OPINION OF ADVOCATE GENERAL STIX-HACKL delivered on 2 June 2005 [1]

Table of contents

1 — Original language: German.

I — Introduction

1. In the present infringement proceedings the Commission complains that, in its opinion, neither German law as regards expulsion of citizens of other EU Member States nor the administrative practice based on that law satisfies the requirements of Community law with sufficient clarity.

2. In particular, the Commission complains of infringements of the following provisions: Articles 18 EC and 39 EC, Directive 64/221/EEC on the coordination of special measures concerning the movement and residence of foreign nationals,[2] Regulation (EEC) No 1612/68 on freedom of movement for workers,[3] Directive 73/148/EEC on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services,[4] and Directive 90/364/EEC on the right of residence.[5]

2 — Council Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (OJ, English Special Edition 1963–1964, p. 117).

3 — Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475).

4 — Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services (OJ 1973 L 172, p. 14).

5 — Council Directive 90/364/EEC of 28 June 1990 on the right of residence (OJ 1990 L 180, p. 26).

II — Legal framework (cross-reference)

3. The relevant provisions of Community law and of German law are set out in the Annex.

III — Facts, pre-litigation procedure and proceedings before the Court

4. Following petitions and complaints submitted to the European Parliament and to the Commission concerning the expulsion of a number of Italian citizens by the Baden-Württemberg authorities, the Commission initiated investigations in 1998.

5. After the Commission had concluded that certain German provisions and administrative practices relating to the right of residence were not compatible with Community law, it sent a letter of formal notice to the German Federal Government on 8 July 1998.

6. In the Commission's opinion, the German Government's reply dated 25 March 1999 did not allay its suspicion that Community law was being infringed. Accordingly, on 24 July 2000 it sent a reasoned opinion to the

German Government, in which it identified the infringements and called on Germany to take the measures necessary to remove the breaches complained of within two months.

7. Even following the German Government's reply dated 26 September 2000 the Commission took the view that Germany had not taken the measures necessary to comply with its obligations under Community law. Therefore, by application dated 4 December 2002, lodged at the Registry of the Court of Justice on 5 December 2002, it brought infringement proceedings against the Federal Republic of Germany under Article 226 EC.

8. The Commission

1. seeks a declaration that

(a) in failing to make sufficiently clear in its legislation that expulsion orders against citizens of the Union may not be based on an enabling provision which provides mandatorily for expulsion on the ground of a final criminal conviction or provides mandatorily for it as the general rule, or in basing expulsion orders against citizens of the Union on this unclear enabling provision;

(b) in failing to implement in sufficiently clear terms in Paragraph 12(1) of the Law on entry and residence of nationals of Member States of the European Economic Community ('Aufenthaltsgesetz/EWG') the requirements under Community law with regard to restriction of freedom of movement, or in basing expulsion orders against citizens of the Union on this unclear enabling provision;

(c) in failing to make sufficiently clear in its legislation that expulsion orders against citizens of the Union may not be based on an enabling provision which pursues general preventive aims, or in justifying expulsion orders against citizens of the Union with deterrence of other foreign nationals;

(d) in adopting expulsion orders against citizens of the Union which fail to maintain a reasonable relationship between the fundamental right to respect for the right to family life, on the one hand, and the preservation of public order, on the other; and

(e) in ordering the immediate enforcement of expulsion orders against citizens of the Union in non-urgent cases,

the Federal Republic of Germany has failed to fulfil its obligations under Articles 18 EC and 39 EC, under the fundamental right to respect for family life as a general principle of Community law, and under Articles 3 and 9 of Directive 64/221/EEC on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, Article 1 of Regulation (EEC) No 1612/68 on freedom of movement for workers, Articles 1, 4, 5, 8 and 10 of Directive 73/148/EEC on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services, and Articles 1 and 2 of Directive 90/364/EEC on the right of residence;

2. an order that the Federal Republic of Germany pay the costs of the proceedings.

IV — Preliminary observations

9. In the present proceedings, there arise inter alia two fundamental questions of law as regards the legal relevance of a particular administrative practice, and these are to be considered first.

A — *Relevance of administrative practice in assessing legal provisions*

10. The present infringement proceedings concern, inter alia, the question whether a practice of the administrative authorities can affect the interpretation of the national provisions on which that practice is based. The particular issue is whether it may be inferred from a particular practice that national legal provisions are unclear and therefore unlawful.

11. On this point, one must start with the leading judgment in *Commission* v *Italy*. [6] In that Case, the Court had to consider the meaning of national legal and administrative provisions having regard to how national courts construed them. [7]

12. In doing so the Court laid down the following standard:

'32. In that regard, isolated or numerically insignificant judicial decisions in the context

6 — Case C-129/00 *Commission* v *Italy* [2003] ECR I-14637.

7 — Paragraphs 30 and 31.

of case-law taking a different direction, or still more a construction disowned by the national supreme court, cannot be taken into account. That is not true of a widely-held judicial construction which has not been disowned by the supreme court, but rather confirmed by it.'

13. In paragraph 33 of that judgment too, the Court referred to 'judicial constructions'. From that it may be inferred that an administrative practice is per se not sufficient. Nor is this inference precluded by the conclusion in paragraph 41, in which the Court refers to construction and application by the administrative authorities, because in that paragraph it refers at the same time to construction and application by 'a substantial proportion of the courts', including the competent national supreme court.

14. By contrast, in the present case it has become clear that the courts, and in particular the administrative courts, do not confirm the administrative practice.

15. Accordingly, an administrative practice such as that in the present proceedings, which consists almost entirely of decisions by regional administrations, the relative importance of which is not in dispute, cannot be regarded as the sole indicators as to how a national law or administrative provision is to be interpreted.

16. This, of course, does not change the fact that an administrative practice may itself constitute an infringement of Community law.

B — *Relevance of individual cases in assessing administrative practice*

17. In its application, the Commission emphasised that it referred to individual cases only by way of example, and in order to illustrate certain patterns of decisions and administrative practices. It follows that the Commission is not seeking a finding against the defendant Member State in respect of each of these individual cases.

18. However, since the Commission also alleges that the administrative practice is in itself unlawful under Community law, these cases are important. It is therefore unneces-

sary to consider the question as to the prevalence necessary to constitute an administrative practice which is reviewable as to its lawfulness under Community law. Nor is it necessary to consider whether there has been systematic infringement of certain provisions of secondary law. [8]

19. As the Court has already held in a number of cases, a single instance of an administrative practice can constitute an infringement of Community law. That applies for example in procurement law, [9] in environmental law, [10] and as an example for the present case as regards the right of residence pursuant to the directives relevant here. [11]

V — First plea in law: Nature of the expulsion

20. By its first plea in law the Commission seeks a declaration that Paragraph 47 of the Auslandergesetz (Law on Foreign Nationals) ('AuslG') is unclear as regards the mandatory nature of expulsion, or its mandatory nature as a general rule, and also that the German administrative authorities have based expulsion orders against citizens of the Union on this unclear enabling provision.

A — *Allegation of defective transposition*

1. Submissions of the parties

21. The Commission submits that Paragraph 47 of the AuslG was in stark and irreconcilable conflict with the requirements of Article 3(1) and (2) of Directive 64/221, inasmuch as Paragraph 47 of the AuslG provides mandatorily for expulsion, or provides mandatorily for it as a general rule, where a foreign national has been convicted of any of the crimes specified in that provision. The authorities must expel the foreign national and have no discretion to make any other decision.

22. The Italian Government, which has intervened in support of the Commission, agrees that German law relating to foreign nationals is incompatible with Community

8 — See most recently Case C-494/01 *Commission* v *Ireland* [2005] ECR I-3331.

9 — Joined Cases C-20/01 and C-28/01 *Commission* v *Germany* [2003] ECR I-3609.

10 — Case C-45/91 *Commission* v *Greece* [1992] ECR I-2509.

11 — Case C-157/03 *Commission* v *Spain* [2005] ECR I-2911.

law in so far as it provides for the automatic expulsion of a citizen of another Member State solely on the basis of a criminal conviction.

23. The German Government, on the other hand, submits that under German law mandatory expulsion of citizens of the Union may be ordered only where the requirements of Community law have been satisfied. The expulsion of citizens of the Union depends not solely on Paragraph 47 of the AuslG but also on Paragraph 12 of the AufenthG/EWG and Paragraph 4 of the Freizügigkeitsverordnung/EG (Regulations regarding free movement of EU citizens).

24. The favourable legal position of citizens of the Union compared with nationals of non-member countries is, the German Government submits, recognised by the fact that, in addition to the general Law on Foreign Nationals, Germany enacted special provisions in the AufenthG/EWG and the Freizügigkeitsverordnung/EG, which apply only to citizens of the Union. The enactment of a general statute, the substance of which is supplemented in specific areas by particular laws, is a standard legislative technique. Paragraph 2(2) of the AuslG expressly confers precedence on the AufenthG/EWG over the AuslG. This means that the legal consequence of mandatory expulsion, or expulsion as the general rule, applies to citizens of the Union only where the requirements of Paragraph 12 of the AufenthG/EWG in that regard have been satisfied.

2. Legal analysis

25. As the court has explained on numerous occasions, [12] an expulsion which automatically follows a criminal conviction, without any account being taken of the personal conduct of the offender or of the danger which that person represents for the requirements of public policy, is incompatible with the fundamental principles of Community law, and in particular with Article 39(3) and Article 3 of Directive 64/221. [13]

26. The reason given by the Court is that justification for an expulsion order, which is an obstacle to the exercise of the freedoms of citizens of the Union on the basis of public

12 — Case C-348/96 *Calfa* [1999] ECR I-11, paragraph 27, Case C-340/97 *Nazli and Others* [2000] ECR I-957, paragraph 40; and Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Others* [2004] ECR I-5257, paragraph 68.

13 — *Orfanopoulos and Others* (cited above, footnote 12), paragraphs 70 and 71.

policy, is acceptable only where, in addition to the perturbation of the social order which any infringement of the law involves, there exists a genuine and sufficiently serious threat affecting one of the fundamental interests of society. [14] Accordingly, a criminal conviction can justify an expulsion only in so far as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy. [15]

27. It follows that providing for mandatory expulsion, or providing for it as a general rule, without any account being taken of the personal circumstances of the person to be expelled, is incompatible with Community law.

28. In *Orfanopoulos* the Court was faced with, inter alia, the question as to whether Article 39(3) EC and Article 3 of Directive 64/221 precluded national legislation which required the authorities to expel nationals of other Member States who had been definitively sentenced for an intentional offence against the German Law on Narcotics to a term of youth custody of at least two years or to a custodial sentence, where the sentence had not been suspended.

29. The Court found that expulsion pursuant to a national provision which required expulsion of citizens of other Member States who had been given specified sentences in respect of specified offences was *ordered automatically,* without any account being taken of the personal conduct of the offender or of the danger which that person represented for the requirements of public policy. [16]

30. In the cases of *Orfanopoulos* and *Oliveri* the Court did not, however, express a view as to whether Paragraph 47 of the AuslG was compatible with Article 39 EC and Article 3 of Directive 64/221. Thus, to date this question has not been definitively answered. It is therefore necessary to consider whether the provisions of German law have such an automatic effect.

31. Paragraph 47 of the AuslG provides for mandatory expulsion following final conviction for most intentional offences (subparagraph 1), and for expulsion as a general rule in respect of other intentional offences (number 1 of subparagraph 2). Paragraph 1(2) of the AuslG provides that any person who is not German is a foreign national, and so these provisions apply to citizens of the Union.

14 — Case 30/77 *Bouchereau* [1977] ECR 1999, paragraph 35, and *Orfanopoulos* (cited above, footnote 12), paragraph 66.

15 — See *Orfanopoulos* (cited above, footnote 12), paragraph 67.

16 — *Orfanopoulos* (cited above, footnote 12), paragraphs 69 and 70.

32. Thus, Paragraph 47(1) of the AuslG provides mandatorily for expulsion in every case of a definitive criminal conviction and does not leave any room for personal circumstances to be taken into account. In result, the same applies for expulsion ordered as a general rule pursuant to Paragraph 47(2) of the AuslG. Although in this case there is room for discretionary considerations, the only circumstances which lead to a different legal consequence are those which make expulsion ordered pursuant to the general rule disproportionate, and these of course arise only in atypical cases. There is, however, no provision for the personal conduct of the person concerned to be taken into account as a matter of course.

33. It follows that Paragraph 47(1) and (2)(1) of the AuslG provide for automatic expulsion. Considered in isolation, these provisions thus infringe Community law.

34. However, account must be taken of the fact that the German legislature has enacted special provisions in respect of the expulsion of citizens of the Union in the Gesetz über Einreise und Aufenthalt von Staatsangehörigen der Mitgliedstaaten der Europäischen Wirtschaftsgemeinschaft (Law on the residence of nationals of the Member States of the European Economic Community, 'AufenthG/EWG'). Paragraph 12(3) of the AufenthG/EWG provides that measures may be taken only where they are justified by the personal conduct of the person concerned. Paragraph 12(4) of that Law expressly provides that a criminal conviction is in itself not enough to justify measures or decisions restricting a person's residence. Thus, Paragraph 12 takes sufficient account of the provisions of the Directive.

35. The concurrency of these two Laws is regulated by Paragraph 2(2) of the AuslG in such a way that the AuslG applies only to the extent to which it is consistent with Community law and the AufenthG/EWG.

36. It follows that the central question is whether this system of applicable Laws, that is to say, the application of the AuslG to citizens of the Union as a *lex generalis* and of the AufenthG/EWG as a *lex specialis*, is in conformity with Directive 64/221.

37. In transposing a directive the Member State has a free choice as regards form and methods, a directive being binding only as to the result to be achieved. [17] This is to enable the Member State to insert the provision to be enacted into its legal system in such a way that it does not constitute a foreign element. In doing this the Member State is also

17 — Case C-40/02 *Scherndl* [2003] ECR I-12647, paragraph 43, and Case 38/77 *Enka* [1977] ECR 2203, paragraph 11.

obliged to regulate the relationship between any potentially competing provisions and to resolve such competition in the way most appropriate for the Member State's legal system, while transposing Community law correctly.

38. By enacting the AufenthG/EWG the German legislature transposed Directive 64/221 and thus established the particular provisions which regulate the residence of citizens of the Union in the Federal territory in conformity with Community law.

39. It brought these particular provisions together in a separate Law, and by statute provided that that Law was to take precedence over the AuslG, which applies to all foreign nationals.

40. Applying a statute as a *lex specialis* means that where its scope of application is engaged, the application of the general law is precluded. To that extent the *lex specialis* is, in substance, applicable exclusively.

41. Thus, in principle citizens of the Union are within the scope of application of the AuslG; however, the substantive provisions applicable to them are exclusively those in the AufenthG/EWG, wherever its requirements are satisfied. Accordingly, citizens of the Union who, under Community law, enjoy free movement within the meaning of Articles 18 EC and 39 EC are protected by the AufenthG/EWG against expulsion in the manner required by Community law as per Directive 64/221.

42. Finally, the *lex specialis* principle is common to the legal traditions of the Member States, and it follows the question as to which Law is applicable does not involve any uncertainty. The Court has expressly held this in relation to the principle that subsequent legislation overrides prior legislation. [18]

43. It follows that Paragraph 47 of the AuslG is not unclear and therefore does not infringe the Community law requirements contained in Article 3(1) and (2) of Directive 64/221.

44. For those reasons the first part of the first plea in law is unfounded.

18 — Case C-145/99 *Commission* v *Italy* [2002] ECR I-2235, paragraph 38.

B — *Allegation of defective application*

1. Substance of the complaint

45. The Commission complains of an administrative practice alleged to be based on the automatic nature of expulsion as described in its complaint. Accordingly, the first question centres on what the Commission regards as constituting an administrative practice in the present case.

46. In paragraph 15 of its application the Commission states that the purpose of the present action is not to review individual questions in individual cases. Individual cases are referred to only for purposes of example and illustration. Identifying individual cases did not preclude the possibility that further cases should be regarded as examples of the various infringements complained of.

47. It follows that the Commission considers the term 'administrative practice' to refer to a large number of individual decisions.

2. Allegation that administrative practice does not comply with Community requirements law

48. The Commission complains that in all the cases to which it refers, the German authorities based expulsion orders against citizens of the Union on Paragraph 47 of the AuslG, and that consequently a number of notices expressly stated that the reason for the authorities' decision was that the case was one of mandatory expulsion in respect of which the authorities had no discretion.

49. The German Government admits that in every case of expulsion of citizens of the Union all the relevant provisions interact, that is to say, Paragraph 47 of the AuslG is applied only in the context of Paragraph 12 of the AufenthG/EWG. It also refers in its submissions to the Verwaltungsvorschriften zum Ausländergesetz (Administrative provisions relating to the AuslG, 'AuslG-VwV'), which provide that an expulsion order under the AuslG is subject to the restrictions laid down by Paragraph 12 of the AufenthG/EWG (AuslG-VwV, Paragraphs 45.0.5.1 and 47.0.2.1).

50. The Commission complains of only a small number of orders. This could be because it is in principle not easy for the Commission to review every individual case itself, let alone to review the whole administrative practice, as to whether every administrative decision complies with Community law. It therefore relies principally on the fact

that individual cases in which there has been a clear infringement are reported to it. In the present case the Commission has received most of its information from the persons concerned, with the consequence that its analysis is based essentially on this information as to the decisions.

51. In this context the question arises as to who bears the burden of proving particular circumstances in the present infringement proceedings.

52. It is necessary under Community law, and the Court has consistently held, [19] that the burden of proving an infringement of the Treaty is on the Commission, that is to say, the Commission has to prove that the Member State has infringed its obligations under the Treaty.

53. At the same time, in a series of judgments, principally in the field of agriculture, it has been made easier for the Commission to satisfy its burden of proof. [20] The Commission's burden of proof has been lowered because the Member State is in the best position to provide evidence of and to establish certain facts, with the result that it is obliged to prove them in more detail and comprehensively and, as the case may be, to demonstrate that the Commission's claims are incorrect.

54. The question is whether a generalisation is permissible in regard to the allocation of the burden of proof. In principle, it is to be assumed that the Member State is always better informed than the Commission and therefore has an advantage over it in terms of knowledge. However, it would be at variance with general procedural principles to attempt to justify a general reversal of the burden of proof on that basis alone.

55. The burden of proof may be reversed where the Community-law provision itself gives rise to an obligation of proof on Member States, since in such cases the State has an obligation to retain documentary evidence and, if necessary, to produce it. However, that is probably not the case as regards expulsion, despite its being a restriction on free movement with serious consequences.

19 — See inter alia Case C-249/88 *Commission* v *Belgium* [1991] ECR I-1275, paragraph 6; Case C-119/92 *Commission* v *Italy* [1994] ECR I-393, paragraph 37; and Case C-160/94 *Commission* v *Spain* [1997] ECR I-5851, paragraph 17.

20 — See Case C-278/98 *Netherlands* v *Commission* [2001] ECR I-1501, paragraphs 39 to 41; Case C-329/00 *Spain* v *Commission* [2003] ECR I-6103, paragraph 68; and Case C-344/01 *Germany* v *Commission* [2004] ECR I-2081, paragraph 58.

56. On the other hand, it is not necessary for the Commission to prove an infringement comprehensively. It may be that sample investigations are sufficient to establish an infringement of Community law.

57. It is in any event clear from the uncontested submissions of the Commission, even though they refer also to decisions which have been set aside on appeal or for other reasons have not been enforced, that the administrative authorities have taken a series of decisions on the basis that they had discretion and were bound by Paragraph 47 of the AuslG. [21]

58. Moreover, these decisions were not made by only a few authorities in a small geographical area, but come from throughout the *Land* of Baden-Württemberg. [22] Furthermore, numerous expulsions have been confirmed by decisions of regional administrations in complaint proceedings under administrative law.

59. Finally, it must be pointed out that a single administrative decision which demonstrably breaches Community law may be sufficient to prove an infringement of the Treaty. [23]

60. The German administrative authorities have issued at least one expulsion order which infringed Community law, namely the decision of the Freiburg regional administration dated 23 March 2000.

61. By that decision the Ausländerbehörde (Office for Foreign Nationals) expelled a citizen of the Union from the Federal territory pursuant to Paragraph 47(2)(1) of the AuslG. It stated the reason to be that that provision required it to order expulsion and it did not have any discretion. The case was not an exceptional one in any way different from the general case, nor did the foreign national have the higher protection against expulsion conferred by Paragraph 47(3) of the AuslG. The applicable administrative provisions to which the German Government referred were in that regard not taken into account.

62. Thus, in that one case at least the Ausländerbehörde based the expulsion of a citizen of the Union on an enabling provision which did not take sufficient account of the

21 — See the application, p. 18.

22 — See Case C-365/97 *Commission* v *Italy* [1999] ECR I-7773, paragraph 69.

23 — *Commission* v *Spain* (cited above, footnote 11).

particular provisions relating to residence of citizens of the Union contained in Directive 64/221. It ordered expulsion under Paragraph 47 of the AuslG on the sole ground of a criminal conviction, that is to say it applied neither Paragraph 12(4) of the AufenthG/EWG, which prohibits precisely that, nor Paragraph 12(3) of the AufenthG/EWG, which requires the personal conduct of the citizen of the Union to be taken into account.

63. Even if only a single case is reviewed by way of example and proves to involve an infringement of Community law, that suffices for a declaration that the administrative authorities have wrongly applied the law, in particular given that they have proceeded in the same way in a series of cases.

64. For those reasons, the second part of the first plea in law is well founded.

VI — Second plea in law: Requirements with regard to restrictions of freedom

65. By its second plea in law the Commission complains that Paragraph 12(1) of the AufenthG/EWG is not sufficiently clear as regards the requirements with regard to restriction of freedom of movement on the grounds of public policy and that the German administrative authorities have based expulsion orders against citizens of the Union on this unclear enabling provision.

A — *Allegation of defective transposition*

1. Submissions of the parties

66. The Commission submits that Paragraph 12 of the AufenthG/EWG did not transpose secondary Community law with sufficient clarity. This is because the distinction drawn between expulsion in the case of unlimited residence permits ('only on serious grounds of public security or policy') and expulsion in the case of limited residence permits ('on grounds of public policy, security or health') creates the impression that in cases of limited rights of residence 'simple' reasons of public security and policy suffice. However, this differs significantly from the requirements laid down by the Court in considering Article 39(4) EC in the context of public policy.

67. Against this, the German Government submits that the reference in the AufenthG/EWG to the EC Treaty makes it sufficiently clear that the terms are to be interpreted in accordance with the interpretation which the Court has given to the EC Treaty and that there is therefore no legal uncertainty.

2. Legal analysis

(a) Fundamental uncertainty in the provision concerning limited rights of residence (Paragraph 12(1)(1) of the AufenthG/EWG)

68. Although in substance the Commission is alleging an infringement of Article 39 EC, it is clear that it is also necessary to examine whether Directive 64/221 has been infringed, in particular because it gives effect to the requirements with regard to the restriction of free movement of workers and of freedom of establishment. Article 2(1) of Directive 64/221 provides that expulsion from a country's territory may be ordered only on grounds of public policy, public security or public health.

69. Precisely this wording is central to the German AufenthG/EWG. The question is whether the mere repetition of a Community law provision causes uncertainty, that is to say, whether the Directive's requirements with regard to expulsion of foreign citizens of the Union from a country's territory do not appear sufficiently clearly from the German transposition measure.

70. The provisions of directives must be implemented with unquestionable binding force, and with the necessary specificity, precision and clarity, in order to satisfy the requirements of legal certainty. [24]

71. On the one hand, transposing a directive does not necessarily require that its provisions be enacted in precisely the same words in a specific express legal provision and the general legal context may be sufficient if it actually ensures the full application of the directive in a sufficiently clear and precise manner. [25]

72. On the other hand, the principle of legal certainty requires appropriate publicity for

24 — See inter alia Case C-80/92 *Commission* v *Belgium* [1994] ECR I-1019, paragraph 20; Case C-151/94 *Commission* v *Luxembourg* [1995] ECR I-3685, paragraph 18; Case C-415/01 *Commission* v *Belgium* [2003] ECR I-2081, paragraph 21; and Case C-296/01 *Commission* v *France* [2003] ECR I-13909, paragraph 54.

25 — Case C-58/02 *Commission* v *Spain* [2004] ECR I-621, paragraph 26; and Case C-217/97 *Commission* v *Germany* [1999] ECR I-5087, paragraph 31.

the national measures adopted pursuant to Community rules in such a way as to enable the persons concerned by such measures to ascertain the scope of their rights and obligations in the particular area governed by Community law. [26]

73. It follows that in principle using precisely the same words as the provisions of a directive does not satisfy the requirements governing its transposition. The present case, however, concerns simply whether the terms used in the AufenthG/EWG provide sufficient information as to their Community law scope, that is whether the scope of protection conferred by the Directive and by the national provisions is the same.

74. In Paragraph 12 of the AufenthG/EWG, the reference to Article 48(3) and Article 56(1) of the EEC Treaty immediately follows the words 'public policy, security or health'. The reference to these provisions makes it clear that the Community law standard applicable to the fundamental freedoms is to be applied, and this in turn has been given specific content by the case-law of the Court. [27]

26 — Case C-415/01 *Commission* v *Belgium* (cited above, footnote 24), paragraph 21; and Case C-313/99 *Mulligan and Others* [2002] ECR I-5719, paragraphs 51 and 52.

27 — See above, footnote 14.

75. However, the question then arises as to whether the mere reference to provisions of primary law is sufficient to satisfy the requirements laid down by the Court. It has stated that to transpose a directive a national provision must *in itself* be comprehensible and sufficiently clear and precise in terms of legal certainty. Thus, where it is possible to interpret a provision only by reference to Community law as developed by the Court, the requisite legal certainty is not achieved.

76. Finally, because it refers only to primary law, reading Paragraph 12(1) of the AufenthG/EWG does not enable the persons concerned to ascertain what restrictions have been imposed by the Court's case-law on the concepts of public policy, security and health.

77. The uncertainty in Paragraph 12(1) of the AufenthG/EWG is exacerbated by the fact that, in cases governed by Paragraph 12(1)(1) of the AufenthG/EWG, there need not be a serious ground justifying expulsion. However, this is precisely at variance with the Court's case-law, according to which, in so far as it may justify an expulsion measure, constituting a restriction on the free movement of persons subject to community law,

the concept of public policy presupposes a genuine and sufficiently serious threat to a fundamental interest of society. [28]

78. Admittedly, Paragraph 47.0.2.1 of the AuslG-VwV provides that expulsion may be ordered only where there is a sufficiently serious threat to a fundamental interest of society. However, in itself this cannot achieve the clarity required of a transposition measure. In the first place, administrative provisions are internal to the administrative authorities and in principle do not have external effect and are not disclosed to individuals. It is therefore not possible for individuals to ascertain the scope and extent of their rights by reference to administrative provisions. In the second place, paragraph 47.0.2.1 of the AuslG-VwV provides that expulsion may be ordered only where there is a genuine and sufficiently serious threat to a fundamental interest of society. Moreover, no distinction is drawn between the first and the second sentence of Paragraph 12(1) of the AufenthG/EWG.

79. Nor does paragraph 45.0.5.1 of the AuslG-VwV contribute to clarity. Specifically, it provides that expulsion may be ordered only for reasons of public policy, security or health. However, in doing so it refers generally to Paragraph 12(1) of the AufenthG/EWG, again without distinguishing between the first and the second sentences thereof.

80. In conclusion, Paragraph 12(1)(1) of the AufenthG/EWG does not therefore satisfy the requirements laid down by the Court in respect of transposing directives.

(b) Uncertainty in connection with the provision concerning unlimited rights of residence (Paragraph 12(1)(2) of the AufenthG/EWG).

81. As regards unlimited rights of residence, Paragraph 12(1)(2) of the AufenthG/EWG expressly provides that expulsion may be ordered only for serious reasons of public security or policy.

82. Thus, the wording of the provision is expressly to the effect that not every offence is sufficient to result in expulsion, and that more serious reasons are required.

28 — *Bouchereau* (cited above, footnote 14), paragraph 35.

83. It follows that Paragraph 12(1)(2) of the AufenthG/EWG transposes Article 3 of Directive 64/221, as interpreted by the Court in its settled case-law, [29] in a manner consonant with Community law.

B — *Allegation of defective application*

1. Admissibility

(a) Submissions of the parties

84. The German Government takes the view that this plea in law constitutes a significant extension of the complaint raised in the reasoned opinion. There the Commission restricted itself to complaining about the method of transposition which the German legislature had adopted in Paragraph 12(1) of the AufenthG/EWG. However, there is a significant difference between the Commission complaining solely about a legislative transposition measure in the abstract as an infringement of the Treaty and raising the additional complaint in its application about an administrative practice by which decisions in individual cases are unlawful under Community law, as being based on the unclear provision in Paragraph 12(1) of the AufenthG/EWG.

85. Against this, the Commission submits that the submissions were not taken verbatim from the pre-litigation procedure, being instead more precise. The more precise submissions do not go beyond the complaints made in the letter of formal notice and in the reasoned opinion. Moreover, the erroneous practice is at the heart of the allegations and is therefore patently a part of the complaint set out in the pre-litigation procedure.

(b) Legal analysis

86. In an action for failure to fulfil obligations the purpose of the pre-litigation procedure set out in Article 226 EC is to give the Member State concerned an opportunity, on the one hand, to comply with its obligations under Community law and, on the other, to avail of its right to defend itself against the charges formulated by the Commission. [30]

29 — *Bouchereau* (cited above, footnote 14), paragraph 35, and *Orfanopoulos* (cited above, footnote 12), paragraph 66.

30 — Case 293/85 *Commission* v *Belgium* [1988] ECR 305, paragraph 13; Case C-96/95 *Commission* v *Germany* [1997] ECR I-1653, paragraph 22; Case C-439/99 *Commission* v *Italy* [2002] ECR I-305, paragraph 10; and Case C-350/02 *Commission* v *Netherlands* [2004] ECR I-6213, paragraph 18.

87. Accordingly, the proper conduct of that procedure constitutes an essential guarantee prescribed by the Treaty not only in order to protect the rights of the Member State concerned, but also to ensure that any contentious procedure will have a clearly defined dispute as its subject-matter. [31]

88. According to the case-law of the Court, the reasoned opinion and the proceedings brought by the Commission must be based on the same complaints as those set out in the letter of formal notice initiating the pre-litigation procedure. However, that requirement cannot be carried so far as to mean that in every case the statement of complaints in the letter of formal notice, the operative part of the reasoned opinion and the form of order sought in the application must be exactly the same, provided that the subject-matter of the proceedings has not been extended or altered but simply limited. [32]

89. The allegation that Germany has based expulsions of citizens of the Union on Paragraph 12 of the AufenthG/EWG does not expressly correspond to any of the allegations contained in the reasoned opinion. Point (vi) thereof refers expressly only to the unclear transposition of Community law.

90. However, account must be taken of the fact that in point (iv) of the reasoned opinion the Commission expressly complained that the German authorities had issued expulsion orders against citizens of the Union in cases in which a genuine and sufficiently serious threat to a fundamental interest of society had not been proved.

91. The question arises as to whether this complaint, albeit not identical in terms of wording, none the less corresponds in substance to the second plea in law in so far as the latter refers to defective administrative acts.

92. The second plea in law concerns the allegation that the German administrative authorities have based decisions on the enabling provision in Paragraph 12(1) of the AufenthG/EWG, which was insufficiently clear as a transposition measure. It is clear from the Commission's submissions that what is meant is that Paragraph 12(1) of the AufenthG/EWG does not define the interests which it seeks to protect, namely public policy and security, in the manner required by the case-law of the Court.

93. According to this case-law, the protected concept of public policy is not affected by every criminal act: there must be a genuine

31 — Case C-1/00 *Commission* v *France* [2001] ECR I-9989, paragraph 53; Case C-287/00 *Commission* v *Germany* [2002] ECR I-5811, paragraph 17; and *Commission* v *Netherlands* (cited above, footnote 30), paragraph 19.

32 — *Commission* v *Italy* (cited above, footnote 22), paragraph 25, and Case C-191/95 *Commission* v *Germany* [1998] ECR I-5449, paragraph 56.

and sufficiently serious threat to a fundamental interest of society. [33]

94. Point (iv) of the reasoned opinion contains the same allegation. Ultimately, it makes no difference whether the complaint is that the administrative authorities have based a decision on an enabling provision which does not expressly require a real and sufficiently serious threat to a fundamental interest of society or whether they have not proved that there is such a serious threat. In one case as in the other, the substance of the allegation is that the administrative authorities have not assessed whether there is such a serious threat.

95. In addition, it is clear from the section in the reasoned opinion headed 'Threat to public policy' that, in addition to the allegation of insufficiently clear transposition, there is also a complaint specifically about administrative practice.

96. This is because the question whether the subject-matter of the action is the same as that of the reasoned opinion is to be determined by reference not only to the wording of the operative part but also to the preceding observations on the specific points. [34]

97. Thus, on pages 7 to 9 of the reasoned opinion the Commission complains about the administrative authorities' application of Paragraph 12 of the AufenthG/EWG in that (a) the term 'public policy' is wrongly interpreted for the purposes of Paragraph 12(1)(1) of the AufenthG/EWG, (b) the orders do not describe the facts of the case specifically and precisely enough to demonstrate a serious, genuine and present threat to public policy on account of the conduct of the person concerned, (c) and a change in circumstances since the authority's previous decision cannot be taken into account.

98. Accordingly, in the light of the case-law of the Court, [35] the second part of the second plea in law corresponds in substance to point (iv) of the reasoned opinion and thus fell within the subject-matter of the pre-litigation procedure

99. Accordingly, this part of the application is admissible.

2. Substance

(a) Submissions of the parties

100. The Commission complains that numerous notices demonstrate a fundamental

33 — *Bouchereau* (cited above, footnote 14), paragraph 35.

34 — *Commission* v *Italy* (cited above, footnote 22), paragraphs 36 et seq.

35 — *Commission* v *Italy* (cited above, footnote 22), paragraph 25, and *Commission* v *Germany* (cited above, footnote 32), paragraph 56.

misinterpretation of the term 'public policy' for the purposes of Paragraph 12(1)(1) of the AufenthG/EWG, and refers in that connection to 17 notices.

101. It submits that in each of these cases the authorities found there to be grounds based on public policy either manifest or sufficient on account of the offence in question. The individual criteria contained in *Bouchereau*, [36] namely 'genuine', 'serious' and 'present', were neither mentioned nor considered. Indeed, it was sometimes even expressly held that it was not necessary to consider whether serious grounds based on public policy existed, since these were required only in cases falling within Paragraph 12(1)(2) of the AufenthG/EWG, that is to say, only for foreign nationals with unlimited EC residence permits. In that connection the Commission referred to seven notices.

102. In this context the Commission reiterates that it referred to individual cases only by way of example. So far as the Commission is concerned, the instances referred to put it beyond doubt that this was not a case of isolated erroneous decisions and that this pattern of decisions arose time and time again, demonstrating a degree of generality that constituted specific unlawful administrative practices (albeit differing from region to region).

36 — Cited above, footnote 14, paragraph 35.

103. The German Government replies that the administrative authorities applied Community law correctly. This was shown, for example, by two of the cases the Commission itself relied upon, in which the Ausländerbehörde had clearly been aware of the strict requirements of Community law. The expulsion orders in those cases had therefore stated, 'Having regard to the case-law of the Court of Justice of the European Communities, which with regard to restrictions on free movement on account of a criminal conviction requires there to be a sufficiently serious threat to a fundamental interest of society, there must be a sufficient probability, assessed by reference to the principle of proportionality and accordingly the extent of the threat, that the foreign national in question will disturb public security or order in the future.'

(b) Legal analysis

104. As the claimant in infringement proceedings, the onus is on the Commission to explain and to prove the disputed facts. In the present case, involving a complaint that the German administrative authorities are applying Paragraph 12 of the AufenthG/EWG in a manner contrary to Community law, this means the relevant administrative decisions. The Commission has not done this, and has therefore not discharged its burden of proof. It has not produced any of

the notices it relied on or provided any excerpts from them, confining itself instead to including lists in its application, as it did in its reasoned opinion and letter of formal notice.

105. The submission that it referred to individual cases only by way of example and by its action was complaining about the whole administrative practice cannot admit of any other conclusion. As stated above, [37] in complaining of an administrative practice which is contrary to Community law, the Commission means nothing more than a number of individual cases. In order to establish that this administrative practice infringes Community law it is necessary to review at least *one* administrative act as to whether it demonstrably infringes Community law. [38] However, since the administrative decisions are not before the Court, it is not possible to reach such a conclusion.

106. Accordingly, this part of the second plea in law is to be dismissed as unfounded, the burden of proof not having been discharged.

37 — See section IV.B.

38 — *Commission* v *Italy* (cited above, footnote 18), paragraph 56.

VII — Third plea in law: General preventive considerations unlawfully taken into account

107. By its third plea in law the Commission seeks a declaration that Paragraph 47(1) and (2) of the AuslG infringe Article 3(1) and (2) of Directive 64/221, in that aragraph 47(1) and (2) of the AuslG provide mandatorily for expulsion on the ground of a final criminal conviction, or provide mandatorily for it as the general rule, without permitting personal conduct to be taken into account and thus pursuing general preventive aims. The Commission also seeks a declaration that in German administrative practice, expulsion orders against citizens of the Union seek to deter other foreign nationals.

A — *Allegation of defective transposition*

1. Admissibility

(a) Submissions of the parties

108. The German Government submits that this part of the third plea in law was an

inadmissible extension of the complaint, since this allegation was not contained in the reasoned opinion. It was brought into the third plea in law only when the previous point (vii) was re-formulated.

109. Against this, the Commission submits that in the letter of formal notice it had already alleged that the enabling provision in Paragraph 47(1) and (2) of the AuslG disclosed a general preventive aim such that notices based on it necessarily involved inadmissible, general preventive considerations and for that reason infringed Community law. This complaint was maintained in the reasoned opinion. In that regard the Commission refers in particular to the third paragraph on page 11 of the reasoned opinion.

(b) Legal analysis

110. The section of the reasoned opinion headed 'Deterrence' contains the allegation that Paragraph 47(1) and (2) of the AuslG pursue general preventive aims. This makes it sufficiently clear that the complaint is not only about administrative practice but also about the transposition of Community law.

111. Finally, the first part of the third plea in law, namely that the legislation fails to make it sufficiently clear that expulsion orders against citizens of the Union cannot be based on an enabling provision which pursues general preventive aims, is in substance the same allegation as that which appeared in point (iii) of the reasoned opinion. This states that the German legislation fails to make sufficiently clear that expulsion orders may not be based on an enabling provision which provides mandatorily for expulsion on the ground of an enforceable criminal conviction, or provides mandatorily for it as a general rule.

112. Far more than any other, a legal basis that permits expulsion on the ground of an enforceable criminal conviction without regard to any other factors, and in particular the personal conduct of the person concerned, pursues general preventive aims. Specific preventive aims require an enabling provision which allows room for the particular circumstances of the case to be taken into account.

113. Thus, this plea in law was included in the reasoned opinion, and is consequently admissible.

2. Substance

(a) Submissions of the parties

114. The Commission submits that Paragraph 47(1) and (2) of the AuslG pursues general preventative aims, since expulsion is intended to deter other foreign nationals from committing the same or similar crimes. This, however, infringes Article 3(1) and (2) of Directive 64/221.

115. The Court had held that expulsion is justified only if 'the personal conduct [of the person concerned] indicates a specific risk of new and serious prejudice to the requirements of public policy'. [39] The Court concluded that a measure expelling an alien as a matter of principle ordered on general preventive grounds following a criminal conviction for a specific offence must be considered to be incompatible with the principles applicable in relation to freedom of movement of workers holding the nationality of a Member State. [40]

116. Against this, the German Government submits that German law is unequivocal and clear to the effect that a citizen of the Union cannot be expelled on general preventive grounds. This is because Paragraph 12 of the AufenthG/EWG prohibits general preventive considerations from being taken into account in relation to citizens of the Union.

(b) Legal analysis

117. As regards the legal analysis of the first part of the third plea in law, it is possible to refer generally to the discussion of the first part of the first plea in law. This is because to the extent that the complaint is that German law takes general preventive considerations into account, the analysis follows that in relation to the complaint that German law provides for automatic expulsion of citizens of the Union from the Federal territory.

118. Specifically, if the law provides for mandatory expulsion, or for mandatory expulsion as a general rule, in response to an enforceable criminal conviction, in order generally to deter others from committing crimes, there is no room for the personal conduct of the individual to be taken into account, and precedence is given to general preventive considerations.

39 — *Nazli* (cited above, footnote 12), paragraph 61.
40 — *Nazli* (cited above, footnote 12), paragraph 63.

119. To that extent, therefore, reference should be made to the foregoing discussion and the same result applies as regards the present point, that in so far as German law permits expulsion orders against citizens of the Union to be made on grounds of public security and policy, Paragraph 12 of the AufenthG/EWG requires general preventive considerations to be disregarded.

120. For those reasons, the first part of the third plea in law is unfounded.

B — *Allegation of defective application*

1. Submissions of the parties

121. The Commission complains that in a series of decisions the German authorities firmly stated that expulsion was being ordered inter alia on grounds of general preventative considerations. By way of example it adduced 11 decisions. It states that the intention was to send a warning to other foreign nationals by means of the expulsion and to constrain them to act lawfully. Sometimes, the grounds even attached particular importance to general preventive effect. It also refers to seven decisions from which it quotes excerpts.

122. The German Government submits that administrative provisions provides that expulsion orders may not be issued against citizens of the Union in pursuit of general preventive aims. It is unobjectionable for the authorities dealing with foreigners to refer to general preventive considerations in addition to specific preventive considerations, and to identify these as supplementary grounds.

2. Legal analysis

123. The public policy exception to the principle of free movement is to be interpreted restrictively so as to require that the personal conduct in the individual case must constitute a present threat to the requirements of public policy. [41]

41 — *Calfa* (cited above footnote 12), paragraphs 22 to 24.

124. From that the Court concluded that Community law prohibits the expulsion of a national of a Member State on the basis of general preventive considerations, that is for the purpose of deterring other foreign nationals, [42] in particular without any account being taken of the personal conduct of the offender or of the danger which that person represents for the requirements of public policy. [43]

125. First, it must be recalled that the German Government cannot justify the practice by the fact that German administrative provisions do not permit justification to be based on general preventive considerations. The first reason is that the complaint is not as to the legal basis but as to the fact that various expulsion orders were based on general preventative considerations. The second reason is that primary legal sources binding the administrative authorities prohibit justification of expulsions by reference to general preventive considerations.

126. The German Government does not dispute that general preventive considerations are referred to in the justification for a number of notices. However, it emphasises that general preventive considerations were referred to merely on an 'additional' basis, and that each expulsion was sufficiently justified by the personal conduct of the person being expelled.

127. The justification given in an official decision addressed to an individual identifies what the authority regards as material for its decision. If it includes general preventive considerations in its justification, this means that such considerations too moved it to issue its decision in that form and with that content.

128. The justification contained in administrative acts serves also to protect the individual, since he should be able to defend himself against the arguments it includes. If the justification includes general preventive considerations, this could reduce the protection given to the individual, since he cannot dispute their force, general preventive considerations being related not to him but to general matters which have nothing to do with him.

129. Accordingly, I consider it to be enough to constitute an infringement that the justification includes general preventative considerations, since this means that at least from the individual's point of view such

42 — Case 67/74 *Bonsignore* v *Oberstadtdirektor der Stadt Köln* [1975] ECR 297, paragraph 7.

43 — *Orfanopoulos* (cited above, footnote 12), paragraph 68; *Calfa* (cited above, footnote 12), paragraph 27; and *Nazli* (cited above, footnote 12), paragraph 59.

considerations are part of the justification and it becomes unclear that Article 3(1) of Directive 64/221 provides that only personal conduct, and thus only specific preventive considerations, may be relied upon.

130. For those reasons, the second part of the third plea in law is well founded.

VIII — Fourth plea in law: Fundamental right to respect for family life

131. By its fourth plea in law the Commission seeks a declaration that the German authorities have issued expulsion orders against citizens of the Union which fail to maintain a reasonable balance between the fundamental right to family life under Article 8 of the European Convention for the Protection of Human Rights (ECHR) and Fundamental Freedoms, on the one hand, and the preservation of public order, on the other. In substance, the Commission complains of an infringement of the principle of proportionality which must be observed in the balance to be struck by Article 8 of the ECHR.

132. The ECHR is part of the fundamental rights which, according to Article 6(2) EU, as confirmed by the consistent case-law of the Court, are protected by the Community legal order. The ECHR encompasses fundamental and human rights which must also be respected by the Member States within the area of application of Community law. [44]

133. According to the case-law of the Court, when taking measures relating to public order the Member States must observe the principle of proportionality; such measures must therefore be appropriate for securing the attainment of the objective which they pursue and must not go beyond what is necessary in order to attain it. [45]

134. In this connection it is incumbent on the Member States to assess the threat to public order in each individual case, taking into account the particular legal situation of the persons subject to Community law and

44 — As regards the fundamental right to family life, see Case C-60/00 *Carpenter* [2002] ECR I-6279, paragraph 41.

45 — Case C-100/01 *Olazabal* [2002] ECR I-10981, paragraph 43, and *Carpenter* (cited above, footnote 44), paragraph 42.

the decisive importance of the principle of free movement. [46]

135. In that regard one must start with the case-law of the European Court of Human Rights on the application of Article 8(2) of the ECHR. In essence, the question is which interests are to be taken into account and weighed up in appraising the need to interfere with the fundamental right to respect for family life guaranteed by the ECHR.

136. These include, for example, the nature and gravity of the crime, the length of residence in and the degree of integration into the country from which the person is to be expelled, the nationality of the person concerned, his family situation, and any difficulties the person in question and his family might experience in his country of origin. [47]

137. The Commission's application requires German administrative practice to be reviewed on two bases: first, in terms of failure to balance interests, and second, in terms of defective balancing of interests.

A — *Failure to balance interests*

138. The Commission complains that in many cases the German authorities dealing with foreigners did not consider the question of proportionality at all, or assumed that mandatory expulsion precluded an assessment of proportionality.

139. Accordingly, in this context it is unnecessary to consider whether individual expulsions were in fact proportionate.

140. It should be observed at this point that, so far as the Commission alleges that Paragraph 47 of the AuslG has been incorrectly applied, its complaint is identical in substance to the complaint of defective application raised by the first plea in law. This is because, where an authority proceeds on the footing that expulsion is mandatory, then, even where national law might in principle provide for an assessment of

46 — *Bouchereau* (cited above, footnote 14), paragraph 30.

47 — From the recent case-law of the European Court of Human Rights, see *Mokrani* v *France*, 15 July 2003, Application No 52206/99, paragraph 30, and *Boultif* v *Switzerland*, 2 August 2001, *Recueil des arrêts et décisions* 2001-IX, paragraphs 39, 41 and 46.

proportionality, *ex hypothesi* it cannot be undertaken to its full extent.

B — *Defective balancing of interests*

141. The German Government does not dispute that in various decisions it was expressly stated that proportionality either had not been or could not be examined. It simply points out that wrong decisions were corrected by the courts or otherwise.

142. However, the German administrative authorities have regarded and ordered expulsion as mandatory in at least one case. This was established with regard to the decision of the Freiburg Regional Administration of 23 March 2000 in the context of the first plea in law. The Commission also referred to a number of similar cases in which comparable decisions were made.

143. For those reasons it is to be held that the German authorities responsible for foreigners have made expulsion orders which infringe Community law, in that, when applying Paragraph 47 of the AuslG, they failed to consider the proportionality of the decision and thus failed to take account of the importance of Article 8 of the ECHR.

144. The Commission also complains that decisions have been disproportionate, on the basis that the authorities failed to attach sufficient importance to the fundamental right to respect for private and family life. It claims that failure to attach sufficient weight to this in an individual case constitutes an infringement. While it accepts that fundamental rights were taken into account in arriving at the decision it complains that they were given insufficient weight. It should also be observed that the Commission has not drawn a clear distinction from the cases referred to in section A above. In other words, in the present context the Commission also cites cases in which the authorities regarded themselves as precluded from assessing proportionality.

145. So far as concerns the balancing of interests, the starting point is that the case-law of the European Court of Human Rights [48] allows States a broad discretion in implementing their immigration policy, pro-

48 — See also the decision of the European Court of Human Rights in *Adam* v *Germany*, 4 October 2001, Application No 43359/98, in which it was found that Article 8 of the ECHR had not been infringed.

vided that there is no undue interference with the rights guaranteed by the ECHR. [49]

146. A finding that the basic rights conferred by Community law have been infringed may be made only if it is evident from the circumstances that there has been an obvious failure to safeguard the fundamental values protected by the ECHR, and thus the rights of the person concerned. That would be the case if, for example, the authority did not refer to the specific family circumstances of the person concerned, indeed even where it was obvious that they could not be decisive in the particular case. In those circumstances it is not enough merely to state that there are no family reasons precluding expulsion.

147. Admittedly, it is difficult to infer from the information provided by the Commission whether family circumstances have actually been left out of account in individual decisions. The Commission confines itself rather to identifying various family factors which in its opinion were not weighed against the misconduct of the person being expelled. However, what the Commission is submitting becomes clear when compared to the various cases the Commission lists in its other pleas-in-law and to its reasoned opinion and letter of formal notice.

148. The German Government does not dispute the Commission's submissions in so far as the reasons given in various expulsion orders did not specify the family context comprehensively. In addition it stresses that, in any event, disproportionate expulsion orders had been set aside by the courts.

149. However, in my opinion this is not enough to dispel the suspicion that a not insignificant number of decisions by the administrative authorities did fail to attach sufficient weight to family circumstances. The crucial point, as already explained, is not whether particular expulsions were in fact proportionate, but whether the considerations leading to them were properly set out in the reasons given.

150. Consideration must also be paid to the question whether account must be taken of whether the person concerned has in principle a right of residence in the balancing process in cases concerning the expulsion of citizens of the Union.

49 — Opinion of Advocate General Geelhoed in Case C-275/02 *Ayaz* v *Land Baden-Württemberg* [2004] ECR I-8765, point 84.

151. Although the ECHR [50] does not itself confer a right of residence, Community law provides a number of bases for such a right of residence. The German Government submits that persons having a right of residence do not receive more protection, because the ECHR precludes different standards of protection for basic rights. Thus stated, that is not the case. Indeed, it can even be inferred from the case-law of the European Court of Human Rights that the expulsion of certain categories of persons, such as second-generation immigrants or persons who have an unlimited right of residence, [51] is subject to particularly stringent conditions.

C — *Conclusion*

152. It must in conclusion therefore be held that, in issuing expulsion orders against citizens of the Union which fail to maintain a reasonable balance between the fundamental right to respect for family life within the terms of Article 8 ECHR, on the one hand, and the preservation of public order, on the other, Germany has failed to fulfil its obligations under Community law.

153. Accordingly, the fourth plea in law is well founded.

IX — Fifth plea in law: Orders for immediate enforcement

154. By its fifth plea in law the Commission asks the Court for a declaration that, in ordering the immediate enforcement of expulsion orders against citizens of the Union in non-urgent cases, the German authorities have breached Article 9(1) of Directive 64/221.

A — *Submissions of the parties*

155. The Commission submits that in German administrative practice it is normally,

50 — See the judgment of the European Court of Human Rights in *Radovanovic* v *Austria*, 22 April 2004, Application No 42703/98, paragraph 30, and *Abdulaziz, Cabales* and *Balkandali* v *United Kingdom*, of 28 May 1985, Series A, No 94, paragraph 68.

51 — *Radovanovic* (cited above, footnote 50), paragraph 36.

and almost systematically, the case that the conditions for immediate enforcement of expulsion are found to be present without sufficient justification. Paragraph 80(2)(1)(4) of the Verwaltungsgerichtsordnung (Administrative Court Regulations) provides that there must be a public interest in immediate enforcement of the decision which outweighs the private interest in suspending its effect where an appeal has been lodged.

156. The German Government accepts that immediate enforcement was ordered in very many of the cases in which citizens of the Union have been expelled. However, it denies that immediate enforcement has been systematically ordered without sufficient justification. Rather, immediate enforcement has always resulted from an independent review of its specific requirements.

B — *Legal analysis*

157. The analysis of the fifth plea in law must begin with the case-law of the Court since the present action was brought.

1. Scope of the judgment in Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Others*

158. In the reference for a preliminary ruling in Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Others* [52] the Court had to decide inter alia whether Article 9 of Directive 64/221 precluded a provision which no longer provided for a complaints procedure, comprising also an examination of expediency, against a decision of expulsion from the national territory taken by a regional administration, where no authority independent of that administration had been put in place.

159. Those proceedings concerned a national provision which stated that a pre-litigation procedure by which the lawfulness and expediency of an administrative act was reviewed by the immediately superior authority was excluded where the administrative act had been adopted by a regional administration (see Paragraph 6a of the Baden-Württemberg Ausführungsgesetz zur Verwaltungsgerichtsordnung (Law implementing the Administrative Court Regulations)).

160. The Court's response was that Article 9(1) of Directive 64/221 precluded a provi-

52 — *Orfanopoulos and Others* (cited above, footnote 12), paragraph 101 et seq.

sion which no longer provided for a complaints procedure or an appeal, comprising also an examination of expediency, against a decision to expel a national of another Member State taken by an administrative authority, where no authority independent of that administration has been put in place.

161. In the present case, the Commission's complaint focuses on the allegation that the administrative authorities ordered expulsion as a general rule in non-urgent cases.

2. Failure to assess the urgency of a case

162. The German Government is correct in stating that in principle very high requirements must be satisfied for an expulsion order, with the result that it is not immediately obvious that there is a difference between these requirements and those for immediate enforcement.

163. On the other hand, a comparison of Articles 7 and 9 of Directive 64/221 shows that, in addition to the requirements for expulsion, there are particular requirements for shortening the length of time a person may remain within the national territory.

164. That means that the urgency required by Article 9 of Directive 64/221 cannot be constituted by the fundamental threat to public order but must relate to the fact that apart from that it is not possible to wait for the usual appeal process to be exhausted.

165. By ordering immediate enforcement the rights of the individual to a judicial hearing are restricted, in favour of the requirements of public policy. This is because the fact that an appeal does not have the suspensory effect provided for in principle means that the effectiveness of the rights of the defence and of the time limit for a defence is lessened. Thus, in considering the question of proportionality in the context of ordering immediate enforcement, it is necessary to look beyond the requirements for expulsion in terms of a threat to public order and to consider the fundamental right to a hearing, which Community law guarantees pursuant to Article 6 of the ECHR. To find that there is urgency in a particular case, the administrative authority must take this basic right into account in an individual case before deciding whether to order immediate enforcement.

166. In its decision dated 23 May 1996 the Landratsamt Göppingen (Göppingen Dis-

trict Administration) failed to do this, giving the following reasons: 'It is in the overriding public interest to order immediate enforcement of this decision. In order to prevent the commission of further crimes after release from imprisonment, it is necessary that you leave the Federal territory before the end of any administrative complaint proceedings'.

167. The Commission referred to numerous other cases in which the German authorities responsible for dealing with foreigners justified an order for immediate enforcement in similar terms.

168. Admittedly, the German Government claims that in Germany, an order for immediate enforcement must in principle be taken separately. However, it does not dispute that, as the Commission has submitted, in many cases the same factor has been used to justify an order for immediate enforcement, namely a threat to public order.

169. It is therefore to be held that, in ordering the immediate enforcement of expulsion orders against citizens of the Union without examining whether the requirements for urgency have been satisfied, Germany has failed to fulfil its obligations under Community law.

170. Accordingly, the fifth plea in law is well founded.

X — Costs

171. Article 69(2) of the Rules of Procedure provides that the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Article 69(3), first subparagraph, provides that where each party succeeds on some and fails on other heads, the Court may order that the costs be shared or that the parties bear their own costs.

172. Since the Commission and the Federal Republic of Germany have each failed in some of their submissions, they should to be ordered to bear their own costs. The Italian Republic, which intervened in the proceedings, is to bear its own costs, pursuant to Article 69(4), first subparagraph, of the Rules of Procedure.

XI — Conclusion

173. For the foregoing reasons, it is proposed that the Court declare:

(1) That:

— in basing expulsion orders against citizens of the Union on the enabling provision in Paragraph 47(1) and (2) of the AuslG, which provides mandatorily for expulsion on the ground of an enforceable criminal conviction, or provides mandatorily for it as the general rule;

— in failing to implement in sufficiently clear terms in Paragraph 12(1)(1) of the AufenthG/EWG the requirements under Community law with regard to persons having limited rights of residence, and in basing expulsion orders against citizens of the Union on general preventive grounds;

— in using expulsion orders against citizens of the Union which fail to maintain a reasonable balance between the fundamental right to respect for private and family life, on the one hand, and the preservation of public order, on the other;

— in ordering the immediate enforcement of expulsion orders against citizens of the Union without considering whether the requirements of urgency have been satisfied,

the Federal Republic of Germany has failed to fulfil its obligations under Articles 18 EC and 39 EC, under Article 8 of the ECHR as a general principle of Community law and under Articles 3 and 9 of Directive 64/221/EEC on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health;

(2) that the action should be otherwise dismissed;

(3) that the Commission, the Federal Republic of Germany and the Italian Republic should each bear their respective costs.

ANNEX

Legal framework

A — *Community law*

1. Directive 64/221/EEC

'Article 3

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

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

...'

'Article 9

1. 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.

2. Any decision refusing the issue of a first residence permit or ordering expulsion of the person concerned before the issue of the permit shall, where that person so requests, be referred for consideration to the authority whose prior opinion is required under paragraph 1. The person concerned shall then be entitled to submit his defence in person, except where this would be contrary to the interests of national security.'

2. Regulation (EEC) No 1612/68

'Article 1

1. Any national of a Member State, shall, irrespective of his place of residence, have the right to take up an activity as an employed person, and to pursue such activity, within the territory of another Member State in accordance with the provisions laid down by law, regulation or administrative action governing the employment of nationals of that State.

2. He shall, in particular, have the right to take up available employment in the territory of another Member State with the same priority as nationals of that State.'

3. Directive 73/148/EEC

'Article 1

1. The Member States shall, acting as provided in this Directive, abolish restrictions on the movement and residence of:

(a) nationals of a Member State who are established or who wish to establish themselves in another Member State in order to pursue activities as self-employed persons, or who wish to provide services in that State;

(b) nationals of Member States wishing to go to another Member State as recipients of services;

(c) the spouse and the children under twenty-one years of age of such nationals, irrespective of their nationality;

(d) the relatives in the ascending and descending lines of such nationals and of the spouse of such nationals, which relatives are dependent on them, irrespective of their nationality.

2. Member States shall favour the admission of any other member of the family of a national referred to in paragraph 1(a) or (b) or of the spouse of that national, which member is dependent on that national or spouse of that national or who in the country of origin was living under the same roof.'

'Article 4

1. Each Member State shall grant the right of permanent residence to nationals of other Member States who establish themselves within its territory in order to pursue activities as self-employed persons, when the restrictions on these activities have been abolished pursuant to the Treaty.

As proof of the right of residence, a document entitled "Residence Permit for a National of a Member State of the European Communities" shall be issued. This document shall be valid for not less than five years from the date of issue and shall be automatically renewable.

Breaks in residence not exceeding six consecutive months and absence on military service shall not affect the validity of a residence permit.

A valid residence permit may not be withdrawn from a national referred to in Article 1(1)(a) solely on the grounds that he is no longer in employment because he is temporarily incapable of work as a result of illness or accident.

Any national of a Member State who is not specified in the first subparagraph but who is authorised under the laws of another Member State to pursue an activity within its territory shall be granted a right of abode for a period not less than that of the authorisation granted for the pursuit of the activity in question.

However, any national referred to in subparagraph 1 and to whom the provisions of the preceding subparagraph apply as a result of a change of employment shall retain his residence permit until the date on which it expires.

2. The right of residence for persons providing and receiving services shall be of equal duration with the period during which the services are provided.

Where such period exceeds three months, the Member State in the territory of which the services are performed shall issue a right of abode as proof of the right of residence.

Where the period does not exceed three months, the identity card or passport with which the person concerned entered the territory shall be sufficient to cover his stay. The Member State may, however, require the person concerned to report his presence in the territory.

3. A member of the family who is not a national of a Member State shall be issued with a residence document which shall have the same validity as that issued to the national on whom he is dependent.

'Article 5

The right of residence shall be effective throughout the territory of the Member State concerned.'

'Article 8

Member States shall not derogate from the provisions of this Directive save on grounds of public policy, public security or public health.'

'Article 10

1. The Council Directive of 25 February 1964 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services shall remain applicable until this Directive is implemented by the Member States.

2. Residence documents issued pursuant to the Directive referred to in paragraph 1 shall remain valid until the date on which they next expire.'

4. Directive 90/364/EEC

'Article 1

1. Member States shall grant the right of residence to nationals of Member States who do not enjoy this right under other provisions of Community law and to members of their families as defined in paragraph 2, provided that they themselves and the members of their families are covered by sickness insurance in respect of all risks in the host Member State and have sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence. The resources referred to in the first subparagraph shall be deemed sufficient where they are higher than the level of resources below which the host Member State may grant social assistance to its nationals, taking into account the personal circumstances of the applicant and, where appropriate, the personal circumstances of persons admitted pursuant to paragraph 2. Where the second subparagraph cannot be applied in a Member State, the resources of the applicant shall be deemed sufficient if they are higher than the level of the minimum social security pension paid by the host Member State.

2. The following shall, irrespective of their nationality, have the right to install themselves in another Member State with the holder of the right of residence:

(a) his or her spouse and their descendants who are dependants;

(b) dependent relatives in the ascending line of the holder of the right of residence and his or her spouse.'

'Article 2

1. Exercise of the right of residence shall be evidenced by means of the issue of a document known as a "Residence permit for a national of a Member State of the EEC", the validity of which may be limited to five years on a renewable basis. However, the Member States may, when they deem it to be necessary, require revalidation of the permit at the end of the first two years of residence. Where a member of the family does not hold the nationality of a Member State, he or she shall be issued with a residence document of the same validity as that issued to the national on whom he or she depends.

For the purpose of issuing the residence permit or document, the Member State may require only that the applicant present a valid identity card or passport and provide proof that he or she meets the conditions laid down in Article 1.

2. Articles 2, 3, 6(1)(a) and (2) and Article 9 of Directive 68/360/EEC shall apply *mutatis mutandis* to the beneficiaries of this Directive.

The spouse and the dependent children of a national of a Member State entitled to the right of residence within the territory of a Member State shall be entitled to take up any employed or self-employed activity anywhere within the territory of that Member State, even if they are not nationals of a Member State.

Member States shall not derogate from the provisions of this Directive save on grounds of public policy, public security or public health. In that event, Directive 64/221/EEC shall apply.

3. This Directive shall not affect existing law on the acquisition of second homes.'

B — *National law*

1. Law on foreign nationals (Ausländergesetz)

'Paragraph 45: Expulsion

(1) A foreign national may be expelled where his residence endangers public security, public order or other important interests of the Federal Republic of Germany.

(2) In deciding whether to order expulsion, the following shall be taken into account:

1. the length of the foreign national's lawful residence and personal, economic and other connections which deserve protection in the Federal territory,

2. the consequences of expulsion for the foreign national's family who reside lawfully in the Federal territory and who live with him as members of his family ...'

'Paragraph 46: Individual grounds for expulsion

Under Paragraph 45(1) a person may be expelled in particular where he

...

2. committed an infringement, other than an isolated or minor infringement, of legal provisions or of judicial or administrative decisions or orders; or has committed outside the Federal territory an offence which is regarded as an intentional offence within the Federal territory;

3. has infringed a statutory provision or an administrative order relating to prostitution;

4. uses heroin, cocaine or other similarly dangerous narcotic and is not willing to undergo, or withdraws himself from, treatment necessary for his rehabilitation ...'

'Paragraph 47: Expulsion on the ground of a particular threat

(1) A foreign national shall be expelled

1. where, after being convicted of one or more intentional offences, he has been definitively sentenced to at least three years' imprisonment or youth custody or where, after being convicted of a number of intentional offences, over a period of five years he has been definitively sentenced to a number of terms of imprisonment or youth custody amounting to at least three years or where, on the occasion of the most recent definitive conviction, a term of preventive detention was ordered; or

2. where he has been definitively sentenced to an unsuspended term of at least two years' youth custody or to an unsuspended term of imprisonment for an intentional offence under the Law on Narcotics, for a breach of the peace under the conditions specified in the second sentence of Paragraph 125a of the Code of Criminal Procedure or for a public order offence committed at a prohibited public assembly or a prohibited procession pursuant to Paragraph 125 of the Code of Criminal Procedure.

(2) A foreign national shall, as a rule, be expelled:

1. where he has been definitively sentenced to an unsuspended term of at least two years' youth custody or to an unsuspended term of imprisonment for one or more intentional offences;

2. where, in contravention of the Law on Narcotics and without authorisation, he cultivates, produces, imports, conveys through the territory, exports, sells, puts into circulation by any other means or traffics in narcotics, or aids or abets such acts;

3. where, in the course of a prohibited or dispersed public assembly or procession, he has been involved, as a perpetrator or accomplice, in acts of violence against persons or property committed collectively by a group of individuals in a manner endangering public security;

...

(3) A foreign national who is entitled to special protection against expulsion under Paragraph 48(1) shall, as a rule, be expelled in the cases referred to in subparagraph 1. In the cases referred to in subparagraph 2, the decision to expel him shall be a discretionary matter. In the cases referred to in subparagraphs 1 and 2 an adolescent foreign national who has grown up in the Federal territory and who has an unlimited residence permit or right of residence may be expelled in the cases set out in subparagraphs 1 and 2 in virtue of a discretionary decision. Subparagraphs 1 and 2(1) shall not apply to foreign nationals who are minors.'

'Paragraph 48: Special protection against expulsion

(1) A foreign national who

1. has the right to reside on the territory;

2. has a residence permit of unlimited duration and was born on Federal territory or entered Federal territory as a minor;

3. has a residence permit of unlimited duration and is married to or cohabiting with a foreign national covered by subparagraph 1 or 2 above;

4. lives with a German family member as a member of his family;

5. is a recognised asylum-seeker and enjoys the legal status of a foreign refugee on Federal territory or holds a travel document issued by an authority of the Federal Republic of Germany under the Convention Relating to the Status of Refugees of 28 July 1951 (BGBl. 1953 11, p. 559);

6. has the right to reside under Paragraph 32a;

may be expelled only on serious grounds of public security or public policy. Those grounds generally exist in the cases covered by in Paragraph 47(1).

(2) A foreign national who is a minor and whose parents or parent of whom he is a dependant are lawfully resident in the Federal Republic of Germany shall not be expelled unless he has been definitely convicted, on a number of occasions, of intentionally committing significant, serious or particularly serious offences. An adolescent who has grown up in the Federal territory and who lives with his parents as a member of their household may be expelled only under Paragraph 47(1), (2)(1) or (3).'

2. Law on the residence of nationals of Member States of the European Economic Community ('Aufenthaltsgesetz/EWG')

'Paragraph 12: Restrictions on freedom of movement

(1) In so far as this Law grants freedom of movement and has not already provided for restrictive measures in the above provisions, refusal of leave to enter and refusal to issue or extend an EC residence permit, restrictive measures referred to in Paragraph 3(5), the second sentence of Paragraph 12(1) and Paragraph 14 of the Ausländergesetz, and expulsion or deportation in relation to the persons referred to in Paragraph 1 shall be permitted only on grounds of public policy, public security or public health (Article 48(3) and Article 56(1) of the Treaty establishing the European Economic Community). Foreign nationals who hold an unlimited EC residence permit may be expelled only on serious grounds of public security or public policy.

(2) The decisions or measures referred to in subparagraph 1 may not be adopted for economic reasons.

(3) The decisions or measures referred to in subparagraph 1 may be adopted only where a foreign national gives cause for doing so on account of his personal conduct. This shall not apply to decisions or measures adopted to protect public health.

(4) The existence of a previous criminal conviction shall not in itself be a sufficient ground for adopting any of the decisions or measures referred to in subparagraph 1.

...

(7) If the issue or extension of an EC residence permit is refused, an expulsion order made or deportation threatened on pain of legal sanction, a period of time must be given within which the foreign national must leave the territory in which this Law applies. Except in urgent cases, that period must be at least fifteen days, where no EC residence permit has been issued and, and at least one month where an EC residence permit has been issued.

...'

3. Paragraph 80(2) and (3) of the Verwaltungsgerichtsordnung (Code of Procedure before the Administrative Courts)

'(2) Suspensory effect shall pertain except:

...

4. where the authority which issued the administrative order or which is to adjudicate the appeal ordered for immediate enforcement specifically in the public interest or in the overriding interest of a person concerned.

The *Länder* may also provide that appeals have no suspensory effect where they are against measures which are taken by the Länder by way of administrative enforcement pursuant to Federal law.

(3) In cases falling within subparagraph 2(4), written reasons must be given for the particular interest in immediate enforcement of the administrative act. It is unnecessary to give specific reasons where the authority takes an emergency preventative measure designated as such in the public interest where delay will create a threat, in particular where there is a threat to life, health or property.'