OPINION OF ADVOCATE GENERAL
STIX-HACKL
delivered on 11 September 2003

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I — Original language: German.

I - 5262
I — Introduction

1. The two references for a preliminary ruling which are the subject of this Opinion concern the power of the Member States to restrict the free movement of workers on grounds of public policy and in particular to expel Community nationals to another Member State for particular criminal offences. They relate to the interpretation of Article 39 EC and Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (hereinafter: 'Directive 64/221').


II — Legal background

A — Community law

2. First, the national court requests an interpretation of Article 39 EC, that is to say the central provision of primary law concerning the freedom of movement for workers. Its question relates in particular to the reservation regarding restrictions justified on grounds of public policy, public security or public health laid down in Article 39(3). Secondly, the national court requests an interpretation of Directive 64/221.
3. Article 3(1) and (2) of Directive 64/221 provides:

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.

4. Article 9 of Directive 64/221 provides:

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.

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.

B — National law

5. The basic German provisions concerning entry and residence are the Gesetz zur Neuregelung des Ausländerrechts (Law reforming legislation on aliens; hereinafter: ‘the Ausländergesetz’) ³ and the Gesetz über Einreise und Aufenthalt von Staatsangehörigen der Mitgliedstaaten der Europäischen Wirtschaftsgemeinschaft (Law on the entry and residence of nationals of Member States of the European Economic Community; hereinafter: ‘the Aufenthaltsgesetz/EWG’). ⁴ Under Paragraph 2(2) of

the Ausländergesetz, that law applies to aliens who are entitled to freedom of movement by virtue of Community law, save where otherwise provided by Community law and the Aufenthaltsgesetz/EWG. Accordingly, Paragraph 15 of the Aufenthaltsgesetz/EWG provides that the Ausländergesetz and the regulations adopted on the basis thereof apply, save where otherwise provided by the Aufenthaltsgesetz/EWG.

6. Paragraph 12 of the Aufenthaltsgesetz/EWG, which governs restrictions on freedom of movement, provides (in so far as is relevant):

'(1) In so far as this Law grants freedom of movement and does not already provide 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 first 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). Aliens who hold an unlimited EC residence permit may be expelled only on serious grounds of public security or public policy.

7. The Ausländergesetz provides for three kinds of expulsion: possible expulsion (or discretionary expulsion), expulsion as a rule, and compulsory expulsion.

8. Pursuant to Paragraph 45 of the Ausländergesetz expulsion is possible when there is prejudice to the requirements of public security and public policy or other substantial interests of the Federal Republic of Germany.

9. Paragraph 47(2) of the Ausländergesetz lays down so-called ‘expulsion as a rule’, that is to say contains an exhaustive list of grounds on which expulsion is ordered ‘as a rule’.
10. Paragraph 47(1) of the Ausländergesetz provides for 'compulsory expulsion', that is to say it provides for mandatory expulsion in particular cases. This provision states:

'(1) An alien shall be expelled if he

1. has been finally sentenced to a term of imprisonment or youth custody of at least three years for one or more intentional criminal offences or has been finally sentenced to several terms of imprisonment or youth custody of a total of at least three years for intentional criminal offences committed within a period of five years, or has been placed in preventative detention by the most recent final sentence, or

2. has been finally sentenced to a term of youth custody of at least two years, or to a term of imprisonment, and the sentence has not been suspended, for an intentional criminal offence under the Betäubungsmittelgesetz (Law on narcotics), for a breach of the public peace under the conditions set out in the second sentence of Paragraph 125a of the Strafgesetzbuch (Criminal Code) or for a breach of the public peace under Paragraph 125 of the Strafgesetzbuch committed in connection with a prohibited public assembly or a prohibited procession.'

11. Paragraph 48 of the Ausländergesetz provides for special protection against expulsion for particular aliens. They include inter alia aliens who possess a residence entitlement (Aufenthaltsberechtigung) (first subparagraph) and aliens who live in a family relationship with a German family member (fourth subparagraph). Such aliens may be expelled 'only on serious grounds of public security or public policy. Serious grounds of public security and public policy exist as a rule in the cases set out in Paragraph 47(1).' Under Article 47(3), compulsory expulsion becomes expulsion as a rule and expulsion as a rule becomes possible expulsion.

12. Under No 48.1.0 of the Allgemeine Verwaltungsvorschrift zum Ausländergesetz (General administrative provision relating to the Law on aliens), 5 EU nationals who hold an unlimited residence permit (Aufenthaltsberechtigung) are to be treated in the same way as the persons referred to in Paragraph 48(1). The requirements set out in Paragraph 12 of the Aufenthaltsgesetz/EWG apply to those entitled to freedom of movement.

5 — Bundesanzeiger No 188a of 6 October 2000.
13. In each individual case it is necessary to apply a proportionality test in which account must also be taken of the protection of marriage and the family laid down inter alia in the European Convention on Human Rights and Fundamental Freedoms (hereinafter: 'the Human Rights Convention').

14. Paragraph 8 of the Ausländergesetz lays down special grounds for refusal. Paragraph 8(a) deals inter alia with the time-limit on expulsion.

15. According to the information provided by the national court, in Baden-Württemberg, until 30 June 1999, a preliminary re-examination of the lawfulness and expediency of the administrative measure relating to an expulsion was as a rule necessary before the bringing of an action for annulment. However, with effect from 1 July 1999 there was no need for preliminary proceedings if the administrative measure had been adopted by a Regierungsrat (office of chief executive of an administrative district).

16. The first sentence of Paragraph 6a of the Ausführungsgesetz zur Verwaltungsge-richtsordnung (Law implementing the rules of procedure for administrative courts; 'the AGVwGO') now states as follows:

'No preliminary proceedings are required if the Regierungsrat has adopted or rejected the administrative measure'.

17. Therefore, the expediency of a decision is not reviewed in appeal proceedings where the Regierungsrat has jurisdiction *ratione materiae* for the adoption of an expulsion order. Under the first sentence of Paragraph 7(1) of the Ausländer- und Asylverfahrenszuständigkeitsverordnung (Regulation on jurisdiction over proceedings relating to aliens and asylum; the 'AAZuVO'), Regierungspräsidenten have jurisdiction over the expulsion of foreign offenders where they have been held in prison by order of a court or on remand for over a week.

III — Facts and main proceedings

A — In Case C-482/01

18. Mr Georgios Orfanopoulos was born in 1959 and is a Greek national. In 1972 he entered the territory of the Federal Republic of Germany to join his parents. He subsequently held limited residence permits. In 1978 Mr Orfanopoulos returned to Greece.
to carry out military service. In September/October 1980 he re-entered the territory of the Federal Republic. In 1981 Mr Orfanopoulos married a German national. This marriage produced three children who are also plaintiffs in the proceedings before the national court. Mr Orfanopoulos subsequently obtained an EC residence permit on several occasions, the most recent being valid until 12 October 1999. On 9 November 1999 he applied for an extension of his EC residence permit. Mr Orfanopoulos has no professional training qualifications. Since 1981 he has pursued various activities as an employed person. Mr Orfanopoulos has several previous convictions imposed by a number of judgments of the Amtsgericht Stuttgart (Stuttgart Local Court).

19. Mr Orfanopoulos was in prison from 3 February 1999 to 5 August 1999. In the time thereafter he was found on several occasions on the drugs scene. From 7 January 2000 to 25 January 2000 Mr Orfanopoulos was at Stuttgart’s Bürgerhospital for detoxification and was then admitted to a rehabilitation centre for inpatient treatment. He was discharged from there on 15 April 2000 when he was found to have a concentration of alcohol in his blood. On 31 May 2000 Mr Orfanopoulos was readmitted to this rehabilitation centre and discharged on 29 June 2000 on disciplinary grounds because he tested positive for benzodiazepine. Since 11 September 2000 Mr Orfanopoulos has been serving the terms of imprisonment imposed by the judgments of the Amtsgericht Stuttgart of 1994 and 1998.

20. In 1992, 1997 and 1998 Mr Orfanopoulos received from the Aliens Department a warning under the law relating to aliens.

21. As regards the facts of the case, the national court further states that Mr Orfanopoulos has been a drug addict for over 15 years. He was drug-free for a period of only around a year and a half up to the end of 1994. At the beginning of 2000 Mr Orfanopoulos underwent detoxification and then made two attempts at inpatient drug treatment. Both attempts were unsuccessful since Mr Orfanopoulos was, on both occasions, discharged prematurely from the rehabilitation centre on disciplinary grounds. According to the report drawn up by the rehabilitation centre, Mr Orfanopoulos now recognises that he is suffering from drug addiction. However, it is not clear that this recognition on the part of Mr Orfanopoulos could lead to him giving up drugs completely. On account of the previous criminal acts it is also clear that Mr Orfanopoulos tends to commit acts of violence when he consumes considerable quantities of alcohol. Thus far Mr Orfanopoulos has taken no steps at all to deal with this extreme alcohol dependency. According to the treatment report drawn up by the rehabilitation centre, Mr Orfanopoulos does not recognise in the slightest that he has an alcohol problem. Mr Orfanopoulos is neither willing nor able to commence treatment for his alcohol dependency. On account of the continuing drug and alcohol dependency there is a real danger of further criminal acts. Neither the penalties provided for under criminal law nor the law
relating to aliens have acted as a warning to Mr Orfanopoulos. At no time during the entire proceedings have Mr Orfanopoulos or his daughters disputed the real danger of his re-offending.

22. By Decision of 28 February 2001 the Regierungspräsidium Stuttgart (Chief Executive’s Office of Stuttgart District) ordered the expulsion of Mr Orfanopoulos from the territory of the Federal Republic, dismissed his application for an extension of his EC residence permit and for the issue of a residence authorisation, and threatened him with deportation to Greece without limit of time. At the same time Mr Orfanopoulos was advised that he would be deported on his release from prison. On 21 March 2001 Mr Orfanopoulos and his daughters brought an action. In March 2002 Mr Orfanopoulos’ remaining sentence was suspended. According to the information provided by the Landgericht (regional court) which suspended his sentence, Mr Orfanopoulos has shown good behaviour whilst in prison. Furthermore, he has decided to accept treatment.

B — In Case C-493/01

24. Mr Raffaele Oliveri was born in Germany in 1977 and is an Italian national. He has resided continuously in Germany since he was born. He has no professional qualifications. Mr Oliveri has been a drug addict for many years. Mr Oliveri has a number of previous convictions.

25. By letter of 14 May 1999 Mr Oliveri received a warning under the law relating to aliens. As from 18 November 1999 Mr Oliveri was in prison serving the terms of imprisonment imposed by two judgments of 1999 and several terms of imprisonment for failure to pay fines. By order of 7 March 2000 the Staatsanwaltschaft Stuttgart (Stuttgart Public Prosecutor’s Office) deferred execution of the sentences imposed by the two judgments of 1999 with effect from 9 March 2000 for the duration of treatment at a treatment centre. Mr Oliveri abandoned this treatment after about one
week. Thereupon the deferral of the execution of the sentences was revoked. On 24 April 2000 Mr Oliveri was re-arrested and has been in prison ever since.

26. By Decision of 29 August 2000 the Regierungspräsidium Stuttgart ordered the expulsion of Mr Oliveri from the territory of the Federal Republic and threatened him with deportation to Italy without setting a time-limit for his leaving the country voluntarily. On 25 September 2000 Mr Oliveri brought an action.

27. By letter of 20 June 2001 the medical service of the competent prison hospital stated that Mr Oliveri has been infected with HIV since December 1998. Mr Oliveri has had full-blown Aids since March 2001. Although he has been given highly effective anti-retroviral treatment since May 2001, this has yet to have the desired effect. It must be assumed that Mr Oliveri will not obtain adequate medical attention in Italy and that care for the extremely ill plaintiff, who will presumably die soon, is not guaranteed there.

28. The national court is uncertain as to the compatibility of the expulsion with Article 39(1) and (3) EC and Article 3 of Directive 64/221. Paragraph 47(1) of the Ausländergesetz makes no provision for review of the specific case. Finally, it is uncertain whether the fact that, according to the settled case-law of the Bundesverwaltungsgericht (Federal Administrative Court), Mr Oliveri may no longer plead material circumstances relating to his state of health, which are of vital importance to the decision concerning expulsion, is compatible with the principle of proportionality.

IV — Questions submitted for a preliminary ruling

29. The Verwaltungsgericht Stuttgart stayed both sets of proceedings and submitted the following questions to the Court for a preliminary ruling:

A — In Case C-482/01

1. Is a restriction on the freedom of movement of a foreign EU national with many years' residence in a host State, ordered on account of a criminal offence under the Betäubungsmittelgesetz, in conformity with European Law in terms of Article 39(3) EC on grounds of public policy, public security or public health, where, on account of his personal conduct, there is a justified expectation that he will also commit future criminal offences and where the spouse of the EU national and his children cannot reasonably be expected to live in his State of origin?
2. Does Article 9(1) of Council Directive 64/221/EEC of 25 February 1964 preclude national legislation which no longer provides for objection proceedings in which an examination of expediency is also carried out in relation to a decision of an administrative authority to expel the holder of a residence permit from the national territory, if a special body which is independent of the administrative authority adopting the decision has not been established?

V — First question submitted for a preliminary ruling in Case C-482/01

B — In Case C-493/01

1. Do Article 39 EC and Article 3 of Council Directive 64/221/EEC of 25 February 1964 preclude national legislation which makes it mandatory for authorities to expel nationals of other Member States who have been finally sentenced to a term of youth custody of at least two years, or to a term of imprisonment, for an intentional criminal offence under the Betäubungsmittelgesetz where the sentence has not been suspended?

A — Main arguments of the parties

30. Mr Orfanopoulos considers that Community law affords extensive protection against expulsion. In that respect he refers to the legal situation in the other Member States. He claims that expulsion may be ordered solely on grounds of personal conduct and not on general preventative grounds. It is not acceptable that the person concerned has to bear the burden of proof that he represents no danger to society. The principle of proportionality requires that developments after the offence also be taken into consideration. Moreover, an expulsion must be linked to the misconduct.
31. Furthermore, account must be taken of the limits imposed by Article 8 of the Human Rights Convention, that is to say the basic right to respect for family life enshrined therein, and in that context the ability to make oneself understood linguistically in the State of origin should not be a criterion for expulsion. Moreover, expulsion could result in expelled EU nationals obtaining spent convictions later than a country's own nationals. In addition, the term 'public policy' in Directive 64/221 must be interpreted strictly.

32. Overall, Mr Orfanopoulos proposes that the answer to the question submitted for a preliminary ruling should be that Article 39 EC prohibits the expulsion of an EU national who has been resident in another Member State for many years and that it is necessary to consider in which Member State re-socialisation is most likely to succeed.

33. As far as the Regierungspräsidium Stuttgart is concerned, the lawfulness of the expulsion turns solely on whether there is a genuine and sufficiently serious threat within the meaning of the Aufenthaltsgesetz. The specific assessment must be made in the light of the principle of proportionality. In that respect not every expulsion on grounds of a criminal offence always infringes Community law where the person concerned has resided in a Member State for many years and his family members cannot reasonably be expected to move. Finally, the Regierungspräsidium Stuttgart observes that an infringement of the European Convention cannot be the subject of preliminary ruling proceedings.

34. The German Government considers that German law properly transposes the requirements of Community law. It follows from the case-law of the Court of Justice that there must be a genuine and sufficiently serious threat affecting a fundamental interest of society. All the offences in question in this case must be classified as a threat to public policy and public security. Existing German law, in particular Paragraph 12 of the Aufenthaltsgesetz/EWG, takes account of the principle of proportionality and the fundamental right to protection of the family under Article 8 of the European Convention, Article 6 EC and the Charter of Fundamental Rights, since it provides for an examination of each individual case.

35. The Italian Government submits that the term 'public policy' needs an autonomous and uniform interpretation in Community law. In addition, the Italian Government refers to the case-law of the European Court of Human Rights (hereinafter: 'the ECHR') relating to Article 8 of the Human Rights Convention. It follows from Article 3 of Directive 64/221 that automatic expulsion is unlawful because derogations from the principle of freedom of movement must be interpreted strictly. Restrictions on
freedom of movement may be imposed only on special preventative grounds and must be proportionate. The Italian Government therefore concludes that a national provision which provides for the automatic expulsion of a national of another Member State solely on the basis of a criminal conviction is incompatible with Community law.

36. The Commission submits that Article 39 EC and Article 3 of Directive 64/221 preclude legislation which makes it mandatory for the authorities to expel nationals of other Member States who have been sentenced to particular punishments for particular criminal offences without having to assess in each individual case the circumstances surrounding the personal conduct of the individual concerned.

37. As regards the proportionality of the expulsion, the Commission refers to Article 8 of the Human Rights Convention. In its view, even though it is justified on grounds of the personal conduct of the individual concerned expulsion is unlawful if the spouse and children of the EU national cannot reasonably be expected to live in his State of origin. On the basis of the case-law of the ECHR and the right to freedom of movement enjoyed by EU nationals the Commission concludes that expulsion is disproportionate.

38. First, it should be noted that in the context of judicial cooperation between national courts and the Court of Justice, it is for national courts to establish and to evaluate the facts of the case and for the Court of Justice to provide the national court with such guidance on interpretation as may be necessary to enable it to decide the dispute. 7

39. The present proceedings concern a measure which restricts the freedom of an EU national and, more specifically, an expulsion. Therefore, they essentially concern the question of the margin of discretion enjoyed by the Member States in respect of public policy.

40. At a very basic level, the only question is whether there are advantages for the European Union in expelling an individual from one Member State to another. The practice of deportation basically constitutes an ‘exportation of danger’.

1. The limits imposed by Directive 64/221

41. According to the Court's case-law, 8 the term 'public policy' must, where it is used as a justification for derogating from the principle of freedom of movement, be interpreted strictly and autonomously in Community law and is subject to review by the Court.

42. It may be inferred from the Court's case-law that there are four requirements which restrictions on the freedom of movement on grounds of public policy and public security must satisfy.

43. First, 'prejudice to the requirements of public policy' is required. Secondly, there must be a genuine and sufficiently serious threat. Thirdly, this threat must affect a fundamental interest of society. 9 Fourthly, the measure adopted by the Member State must be proportionate.

44. It is not disputed that the first requirement is satisfied in so far as the present case relates to drugs offences which as a rule affect a fundamental interest of society.

45. However, it is uncertain whether the second and fourth requirements are satisfied. Since the main proceedings concern a measure taken on grounds of public policy or of public security within the meaning of Directive 64/221, it is necessary to comply with its provisions. Therefore, the second requirement, relating to the threat, must be viewed in the context of Article 3 of Directive 64/221.

46. The starting point must be the requirement of Article 3(1) of Directive 64/221 that measures taken on grounds of public policy or of public security are to 'be based exclusively on the personal conduct of the individual concerned'. According to the Court's case law, account must be taken in that respect of 'the danger which [the offender's personal] conduct represents for the requirements of public policy'. 10 A present and specific threat, that is to say the existence of a particular risk, is required. Therefore, overall it may be

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inferred from the Court’s case-law\textsuperscript{11} that assessments may not be made on the basis of general considerations. However, it is consequently also prohibited to take as a basis general preventative grounds, that is to say an individual may not be expelled on such grounds.

47. A further condition follows from Article 3(2) of Directive 64/221, that is to say that ‘previous criminal convictions shall not in themselves constitute grounds for the taking of such measures’.

48. This provision is construed by the Court as meaning that the appraisal under the law relating to aliens ‘does not necessarily coincide with the appraisals which formed the basis of the criminal conviction. ... The existence of a previous criminal conviction can, therefore, only be taken into account 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.’\textsuperscript{12}

49. The Court has confirmed this expressly in relation to drugs offences.\textsuperscript{13} In that respect I consider that a distinction may definitely be drawn between different drugs offences, and particular weight may be given to dealing in dangerous drugs such as heroin.

50. Therefore, it may be deduced from the case-law that the competent authorities of the Member States must base their decision on an assessment of the future conduct of the individual concerned. The kind and number of previous convictions must form a significant element in this assessment and particular regard must be had to the seriousness and frequency of the crimes that have been committed. Furthermore, while the danger of re-offending is of considerable importance, the remote possibility of new offences is not sufficient. For example, the danger of re-offending will be rather greater in the case of a drug dependency where there is a risk that further criminal offences will be committed in order to fund it.

51. The fact that a sentence has been suspended, as it has in the main proceedings, also constitutes an important factor in the assessment of the future threat. That suggests that the individual concerned no

\textsuperscript{11} — Case 67/74, cited in footnote 10 above, paragraph 7, Case 36/75, cited in footnote 8 above, paragraph 29, Case 48/75 \textit{Royer} [1976] ECR 497, paragraph 45-49, Joined Cases 115/81 and 116/81 \textit{Adoui and Cornuaille} [1982] ECR 1665, paragraph 11, and Case C-340/97, cited in footnote 9 above, paragraphs 59 and 63; see also Case C-100/01, cited in footnote 8 above, paragraph 30 et seq.

\textsuperscript{12} — Case 30/77, cited in footnote 8 above, paragraphs 27 and 28.

\textsuperscript{13} — Case C-340/97, cited in footnote 9 above, paragraph 58; see Case C-348/96, cited in footnote 10 above, paragraphs 22 to 24.
52. As a fourth requirement relating to the lawfulness of restrictions on freedom of movement on grounds of public policy and public security, the case-law of the Court requires compliance with the principle of proportionality. 'In that respect, such a measure must be appropriate for securing the attainment of the objective which it pursues and must not go beyond what is necessary in order to attain it.'

53. In addition to the provisions of Directive 64/221, the national authorities also have to comply with the provisions of the Human Rights Convention. In the context of compliance with fundamental rights, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. According to the Court's established case-law, and as confirmed by the second paragraph of Article 6 EC, among the fundamental rights protected in the Community legal order are those of the Human Rights Convention.

54. The present case relates to respect for private and family life under Article 8 of the Human Rights Convention, to which the national court, Mr Orfanopoulos, the German and Italian Governments, and the Commission have also referred.

55. However, it is first necessary to examine the objection that an expulsion order under German law does not constitute interference in the scope of protection afforded by Article 8 of the Convention because there is no direct prejudice. Unlike the cases decided by the ECHR, which concerned an expulsion under French law, an expulsion under German law does not result in an actual separation of the individual concerned from his wife and/or children. For example, it is possible for an individual affected by an expulsion under German law to continue to reside in the Federal Republic by applying for 'tolerance'
Moreover, after a certain period the individual concerned may even be granted a residence authorisation which can be extended and lead to a right of long-term residence.\(^\text{16}\)

56. Without embarking upon an assessment of the decisions of the ECHR based on French law relating to aliens, it suffices in this connection to refer to the Court's own interpretation of the term 'interference' within the meaning of Article 8 of the European Convention. According to the Court's judgment in Carpenter,\(^\text{17}\) there can be such interference where there is a mere decision to make a deportation order. Even though the Court refers expressly only to a 'decision to deport', the main proceedings related to a 'decision to make a deportation order'. Therefore, there can be interference even where the deportation order itself has not yet been made, let alone executed.

57. However, according to the case-law of the Court, and that of the ECHR, such interference will infringe Article 8 of the Human Rights Convention only 'if it does not meet the requirements of paragraph 2 of that article, that is unless it is "in accordance with the law", motivated by one or more of the legitimate aims under that paragraph and "necessary in a democratic society", that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued.'\(^\text{18}\)

58. Therefore, it is necessary to set out in detail the criteria to be applied in connection with the proportionality test. This test consists in weighing up, in each particular case, the interests of the State imposing the measure terminating residence and the interests of the individual concerned.

59. However, in accordance with the division of functions between the Court of Justice and the national courts it is not for the Court of Justice to give final judgment on a specific case within the framework of preliminary ruling proceedings. Instead, '[i]t is for the national courts to determine whether the measures taken in this case do in fact relate to individual conduct which constitutes a genuine and sufficiently serious threat to public order or public security, and whether they comply with the principle of proportionality.'\(^\text{19}\) The


17 — Case C-60/00, cited in footnote 15 above, paragraph 41. Although this paragraph refers to a 'decision to deport', the main proceedings relate to a 'decision to make a deportation order'.

18 — Case C-60/00, cited in footnote 15 above, paragraph 42; see judgment of the ECHR in the case of Boulaïf v Switzerland of 2 August 2001, Reports 2001-IX, §§ 39, 41 and 46.

19 — Case C-100/01, cited in footnote 8 above, paragraph 44; see Case 30/77, cited in footnote 8 above, paragraph 30.
national court will therefore have to consider whether an expulsion is proportionate in the main proceedings, having due regard to the guidance on interpretation provided in this case.

60. Therefore, as regards the situation of Mr Orfanopoulos, it is necessary firstly to assess his personal situation. In this respect, it is necessary to establish the extent of his integration in Germany, socially, professionally and in terms of family relations. In this connection account must also be taken of the time he has spent in Germany, the age at which he came to Germany, and his command of the language of his State of origin.  

61. In a case such as that in the main proceedings it is necessary secondly to examine whether the family members, that is to say the spouse and children, can reasonably be expected to live in the State of origin of the individual who is expelled. However, as regards this aspect of the balance of interests, the national court has already concluded that the spouse and children cannot reasonably be expected to do so, as is evident from the question submitted for a preliminary ruling. Therefore, there is no need to consider here the factors which are relevant in that respect.

62. Thirdly, in a case such as that in the main proceedings account must be taken of the seriousness and number of the offences committed by the individual concerned. In this connection it should be emphasised in general that drugs offences are very serious and, furthermore, also satisfy the Court's requirement that a fundamental interest of society be affected.

63. As regards the sentences passed in this case, it should be noted that a term of imprisonment was imposed in six of the sentences concerned. However, in most cases they were very short. According to the case-law of the ECHR, not even an overall sentence of just under five years justifies an expulsion. Furthermore, account must also be taken, precisely in the present case, of the fact that the sentence was suspended.


21 — See judgment of the ECHR in *Beldjoudi v France* of 26 March 1992, Series A, No 234, in which it was found that there had been an infringement even though a sentence of eight years had been passed; on the other hand, in *Amrollahi v Denmark* of 11 July 2002, not yet published in the Reports, no reference was made to the length of the sentence.
64. On the other hand, repeated recidivism could militate in favour of expulsion although it will probably relate more to petty crime. Finally, the national court should consider where re-socialisation is most likely to be achieved.

65. It follows from the need to take account of all these factors that authorities of the Member States must be able to weigh up the interests in each individual case also in connection with expulsion that is ordered as a rule. Although Community law lays down no absolute prohibition on expulsion, national law may not provide for expulsion as a mandatory legal consequence in cases such as those in the main proceedings.

66. In these preliminary ruling proceedings the question may be left open whether existing German provisions infringe Directive 64/221, as interpreted by the Court, because an examination of conformity in the abstract is not the subject of these proceedings.

67. However, the German authorities are in any event required to interpret German law, including administrative rules, in conformity with Community law.

68. The answer to the first question submitted for a preliminary ruling should therefore be that Article 3 of Directive 64/221 is to be interpreted as not precluding a restriction on the freedom of movement of a foreign EU national with many years' residence in a host State, ordered on account of a criminal offence under the Betäubungsmittelgesetz on grounds of public policy, public security or public health, in so far as that measure is proportionate in the light of Article 8 of the European Convention, in particular where, on account of the EU national's personal conduct, there is a justified expectation that he will also commit future criminal offences and where the spouse of that EU national and his children can reasonably be expected to live in his State of origin.

VI — Second question submitted for a preliminary ruling in Case C-482/01

A — Main arguments of the parties

69. Mr Orfanopoulos takes the view that the proceedings are vitiated by errors on several counts. First, a court will intervene not before but only after the measure has been adopted and its intervention gives rise to additional costs. Furthermore, the fact that the Verwaltungsgericht cannot be an independent competent authority follows also from the fact that it can intervene only
when requested to do so. Secondly, the Verwaltungsgericht can examine the expediency of the measure to only a limited degree. Thirdly, an expulsion also infringes Article 10 EC because the host State thereby passes the social burden on to the State of origin.

70. As far as the Regierungspräsidium Stuttgart is concerned, it is sufficient that the individual concerned has the possibility of obtaining judicial review of the order for immediate execution of the expulsion. The Verwaltungsgericht must be regarded as an independent competent authority for the purposes of Article 9(1) of Directive 64/221.

71. The German Government considers that objection proceedings are not necessary where timely and comprehensive judicial review is carried out in proceedings before the Verwaltungsgericht. Moreover, the fact that the court ruling is given before the expulsion is enforced also indicates conformity with Community law.

72. The Italian Government emphasises that the minimum protection afforded by Article 9(1) of Directive 64/221 should have been ensured in the administrative proceedings.

73. The Commission submits that in Baden-Württemberg the Verwaltungsgericht may examine only the legal validity of an expulsion decision and consequently the requirements for the application of Article 9(1) of Directive 64/221 are satisfied. However, in Baden-Württemberg there is no independent competent authority which issues an opinion prior to its ruling, as required under this provision. Furthermore, it is uncertain whether Article 9(1) of Directive 64/221 satisfies the requirements of effective legal protection laid down in the case-law of the Court.

B — Appraisal

74. It is necessary to bear in mind from the outset the principle that, according to the Court's case-law, Articles 8 and 9 of Directive 64/221 define the minimum procedural safeguards to which Community nationals are entitled when they rely on freedom of movement in relation to the situation in which they find themselves. The purpose of Article 9, which complements Article 8, is to provide minimum procedural safeguards for persons affected by 'one of the measures referred to in the three cases mentioned in Article 9(1), namely where there is no right of appeal to a court of law,
or where such appeal lies only in respect of the legal validity of the decision, or where the appeal cannot have suspensory effect.'

1. The need for the opinion of an independent competent authority

75. First it is necessary to examine whether any of the three cases obtain in which Article 9(1) of Directive 64/221 applies. In the present case the only possible alternative is that the appeal against the expulsion order may be only in respect of the legal validity of the decision.

76. As the Court has consistently held, 'the purpose of the intervention of the competent authority referred to in Article 9(1) is to enable an exhaustive examination of all the facts and circumstances, including the expediency of the proposed measure, to be carried out before the decision is finally taken.'

77. Therefore, it is necessary to consider whether the examination to be carried out by the Verwaltungsgericht on the basis of an appeal seeking annulment satisfies the above requirements.

78. It follows from Paragraph 86(1) of the Verwaltungsgerichtsordnung (Rules of procedure for administrative courts) that the administrative courts are first required to establish the facts of the case of their own motion. This examination of the factual situation can even result in the annulment of administrative acts where the authorities have proceeded on the basis of inaccurate facts.

79. It can therefore be concluded that the administrative courts must carry out the 'exhaustive examination of all the facts and circumstances' prescribed by the case-law of the Court. However, even though national law may satisfy this requirement of Community law, that does not necessarily mean that the administrative courts also apply this principle in practice, in each individual case, in conformity with Community law. Admittedly, the present proceedings do not involve an assessment of specific individual cases, unlike proceedings for failure to fulfil Treaty obligations, which are aimed at pursuing specific infringements.

80. Secondly, the administrative courts must consider the formal and substantive legality of the expulsion order. According to this wording, their obligation is limited to a review of the legality of the decision.
81. At this juncture it would be possible to examine the intensity and depth of the review which the administrative courts conduct or should conduct under German law. In particular it could be examined how the review under German law must be organised in respect of administrative decisions dictated by the law, on the one hand, and discretionary decisions, on the other.

82. However, such an examination requires an interpretation of German law. According to the Court's case-law, it may not interpret domestic legislation or regulations. 24

2. Decision of the Verwaltungsgericht as a decision of an independent competent authority?

83. In these proceedings it has been submitted that, being a first-instance court, the Verwaltungsgericht must be regarded as an independent competent authority for the purposes of Article 9(1) of Directive 64/221. Connected with this is the question whether the decision taken by the Verwaltungsgericht in proceedings such as the main proceedings must be classified as an 'opinion [of] a competent authority' within the meaning of Article 9(1) of Directive 64/221.

84. In this regard it should be noted that the directive does not define the term 'competent authority' or the term 'opinion'. The directive 'refers to an authority which must be independent of the administration, but it gives Member States a margin of discretion in regard to the nature of the authority'. 25

85. This margin of discretion is naturally not unlimited. The principle of the uniform application of Community law and the principle of equality require 'that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Community; that interpretation must take into account the context of the provision and the purpose of the legislation in question'. 26


In this regard it is necessary to take as a premiss the established case-law of the Court, according to which 'the purpose of the intervention of the competent authority referred to in Article 9(1) is to enable an exhaustive examination of all the facts and circumstances, including the expediency of the proposed measure, to be carried out before the decision is finally taken.' 'Save in cases of urgency, the administrative authority may not take its decision until an opinion has been obtained from the competent authority'. The authority which takes the decision on a measure restricting freedom, such as expulsion, is thus required to await that decision.

In this connection it should be emphasised that it is not necessary to examine whether the Verwaltungsgericht displays all the features which characterise an independent competent authority for the purposes of Article 9(1) of Directive 64/221. As is evident from Santillo, a court can be an independent competent authority for the purposes of Article 9(1) of Directive 64/221. However, the decisive feature of the UK provisions at issue in that case was the fact that the court intervenes before the decision. Therefore, the relevant criterion here is the fact that the opinion must be issued before the decision. By contrast, the Verwaltungsgericht intervenes, in accordance with the legal situation in Baden-Württemberg, after the administrative authority, that is to say the Regierungspräsidium, has acted.

The argument that the requirements of Article 9(1) of Directive 64/221 are satisfied if the opinion is issued before enforcement must be expressly rejected in this case. As regards the time by which the opinion must be issued, the relevant established case-law of the Court refers to the time of the decision relating to the measure restricting freedom rather than that of the enforcement.

In summary then, the legal position in Baden-Württemberg applicable in the main proceedings following the introduction of Paragraph 6a of the AGwGO does not provide for an independent competent
authority within the meaning of Article 9(1) of Directive 64/221 which issues an opinion at the time laid down in Community law in cases in which the Regierungspräsidium has jurisdiction to an expulsion order.

91. Finally, it should be noted that Article 9 of Directive 64/221 has been classified by the Court as sufficiently well-defined and specific and therefore can be invoked by individuals without having to wait for an adjustment of federal or Land law.

92. The answer to the second question submitted for a preliminary ruling should therefore be that on a proper construction of Article 9(1) of Directive 64/221 national legislation — which does not provide for objection proceedings in which an examination of expediency is also carried out in relation to an administrative authority’s decision to expel the holder of a residence permit from the national territory in circumstances where a special body independent of the administrative authority adopting the decision has not been established — is not precluded provided that an appeal is possible that permits an exhaustive examination of all the facts and circumstances, including the expediency of the proposed measure.

93. The Regierungspräsidium Stuttgart submits that Article 39 EC and Article 3 of Directive 64/221 do not preclude the rules contained in Paragraph 45 of the Ausländergesetz and Paragraph 12 of the Aufenthaltsgesetz/EEC. The fact that the requirements of Paragraph 47(1) of the Ausländergesetz are satisfied does not make it mandatory for authorities to expel an individual. Furthermore, an examination of the specific case is carried out which also takes account of compatibility with the principle of proportionality. Moreover, since the orders in the main proceedings were based on aspects relating to individual deterrence, the first question submitted is not material.

94. The German and Italian Governments make the same observations on this question as they did on the first question in Case C-482/01.

95. The Commission considers that Directive 64/221 implements the derogation relating to public policy contained in Article
39(3) EC, and it points to the two central principles of Article 3 of this directive. First, measures taken on grounds of public policy or of public security are to be based solely on the personal conduct of the individual concerned. Secondly, previous criminal convictions are not in themselves to constitute grounds for the taking of such measures.

96. On the basis of the Court’s case-law the Commission concludes that Article 39(3) EC and Article 3 of Directive 64/221 preclude national legislation which makes it mandatory for authorities to expel nationals of other Member States who have been finally sentenced to a term of youth custody of at least two years, or to a term of imprisonment, for an intentional criminal offence under the Betäubungsmittelgesetz where the sentence has not been suspended.

B — Appraisal

1. Admissibility of the first question submitted for a preliminary ruling

97. Since the Regierungspräsidium Stuttgart takes the view that the first question submitted is not at all material, it is necessary first to examine the admissibility of this question.

98. According to the Court’s established case-law, in the context of the cooperation between the Court of Justice and the national courts provided for by Article 234 EC, it is solely for the national court before which the dispute has been brought, and which must rule thereon, to determine in the light of the particular case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. 31

99. On the other hand, the Court’s functions do not include delivering advisory opinions on general or hypothetical questions. 32 Similarly, the Court can decline to rule on a question submitted by a national court where, for example, the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a helpful answer to the questions submitted to it. 33 Moreover, in order to enable the Court to give a useful interpretation of Community law, it is essential for the national court to explain


32 — Case C-415/93, cited in footnote 31 above, paragraph 60, Case C-451/99 Cura Anlagen [2002] ECR I-3193, paragraph 26, Case C-153/00, cited in footnote 31 above, paragraph 32.

33 — Case C-379/98, cited in footnote 31 above, paragraph 39, Case C-390/99, cited in footnote 31 above, paragraph 19, and Case C-153/00, cited in footnote 31 above, paragraph 33.
why it considers that an answer to its questions is necessary for resolving the dispute. 34

100. In the present case it is not apparent that one of these grounds of inadmissibility obtains in respect of the question submitted for a preliminary ruling. Even if it were true that the orders in the main proceedings were based also on aspects relating to individual deterrence, that would not render the question inadmissible.

101. Therefore, the first question submitted for a preliminary ruling is admissible.

2. Substance of the first question submitted for a preliminary ruling

102. The first question submitted for a preliminary ruling is worded in such a way that it makes reference exclusively and specifically to national legislation which makes it mandatory for authorities to expel individuals in particular cases. In this context it should be noted that it is evident from the decision at issue in the main proceedings that the authority itself assumes that Paragraph 47(1)(2) of the Ausländergesetz provides for expulsion as a mandatory legal consequence.

103. Furthermore, it is likewise not for the Court, in preliminary ruling proceedings, to interpret provisions of national law, that is to say, for example, to determine whether and in what respect the provisions concerning 'expulsion as a rule' give the authorities a margin of discretion. 35

104. Moreover, the question submitted for a preliminary ruling does not refer specifically to a particular provision of the Ausländergesetz and therefore there is no need to consider the problem of the disputed relationship between Paragraph 12 of the Aufenthaltsgesetz/EWG and Paragraph 47 of the Ausländergesetz. 36

105. Nor is it necessary in these preliminary ruling proceedings to consider the conformity of national implementing measures or to examine whether and to what extent an interpretation of the national


35 — For example, in German legal circles the view is taken that 'expulsion as a rule' constitutes a sub-case of compulsory expulsion, the authorities may rely on a margin of discretion only at a secondary level, a margin of discretion may be given only in connection with atypical events, and the demarcation between rule and exception is not subject to a margin of discretion.

legislation in conformity with Community law is possible and is actually practised by the administrative authorities and the courts. According to its case-law, the Court may not, in preliminary ruling proceedings, rule upon the compatibility of a provision of domestic law with Community law. 37

106. The question submitted concerns the following four points: an intentional criminal offence, an intentional criminal offence under the Betäubungsmittelgesetz, a final sentence, and non-suspension of the sentence.

107. It is evident from Article 3 of Directive 64/221, the provision to be interpreted in this case, that there are two limits on the Member State taking measures under the law relating to aliens.

108. First, Article 3(1) of Directive 64/221 requires that measures ‘be based exclusively on the personal conduct of the individual concerned’. 38

109. The German legislation appears to satisfy this criterion since its defining elements refer to the personal conduct of the individual concerned, inasmuch as what matters is the nature of the fault, the infringement of a particular law, the nature and term of the sentence and the absence of suspension.

110. Secondly, Article 3(2) of Directive 64/221 provides that ‘[p]revious criminal convictions shall not in themselves constitute grounds for the taking of such measures’. 39

111. According to the Court's case-law, when the future conduct of the individual concerned is assessed for the purposes of the law relating to aliens there is a duty to consider whether there is a genuine and sufficiently serious threat to one of the fundamental interests of society. 38 It also follows from the Court's case-law that 'general considerations' are prohibited. 39 Such general considerations exist also where national law makes expulsion man-


38 — Case 30/77, cited in footnote 8 above, paragraph 35, and Case C-340/97, cited in footnote 9 above, paragraph 37.

39 — Case 67/74, cited in footnote 10 above, paragraph 7, Case 36/75, cited in footnote 8 above, paragraph 29-31, Case 48/75, cited in footnote 11 above, paragraph 46, Joined Cases 115/81 and 116/81, cited in footnote 11 above, paragraph 11, Case C-348/96, cited in footnote 10 above, paragraphs 22 to 24, and Case C-340/97, cited in footnote 9 above, paragraph 63; see Case C-100/01, cited in footnote 8 above, paragraph 30 et seq.
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datory in general and abstract terms. Such legal constructions prevent a substantive examination of a specific case.

112. In any event, the application of a general and abstract provision to a specific case is not consistent with the prohibition on 'general considerations'. This is evident precisely in legislation such as that in the main proceedings which lays down 'standardised criteria' on the basis of which a particular threat is inferred. Therefore, even if an individual threat assessment were carried out in such cases, no weight could be attributed to it on account of the mandatory nature of the expulsion and it would not have the importance conferred on it by Community law.

113. In this context note should be taken of the comparison which the Commission rightly makes between the legislation at issue and the national legislation which was the subject of the proceedings in Calfa. In that case too the authorities had to order expulsion. The fact that it concerned expulsion for life is immaterial because it was the automatic nature of the national provision that rendered it incompatible with Community law, as is evident from the Court's interpretation of Calfa in the case of Nazli.

114. The answer to the first question submitted for a preliminary ruling should therefore be that Article 39(3) EC and Article 3 of Directive 64/221 preclude national legislation which makes it mandatory for authorities to expel nationals of other Member States who have been finally sentenced to a term of youth custody of at least two years, or to a term of imprisonment, for an intentional criminal offence under the Betäubungsmittelgesetz where the sentence has not been suspended.

VIII — Second question submitted for a preliminary ruling in Case C-493/01

A — Main arguments of the parties

115. In the view of the Regierungspräsidium Stuttgart, the second question submitted for a preliminary ruling in this case is


41 — Case C-348/96, cited in footnote 10 above, paragraph 5 et seq.

42 — Case C-340/97, cited in footnote 9 above, paragraphs 58 and 59.
irrelevant. The illness acquired after the expulsion constitutes an obstacle to deportation and consequently affects the legality of the enforcement of the expulsion, not the lawfulness of the expulsion itself. Moreover, Community law does not preclude the time of the adoption of a measure from being regarded as the material time. Finally, the question of a time-limit on the expulsion does not necessarily depend on the individual concerned already having left the country.

116. The German Government submits that it does not follow from Article 3 of Directive 64/221 that submission of a report and a positive development in the person concerned which occurred after the final decision of the authority must be taken into account when the lawfulness of the expulsion is reviewed. The authority is not able to take into consideration actual future developments. Therefore it is the time at which a decision is adopted which is decisive. Since Article 3 lays down only the substantive requirements relating to measures adopted under the law relating to aliens, it cannot alter the position in that regard.

117. Developments following the adoption of the final decision of the authority must be taken into account in the context of a decision on an application for a time-limit to be placed on the expulsion. That can result in the lifting of the prohibition on re-entry and the issuing of a new residence permit. Moreover, new facts must be taken into account in relation to enforcement of the expulsion.

118. In its observations the Italian Government does not make a separate examination of the second question submitted but makes the same submissions as in Case C-482/01.

119. In the view of the Commission, it follows from the case-law of the Court that the authorities must consider whether or not there is a present threat to the requirements of public policy. Article 3 of Directive 64/221 precludes any restriction on account being taken of the submission of a report or of a positive development in the person concerned which occurred between the decision of the authority concerned and the ruling of the national court.

B — Assessment

120. By the second question the national court asks whether national courts are required to take account of certain developments in the person concerned which...
occurred after the final decision of the authority. The main proceedings are concerned essentially with the fact that the person concerned developed Aids after the action was brought and will presumably soon die in spite of treatment.

121. This question concerns another matter of dispute in German law, that is to say the material time to be taken into consideration by the national court. In that regard three positions can be distinguished as regards the interpretation of the relevant provision of national procedural law, that is to say Paragraph 113 of the Verwaltungsgerichtsordnung. Whilst according to the first position the conclusion of the administrative proceedings is decisive, according to the second position the time of the application for annulment is decisive. According to a third position, it is the factual and legal situation at the time of the final oral procedure that is decisive. The present case relates to proceedings before an administrative court which were initiated by an action for annulment.

122. Under national law the question has already arisen as to whether the solution is to be found at all in administrative law alone rather than in substantive law. Applied to the main proceedings, this would mean that the solution is to be sought in the national law relating to aliens.

123. However, in view of the Court's function in preliminary ruling proceedings, it is Community law and not national law which should be taken as the starting point in the present case.

124. It is first necessary to start with Article 3 of Directive 64/221, which is expressly referred to in the question submitted.

125. According to the Court's case-law, that provision must be interpreted as meaning that 'the circumstances which gave rise [to that criminal conviction] are evidence of personal conduct constituting a present threat to the requirements of public policy'.

126. Therefore, the decisive factor is a present threat, although an assessment of the future may indeed be necessary. However, no more specific information as to what constitutes the 'present' is evident from the wording of Article 3 of Directive 64/221 or the case-law based thereon.

43 — Case 30/77, cited in footnote 8 above, paragraph 28, Case C-348/96, cited in footnote 10 above, paragraph 24, and Case C-340/97, cited in footnote 9 above, paragraph 58.
Although the case of Scintillo,\textsuperscript{44} cited by the Commission, also relates to a temporal aspect, it concerns the period between the opinion of the independent competent authority and the expulsion order.

However, the principle underlying Scintillo, namely that 'the factors to be taken into account, particularly those concerning [a person’s] conduct, are likely to change in the course of time', applies in respect of the period between the expulsion order and its review by the administrative court, which is the material period in this case.

German law relating to aliens, which — from the point of view of Community law — also includes the procedural law of administrative courts in this field, must also comply with this principle.

Where Community law does not provide for more specific rules, national procedural law does, in principle, apply. However, in that respect it is necessary to apply the case-law of the Court, according to which 'it is for the domestic legal system of each Member State ... to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, first, that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and, secondly, that they do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)'\textsuperscript{45}

It can be inferred from this that the exercise of the rights conferred on a person affected by an expulsion order by Directive 64/221 is rendered excessively difficult for him if he is unable to put forward new facts in pending administrative proceedings, including proceedings before an administrative court, but must make a specific application for a time-limit on expulsion and if any developments that have occurred in the meantime can be taken into account only in the decision on that application.

Not only the assertion of rights by the person concerned is relevant under Community law. Community law also requires that the bodies responsible under national law, that is to say also the administrative courts, must be able to ensure the exercise of rights and are not hindered in this respect by provisions of procedural law.

\textsuperscript{44} — Case 131/79, cited in footnote 22 above.

\textsuperscript{45} — See, to that effect, Case C-255/00 Grundig [2002] ECR I-8003, paragraph 33.
133. Such a hindrance would, however, exist if administrative courts could consider new developments only upon application and were barred from taking them into account of their own motion.

134. Therefore, it follows that national procedural law, that is to say also Paragraph 8 of the Ausländergesetz or the Verwaltungsgerichtsordnung, must be interpreted in conformity with Community law as meaning that a time-limit on expulsion is also to be granted of a court's own motion. 46

135. However, even if it is concluded that a time-limit must be granted in any event also of a court's own motion, it must still be asked whether or not the requirements of Community law are thereby satisfied.

136. Although the taking into account of further developments in connection with a decision on a time-limit on expulsion can result in the lifting of the prohibition on re-entry and the issuing of a new residence permit, this possibility does not constitute an adequate instrument which satisfies the requirements of Community law.

137. Thus, the problem of taking account of further developments arises also in respect of expulsion orders themselves. Although an expulsion order is not an administrative measure with permanent effect, new developments could be taken into consideration for as long it is not enforced. Since an expulsion order is based on an expulsion prognosis, that is to say an assessment with no temporal limit, new developments are of great practical importance precisely in relation to the expulsion.

138. The answer to the second question submitted for a preliminary ruling should therefore be that Article 3 of Directive 64/221 is to be interpreted as meaning that the submission of a report and a positive development in the person concerned which occurred after the final decision of the authority must also be taken into account by the national courts when they review the lawfulness of the expulsion of an EU national.

46 — Renner, cited in footnote 40 above, p. 304 et seq., already comes to the same conclusion under national law.

47 — Beichel, cited in note 40 above, p. 460.
139. In the light of those considerations I propose that the Court should answer the national court’s questions as follows:

A — In Case C-482/01

(1) Article 3 of Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health is to be interpreted as not precluding a restriction on the freedom of movement of a foreign EU national with many years’ residence in a host State, ordered on account of a criminal offence under the Betäubungsmittelgesetz on grounds of public policy, public security or public health, in so far as that measure is proportionate in the light of Article 8 of the European Convention on Human Rights and Fundamental Freedoms, in particular where, on account of the EU national’s personal conduct, there is a justified expectation that he will also commit future criminal offences and where the spouse of that EU national and his children can reasonably be expected to live in his State of origin.

(2) On a proper construction of Article 9(1) of Directive 64/221/EEC national legislation — which does not provide for objection proceedings in which an examination of expediency is also carried out in relation to an administrative authority’s decision to expel the holder of a residence permit from the national territory in circumstances where a special body independent of the administrative authority adopting the decision has not been established — is not precluded provided that an appeal is possible that permits an exhaustive examination of all the facts and circumstances, including the expediency of the proposed measure.
(1) Article 39 EC and Article 3 of Directive 64/221/EEC preclude national legislation which makes it mandatory for authorities to expel nationals of other Member States who have been finally sentenced to a term of youth custody of at least two years, or to a term of imprisonment, for an intentional criminal offence under the Betäubungsmittelgesetz where the sentence has not been suspended.

(2) Article 3 of Directive 64/221/EEC is to be interpreted as meaning that the submission of a report and a positive development in the person concerned which occurred after the final decision of the authority must also be taken into account by the national courts when they review the lawfulness of the expulsion of an EU national.