



MEPs  
Petitions Committee  
European Parliament  
Rue Wiertz 60  
B – 1047 Bruxelles

Paris, 25 February 2015

Dear MEPs,

On 16 January of this year, the European Parliament adopted a resolution in plenary session on "respect for the fundamental right of free movement". In this resolution, the Parliament reiterated, as the Court of Justice has, that the free movement of EU citizens is a “fundamental freedom”, the cornerstone of European integration, at the heart of the concept of citizenship of the European Union.

This freedom is not without limits. As you have pointed out in the above-mentioned resolution, and as co-legislator through the adoption of the Directive 2004/38/EC, it must be exercised within the limits imposed by legislation. Among those limits is the notion of a "threat to public order". This is an old concept in EU law already contained in the Directive of 25 February 1964 (now repealed), Article 3 of which stated:

*“1. Measures taken on grounds of public order or of public security shall be based exclusively on the personal conduct of the individual concerned.*

*2. Previous criminal convictions shall not in themselves constitute grounds for the taking of such measures.”*

The Court of Justice started to provide guidance for the application of this concept by the national authorities of the Member States. The public order reservation may only be invoked in the presence of a “genuine, present and sufficiently serious threat”, and the existence of this threat must be based on the personal conduct of the person concerned, which

must be assessed on an individualised basis. The assessment of this concept must be restrictive, so as not to impair the exercise of this fundamental freedom.

Other limitations are also provided, in particular when it comes to students or persons not engaged in economic activities. If such persons want to stay beyond a period of three months in the territory of the host Member State, they must have sufficient resources and comprehensive health insurance. In these cases, the competent national authorities must assess their individual situations and can only terminate the stay of these people when they constitute an “unreasonable burden” on the welfare system of the host country.

In recent years, several Member States have expressed, either by the adoption of national legislation or through public speeches, their desire to see the freedom of movement restricted further. Such was the case of the joint initiative of the Interior Ministers of Germany, Austria, the UK and the Netherlands addressed to the Presidency of the Council in April 2013, in which they expressed their view that nationals of other Member States were abusing the freedom of movement to receive benefits and proposed to amend existing laws to provide for stronger sanctions, such as banning return after an expulsion.

France did not take part in this initiative. Nevertheless, it has for a long time adopted legislation which at first sight complies with EU law but whose implementation appears incompatible with EU law. This is the case of the introduction into French law of the concept of “abuse of rights” that we will discuss later on, or the interpretation by the administration of the concept of a threat to public order that is “*genuine, present and sufficiently serious that is affecting a fundamental interest of society*”. We want to show that this interpretation is so broad that it now allows for the expulsion of a significant number of citizens or their detention with a view to expelling them, even when they do not represent a threat “*affecting a fundamental interest of society*”.

Two recent events confirm our fears:

First, Article 2 of the Law “*strengthening the provisions relating to the fight against terrorism*” (Law No. 2014-1353 of 13 November 2014) provides:

*“The Code on Entry and Residence of Foreigners and Asylum Right is amended as follows:*

*Administrative prohibition to enter territory*

*Art. L.214-1. - Any national of a Member State of the European Union, of another State party to the Agreement on the European Economic Area or the Swiss Confederation, or any member of the family of such person may, if they are not ordinarily resident in France and are not in the national territory, be subject to an administrative prohibition against entering the territory when their presence in France would pose, because of their personal conduct, and from the point of view of public order or public security, a genuine, present and sufficiently serious threat to a fundamental interest of society.*

As of the entry into force of this law, EU citizens considered to be such a threat can be the subject of an expulsion order and, in addition, be barred from returning to French territory. As the French administrative authorities interpret the notion of threat to public order in an

excessively broad fashion, the law will mean that those arrested for reasons such as theft, aggressive begging, or “ public charity fraud” and who are already expelled as a result could in the future be banned from returning to France, without at any time having taken part in any “terrorist” activities.

Secondly, a recent decision of the Conseil d'État dated 1 October 2014 shows that the free movement of EU citizens is at risk of being severely restricted. In this case, a person who was already known to the authorities, was arrested for "public charity fraud"<sup>1</sup>. The mother of four children, with only one in her care, she had no other means of existence than begging. According to the Conseil d'État, this woman in extreme poverty “*was a genuine, present and sufficiently serious threat to public safety, which is a fundamental interest of French society*” (CE, 1st October 2014, No. 365054). The highest administrative court also refused to submit a preliminary question to the ECJ on the definition of “*genuine, present and sufficiently serious threat affecting a fundamental interest of society*”.

Measures affecting the free movement of persons in France do not affect all nationalities of the Member States of the European Union. Indeed, the analysis of different decisions collected (see attached) reveals discrimination based either on the nationality or ethnicity, which is clearly contrary to Article 18 TFEU and Article 21(1) of the Charter of Fundamental Rights.

18 TFEU prohibits discrimination based on nationality when it happens in areas covered by the Treaty. The information gathered by the various signatory organisations reveals that Romanian and Bulgarian citizens are given expulsion decisions in much greater proportions than citizens of other EU Member States. It is in particular people designated as "Roma" who are the target of these measures. In September 2010, the Minister of Immigration, Eric Besson, said that during the first nine months of the year, 13,241 of the 21,384 foreigners deported from France were Romanian and Bulgarian nationals. Of these, over half were forcibly expelled and another half allegedly left France voluntarily through “assisted humanitarian return”.

As Human Rights Watch said in a report in September 2011: “[...], *in practice, the French authorities continue to target Roma EU citizens to send them away, often when they are evacuated from camps or squats, in a way that constitutes unlawful discrimination under European law and human rights*”<sup>2</sup>.

A few months later, in February 2011, the Immigration Minister announced that 70% of Roma camps considered “illegal” had been dismantled and 3,700 Roma people had been sent back to their country of origin.

Since then, the French authorities have not improved the situation. In 2012, the new government continued to forcibly expel Roma EU citizens from France. In 2011 and 2012, the ERRC counted at least sixty-six sets of OQTF notifications (obligations to leave the French

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<sup>1</sup>

This consist in soliciting, with others, payment of money by using false documents bearing the letterhead of a charity.

<sup>2</sup> Human Rights Watch, “France’s Compliance with the European Free Movement Directive and the Expulsion of Ethnic Roma EU Citizens”, a Briefing Paper Submitted to the European Commission in July 2011.

territory) of a collective nature. When he was Interior Minister, Manuel Valls said in the press that “*Roma are destined to return to Bulgaria and Romania*”. According to research by the ERRC and the League of Human Rights, in France, two times more people – mostly Roma – were evicted from their living quarters in 2013 compared to 2012.

In this poisonous atmosphere, Roma seem to be a particular target for OQTFs taken on the basis of public order or public security. It is of course not possible, for legal reasons, to keep ethnic data about persons in detention centres, but many NGO reports clearly show that a disproportionate number of people affected by this policy are of Roma origin<sup>3</sup>.

Furthermore, the French courts have long stifled lawyers who tried to invoke these arguments about expulsion and detention and have tried to secure a preliminary ruling from the ECJ. The European Court of Human Rights has recognised that the refusal to ask the ECJ for a preliminary ruling could constitute a violation of the right to a fair trial. In March 2013, the Administrative Court of Melun agreed to ask the ECJ for a preliminary ruling on the question of compliance procedures surrounding the expulsion measures, but the response is still awaited.

These are the reasons why we turn to the European Parliament, as part of the right of petition under Article 227 TFEU. We would like the Parliament to take whatever measure that seems appropriate, including an investigation to ensure that France, both in law and in administrative practice, respects the exercise of free movement by citizens of the European Union. This seems particularly necessary today because complaints have twice been filed with the European Commission, in July 2008 and October 2010, against France by some of the signatory associations, for similar violations of EU law. The Commission has merely thanked us for our “report” without undertaking any further steps.

After restating the main applicable legal provisions (I), we examine the expulsion measures (II) and how they mainly target Romanians and Bulgarians (III). We also discuss how the French authorities use detention to proceed with the effective expulsion of these citizens of the European Union (III).

## **I. Presentation of the relevant provisions**

### **A. The provisions of the law of the European Union**

The main provisions of the law of the European Union are:

#### **\*Treaty on the Functioning of the European Union**

##### **Article 18**

(Former Article 12 TEC)

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<sup>3</sup>See : “*We ask for justice*”: *Europe’s failure to protect Roma from racist violence*, Amnesty International report, Avril 2014, and Human Rights Watch, “*France’s Compliance with the European Free Movement Directive and the Expulsion of Ethnic Roma EU Citizens*”, a Briefing Paper Submitted to the European Commission in July 2011.

Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination.

## **Article 20**

(Former Article 17 TEC)

1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the European Union. Citizenship of the European Union shall be additional to and not replace national citizenship.

2. Citizens of the European Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:

- (a) the right to move and reside freely within the territory of the Member States;
- (b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;
- (c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;
- (d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the European Union in any of the Treaty languages and to obtain a reply in the same language.

These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.

## **Article 21**

(Former Article 18 TEC)

1. Every citizen of the Union shall have the right 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.

2. If action by the Union should prove necessary to attain this objective and the Treaties have not provided the necessary powers, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1.

3. For the same purposes as those referred to in paragraph 1 and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative

procedure, may adopt measures concerning social security or social protection. The Council shall act unanimously after consulting the European Parliament.

## **Article 22**

(Former Article 19 TEC)

1. Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.

2. Without prejudice to Article 223(1) and to the provisions adopted for its implementation, every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.

**\*DIRECTIVE 2004/38/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC**

## **Article 7**

### **Right of residence for more than three months**

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

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

to become a burden on the welfare system of the host Member State during their period of residence; or

(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c).

3. For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:

(a) he/she is temporarily unable to work as the result of an illness or accident;

(b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office;

(c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months;

(d) he/she embarks on vocational training. Unless he/she is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment.

4. By way of derogation from paragraphs 1(d) and 2 above, only the spouse, the registered partner provided for in Article 2(2)(b) and dependent children shall have the right of residence as family members of a Union citizen meeting the conditions under 1(c) above. Article 3(2) shall apply to his/her dependent direct relatives in the ascending lines and those of his/her spouse or registered partner.

## **Article 14**

### **Retention of the right of residence**

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

2. Union citizens and their family members shall have the right of residence provided for in Articles 7, 12 and 13 as long as they meet the conditions set out therein. In specific cases where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfies the conditions set out in Articles 7, 12 and 13, Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically.

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

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

(a) the Union citizens are workers or self-employed persons, or

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

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

## **Article 27**

### **General principles**

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

2. Measures taken on grounds of public order or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.

The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.

3. In order to ascertain whether the person concerned represents a danger for public order or public security, when issuing the registration certificate or, in the absence of a registration system, not later than three months from the date of arrival of the person concerned on its territory or from the date of reporting his/her presence within the territory, as provided for in Article 5(5), or when issuing the residence card, the host Member State may, should it consider this essential, request the Member State of origin and, if need be, other Member States to provide information concerning any previous police record the person concerned may have. Such enquiries shall not be made as a matter of routine. The Member State consulted shall give its reply within two months

4. The Member State which issued the passport or identity card shall allow the holder of the document who has been expelled on grounds of public order, public security, or public health from another Member State to re-enter its territory without any formality even if the document is no longer valid or the nationality of the holder is in dispute.

## **Article 28**

### **Protection against expulsion**

1. Before taking an expulsion decision on grounds of public order or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.

2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public order or public security.

3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:

- (a) have resided in the host Member State for the previous ten years; or

(b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989.

## **B. Relevant provisions of French law**

French law distinguishes between three types of expulsion measures:

- **Judicial prohibitions on staying in France**, which are imposed either primarily, or following a term of imprisonment, in criminal cases (see, mainly, Articles 130-30 and following of the Criminal Code);

- **Administrative measures**, taken either by the Minister of Interior or the Préfet, his representative at departmental level, in cases of **serious threats to public order** (Article L.521-1 to L.524-4 of the Code of Entry and Stay of Foreigners and of Asylum - CESEDA thereafter) ;

- **Measures taken by the Préfet** requiring foreigners to leave France: these are the “obligations to leave French territory”, hereafter OQTFs, which are governed by the Article L. 511-3-1 of the CESEDA for citizens of the European Union.

Article L. 511-3-1 was introduced in the CESEDA by Act No. 2011-672 of 16 June 2011 on immigration, integration and nationality (French Official Gazette No. 0139 of 17 June 2011, p. 10290).

This new provision is in theory intended to implement the fundamental guarantees provided by the laws of the Union in the event of expulsion, including, notably, the following protection: *“The competent administrative authority shall take into account all of the circumstances of her/his situation, including the length of stay of the person concerned in France, their age, state of health, family and economic situation, its social and cultural integration in France, and the intensity of her/his links with the country of origin”*. However, the French legislator decided in parallel to extend the circumstances in which an expulsion decision may be taken, in particular through the concept of “abuse of rights” (see below).

Please note finally that Prefectures may grant a period for voluntary departure or, conversely, accompany the OQTF with an administrative detention order, as defined by Articles L. 551-1 to L. 554-3 of the CESEDA.

### **\* Article L. 511-3-1 of the CESEDA**

The competent administrative authority may, by a reasoned decision, force a national of a Member State of the European Union, of another State party to the Agreement on the European Economic Area or the Swiss Confederation, or a member of his family to leave French territory if it finds:

1. The person **can no longer demonstrate a right of residence** as provided by Articles L.121, L.121 3 or L.121-4-1;

2. Or if **the stay constitutes an abuse of rights**. Renewing stays of less than three months in order to remain in the territory when the conditions for a stay of more than three months are not met constitutes an abuse of rights. It also constitutes an abuse of rights if the primary aim of staying in France is to benefit from the welfare system;

3. Or that during the period of three months from the entry into France, her/his conduct constitutes a **genuine, present and sufficiently serious threat to a fundamental interest of French society**.

The competent administrative authority shall take into account all of the circumstances of her/his situation, including the length of stay of the person concerned in France, their age, state of health, family and economic situation, social and cultural integration France, and the intensity of her/his links with the country of origin.

The foreigner must leave French territory, within a period which cannot be less than thirty days from the notification, except in emergency situations. In exceptional cases, the administrative authority may grant a period of voluntary departure above and beyond thirty days.

The OQTF indicates the country to which the person will be sent back, in case of forced expulsion.

Articles L. 512-1 to L. 512-4 apply to measures taken under this Article.

[The articles referred to in Article L. 511-3-1, 1 of CESEDA are:]

**\*Article L. 121-1 of the CESEDA**

Unless her/his presence is a threat to public order, any citizen of the European Union, or any national of another State party to the Agreement on the European Economic Area or the Swiss Confederation, has the right to stay in France for more than three months if she/he meets one of the following conditions:

1. If she/he carries on a professional activity in France;
2. If she/he has for her/himself and members of her/his family as referred to in 4 sufficient resources to avoid becoming a burden on the welfare system, and has health insurance;
3. If she/he is enrolled in an institution operating in accordance with laws and regulations in force in order to get, as a principal activity, an education or, in this context, vocational training, and provides guarantee to having health insurance and sufficient resources for her/him and for his family as referred to in 5° in order not to become a burden on the welfare system;
4. If she/he is a direct descendant under the age of twenty-one years, or a dependent direct ascendant, spouse, direct ascendant or descendant dependent on a spouse, accompanying or joining a national who meets the conditions of 1 or 2;
5. If she/he is a spouse or a dependent child accompanying or joining a national who meets the conditions set out in 3.

### **\*Article L. 121-3**

Unless her/his presence is a threat to public order, the family member referred to in 4° or 5° of Article L. 121-1 has the right to stay on the entire French territory for more than three months, dependent on the situation of the person she/he accompanies or joins who is a national of another State.

If she/he is over the age of eighteen or is at least sixteen years old when she/he wants to pursue a professional activity, she/he must have a residence permit. This card, which is valid for the intended duration of stay of the Union citizen within five years, bears the mention "Residence card of the family member of a citizen of the Union". Except in cases of transitional measures applicable to State of her/his nationality foreseen in the Treaty of Accession to the European Union, this card gives the holder the right to exercise a professional activity.

### **\*Article L. 121-4-1**

As long as they do not become an unreasonable burden on the welfare system, citizens of the European Union and nationals of another State party to the Agreement on the European Economic Area or the Swiss Confederation, as well as their family members as defined in 4 and 5 of Article L. 121-1, have the right to stay in France for a maximum period of three months without any conditions or formalities for entry into France.

[Regarding the placement in administrative detention, the Immigration Code provides:]

### **\*Article L. 551-1**

Unless she/he is under house arrest in application of Article L.561-2, a foreigner who cannot immediately leave the French territory can be detained by the administrative authorities in premises not managed by the prison administration for a period of five days, when the foreigner:

1. Must be remanded to the competent authorities of a Member State of the European Union pursuant to Articles L.531-1 and L.531-2;
2. Is the subject of an expulsion order;
3. Must be expelled from the territory pursuant to a judicial expulsion order under the second paragraph of Article 131-30 of the Criminal Code;
4. Is the subject of an alert for the purpose of refusing entry to the territory or of an enforceable expulsion order referred to in Article L.531-3 of this Code;
5. Is the subject of an expulsion order issued less than three years ago under Article L.533-1;
6. Is under an obligation to leave French territory (OQTF) taken less than a year before and for which the deadline to leave the country has expired or was never granted;
7. Must be forcibly taken to the border for the enforcement of a ban to return;
8. Having been the subject of a detention order under paragraphs 1-7, did not comply with an expulsion measure within seven days of the end of her/his previous detention or,

having complied with an expulsion measure, has returned to France while this measure is still enforceable.

## **II. Measures for the expulsion of European Union citizens**

The deportation of nationals of a European Union Member State from the territory of another State is strictly regulated by the laws of the European Union.

As set out below, the French Prefects nonetheless take expulsion measures based knowingly on an incorrect interpretation on the threat to public order (A), an alleged lack of resources (B) or an often unproven abuse of rights (C). These measures therefore do not comply with EU law.

### **A. Expulsion for alleged threat to public order**

The French authorities issue expulsion measures to citizens of the European Union based on an alleged threat to public order in cases where the threat is non-existent or far from meeting the requirements of the law of the European Union.

#### **1. The law**

Articles 27 and following of Directive 2004/38/EC govern the expulsion of EU citizens from other Member States for reasons of public order, public security or public health. According to Article 27, a citizen of the European Union may be removed on this basis only if she/he represents “*a genuine, present and sufficiently serious threat to a fundamental interest of society*”. According to Article 28 of the Directive, this decision must be proportionate to the objective pursued, taking into account the particular situation of the person subject to expulsion. Section 52 (1) of the Charter of Fundamental Rights states that “*any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. In accordance with the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.*”

The case law of the Court of Justice is clear on this point: the provisions of the Directive allowing expulsion must be interpreted “in a narrow way” (ECJ, 19 January 1999, Case C- 348/96 *Calfa*, § 23). An expulsion measure taken by the authorities of a Member State only complies with the law of the European Union if the applicant's personal behaviour is likely to represent an “*actual threat to public order*” (*Calfa*, § 24).

In addition, the European Commission has set out in detail the underlying principles of the legislation of the European Union and the case law of the Court of Justice<sup>4</sup>. The Commission emphasises in particular the distinction that must be made between public order and public safety:

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<sup>4</sup> Communication from the Commission to the European Parliament and The Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the European Union and their family members to move and reside freely within the territory of the Member States (COM/2009/0313 final).

*“Public security is generally interpreted to cover both internal and external security along the lines of preserving the integrity of the territory of a Member State and its institutions.*

*Public order is generally interpreted along the lines of preventing disturbance of social order.”*

The Commission also notes that expulsion should be based on the individual's personal behaviour:

*“Community law precludes the adoption of restrictive measures on general preventive grounds. Restrictive measures must be based on an actual threat and cannot be justified merely by a general risk. Restrictive measures following a criminal conviction cannot be automatic and must take into account the personal conduct of the offender and the threat that it represents for the requirements of public order. Grounds extraneous to the personal conduct of an individual cannot be invoked. Automatic expulsions are not allowed under the Directive.”*

It also elaborates on the terms “threat”, “genuine” and “current”:

*“Individuals can have their rights restricted only if their personal conduct represents a threat, i.e. indicates the likelihood of a serious prejudice to the requirements of public order or public security.*

*A threat that is only presumed is not genuine. The threat must be present. Past conduct may be taken into account only where there is a likelihood of reoffending. The threat must exist at the moment when the restrictive measure is adopted by the national authorities or reviewed by the courts. Suspension of sentence constitutes an important factor in the assessment of the threat as it suggests that the individual concerned no longer represents a real danger.”*

In its communication, the European Commission also addressed the issue of petty crime, including in cases where it is recurrent:

*“In certain circumstances, persistent petty criminality may represent a threat to public order, despite the fact that any single crime/offence, taken individually, would be insufficient to represent a sufficiently serious threat as defined above. National authorities must show that the personal conduct of the individual concerned represents a threat to the requirements of public order. (...) The existence of multiple convictions is not enough, in itself.”*

All of these requirements should be read into Article L.511-3-1,3 of CESEDA, which provides that an OQTF can only be contemplated against a citizen of the European Union if “during the period of three months from the entry into France, his conduct constitutes a genuine, present and sufficiently serious for a fundamental interest of French society”.

A person who has been the subject of a criminal conviction is not systematically a serious danger to the fundamental interests of society. However, the practices of the French administrative authorities ignore this.

## **2. In practice**

The French authorities routinely violate the principles set out directly above by making expulsion orders against citizens of the European Union who, although they were the subject of a criminal conviction, do not pose a threat to the fundamental interests of French society.

Our organisations have identified a number of practices that can be grouped into four categories. None are consistent with the principles and rules of the law of the European Union or French legislation.

Category 1: A number of OQTFs are based on the mere assertion of an alleged threat to public order, with no detail given.

Category 2: Some OQTFs are made based on facts that are not punishable under criminal law.

Category 3: Many OQTFs are based on suspicion of the commission of offences, but did not lead to any criminal prosecution.

Category 4: Some OQTFs are made because of events leading to a minor criminal conviction, without the authorities demonstrating that the person's conduct constitutes a current, genuine and serious threat affecting a fundamental interest of society.

### **a. OQTFs based on mere assertion of a threat to public order**

Many decisions ordering a person to leave the French territory are based on general considerations of public order and include the mere mention of the existence of disorder or a threat to public order, without any circumstantial detail (*P.J. No.1, OQTF, Préfet of Eure-et-Loir, May 19, 2013: mention of questioning; P.J. No.2, OQTF, Préfet of Essonne, April 23, 2013: Single mention of questioning; P.J. No.3, OQTF, Préfet of the Hauts-de-Seine, April 12, 2013: mention of placement in custody*).

The violation of EU law in such cases is obvious.

### **b. OQTFs made for offences not punishable criminally**

French prefects base a number of OQTFs on facts that are not even covered by criminal law. On 9 July 2013, at least five Romanian nationals were placed in the Mesnil-Amelot detention centre, located near the Paris-Roissy-Charles-de-Gaulle airport (P.J. No. 4-8), having been given OQTFs without any period for voluntary departure. The Prefect of Maine-et-Loire considered that, due to the “*illegal occupation of a public domain*” via a squat, the conduct of these people was “*a genuine, present and sufficiently serious for the safety of goods and people, as well as to public health*”. The precarious living conditions in which these people are forced to survive are used as a basis to justify an alleged threat to public order, while French criminal law does not punish homelessness.

### **c. OQTFs based on mere suspicion**

The Prefects base many OQTFs on offences which, assuming they were actually committed, have not resulted in any criminal prosecution. These examples demonstrate that the French authorities are acting outside the scope of EU law.

These facts sometimes are not the subject of any police investigation and those arrested are not criminally prosecuted. The mere suspicion of the commission of a criminal offence, of course, is not sufficient to establish a genuine and serious threat to a fundamental interest of society within the meaning of EU law.

The Prefects refer to police reports, police questioning, or the fact of having been in custody, which do not in and of themselves demonstrate the existence of a genuine and sufficiently serious threat to a fundamental interest of society. Reliance on reports or questioning are found in many decisions (*P.J. No.9, OQTF, Seine-et-Marne, February 1, 2013; P.J. No. 10, OQTF, Seine-et-Marne, February 5, 2013 P.J. No.11, OQTF, Seine-et-Marne, March 11, 2013 (1st decision); P.J. No.12, OQTF, Seine-et-Marne, March 11, 2013 (the second decision); P.J. No.13, OQTF, Seine-et-Marne, March 11, 2013 (3rd decision); P.J. No.14, OQTF, Seine-et-Marne, April 4, 2013; P.J. No.15, OQTF, Seine-et-Marne, April 4, 2013*). Being held in custody and then released without prosecution may also suffice in the eyes of the French authorities (*P.J. No.16, OQTF, Hauts-de-Seine, February 6, 2013; P.J. No.17, OQTF, Hauts-de-Seine, April 3, 2013*).

At least 42 of the of the 63 people whose OQTFs were collected by Cimade between January and May 2013 were placed in the Mesnil-Amelot detention centre within 48 hours after having been arrested and/or detained in police custody (Annex 1 – Cimade, "Detention and Expulsion of Community nationals: the example of Mesnil-Amelot CRA (February-July 2013)" All these OQTFs had no period for voluntary departure, that is to say they were immediately enforceable.

Similarly, the ERRC, an association co-signing the present petition, has assisted in an appeal before the Conseil d'État for a Romanian woman arrested for "public charity fraud". The Prefect made an OQTF against the person concerned based on acts the Prosecutor decided not to prosecute. The Conseil d'État refused to quash the decision of the Court of Appeal that validated the OQTFs taken by the Prefect, considering that this person was, by her conduct, a genuine, present and sufficiently serious threat to public security, which is a fundamental interest of French society (CE, October 1, 2014, No.365054).

These examples perfectly illustrate the practices of the French Prefects, who base expulsion measures on mere suspicion, even though the people concerned are not brought before the criminal courts This practices allows deportations of a "general preventive nature", even though this is clearly prohibited by the law of the European Union, as the Commission firmly stated.

### **d. OQTFs based on a minor criminal conviction**

Many OQTFs are based on criminal convictions for minor offences. Indeed, when a criminal conviction is mentioned in the OQTF it is most often for less serious offences: theft, handling stolen goods, begging, and solicitation an offence that is in the process of being eliminated). These offences were sometimes only attempts, and if they were committed, it is usually due to necessity to meet the basic needs of the perpetrator. In any case, these facts do not amount a threat to public order so serious that the free movement of persons should be impeded. These are not serious crimes or offences, according to the approach of the criminal courts to these matters.

Very often, convictions cited by administrative decisions relate to very short prison terms. This shows that the criminal courts found that the accused was not a serious threat to public order (*P.J. No.18, OQTF, Val-de-Marne, January 29, 2013: sentenced to four months' imprisonment in a case of theft aggravated by three circumstances; the maximum penalty for this offence is 10 years; P.J. No.19, OQTF, Val-de-Marne, February 8, 2013: sentenced to three months' imprisonment in a case of sexual exhibitionism; the maximum penalty for this offence is one year*).

In addition, a reference to repeat offences is frequently made. However, the contents of criminal judgments show the repeated offence concerned does not amount to a grave and serious threat. In some of the cases, the criminal, in a specially reasoned decision, refused to apply the minimum sentence for repeat offences required by, Articles 132-18-1 and 132-19-1 of the Penal Code in force from 10 August 2007 and until 30 September 2014. The criminal court could only decide to impose a lower sentence "*in consideration of the circumstances of the offence, the personality of the offender or the guarantees for her/his integration or reintegration*." These were obviously exceptions that had to be justified by the absence of threat to public order.

It is therefore legally inconsistent that a number of decisions to expel EU citizens have been taken because of convictions for repeat offences, as if the mention of repeat offence could in itself constitute a threat to public order. The fact that criminal judges imposed sentences that were below the thresholds required by law at that time, deciding that the minimum punishment was not necessary due to the circumstances of the offence, the personality of the offender, or her/his promise to integrate, is sufficient to demonstrate that, by definition, there was no serious threat to public order (*P.J. No.20, OQTF, Evry, January 28, 2013: mention of a repeat conviction for theft with a 15-days prison sentence, while the minimum sentence is normally one year; P.J. No.21, OQTF, Créteil, January 29, 2013*).

### **B. The expulsion for lack of resources**

The French authorities base many expulsion orders on an alleged lack of resources in cases where the person is not a burden on the welfare system.

## **1. The law**

Article 7 of Directive 2004/38/EC provides for four cases in which a Union citizen may reside in the territory of another EU Member State for more than three months. One of these cases concerns persons not engaged in a professional activity but with sufficient resources, provided that she/he does not become an unreasonable burden on the welfare system and has comprehensive sickness insurance [Article 7 (1) (b)].

However, the Directive does not specify that an EU citizen can be automatically expelled in cases where these conditions are not met.

Only Article 14 of Directive refers to expulsion in these circumstances, straight away ruling it out as a result of individuals merely having recourse to social assistance (paragraph 3):

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

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

***3. An expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the welfare system of the host Member State.”***

The Directive therefore provides for the expulsion of EU citizens in another Member State when they do not have a right to stay only in extremely limited circumstances, which is right, given the general principle of EU law that any freedom under the Treaty, such as the freedom of movement, must be interpreted extensively and any limitations to this principle must be applied strictly.

In any case, Article 14 protects EU citizens from the risk of being expelled in a “systematic” way and asserts that such a measure may in no event “*be the automatic consequence of a Union citizen's or his or her family member's recourse to the welfare system of the host Member State*”.

Please note that this provision has not been transposed into French law. The fact remains that it has a direct effect since it is formulated in terms sufficiently clear, precise and unconditional to be applied as is by administrations and national courts.

The Court of Justice of the European Union, meanwhile, has clarified the legality of the expulsion of EU citizens in cases where they do not have sufficient resources. The Court declared:

*“It should be added that it remains open to the host Member State to take the view that a national of another Member State who has recourse to social assistance no longer*

fulfils the conditions of his right of residence. In such a case the host Member State may, within the limits imposed by Community law, take a measure to remove him. However, recourse to the welfare system by a citizen of the Union may not automatically entail such a measure.” (ECJ, 7 September 2004, Case C-456/02 *Trojani*, §45).

More recently, it reiterated its position:

“Since the extent of needs can vary greatly depending on the individuals, that authorisation must, moreover, be interpreted as meaning that the Member States may indicate a certain sum as a reference amount, but not as meaning that they may impose a minimum income level below which all family reunifications will be refused, **irrespective of an actual examination of the situation of each applicant.**” (ECJ, 4 March 2010, Case C-578/08, *Chakroun*, § 48).

In addition, according to recital 16 of Directive 2004/38, when determining whether the recipient of a social assistance benefit is an unreasonable burden on the welfare system of the host Member State, **this Member State should, before taking an expulsion decision, examine whether it is a case of temporary difficulties and take into account the duration of residence, the personal circumstances of the recipient, and the amount of aid granted.**

Third and finally, “it should be borne in mind that, since the right to freedom of movement is – as a fundamental principle of EU law – the general rule, **the conditions laid down in Article 7(1)(b) of Directive 2004/38 must be construed narrowly**” [excerpts highlighted by the authors] (ECJ, 19 September 2013, Case C-140/12, *Brey*, § 68-70).

The European Commission stressed this point in its guidelines to the Member States of the Union: “Only the receipt of social assistance benefits can be considered relevant in determining whether the person concerned is a burden on the welfare system.”<sup>5</sup>

Expulsion in these circumstances is a possibility for Prefects to consider, and by no means a legal obligation for them to enforce.

## **2. In practice**

Prefectures, as well as the French courts, stubbornly ignore this binding case law and the official guidelines. Thus, the Conseil d’État held that “the lack of resources can be relied on by the Préfet to make an expulsion order against a national of a Member State of the European Union, even though the person is not yet actually supported by the welfare system”. (CE, 6th and 1st subsections together, 26 November 2008, No.315441). This interpretation, although clearly incompatible with EU law, was restated by the Conseil d’État (CE, 6th and 1st subsections together, April 24, 2013, No.351460), and is followed by lower administrative courts.

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<sup>5</sup> Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the European Union and their family members to move and reside freely within the territory of the Member States (COM/2009/0313 final) <http://www.ipex.eu/IPEXL-WEB/dossier/files/download/082dbcc530b1bf490130bbcdca9f6c11.do>

In addition, in four OQTFs of which Cimade became aware, the fact that a person was begging for a living was used to prove the lack of sufficient resources to avoid becoming a burden on the welfare system (see P.J. No. 4, 5, 7, 8).

We note the difficulty of some Prefects who are conscious of the strict framework governing potential expulsion measures that may be taken on the ground of insufficient resources. Indeed, a number of these decisions are justified in flimsy and contradictory ways. The Prefectorial authorities have held, for example, that a person “*does not have sufficient resources to avoid becoming a burden on the welfare system and do not have health insurance*”, whilst also finding that person arrested for theft but not prosecuted, poverty threat to public order, refusing to accept that the alleged theft may have been based on poverty (necessity defence).

The Prefect assumes powers belonging only to the criminal courts. Only the latter are entitled to rule whether or not there is a state of necessity justifying the commission of an offence. However, the criminal court is not given the opportunity to rule on these minor cases involving poor people. Their poverty means that they are spared criminal justice but instead found guilty by Prefects and expelled (see P.J. No.22, OQTF, Seine-et-Marne, 21 May 2013; P.J. No.23, OQTF, Seine-et-Marne, 22 May 2013; P.J. No.24, OQTF, Seine-et-Marne, 10 June 2013).

### **C. Abuse of rights**

#### **1. Under the laws of the European Union**

The application and interpretation of this notion carried out at the national level by Prefects and administrative courts are clearly incompatible with EU law and the jurisprudence of the Court of Justice of the European Union.

In the landmark case *Emsland-Stärke*, the Court considered that the existence of an abusive practice is the result of a combination of objective circumstances showing that, despite formal observance of the conditions laid down by EU law, the objective pursued by those rules has not been achieved. Furthermore, there must be a subjective element revealing the intention to obtain an advantage under EU law by artificially creating the conditions required for obtaining it (ECJ, 14 December 2000 Case C-110/99 *Emsland-Stärke*).

In that case, the Court identified two components of the concept of abuse of rights: the objective circumstances that demonstrate that the objective pursued by the legal norm was not met, and a subjective component, consisting of the intention of the individual to invoke the provisions of EU law fraudulently.

As one commentator has said, “*under the principle of procedural autonomy, it is for Member States to decide what action to take in case of abuse of rights. This has been amply confirmed by the case law which requires however that the chosen measure is proportionate and justified by the aim pursued. The Court has framed this procedural autonomy quite extensively, requiring a case-by-case assessment of the situations that involved conducts that*

*may be deemed abusive and an assessment based on objective evidence. The Court excludes any general presumption of fraud and any national measure of a general nature”.*<sup>6</sup>

Subsequently, in the Opinion for the *Akrich* case<sup>7</sup>, Advocate General L.A. Geelhoed conducted an analysis of abuse of EU law. On the basis of the extensive case law of the Court, he admits that the freedom of movement under the Treaty does not prevent Member States from taking the necessary measures to prevent the misuse of this freedom. This flexibility reserved to Member States is nevertheless limited. The implementation of such national measures must not “*prejudice the full effect and uniform application of Community law in the Member States*”<sup>8</sup>. He recalled that a Member State may apply its own legislation on immigration for overriding reasons of general interest, such as the effective implementation of this legislation, as long as the restriction on the free movement of persons is found appropriate and proportionate<sup>9</sup>. Thus, the Advocate General concluded that “*In other words, the installation of a worker in another Member State in order to benefit from a more favourable legal system is by its nature not a misuse of Community law*”<sup>10</sup>.

## **2. In France**

Article L. 511-3-1 of the CESEDA provides that an abuse of rights is one of the bases on which an expulsion may be decided against a national of a Member State of the European Union:

*“The competent administrative authority may, by reasoned decision, force a national of a Member State of the European Union, of another State party to the Agreement on the European Economic Area or the Swiss Confederation, or a member of his family to leave French territory if it finds:*

[...]

*2. Or if the stay constitutes an abuse of rights. The fact of renewing stays of less than three months in order to remain on the territory when the conditions for a stay of more than three months are not met constitutes an abuse of rights. Stay in France with the primary aim to benefit from the welfare system also constitutes an abuse of rights; [...]*

*The competent administrative authority shall take into account all of the circumstances of her/his situation, including the length of stay of the person concerned in France, their age, state of health, family and economic situation, social and cultural integration France, and the intensity of its links with the country of origin”.*

As already explained, this provision was introduced into French law by Law No.2011-672 of 16 June 2011 on immigration, integration and nationality (French Official Gazette No. 0139 of 17 June 2011, p. 10290). It is the result of a compromise reached by the European Commission and the French government following the controversy of August 2010,

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<sup>6</sup> “The Court of Justice of the European Communities and the general principles of Community law; the example of the general principle of the prohibition of abuse of rights”, Raluca Nicoleta Ionescu.

<sup>7</sup> Opinion of Advocate General Mr. L. A. Geelhoed delivered on 27 February 2003, Case C-109/01, Secretary of State for the Home Department v Hacene Akrich ; See also ECJ, 23 September 2003, Case C-109/01.

<sup>8</sup> Pt. 100 of the opinion.

<sup>9</sup> Pt. 148 of the opinion.

<sup>10</sup> Pt. 181 of the opinion.

initiated by the former President of the Republic during his famous speech on 30 July 2010 in Grenoble.

On 5 August 2010 the ministerial circular on the requirements for the evacuation of illegal camps was published. On 18 August 2010, the European Commission, through its Commissioner for Fundamental Rights and Citizenship, Viviane Reding, publicly expressed its concern about the events that took place in France and the announcement of the imminent expulsion, before the end of the month, of 700 Romanian citizens belonging to the Roma minority. The Commission also stressed that France must respect the basic rules on the freedom of movement and residence of European citizens.

The French government had pledged, following the demands of the Commission, to complete the transposition of Directive 2004/38/EC of 29 April 2004 and consolidate the guarantees granted to citizens of the Union subject to an expulsion. For the Commission, the French legislation was not clear enough.

#### **a. Legislative reform**

The following provision was supposed to complete the transposition of the Directive, as described directly above:

*“The competent administrative authority shall take into account all of the circumstances of her/his situation, including the length of stay of the person concerned in France, their age, state of health, family and economic situation, social and cultural integration France, and the intensity of its links with the country of origin”.*

The French legislator nevertheless seized the opportunity to expand the cases in which the Prefect could make an expulsion order and created the new ground of “abuse of rights”.

Two scenarios are covered by the concept of abuse of rights:

- renewing stays of less than three months in order to remain in the territory where the conditions required for a stay of more than three months are not met;
- staying in France primarily for the purpose of benefitting from the welfare system.

During the parliamentary debate, the Minister of the Interior in office, Brice Hortefeux, stated quite explicitly that it was at the request of the European Commission that the concept was integrated into the internal regulations. However, the Commission had demanded the introduction of measures to guarantee the effective exercise of the rights of European citizenship, and had not made any comments about this notion of abuse of rights, even if it is discussed in Article 35 of Directive 2004/38/EC, as follows:

*“Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31”.*

By the admission of Thierry Mariani, the rapporteur of the bill in the National Assembly, *“this provision, I admit, is much more difficult to implement”*. Indeed, what is meant by *“renewing stays of less than three months in order to remain on the territory where the conditions required for a stay of more than three months are not met”*? Should a citizen of the EU therefore refrain from making use of her/his fundamental freedom of movement at the risk of being confronted with the notion of abuse of rights by the French authorities? Moreover, the free movement of persons, which, as the ECJ has emphasised, is a fundamental freedom, does not come from the Directive 2004/38/EC, but directly from the Treaty. The Directive is intended only to clarify the procedures for the exercise of a right of residence in the territory of the host Member State beyond three months.

It should also be noted that, according to Article L. 121-4-1 of the CESEDA:

*“As long as they do not become an unreasonable burden on the welfare system, citizens of the European Union, nationals of another State party to the Agreement on the European Economic Area, or of the Swiss Confederation, and members of their families as defined in 4 and 5 of Article L.121-1, have the right to stay in France for a maximum period of three months without any conditions or formalities as laid down for the entry on French territory”*.

The legislator has therefore provided for situations where an expulsion measure against a citizen of the Union can be taken:

- if the person has been present in France for less than three months and constitutes an unreasonable burden on the welfare system (Article L. 121-4-1, which was already in the CESEDA in the “regulatory” section and article L. 511-3-1,1);
- if the person is present in France for less than three months and makes round trips in order not to have to demonstrate that she/he meets the requirements for legal residence in France (Article L. 511-3-1 , 2);
- if the person stays only in order to benefit from the welfare system (Article L. 511-3-1, 2).

The person may in addition be subject to an obligation to leave the country if she/he does not meet the conditions required for a stay of more than three months, namely the exercise of a professional activity or, if inactive, the possession of sufficient resources and proof of comprehensive sickness insurance for her/himself and her/his family members (Article L. 511-3-1, 1°).

The parliamentary debates suggest that the introduction of the concept of abuse of rights in the French legislation was fully justified insofar as Article 35 of Directive 2004/38/EC allows national authorities *“to take all measures to refuse, terminate or withdraw any right conferred by the Directive in cases of abuse of rights or fraud”*.

However, the Prefects already had, under the legislation in force before the law of 16 June 2011, the possibility to terminate, cancel or withdraw the right of residence of a citizen of the Union, either during the three-month period when the stay put an unreasonable burden on the French welfare system, or beyond three months of presence in France when the person

does not, or no longer, fulfils the conditions imposed by EU legislation as transposed into national law.

The introduction of this new concept of abuse of rights was not at all necessary because access to most social assistance benefits in France is generally subject to proof of residence in France for more than three months. Affiliation to the sickness insurance system, also known as “basic universal health coverage” (article L. 380-1 and R. 380-1 of the Code of Social Security) and “State medical aid”, is based on the criterion of stable and regular residence - except for minors who benefit from this a right immediately upon arrival in France (Article L. 251-1 of the Code of Social Action and Families). The texts also provide a residence requirement of three months for access to the active solidarity income (“revenu de solidarité active”) (RSA, Article L.262-6 of the Code Social Action and Families) and the allowance for disabled adults (“l’allocation aux adultes handicapés”) (AAH, Article L. 821-1 of the Code of Social Security) for EU citizens who are neither workers nor treated as workers.

For other welfare benefits, such as social assistance for children or emergency accommodation, it is necessary to prove “habitual residence”, that is to say the intent to take up residence in France and not to stay merely transiently or temporarily.

In our view, the introduction of this new provision in the French legislation was unnecessary. Indeed, in circumstances similar to those invoked, the Prefect already had the legal tools to take similar decisions:

- Article L. 121-4 of CESEDA states that “Every citizen of the European Union, every national of another State party to the Agreement on the European Economic Area or the Swiss Confederation or their family members who cannot prove a right of residence under Article L.121-1 or article L.121-3 or whose presence poses a threat to the public order may, as the case requires, be refused the right to stay, be the object of a refusal to be granted residence, a refusal to issue or renew a residence permit or withdrawal thereof, as well as being subject to an expulsion measure as provided in Book V”;
- Former Article L. 511-1, I of the same code provided, in the version prior to the law of 16 June 2011, that a citizen of the European Union could be subject to an OQTF if she/he did not meet the conditions of the right of residence under Article L. 121-1;
- Former Article R.121-3 of the CESEDA also provided that EU citizens could stay in France for a period of three months “*as long as they do not become an unreasonable burden on the welfare system*”. It was repealed by the Law of 16 June 2011 and replaced by the new Article L.121-4-1.

## **b. Interpretation by the national administrative judge**

As predicted by the rapporteur of the bill in the National Assembly, Thierry Mariani, the application and interpretation of this new concept can be tricky.

Here are several decisions which we are aware of made by administrative courts, some of which are clearly contradictory.

The administrative court of Lyons considers, for example, that:

*“limiting his consideration to the fact that the applicant’s living conditions are precarious and that he does not have any resources, without providing any precise evidence showing abuse of the social assistance system, the Prefect of the Rhone region has not established that Mr D’s stay in France constituted an abuse of rights under the provisions cited” (P.J. n° 25, TA Lyon, 2 mai 2012, n° 1200668, M. D).*

By a decision of 16 May 2012, the same court states as follows:

*“ [I]t is not demonstrated that the only previous visit of Mr. M, which incidentally ended about a year and a half before his last known entry into France, lasted less than three months and therefore the Prefect of the Rhone region provides no evidence to show that the applicant would have renewed several stays of less than three months; on the other hand, by merely stating that Mr M’s living conditions are precarious and that he does not have sufficient resources, the Prefect of the Rhone region does not provide sufficiently precise and objective evidence capable of establishing the reality of an intentional abuse of the welfare system, while the applicant alleges, without being effectively contradicted in defence, that he does not receive any benefit, given the duration of his stay of less than three months” (P.J. No.26, TA Lyon, May 16, 2012 , No. 1,201,114, M. M).*

Similarly, the Administrative Court of Lille is satisfied that:

*“In order to force Ms A to leave the country on the basis of the provisions of paragraph 2 of Article L. 511-3-1 of the CESEDA, the Prefect of the Northern Region relied, in the impugned decision, on the fact that: she had said during her hearing by the police on 21 November 2011 that she was making frequent trips between France and Bulgaria; she did not have any professional activity; she did not provide evidence that she had sufficient income to avoid becoming a burden on the French welfare system; and she did not have health insurance; such evidence, however, is insufficient to consider that the presence of Mrs A in France would constitute an abuse of rights” (P.J. No.27, TA Lille, September 26, 2012, No. 1203287, Mrs A).*

The cases of some Administrative Courts of Appeal are more nuanced. Thus, for the Administrative Court of Appeal of Douai has found:

*“The mere fact that the person concerned has made frequent return trips between France and Romania is not sufficient to establish that the recipient has organised short breaks and movements to be able to remain illegally on French territory without fulfilling the conditions for a stay of more than three months” (P.J. No.28, CAA Douai, October 25, 2012, No. 13DA00853, Mr. F).*

Similarly, the Administrative Court of Appeal of Lyon believes that:

*“The mere fact that Ms M had declared on 27 July 2012 that she wanted to ‘make a return trip to Romania but not at the same time as her husband to avoid losing the room’ [in emergency accommodation], and that she declared on 26 October 2012, after the expulsion measure in dispute, that she went back to Romania on 24 August 2012 before returning to France on 31 August 2012, does not suffice to conclude that she was renewing stays in France of less than three months in the absence of any document or declaration confirming the existence of several trips of this person between France and Romania prior to 2 August 2012, particularly given that she was the subject of two obligations to leave the French territory, on 1 October 2008 and 25 September 2009, and has benefited from assisted voluntary return in the first expulsion, the return decisions both being motivated by the fact Mrs M did not demonstrate that she had been in France for less than three months”* (P.J. No. 29, CAA Lyon, May 30, 2013, No. 12LY02929). Therefore the Prefect could not legally make a decision on the basis of paragraph 2 of Article L.511-3-1 of the CESEDA.

However, the same court considers that the concept of abuse of rights can be relied upon when a citizen of the European Union was in France with the primary aim to benefit from the welfare system. Such is the case when she/he is seeking emergency accommodation and enjoys it for a long time (in this case, six months) for an estimated daily cost of between 20 and 34 euros per person. The person has therefore used this system and thus constituted an unreasonable burden on the welfare system.

In contrast, the Administrative Court of Appeal of Bordeaux considers that national provisions on abuse of rights

*“intend to [...] cover cases in which the repetition and frequency of stays of less than three months’ time in France reveal, on the part of a national of another Member State of the European Union who does not fulfil the requirements to stay in France longer than three months, her/his desire to remain in the territory to take advantage of the benefits reserved for long-term residents and particularly the French welfare system and care”* (P.J. No.30, CAA Bordeaux, October 30, 2012, No.12BX00601, 12BX00602, 12BX00603, 12BX00604, 12BX00605, Y and others).

Given these factors, it can be concluded that the French legislator has breached the law of the Union by considering that a citizen of the Union abuses her/his right when making round trips for the sole purpose of not having to demonstrate the required conditions for more than three months. This measure is generally not proportionate and exceeds the objective to be achieved, that is to say, to prevent Union citizens from drawing undue benefits from the exercise of this fundamental freedom, such as the payment of welfare benefits. Indeed, we have shown that, with the exception of social emergency accommodation, it is not possible to benefit from social assistance because the French legislation conditions these rights on a residence in France for a period exceeding three months.

### **III. The use of detention for expulsion purposes**

The statistics we have show that the French authorities extensively use detention for purpose of expelling citizens of the European Union (German, Belgian, Bulgarian, Spanish, Estonian, Hungarian, Italian, Lithuanian, Dutch, Polish, Portuguese, Romanian, Slovak, Slovene, and Czech). Bulgarian and Romanian nationals are particularly affected by

detention, which raises suspicions of discrimination contrary to Article 18 TFEU and recital 31 of Directive 2004/38.

However, the detention of citizens of the Union for the purpose of expulsion can only be considered compatible with the law of the European Union in exceptional cases (A). The procedural safeguards in place are particularly weak and do not meet the requirements of EU law (B). The reversal of the burden of proof imposed under national law is contrary to EU law (C).

## **A. The detention of citizens of the Union**

### **1. Under the laws of the European Union**

First, Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning third-country nationals is not applicable. This was pointed out by the Paris Court of Appeal in its judgment of June 7, 2012, confirmed by the First Civil Chamber of the Cour de Cassation (French Supreme Court) (Cass. 1st civ., November 6, 2013, case No. 12-16070).

In addition, Directive 2004/38/EC does not expressly permit the use of detention. It does provide a number of exceptions to the principle of the free movement of persons, including the ability to make expulsion orders, but does not cover placement in administrative detention. This Directive merely provides the possibility of making OQTFs with a period of voluntary departure (art.30, 3), which, by definition, appears to exclude the possibility of detention. Indeed, detention prevents people, who are then deprived of freedom, from organising their departure voluntarily.

The issue of compliance with the laws of the European Union in cases of detention for purposes of expulsion has been examined by the Court of Justice, in the case of a French national suspected of being unlawfully present in the Netherlands and against whom expulsion and detention measures had been adopted (ECJ, February 17, 2005, Case C-215/03, *Salah Oulane*). As specified by the Luxembourg Court, a detention order can only be based on an express exemption, such as Article 8 of Directive 73/148, which allows Member States to place restrictions on the right of residence of nationals of other Member States to the extent that they are justified on grounds of public order, public security or public health (paragraph 41 of the judgment). In this case, failure to present a valid ID or passport does not establish the existence of a genuine and serious threat to public order.

In this case, the conclusions of Advocate General Léger are illuminating (Conclusions Advocate General Léger, 21 October 2004, in particular paragraphs 91 and following). He considers that any measure of detention for the purpose of expulsion is, in itself, an obstacle to the free movement of citizens of the European Union. If it can possibly be justified on grounds of public order, only **“genuine and sufficiently serious threat to a fundamental interest of society”** will suffice. As an exception to the fundamental principle of free movement of persons, the use of detention must be applied **restrictively** by the Member States. The mere existence of a criminal conviction and, *a fortiori*, the mere suspicion of commission of a criminal offence, is not enough to pass the threshold required by the Court of Justice.

This applies to expulsion orders, and therefore *a fortiori* to detention measures taken to facilitate the execution of the expulsion decision.

## **2. In France**

French law does not contain specific provisions on the detention of citizens of the European Union. This makes sense since they would not have been considered consistent with the law of the European Union, which does not foresee such provisions.

In practice, Prefects apply the law applicable to third-country nationals, in particular Article L.551-1 of the CESEDA which provides:

*“Unless she/he is under house arrest in application of Article L.561-2, a foreigner who cannot immediately leave the French territory can be detained by the administrative authority in premises not managed by the prison administration for a period of five days, when the foreigner:*

- 1. Must be remanded to the competent authorities of a Member State of the European Union pursuant to Articles L.531-1 and L.531-2;*
- 2. Is the subject of a deportation order;*
- 3. Must be deported from the territory pursuant to a judicial expulsion order under the second paragraph of Article 131-30 of the Criminal Code;*
- 4. Is the subject of an alert for the purpose of refusing entry to the territory or an enforceable expulsion order referred to in Article L.531-3 of this Code;*
- 5. Is the subject of a deportation order issued less than three years ago under Article L.533-1;*
- 6. Is under an obligation to leave French territory taken less than a year before and for which the deadline to leave the country has expired or has not been granted;*
- 7. Must be forcibly taken to the border for the enforcement of a ban to return;*
- 8. Having been the subject of a detention order under 1 to 7, did not comply with an expulsion measure within seven days of the term his previous detention or, having complied with an expulsion measure, has returned to France while this measure is still enforceable”.*

Pursuant to Article L. 551-1 of the CESEDA, which provides no specific mechanism for citizens of the European Union, the French administrative authorities take decisions to place a person in administrative detention mainly based on OQTFs (6° of Article L. 551-1 of the CESEDA), which are themselves inconsistent with the law of the European Union simply because EU law prohibits any measure implemented within less than a month, with very few exceptions relating to public order.

Indeed, Article 30 of Directive No. 2004/38 provides that *“The notification shall specify [...] the time allowed for the person to leave the territory of the Member State. Save in duly substantiated cases of urgency, the time allowed to leave the territory shall be not less than one month from the date of notification”.*

To be compatible with EU law and especially with that provision, an expulsion should systematically include a period for voluntary departure of at least one month and, before the expiry of that period, the person concerned should never be subject to any measure of detention, not only because the deprivation of freedom itself is a disproportionate interference

with the principle of free movement and free stay, but also because administrative detention entails a risk of effective enforcement from the first hour.

However, in domestic law, the overwhelming majority of detentions result from decisions obliging to leave the territory without period of voluntary departure (*P.J. No.31, OQTF, Seine-et-Marne, April 7, 2013; P.J.32, OQTF, Hauts-de-Seine, April 12, 2013, P.J. 33, OQTF, Essonne, April 18, 2013, P.J. 34, OQTF, Eure-et-Loire, April 18, 2013*).

While the use of detention of citizens of the European Union is not provided for by the law of the EU nor specifically governed by French law, the team from Cimade working in the administrative detention centre of Mesnil-Amelot collected the orders placing EU citizens in detention and the expulsion decisions taken against them between 1 February 2013 and 31 July 31 2013.

The data collected confirm an existing trend, already noted in the *2012 Report on centres and administrative detention premises*<sup>11</sup>. Romanians and Bulgarians are among the most frequently detained and expelled groups in France. The data also emphasise many unlawful practices, regularly denounced by associations. 1554 Romanian citizens were detained in 2012 in French administrative detention centres

During the period analyzed by Cimade, 1,596 people were detained, of which 204 EU citizens, or about 12.78% of the total. Of these 204 EU citizens, 165 were Romanians, 29 Bulgarians, 4 Lithuanians, 2 Poles, 1 Dutch, 1 Latvian, 1 Austrian, and 1 Portuguese.

This trend continued in 2013 across the country. The NGOs present in detention centres just made public their final report in which they stated that the record for the detention of European citizens in detention centres had been beaten in 2013<sup>12</sup>. Mostly Romanians were targeted yet again, with a total of 1,841 persons referred, representing the 4th most detained nationality (accounting for 17% of the EU citizens removed from mainland France).

The vast majority of EU citizens in detention are Romanians or Bulgarians. Most of them say that they are Roma. We can therefore only conclude that placement in detention and forced expulsion target primarily poor citizens of the European Union, belonging to one of the most discriminated against minorities. We also note that this detention concerns almost exclusively Central and Eastern Europeans, as only two Western Europeans were detained during this period.

## **B. Poorly enforced procedural safeguards**

### **1. Under the laws of the European Union**

Directive 2004/38 contains a procedural safeguard that is fundamental and makes the practice of administrative placement in detention incompatible with EU law. Article 30 on the notification of decisions, provides:

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<sup>11</sup> *2012 Report on centres and administrative detention premises*, ASSFAM, Forum Réfugiés, FTDA, Cimade, Malta Order.

<sup>12</sup> *2013 Report on centres and administrative detention premises*, ASSFAM, Forum Réfugiés, FTDA, Cimade, Malta Order.

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

## **2. The practice in France**

Once a foreigner has been placed in detention, expulsion measures can be implemented at any time, except when she/he contests the Prefect’s decision within 48 hours before the Administrative Court which has jurisdiction over the detention centre. These appeals have suspensive effect. The Court must rule within 72 hours. If the expulsion order is cancelled, the detention immediately ends since it is unfounded. If it is not, the expulsion can be enforced at any time.

Detention is ordered for five days and may be extended by another specialist judge for two subsequent periods of twenty days each. The total duration is 45 days (Article L.512 and following and L.551-1 and following of CESEDA; <http://www.gisti.org/IMG/pdf/ceseda.pdf>).

This judicial oversight is important because it concerns, on the one hand, the compatibility of the deprivation of liberty with fundamental rights, and on the other hand the lawfulness of the prior acts: placement in administrative detention, arrest, custody, etc.

However, in practice, Romanians and Bulgarians are an easy target for expulsions. First, they often forgo an appeal before the Administrative Court, even if it is suspensive, especially because it ends up extending their detention (*see above*). They want above all to get out of the detention centre, for which reason they agree to return to their country of origin and hand over their identity card or valid passport to the authorities. When they do not have one, the Consulate of their country meets them quickly and delivers on the same day a *laissez-passer* allowing their return. So they are usually sent away in a few days, before any judge has had the chance to review the conditions of their arrest, imprisonment, or expulsion. The average length of detention of EU nationals at the Vincennes detention centre, which is managed by the police headquarters in Paris, is a little less than 4 days, while the review by the specialist judge occurs at the end of 5 days. Serious rights violations may be committed without the oversight of a judge (illegal passport controls, no notification of rights, inadequate access to interpreters, no access to a lawyer or a doctor, or abusive deprivation of liberty). These individuals are in fact deprived of all the procedural safeguards (including access to justice, which is available only after 5 days), including those provided to nationals of third countries, and they are therefore in a worse situation.

Strikingly, over the study period, 90.8 % of Romanians, 71.4% of Bulgarians and 70% of other EU citizens detained were removed from France; but only 27.07% of people (of any other nationality) detained in Mesnil-Amelot over the period were expelled from the country. The difference in the percentage of removals carried out is naturally higher when EU citizens are taken out.

These are just a few examples. The associations signing the present petition, such as Cimade and ASSFAM, are present in the detention centres to provide legal assistance, yet they witness daily violations of the law. In addition, many of these cases are beyond their reach, since the actual departure often happens so quickly that the associations do not even have time to meet with the people detained and to inform them fully of their rights.

It has been extensively shown that in almost all cases that the Prefects have not demonstrated the existence of a current, genuine and serious threat, affecting a fundamental interest of society. Prefects use the most whimsical reasons to try to circumvent the safeguards provided by the Treaty and the legislation implementing it, mainly Directive 2004/38.

These practices are carried out in clear violation of EU law.

### **C. The reversal of the burden of proof**

The practices of Prefects are also contrary to EU law because the burden of proof is reversed.

In principle, the administrative authorities have a duty to demonstrate the lawfulness of all their decisions. When they decide to issue an administrative detention order, they must base their decision on the existence of an OQTF that is itself consistent with French law and the law of the European Union. We have shown that this is rarely the case with regard to OQTFs targeting nationals of Member States of the European Union.

In addition, these expulsion measures must have been taken within one year prior to their implementation, otherwise they lapse. However, detention is very often based on a decision more than one year old, without even attaching a copy of the decision to the detention order.

If the intent is to implement an expulsion order dating back more than a year, the Prefect must take a new decision, which should be based on legal grounds.

In cases where the OQTF was made less than a year before the administrative detention order, Prefects often require that the person concerned provides evidence that the expulsion has already been carried out. This is obviously difficult in cases where the person has left France by land, which is common, without the affixing of any stamp on his passport because of EU rules.

The European Commission has clearly stated that “*the burden of proof lies with the authorities of the Member States seeking to restrict rights under the Directive*”.<sup>13</sup>

The following example is far from being isolated:

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<sup>13</sup> Communication from the Commission to the European Parliament and The Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the European Union and their family members to move and reside freely within the territory of the Member States (COM/2009/0313 final).

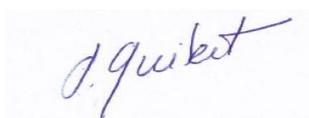
*“The person concerned has been subject to an obligation to leave the territory taken by the Préfet de police dated XXX. Further, the person remained in the territory beyond the time that was allotted to him and the person does not give any evidence guaranteeing the reasonable prospect of voluntary compliance within the meaning of Article L.561-2 CESEDA; rather that there is a risk, within the meaning of Article L.511-1 II of CESEDA, that the person will evade the expulsion order.”*

The foreigner is subject to what appears to be a presumption of non-compliance and must prove that he has left France since the notification of the expulsion decision. That requires proof of the date of her/his last entry in France.

The difficulty is increased by the fact that the administration considers the probative value of the elements that are presented very strictly: proof of renewal of an identity document, presentation of a medical prescription or a bill enacted in the country of origin are considered by the administration as inconclusive.

The presentation of an airline or bus ticket in the name of the person attesting the date of entry into France normally satisfies the evidence requirements of the administration. But this requirement is not imposed by European case law. Indeed, as freedom of movement is the principle, any limitation must be narrowly construed under the EU principles of proportionality and necessity. A requirement of excessive and disproportionate evidence has been found to be contrary to the law of the European Union (ECJ, April 10, 1998, Case C-398/06 *Commission v/ Netherlands*). In general, the ECJ case law prohibits requiring an applicant to present evidence to establish her/his date of entry into France, and this in accordance with the principle of free movement within the area without internal borders of the EU (ECJ, July 3, 1980, Case 157/79 *Pieck*; ECJ, August 2, 1993 Case. C-9/92, *Commission v/ Greece*).

The signatory associations:



Association Européenne Des Droits de l’Homme (AEDH)



ASSFAM



CIMADE



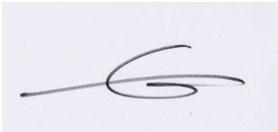
European Roma Rights Centre (ERRC)



Groupe d'information et de soutien des immigré.e.s (Gisti)



Ligue des Droits de l'Homme (LDH)



Collectif National Droits de l'Homme Romeurope

## **EXHIBIT 1**

### **CIMADE, Detention and expulsion of EU citizens: the example of the CRA Mesnil-Amelot (*February-July 2013*)**

Since 1 February 2013, the Cimage team working in the administrative detention centre of Mesnil-Amelot has been noting the detention of EU citizens and collecting information, to the extent possible, about the administrative measures imposed on these citizens and what happens to those detained. The work presented here is based in data collected over 6 months, from 1 February to 31 July 2013.

The data collected confirms an existing trend already noted by the *2011 Report on centres and administrative detention premises*: Romanians and Bulgarians, despite being EU citizens, are among the nationalities most detained and expelled from France. The data also emphasises many illegal practices, regularly denounced by associations.

#### **Deportation and mass detention of poor EU citizens**

Between 1 February and 31 July 2013, 204 EU citizens were detained in CRA Mesnil-Amelot, under expulsion decisions taken by 17 Préfectures.

Over the same period, 1,596 people were detained, from which 12.78% were EU citizens.

Of these 204 EU citizens, 165 were Romanians, 29 Bulgarians, 4 Lithuanians, 2 Poles, 1 Dutch, 1 Latvian, 1 Austrian, and 1 Portuguese.

The vast majority of EU citizens in detention are therefore Romanians or Bulgarians. Most of them say they are Roma. We can therefore only conclude that placement in detention and forced expulsion primarily target poor citizens of the European Union belonging to one of the minorities facing the most discrimination. We also note that this detention concerns almost exclusively Central and Eastern Europeans, as only two Western Europeans were detained during this period.

The majority of EU citizens detained in Mesnil-Amelot were arrested as a result of offences that can be connected to their situation of social and economic precarity: theft, conspiracy to steal, receiving stolen goods, attempted theft, soliciting, or illegal occupation (squatting).

Romanians and Bulgarians are an easy target for expulsions. First, they generally do not wish to exercise their right to appeal against the Prefect's decisions. They want above all to get out of the detention centre, so they agree to return to their country of origin and hand over their identity card or valid passport to the authorities. When they do not have one, the Consulate of their country meets with them quickly and delivers on the same day a *laissez-passer* allowing their return. So they are usually sent away in a few days, before any judge has a chance to exercise any control over the conditions of their arrest, imprisonment, or their expulsion.

Thus, over the study period, 90.8 % of Romanians, 71.4% of Bulgarians and 70% of other EU nationals have been expelled from the territory. Yet, when all nationalities are taken together, only 27.07% of people detained in Mesnil-Amelot over the period were removed from the territory.

### **Obligations to leave France immediately**

With three exceptions, EU citizens detained in Mesnil-Amelot during the study period were subject to an OQTF (there were three sentenced to interdiction to enter the French territory).

Article L. 511-3-1 of the CESEDA providing for the circumstances in which an OQTF can be taken against EU citizens, states:

*“The foreigner has to fulfil the obligation to leave French territory, within a period which cannot be less than thirty days from its notification, except in emergency situations. In exceptional cases, the administrative authority may grant a period of voluntary departure superior to thirty days”.*

The CESEDA does not state that a citizen may be obliged to leave the territory immediately: the time can be increased or reduced, in an emergency, but cannot be eliminated completely.<sup>14</sup>

But of the 201 EU citizens detained, only around forty had been subject to an OQTF before their placement in detention:

- Less than ten had been subject to an OQTF with a 30-day delay for departure;
- Around twenty people were given an OQTF without any delay for departure during their custody before been placed in detention;
- The others were given an OQTF without any delay for departure and were detained or expelled on the basis of this measure.

Eighty percent of the EU citizens detained were simultaneously the object of both an OQTF without delay and an order of detention. Despite the manifest illegality of these OQTFs, the Melun Administrative Court, in the rare cases where it was seized of an action for annulment of Préfet’s measures, dismissed this ground of appeal:

*“The above-mentioned provisions of Article L. 511-3-1 of the Code of Entry and Residence of Foreigners and Asylum Right does not prohibit the expulsion of the period for voluntary departure of a EU national subject to an obligation to leave the territory in case of emergency; thus as it has been said, the person was arrested for theft and possession of stolen goods, and has no home and resources; the person does not demonstrate any prospect of lodging, nor of any prospect of work and also does not have the slightest qualification; thus in view of all these circumstances, the Prefect of Hauts-de-Seine could lawfully consider that it was urgent to remove the person concerned”* (TA Melun, No. 1302809/12, April 15, 2013).

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<sup>14</sup>By contrast, for third party country nationals, Article L.511-1-II of the CESEDA allows under certain conditions an OQTF “without delay”.

L.511-1-II of the CESEDA allows under certain conditions an OQTF “without delay”.

## **The misapplication of the concept of disturbing public order**

Prefects, to justify their refusal to grant EU citizens a period of voluntary departure before their expulsion, invoke the particular urgency created by the disturbance of the public order that the people concerned allegedly represent.

However, when it comes to EU citizens, the derogation based on public order must be assessed in the light of EU law, which provides that Member States may derogate from the principle of free movement of persons only for reasons of public order, public security, and public health.

Article 27 of Directive 2000/ includes the following principles concerning the notion of disturbing public order:

- The mere existence of criminal convictions does not automatically justify refusal of entry the territory or expulsion measures;
- Public order presupposes the existence, beyond the social disturbance caused by any infringement of the law, of a genuine and sufficiently serious threat to a fundamental interest of society.

The ECJ case law has supplemented this definition by stating in particular that the mere fact of having committed an offence that resulted in a criminal conviction is not sufficient to meet the condition of a genuine and sufficiently serious threat affecting one of the fundamental interests of society (a principle established by the *Bouchereau* judgment).

It is clear, from reading the orders made against EU citizens that EU law is not respected by the French administration.

A few examples:

The OQTF made by the Prefect of Essonne on April 2, 2013 against a Romanian national states: "*As Madame X was sentenced on 15 March 2013 by the Criminal court of Paris to one month imprisonment for conspiracy to steal, her behaviour constitutes a disturbance to public order* " (P.J. No. 35).

The OQTF notified by the Prefect of Seine-et-Marne on 5 February 2013 to a Bulgarian national says: "*Given that Mr. X was arrested on 4 February 2013 for conspiracy to steal, his behaviour is therefore a genuine, present and sufficiently serious threat; the notion of necessity does not assist Mr. X, given the nature of the theft he committed; given the nature and seriousness of the offence committed, there is urgency to remove Mr. X from the French territory* " (P.J. No.36).

The OQTF made by the Prefect of Hauts-de-Seine on 12 April 2013 against a Romanian national said: "*Given that Mr. X was placed in custody for detention of stolen goods; [...] given that it emerges from an examination of his situation that his behaviour constitutes a genuine, present and sufficiently serious threat to a fundamental interest of French society; [...] It is therefore apparent from the examination of Mr. X's file that the risk*

*of threats to public order presented by his presence in France is indisputably established and that there is therefore urgent to expel him from the French territory" (P.J. No.37).*

All the measures collected are similarly reasoned and are based on offences which clearly do not constitute a genuine, present and sufficiently serious threat to a fundamental interest of French society.

The frequent and unjustified use of the concept of public order reveals the prejudice against and the criminalisation of poor EU citizens, including members of the Roma community.

### **The concepts of unreasonable burden and abuse of rights**

A significant portion of the measures collected mention, in addition to disturbing public order, the fact that the applicants would be an unreasonable burden on the welfare system, or even would be guilty of an "abuse of rights".

The Prefect of Seine-et-Marne systematically mentions that the person *"does not have sufficient resources to avoid becoming a burden on the social security and health insurance systems"*, even when she reports herself that the person has been in France for less than three months, and therefore is exercising her/his freedom of movement (under Article 6 of Directive 2004/38).

The Prefect of Essonne, in an OQTF made on February 2, 2013 against a Polish citizen and based on the notion of disturbing public order (for shoplifting), also claims: *"The person concerned states to have renewed stays of less than three months every six months; the person is homeless and does not warrant any right of residence on the basis of Article L.121-1 of the CESEDA; the person says he/she is economically inactive on French territory, cannot prove (s)he has sufficient resources or a livelihood and (s)he is in a situation of complete dependence on the French social welfare system since (s)he cannot prove having personal sickness insurance in France or in the country of origin; he/she lives in a "squat" and lives out "undeclared little jobs"; in the light of the above the person constitutes an unreasonable burden on the welfare system and his/her right to stay in France cannot be maintained."*

Finally, the orders made on 9 July 2013 by the Préfet of Maine-et-Loire to Romanian nationals expelled from a squat in Orgemont street, Angers, throw in grounds of public order (because they were living in a squat), of abuse of rights, and of posing an unreasonable burden on the social welfare system: *"It is clear that Mr. X does not have sufficient resources, as he declared not having any income and surviving in France through begging; this lack of resources may be relied on by the Prefect to demonstrate the absence of the right of residence of an EU citizen and make an expulsion order against him, even though the person is not actually supported by the welfare system [...]; that Mr. X is illegally occupying the public space in a squat located 46-50 rue d' Angers Orgemont; based on these facts, his behaviour constitutes a genuine, present and sufficiently serious threat for the security of goods and people, as well as for public health [...]; his stay otherwise constitutes an abuse of rights as he recognises making regular back-and-forth trips between Romania and France."* (P.J. No. 4-8).

Frequent parallel uses of the notions of disturbing public order, unreasonable burden, and abuse of rights (as in the case of the Angers squat) show an overall prejudice against some EU citizens, mainly Romanians and Bulgarians or others from East European Member States, considered poor, criminal profiteers. In these cases, there is no serious examination of the personal circumstances of those concerned.

### **The lack of serious consideration of personal situations**

Articles 28 and 30 of Directive 2004/38/EC stress that the authorities, before issuing a return decision, must conduct a serious and thorough examination of the personal circumstances of the person concerned, and provide accurate and complete reasons for the expulsion order.

In reality, there is a lack of serious consideration of situations of poor EU citizens in these circumstances. Measures by Prefect are based on stereotypes and contain hasty reasoning and little or no evidence relating to the situation of those concerned.

In Seine-et-Marne and Essonne mainly, there are repeated decisions to place groups of people in detention - up to 7 people together - with identical reasons, where only the name of the person being detained is different.

A comparison between the grounds for the decisions and what the persons concerned have indicated during the interview is revealing. For example, the OQTF made on 1 February to a Romanian citizen by the Prefect of Val-de-Marne does not indicate that his wife and two children reside in France with the help of the Samu Social and does not examine whether the right of residence of his wife or one of his children could also confer on him such a right. Another example, among many others, is the decision by the Prefect of Seine-et-Marne, dated 22 May 2013 and made against a Romanian national which merely states that two of his minor children reside in Romania, but does not consider that the person, who had been in France for less than three months, had stable accommodation, that her husband (also in France had serious health problems, and that her epileptic son was enrolled in elementary school in the Val-de-Marne. The Administrative Court of Melun annulled the decision of the Prefect against this woman. But two weeks later, the same Prefect issued an OQTF against her husband and placed him in detention. He, too, was released by the Administrative Court.

Finally, it is worth noting, among the decisions collected, the orders made on 12 April by the Prefect of Hauts-de-Seine against three Romanian nationals that do not mention the date and place of birth, nor their nationality, nor their place of residence.

This shows that the Prefect does not hesitate to rely on disturbances to public order, the fact of being an unreasonable burden on social assistance, and “abuse of rights” without seriously considering the right of residence of poor EU citizens.

### **OQTFs made against those in jail**

During the study period, about twenty OQTFs were made against people in jail, that is to say, before their release from custody. At Mesnil-Amelot, they are mainly people incarcerated in Fresnes (94) and in Fleury-Merogis (91).

Generally, OQTFs are notified in prison a few days or the day before release from custody. Many of the orders collected were given without an interpreter to people who do not understand French, who were therefore unable to understand the subject of the decision or the ways to appeal it. It should also be noted that inmates are not entitled to keep their administrative papers with them, so the person cannot get help from another inmate to later understand the meaning of the decision.

If the person understands the purpose of the decision and wants to challenge it, (s)he needs to ask for an appointment with the Right Access Point [PAD] (Fresnes) or Prison Service for Integration and Probation [SPIP] (in Fleury-Merogis). The delays for securing an appointment mean that it is often not possible to challenge the decision within the 48-hour deadline. Moreover, at Fresnes in particular, decisions are frequently notified on Friday. Even if the person sends a meeting request, this person has no chance to appeal before the following Monday.

Several people, over the study period, were given an OQTF in prison on Thursday and then placed in detention on Friday. These persons do not have the time to see the PAD or SPIP in prison, and do not necessarily have the possibility to meet an organisation there to help them exercise their rights before the weekend. The administration of the detention centre, which is nevertheless supposed to be the guarantor of the effective exercise of rights, will only provide an appeal form (to fill in French) if asked.

An appeal lodged after of the deadline can sometimes be considered admissible (based on the inconsistent jurisprudence from the Administrative Court of Melun) if the person proves that she/he tried to contact the SPIP or PAD in time.

As a result, the notification of OQTFs in prison, a practice affecting EU citizens and third-country nationals alike, seriously impedes the exercise of the right to appeal.

*The signatories to this petition are grateful to the Intel Corporation (UK) for its assistance in translation this petition from the original French to English.*