental freedom of movement on the territory of another Union State, even if the title of the chapter mentioned is drawn up differently.

In order to support our statement, we bring the Advocate-General Ján Mazák’s opinion from *Jipa* case, who, at point 40, shows that “the provisions of Chapter VI of Directive 2004/38 ... regulate the circumstances in which Member States may restrict the right of Union citizens to move and reside freely within the territory of the Member States. While the title to Chapter VI of Directive 2004/38 does not specifically refer to the right to leave, and indeed many of the provisions of that chapter address questions relating to the right of entry ... and the right of residence, ... it is clear from the wording of Article 27(1) and the 22nd recital in the preamble to that directive that Chapter VI thereof regulates restrictions on the ‘freedom of movement of Union citizens’, a matter which undoubtedly relates to both the right to leave the territory of a Member State to travel to another Member State and the right to enter another Member State”.

Thus, we see that at this moment, within the European Union, restrictions on the freedom of movement of persons, justified on grounds of public security, policy and health can target the right to entry and the right to reside in another Member State, the right to exit from one’s own state, but also other rights that are consequences of the principle of free movement.

⁹ Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (OJ 56, 4.4.1964).

¹⁰ Entered into force on the date of its publication in Official Journal of European Union (OJ L 158 / 30.04.2004, p. 77-123) and having as final date of transposition 30.04.2006.

¹¹ Art. 27 -33.

¹² Judgment of 04/12/1974, *Van Duyn / Home Office*, C-41/74 (ECR.1974, p.1337), para.21.

¹³ Judgment of 10/07/2008, *Jipa*, C-33/07, (ECR 2008 p. I-5157).

¹⁴ Reiterating paragraph 35 of the Advocate-General Jan Mazák’s opinion. The Court calls for an analysis, by analogy with the freedom of establishment and free movement of workers sending to Case 81/87 *Daily Mail and General Trust* [1988] ECR 5483, paragraph 16; Case C-379/92 *Peralta* [1994] ECR I-3453, paragraph 31; and Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 97).

Regarding the persons against whom measures may be ordered, they can be both EU citizens - employees or service providers, inactive persons or students – as well as their family members.

The restrictive measures can take various forms, such as: the prohibition of leaving the home state, the prohibition of getting visas (in the case of family members that are citizens of third countries), denying the entry, refusing to issue the registration certificate or residence permit or expulsion.

2.3. What do “justified restrictions” mean?

The meaning of the expression *justified restrictions* from article 45 paragraph (3) TFEU¹⁵ has been clarified by the Court of Justice, through the preliminary ruling delivered in the *Rutili* case¹⁶. The Court stated¹⁷ that “only limitations which fulfil the requirements of the law, including those contained in Community law, are permissible with regard, in particular, to the right of nationals of member states to freedom of movement and residence. In this context, regard must be had both to the rules of substantive law and to the formal or procedural rules subject to which member states exercise the powers reserved under article 48 (3) in respect of public policy and public security”.

Also in the *Rutili* case, the Luxembourg Court stopped upon the meaning of the phrase “*subject to limitations justified on grounds of public policy*” from the beginning of paragraph 3 of article 48 TEEC¹⁸ (18), and appreciated that it applied not only to the legal provisions (regulations) adopted by each Member State in order to limit the freedom of movement and residence of nationals of other Member States, on its territory, but also to individual decisions (issued individual acts) delivered in the application of such legal provisions¹⁹.

3. Grounds for restricting the right to free movement.

The Treaty of Rome provided three grounds that might legitimize the restrictions on the free movement of persons, namely: public policy, public security and public health²⁰ which also became the object of Directive 64/221/EEC²¹, adopted to harmonize the laws of Member States. Although those reasons received express provision for all forms of free movement of persons, both in the Community primary law and in the secondary law, the absence of clarification on the meaning of the notions of public policy, public security and public health has allowed the national authorities to use them sometimes, abusively, by extending their scope. We mention that the infringements of public morals²² have not been accepted as a justification for restrictions on the right of free movement within the Union.

3.1. Public policy and public security.

Of the three reasons, **public policy** was considered the most sensitive aspect on which both the Community legislator²³ and the Luxembourg Court bended, with great caution, for an obvious reason: to prevent abuses in claiming the limitation provided under the Treaty.

Thus, given the characteristics of each act of the Community institutions - in particular, the scope of addressees or the completeness of rules - at Community level, the regulation of the exception of public policy, public security and public health, through a directive, was chosen, and not

¹⁵ Ex art.39 TEC, respective ex art.48 TEEC.

¹⁶ Judgement of 28/10/1975, *Rutili / Ministre de l'intérieur* C-36/75, (Rec.1975, p.1219).

¹⁷ Paras.23 and 24 of *Rutili* judgment, cited above.

¹⁸ Art. 45 TFUE.

¹⁹ *Rutili* judgment, cited above, para.21.

²⁰ Stipulated also in article 12, paragraph 3 of the International Covenant on Civil and Political Rights.

²¹ Council Directive 64/221/EEC on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health.

²² Although provided for in article 12, paragraph 3 of International Covenant on Civil and Political Rights

²³ Initially the Council, and then the Council and Parliament.

its provision into a regulation or decision. Directive 64/221/EEC, as it clearly results from its title, was meant to coordinate the invocation of reasons that could justify restrictions on movement and residence of foreign citizens; the assessment of situations that might be considered prejudicial to the public policy was left to Member States, under the condition that they respect the criteria set out in the Community Act, in order for restrictive measures taken by national authorities to be legitimate.

A definition of the concept of *public policy* was included neither in Directive 64/221/EEC, nor in Directive 2004/38/EC; establishing its meaning, in a manner appropriate to internal realities, remained an attribute of each Member State.

For measures taken by national authorities not to be discriminatory, the Court of Justice was given the mission to clear the concept of *public policy*. The first occasion was the decision delivered in *Van Duyn* case²⁴, when the Court stated that, “in the context of the Community and where, in particular, it is used as a justification for derogating from a fundamental principle of Community law”, the concept of *public policy* “must be interpreted strictly, so that its scope cannot be determined unilaterally by each member state without being subject to control by the institutions of the Community”. Unfortunately, further arguments did not lead to shaping the defining elements of *public policy*, the Court finding that, they will be analyzed, from case to case by the national authorities to which the Treaty has left an area of discretion, because “the particular circumstances justifying recourse to the concept of *public policy* may vary from one country to another and from one period to another”.

W. Cairns criticized the Court’s wording that he appreciated as inconclusive, and too little useful to national jurisdictions which addressed a preliminary question to the Community Court, as long as the Community law, even at that time (December 1974, when the decision was delivered), contained a number of indications regarding the meaning and scope of the concept of public policy²⁵. Thus, the author continues, article 3, paragraph (1) of Directive 64/221/EEC provides that measures taken on grounds of public policy and public security must be based exclusively on the personal conduct of the individual concerned, and according to paragraph (2); the existence of previous convictions can not be a justification in itself for the adoption of such measures.

The concept of **public security**, although used by Directive 64/221/EEC, and now, by Directive 2004/38/EC, also does not receive a legal explanation for its meaning. C. Barnard noted that, although the text of the Treaty suggests that public policy and public security constituted distinct derogations, “the Court’s case law has largely subsumed, public security under the heading of public policy”²⁶.

In this regard, decisions of the Union’s judicial institution do not provide too many elements of differentiation between the concepts of public policy and public security, especially since, no national law of Member States separates them clearly, and the Community regulation on restrictions to the free movement of persons determined for reasons of public security and order sets that they will be grounded on the individual’s *personal conduct*.

A. Fuerea²⁷ considered that “the notion of public security is ambivalent” because it can be “understood as national security and also as national defence”.

The relation between public policy and public security was synthesized by S. Deleanu as it follows: “Although in the texts of Community provisions, there are references to public policy and also to public security, the European Court of Justice generally prefers to consider these concepts together. It could be argued that public policy concerns the foundations of society, freedom and personal security, and public security concerns the foundations of the state and its security. Drawing

²⁴ Judgment of 04/12/1974, *Van Duyn / Home Office*, C-41/74 (*Rec.1974,p.1337*).

²⁵ In *Introduction to European Union Law*, second edition, Cavendish Publishing Limited, London, 2002, p.194-196.

²⁶ *Op.cit.*, p.462.

²⁷ In *Drept comunitar al afacerilor*, Universul Juridic Publishing House, Bucharest, 2005, p.137.

a dividing line between these two concepts is, however, difficult because of the connections that exist between them. A person who disregards the rules of public policy may also affect the public security, and vice versa. Just remember that if public peace and social harmony are seriously affected or if laws or legitimate decisions of the public authorities are violated, both the system organized upon relationships between persons who constitute the population of a state, as well as the foundations of the state can be affected”²⁸.

3.2. Public health. Public health reasons that may justify the restriction of the right to free movement are the object of article 29 of Directive 2004/38/EC²⁹, under which the only diseases that may ground such measures are the diseases with epidemic potential as defined in the relevant documents of the World Health Organisation, as well as other infectious or contagious parasitic diseases if they are the subject of protective provisions applied to nationals of the host Member State. Compared to those aspects under Directive 64/221/EEC, the number of diseases as reasons for restriction has been substantially reduced.

Under paragraph (2) of article 29, diseases occurring after a period of three months from the date of arrival shall not constitute grounds for expulsion from that territory. The repealed text from which it is inspired - article 4, paragraph (2) of Directive 64/221/EEC - refers to the first residence permit, the release of which could have been refused if public health reasons had been identified. Under the regulation in force, the right of residence can not be challenged anymore, after three months, for reasons pertaining to public health protection; diseases referred to only justify a measure for restricting the right of entry and the right of residence for a period up to three months.

The last paragraph of article 29 was introduced in order to stop the practice of certain Member States to submit beneficiaries of the right of residence to medical checks. Medical examinations proving that people do not suffer from any of the diseases referred to in paragraph (1) can be freely carried, under three conditions:

- a) if there are serious indications that this is necessary,
- b) within three months from the date of arrival,
- c) the examinations must not acquire a systematic character which would compromise the effectiveness of provisions related to the release of the registration certificate or of the residence permit, as appropriate. This last text is similar to that contained in article 27, paragraph (4) on the request for information about the person’s criminal record only when the information is absolutely necessary for justifying the refusal to allow entry or stay on that territory.

In the *Gül* case³⁰, the Court of Justice stated that the possibility for Member States to restrict freedom of movement on public health grounds could not justify the exclusion of the public health sector from the scope of economic sectors, but it could only substantiate the refusal to access or residence on their territory for people whose access or residence in itself would constitute a danger to public health³¹ (31).

4. Material guarantees. Features of a restrictive measure under EU law

Partially provided for previously in Directive 64/221/EEC, highlighted and interpreted by the Luxembourg Court, the defining elements of restrictive measures compatible with Community law can be now drawn easily from the provisions of article 27 of Directive 2004/38/EC, dedicated to the general principles that must be taken into consideration by Member States authorities when they want to limit free movement of persons within the country.

²⁸ Sergiu Deleanu, Gyula Fabian, Cosmin Flavius Costas, Bogdan Ionita, *Curtea de Justiție Europeană*, Wolters Kluwer Publishing House, 2007, p.106-107 (our translation).

²⁹ Which is based on the provision contained in article 4 of Directive 64/221/EEC, now repealed.

³⁰ Judgment of 07/05/1986, *Gül / Regierungspräsident Düsseldorf*, C-131/85, (Rec.1986, p.1573).

³¹ C-131/85, *Gül*, above mentioned, paras. 15-17.

- a. The measures may be taken against EU nationals and their family members, Union citizens or not.
- b. The measures may be based solely on grounds of public policy, public security and public health.
- c. The reasons listed above, stipulated by the primary provisions and initially reiterated by Directive 64/221/EEC - can not be relied upon or used for the safeguard of some economic interests or purposes of Member States³².
- d. The measure will respect the principle of proportionality³³.

The reference to the principle of proportionality, which the Court of Justice applied in its numerous decisions, was inserted into the final text of the Directive³⁴. "A measure restricting one of the fundamental freedoms guaranteed by the Treaty may be justified only if it complies with the principle of proportionality" meaning that the "measure must be appropriate for securing the attainment of the objective which it pursues and must not go beyond what is necessary in order to attain it", stated the Court in *Olazabal* decision³⁵. On the same occasion, it was appreciated that for the given situation, the principle of proportionality would have been respected if a measure of territorial limitation of the residence permit validity had been taken, instead of a deportation decision³⁶.

Applying the principle of proportionality in relation to restrictions on the free movement can be summarized as: "the obligation imposed to national authorities to analyze the overall situation of the person concerned"³⁷. To this end, Directive 2004/38/EC dedicated article 28, with innovative character, to the protection against expulsion.

Since the expulsion of Union citizens and their families, for reasons of public policy or public security is a measure that can seriously affect people who, by using the rights and freedoms conferred by the Treaty, were effectively integrated into the host Member State before that state disposed such measure, it would be compelled to restrict its scope, in accordance with the principle of proportionality. Under the provisions of article 28, paragraph (1), the host Member State is required to examine issues aimed at cultural and social integration of the person concerned in the host Member State, the duration of their stay in the host country, age, state of health, family and economic situation and their connections with their country of origin³⁸.

Therefore, the degree of integration of Union citizens and their families in the host country will also determine their degree of protection against expulsion.

For EU citizens, holders of the right of permanent residence in the receiving state, Directive 2004/38/EC³⁹ provides additional guarantees relating to the right to free movement. No expulsion decision can be delivered against them or their family members, regardless of nationality; only in cases where there are imperative reasons of public policy or public security, such measure can be taken.

In addition, an expulsion measure against Union citizens who have lived many years in the host Member State and, in particular if they were born and have resided there their whole life, should be taken only under exceptional circumstances, for imperative reasons related only to public security⁴⁰ and that are defined by Member States.

³² See art.27 (1), second sentence, of Directive 2004/38/CE.

³³ See art.27 (2), first sentence, of Directive 2004/38/CE.

³⁴ See, e.g., in the field of free movement of persons, judgment of 19/01/1999, *Calfa*, C-348/96, (Rec.1999, p.I-11) and judgment of 26/11/2002, *Oteiza Olazabal*, C-100/01, (Rec.2002, p.I-10981).

³⁵ C-100/01, *Oteiza Olazabal*, above mentioned para.43.

³⁶ C-100/01, *Oteiza Olazabal*, above mentioned para.21.

³⁷ A.Iliopoulou, *op.cit.*, p.548 (our translation).

³⁸ See, also judgment of 29/04/2004, *Orfanopoulos and Oliveri*, C-482/01 (Rec.2004, p.I-5257).

³⁹ Art. 28 (2).

⁴⁰ Directive 2004/38/CE preambles, recital 24.

As provided in article 28 paragraph (3), it is the case of Union citizens who (a) have resided in the host country in the previous ten years, - and therefore their degree of integration in the host country is high - (b) are a minor, except if the expulsion is necessary for the best interests of the child, according to United Nations Convention on the Rights of the Child of 20 November 1989.

Paul P. Craig and Gráinne De Búrca⁴¹ pointed out, in this context, one of the innovations of Directive 2004/38/EC, namely, the introduction of three levels of protection against expulsion on grounds of public policy, public security and public health, as it follows: “(i) a general level of protection for all individuals covered by EU law; (ii) an enhanced level of protection for individuals who have already gain the right of permanent residence on the territory of a Member State; and (iii) and a super-enhanced level of protection for minors or for those who have resided for ten years in a host state”.

e. The restriction will be based **solely** on the **personal behaviour**, but previous convictions - although, obviously, constituting an important factor in determining the personal behaviour – can not justify the limitation of the right to free movement⁴².

The danger represented by the individual's behaviour towards the Member State concerned must be established, in order for the measure to be legitimate, before being ordered. Thus, if only by analyzing the personal conduct, it is found that this **constitutes** “a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society”⁴³, the measure is justified. In the *Rutili* case, the Luxembourg Court stated that restrictions on the right of a citizen of any Member State to enter, stay and move on the territory of another Member State could not be imposed, unless his presence or conduct constitutes a genuine and sufficiently serious threat to the public policy⁴⁴.

The wording was reiterated and developed in the decision delivered in *Bouchereau* case⁴⁵. The French citizen Bouchereau was a worker in Great Britain, since 1975. Having earlier been convicted in the United Kingdom, for illegal possession of narcotics in 1976, Bouchereau recognized that he was guilty, again, of committing the same offence, punishable by English law. In that context, the Court was asked to interpret the concept of *public policy*, since the procedure for expulsion from Great Britain, against Bouchereau had started. The Court stated that “In so far as it may justify certain restrictions on the free movement of persons subject to community law, recourse by a national authority to the concept of public policy presupposes, in any event, the existence, in addition to the perturbation of the social order which any infringement of the law involves, of **a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society**”⁴⁶.

In *Adoui and Cornuaille* case⁴⁷, the Court attempted⁴⁸, on the one hand, to clarify the notion of *serious threat* and, on the other hand, to ensure the principle of equal treatment for nationals of other Member State s in relation to their own citizens. Thus, the decision of the Court shows “although Community law does not impose upon the Member States a uniform scale of values as regards the assessment of conduct which may be considered as contrary to public policy, it should nevertheless be stated that conduct may not be considered as being of a sufficiently serious nature to justify restrictions on the admission to or residence within the territory of a Member State of a national of another member state in a case where the former member state does not adopt, with

⁴¹ In *EU law: text, cases, and materials*, Oxford University Press, 2007, p.783

⁴² See article 27, paragraph (2), first sentence which resumes the text of article 3, paragraphs (1) and (2) of Directive 64/221/EEC.

⁴³ See art.27 (2), second sentence, of Directive 2004/38/CE.

⁴⁴ Judgment of 28/10/1975, *Rutili*, above mentioned, para. 28.

⁴⁵ Judgment of 27/10/1977, *Regina / Bouchereau*, C-30/77 (*Rec.1977, p.1999*).

⁴⁶ C-30/77, *Regina / Bouchereau*, above mentioned, para. 35.

⁴⁷ Judgment of 18/05/1982, *Adoui and Cornuaille / Belgian State*, C-115/81, (*Rec.1982, p.1665*).

⁴⁸ See para.8 of *Adoui and Cornuaille*.

respect to the same conduct on the part of its own nationals repressive measures or other genuine and effective measures intended to combat such conduct”.

f. Considerations of general prevention or reasons that are not directly related to the case can not constitute grounds for restricting the freedom of movement⁴⁹.

The best illustration of this material guarantee for free movement of persons is “the retreat from *Van Duyn*”, as the Court’s decision in *Bonsignore*⁵⁰ case is being called in the doctrine⁵¹. The Italian citizen Carmelo Angelo Bonsignore who was working and had the residence in Cologne, Germany, accidentally killed his brother while cleaning his gun. Although he was found guilty both of the offence of manslaughter and of illegal possession of a weapon, he was sentenced only for the last, to pay a fine. As for the offence of manslaughter, the German court did not consider that it would impose another sentence, since it would not have served any purpose under the given circumstances, moreover, it would have caused additional distress unnecessary for the person who already had lost his brother. However, the German authority for foreigners decided Bonsignore’s expulsion, arguing that the illegal possession of a weapon was circumscribed in the sphere of *personal conduct* referred to in article 3, paragraph (1) of Directive 64/221/EEC. The Luxembourg Court noticed⁵² that the Directive provisions had to be interpreted like this: the measures taken for reasons related to maintaining the public policy and public security against nationals of Member States of the Community **could not be justified through reasons apart from the case**; only the **personal conduct** of those affected by these measures should be considered as conclusive. In addition, the concept of *personal conduct* gives substance to the requirement that expulsion could be imposed only for violations of public policy and security by the individual affected by the measure of restriction. Therefore, the correct interpretation of article 3, paragraphs (2) and (3) of Directive 64/221/EEC is the one according to which the decision for expulsion can not be delivered if it is only based on considerations of general prevention⁵³.

Unlike the above interpretation given to the expression of *personal conduct*, earlier, in the *Van Duyn* case, the Court of Justice had stated that the membership of a person in an organization considered to be dangerous in the host country, fell under the concept of *personal conduct*, within the meaning of Directive 64 / 221/CEE, entitling the national authorities to invoke the exception of public policy or security in order to expel that person.

With regard to **previous criminal convictions**, their mere existence is not the equivalent of an individual threat against public policy and security. There should not be any direct connection between previous conviction and expulsion, and the conclusion of the threat represented by the individual must result from an overall assessment of his facts and personality⁵⁴.

To check the degree of danger, posed by a particular individual, to the public policy or public security, the text of article 27 paragraph (3) of Directive 2004/38/EC provides to the host Member State, a legal instrument, consisting of legitimizing the request for information on previous convictions.

Thus, at the issuance of the registration certificate or in the absence of a registration system, not later than three months after the person concerned has entered its territory or from the date the person has reported her presence on its territory, under article 5, paragraph (5) of the Directive or when issuing the residence permit, the host Member State can, if deemed indispensable, request the Member State of origin or, if necessary, other Member States, to provide information concerning any

⁴⁹ See art.27 (2), the end of second sentence of Directive 2004/38/CE.

⁵⁰ Judgment of 26/02/1975, *Bonsignore/Oberstadtdirektor der Stadt Köln*, C-67/74, (Rec.1975, p.297).

⁵¹ See Anthony M. Arnall, *Article 177 and the Retreat from Van Duyn*, 8 European Law Review (1983), p. 365-382 and W. Cairns, *op.cit.*, p.196.

⁵² C-67/74, *Bonsignore*, para.6.

⁵³ C-67/74, *Bonsignore*, para.7.

⁵⁴ A. Fuerea, *op.cit.*, Bucharest, 2005, p.132 (our translation).

previous police record the person concerned may have; the consultation can not have a systematic character. The response of the Member State consulted must be sent within two months.

5. Procedural requirements in order for the measure to limit the right to free movement not to be contrary to European Union law

Restrictions that Member States can apply to the free movement of persons may be subject to judicial review⁵⁵ which is intended to guarantee to persons affected by measures of limiting the right to free movement that they were not improperly taken or if they were illegal, that they can be cancelled. The control covers regulations adopted, as well as individual ones given in the application of restriction measures⁵⁶.

Directive 2004/38/EC simplifies the procedural requirements of Directive 64/221/EEC referred to above, and ensuring the access to judicial or administrative means of questioning the decision delivered against a person on grounds of public policy, public security and public health becomes an obligation for the host Member State and previous references to comparable national procedures are eliminated⁵⁷.

5.1. Notification of decisions

Under the provision contained in article 30 paragraph (1) of Directive 2004/38/EC, those persons concerned must be informed in writing of any decision on the restriction of the right to free movement, for reasons of public policy, public security or public health so that they could understand its content and implications. The text takes as its starting point the provision of first sentence of article 7 from Directive 64/221/EEC that was referring to the notification of any decision on the refusal of the issuance or renewal of the residence permit and to those decisions concerning expulsion. In addition, the provision in force mentions **the way** the notification will be made - **in writing**, so that courts could exercise an effective judicial review if it is necessary - and it integrates⁵⁸ considerations that constituted the basis for delivering the decision in *Adoui and Cornuaille* joined cases⁵⁹. The Court stated that, “the notification of the grounds must be **sufficiently detailed and precise** to enable the person concerned to defend his interests. As regards the language to be used, it appears from the file on the case that the plaintiffs in the main proceedings are of French nationality and that the decisions affecting them were drawn up in French ... It is sufficient in any event if the notification is made in such a way as to enable the person concerned to comprehend the content and effect thereof”⁶⁰.

In a similar manner, paragraph (2) of article 30 incorporates, starting from the wording of article 6 of Directive 64/221/EEC, the principles drawn from the Court’s decision in *Rutili* case⁶¹ and has the following wording: „The persons concerned shall be informed, precisely and in full, of the public policy, public security or public health grounds on which the decision taken in their case is based, unless this is contrary to the interests of State security”.

Therefore, the Member State must communicate to the person, immediately or at the moment of notifying the restrictive measure taken against her, the accurate and complete reasons that grounded the decision, in order for her to be able to prepare the defence.

At the same time, the same notification lets the person against whom the sentence was given know the court or administrative authority where the decision may be appealed, the time limit for the appeal, and if it is the case, the time allowed for the person to leave the territory. The latter can not be less than one month from the notification date; exceptions are admitted only in cases of emergency,

⁵⁵ Judgment of 04/12/1974, *Van Duyn*, para. 7.

⁵⁶ Judgment of 28/10/1975, *Rutili*, paras. 17 -21.

⁵⁷ Paul P. Craig și Gráinne De Búrca, *EU law: text, cases, and materials*, Oxford University Press, 2007, p.786

⁵⁸ See Commission proposal, COM 2001/0257 Final; OJ C 270E/2001 P 150.

⁵⁹ Judgment of 18/05/1982, *Adoui and Cornuaille* cited above.

⁶⁰ Judgment of 18/05/1982, *Adoui and Cornuaille*, para.13.

⁶¹ Judgment of 28/10/1975, *Rutili*, para.39.

properly motivated⁶². (62) The stated rule amends the text of article 7, the final thesis of Directive 64/221/EEC, which stipulates that the deadline for leaving the territory shall not be less than 15 days if the person has not yet received a residence permit and can not be less than a month, in other cases.

5.2. Procedural guarantees

Jean-Yves Carlier⁶³ observed that “whatever the reasons for expulsion would be, procedural guarantees⁶⁴ must be respected” and that “the Court of Justice has already stopped on this issue⁶⁵ and stated that both for the expulsion of a citizen of the Union and for the expulsion of a Turkish citizen, beneficiary of an association agreement, in the absence of a notice given by an independent tribunal, previously to the expulsion, the legal appeal must be suspensive and can not be limited to a legality control that would exclude the control of opportunity”⁶⁶.

A.Iliopoulou showed⁶⁷ that through the new Community provisions contained in article 31 of Directive 2004/38/EC, substantial changes were made to the system created by the provisions of articles 8 and 9 of Directive 64/221/EEC for ensuring a “comprehensive and effective” judicial protection. “The very nature of the right to free movement of persons” determines the regulation of a judicial control of legislative measures that restrict it. Given its character of fundamental freedom, the freedom of movement must be accompanied by “strong guarantees against arbitrary interferences”. Moreover, an effective control corresponds to requirements of the general principle of Community law on effective judicial protection of individuals. This principle was judicially established⁶⁸, being inspired by the constitutional traditions” of Member States “and by articles 6 and 13 of the European Convention on Human Rights. Its recognition in the Community legal order was achieved by article 47⁶⁹ of the Charter of Fundamental Rights” of the European Union.

The first procedural safeguard covered by article 31 of Directive 2004/38/EC consists of *the right of redress* against a restrictive measure. “The persons concerned shall have access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health”⁷⁰.

It results from this wording, that a person has **always** guaranteed the access to a legal appeal, and moreover, if the law of the receiving Member State provides it, to an administrative appeal.

When challenging an expulsion measure is accompanied by a request for suspension of the decision, the person’s effective expulsion from the territory can not be pursued before the delivery of an ordinance on the provisional measures of suspension. Exceptions are the situations when: the decision of expulsion is based on a previous judicial decision or the person affected had previous

⁶² Art.30 (3) of Directive 2004/38/CE.

⁶³ In *Le devenir de la libre circulation des personnes dans l'Union européenne: regard sur la directive 2004/38*, Cahiers de Droit Européen (CDE), no.1-2, 2006, p. 31 (our translation).

⁶⁴ Provided currently by article 31 of Directive 2004/38/EC.

⁶⁵ Judgment of 05/03/1980, *Pecastaing / Belgian State*, C-98/79, (Rec.1980,p.691).

⁶⁶ Judgment of 02/06/2005, *Dörr and Ünal*, C-136/03 (Rec.2005,p.I-4759).

⁶⁷ In „*Le nouveau droit de séjour ...*” op.cit., p.550.

⁶⁸ Judgment of 19/06/1990, *The Queen / Secretary of State for Transport, ex parte Factortame*, C-213/89 (Rec.1990,p.I-2433); Judgment of 15/10/1987, *Unectef / Heylens*, C-222/86 (Rec.1987,p.4097); Judgment of 15/05/1986, *Johnston / Chief Constable of the Royal Ulster Constabulary*, C-222/84 (Rec.1986,p.1651).

⁶⁹ Art.47, *Right to an effective remedy and to a fair trial*:

„Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”.

⁷⁰ Art.31 (1) of Directive 2004/38/CE.

access to a judicial way of appeal or the expulsion decision is based on imperative grounds of public security, under article 28, paragraph (3)⁷¹.

The legal review of the measure to restrict the right to free movement will concern the legality of the decision, the facts and circumstances that have grounded the measure and the principle of proportionality⁷².

Another procedural safeguard is introduced by the provision contained in paragraph (4) of article 31. Although Member States can deny the concerned individual's presence on their territory during the appeal procedures, they can not prevent him from personally formulating his defence, unless his presence could seriously cause troubles to public policy or public security or when the appeal regards the denial of access on that territory. In this way, **the right to a fair trial is guaranteed**⁷³, because, even if during appeal proceedings, the person concerned is denied the presence on the territory from which she was expelled, her right to personally present evidence can be restricted only when her presence on the territory of the host Member State would endanger the public policy and safety or when the measure aimed at restricting the right of entry.

5.3. Duration and effects of the prohibition of entry on the territory of a Member State.

After a reasonable period of time, related to circumstances, but in any case not earlier than three years after the enforcement of the final decision of prohibiting the entry, validly sentenced in accordance with European Union law, persons affected by a decision that prohibits the access on a territory may submit a request to suspend the prohibition. To this end, they will present evidence for effective changes in the circumstances that led to the decision of prohibiting the entry, sentenced against them. Within six months from the moment of submitting the application, the competent authorities of the Member State concerned shall deliver a decision on the possibility of suspending the prohibition⁷⁴.

Article 32 paragraph (1) of Directive 2004/38/EC gives legislative character to a consideration from a decision of the Court of Justice⁷⁵, through the prohibition of permanent interdictions of entry on the territory from which a person was expelled, on grounds of public policy and public security. However, people have no right to enter the territory of the Member State concerned while their application is being considered⁷⁶.

In the event of expulsion on grounds of public policy, public security or public health from the territory of a Member State, a Union citizen has the right to re-enter the Member State which issued his passport or identity card, without having to fulfil any formality, even if the document is no longer valid or if the holder's citizenship is disputed. This provision of article 27 paragraph (4) of Directive 2004/38/EC resumes the text of article 3, paragraph (4) of Directive 64/221/EEC and constitutes the Community expression of the principle of international law, under which a state can not refuse their own citizens the right to access and the right of residence on its territory⁷⁷.

Conclusions

At present, the benefit of rights of free residence and movement within a Member State may be denied to the nationals of another Member State, for reasons expressly and exhaustively covered by the Treaty on the Functioning of the European Union - public policy, public security and public health - developed in Directive 2004/38/CE, and broadly interpreted in Luxembourg Court's rulings.

⁷¹ Art.31 (2) of Directive 2004/38/CE.

⁷² A.Iliopoulou in „*Le nouveau droit de séjour ...*”, op.cit., p.554.

⁷³ Judgment of 05/03/1980, *Pecastaing / Belgian State*, C- 98/79, (Rec.1980,p.691).

⁷⁴ Art.32 of Directive 2004/38/CE

⁷⁵ Judgment of 18/05/1982, *Adoui and Cornuaille*, para.12.

⁷⁶ Art.32 (2) of Directive 2004/38/CE. The provision was inspired by de Judgment of 18/05/1982, *Adoui and Cornuaille* and included in the directive's text in order to avoid abuse of rights.

⁷⁷ Judgment of 04/12/1974, *Van Duyn*, para.22.

Our analysis revealed the dual nature of the limitation based on grounds of *public policy, public security and public health*. First, the limitation has Community nature, meaning it is specific to European Union law, because: (a) has been explicitly provided in its texts - primary and secondary; (b) its limits are set specifically under the form of material and procedural guarantees through derived rules, (c) its scope was restricted through the interpretative jurisprudence of the Court of Justice. Secondly, the limitation has also national character, because it aims at safeguarding the fundamental values of society, closely connected to national sovereignty and the concepts are defined through the national legislation.

Measures restricting the right to free movement must comply with certain material and procedural requirements in order to be in accordance with EU law. Thus, the exception cannot be invoked for economic purposes. The restrictive measures based on reasons of public policy and public security must comply with the principle of proportionality and can be taken only after having considered the behaviour of the person concerned, which should represent a present threat, sufficiently serious and real to the fundamental interests of society. As for the grounds of public health, national authorities may refuse the entry or stay on their territory, but only for a limited number of diseases. Member States may require beneficiaries of the right of residence to undergo a free medical examination, but only if there are serious indications about its necessity and only in the first three months from their arrival on the territory of the receiving state.

From a procedural perspective, we mention that the person concerned must be informed in writing and in a manner that would allow the understanding of the decision that restricts her freedom of movement and residence in a Member State, and she has the right to appeal against or seek review of any decision taken against her in front of the competent judicial or administrative authorities of that state; she may be required to leave the territory, with some exceptions, not earlier than one month after the notification. In addition, the prohibition to enter the territory of a state can not be permanent. The interested persons are entitled to request its suspension, after a reasonable period of time, but after at least three years from the execution of the final decision through which it was ordered.

Summarizing, we see that the European Union legislation in force, valuing the relevant jurisprudential *acquis*, allows Member States to adopt, for reasons of public policy, public security and public health, measures that restrict the movement and residence of nationals of other Member States on their territory, but at the same time, it establishes a complex system of guarantees conceived to protect the holders of rights.

Since our study aimed to approach the limitations of the free movement of persons on grounds of public policy, public security and public health, mainly from legal and theoretical perspective, we consider that the theme may be subject to further research focused on the analysis of concrete ways through which Member States would comply with the provisions of EU law, in this area.

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