Immigration law

Sources in law:

Basic Law, art. 3 (1)
Code of Administrative Court Procedure, sec. 144 (5)
Directive 2004/38/EC, art. 24, 32
Directive 2008/115/EC, art. 2 (1), art. 11 (2)
EU Citizens Freedom of Movement Act, sec. 2 (7), sec. 6 (1), sec. 7 (2)
Residence Act, secs. 11 and 102 (1)
TFEU, art. 18 (1)

Title line:

Time limit on ‘pre-existing expulsion’ of a man who is now a Union citizen

Headwords:

Expulsion; time limit; entry ban; finding of a forfeiture of freedom of movement; continuing effect of pre-existing expulsions; threat; prediction of danger; proportionality; danger of recidivism; ten-year time period.

Headnotes:

1. The legal exclusion effects linked to the ‘pre-existing expulsion’ of a man who is now a Union citizen persist even after the accession to the European Union of the country of which he is a national (here: Poland on 1 May 2004), the entry into force of the EU Citizens Freedom of Movement Act on 1 January 2005 and the expiry of the transposition period for the Return Directive 2008/115/EC (along same lines as Federal Administrative Court judgments of 7 December 1999 – 1 C 13.99 – BVerwGE 110, 140 <149 f.> and 4 September 2007 – 1 C 21.07 – BVerwGE 129, 243 para. 14 et seq.).

2. The time limit on the exclusion effects of such a ‘pre-existing expulsion’ for Union citizens is now determined mutatis mutandis under sec. 7 (2) sentence 5 of the EU Citizens Freedom of Movement Act (following Federal Administrative Court judgment of 4 September 2007 – 1 C 21.07 – BVerwGE 129, 243 para. 17).

3. Since the entry into force of the amendment of sec. 7 (2) of the EU Citizens Freedom of Movement Act under the Act Amending the EU Citizens Freedom of Movement Act and Other Provisions of 2 December 2014 (BGBl. I 2014 p. 1922), the decision on the time limit for effects of a finding of forfeiture is fully subject to court review, including with respect to the duration of the time period.

4. The time limit decision under sec. 7 (2) of the EU Citizens Freedom of Movement Act must be made on the basis of a current prediction of danger and

review of proportionality; there is no maximum time limit beginning at the time of leaving the country (continuation of Federal Administrative Court judgment of 4 September 2007 – 1 C 21.07 – BVerwGE 129, 243 para. 19).

Judgment of the First Division of 25 March 2015 - BVerwG 1 C 18.14

I. Stuttgart Administrative Court of 22 July 2014,
Case VG 11 K 1243/14

FEDERAL ADMINISTRATIVE COURT

IN THE NAME OF THE PEOPLE

JUDGMENT

BVerwG 1 C 18.14
VG 11 K 1243/14

Released
on 25 March 2015
Ms Thiele
Principal Court Officer
as Clerk of the Court

In the administrative matter

Translator's Note: The Federal Administrative Court, or *Bundesverwaltungsgericht*, is the Federal Republic of Germany's supreme administrative court. This unofficial translation is provided for the reader's convenience and has not been officially authorised by the *Bundesverwaltungsgericht*. Page numbers in citations of international texts have been retained from the original and may not match the pagination in the parallel English versions.

When citing this decision, it is recommended to indicate the court, the date of the decision, the case number and the paragraph: BVerwG, Judgment of 25 March 2015 – BVerwG 1 C 18.14 – para. …

the First Division of the Federal Administrative Court
upon the hearing of 25 March 2015
by Presiding Federal Administrative Court Justice Prof. Dr. Berlit,
and Federal Administrative Court Justices Prof. Dr. Dörig, Prof. Dr. Kraft,
Fricke and Dr. Rudolph

decides:

On appeal by the Respondent, the judgment of Stuttgart Administrative court of 22 July 2014 is set aside.

The matter is remitted to the Baden-Württemberg Higher Administrative Court for further hearing and a decision.

The disposition as to costs is reserved for the final decision.

Reasons:

I

1 The Complainant, born in July 1968, is a Polish national. For his expulsion ordered in 2000, he seeks to have a time limit with immediate termination set under section 7 (2) of the Act on General Freedom of Movement of Union Citizens (the ‘EU Citizens Freedom of Movement Act’) (reduction of time limit to zero).

2 The Complainant, together with his mother and sister, entered Germany in July 1984 to join his father, who was working here; in July 1992 he received an unlimited residence title. His November 1990 marriage to a Brazilian national failed. His wife, together with their daughter, born in April 1992, returned to Brazil in April 1994. The couple were divorced in April 1999. Since age 8, the Complainant has suffered from a paranoid-hallucinatory psychosis, and has repeatedly drawn attention by aggressive conduct ranging even to violence against himself, his parents, his neighbours, treating physicians, and fellow patients. He has been confined several times as an inpatient in psychiatric hospitals because of his illness.

3 In 1999 he was confined to a psychiatric hospital by order of Stuttgart Regional Court. This decision resulted from an attempt by the Complainant to murder his father, who was critically injured by a knife blow to the head. In a decision of 10 January 2000 the Stuttgart District Government expelled the Complainant from Germany indefinitely. In May 2000 he was deported to Poland. His divorced parents and his sister continue to reside in Germany.

4 In Poland, the Complainant was confined in a psychiatric hospital from 2005 to 2013 after another criminal incident (assault with a knife against a neighbour). The Local Court in Bialystok lifted the detention order against the Complainant in a decision of 1 July 2013. From the reasons, it appears that two expert opinions sought by the court found that because of the state of the Complainant's mental health, he continued to pose a very probable threat of committing a criminal offence endangering the public. However, the Local Court found that a further inpatient confinement of the Complainant was disproportionate.

5 In response to the application, lodged in 2013, to have the time limit for the Complainant's present ban on entry and residence reduced to zero, the Respondent ordered in May 2014 that the ban would continue until 21 May 2024. It founded this decision on the grounds that the Complainant would still continue to pose a significant threat to public safety and order in the next ten years because of his paranoid-hallucinatory psychosis, and there was therefore a strong legal interest in keeping him out of the Federal Republic.

6 The Administrative Court ordered the Respondent to end the ban immediately. It held that as a Union citizen, the Complainant was entitled to this reduction of the time limit under section 7 (2) of the EU Citizens Freedom of Movement Act. The court acknowledged that the Complainant continued to pose a serious threat to public safety and order, as was evident with sufficient clarity from the decision of Bialystok Local Court of 1 July 2013. Nevertheless, he was entitled to have a time limitation without further extension in view of the total duration of more than 14 years of the ban on his re-entering the country as a result of the expulsion decision. On this point the Administrative Court refers to the recent case law of Mannheim Higher Administrative Court, under which an expulsion

can normally be time-limited to no more than ten years, irrespective of the continuing existence of the purpose of expulsion, and this ten-year period begins with the date of leaving the country (see Mannheim Higher Regional Court, judgment of 30 April 2014 – 11 S 244/14 – InfAuslR 2014, 365 para. 83). The Administrative Court held that in the instant case, maintaining a ban on entering the country for more than ten years was also unjustifiable from the standpoint of proportionality.

7 The Respondent appeals the judgment in a leapfrog appeal by leave of the Administrative Court, and complains of a violation of section 7 (2) of the EU Citizens Freedom of Movement Act. It argues that the Administrative Court's opinion makes an error of law in holding that a general maximum term of ten years applies for the same limitation, and that this term – which cannot be extended – must always be calculated from the date of leaving the country even for a time limit that is set subsequently.

8 The Complainant defends the Administrative Court's judgment. Additionally, he points out that Union citizens cannot be treated less well than third country nationals. The time limit to be set under section 7 (2) of the EU Citizens Freedom of Movement Act therefore cannot be longer than a time period to be set under section 11 (1) sentence 4 of the Residence Act. To that extent, the Return Directive, which applies to third country nationals, must also be applied to the advantage of Union citizens. In respect of the facts, he argues that a more recent decision of Bialystok Local Court of November 2014 shows that a material improvement has now taken place in his psychological condition.

II

9 The Respondent's leapfrog appeal is admissible and meets with success. In setting the time period for the entry and residence ban under section 7 (2) of the EU Citizens Freedom of Movement Act, the Administrative Court applied a standard that is in contravention of federal law (section 137 (1) Code of Administrative Court Procedure). In the absence of sufficient findings of fact in the Administrative Court's judgment concerning the circumstances material to set-

ting the time limit, this Court cannot itself decide finally either for or against the Complainant. Therefore the matter must be remitted for further hearing and decision (section 144 (3) sentence 1 no. 2 Code of Administrative Court Procedure).

10 The legal assessment of the time limitation sought here is governed by the factual and legal circumstances at the date of the last oral hearing before the Administrative Court (established case law, see Federal Administrative Court, judgment of 6 March 2014 – 1 C 2.13 – Buchholz 402.242 section 25 Residence Act no. 20, para. 6). However, changes in the law during the appeal proceedings before this Court must be taken into account if the court finding on the facts would have to consider them if it were deciding in place of the Federal Administrative Court (judgment of 6 March 2014 – 1 C 2.13 – Buchholz 402.242 section 25 Residence Act no. 20 para. 6). The basis of claim for the time limitation being sought here must therefore now be section 7 (2) of the EU Citizens Freedom of Movement Act in the version from the Act Amending the EU Citizens Freedom of Movement Act and Further Provisions of 2 December 2014 (BGBl. I 2014 p. 1922), which entered into force on 9 December 2014.

11 1. The original action to compel an administrative act is procedurally admissible. The Complainant has a need for legal protection for what he sought. The January 2000 expulsion of the Complainant under section 45 (1) in conjunction with section 46 no. 2 of the Aliens Act 1990 resulted in a statutory ban on re-entry and new residence in the federal territory, pursuant to section 8 (2) sentence 1 of the Aliens Act 1990. This ban did not lapse as a consequence of either Poland's accession to the EU on 1 May 2004 (a), or the entry into force of the EU Citizens Freedom of Movement Act on 1 January 2005 (b), or the Return Directive 2008/115/EC, to be implemented by 24 December 2010 (c). However, there is no longer any exclusion effect from the Complainant's deportation in May 2000 (d).

12 a) First of all, the effects of the Complainant's expulsion did not lapse simply as a consequence of Poland's accession to the EU on 1 May 2004, even though this event gave the Plaintiff citizenship of the Union. According to this Court's

case law on the prior status of the law, the legal effects of an order for expulsion under section 8 (2) sentence 1 of the Aliens Act 1990 continue to affect the residence status of EU citizens under the EEC Nationals Residence Act. The Aliens Act 1990 and the EEC Nationals Residence Act constitute a single legal unity, so that the exclusion effects of section 8 (2) of the Aliens Act 1990 also had effect within the purview of the EEC Nationals Residence Act. Freedom of movement under Union law was taken into account in that no later than the time when the reasons justifying the restriction of freedom of movement cease to exist, a foreigner could request for a time limit to be set for the effects of the expulsion (Federal Administrative Court, judgment of 7 December 1999 – 1 C 13.99 – BVerwGE 110, 140, 149 f.). That case law is to be reaffirmed. It is consistent with the case law of the European Court of Justice, under which a restriction of the right of freedom of movement under primary law cannot be of unlimited duration, and a Community national therefore has a right to have his situation re-examined if he considers that the circumstances which justified prohibiting him from entering the country no longer exist (ECJ, judgment of 17 June 1997 – C-65/95, C-111/95 [ECLI:EU:C:1997:300], Shingara and Radiom – para. 40).

13 b) The entry and residence ban imposed on the Complainant also did not expire as a result of the entry into force of the EU Citizens Freedom of Movement Act on 1 January 2005. It is true that since that time, Union citizens can no longer be expelled. However, section 7 (2) sentence 1 of the EU Citizens Freedom of Movement Act provides that following a finding of forfeiture of freedom of movement under section 6 (1) of the EU Citizens Freedom of Movement Act, which has taken the place of expulsion in the case of Union citizens, an entry and residence ban still exists. This Court has already decided that in virtue of the transitional provision of section 102 (1) sentence 1 of the Residence Act and the reference under section 11 (2) of the EU Citizens Freedom of Movement Act, the effects of a ‘pre-existing expulsion’ of a Union citizen generally continue after the entry into force of the EU Citizens Freedom of Movement Act (see Federal Administrative Court, judgment of 4 September 2007 – 1 C 21.07 – BVerwGE 129, 243 para. 14 et seq.). This also applies if – as here – the expulsion took place before the Union citizen acquired a right of freedom of move-

ment, and was expelled under the rules that still applied for third country nationals (see Hamburg Higher Regional Court, decision of 19 March 2012 – 3 Bs 234/11 – InfAuslR 2012, 247 para. 25 et seq. for subsequent acquisition of a right of freedom of movement of a family member; contrasting opinion, Bremen Higher Regional Court, judgment of 28 September 2010 – 1 A 116/09 – InfAuslR 2011, 2 para. 44; Munich Higher Regional Court, decision of 9 August 2012 – 19 CE 11.1893 – InfAuslR 2012, 404 para. 33).

14 Nor does anything else result from the Free Movement of Citizens Directive 2004/38/EC, against which the continuing legal effects of the pre-existing expulsion must be measured under Union law (see ECJ, judgment of 19 September 2013 – C-297/12 [ECLI:EU:C:2013:569], Filev and Osmani – para. 40 et seq. on the interim applicability of the Return Directive to the continuing effects of measures terminating residence that were taken before the directive went into force). In particular, the time limitation provisions under section 7 (2) of the EU Citizens Freedom of Movement Act, which when applied mutatis mutandis also include the continuing legal consequences of a pre-existing expulsion (see Federal Administrative Court, judgment of 4 September 2007 – 1 C 21.07 – BVerwGE 129, 243 para. 17 on section 7 (2) sentence 2 EU Citizens Freedom of Movement Act (old version)), are subject to the requirements of Art. 32 of the Free Movement of Citizens Directive in respect of the duration of the effects of a residence ban.

15 c) Finally, the Return Directive also has changed nothing in the continuing effect of the statutory entry and residence ban associated with the Complainant's expulsion. That directive, and its transposition into national law in section 11 (1) of the Residence Act, do not apply to the Complainant, as a Union citizen (aa). The Complainant is also not entitled to be treated no less well under the residence laws than a third country national in a comparable situation (bb). Irrespective of that point, he also does not fulfil the requirements under which an expelled third country national might no longer be subject to an entry and residence ban without regard to any time limitation (cc).

16 aa) According to Article 2 (1) of the Return Directive, the directive’s personal sphere of application extends only to third country nationals; it is not applicable to Union citizens. The same applies to the transposition of the Return Directive into national law in section 11 (1) of the Residence Act (section 1 (2) no. 1 Residence Act in conjunction with section 1 EU Citizens Freedom of Movement Act). Nor does the directive apply, by way of the reference under section 11 (2) of the EU Citizens Freedom of Movement Act, to Union citizens who are not (or no longer) entitled to freedom of movement. After all, the provision for a time limitation in section 7 (2) of the EU Citizens Freedom of Movement Act represents a special condition within the meaning of section 11 (2) of that Act (see Federal Administrative Court, judgment of 4 September 2007 – 1 C 21.07 – BVerwGE 129, 243 para. 17 on section 7 (2) EU Citizens Freedom of Movement Act, (old version)). To that extent, the Complainant also cannot invoke the favoured-treatment principle under section 11 (1) sentence 11 of the EU Citizens Freedom of Movement Act. According to that provision, the Residence Act does not apply either, if it confers a more favourable legal position than the EU Citizens Freedom of Movement Act. That is not the case here, if only because under section 11 (1) of the Residence Act, a decision on a time limit is also required. In the present context we may leave aside the question whether and to what extent a statutory entry and residence ban automatically lapses for third country nationals in certain case configurations, under a direct application of the Return Directive, because the favoured-treatment principle refers only to the Residence Act, and not to Union laws that may take precedence. Furthermore, the comparison of favoured treatment is founded on an overall assessment. Under the overall consideration thus required, there is no less favoured legal position in the instant case. In the case of a third country national, the entry ban associated with an expulsion regularly results in an alert for a refusal of entry in the Schengen Information System (SIS) under Art. 96 (3) of the Schengen Implementing Convention (SIC) and thus to an entry ban for the territory of all Schengen States (see 11.1.0 of the General Implementing Regulations for the Residence Act), while the entry ban under the EU Citizens Freedom of Movement Act applies only to the host Member State. Furthermore, after the ban expires, Union citizens may once again exercise their freedom of movement with no new permission from the authorities to enter the territory, while for third

country nationals, only the ban on granting a title under section 11 (1) sentence 2 of the Residence Act lapses, while the old right of residence, by contrast, does not automatically revive.

17 bb) Nor is it necessary to apply the provisions in force for third country nationals in order to avoid impermissible discrimination. The prohibition of discrimination on grounds of nationality under Union law (Art. 18 (1) TFEU) refers only to unequal treatment of Union citizens, but not to unequal treatment between Union citizens and third country nationals, of which the Complainant complains here (ECJ, judgment of 4 June 2009 – C-22/08 [ECLI:EU:C:2009:344], Vatsouras and Koupatantze – para. 51 et seq. on Art. 12 (1) EC). Nor does unequal treatment between Union citizens and third country nationals violate the requirement for equal treatment under Art. 24 (1) of the Free Movement of Citizens Directive, which according to the case law of the European Court of Justice gives more specific expression in secondary law to the principle of non-discrimination laid down generally in Art. 18 TFEU (ECJ, judgment of 11 November 2014 – C-333/13 [ECLI:EU:C:2014:2358], Dano – para. 61). By its very wording, the provision is limited to unequal treatment between Union citizens and the nationals of the Member State concerned. There is no need for a reference to the ECJ for a preliminary ruling as sought by the Complainant, because the situation of law is clear in this respect and the question raised is furthermore not material to a decision. Where the German Federal Court of Justice consulted the terms of the Return Directive concerning enforcement of detention for deportation in the case of a Union citizen required to leave the country (Federal Court of Justice, decision of 25 September 2014 – V ZB 194/13), that decision concerned the interpretation of section 62a of the Residence Act in conformity with the directive, and does not take a general position on the equal treatment of Union citizens and third country nationals. The national requirement of equal treatment under Art. 3 (1) of the Basic Law also does not give rise to an entitlement to equal treatment, because the legislative differentiation between Union citizens and third country nationals is founded on different requirements of Union law, and therefore on sufficiently objective grounds. Equivalent considerations apply to the prohibition of discrimination under Art. 14 of the European Convention on Human Rights.

18 cc) Nevertheless, even if the provisions applicable to third party nationals were applied, the effects of the expulsion of the Complainant would not automatically expire at the end of five years from his leaving the country. In the instant case, the requirements under section 11 (1) sentence 4 of the Residence Act in conjunction with Art. 11 (2) of the Return Directive for an entry and residence ban of more than five years have been met. Article 11 (2) of the directive does, to be sure, preclude in principle a continuation of the effects of entry bans of unlimited length made – as here – before the effective date of the directive, if they extend beyond the maximum duration of five years established in this provision. But this does not apply if these bans were made against third country nationals constituting a serious threat to public order, public security or national security (ECJ, judgment of 19 September 2013 – C-297/12 – para. 44). That is the case here.

19 The expulsion order issued against the Complainant was founded on the fact that the Complainant presented a serious threat to public security and order. Such a serious threat, according to the findings of the fact in the challenged decision (original copy of the decision, p. 8 top), still persisted at the time of the decision of the Administrative Court in July 2014, which is the relevant time here. Therefore, even if the provisions applicable to third country nationals are applied, one cannot assume that the exclusion effects of the expulsion dating from 2000 have expired. The Complainant's objection that the Administrative Court assessed the present situation of fact erroneously and without its own knowledge of the facts must be left out of consideration in the present proceedings, because under section 137 (2) of the Code of Administrative Court Procedure, the present Court is bound by the findings of fact of the Administrative Court.

20 d) Finally, there is also no absence of a need for legal protection because the Complainant was deported in 2000, which under section 8 (2) sentence 1 of the Aliens Act 1990 would likewise result in an entry and residence ban. This legal effect lapsed with the entry into force of the Immigration Act on 1 January 2005. As proceeds from section 7 (2) of the EU Citizens Freedom of Movement Act, in

the case of Union citizens an entry and residence ban can result only from a finding of forfeiture of freedom of movement under section 6 (1) of the EU Citizens Freedom of Movement Act or in cases where freedom of movement is found not to apply, and now also from an express ban under section 7 (2) sentence 3 of the EU Citizens Freedom of Movement Act; but it cannot result from a deportation alone. Because of this conclusive provision in the Freedom of Movement Act, a recourse to the transitional provision of section 102 (1) sentence 1 of the Residence Act by way of the reference in section 11 (2) of the EU Citizens Freedom of Movement Act is precluded with regard to the effects of a deportation that occurred before 1 January 2005.

21 2. It cannot be finally decided on the basis of the Administrative Court's findings of fact whether the action seeking to compel an administrative act is well-founded. The Administrative Court's interpretation of section 7 of the EU Citizens Freedom of Movement Act (old version) contravenes federal law.

22 a) Only section 7 (2) sentence 5 of the EU Citizens Freedom of Movement Act, in the current version that went into force during the present proceedings, comes under consideration as a legal basis for the claimed entitlement to a time limitation, and must be applied mutatis mutandis to the Complainant as a former third country national and now Union citizen. According to that provision, a finding of forfeiture of freedom of movement under section 6 (1) of the EU Citizens Freedom of Movement Act must be time-limited ex officio at the very time of its issuance. The provision grants Union citizens a strict legal entitlement to a time limit. This is consistent with this Court's case law to date on section 7 (2) sentence 2 of the EU Citizens Freedom of Movement Act (old version) (Federal Administrative Court, judgment of 4 September 2007 – 1 C 21.07 – BVerwGE 129, 243 para. 18). According to the system of the law, however, the finding of forfeiture and setting a time limit to its effect are still two separate administrative acts (on the comparable relationship between expulsion and the time limit on its effects, see Federal Administrative Court, judgments of 14 February 2012 – 1 C 7.11 – BVerwGE 142, 29 para. 30 and of 10 July 2012 – 1 C 19.11 – BVerwGE 143, 277 para. 39). In the case of a finding of forfeiture without a time limit under the old legal situation, the time limit required under the new law must be set

subsequently ex officio. Equivalent considerations apply to an expulsion of a Union citizen ordered without a time limit before the Freedom of Movement Act went into force.

23 Under section 7 (2) sentence 6 of the EU Citizens Freedom of Movement Act, the time limit must be set taking account of the circumstances of the particular case, and can exceed a term of five years only in the cases under section 6 (1) of that Act. The requirement to take account of the circumstances of the individual case, according to the statement of legislative intent, is simply a clarification (see Bundestag Printed Paper 18/2581 p. 17 on no. 5 (c)). It has not changed the standard for review in substantive law in comparison to the status of the law taken into account by the court below. The new maximum time limit of five years applies only for cases in which it has been found, in accordance with section 2 (7) of the EU Citizens Freedom of Movement Act, that there is no right of entry and residence, and that therefore the person concerned has been forbidden under section 7 (2) sentence 2 of the EU Citizens Freedom of Movement Act from re-entering the federal territory and remaining here. For findings of forfeiture under section 6 (1) of the EU Citizens Freedom of Movement Act and equivalent pre-existing expulsions, there is still no maximum time limit. According to the statement of reasons for the Immigration Act, the legislature assumes that for Union citizens, a long-term ban on re-entry is not precluded if a there is still a prediction of a recidivism or threat (Bundestag Printed Paper 15/420 p. 105 on section 7). This also applies to the new version. There is no contradictory assessment in the different provisions on the maximum time limit, because a finding of forfeiture under section 6 (1) of the EU Citizens Freedom of Movement Act substantively presupposes that the Union citizen poses a threat to public order, security or health; but this is not the case in section 2 (7) of that Act. The reasons for limiting freedom of movement in the case of a finding of forfeiture therefore weigh more heavily than in the cases under section 2 (7) of the Act.

24 Union law also provides no further requirements for determining the length of the time limit. According to the case law of the ECJ, an entry and residence ban cannot be imposed for life; instead its justification must be reviewed at reasona-

ble intervals at the request of the person concerned. The review in each case must take into account the current circumstances of fact at the time of the review decision (see ECJ, judgment of 17 June 1997 – C-65/95, C-111/95 – para. 39 et seq.). This case law is also cited in the 27th Recital of the Free Movement of Citizens Directive 2004/38/EC, which reads:

> 'In line with the case-law of the Court of Justice prohibiting Member States from issuing orders excluding for life persons covered by this Directive from their territory, the right of Union citizens and their family members who have been excluded from the territory of a Member State to submit a fresh application after a reasonable period, and in any event after a three year period from enforcement of the final exclusion order, should be confirmed.'

25 This desire is met by the provision in Art. 32 of the Free Movement of Citizens Directive about the time effects of a residence ban. The case law of the ECJ and the Free Movement of Citizens Directive thus require, when determining the length of the exclusion period, only that the exclusion cannot be for life without the possibility of a reduction (see also Hailbronner, *Ausländerrecht*, version: September 2013, section 7 EU Citizens Freedom of Movement Act, para. 21 – 23). This is acknowledged by the possibility of reducing the duration subsequently under section 7 (2) sentence 8 of the EU Citizens Freedom of Movement Act.

26 b) In light of the normative requirements for determining the length of this period, which have also remained largely unchanged under the new situation of the law, for further specification we may recur to this Court's case law on the entitlement to a time limit under section 7 (2) sentence 2 of the EU Citizens Freedom of Movement Act (old version).

27 According to that case law, as a first step, a maximum deadline must be determined based on the significance of the reason for the finding of forfeiture and the special preventive purpose pursued with the measure. To that end, a prediction-based assessment must be made in each case for how long the concerned individual's conduct that led to the finding of forfeiture for special preventive purposes will give rise to a public interest in averting danger, with an eye to the

threshold of danger – which in the instant case is significant – under section 6 (1) of the EU Citizens Freedom of Movement Act. In the event of a continuing long-term prediction of recidivism or danger, a long-term ban on re-entering the country is not precluded (Federal Administrative Court, judgment of 4 September 2007 – 1 C 21.07 – BVerwGE 129, 243 para. 19). Based on the same approach, this Court has held, on the claim to a time limit under section 11 (1) sentence 3 of the Residence Act, that as a rule, a period of not more than ten years represents the time horizon for which a prediction can realistically still be made. Beyond that point, it is unlikely that one can estimate the development of a personality – especially in younger persons – without descending into speculation (Federal Administrative Court, judgment of 13 December 2012 – 1 C 14.12 – Buchholz 402.242 section 11 Residence Act no. 10 para. 14). This also applies for the prediction to be made under section 7 (2) sentence 5 of the EU Citizens Freedom of Movement Act.

28 As a second step, the maximum time period based on achieving the purpose of the finding of forfeiture must be measured against higher-level law, meaning requirements of Union law and decisions on constitutional values, and if applicable must be adjusted. This normative corrective offers a means under the rule of law for limiting the on-going radical consequences of an entry and residence ban for the personal life of the individual concerned. Here the Union citizen's concerns that are worthy of protection, as mentioned in section 6 (3) of the EU Citizens Freedom of Movement Act, must particularly be taken into account. A consideration under the principle of proportionality, which must be conducted on the basis of the circumstances of the individual case after weighing the various concerns involved, may also lead, in extreme cases, to a reduction of the time limit to the present moment (Federal Administrative Court, judgment of 4 September 2007 – 1 C 21.07 – BVerwGE 129, 243 para. 20).

29 c) In its case law on section 7 (2) sentence 2 of the EU Citizens Freedom of Movement Act (old version), this Court has held that the foreigners' authority has selective discretion in determining the length of an entry and residence ban (Federal Administrative Court, judgment of 4 September 2007 – 1 C 21.07 – BVerwGE 129, 243 para. 19). For time limitations under section 11 (1) sentence

3 of the Residence Act, on the other hand, since the Directive Transposition Act 2011 went into force this Court has held that the administrative decision is also constrained with respect to the duration of the time period and is fully subject to review by the courts (Federal Administrative Court, judgment of 14 February 2012 – 1 C 7.11 – BVerwGE 142, 29 para. 33). The considerations that the Court found relevant there also apply here. Consequently the case law on section 11 (1) sentence 3 of the Residence Act, following the revision of section 7 (2) of the EU Citizens Freedom of Movement Act in December 2014 and the resulting upgrade in the legal status of persons entitled to freedom of movement in view of the open wording of the provision, is also transferable to deciding the length of the entry ban under the same Act.

30 d) The Administrative Court's legal interpretation that in determining the period under section 7 (2) of the EU Citizens Freedom of Movement Act, the maximum applicable period is ten years from the date of leaving the country is contrary to federal law.

31 Concerning the time limit decision under section 7 (2) of the EU Citizens Freedom of Movement Act (old version), this Court has already ruled that the decision must be made on the basis of the circumstances of fact at the time, and in that respect the conduct of the individual concerned subsequent to expulsion must also be given consideration (Federal Administrative Court, judgment of 4 September 2007 – 1 C 21.07 – BVerwGE 129, 243 para. 19). The Administrative Court's decision that a current prediction of danger is no longer relevant on expiration of a period of ten years from leaving the country is incompatible with this ruling. To support its interpretation, the Administrative Court cannot rely on this Court's case law on section 11 (1) of the Residence Act, according to which a period of not more than ten years as a rule represents the time horizon for which a prediction can realistically still be made (as in Federal Administrative Court, judgment of 13 December 2012 – 1 C 14.12 – Buchholz 402.242 section 11 Residence Act no. 10 para. 14). This time limit proceeds solely from the fact that predictability is limited, and for that reason the limit must always be calculated from the date of the prediction-based decision. The Administrative Court has failed to recognise this, as has the Mannheim Higher Administrative Court,

which the Administrative Court cites, when they calculate the ten-year period from the past date of exit and find that after that period expires, it is no longer relevant whether the reason for expulsion still continues to exist (see Mannheim Higher Administrative Court, judgment of 30 April 2014 – 11 S 244/14 – InfAuslR 2014, 365 para. 83). On the contrary, in deciding on a time limit, this Court always focuses on the current date of the decision being made, consequently even in cases in which the person never exited the country – for example, because of impediments to departure owing to the danger of persecution of a refugee – it may be necessary to set a time limit of zero without any exit having taken place (see Federal Administrative Court, judgment of 6 March 2014 – 1 C 2.13 – Buchholz 402.242 section 25 Residence Act no. 20 para. 13 et seq. with further references).

32 e) If one applies the prevailing principles under section 7 (2) sentence 5 of the EU Citizens Freedom of Movement Act to the time period set in the challenged decision, which extends the entry and residence ban until 21 May 2024, that time limit does not inherently – contrary to the Administrative Court's opinion – prove to be disproportionate. This holds true, even when considering that at the relevant time of the Administrative Court's decision, the entry ban had been in force for more than 14 years, and could already have been time-limited at an earlier date. After all, if a threat persists, at least when the situation of danger continues that justified the finding of a forfeiture, a time limit once set can also be extended subsequently by the foreigners' authority. Conversely, if the circumstances of fact change to his advantage in the future, the Complainant is entitled to have the time limit eliminated or shortened, subject to section 7 (2) sentence 8 of the EU Citizens Freedom of Movement Act.

33 This Court is not in possession of the necessary findings of fact for a final decision as concerns the duration of the threat still posed by the Complainant as well as his personal interest in residence in Germany. These findings are necessary in order to determine a reasonable exclusion period. Making reference to the decision of Bialystok Local Court of 1 July 2013, the Administrative Court merely found that the Complainant still poses a serious threat to public security and order (original copy of the decision, p. 8 top). But there is not even the nec-

essary predictive assessment of how long the serious threat posed by the Complainant will presumably continue. Nothing can be found on this point from the Local Court's decision. The Local Court first cites from the expert opinions before it, according to which there still is a high probability that the Complainant continues to pose the danger of committing a criminal offence endangering the public, but that court does not concur in the experts' assessment and concludes that there is no need for the Complainant to be confined further.

34 3. In the absence of adequate court findings for setting the time period under section 7 (2) sentence 5 of the EU Citizens Freedom of Movement Act, the matter must be remitted for further hearing and a decision. The remittance is to the Higher Administrative Court in Mannheim, because the Administrative Court's decision rests materially on that court's case law (section 144 (5) Code of Administrative Court Procedure). The following in particular is to be taken into account in the new decision:

35 a) The Higher Administrative Court will first have to clarify on the basis of the current circumstances of fact whether the Complainant still poses a threat, and if so what specific threat he poses. This clarification must also take account of changes adverse to the Complainant in the circumstances of fact. The holding of the Higher Administrative Court in its judgment of 30 April 2014 – 11 S 244/14 – (InfAuslR 2014, 365 para. 74) that in decisions on time limits under section 7 (2) of the EU Citizens Freedom of Movement Act, changes in the circumstances of fact that take place more than six months after the application is lodged can no longer be taken into account to the foreigner's detriment, is already opposed by the fact that section 7 (2) of the EU Citizens Freedom of Movement Act, in the new version which is now definite, provides a decision-making deadline not for setting the initial time limit (section 7 (2) sentence 5 EU Citizens Freedom of Movement Act) – which is at issue here – but only for subsequent applications for a reduction of the time period (section 7 (2) sentence 8 EU Citizens Freedom of Movement Act). Irrespective of that fact, neither section 7 (2) of the EU Citizens Freedom of Movement Act nor Art. 32 (1) of the Free Movement of Citizens Directive offers any cause for the facts on which a decision is based to be frozen in the Complainant's favour. In particular, it cannot be

derived from the relevant provisions that the six-month deadline is anything more than a mere processing deadline for effectively ensuring the entitlement, under Union law, to a new review of an entry ban after the relevant circumstances have changed.

36 If the Complainant continues to pose a serious threat to public safety and order into the unforeseeable future, this could justify maintaining the entry and residence ban until 21 May 2024. The deciding factors will, first of all be, the significance of the legal interests that the Complainant threatens (life and limb). However, a consideration may reach a different conclusion if the results of a new assessment of the Complainant conducted in Poland in the autumn of 2014 leads one to believe that he presents no danger, or at most a minor one. In its latest decision of 26 November 2014, Bialystok Local Court merely arrives at the conclusion that there is ‘at present no high probability of [the Complainant’s] committing’ an ‘act with a significant degree of social harmfulness’. The Higher Administrative Court will have to clarify whether, and if so with what degree of probability, the Complainant continues to pose a threat to significant legal interests like life and health, and for what period of time this prediction of danger applies.

37 b) If the court concludes that the Complainant still poses a significant threat, and if it has arrived at a prediction of the duration of the threat, the exclusion period for the Complainant’s re-entry that is considered necessary to avert the threat might have to be adjusted in a second step, taking account of the Complainant’s interests that are worthy of protection. For this purpose the Higher Administrative Court will have to determine and weigh those concerns worthy of protection. In so doing, it will have to take into account that in order to reduce the time period in the second stage, the personal concerns to be protected must be all the more serious, the greater the danger posed by the Complainant.

38 The interest deserving protection to be considered here is essentially the Complainant’s ability to lead a life in freedom under the care of his mother, who lives in the Federal Republic. There is a need for a finding whether his mother is willing and able to provide such care. Furthermore, it will have to be taken into ac-

count that in the past, his mother was unable to prevent eruptions of the Complainant's mental illness, and the resulting acts of violence. To that extent, it may be necessary to show what circumstances have changed significantly in the meantime. The court will furthermore have to address the question of whether outpatient care for the Complainant is possible in Poland. If the court concludes that the Complainant must particularly rely on his mother's care, it will have to examine whether his mother can reasonably be expected to provide the care in Poland, at least for a transition period of one or two years (on reliance on personal care, see: Federal Administrative Court, judgment of 18 April 2013 – 10 C 10.12 – BVerwGE 146, 198 para. 37 – 39).

39 c) So far as concerns the Complainant's relationship to his now-adult daughter, it is not evident from the record that any such contact still exists, or whether she is even resident in the Federal Republic. There is furthermore no reason to believe that the ban on re-entering the Federal Republic might affect a still-existing relationship between the Complainant and his sister and father, both of whom live in the Federal Republic.

40 d) With respect to the Complainant's ties to Germany, it will have to be taken into account that the Complainant has not lived in the Federal Republic for more than 14 years now. His expulsion from the Federal Republic, at the time, also took place at his own instigation, presumably because he thereby intended to pre-empt the confinement in a psychiatric institution ordered by Stuttgart Regional Court. Furthermore, the Complainant is not a member of the group of second-generation immigrants whose ties to the Federal Republic should be given special consideration. He was born in Poland and grew up there until the age of 16, after all.

41 4. The disposition as to costs is reserved for the final decision.

Prof. Dr. Berlit Prof. Dr. Dörig Prof. Dr. Kraft

Fricke Dr. Rudolph

D e c i s i o n   a n d   O r d e r

The value of the matter at issue is set at €5,000 for the present proceedings (section 47 (1) in conjunction with section 52 (2) Court Costs Act).

Prof. Dr. Berlit Prof. Dr. Dörig Prof. Dr. Kraft