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A right to rehabilitation through transfer or a right to not be transferred? Identifying potential beneficiaries through nationality and residence

Ellen Vandennieuwenhuysen

Abstract

Within the EU, two Framework Decisions have been adopted to increase the chances of social rehabilitation of sentenced persons through the transfer of the enforcement of sentences to another Member State. The older Framework Decision on the European Arrest Warrant contains some mechanisms to strengthen the social rehabilitation of sentenced persons as well. First, this article examines who can benefit from these possibilities and highlights the importance of residence and EU nationality. It further explores whether these persons have an enforceable right to rehabilitation or a right to transfer for the purpose of rehabilitation. Even though this does not seem to be the case, they do have a right not to be transferred if the transfer does not facilitate rehabilitation. However, this right proves particularly difficult to enforce, especially given the possibility for states to expel foreigners. This paper claims that without further limitations on expulsions by states, or without giving more rights to sentenced persons under Framework Decision 2008/909/JHA, states might rather easily be able to circumvent the main objective of that Framework Decision.

Key words

right to rehabilitation, right to transfer, importance of residence and EU-nationality, mutual trust, expulsions, fundamental rights, EU citizenship, third country nationals, Directive 2004/38/EC, Framework Decision 2008/909/JHA, Framework Decision 2008/947/JHA, Framework Decision 2002/584/JHA, ECtHR, CJEU

Introduction

For several decades prisoners have been transferred across Europe to serve their sentence in their country of origin, and/or nationality. This has been possible on the basis of bilateral treaties and, most importantly, the 1983 Council of Europe's Convention on the transfer of sentenced persons. The purpose of these instruments is to increase the chances of rehabilitation for the convicted person. Serving the sentence in a country where language and culture are understood, close to family and other contacts who can visit the convict in prison, and where the prisoner will be able to fully enjoy opportunities for conditional release or parole, is thought to promote the offender's rehabilitation and reduce the harm deriving from imprisonment.¹ Although widely ratified, the application of the 1983 Convention was beset by numerous hurdles, the most important of which were the lengthy and inefficient procedures and the fact that the requested state could always refuse to enforce the sentence.

¹ X. Yang, 'Changes in European instruments as a reflection of a shift in legal philosophies relating to community sanctions and measures' *European Journal on Criminal Policy and Research* 2019, (153) 157; E. De Wree, T. Vander Beken and G. Vermeulen, 'The Transfer of Sentenced Persons in Europe' *Punishment and Society* 2009, (111) 117 and 121-123; P. Faraldo-Cabana, 'Transferring Non-Consenting Prisoners' in S. Montaldo (ed.), *The Transfer of Prisoners in the European Union Challenges and Prospects in the Implementation of Framework Decision 2008/909/JHA*, the Hague, Chicago, Eleven International Publishing - Giappichelli, 2020, (61) 61-63; S. Montaldo, 'Offenders' rehabilitation and the cross-border transfer of prisoners and persons subject to probation measures and alternative sanctions: a stress test for EU judicial cooperation in criminal matters' *Revista Brasileira de Direito Processual Penal* 2019, (925) 937-939.

Within the EU, Framework Decision 2008/909/JHA² was created to tackle such obstacles³ and to focus on facilitating the rehabilitation of prisoners.⁴ This Framework Decision covers different situations in which states other than the one of sentencing may be asked to take over the enforcement of a custodial sentence. Framework Decision 2008/947/JHA⁵ which was adopted simultaneously concerns the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions. This Framework Decision is perhaps even more innovative in its potential impact. Among the existing conventions, only the Council of Europe Convention of 30 November 1964 on the Supervision of Conditionally Sentenced or Conditionally Released Offenders included provisions relevant in this area. However, it was only ratified by a limited number of states, and in some cases, this was with numerous reservations.⁶ On the basis of this Framework Decision, alternative sanctions and probation decisions can be forwarded to and executed in another state. Once again, facilitating social rehabilitation and re-integration into society is the explicit aim of the Framework Decision.⁷

Framework Decision 2002/584/JHA on the European Arrest Warrant on the other hand, was not drafted with a rehabilitation perspective in mind, but instead aimed at avoiding impunity as a possible consequence of open borders and free movement within the EU.⁸ FD 2002/584/JHA can thus be seen as a compensatory measure furthering the objective of the establishment of an EU area of freedom, security and justice, through swifter surrender procedures, for the purposes of conducting a criminal prosecution or executing a custodial sentence. However, some of its provisions are aimed at rehabilitation and reintegration as well, as will later be explained. This raises the question of the interconnections and resemblances between these three instruments.

A first important question is whether the three mutual recognition instruments have the same scope of application as regards their potential subjects. Despite being a fundamental aspect, especially for a better understanding of the functioning and possible application of the Framework Decisions⁹, the question of how to identify potential subjects of the Framework Decisions whose sentences may be transferred to another country has remained under-researched. This issue will be addressed in the first part of this article. The first section focuses on the importance of EU nationality within the three Framework Decisions. The second highlights the importance of residence in an EU Member State and examines how this concept and related concepts should be interpreted.

Furthermore, while the way the Framework Decisions are designed to pursue their goal of promoting rehabilitation has been questioned¹⁰, the extent to which these subjects can actually benefit from

² Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (FD 2008/909/JHA).

³ Recital 4 FD 2008/909/JHA; A. Martufi, 'Assessing the resilience of 'social rehabilitation' as a rationale for transfer: A commentary on the aims of Framework Decision 2008/909/JHA' *NJEC* 2018, (43) 46-47; EU Agency for Fundamental Rights, *Criminal Detention and Alternatives: Fundamental Rights Aspects in EU Crossborder Transfers*, Luxembourg, EU, 2016, 28. Available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-criminal-detention-and-alternatives_en.pdf; E. De Wree, T. Vander Beken en G. Vermeulen, 'The Transfer of Sentenced Persons in Europe' *Punishment & Society* 2009, (111) 113; A. Martufi, 'The paths of offender rehabilitation and the European dimension of punishment: New challenges for an old ideal?' *Maastricht Journal of European and Comparative Law* 2018, (672) 682.

⁴ Article 3 FD 2008/909/JHA; See also Recital 9, article 4,(2) and (6).

⁵ Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions (FD 2008/947/JHA).

⁶ See recital 4 FD 2008/947/JHA: the Convention had only been ratified by 12 Member States.

⁷ Article 1, recital 8 and recital 24 FD 2008/947/JHA.

⁸ CJEU (GC) 24 June 2019, C-573/17, *Popławski II*, para 82; CJEU 29 June 2017, C-579/15, *Popławski*, para 23; CJEU 13 December 2018, C-514/17, *Sut*, para 47 .

⁹ Or to be more precisely the application of the national implementation law.

¹⁰ See for example A. Martufi, 'Assessing the resilience of 'social rehabilitation' as a rationale for transfer: A commentary on the aims of Framework Decision 2008/909/JHA' *NJEC* 2018, 43-61; S. Montaldo, 'Offenders' rehabilitation and the cross-

transfers enhancing their chances of rehabilitation, and can thus really be considered as beneficiaries of the Framework Decisions, has not been further discussed. Therefore, in the second part this paper will investigate whether a right to rehabilitation or a right to transfer for the purpose of rehabilitation for the identified subjects can be derived from the Framework Decisions.

As this question will be answered negatively, and given the concerns raised in literature regarding the possible misuse of the Framework Decisions, the third part explores whether the subjects have on the other hand an (enforceable) right not to be transferred if the transfer would not facilitate rehabilitation. In its first section, it is argued that such a right can be deduced from the wording and purpose of FD 2008/909/JHA. However, the invocation of such a right might be of limited use given the power of states to expel foreign nationals. After having explained the power of states to restrict the right to free movement and the right of residence of foreign nationals in the second section, it will be demonstrated in a third section that this power might threaten the pursuit of rehabilitation. Lastly, in the fourth section, it is examined whether in such cases invoking human rights might be able to prevent a transfer which would not increase chances of rehabilitation. The concluding argument will be that rehabilitation through transfers is difficult to ensure in so far as it remains easy for Member States to issue expulsion orders or as the application of FD 2008/909/JHA does not become more rights-based with a greater involvement of prisoners.

Identifying the potential subjects of the Framework Decisions

Importance of EU nationality for the application of the Framework Decisions

Since the aim of the first part of the article is to identify the possible subjects of the various Framework Decisions, the factors that are relevant for their proper application need to be examined. Since two factors are particularly significant, EU nationality and residence, this first section focuses on the relevance of EU nationality and the second one will focus on residence.

Concerning the transfer¹¹ of prisoners under FD 2008/909/JHA, the nationality of an EU country is of major importance, as no consent is needed of the executing state¹², nor of the sentenced person for the forwarding of the judgment to the Member State of which the sentenced person is a *national* and in which he or she lives. In addition, consent of the executing state or of the sentenced person is not required if the sentenced person is sent to the state of which he is a *national* and to which he is to be deported.¹³ In these cases, even though the sentenced person and the executing state can ask for a transfer, it is the issuing state¹⁴ that decides on the forwarding. The executing state and the sentenced person must obey and can only express opinions.¹⁵ The executing state can only refuse to recognise the judgment and to enforce the sentence on the limited grounds mentioned in Article 9. If, on the other hand, the sentenced person is not a national of the executing state, the executing state can

border transfer of prisoners and persons subject to probation measures and alternative sanctions: a stress test for EU judicial cooperation in criminal matters' *Revista Brasileira de Direito Processual Penal* 2019, 925-960.

¹¹ The transfer of the sentenced person will not be needed if the person is already residing or staying in the executing state. In that event, only the certificate and the judgment should be forwarded in order to execute the sentence in that state.

¹² This is the Member State to which a judgment is forwarded for the purpose of its recognition and enforcement. See Article 1(d) FD 2008/909/JHA.

¹³ Article 4(1)(a) and (b) FD 2008/909/JHA and article 6 (2)(a) and (b) FD 2008/909/JHA. The consent of the sentenced person is also not needed if the transfer is sought to another state than that of which the person is a national, to which the sentenced person is to be deported following an expulsion decision. However, the executing state can refuse the forwarding of that judgment. Besides, most of the times, foreigners are expelled and deported to their state of nationality. For example, only 9 % of all deportees in Belgium in 2016 were deported to another state than the one of which they were a national (repatriations following a Dublin procedure excluded). Repatriations of EU citizen prisoners take place almost exclusively to the country of origin. Myria, *Terugkeer, detentie en verwijdering van vreemdelingen in België - Terugkeer, tegen welke prijs? MyriaDocs #5*, Brussel, 2017, 25 and 29.

¹⁴ This is the Member State in which the judgment is delivered and which decides to forward a judgment to another Member State for the purpose of its recognition and enforcement. See Article 1(c) FD 2008/909/JHA.

¹⁵ Article 4(4),(5) and 6(3) FD 2008/909/JHA.

decide to refuse the forwarding of the judgment.¹⁶ Even though one may assume that this refusal should be based on the limited chances for re-integration following the transfer¹⁷, this could be seen as an extra hurdle to the rehabilitation of EU-citizens who want to be reintegrated in a Member State of which they are not nationals, but in which they live and/or have the most links with. The same goes for sentenced Third-Country Nationals (TCNs). FD 2008/909/JHA does not exclude them and the Handbook on the transfer of sentenced persons and custodial sentences in the European Union explicitly includes them.¹⁸ One may hope that in practice, states only refuse after an assessment of the prospects of rehabilitation, regarding their obligation of sincere cooperation, as more chances for rehabilitation and reintegration are better for the safety and security of the whole EU.¹⁹

EU nationality is also important for the FD 2002/584/JHA. If a European Arrest Warrant has been issued for the purpose of execution of a custodial sentence or detention order, the executing state may refuse to execute the European Arrest Warrant if the requested person is a *national* of the executing State and that state undertakes to execute the sentence or detention order in accordance with its domestic law.²⁰ Furthermore, if a European Arrest Warrant has been issued for the purpose of prosecution and the person is a *national* of the executing state or of the state of transit, surrender or transit may be subject to the condition that the person, after being heard, is returned to that state in order to serve the custodial sentence or detention order passed against him in the issuing Member State.²¹ Besides that, Member States can refuse the transit of *nationals* if this is requested for the purpose of the execution of a custodial sentence.²²

EU citizenship has however no relevance for the recognition and enforcement of probation measures and alternative sanctions. FD 2008/947/JHA does not mention the term 'national' or any similar concept but requires that the sentenced person is *lawfully and ordinarily residing* in the executing state for the decision to be forwarded without the consent of that state.²³ This consent is, however, needed if the sentenced person requests the forwarding of the judgment to another state.²⁴ Even in the latter case, nationality is not relevant. Again, hopefully, states will not only consent to the enforcement of sentences of their own nationals, but will also consent to enforcement of sentences imposed on persons with other EU nationalities, or even with a third country nationality if that would facilitate the rehabilitation of the person concerned.

Hence, for FD 2008/947/JHA, residence is particularly important. The next section will show that this concept is also significant for the other two Framework Decisions, in addition to, in some cases, having a particular EU nationality. However, the Framework Decisions do not all include the exact concept of residence, but rather contain words such as 'lives' and 'habitual residence' (FD 2008/909/JHA) 'lawfully and ordinarily residing', (FD 2008/947/JHA), 'staying' and 'resident' (FD 2002/584/JHA). After illustrating the importance of those concepts for the application of the Framework Decisions, it will be explored how these different terms should be interpreted in the application of the three Framework

¹⁶ In those cases, the consent of the convicted person is in principle also required. No consent of this person is however required if he has fled or returned to the country to which the 'transfer' is sought, in view of the criminal proceedings pending against him in the issuing state or following the conviction in that state. Article 6(2)(c) FD 2008/909/JHA.

¹⁷ Article 4(6) FD 2008/909/JHA obliges states to adopt measures, taking into account the purpose of facilitating social rehabilitation, based on which their authorities have to decide whether or not to consent to the forwarding of the judgment if they are not the Member State of nationality, or if they are, when the person does not live there, nor will be deported to it.

¹⁸ Handbook on the transfer of sentenced persons and custodial sentences in the European Union, *OJ C* 29 November 2019, 403, 10.

¹⁹ CJEU 23 November 2010, C-145/09, *Tsakouridis*, para 50.

²⁰ Article 4(6) FD 2002/584/JHA.

²¹ Articles 5(3) and 25(1) FD 2002/584/JHA.

²² Article 25(1) FD 2002/584/JHA. Even though the article does not explicitly require the transit state to undertake to execute the sentence or detention order in accordance with its domestic law, this can be assumed by analogy of article 4(6) FD 2002/584/JHA.

²³ Article 5(1) FD 2008/947/JHA.

²⁴ Article 5(2) FD 2008/947/JHA.

Decisions, as the concept of residence cannot be interpreted the same way in EU criminal law as in other EU instruments.

Importance of residence for the application of the Framework Decisions

Residence is another important element for a transfer based on FD 2008/909/JHA, since the transfer is, as already mentioned, possible without consent of the sentenced person and of the executing state if the person is to be transferred to the state of nationality where he or she *lives*. Furthermore, residence status is relevant given that no consent of the sentenced person is needed if no right of residence exists since an *expulsion* decision is ordered and the person is to be transferred to the state to which he or she would be deported. Lastly, the place where the sentenced person is located is important since the forwarding of the judgment is possible without the consent of the sentenced person to the state to which the person has *fled or has returned* given the criminal proceedings or following the conviction.

Residence is also significant regarding FD 2002/584/JHA as the execution of the European Arrest Warrant for the purpose of execution of a custodial sentence or detention order can also be refused if the person is *staying* in or is *a resident* of the executing Member State.²⁵ Besides, the transit for the purpose of execution of a custodial sentence or detention order can as well be refused if the person is *a resident*.²⁶ Lastly, both the transit in case of a European Arrest Warrant for the purpose of prosecution, as well as the execution of the European Arrest Warrant for this purpose, may be subject to the return of the person to the transit or executing state in order to serve there the custodial sentence or detention order passed against him in the issuing state if the person is a *resident* of the transit or executing state.²⁷

As already mentioned, residence and residence status are relevant for the recognition and enforcement of probation measures and alternative measures in another Member State, since the forwarding of the decision is only possible without consent of the executing state if the sentenced person is *lawfully and ordinarily residing* in that state.²⁸ Upon request of the sentenced person, the judgment can, however, be forwarded to another state if the authority of that state consents to the forwarding.²⁹

The term 'residence' and the abovementioned related terms need further clarification, as they are nowhere defined. In other areas of EU law too, the concept of residence is often not extensively defined in relevant legislation. The Court of Justice of the European Union (CJEU), however, had several occasions to define it.³⁰ For example, in Regulation No 883/2004 on the coordination of social security systems, residence is defined as 'habitual residence'.³¹ In social security law, the Court has continuously ruled that the state where one resides is the state in which one continues habitually to reside, and where the habitual centre of one's interests is situated. In that context, account should be taken of the employed person's family situation, the reasons which have led him to move, the length

²⁵ Article 4(6) FD 2002/584/JHA furthermore requires that the state undertakes to enforce the sentence.

²⁶ Article 25 FD 2002/584/JHA. It can be assumed that the state must undertake to enforce the sentence.

²⁷ Article 5(3) and 25(1) FD 2002/584/JHA requires that the person is heard.

²⁸ Article 5(1) FD 2008/947/JHA.

²⁹ Article 5(2) FD 2008/947/JHA.

³⁰ See J. Wouters 'Residence of Individuals in EU Law', *Working Paper 148* 2010, Institute for International Law, Leuven University, Leuven.

³¹ Article 1(j) Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, *OJ L* 30 April 2004, 166, 1. See also art. 1(h) Regulation No 1408/17 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, *OJ L* 5 July 1971, 149, 2 which has been repealed by Regulation (EC) No 883/2004.

and continuity of his residence, whether he is in stable employment and his intention as it appears from all the circumstances.³²

This interpretation of (habitual) residence has also been reaffirmed in the case law on civil service law.³³ In the field of tax law, where the Court needed to interpret normal residence, it interpreted it in the same way as habitual residence, with reference to previous judgments in social security law and added that for its evaluation all the relevant elements of fact must be taken into consideration.³⁴

In the sphere of private international law, rules of jurisdiction in matters of parental responsibility contained in the Brussels II bis Regulation³⁵ are based on the concept of habitual residence of the child. In *Barbara Mercredi v. Richard Chaffe* the Court referred, however, only very briefly to the permanent or habitual centre of interest, but rather mentioned the importance of uniform application of EU law and clarified that it should be interpreted in light of the objectives pursued by the Regulation, which concern in particular the best interest of the child.³⁶ The Court concluded that 'habitual residence', in this context corresponds to the place which reflects some degree of integration by the child in a social and family environment. Where an infant has been staying with her mother only a few days in another Member State to which she has been removed, the factors which should be considered to assess whether the child has acquired habitual residence in that state include the duration, regularity, conditions, reasons for the stay in the territory of that Member State and for the mother's move to that state and, regarding the child's age, the mother's geographic and family origins and the family and social connections which the mother and child have with that Member State. The Court added that the national court should take account of all the circumstances of fact in assessing the habitual residence.³⁷ The Court thus gave a more specific definition of habitual residence in this field of law.

Hence, residence cannot be understood identically in every field of EU law. It is important to consider the wording and objectives of the relevant EU legislation. Advocate General Bobek argued that the regulatory and systemic context of those other instruments is too remote and different from the system and purpose of Framework Decision 2008/909/JHA to rely on them for the interpretation of the terms 'lives' and 'habitual residence' mentioned in the latter Framework Decision.³⁸ Besides that, the EU legislator did not merely introduce terms such as 'residing', 'residence', or 'habitual residence' in the different Framework Decisions, but used different terms as 'resident', 'staying', 'lives', and 'lawfully and ordinarily residing', which might imply a different interpretation. Furthermore, the Court did not refer to the definition of habitual residence as interpreted in social security case law in

³² CJEU 17 February 1977, 76/76, *Di Paolo*, para 17- 20; CJEU 8 July 1992, C-102/91 *Knoch*, para 21 and 23; CJEU 25 February 1999, C-90/97, *Swaddling*, para 28-29; CJEU 11 November 2004, C-372/02, *Adanez-Vega*, para 37. See on this C. Bruzelius, 'Freedom of movement, social rights and residence-based conditionality in the European Union' *Journal of European Social Policy* 2019, 29(1), (70) 74.

³³ In CJEU 15 September 1994, C-425/93 P, *Pedro Magdalena Fernández v Commission*, para 22, regarding the refusal of expatriation allowance, the Court agreed with the Court of First Instance that according to settled case law, the place of habitual residence is that in which the official concerned has established, with the intention that it should be of a '*lasting character, the permanent or habitual centre of his interests, but for which all circumstances of the case should be taken into account*'. See also CJEU 10 July 1999, T-63-91, *Elisabeth Benzler v Commission*, para 25 in which the Court ruled that the concept of habitual means the place where the person concerned has established, and intends to maintain, the permanent or habitual centre of his or her interests. Both cases concerned the Regulation NO 31 (EEC) laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, *OJ* 14 June 1962, 45,135. In CJEU 14 July 1988, 284/87, *Schäfflein v. Commission*, para 9, the Court reaffirmed that residence that must be understood as meaning "*the place in which the former official has in fact established the centre of his interests*".

³⁴ CJEU 23 April 1991, C-297/89, *Ryborg*, para 19 and 20.

³⁵ Council Regulation of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, *OJ L* 2003, 338, 1.

³⁶ CJEU 22 December 2010, C-497/10 PPU, *Barbara Mercredi v. Richard Chaffe*, para 45 and 46.

³⁷ CJEU 22 December 2010, C-497/10 PPU, *Barbara Mercredi v. Richard Chaffe*, para 56. See also para 47-55 and CJEU 2 April 2009, C-523/07, A., para 44.

³⁸ Opinion of the advocate general Bobek 3 June 2021, C-919/19, para 51.

important cases concerning the Framework Decisions. Therefore, the next sections will analyse case law of the CJEU and opinions of the advocates general to give insight in the concepts used in the different Framework Decisions in order to identify the possible subjects and to clarify the scope of application of the different Framework Decisions; in particular the possibilities of asking guarantees for the execution of the European Arrest Warrant or for a transit, the refusal of executing a European Arrest Warrant, the refusal of transit, and the cases in which consent of the executing state and/or of the sentenced person is required for the forwarding of the judgment concerning custodial sentences and alternative sanctions.

Interpretation of the concepts regarding FD 2002/584/JHA

In *Kozłowski*, the Court needed to interpret Article 4(6) FD 2002/584/JHA. The European Commission had argued that the fact that the requested person is 'staying' in the executing Member State is a necessary but not sufficient condition for invoking the ground for optional non-execution of the European Arrest Warrant.³⁹ The Court confirmed this, stating that '*the term 'staying' cannot be interpreted in a broad way which would imply that the executing judicial authority could refuse to execute a European arrest warrant merely on the ground that the requested person is temporarily located on the territory of the executing Member State*'.⁴⁰ 'Staying' should be interpreted in a way complementing 'resident'⁴¹ and both terms should be interpreted in light of the objective of the provision, namely '*enabling the executing judicial authority to give particular weight to the possibility of increasing the requested person's chances of reintegrating into society when the sentence imposed on him expires*'.⁴² According to the Court, the concepts are subject to an autonomous and uniform interpretation within the EU.⁴³ 'Resident' means that the person has established his actual place of residence there, and the person is 'staying' in a Member State when, following a stable period of presence in that state, he or she has acquired connections with that state which are of a similar degree to those resulting from residence.⁴⁴ In order to determine whether there are such connections, it is necessary to make an overall assessment of various objective factors characterising the situation of that person, which include, in particular, the length, nature and conditions of his presence and the family and economic connections that he has with the executing Member State.⁴⁵ Therefore, the mere fact that the stay was not uninterrupted or not legal⁴⁶, cannot lead to the conclusion that the person is not 'staying' in that Member State. However, they can be relevant in the overall assessment.⁴⁷

By contrast, in *Wolzenburg*, the Court ruled that even though the length of time that a person has resided in the Member State cannot, in principle, have a conclusive effect because an overall assessment should be made when a Member State has implemented Article 4(6) of 2002/584/JHA without laying down specific conditions relating to its application, national law requiring residence for a continuous period of five years for nationals of other Member States in order to apply the ground of

³⁹ CJEU 17 July 2008, C-66/08, *Kozłowski*, para 35.

⁴⁰ *Ibid*, para 36; CJEU 5 September 2012, C-42/11, *Lopes Da Silva Jorge*, para 39.

⁴¹ CJEU 17 July 2008, C-66/08, *Kozłowski*, para 39.

⁴² *Ibid*, para 45; CJEU 6 October 2009, C-123/08, *Wolzenburg*, para 62 and 68; CJEU 5 September 2012, C-42/11, *Lopes Da Silva Jorge*, para 40.

⁴³ CJEU 17 July 2008, C-66/08, *Kozłowski*, para 42-43.

⁴⁴ *Ibid*, para 46.

⁴⁵ CJEU 17 July 2008, C-66/08, EU:C:2008:437, *Kozłowski*, para 48; CJEU 6 October 2009, C-123/08, *Wolzenburg*, para 76; CJEU 5 September 2012, C-42/11, *Lopes Da Silva Jorge*, para 43. The Court seems to imply with its reasoning in these last two cases that these assessment criteria are also relevant for evaluating whether a person is a resident within the meaning of Article 4 (6).

⁴⁶ Meaning in accordance with the residence legislation of that Member State.

⁴⁷ CJEU 17 July 2008, C-66/08, *Kozłowski*, para 50. The fact that the person systematically commits crimes in the executing Member State or that he is in detention there serving a custodial sentence, are no relevant factors for the executing judicial authority when it must ascertain whether the person concerned is 'staying'. By contrast, if the person is 'staying' in the executing Member State, they can be of some relevance in deciding whether there are grounds for not implementing a European Arrest Warrant, see para 51.

refusal does not violate EU-law.⁴⁸ The Court based its reasoning, inter alia, on the fact that national legislation which limits the situations in which the executing authority may refuse to surrender a requested person reinforces the system of surrender to the advantage of an area of freedom, security and justice.⁴⁹ In addition, it considered a condition of a continuous period of five years for nationals of other Member States to be able to ensure that the requested person is sufficiently integrated in the Member State.⁵⁰ Therefore, this condition is in line with the purpose of the provision, which is increasing the requested person's chances of reintegrating into society after expiration of the sentence.⁵¹ Limiting the facultative ground of refusal to nationals only, however, does violate EU law.⁵² Furthermore, states cannot make the application of the optional ground of refusal in addition to a condition as to the duration of residence in that State, subject to supplementary administrative requirements, such as possession of a residence permit of indefinite duration.⁵³

Interestingly, in *Lopes*, the Court seemed to narrow down the interpretation of 'resident' and 'staying', as it required the national judge to examine all the relevant factors whether there are sufficient connections between the person and the executing Member State (in particular family, economic and social connections) to demonstrate that the person requested is integrated in that Member State in a degree comparable to that of a national.⁵⁴ It is only after this integration assessment considering the person as covered by Article 4(6) that national authorities must assess whether there is a legitimate interest in refusing the execution of the European Arrest Warrant.

In any event, the interpretation given by the Court of the terms 'resident' and 'staying' seems only to be of relevance in so far as the executing state has not limited the optional ground for non-execution in line with the rehabilitation purpose.

Interpretation of the concepts regarding FD 2008/909/JHA

The FD 2008/909/JHA does not use the words 'resident' or 'staying' but mentions 'lives'. Recital 17 clarifies that this indicates the place to which that person is attached based on habitual residence and on elements such as family, social or professional ties. What habitual residence means, or how family, social or professional ties should be assessed is not explained in the Framework Decision. The Handbook refers to the case law of the Court in *Kozłowski* and *Wolzenburg*.⁵⁵ However, it is not entirely clear whether living is to be equated with 'resident' or with 'staying'⁵⁶, even more so because the drafters of the Framework Decision could have used the same wording as in Article 4(6) FD 2002/584/JHA if they wanted the provisions to be interpreted in a uniform manner.

One might assume that the EU legislator deliberately chose the term 'lives' instead of 'resident' or 'staying', even though it is rather difficult to identify why. Possibly the term 'staying' was avoided to prevent ambiguity, as the term suggests that only a certain period of time during which the person should be located in that state is required, even though the CJEU has given a narrower interpretation of the term in the aforementioned judgments. The same might be true for the term 'resident', which seems to imply an administrative registration of residence, which is not necessary in order to be seen as someone who 'lives' in that certain Member State.⁵⁷

⁴⁸ CJEU 6 October 2009, C-123/08, *Wolzenburg*, para 73-74 and 76; CJEU 5 September 2012, C-42/11, *Lopes Da Silva Jorge*, para 42.

⁴⁹ CJEU 6 October 2009, C-123/08, *Wolzenburg*, para 58.

⁵⁰ CJEU 6 October 2009, C-123/08, *Wolzenburg*, para 67-68.

⁵¹ CJEU 6 October 2009, C-123/08, *Wolzenburg*, para 45.

⁵² CJEU 5 September 2012, C-42/11, *Lopes Da Silva Jorge*, para 50.

⁵³ CJEU 6 October 2009, C-123/08, *Wolzenburg*, para 53.

⁵⁴ CJEU 5 September 2012, C-42/11, *Lopes Da Silva Jorge*, para 51 and 58.

⁵⁵ Handbook on the transfer of sentenced persons and custodial sentences in the European Union, *OJ C* 29 November 2019, 403, 12.

⁵⁶ See also L. Mancano, 'Criminal Conduct and Lack of Integration into the Society under EU Citizenship' *NJECL* 2015, (53) 62.

⁵⁷ However, even for the optional ground for non-execution of the European Arrest Warrant, being a resident is not necessary as it is also possible to invoke this ground for persons that are not resident of but staying in that Member State.

Moreover, a formal registration of residence will probably not be sufficient to conclude that a person lives in the executing state, in view of recital 17. However, this question has already been put to the Court twice. In 2018, the Court was asked by way of a preliminary question to clarify whether the fact that the *'merely formally recorded habitual residence in the executing State, regardless of whether the sentenced person has concrete ties in that State which could enhance his social rehabilitation'* is sufficient for the recognition and execution of a judgment. The Court did not have to answer this question since the application for recognition of the sentence had been withdrawn.⁵⁸ When the Court was asked to answer a similar question, Advocate General Bobek argued that a formal registered address (whether temporary or permanent) was insufficient to consider that one resides in the executing state, because in recital 17, between 'habitual residence' and 'family, social or professional ties', 'and' was used rather than 'or' which links them together, rather than making them alternatives to each other.⁵⁹

Although this answer was sufficient to the question, the Advocate General took the liberty of examining what can be seen as sufficient.⁶⁰ First of all, he observes that these concepts are not defined in the Framework Decision and must be given an autonomous and uniform interpretation.⁶¹ On the basis of other instruments of European Union law, the Advocate General concludes that the emphasis must lie on the factual reality instead of on the merely declared residence.⁶² He refers to the interpretation of the terms as established in *Wolzenburg*, *Kozłowski*, and *Lopes*, including the fact that an overall assessment should be made of several factors, none of which can have in itself a conclusive effect. He believes that a similar logic should apply, but does not explicitly state that 'lives' should be interpreted as 'staying' or as 'resident'. However, these cases may have a considerable impact on the interpretation of the term 'lives' of FD 2008/909/JHA regarding the importance of the purpose of rehabilitation in the interpretation of the concept. Indeed, the same elements can be used to assess where the person 'lives' as those to assess whether a person is 'staying' in a certain Member State, even though the Advocate General emphasises the need to assess 'lives' by reference to ties of every nature which may be of benefit to the chances of rehabilitation.

According to the Advocate General, 'habitual residence' and 'family, social or professional ties' are two sides of the same coin and cannot be separated, as they imply each other.⁶³ The Advocate General, however, admits that these concepts do not mean exactly the same, as one can have habitual residence somewhere but not have many ties to the community or its members because one lives very isolated, and, on the other hand, one can live like an expat in different places and thus have numerous links with different Member States, due to work, family, cultural or linguistic ties, but not have a real habitual residence anywhere specific.⁶⁴ The Advocate General fails to explain what the consequences would be for the assessment of residence in such situations. One can assume that in the former case, the state where the person lives is the state in which the person resides in an isolated manner. In the latter case, the state where the person has the most ties with should be seen as the state where he or she lives, if that would foster rehabilitation. This is in line with the view of the Advocate General as expressed further on in his opinion, and with the main objective of the Framework Decision.

Indeed, 'habitual residence' and the 'existence of some ties' are a proxy for attachment, which serve as a stepping-stone for determining the chances of social rehabilitation. Furthermore, the facts must always be assessed through the *'lens of the objective of social rehabilitation'*. First, the Advocate General mentions that family and social contacts are particularly useful in helping the released person to reconnect with society. In accordance with recital 9, linguistic, cultural, economic or other ties may

⁵⁸ CJEU 1 October 2019, C-495/18, YX.

⁵⁹ Opinion of the advocate general Bobek 3 June 2021, C-919/19, para 41-43.

⁶⁰ *Ibid*, para 44 and 47.

⁶¹ *Ibid*, para 48-49.

⁶² *Ibid*, para 50 and 54, with reference to article 3(1) FD 2008/909/JHA.

⁶³ *Ibid*, para 55-56.

⁶⁴ *Ibid*, para 57.

also be considered in order to determine whether the person concerned has ties with a particular state. In addition, and very importantly, he argues that ties and residence should not be considered solely in light of the period immediately preceding the criminal period. Instead, ties established by the person concerned some time ago which may contribute to his rehabilitation and thus his '*capacity to reconnect with the community*' after serving his or her sentence, should be taken into account.⁶⁵ As a result, residence cannot be reduced to the residence at the time of the commitment of the crime, nor of the time of the issuing of the judgment, which considerably broadens the scope of possibility under Article 4(1)(a) FD 2008/909/JHA. Hence, the Advocate General creates the impression that residence in itself is not the most important factor to be assessed, but rather the ties, which may indeed be more important for re-integration after a prison sentence.

In addition, according to the Advocate General, the assessment of where the person 'lives' is not solely a matter for the issuing state. He argues that based on Article 9(1)(b), which holds a ground for non-recognition and non-enforcement if the criteria of Article 4(1) are not met, the executing authority may refuse to recognise and enforce the judgment if, in its view, the person concerned does not have family, social, professional or other ties with the executing state that would allow the sentence to be enforced in that state in a manner conducive to his or her social rehabilitation.⁶⁶ This reasoning is commendable, since the state that is supposed to have the closest relationship with the person in question will indeed be in a good position to assess this.⁶⁷

The Advocate General thus proposes a welcome, broad interpretation of the notion of 'lives' under Article 4(1)(a), whereby ties rather than (current) residence, are the primary factor to be determined and can be assessed by both states. The Court itself has not yet elaborated on the concept. It remains to be seen whether states apply this broad interpretation in practice.

Interpretation of the concepts regarding FD 2008/947/JHA

FD 2008/947/JHA does not include 'resident', 'staying', 'lives' or 'habitual residence'. Instead, the person must be lawfully and ordinarily residing for the forwarding of the judgment without consent of the executing state. 'Lawfully' should probably be understood as residence in conformity with the national legislation on residence. In order to transfer the enforcement of the sentence to a state where a person has no right of residence, the authority of that state will have to give its consent. The addition of 'lawfully' might be the consequence of the absence of the nationality requirement, as a national can never reside illegally in its country of nationality. Furthermore, the sentenced person is not deprived of his or her liberty, but can move rather 'freely' in society, for which the person needs a right of residence, which is not the case for a stay in prison.⁶⁸ Why the term 'ordinarily' is used or how it should be interpreted is however unclear, since its meaning is not clarified in the Framework Decision, nor by the Court. Although one can assume that 'ordinarily' residing might be interpreted in the same way as 'staying' under FD 2002/584/JHA, 'living' or especially 'habitually residing' under FD 2008/909/JHA, it remains a question why the EU legislator, if it indeed had this intention, did not use the same wording in FD 2008/909/JHA and FD 2008/947/JHA, both of which were adopted on the same day.

Conclusion regarding the potential subjects of the Framework Decisions

This analysis made it clear that any citizen, regardless of nationality and place of residence, can be subjected to the application of the Framework Decisions.⁶⁹ However, elements such as having a certain

⁶⁵ *Ibid*, para 58-62.

⁶⁶ *Ibid*, para 95-115.

⁶⁷ There might be a small risk that executing states would use this option to block the transfer if they do not want the transfer to happen. However, both issuing and executing states are expected to respect and actively support the principles of mutual trust and sincere cooperation, which hopefully minimises aforementioned risk.

⁶⁸ In *Kozłowski*, the Court clarified that the fact that the stay in that state does not comply with the national legislation on residence of foreign nationals, does not lead by itself to the conclusion that the person is not 'staying' in that state within the meaning of art. 4(6) FD 2002/854/JHA, but it can be of relevance to the executing authority when it has to assess whether the person is covered by that provision. CJEU 17 July 2008, C-66/08, *Kozłowski*, para 50.

⁶⁹ Or rather of their national implementation legislation.

EU nationality, the state of residence, or the state in which one is staying may be important for the possibility of states to refuse European Arrest Warrants or transits for the execution of custodial sentences, as well as for the possibility to ask for a guarantee of return of the person concerned when executing a European Arrest Warrant for the purpose of prosecution. Elements such as having a (certain) EU nationality, as well as the state where one lives, the existence of an expulsion order and the fact that one has fled or returned to a certain state, can have an influence on whether the forwarding of the judgment requires the consent of the executing state and/or the consent of the person concerned for FD 2008/909/JHA. For FD 2008/947/JHA, nationality is not relevant, but lawfully and ordinarily residing in the state to which the judgment will be forwarded ensures that the consent of that State is not required. Since the interpretation of the various terms does not appear to be straightforward, the question arises as to how the states apply these different provisions.

A right to rehabilitation for the potential subjects?

After resolving the question of who can serve their sentence in another state, this part will assess whether these subjects can be considered as beneficiaries who have a right to rehabilitation or a right to transfer for the purpose of rehabilitation.

Facilitating the rehabilitation of the sentenced person is the main goal of FD 2008/909/JHA.⁷⁰ The forwarding of the judgment and the certificate requires that the authority of the issuing state *'is satisfied that the enforcement of the sentence by the executing State would serve the purpose of facilitating the social rehabilitation of the sentenced person'*.⁷¹ The question arises, however, as to when the issuing authority can be considered to be satisfied and how the authority can know whether the transfer would facilitate rehabilitation.

The first critical point is that neither the Framework Decision, nor the Court have defined *'facilitating social rehabilitation'*.⁷² Recital 9, however, stipulates that in the context of satisfying itself that the enforcement of the sentence by the executing state will serve the purpose of facilitating the social rehabilitation, states should consider various elements including family, linguistic, cultural, social, economic or other links that show attachment to the executing state.

On a more practical level, FD 2008/909/JHA provides some tools which can help states to make sure that the transfer would facilitate rehabilitation. However, states are not always obliged to use these different approaches. For example, in order to assess whether the transfer would facilitate rehabilitation, the issuing state can consult the executing state.⁷³ The latter may inform the issuing state with a reasoned opinion that the transfer *'would not serve the purpose of facilitating the social rehabilitation and successful reintegration of the sentenced person into society'*.⁷⁴ However, this consultation is only mandatory for the forwarding of the judgment in cases in which the executing state is not the state of nationality of the sentenced person, or if so, if it is not the one where the person lives or will be deported to. During this consultation, the authorities should take elements such

⁷⁰ Article 3(1) FD 2008/909/JHA.

⁷¹ Article 4(2) FD 2008/909/JHA. See also recital 9.

⁷² The same is true for the occasionally used concepts as re-integration and resettlement in the Framework Decisions. However, numerous attempts have been made in the literature to clarify what should be understood by rehabilitation. See amongst others A. Martufi, *'Assessing the resilience of 'social rehabilitation' as a rationale for transfer: A commentary on the aims of Framework Decision 2008/909/JHA'* *NJECL* 2018, (43) 50; S. Montaldo, *'Offenders' rehabilitation and the cross-border transfer of prisoners and persons subject to probation measures and alternative sanctions: a stress test for EU judicial cooperation in criminal matters'* *Revista Brasileira de Direito Processual Penal* 2019, (925) 942; P. Faraldo-Cabana, *'Transferring Non-Consenting Prisoners'* in S. Montaldo (ed.), *The Transfer of Prisoners in the European Union Challenges and Prospects in the Implementation of Framework Decision 2008/909/JHA*, The Hague, Chicago, Eleven International Publishing - Giappichelli, 2020, (61) 68.

⁷³ Article 4(2) and (3) FD 2008/909/JHA.

⁷⁴ Article 4(4) FD 2008/909/JHA. If no consultation has taken place, the executing state can present this opinion without delay after the transmission of the judgment and the certificate. The issuing state shall decide whether to withdraw the certificate or not.

as the duration of residence or other links to the executing state in consideration⁷⁵, but this negative reasoned opinion does not constitute a ground for refusal.⁷⁶

The Framework Decision furthermore obliges the issuing states to always ask the opinion of the prisoner and this opinion should be taken into account.⁷⁷ The issuing states can also ask for the consent of the prisoner. Again, this consent is only mandatory in several cases. The fact that the consent of the prisoner is not always needed, and that the negative opinion of the prisoner towards the transfer is not a ground for refusal⁷⁸, is remarkable given the Framework Decision's goal to facilitate social rehabilitation, as '*social rehabilitation inherently requires the engagement of the person involved*'.⁷⁹

The aforementioned elements are not the only critical issues that may not contribute to the objective of social rehabilitation. As already mentioned, even though the convicted person can request a transfer – as can the executing state – it is always the issuing state that decides on the forwarding. One can conclude from this analysis that no right to get transferred for the purpose of social rehabilitation under FD 2008/909/JHA exists.

Regarding FD 2008/947/JHA, while the aim is, inter alia, to enhance the prospects of the sentenced person's reintegration into society⁸⁰, there is little to support this goal in the Framework Decision. States must not be satisfied that executing the decision will facilitate rehabilitation and are not obliged to forward the certificate if the sentenced person so wishes. The Framework Decision provides for the mere possibility of forwarding the decision to a state other than the one in which the sentenced person is lawfully and ordinarily residing on his request and with consent of the executing state, for example, if he wants to move there to work, follow a training or study or if he is family of a lawful and ordinary resident of that Member State.⁸¹ Several states have made declarations regarding the conditions under which they may consent to such forwarding.⁸² The only right that can be derived from the Framework Decision is that the supervision of the sentence in principle cannot be transferred without consent of the sentenced person. However, if the person has returned to the Member State where he or she lawfully and ordinarily resides, the consent of the sentenced person is assumed, which has been criticised in literature.⁸³

Even if the aim of the FD 2002/584/JHA is not the rehabilitation of sentenced persons or persons to be tried, it contains a mechanism which has the objective to enable the executing authority to increase the requested person's chances of reintegrating into society.⁸⁴ This mechanism is, as already

⁷⁵ Recital 8 FD 2008/909/JHA.

⁷⁶ Recital 10 FD 2008/909/JHA.

⁷⁷ Article 6(3) FD 2008/909/JHA.

⁷⁸ Recital 10 FD 2008/909/JHA.

⁷⁹ S. Montaldo, 'Offenders' rehabilitation and the cross-border transfer of prisoners and persons subject to probation measures and alternative sanctions: a stress test for EU judicial cooperation in criminal matters' *Revista Brasileira de Direito Processual Penal* 2019, (925) 943.

⁸⁰ Other objectives are improving the protection of victims and of the general public (by preventing recidivism), facilitating the application of suitable probation measures and alternative sanctions, and monitoring the compliance of these measures. See article 1(1), recital 8 and 24 FD 2008/947/JHA.

⁸¹ Recital 14 FD 2008/947/JHA.

⁸² See declarations made under article 5(4) FD 2008/947/JHA. Available at: www.ejn-crimjust.europa.eu/ejn/libcategories/EN/37/-/1/-1/-1#nodesGroups.

⁸³ T. Daems en Y. Magis, 'Elektronisch toezicht en autonome probatie nader bekeken' in *Strafrecht en strafprocesrecht: doel of middel in een veranderde samenleving?*, Mechelen, Wolters Kluwer, 2017, (175) 208; S. Neveu, 'Probation measures and alternative sanctions in Europe: from the 1964 convention to the 2008 Framework Decision' *NJECL* 2013, (134) 145; I. Durnescu, 'Framework Decisions 2008/947 and 2009/829: State of Play and Challenges' *ERA Forum* 2017, (355) 362-363; EU Agency for Fundamental Rights, *Criminal Detention and Alternatives: Fundamental Rights Aspects in EU Crossborder Transfers*, Luxemburg, EU, 2016, 30. Available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-criminal-detention-and-alternatives_en.pdf; S. Montaldo, 'Offenders' rehabilitation and the cross-border transfer of prisoners and persons subject to probation measures and alternative sanctions: a stress test for EU judicial cooperation in criminal matters' *Revista Brasileira de Direito Processual Penal* 2019, (925) 947.

⁸⁴ CJEU 17 July 2008, C-66/08, *Kozłowski*, para 45; CJEU 6 October 2009, C-123/08, *Wolzenburg*, para 62.

mentioned, the optional non-refusal ground to execute the European Arrest Warrant, if it has been issued for the execution of a custodial sentence, where the requested person is staying in, or is a national or a resident of the executing state and that state will execute the sentence.⁸⁵ That same rehabilitation rationale lies behind the possibility of each Member State to refuse transit when the transit of a national or a resident is requested for the purpose of the execution of a custodial sentence. The same is true for the possibility to subject the transit or the execution of a European Arrest Warrant of a national or resident, when the warrant is issued for the purposes of prosecution, to the condition that the person is returned to the transit or executing state to serve the custodial sentence passed against him in the issuing state.⁸⁶ However, these are only possibilities for the executing state or state of transit. Beside the right to be heard⁸⁷, no rights for sentenced persons or persons to be tried can be derived from them.⁸⁸

As no right to rehabilitation or transfer for the purpose of rehabilitation can be derived from the Framework Decisions, the next section will address the question of whether the potential subjects have an (enforceable) right not to be transferred when the transfer would not facilitate rehabilitation.

An (enforceable) right to not to be transferred when transfer would not facilitate rehabilitation?

Regarding the wording and aims of the Framework Decisions

In literature, concerns have been raised regarding the possible misuse or instrumentalization of Framework Decision 2008/909/JHA for migration purposes⁸⁹, deterrence of (illegal) migrant crimes, reducing prison costs and diminishing prison overcrowding.⁹⁰ In these cases, the transfer would not take place to enhance the chances of rehabilitation. In that context, it is important to examine whether a transfer that goes against the purpose of the Framework Decisions is prohibited and thus whether an (enforceable) right to not be transferred exists.

It is clear from Article 4(2) FD 2008/909/JHA that no transfer is allowed if it does not facilitate social rehabilitation, since the Framework Decision requires that issuing states need to be satisfied that the transfer will have this effect before forwarding the certificate.⁹¹ However, while sentenced persons have a right to not be transferred if the transfer would not facilitate their rehabilitation, it seems difficult to enforce this right.

⁸⁵ Article 4(6) FD 2002/548/JHA.

⁸⁶ Article 25(1) and 5(3) FD 2002/548/JHA CJEU 6 October 2009, C-123/08, *Wolzenburg*, para 62.

⁸⁷ The requirement of hearing the person is however not explicitly mentioned in case of refusal of transit when it is requested for the purpose of the execution of a custodial sentence of detention order.

⁸⁸ However, according to Article 25 FD 2008/909/JHA, where the Member State undertakes to enforce the sentence in cases pursuant to Article 4(6) of that Framework Decision, or where, acting under Article 5(3) of that Framework Decision, it has imposed the condition that the person has to be returned to serve the sentence in the Member State concerned, the provisions of that Framework Decisions shall apply to the enforcement of the sentence, to the extent they are compatible with the provisions of FD 2002/584/JHA. Hence, the abovementioned analysis regarding FD 2008/909/JHA might be of relevance for the subjects of FD 2002/584/JHA as well.

⁸⁹ One can think of (mis)using transfers for removing undesired and unlawfully residing foreign nationals.

⁹⁰ A. Martufi, 'Assessing the resilience of 'social rehabilitation' as a rationale for transfer: A commentary on the aims of Framework Decision 2008/909/JHA' *NJECL* 2018, (43) 44; E. De Wree, T. Vander Beken and G. Vermeulen, 'The Transfer of Sentenced Persons in Europe' *Punishment and Society* 2009, (111) 117; G. Vermeulen, 'Mutual instrumentalization of criminal and migration law from an EU perspective' *European Journal of Migration and Law* 2007, (347) 352–353; M. Pleić, 'Challenges in cross-border transfer of prisoners: Eu framework and Croatian perspective' in D. Duić and T. Petrašević (eds.), *Eu law in context – Adjustment to membership and challenges of the enlargement - conference book of proceedings, EU and comparative law issues and challenges*, Osijek, University Josip Juraj Strossmayer, 2018, (375) 380; P. Faraldo-Cabana, 'Transferring Non-Consenting Prisoners' in S. Montaldo (ed.), *The Transfer of Prisoners in the European Union Challenges and Prospects in the Implementation of Framework Decision 2008/909/JHA*, the Hague, Chicago, Eleven International Publishing - Giappichelli, 2020, (61) 64 en 76; R. Mulgrew, 'The International Movement of Prisoners' *Criminal Law Forum* 2011, (103) 141-142.

⁹¹ See also recital 9.

FD 2008/909/JHA has been criticised because it does not oblige states to provide a remedy for the failure to ask for the opinion and to take it into account.⁹² One could add that it does not clarify either the consequences of failing to carry out the mandatory consultation. However, the sentenced person must have an effective remedy before an independent and impartial tribunal⁹³ on the basis of Article 47 of the Charter, if no consultation is carried out where it is mandatory, or if no opinion is asked or taken into account, or if no consent is asked and given when required.⁹⁴ Indeed, even if EU law does not mention specific judicial remedies applicable for violations, Member States should provide for effective, proportionate and dissuasive remedies.⁹⁵ In light of the principles of equivalence and effectiveness, the remedy and procedures in which those claims are raised, should grant equal protection as those available against violations of national law.⁹⁶

Importantly, however, there may still be cases in the application of FD 2008/909/JHA, where sentenced persons may consider that the transfer would not facilitate rehabilitation even if, whether after national judicial enforcement, the mandatory consultation has taken place and their opinion is asked and even 'allegedly' taken into account. This may be the case where consent is not required. However, this may also be possible in cases where the prisoner refuses to give the required consent, and where the issuing state subsequently withdraws the right of residence, so that consent is no longer required. In these cases too, the sentenced person should have a national remedy, again based on Article 47 of the Charter, allowing him or her to demonstrate that the transfer would not contribute to rehabilitation, since one can derive a right from the Framework Decision not to be transferred in such cases. The next section will however discuss the possibly limited benefit of a national remedy for the prisoner.

In any event, no similar observations can be made regarding FD 2002/584/JHA, as no right to not be transferred can be derived from it. Regarding FD 2008/947/JHA, one might argue that the sentenced person who has not consented with the execution in the other state to which he or she has been returned, has a right to object to the forwarding of the certificate should the execution in the other Member State not facilitate rehabilitation. While it is true that FD 2008/947/JHA only mentions rehabilitation of the sentenced person as one of the objectives⁹⁷, in line with the principle of loyalty⁹⁸, states must refrain from practices that run counter to the objectives of EU law, including regulations, directives and Framework Decisions, and national judges should ensure this.

The problem of the conditionality of the right to free movement: the possibility to expel

Even though, in particular FD 2008/909/JHA does not allow for transfers not facilitating rehabilitation and one should be able to have a remedy against this transfer, this remedy might have limited practical use. After all, states often have the possibility to expel foreigners. How this possibility makes it difficult

⁹² On this, see S. Montaldo, 'Offenders' rehabilitation and the cross-border transfer of prisoners and persons subject to probation measures and alternative sanctions: a stress test for EU judicial cooperation in criminal matters' *Revista Brasileira de Direito Processual Penal* 2019, (925) 944; L. Mancano, 'The Right to Liberty in European Union Law and Mutual Recognition in Criminal Matters' *Cambridge Yearbook of European Legal Studies* 2016, (215) 231-232; A. Martufi, 'Assessing the resilience of 'social rehabilitation' as a rationale for transfer: A commentary on the aims of Framework Decision 2008/909/JHA' *NJECL* 2018, (43) 53.

⁹³ It should be permanent, with compulsory jurisdiction, with *inter partes* procedures, and should apply the rule of law. See CJEU 17 September 1997, C-54/95, *Dorsch Consult*, para 23.

⁹⁴ This is because they can be considered as rights guaranteed by EU law, leading to the applicability of article 47 Charter. The same is true in the case that a decision is forwarded pursuant to FD 2008/947/JHA to an executing state without consent of the sentenced person.

⁹⁵ CJEU 21 September 1989, C-68/88, *Commission v Greece*, para 23-24 ; CJEU 25 July 2002, C-50/00 P, *Unión de Pequeños Agricultores*, para 41.

⁹⁶ CJEU 17 June 2004, C-30/02, *Recheio – Cash & Carry SA*, para 17; CJEU 21 September 1983, C-205–15/82, *Deutsche Milchkontor*, para 17.

⁹⁷ Article 1 FD 2008/947/JHA.

⁹⁸ Article 4(3)TEU. See for more on this principle M. Klamert, *The Principle of Loyalty in EU Law*, Oxford University Press, Oxford, 2014. See also E. Neframi, 'The Duty of Loyalty: Rethinking its Scope through its Application in the Field of EU External Relations' *CLMR* 2010, 47(2), (323) 347.

to prevent transfers not facilitating rehabilitation will be clarified later. The next sections will first introduce the power of states to expel EU citizens, their TCN family members and other TCN's.

EU citizens, their TCN family members and their conditional right to free movement

Every EU citizen, that is, every national of an EU Member State, has EU citizenship, which is considered a fundamental status.⁹⁹ Numerous rights are attached to EU citizenship¹⁰⁰, but the most important right is probably the right to free movement and residence. In order to benefit from these rights under objective conditions of freedom and dignity, Directive 2004/38/EC grants them as well, subject to certain conditions, to certain family members who are TCNs and who accompany or join the Union citizen.¹⁰¹ Directive 2004/38/EC lays down the possibility to restrict these rights on grounds of public policy, public security or public health, and describes the conditions under which this is possible. In practice, these restrictions are often expulsions, to which an exclusion order or entry ban can be added, which prohibits the foreigner from entering the territory of the issuing state for the duration of that order or ban. These restrictions need to be proportionate and based exclusively on the personal conduct of the individual. The latter should represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. However, criminal convictions cannot in themselves constitute grounds for taking expulsion decisions.¹⁰² When taking such decisions, states have to take account of considerations concerning the situation of the individual and his ties with the host Member State and the country of origin.¹⁰³ Furthermore, the Directive sets thresholds which provide different categories of EU-citizens and their TCN family members with a higher level of protection against expulsions.¹⁰⁴ If they have the right of permanent residence in the host Member State, they can only be expelled if there are serious grounds of public policy or public security.¹⁰⁵ Imperative grounds of public security should exist in order to expel EU-citizens if they have resided in the host Member State for the previous 10 years or if they are minors (except if the expulsion is necessary for the best interests of the child).¹⁰⁶

How exactly these different concepts are to be interpreted, and how the different thresholds are to be assessed, as well as the circumstances of each individual case, remains rather vague, and is primarily a matter for the national judge to assess. Nonetheless, the Court has clarified that the more integrated a Union citizen or his family members are in a Member State, the greater the protection against expulsion they enjoy.¹⁰⁷ Furthermore, it ruled that time spent in prison may be taken into consideration to conclude that the integrating links with the host Member State have been broken, which allows that State to not grant the higher protection of Article 28(3) Directive 2004/38/EC against expulsion.¹⁰⁸ It is settled case law that a threat to the functioning of the institutions and essential public services and

⁹⁹ Recital 3 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 (Directive 2004/38/EC); CJEU 20 September 2001, C-184/99, *Grzelczyk*, para 31.

¹⁰⁰ Article 20 (2) TFEU. These are the right to vote and stand for election, right to consular and diplomatic protection,...

¹⁰¹ Recital 5, articles 2(2) and 3(1) Directive 2004/38/EC. Family members are: (a) the spouse; (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State; (c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b); (d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b). See article 2 Directive 2004/38/EC.

¹⁰² Article 27(2) Directive 2004/38/EC.

¹⁰³ Article 28(1) Directive 2004/38/EC.

¹⁰⁴ Article 28(3) Directive 2004/38/EC.

¹⁰⁵ These are EU-citizens who have resided legally for a continuous period of five years in the host Member State. See article 16 Directive 2004/38/EC. The same is true for TCN family members who have legally resided with the Union citizen in the host Member State for a continuous period of five years.

¹⁰⁶ This protection does not exist for their TCN family members.

¹⁰⁷ CJEU 17 April 2018, C-316/16 and C-424/16, *B and Vomero*, para 44; CJEU 23 November 2010, C-145/09, *Tsakouridis*, para 25.

¹⁰⁸ CJEU 16 January 2014, C-400/12, *M.G.*, para 36.

the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations, or a risk to military interests, may affect *public security*.¹⁰⁹ This seems to be a high threshold, but in *Tsakouridis*, the Court clarified that organised drug trafficking can also constitute a *threat to public security*.¹¹⁰ In *P.I.*, the Court held that the criminal offences listed in Article 83(1), second subparagraph, TFEU can fall within the scope of *imperative grounds of public security*.¹¹¹ This provision refers to terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.

Hence, and especially for expulsions on 'ordinary' public policy grounds, it seems quite easy for a state to expel an EU citizen once the expulsion is duly reasoned in accordance with the requirements of Directive 2004/38/EC. In practice, expulsions of EU citizens combined with an entry ban, in particular after criminal convictions, are far from uncommon.¹¹²

The conditional right to reside and the free movement of TCNs

TCNs, other than TCN family members of EU citizens, may under certain conditions also acquire a right of residence in EU Member States on the basis of EU law. Again, this right can be seen as a conditional right, which can be lost as soon as one is deemed to be a danger to public policy.¹¹³ This danger to public policy does, however, not have to be assessed in the same way as required for by Directive 2004/38/EC, especially when the directive concerned does not explicitly require the threat to be genuine, present and sufficiently serious¹¹⁴, or to affect a fundamental interest of society.¹¹⁵ A potential threat might be sufficient regarding the Students and Researchers Directive and the Seasonal Workers Directive.¹¹⁶ As regards the Family Reunification Directive, the mere existence of a criminal conviction may suffice if the offence is so serious or of such a nature that it is necessary to exclude this foreigner from the territory of the Member State.¹¹⁷ However, states have to take several elements into account such as the duration of residence in the territory, the person's family ties, and ties with the country of origin.¹¹⁸ States have to consider similar elements when expelling long-term residents¹¹⁹, which are TCNs who applied for and have obtained this status because they have resided legally and continuously for five years in that same Member State.¹²⁰ They can, however, only be

¹⁰⁹ See cited judgments in CJEU 23 November 2010, C-145/09, *Tsakouridis*, para 44.

¹¹⁰ CJEU 23 November 2010, C-145/09, *Tsakouridis*, para 46-47.

¹¹¹ CJEU 22 May 2012, C-348/09, *P.I.*, para 28 and 33. See also CJEU 13 July 2017, C-193/16, *E.*

¹¹² See for some recent numbers J. A. Brandariz, "Framework Decision 2008/909/JHA and Deportation of EU Citizens: Encroaching Different EU Law Tools" in S. Montaldo (ed.), *The Transfer of Prisoners in the European Union: Challenges and Prospects in the Implementation of Framework Decision 2008/909/JHA*, The Hague, Eleven international publishing, 2020, 95-120; In Belgium, for example, the deportation of EU citizens in 2016 constituted 18% of all deportations, which is a lot as EU citizens can only be deported in Belgium based on ground of public policy, public security. 798 EU citizens were deported immediately after their release from prison. 425 of the entry bans in 2019 concerned EU citizens, accounting for 19% of all entry bans. See Myria, *Terugkeer, detentie en verwijdering van vreemdelingen in België - Terugkeer, tegen welke prijs? MyriaDocs #5*, Brussels, 2017, 29-31 and Myria, *Terugkeer, detentie en verwijdering van vreemdelingen in België Een blik op de monitoring van verwijderingen, MyriaDoc 11*, Brussels, 2021, 8.

¹¹³ Article 6 Directive 2003/86/EC (Family Reunification Directive); Article 12 Directive 2003/109/EC (long-term residents Directive); Article 14 Directive 2004/81/EC (Directive concerning victims of trafficking); It may also be a reason to withdraw and not renew residence permit: Article 9 Directive 2009/50/EC (Highly Qualified Employers Directive); Article 21 Directive 2016/801 (Students and researchers Directive); Article 6 Directive 2014/36/CE (Seasonal Workers Directive), Article 21 Directive 2004/83/EC (Qualification directive).

¹¹⁴ CJEU 4 April 2017, C-544/15, *Fahimian*, para 40 ; CJEU 12 December 2019, nos. C-381/18 and C-382/18, *G.S. and V.G.*, para 54.

¹¹⁵ CJEU 12 December 2019, nos. C-381/18 and C-382/18, *G.S. and V.G.*, para 57. See also para 54-65.

¹¹⁶ CJEU 4 April 2017, C-544/15, *Fahimian*, para 40 and 43, with reference to recital 14 Directive 2004/114/EC. The wording of this recital of is repeated in recital 16 of Directive 2016/801 that replaced the former directive; Recital 16 Directive 2014/36/CE.

¹¹⁷ CJEU 12 December 2019, C-381/18 and C-382/18, *G.S. and V.G.*, para 54-68.

¹¹⁸ Article 6(2) *juncto* article 7 Directive 2003/86/EC.

¹¹⁹ Article 12(3) Directive 2003/109/EC.

¹²⁰ Article 4(1) Directive 2003/109/EC.

expelled if they constitute an actual and sufficiently serious threat to public policy or public security.¹²¹ Lastly, persons who have never resided lawfully, because they have not been able to obtain a right of residence by any means, or have never tried to do so, can also be expelled. In general, it is therefore even easier for states to expel third-country nationals, except for long-term residents, than it is to expel Union citizens.¹²²

Possible circumvention of transfer requirement to facilitate rehabilitation by expulsion orders?

The possibility of withdrawing the right of residence of prisoners is by no means purely theoretical, since they can often be regarded as a sufficient threat to public policy to justify expulsion.¹²³ This power to expel and the power to forward judgments and transfer sentenced persons may, however, be combined and might result in compromising the main objective of FD 2008/909/JHA, which is to foster social rehabilitation.

The first clearly visible entanglement between expulsions and transfers is the possibility of transferring the person who is to be deported, without his consent, to his country of origin or to another country.¹²⁴ A somewhat less obvious connection is the fact that the state that, for any reason¹²⁵, would like to transfer the person who does not consent even though this is required for by the Framework Decision, can revoke the right of residence of that person and make a transfer possible on the basis of Article 4(1)(b), thus without consent of the person, and without consent of the executing state if it is the state of nationality. The issuing state can adopt this same strategy if the executing state does not consent to the forwarding of the judgment where required, or if it believes that no consent of the person is required, because in its opinion, the sentenced person is a national of and lives in the executing state, but where the executing state or the sentenced person does not agree with this. This strategy is even possible when the person is of the opinion that the transfer would not facilitate rehabilitation (because for example he or she does not want to live anymore in the executing state) and introduces a national remedy in order to prevent the transfer from happening.¹²⁶

In these cases, states might be able to circumvent the requirement for transfers to increase the chances of rehabilitation. Of course, sentenced persons can introduce a complaint in a national procedure if they are of the opinion that the transfer would not facilitate their social rehabilitation, even in cases where their residence right is withdrawn during the execution of the prison sentence, and in cases where an expulsion order has already been issued. However, this complaint might be unlikely to succeed. Indeed, where does the rehabilitation lie if no right of residence exists in the issuing state? Probably not (anymore) in the issuing state, but rather in the state where the person has a right of residence. This is especially true for short-staying EU citizens, or TCNs who never had a right of residence, who do not know the language and who have not established real ties.

However, long-term foreign residents may know the language, enabling them to receive therapy and to be more likely considered for work in prison. Furthermore, they may have family in the issuing state who can come visit them. These are exactly elements that can facilitate social rehabilitation, even if they eventually must leave the issuing state. This is all the more true when the person does not know

¹²¹ Article 12(1) Directive 2003/109/EC.

¹²² However, states must always take the right to respect for private and family and the non-refoulement principle in account, as will be further explained in the next section.

¹²³ In Belgium, in principle, ex officio proceedings in the event of unlawful residence of prisoners are only initiated by the competent authority for prisoners sentenced to more than three years' imprisonment. These persons can presumably often be expected to pose a danger to public policy.

¹²⁴ In the latter case the consent of the executing state is required.

¹²⁵ This could be for reasons of decreasing costs, prison overcrowding, removing criminals from the territory as much as possible, etc.

¹²⁶ Note that according to the case law of the ECtHR, a suspensive remedy is not required unless the transfer would expose him/her to a real risk of treatment contrary to article 3 ECHR or a real risk of violation of his/her right to life as protected by Article 2 ECHR, and in case of complaints under article 4 Protocol 4. See ECtHR (GC) 13 July 2012, 22689/07, *De Souza Ribeiro/France*, § 82 regarding expulsions. See ECHR 14 February 2012, 46721/15, *Allanazarova/Russia*, § 96-105 regarding extraditions.

the language of the executing state and has no family there. Therefore, an expulsion does not automatically lead to increased chances of rehabilitation in the state to which the person is to be deported. Indeed, even if the person has received an expulsion order and the forwarding of the judgment will be done under Article 4(1)(b), states must first ensure that the transfer will promote rehabilitation, without automatically assuming this effect. However, in practice, states will probably often assume higher chances for rehabilitation in the state to which the person will be deported and where he or she has a right of residence, since the person has no (legal) future in the issuing state. In these cases, invoking human rights might be valuable, as clarified in the following section.

Regarding the forwarding of the judgment and the certificate concerning probation measures and alternative sanctions, the withdrawal of residence rights by the issuing state is not advantageous for the issuing state as the forwarding requires the consent (or the return) of the sentenced person. The withdrawal will only result in an obligation for the person to leave the country after serving his sentence, or in a deportation during or after the sentence. The withdrawal of residence rights is also not relevant for the execution of a European Arrest Warrant, as the possibility to refuse transit or execution of the European Arrest Warrant, or the conditional transit or surrender is optional and never mandatory.¹²⁷

Transfer at odds with rehabilitation, fundamental rights to the rescue?

As argued in the previous section, states must always consider whether the transfer facilitates rehabilitation, including in the event where the transfer is based on an expulsion order. Although states will presumably automatically assume that a transfer facilitates rehabilitation in that case, their actions must nevertheless be in accordance with fundamental human rights. This section will examine to what extent invoking human rights could be a remedy for persons subjected to application of the Framework Decisions in this situation.

Deportations, extraditions and transfers should be in conformity with Articles 8 and 3 ECHR, which might reduce the possibilities of issuing states.¹²⁸ Article 8 ECHR guarantees the right to respect for private and family life. This right is not absolute. If the interference is in accordance with the law, pursues a legitimate aim and is necessary in a democratic society (meaning proportionate to that legitimate aim), there will be no violation of Article 8. According to the ECtHR, prevention of disorder and crime is a legitimate purpose of extraditions and expulsions.¹²⁹

In *Boultif* and *Üner*, the ECtHR established various criteria that states must take into account when assessing whether or not the expulsion of an offender would be an unjustified interference, such as the nature and seriousness of the offence; the length of the applicant's stay; the ties with the host country and the country of destination, the time elapsed since the offence was committed and the applicant's conduct during that period; the nationalities of the various persons concerned; the applicant's family situation, the consequences for the family, and the best interests of the children.¹³⁰ Several other elements can be of importance, such as the duration of the entry ban, or medical aspects.¹³¹ Again, the justification of the expulsion decision by the national authorities will be very important. According to the ECtHR, where the domestic courts have carefully examined all the facts, and adequately balanced the applicant's interests against the public interest, the ECtHR should not

¹²⁷ It might, however, make the justification for not using the ground for refusal more convincing.

¹²⁸ Important case law on Article 5 ECHR exists as well, but is not relevant to the following analysis.

¹²⁹ ECtHR 2 August 2001, 54273/00, *Boultif/Switzerland*, § 44-45 (expulsion); ECtHR 26 January 2010, 9742/07, *King/the UK*, § 29, decision (extradition).

¹³⁰ See more detailed ECtHR 2 August 2001, 54273/00, *Boultif/Switzerland*, § 48; ECtHR (GC) 18 October 2006, 46410/99, *Üner/the Netherlands*, § 57-58.

¹³¹ ECtHR (GC) 7 December 2012, 57467/15, § 182, 184. See ECtHR (GC) 23 June 2008, 1638/03, *Maslov/Austria*, § 71, for criteria concerning young adult offenders who have not yet started a family of their own.

substitute its own assessment of the merits and the proportionality test, for that of the national authorities, except where there are strong reasons for doing so.¹³²

This particular assessment is not required in the case of extraditions.¹³³ In those cases, the applicant's private or family life will only under exceptional circumstances outweigh the legitimate purpose of the extradition.¹³⁴ However, the Court emphasised in these cases that the extradited person faced trial on charges of serious offences¹³⁵, and pointed at the interest of the state to comply with the request of the other state¹³⁶. The Court did not yet have to rule on a possible violation of Article 8 ECHR regarding a transfer pursuant to FD 2008/909/JHA. Possibly, the Court will not require exceptional circumstances in those cases, especially when it is not the executing state that requests a transfer, but where the issuing state acts on its own initiative. This is because in the case of transfers in application of FD 2008/909/JHA, the persons concerned are already convicted and often no risk of impunity exists.

Moreover, where the issuing state acts on its own initiative, the transfer without consent of the prisoner might be seen as an expulsion decision and thus as a restriction to the right to free movement. Indeed, if the transfer takes place pursuant Article 4(1)(b) FD 2008/909/JHA, the sentenced person has no right of residence anymore based on that expulsion decision. If the transfer takes place pursuant Article 4(1)(a), the sentenced person has in theory still a residence right but can only use it when he or she is released. Thus, in any case, the sentenced person has to wait, just as with an entry ban, until he or she can return to the territory of the issuing state. In addition, if the duration of imprisonment in the foreign prison exceeds six months, it could constitute an interruption of the stay that is required to obtain a permanent right of residence.¹³⁷ Just like during an entry ban, one cannot obtain a right of residence. Moreover, if the stay in the foreign prison exceeds two years, it could result in the loss of acquired permanent residence rights¹³⁸, just as in the case of an expulsion. Therefore, these expulsions should be in conformity with the requirements of Directive 2004/38/EC if it concerns an EU-citizen or a TCN family member, and with the case law of the ECtHR regarding expulsions. As a result, the person's interest¹³⁹ in not being deported or transferred might outweigh the interest of the state, given the personal, social, or economic ties with the issuing state, the family living in that state, and maybe even given his prospects of rehabilitation.

Indeed, in the assessment of applications on the basis of Articles 8 and 3 ECHR, the Court has emphasised that states must take account of rehabilitation and reintegration in designing their penal policy.¹⁴⁰ States must offer rehabilitation possibilities to life prisoners for them to really have the possibility of being released.¹⁴¹ In addition, rehabilitation and reintegration are important elements in the proportionality test of Article 8 ECHR, when, for example, complaints about visiting arrangements are raised.¹⁴² Furthermore, systematically poor detention conditions in the executing state can constitute inhuman or degrading treatment which may reinforce the detainee's detachment from

¹³² ECtHR 14 September 2017, *Ndidi/the UK*, § 76.

¹³³ And by analogy probably not in cases of surrender under FD 2002/584/JHA.

¹³⁴ ECtHR 5 June 2012, 55822/10, *Shakurov/Russia*, § 202; ECtHR, 26 January 2010, 9742/07, *King/the UK*, § 29, decision.

¹³⁵ ECtHR 26 January 2010, 9742/07, *King/the UK*, § 29, decision; ECtHR 5 June 2012, 55822/10, *Shakurov/Russia*, § 202; ECtHR 8 December 1997, 27279/95, *Lauder/the UK*, § 3, decision.

¹³⁶ ECtHR 26 January 2010, 9742/07, *King/the UK*, § 29, decision; ECtHR 5 June 2012, 55822/10, *Shakurov/Russia*, § 202.

¹³⁷ Article 16(2) Directive 2004/38/EC.

¹³⁸ Article 16(4) Directive 2004/38/EC.

¹³⁹ Whether EU citizen, TCN family member or another TCN.

¹⁴⁰ ECtHR (GC) 30 June 2015, 41418/04, *Khoroshenko/Russia*, § 121.

¹⁴¹ ECtHR (GC) 9 July, 66069/09 a.o., *Vinter a.o./the UK*, § 108-110. See on this obligation: S. Meijer, 'Rehabilitation as a positive obligation' *European Journal of Crime, Criminal Law and Criminal Justice* 2017, (145) 149. The same applies to detainees with a custodial sentence of indefinite duration ECtHR 18 September 2012, 25119/09, a.o., *James, Wells and Lee/the UK*.

¹⁴² ECtHR (GC) 30 June 2015, 41418/04, *Khoroshenko/Russia*, §148-149; ECtHR 7 March 2017, 35090/09 a.o., *Polyakova a.o./Russia*, § 94 and 113.

society and increase the risk of reoffending, hence compromising the rehabilitation¹⁴³, and can prevent the transfer or surrender under Article 3 ECHR¹⁴⁴. So far, the Court has not yet recognised an absolute right to rehabilitation in the Convention, and it has traditionally linked the obligation to provide rehabilitation possibilities to persons sentenced to life imprisonment or to indefinite detention. However, one could deduce from *Murray/the Netherlands* that states must strive for the rehabilitation of each convicted person.¹⁴⁵ It is not yet clear whether and how the ECtHR will in future give more weight and substance to the obligation of states to pursue the rehabilitation of convicts and what the consequences of this could be for transfer decisions. In any event, the situation will still have to reach a minimum threshold of seriousness for Article 3 to apply or be disproportionate within the meaning of Article 8 ECHR.

Nonetheless, this analysis demonstrates that fundamental rights may protect sentenced persons in cases of transfer that do not facilitate rehabilitation and/or involve expulsion to a certain extent.

Conclusion

In order to have a better understanding of the functioning of the Framework Decisions this article has identified the possible subjects for their different application cases and it has highlighted the importance of nationality and residence under the various Framework Decisions. The concept of 'residence' needed to be examined more closely, as its interpretation cannot be simply equated with that of 'habitual residence' outside EU criminal law, given the underlying objectives of the Framework Decisions. In addition, the Framework Decisions include different related terms, with very similar, but not identical content, given the specific nature of the Framework Decisions and the possible situations in which they are to be applied.

The reason that the literature is rather silent on third country nationals might be due to the fact that EU nationality is a significant factor allowing for a quasi-automatic transfer under FD 2008/909/JHA, which is a transfer for which no prior consent of the sentenced person nor of the executing state is required. However, in accordance with Framework Decisions 2008/909/JHA and 2008/947/JHA, they can also benefit from transfers. The question arises whether in practice the same assessment is carried out for them as for EU citizens, and whether they have equal chances to serve their sentences in the Member State with which they have the closest links, both with respect to FD 2008/909/JHA and FD 2008/947/JHA, and with respect to the application of Articles 4(6), 5(3), and 25(1) FD 2002/584/JHA. In addition, given the ambiguity of the concept of residence and related terms, questions arise as to their implementation in practice. When is a person considered to live in another state, or to reside there ordinarily and lawfully by the competent authorities?

The analysis has furthermore shown that potential subjects can hardly be considered as real beneficiaries of the Framework Decisions. Indeed, a right to rehabilitation or a right to transfer for the purpose of rehabilitation cannot be inferred for the potential subjects of the different Framework Decisions. By contrast, a transfer that does not facilitate rehabilitation seems to be prohibited, in particular under FD 2008/909/JHA, but difficult to enforce for the sentenced person. Even national procedures in which this right not to be transferred can be enforced do not seem to be able to provide a lasting solution for these prisoners, as Member States might circumvent this by withdrawing the residence rights of sentenced persons, given the conditionality of the right of freedom of movement and of the right to reside. In those cases, states might argue that the transfer facilitates their rehabilitation. However, states are limited in their actions by fundamental human rights. In particular,

¹⁴³ Opinion of the Advocate General Bot 3 March 2016, C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*, 143; A. Martufi, 'The paths of offender rehabilitation and the European dimension of punishment: New challenges for an old ideal?' *Maastricht Journal of European and Comparative Law* 2018, (672) 686-687.

¹⁴⁴ ECtHR 25 March 2021, 40324/16 12623/17, *Bivolaru and Moldovan/France*. The CJEU ruled along the same lines in CJEU 5 April 2016, C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*.

¹⁴⁵ ECtHR (GC) 26 April 2016, 10511/10, *Murray/the Netherlands*, § 103. The Court, after reiterating the relevant principles concerning rehabilitation, held that 'all prisoners, including life prisoners, should be allowed to rehabilitate themselves'.

Articles 3 and 8 ECHR are relevant to prevent decisions to expel or to transfer prisoners. Not facilitating rehabilitation as such, however, may not be enough to prevent a transfer in the current state of the case law of the ECtHR. In this respect, the EU-principle of loyal cooperation might be of relevance, as it obliges states to strive towards the objectives of the Framework Decision, thus prohibiting them from acting against its purpose. But even then, withdrawing the right of residence remains one of their prerogatives. Hence, it seems that, as things currently stand, even if one could argue that the risk of abuse is at the moment rather limited, given the limited application of the Framework Decisions compared to expulsions, and the difficulties states encounter in these transfer procedures, prisoners will only be fully protected from abusive transfers when the CJEU becomes stricter on expulsions. Another possibility to protect prisoners could be to give them substantial rights and to give greater weight to their consent, through amendments of the Framework Decision or through the case law of the CJEU. Ultimately, such changes may only strengthen the ultimate objective of the Framework Decision.