

1. Article 9 of Directive No 64/221 imposes obligations on Member States which may be relied upon by the persons concerned before national courts.
2. Directive No 64/221 leaves a margin of discretion to Member States in regard to the definition of the “competent authority” referred to in Article 9 (1). Any public authority independent of the administrative authority called upon to adopt one of the measures referred to by the directive, which is so constituted that the person concerned enjoys the right of representation and of defence before it, may be considered as such an authority.
3. A recommendation for deportation made under British legislation by a criminal court at the time of conviction may constitute an opinion under Article 9 of Directive No 64/221 provided that the other conditions of Article 9 are satisfied. The criminal court must take account in particular of the provisions of Article 3 of the directive inasmuch as the mere existence of criminal convictions may not automatically constitute grounds for deportation measures.
4. The opinion of the competent authority referred to in Article 9 (1) of Directive No 64/221 must be sufficiently proximate in time to the decision ordering expulsion to provide an assurance that there are no new factors to be taken into consideration. A lapse of time amounting to several years between the recommendation for deportation on the one hand and the decision by the administration on the other is liable to deprive the recommendation of its function as an opinion within the meaning of Article 9. It is indeed essential that the social danger resulting from a foreigner’s presence should be assessed at the very time when the decision ordering expulsion is made against him as the facts to be taken into account, particularly those concerning his conduct, are likely to change in the course of time.
5. Both the administrative authority qualified to make the deportation order and the person concerned should be in a position to take cognizance of the reasons which led the “competent authority” to give the opinion referred to in Article 9 (1) of Directive No 64/221 — save where grounds touching the security of the State referred to in Article 6 of the directive make this undesirable.

In Case 131/79

REFERENCE to the Court under Article 177 of the EEC Treaty by the High Court of Justice, Queen’s Bench Division, Divisional Court, for a preliminary ruling in the case pending before that court between

REGINA

and

SECRETARY OF STATE FOR HOME AFFAIRS, EX PARTE MARIO SANTILLO

upon the interpretation of Council Directive No 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (Official Journal, English Special Edition 1963-1964, p. 117), in particular Article 9 (1) thereof,

THE COURT

composed of: A. O'Keeffe, President of the First Chamber, acting as President, A. Touffait (President of the Second Chamber), J. Mertens de Wilmars, P. Pescatore, Lord Mackenzie Stuart, G. Bosco and T. Koopmans, Judges,

Advocate General: J.-P. Warner
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

1. The third recital in the preamble to Council Directive No 64/221/EEC of 25

February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health states that "... in each Member State, nationals of other Member States should have adequate legal remedies available to them in respect of the decisions of the administration in such matters".

According to Article 8 of the directive the person concerned is to have "the same legal remedies ... as are available to nationals ... in respect of acts of the administration" as regards any decision affecting him.

Article 9 (1) reads as follows:

"Where there is no right of appeal to a court of law, or where such appeal may be only in respect of the legal validity of the decision, or where the appeal cannot have suspensory effect, a decision refusing renewal of a residence permit or ordering the expulsion of the holder of a residence permit from the territory shall not be taken by the administrative authority, save in cases of urgency, until an opinion has been obtained from a competent authority of the host country before which the person concerned enjoys such rights of defence and of assistance or representation as the domestic law of that country provides for.

This authority shall not be the same as that empowered to take the decision refusing renewal of the residence permit or ordering expulsion."

Article 9 (2) provides that the person concerned shall be entitled to submit his defence in person to the competent authority.

2. Persons described as "non-patrial" are subject in England to controls

imposed under the Immigration Act 1971 which includes liability for such a person to be deported in the circumstances set out below:

— Under section 3 (5):

"(a) if, having only a limited leave to enter or remain, he does not observe a condition attached to the leave or remains beyond the time limited by the leave; or

(b) if the Secretary of State deems his deportation to be conducive to the public good; or

(c) if another person to whose family he belongs is or has been ordered to be deported.";

— under section 3 (6):

"... if, ... he is convicted of an offence for which he is punishable with imprisonment and on his conviction is recommended for deportation by a court ...".

The system of appeals differs according to whether the case is within section 3 (5) or section 3 (6).

— If section 3 (5) applies:

The decision by the Secretary of State to make a deportation order is subject to an appeal to an adjudicator and to a further appeal from him to the Immigration Appeal Tribunal.

— If section 3 (6) applies:

The recommendation for deportation made by a court may be appealed against but no appeal can be brought after the making of the deportation order and there is no machinery for making representations before the decision to make the order is taken.

3. Mr Santillo is an Italian national who has been working in the United Kingdom since 1967. He is married to an Italian national and has two children born in the United Kingdom. On 13 December 1973 the Central Criminal Court convicted him of buggery and rape committed on 18 December 1972 on a prostitute and of indecent assault and assault occasioning actual bodily harm on 14 April 1973 on another prostitute. On 21 January 1974 he was sentenced to a total of eight years' imprisonment for these four offences. When giving judgment the Central Criminal Court made a recommendation for deportation under the Immigration Act.

On 10 October 1974 the Court of Appeal (Criminal Division) refused Mr Santillo leave to appeal against the prison sentence and the recommendation for deportation. On 28 September 1978 the Secretary of State made a deportation order against him expelling him from the United Kingdom as soon as his sentence was completed. Having completed his prison sentence on 3 April 1979 after remission of one third of the sentence for good behaviour, Mr Santillo was due to be released but remained in detention under the Immigration Act.

On 10 April 1979 the Divisional Court of the Queen's Bench Division of the High Court of Justice heard an application for judicial review to quash the deportation order on the grounds that such an order, made four and a half years after the recommendation for deportation by the Central Criminal Court infringed Mr Santillo's individual rights for failure to comply with the provisions of Article 9 (1) of Directive No 64/221.

4. By an order of 30 July 1979 the Divisional Court of the Queen's Bench

Division decided to stay the proceedings and to ask the Court of Justice for a preliminary ruling under Article 177 of the Treaty upon the following questions:

- "1. Whether Article 9 (1) of Council Directive No 64/221 of 25 February 1964 confers on individuals rights which are enforceable by them in the national courts of a Member State and which the national courts must protect.
2. (a) What is the meaning of the phrase 'an opinion has been obtained from a competent authority of the host country' within Article 9 (1) of Council Directive No 64/221 of 25 February 1964 ('an opinion'); and
 - (b) in particular, can a recommendation for deportation made by a criminal court on passing sentence ('a recommendation') constitute 'an opinion'?
3. If the answer to Question 2 (b) is Yes:
 - (a) Must 'a recommendation' be fully reasoned?
 - (b) In what (if any) circumstances does the lapse of time between the making of 'a recommendation' and the taking of the decision ordering the expulsion preclude 'a recommendation' from constituting 'an opinion'?
 - (c) In particular does the lapse of time involved in serving a sentence of imprisonment have the effect that 'a recommendation' ceases to be 'an opinion'?"

The order making the reference was received at the Court Registry on 10 August 1979.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC the United Kingdom Government, represented by Simon Brown, Barrister, and G. Dagtoglou of the Treasury Solicitor's Department, acting as Agent, Mr Santillo represented by Louis Blom-Cooper, Q.C., and Alan Newman, Barrister, and the Commission of the European Communities represented by Anthony McClellan, its Legal Adviser, acting as Agent, assisted by Stephen O'Malley, Barrister, submitted written observations.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Summary of the written observations submitted to the Court

1. *Observations submitted by the United Kingdom Government*

First question

The Government of the United Kingdom maintains that Article 9 (1) of the directive in question cannot be deemed to have direct effect.

First, the provision is not clear. In Case 30/77 (*Bouchereau*, [1977] ECR 1999) it was not argued, even by the Commission, that a recommendation for

deportation by an English criminal court was a breach of the United Kingdom's obligation under Article 9 (1). It is implicit in the judgment in that case that such a deportation recommendation constituted an "opinion" for the purposes of the article by the same token that it was held to constitute a measure within the meaning of Article 3 of the directive. If this argument cannot be regarded as clearly correct then Article 9 (1) cannot be regarded as constituting a clear and precise provision.

Secondly, Article 9 (1) is subject to conditions which are imprecise in their meaning and application. For instance, under the United Kingdom procedure of judicial review, although an appeal in one sense is only concerned with the legal validity of the decision under review such legal validity is reviewable on grounds which include consideration of the existence of factual material to support the decision. Similarly urgency is a relative concept.

Thirdly, Article 9 (1) leaves a real discretion to Member States with regard to its application. It admits of a variety of methods of application and appears to have been drafted with that very end in mind so that the general safeguard which it provides may be assimilated into the varied administrative and judicial processes of the individual Member States.

Second question

The United Kingdom Government submits that an "opinion" consists of an expression of view by an impartial organ of the Member State independent of the executive authority empowered to take the relevant administrative decision, as to whether or not that decision should be taken on one or more of the permitted

grounds of public policy, public security or public health, such organ being as provided for by Article 9, "a competent authority of the host country before which the person concerned enjoys such rights of defence and of assistance or representation as the domestic law of that country provides for".

The answer to Question 2 (b) must be in the affirmative for the following reasons:

- A "recommendation" is an expression of view as to whether or not an administrative decision to deport the person concerned should be taken by the executive authority.
- As was decided in *Bouchereau* a "recommendation" constitutes a measure within the meaning of Article 3 of the directive and accordingly such expression of view can only lawfully be based on grounds of public policy and/or public security and public health and in respect of the first two grounds must be related to the personal conduct of the individual concerned.
- The Criminal Court expressing such a view is an impartial organ of the Member State separate from and independent of the Secretary of State.
- Before the Criminal Court the person concerned enjoys such rights of defence and assistance or representation as United Kingdom law (in this instance the law of England and Wales) provides for.

Third question

As to (a), the United Kingdom submits that the answer should be in the negative because:

— There is no express requirement imposed by Article 9 (1) for an opinion (including a recommendation) to be fully reasoned or, indeed, reasoned at all;

— There is not normally any right of appeal from an opinion.

As to (b) there are no circumstances in which the lapse of time between the making of a recommendation and the taking of the decision ordering the deportation can preclude that recommendation from constituting an opinion within the meaning of the provision in question. The Government of the United Kingdom thinks that the broad object of Article 9 (1) is to ensure that two separate organs of the State consider each case, unless there is an appeal on the merits from the decision. The said article does not, according to the United Kingdom, even require that the opinion must support the deportation decision; how much less therefore can the article be construed so as to require the opinion to be based upon exactly the same material as founds the decision. Only the most general criteria can and should be laid down by the Court as to the nature of changes of circumstance, the proper application of these criteria being a matter for the determination of the national court. And only some fundamental change of circumstance, introducing some entirely fresh material factor outside the reasonable contemplation of the sentencing court such as nullifies the significance of the previous recommendation and requiring that the person concerned should be permitted to plead afresh his case against deportation, could ever reasonably be relied upon to invalidate what had previously been recognized to be a lawful and effective opinion.

As to (c), the Government of the United Kingdom thinks that the passage of time in itself during the serving of a prison sentence, irrespective of any change in the circumstances, cannot invalidate a recommendation. It is implicit in any recommendation that in the opinion of the sentencing court the person concerned still constitutes upon his release and despite the time elapsed a threat to the requirements of public policy.

Article 9, that the opinion of the competent authority involves a precise and comprehensive statement of the grounds for the opinion, to enable the individual to take effective steps to challenge any consequent decision of the administrative authority. This conclusion is confirmed by the deductive process of the directive, the penultimate paragraph in the preamble proceeding upon an assumption that the provisions of Articles 6 to 9 of the directive are directly applicable.

2. *Observations submitted on behalf of Santillo*

Second question

First question

It is argued on behalf of Santillo that by providing that measures can be taken only after the administrative authorities have complied with due process, Article 9 (1) of the directive is intended to restrict the discretionary power which national laws generally confer on the authorities responsible for the entry and expulsion of Community nationals. Since deportation can only follow a procedure complying with due process, the principle of legal certainty requires that the individual should be able to rely on this obligation of due process.

It is further argued on behalf of Santillo that the power of the court concerned is circumscribed. It determines the individual's potential detriment in the light of his previous criminal record and the seriousness of the offence. The court does not and cannot take into account other factors relevant to the personal circumstances of the person convicted. It is not a fully "competent" authority within the meaning of Article 9 (1), because "competence" implies a jurisdictional capacity to enquire into all relevant factors. Recommendations for deportation cannot therefore be truly considered as "opinions".

In Case 36/75 (*Rutili*, [1975] ECR 1219) the Court held that Article 6 of the directive meant "that the State concerned must, when notifying an individual of a restrictive measure adopted in this case, give him a precise and comprehensive statement of the grounds of the decision, to enable him to take effective steps to prepare his defence". This provided the ground for the Court's saying that Article 6 had a precise provision imposing an unqualified obligation on Member States. By the same reasoning the same may be said of

Third question

It is submitted on behalf of Santillo that an opinion is a formal expression by a judicially constituted body of the legal reasons and principles upon which a legal decision is based. If no reasons are given, one has merely a "conclusion" rather than an "opinion". Looked at from the point of view of the potential deportee a mere conclusion without the giving of any reasons upon which it is based is a valueless document so far as

the exercise of any appellate rights is concerned, and renders nugatory the protection provided by Article 9 (1) of the directive.

Under Article 48 (3) of the Treaty, deportation must be "justified" on grounds of public policy; the administrative authority has to satisfy itself that the deportee, by his personal conduct, constitutes a "present threat to the requirements of public policy" (cf. *Bouchereau* judgment). It follows that an "opinion" which no longer bears upon the present circumstances is an irrelevance and ceases to be an "opinion". This is the case even where the reason for the delay is in fact that the deportee is serving a term of imprisonment brought about by his own criminal activity. In the present case, the deportation decision was taken more than four and a half years after the recommendation for deportation; during that interval Santillo's psychiatric disposition might have undergone profound changes so that he no longer presents any present or future threat to society. In this respect Santillo argues that he has never had an opportunity to present his comments on the new factors upon which the Secretary of State based his deportation decision.

3. *Observations of the Commission*

First question

The Commission submits that the object of Article 9 (1) of the directive is to enable the merits of the deportee's case to be considered by some tribunal or body other than the authority which makes the decision to expel him.

In the *Royer* judgment (Case 48/75, [1976] ECR 497) the Court ruled:

"1. The right of nationals of a Member State to enter the territory of another Member State and reside there is a right conferred directly, on any person falling within the scope of Community law, by the Treaty — especially Articles 48, 52 and 59 — or, as the case may be, by the provisions adopted for its implementation . . .

4. A decision ordering expulsion cannot be executed, save in cases of urgency which have been properly justified, against a person protected by Community law until the party concerned has been able to exhaust the remedies guaranteed by Articles 8 and 9 of Directive No 64/221."

It is clear from this that Article 9 (1) of the directive confers directly on individuals rights which are enforceable by them in the national courts of a Member State and which the national courts must protect.

Second question

The Commission submits that the phrase "an opinion has been obtained from a competent authority of the host country" means that as soon as an administrative authority in the host country is minded to take a decision under Article 9 it must forthwith, as a necessary prerequisite to taking or refraining from that decision, obtain an opinion from an independent competent authority as to whether or not

the personal conduct of the individual justifies the decision on grounds of public policy or public security.

In the *Bouchereau* case quoted above the Court ruled that “measure” includes the action of a court which is required by the law to recommend in certain cases the deportation of a national of another Member State, whenever such recommendation constitutes a necessary prerequisite for a decision to make a deportation order. In the opinion of the Commission the adoption of such a “measure” is subject to the procedural safeguards afforded by the directive to the individual concerned.

Where the administrative authority obtains an opinion from a competent authority as a prerequisite for taking a measure affecting the right of free movement of persons, the action of the competent authority in giving an opinion cannot be a “measure” as it is the final element of a “procedural safeguard” for the individual in respect of the contemplated measure. Where a “recommendation” for deportation made by a criminal court on passing sentence is a measure, it is submitted that it cannot constitute an “opinion” which is the final element of a procedural safeguard.

Third question

The Commission submits that when a court is making a “recommendation” or an “opinion”, which constitutes a

measure, that “recommendation” or “opinion” must be in the form of a precise and comprehensive statement indicating how the personal conduct of the individual involves a genuine, sufficiently serious and present threat to the requirements of public policy affecting one of the fundamental interests of society, thereby justifying the decision. In any event where a competent authority is giving an opinion, which does not constitute a measure, as a prerequisite to a measure, that opinion, by virtue of Article 6 and 9 of the directive must also be precise and comprehensive.

When Article 9 (1) provides that the opinion of a competent authority should be obtained, the purpose of this requirement is to ensure, so far as possible, the fairness of the decision to expel. The lapse of time between the giving of the opinion by the competent authority and the taking of the decision is clearly detrimental to the fairness of the decision. In particular in a system in which the only practical opportunity for representations to be made on behalf of the deportee occurs prior to the giving of the recommendation or the opinion, the effect of those representations diminishes progressively with the passage of time.

In case the Court does not accept the Commission’s proposal with regard to the answer to be given to Question 2 (b) the Commission thinks that the answer to Question 3 (b) should be that if by virtue of Article 9 (1) of the directive a “recommendation” by a court should qualify as an “opinion” by a competent

authority, lapse of time between the recommendation and the decision is irrelevant with regard to that qualification but that, if the lapse of time is unreasonable, it may invalidate the "opinion".

The Commission thinks that the answer to Question 3 (c) should be that the lapse of time involved in serving a sentence of imprisonment may similarly have the effect of invalidating the "opinion".

Mr Santillo, represented by Louis Blom-Cooper, Q.C., and Alan Newman, Barrister, the Government of the United Kingdom, represented by Simon Brown, Barrister, and the Commission, represented by Anthony McClellan, acting as Agent, and by Stephen O'Malley, Barrister, presented oral argument at the sitting on 6 February 1980.

The Advocate General delivered his opinion at the sitting on 27 February 1980.

Decision

- 1 By an order of 30 July 1979 received at the Court on 10 August 1979 the High Court of Justice, Queen's Bench Division, Divisional Court, referred several questions to the Court under Article 177 of the EEC Treaty concerning the interpretation of, in particular, Article 9 (1) of Council Directive No 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (Official Journal, English Special Edition 1963-1964, p. 117) with a view to the exercise of its powers of judicial review following an application made by an Italian national resident in the United Kingdom as an employed person to set aside a deportation order made against him pursuant to a criminal conviction.
- 2 It emerges from the file and from the observations made in the course of the oral procedure that the United Kingdom has not introduced any specific legislation to implement Directive No 64/221. The law applied in this case, namely the law regulating immigration (The Immigration Act), dates back to 1971. It provides that any person described as "non-patrial" is subject in the United Kingdom to controls which include liability to be deported in the circumstances set out below:

— Under section 3 (5):

- “(a) if, having only a limited leave to enter or remain, he does not observe a condition attached to the leave or remains beyond the time limited by the leave; or
- (b) if the Secretary of State deems his deportation to be conducive to the public good; or
- (c) if another person to whose family he belongs is or has been ordered to be deported”;

— under section 3 (6):

“... if ... he is convicted of an offence for which he is punishable with imprisonment and on his conviction is recommended for deportation by a court ...”.

The system of appeals differs according to whether the case is within section 3 (5) or section 3 (6).

— If section 3 (5) applies:

The decision by the Secretary of State to make a deportation order is subject to an appeal to an adjudicator from whose decision there is a further appeal to the Immigration Appeal Tribunal.

— If section 3 (6) applies:

The recommendation for deportation made by a court may be appealed against but no appeal may be brought after the making of a subsequent deportation order and there is no machinery for making representations before the decision to make the order is taken.

- 3 It may be seen from the order making the reference and the documents in the file that on 13 December 1973 the applicant was convicted before the Central Criminal Court of buggery and rape committed on 18 December 1972 on a prostitute and of indecent assault and assault occasioning actual bodily harm on 14 April 1973 on another prostitute. On 21 January 1974 he was sentenced to a total of eight years' imprisonment for these four offences. When giving judgment the Central Criminal Court made a recommendation for deportation under the Immigration Act.

- 4 On 10 October 1974 the Court of Appeal (Criminal Division) refused the applicant leave to appeal against the prison sentence and the recommendation for deportation. On 28 September 1978 the Secretary of State made a deportation order against him to take effect when his prison sentence was completed. Having completed his prison sentence on 3 April 1979 after remission of one third for good behaviour, the applicant was due to be released but remained in detention under the Immigration Act. On 10 April 1979 the applicant applied to the High Court to set aside the deportation order on the ground that, having been made more than four years after the recommendation for deportation by the Central Criminal Court, it infringed his individual rights for failure to comply with the provisions of Article 9 (1) of Directive No 64/221.

- 5 Article 48 of the Treaty ensures freedom of movement for workers within the Community. This comprises the right of nationals of Member States, subject to restrictions justified on grounds of public policy, public security or public health, to move freely in the territory of Member States and to stay in a Member State to take up a post there in accordance with the laws, regulations and administrative provisions governing the employment of national workers.

- 6 According to the third recital in the preamble to Directive No 64/221, one of the aims which it pursues is that "in each Member State, nationals of other Member States should have adequate legal remedies available to them in respect of the decisions of the administration" in the sphere of public policy, public security and public health.

- 7 Under Article 8 of the same directive the person concerned must, in respect of any decision affecting him, have "the same legal remedies ... as are available to nationals of the State concerned in respect of acts of the administration"; in default of this, the person concerned must, under Article 9, at least be able to exercise his rights of defence before a competent authority which must not be the same as that empowered to take the decision ordering expulsion.

8 Article 9 (1) of the directive provides as follows:

“Where there is no right of appeal to a court of law, or where such appeal may be only in respect of the legal validity of the decision, or where the appeal cannot have suspensory effect, a decision refusing renewal of a residence permit or ordering the expulsion of the holder of a residence permit from the territory shall not be taken by the administrative authority, save in cases of urgency, until an opinion has been obtained from a competent authority of the host country before which the person concerned enjoys such rights of defence and of assistance or representation as the domestic law of that country provides for.

This authority shall not be the same as that empowered to take the decision refusing renewal of the residence permit or ordering expulsion”.

- 9 It is settled in English law that the legal remedies available against a deportation order relate only to the legal validity of that order. It follows that the deportation order itself may be made only in accordance with the provisions of Article 9 of the directive, which makes express provision for such a case.
- 10 These were the circumstances in which the High Court of England and Wales, Queen’s Bench Division, came to refer the following questions to the Court of Justice for a preliminary ruling:
- “1. Whether Article 9 (1) of Council Directive No 64/221 of 25 February 1964 confers on individuals rights which are enforceable by them in the national courts of a Member State and which the national courts must protect.
 2. (a) What is the meaning of the phrase ‘an opinion has been obtained from a competent authority of the host country’ within Article 9 (1) of Council Directive No 64/221 of 25 February 1964 (‘an opinion’)?; and
 - (b) in particular, can a recommendation for deportation made by a criminal court on passing sentence (‘a recommendation’) constitute ‘an opinion’?

3. If the answer to Question 2 (b) is Yes:

(a) Must 'a recommendation' be fully reasoned?

(b) In what (if any) circumstances does the lapse of time between the making of 'a recommendation' and the taking of the decision ordering the expulsion preclude 'a recommendation' from constituting 'an opinion'?

(c) in particular does the lapse of time involved in serving a sentence of imprisonment have the effect that 'a recommendation' ceases to be 'an opinion'?"

11 Article 9 (1) of the directive is one of a number of provisions designed to ensure that the rights of nationals of a Member State regarding the freedom of movement and residence in the territory of other Member States are observed. Articles 3 and 4 of the directive restrict the grounds for deportation or for refusing a worker leave to enter a Member State. Article 6 provides that the person concerned shall be informed of the grounds of public policy, public security or public health upon which the decision taken in his case is based, unless this is contrary to the interests of the security of the State involved. Article 7 provides *inter alia* that the person concerned shall be notified of any decision to refuse the issue or renewal of a residence permit to expel him from the territory. Article 8 gives the person concerned access to the same legal remedies as are available to nationals in respect of acts of the administration.

12 The provisions of Article 9 are complementary to those of Article 8. Their object is to ensure a minimum procedural safeguard for persons affected by one of the measures referred to in the three cases set out in paragraph (1) of that article. Where the right of appeal relates only to the legal validity of a decision, the purpose of the intervention of the "competent authority" referred to in Article 9 (1) is to enable an exhaustive examination of all the facts and circumstances including the expediency of the proposed measure to be carried out before the decision is finally taken. Furthermore the person concerned must be able to exercise before that authority such rights of defence and of assistance or representation as the domestic law of that country provides for.

- 13 These provisions, taken together, are sufficiently well-defined and specific to enable them to be relied upon by any person concerned and capable, as such, of being applied by any court. This conclusion justifies a positive reply to the first question submitted by the national court.

- 14 The requirement contained in Article 9 (1) that any decision ordering expulsion must be preceded by the opinion of a “competent authority” and that the person concerned must be able to enjoy such rights of defence and of assistance or representation as the domestic law of that country provides for, can only constitute a real safeguard if all the factors to be taken into consideration by the administration are put before the competent authority, if the opinion of the competent authority is sufficiently proximate in time to the decision ordering expulsion to ensure that there are no new factors to be taken into consideration, and if both the administration and the person concerned are in a position to take cognizance of the reasons which led the “competent authority” to give its opinion — save where grounds touching the security of the State referred to in Article 6 of the directive make this undesirable.

- 15 As regards the question what is the significance of the phrase “opinion . . . obtained from a competent authority of the host country” and whether a recommendation for deportation made by a criminal court at the time of conviction constitutes such an opinion, it should be noted that the directive does not define the expression “a competent authority”. It refers to an authority which must be independent of the administration, but it gives Member States a margin of discretion in regard to the nature of the authority.

- 16 It is common ground that the criminal courts in the United Kingdom are independent of the administration, which is responsible for making the deportation order, and that the person concerned enjoys the right to be represented and to exercise his rights of defence before such courts.

- 17 A recommendation for deportation made by a criminal court at the time of conviction under British legislation may, therefore, constitute an opinion within the meaning of Article 9 of the directive provided that the other conditions of Article 9 are satisfied. As the Court has already stressed in its judgment of 27 October 1977 (Case 30/77, *Bouchereau*, [1977] ECR 1999), a

criminal court must take account in particular of the provisions of Article 3 of the directive inasmuch as the mere existence of criminal convictions may not automatically constitute grounds for deportation measures.

- 18 As regards the time at which the opinion of the competent authority must be given, it must be observed that a lapse of time amounting to several years between the recommendation for deportation and the decision by the administration is liable to deprive the recommendation of its function as an opinion within the meaning of Article 9. It is indeed essential that the social danger resulting from a foreigner's presence should be assessed at the very time when the decision ordering expulsion is made against him as the factors to be taken into account, particularly those concerning his conduct, are likely to change in the course of time.
- 19 These considerations lead a reply in the following terms to the second and third questions submitted by the High Court of Justice:

The directive leaves a margin of discretion to Member States for defining the "competent authority". Any public authority independent of the administrative authority called upon to adopt one of the measures referred to by the directive, which is so constituted that the person concerned enjoys the right of representation and of defence before it, may be considered as such an authority.

A recommendation for deportation made under British legislation by a criminal court at the time of conviction may constitute an opinion under Article 9 of the directive provided that the other conditions of Article 9 are satisfied. The criminal court must take account in particular of the provisions of Article 3 of the directive inasmuch as the mere existence of criminal convictions may not automatically constitute grounds for deportation measures.

The opinion of the competent authority must be sufficiently proximate in time to the decision ordering expulsion to ensure that there are no new factors to be taken into consideration, and both the administration and the person concerned should be in a position to take cognizance of the reasons which led the "competent authority" to give its opinion — save where grounds touching the security of the State referred to in Article 6 of the directive make this undesirable.

A lapse of time amounting to several years between the recommendation for deportation and the decision by the administration is liable to deprive the recommendation of its function as an opinion within the meaning of Article 9. It is indeed essential that the social danger resulting from a foreigner's presence should be assessed at the very time when the decision ordering expulsion is made against him as the factors to be taken into account, particularly those concerning his conduct, are likely to change in the course of time.

Costs

- 20 The costs incurred by the Government of the United Kingdom and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the High Court of Justice, Queen's Bench Division, Divisional Court, by an order of 30 July 1979, hereby rules:

1. Article 9 of Council Directive No 64/221/EEC of 25 February 1964 imposes obligations on Member States which may be relied upon by the persons concerned before national courts.
2. (a) The directive leaves a margin of discretion to Member States in regard to the definition of the "competent authority". Any public authority independent of the administrative authority called upon to adopt one of the measures referred to by the directive, which is so constituted that the person concerned enjoys the right of representation and of defence before it, may be considered as such an authority.

- (b) A recommendation for deportation made under British legislation by a criminal court at the time of conviction may constitute an opinion under Article 9 of the directive provided that the other conditions of Article 9 are satisfied. The criminal court must take account in particular of the provisions of Article 3 of the directive inasmuch as the mere existence of criminal convictions may not automatically constitute grounds for deportation measures.
3. (a) The opinion of the competent authority must be sufficiently proximate in time to the decision ordering expulsion to ensure that there are no new factors to be taken into consideration, and both the administration and the person concerned should be in a position to take cognizance of the reasons which led the "competent authority" to give its opinion — save where grounds touching the security of the State referred to in Article 6 of the directive make this undesirable.
- (b) A lapse of time amounting to several years between the recommendation for deportation and the decision by the administration is liable to deprive the recommendation of its function as an opinion within the meaning of Article 9. It is indeed essential that the social danger resulting from a foreigner's presence should be assessed at the very time when the decision ordering expulsion is made against him as the facts to be taken into account, particularly those concerning his conduct, are likely to change in the course of time.

O'Keeffe

Touffait

Mertens de Wilmars

Pescatore

Mackenzie Stuart

Bosco

Koopmans

Delivered in open court in Luxembourg on 22 May 1980.

A. Van Houtte

Registrar

A. O'Keeffe

President of the First Chamber,
Acting as President