JUDGMENT OF THE COURT (First Chamber)

27 April 2006 *

In Case C-441/02,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 5 December 2002,

Commission of the European Communities, represented by C. O'Reilly and W. Bogensberger, acting as Agents, with an address for service in Luxembourg,

applicant,

supported by:

Italian Republic, represented by I.M. Braguglia, acting as Agent, and M. Fiorilli, avvocato dello Stato,

intervener,

* Language of the case: German.

Federal Republic of Germany, represented initially by W.-D. Plessing, and subsequently by A. Tiemann, acting as Agents,

defendant,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, K. Schiemann, J.N. Cunha Rodrigues (Rapporteur), K. Lenaerts and E. Juhász, Judges,

Advocate General: C. Stix-Hackl,
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 2 June 2005,

gives the following

Judgment

1 By its application, the Commission of the European Communities is seeking a declaration from the Court that:

— 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;

— 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 (Gesetz über Einreise und Aufenthalt von Staatsangehörigen der Mitgliedstaaten der Europäischen Wirtschaftsgemeinschaft, BGBl. 1980 I, p. 116) of 21 January 1980 (the '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;

— 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;

— 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

— 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 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), Article 1 of 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), Articles 1, 4, 5, 8 and 10 of 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), and Articles 1 and 2 of Council Directive 90/364/EEC of 28 June 1990 on the right of residence (OJ 1990 L 180, p. 26).

Legal context

Community legislation

2 Article 3(1) and (2) of Directive 64/221 reads:

'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.'

3 Article 9 of that directive 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.

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.'

4 Article 1 of Regulation No 1612/68 provides:

'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.'

5 Article 1 of Directive 73/148 states:

'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.'

6 According to Article 4 of that directive:

'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.'

7 According to Article 5 of Directive 73/148:

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

8 Article 8 of that directive reads:

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

9 Article 10 of Directive 73/148 provides:

'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.'

10 Article 1 of Directive 90/364 states:

'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.'

11 According to Article 2 of Directive 90/364:

'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.'

National legislation

12 Paragraph 2(2) of the Law on Foreign Nationals (Ausländergesetz, BGBl. 1990 I, p. 1354) provides:

'This law applies to foreign nationals who are entitled to freedom of movement under Community law, save where otherwise provided by Community law and the Aufenthaltsgesetz/EWG'.

13 Paragraph 45 of that Law reads:

'(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 matters 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 members of the foreign national's family who reside lawfully in the Federal territory and who live with him as member of his family; and

...'

14 Paragraph 46 of the Ausländergesetz states:

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

...

2. has 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 the treatment needed for his rehabilitation, or withdraws from such treatment;

...'

15 Paragraph 47 of that Law provides:

'(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 ('Sicherungsverwahrung') 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 (Betäubungsmittelgesetz), a breach of the peace ... or a public order offence ...

(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 Article 48(1) [of the EC Treaty, now after amendment Article 39(1) EC] 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, a decision to expel a foreign national aged between 18 and 21 years who has grown up in the Federal territory and who holds a residence permit of unlimited duration or the right to reside on the territory shall be a discretionary matter. Subparagraphs 1 and 2(1) shall not apply to foreign nationals who are minors.'

16 According to Article 48 of the Ausländergesetz:

'(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 II, 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 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 definitively convicted, on a number of occasions, of intentionally committing significant, serious or particularly serious offences. A young person aged between 18 and 21 years who has grown up on 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).'

17 Paragraph 12 of the Aufenthaltsgesetz/EWG provides:

'(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.

...

(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 wherein the present Law applies. Except in urgent cases, that period must be at least days where no EC

residence permit has yet been issued, and at least one month where an EC residence permit has been issued.

...'

18 Paragraph 4(2) of the Regulations governing freedom of movement for EU citizens (Freizügigkeitsverordnung/EG) provides that Paragraph 12(2) to (9) of the Aufenthaltsgesetz/EWG applies *mutatis mutandis* to nationals of Member States who do not have an occupation.

19 Paragraph 80(2) and (3) of the Code of Procedure before the Administrative Courts (Verwaltungsgerichtsordnung, 'VwGO') reads as follows:

'(2) Suspensory effect shall pertain except:

...

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

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

(3) In cases falling within subparagraph 2(4), reasons must be given in writing for the particular need for immediate enforcement of the administrative act. Specific reasons shall not be required where an authority adopts an emergency measure, designated as such, in the public interest and as a precaution, in a case of immediate danger, in particular in a case of harm constituting a threat to life, health or property.

...'

Pre-litigation procedure

20 After examining several dozen petitions and complaints sent to the European Parliament and the Commission by Italian nationals residing in the *Land* of Baden-Württemberg concerning measures taken against them by the German authorities on public policy grounds and affecting their right to reside in Germany, the Commission, in a letter of formal notice of 8 July 1998, drew the attention of the Federal Republic of Germany to the matter of whether certain statutory provisions and administrative practices were compatible with the provisions of Community law concerning the right to reside in the Member States.

21 As the German Government's reply dated 25 March 1999 did not allay the Commission's doubts, the Commission sent a reasoned opinion to the Federal Republic of Germany on 24 July 2000, in which it reiterated the complaints set out in the letter of formal notice and called on the Federal Republic of Germany to take the measures necessary to comply with that opinion within two months of its notification.

22 In its reply of 26 September 2000 the German Government denied the existence of any administrative practice contrary to Community law, stating that it was prepared to investigate whether some clarification needed to be made in certain specific areas of national legislation.

23 As the Commission had not been informed that such clarification had been made, and as it also took the view that the checks proposed to determine whether such clarification was needed were in any event not adequate to deal with its complaints, the Commission decided to bring the present action.

The action

The first complaint: German legislation and practice take insufficient account of personal conduct in cases of expulsion of nationals of other Member States on public policy grounds

Arguments of the parties

24 The Commission maintains that, since Paragraph 47(1) of the Ausländergesetz provides that expulsion of a foreign national is mandatory (hereinafter 'mandatory

expulsion') and Paragraph 47(2) provides that such expulsion is mandatory as a general rule (hereinafter 'expulsion as a general rule') where the individual concerned has been convicted of one of the offences referred to in those subparagraphs, the competent authority has no discretion in its decision-making.

25 The Commission notes that Paragraph 47(1) and (2) of the Ausländergesetz makes general reference to 'foreign nationals' and therefore includes nationals of the Member States. In so far as that provision applies to Community nationals, the Commission, supported by the Italian Government, argues that it is in stark and irreconcilable conflict with the requirements of Article 3(1) and (2) of Directive 64/221. Article 3 of the latter provides that an expulsion order must be based exclusively on the personal conduct of the individual concerned and previous criminal convictions cannot in themselves constitute grounds for such an order, Under Paragraph 47(1) and (2) of the Ausländergesetz, however, the competent authorities do not have the discretion which they require to examine cases individually, but instead have a general discretion, provided by the legislature, related solely to whether or not the foreign national concerned has a previous conviction. The Commission takes the view that Paragraph 47(1) and (2) of the Ausländergesetz conflicts with Paragraph 12(3) and (4) of the Aufenthaltsgesetz/EWG, although according to the German Government it is supposed to clarify those provisions.

26 According to the Commission, this conflicting legal situation clearly leads to problems in the practical application of the national legislation and hence to orders that are contrary to Community law. An expulsion order based on Paragraph 47 of the Ausländergesetz is contrary to Community law, and infringement of that law is particularly evident in cases where the competent authorities expressly state in their order that, given the existence of a previous criminal conviction, they have no discretion to decide against expulsion. The German legislation requires clarification in order to leave no room for doubt that the requirements of Community law have been taken into account.

27 The Commission makes clear that the purpose of the present action is not to examine individual cases, and that the expulsion cases mentioned in its application are cited merely as examples in order to illustrate the general nature of an administrative practice that is contrary to Community law because it is based on legislation which does not transpose the requirements of the Community rules with sufficient clarity. In the Commission's view, it follows beyond any doubt from those examples that incorrect orders have been made not on isolated occasions but quite frequently and are therefore of a general nature leading to certain practices that are incompatible with Community law, although such practices differ in extent from one region to another.

28 The German Government points out that the expulsion of nationals of Member States is not governed only by Paragraph 47 of the Ausländergesetz, but also by Paragraph 12 of the Aufenthaltsgesetz/EWG in the case of citizens of the Union who have an occupation, and by Paragraph 4 of the Freizügigkeitsverordnung/EG, which extends application of that Paragraph 12 to citizens of the Union who do not have an occupation.

29 Paragraph 12 of the Aufenthaltsgesetz/EWG states clearly that an examination must be made on an individual basis, including an assessment of the personal conduct of the person concerned, and that previous criminal convictions are not in themselves sufficient to justify expulsion. That provision, which repeats almost word for word the text of Article 3(1) and (2) of Directive 64/221, is a sufficiently clear and precise transposition of those provisions into domestic law. Contrary to the Commission's contention, Paragraph 47 of the Ausländergesetz in conjunction with Paragraph 12 of the Aufenthaltsgesetz/EWG does not create a legal situation that is vague and self-contradicting. Indeed, Paragraph 2(2) of the Ausländergesetz makes clear that the provisions of the Aufenthaltsgesetz/EWG take precedence over the rules of the Ausländergesetz, so that the consequent legal effect of mandatory expulsion (Paragraph 47(1) of the Ausländergesetz) or expulsion as a general rule (Article 47 (2) of the Ausländergesetz) applies to foreign nationals entitled to freedom of movement under Community law only where the conditions laid down in Paragraph 12 of the Aufenthaltsgesetz/EWG are met. The complaint that the transposition of Article 3 of Directive 64/221 into German law is insufficiently clear should be rejected.

30 With regard to the complaint that the Federal Republic of Germany based expulsion orders on 'that unclear basis', the German Government responds that there is no administrative practice contrary to Community law and that the Commission is not in a position to prove that such a practice exists, which it is moreover required to do.

31 It is conceivable that in some cases the competent administrative authorities have terminated the residence of nationals of other Member States by orders made not only in breach of domestic law but also of Community law, which takes precedence over domestic law. However, besides the fact that they did not all result in expulsion or entry refusal, the 51 cases mentioned by the Commission in its application extended over a period of 9 years and concerned only 3 of the 16 *Länder*. The contested measures do not therefore have the requisite level of consistency and generality to establish the existence of an administrative practice. The Commission's complaint is based principally on the assumption that orders that were also contrary to Community law were made in cases other than those mentioned in the application, something which has not been proved.

Findings of the Court

32 As the Court observed in Case C-503/03 *Commission* v *Spain* [2006] ECR I-1097, paragraph 43, the right of Member State nationals to enter and remain on the territory of another Member State is not unconditional. Among the limits laid down or authorised by Community law, Article 2 of Directive 64/221 enables Member States to prohibit nationals of other Member States from entering their territory on grounds of public policy or public security.

33 The Community legislature has nevertheless made reliance by the Member States on such grounds subject to strict limits. Article 3(1) of Directive 64/221 states that measures taken on grounds of public policy or public security are to be based exclusively on the personal conduct of the individual concerned and Article 3(2) states that previous criminal convictions do not in themselves constitute grounds for the taking of such measures. 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 (Case 30/77 *Bouchereau* [1977] ECR 1999, paragraph 28; Case C-348/96 *Calfa* [1999] ECR I-11, paragraph 24; and Case C-503/03 *Commission* v *Spain*, paragraph 44).

34 The Court, for its part, has always emphasised that the public policy exception is a derogation from the fundamental principle of freedom of movement for persons, which must be interpreted strictly, and that its scope cannot be determined unilaterally by the Member States (Case 36/75 *Rutili* [1975] ECR 1219, paragraph 27; *Bouchereau*, paragraph 33; *Calfa*, paragraph 23; Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257, paragraphs 64 and 65; and Case C-503/03 *Commission* v *Spain*, paragraph 45).

35 According to settled case-law, reliance by a national authority on the concept of public policy presupposes, in any event, the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine and sufficiently serious threat to one of the fundamental interests of society (*Rutili*, paragraph 28; *Bouchereau*, paragraph 35; *Orfanopoulos and Oliveri*, paragraph 66; and Case C-503/03 *Commission* v *Spain*, paragraph 46).

36 It is in the light of those considerations that the Commission's first complaint should be examined. That complaint comprises two parts: the first alleging incorrect transposition into domestic law of the Community law rules on the expulsion of

Community nationals on grounds of public policy, and the second concerning the practice followed by the administration in that regard.

— Allegedly incorrect transposition

37 Under Paragraph 47 of the Ausländergesetz, a foreign national, that is to say, any person who does not have German nationality (Paragraph 1(2) of that Law), is to be expelled (mandatory expulsion) if he has been definitively convicted of an offence referred to in Paragraph 47(1), whilst such expulsion is to take place as a general rule (expulsion as a general rule) if he has been convicted of an offence referred to in Paragraph 47(2)(1).

38 The provisions of Paragraph 47(1) and (2)(1) of the Ausländergesetz, considered in isolation, in so far as they lead to the expulsion of Community nationals following a criminal conviction, without the offender's personal conduct or the actual danger he represents with regard to public policy being taken into account as a matter of course, do not meet the requirements of Community law (see, to that effect, with regard to Paragraph 47(1)(2) of the Ausländergesetz, *Orfanopoulos and Oliveri*, paragraphs 59 and 69 to 71).

39 However, as the German Government has rightly observed, the Aufenthaltsgesetz/EWG applies as special legislation to nationals of Member States who are entitled to freedom of movement under the EC Treaty. Under Paragraph 2(2) of the Ausländergesetz, that Law applies to foreign nationals entitled to freedom of movement under Community law save where Community law and the Aufenthalts-

gesetz/EWG, which applies in particular to nationals of other Member States who have an occupation, provide otherwise. Moreover, Paragraph 4(2) of the Freizügigkeitsverordnung/EG extends application of Paragraph 12(2) to (9) of the Aufenthaltsgesetz/EWG to nationals of Member States who do not have an occupation.

40 Accordingly, the Aufenthaltsgesetz/EWG, being special legislation (a *lex specialis*) vis-à-vis the Ausländergesetz (a *lex generalis*), prevails over the provisions of the Ausländergesetz in situations which it specifically seeks to regulate (see, with regard to Community directives, Case C-444/00 *Mayer Parry Recycling* [2003] ECR I-6163, paragraph 57).

41 Paragraph 12(3) and (4) of the Aufenthaltsgesetz/EWG indeed states that an expulsion order may be adopted only where a foreign national gives cause for doing so on account of his personal conduct, and the existence of a previous criminal conviction is not in itself a sufficient ground for adopting such a measure.

42 Although the scope of national laws, regulations or administrative provisions must be assessed in the light of the interpretation given to them by national courts (see, in particular, Case C-129/00 *Commission* v *Italy* [2003] ECR I-14637, paragraphs 30 to 33), the Commission is not alleging in the present case that the legislation at issue has been the subject of different judicial constructions that may be taken into account, some leading to the application of that legislation in compliance with Community law, others leading to an application which is incompatible with it, with the result that such legislation is not sufficiently clear to ensure its application in compliance with Community law.

43 In those circumstances, there is no basis to the Commission's complaint alleging infringement of Community law in so far as the German legislation does not provide sufficiently clearly that expulsion from the territory of the Federal Republic of Germany of a national of another Member State entitled to freedom of movement under Community law must not automatically follow a criminal conviction without any account being taken of the personal conduct of the offender or of the present danger which that conduct represents for the requirements of public policy.

— The existence of an alleged administrative practice that is contrary to Community law

44 It is clear from the conclusions of the application initiating proceedings that, by its first complaint, the Commission seeks not only a finding that the rules of Community law have been incorrectly transposed into domestic law, but also a finding that 'expulsion orders' have been made in breach of those rules.

45 The Court has held on several occasions that the Commission may ask the Court to find that, in not having achieved, in a specific case, the result intended by a directive, a Member State has failed to fulfil its obligations (see, in particular, Joined Cases C-20/01 and C-28/01 *Commission* v *Germany* [2003] ECR I-3609, paragraph 30; Case C-157/03 *Commission* v *Spain* [2005] ECR I-2911, paragraph 44; and Case C-503/03 *Commission* v *Spain*, paragraph 59).

46 As is clear from paragraph 27 above, and notwithstanding the loose drafting of the submissions set out in the application on this point, the Commission expressly stated during the proceedings before the Court that the purpose of its action is not to request the Court to examine specific issues raised by individual cases in connection with the various complaints, but to demonstrate that the German legislation inadequately transposes the requirements of Community law, thereby

giving rise to an administrative practice that is contrary to Community law. In that context, the Commission refers to a number of cases that it cites purely as examples in order to illustrate certain types of decisions and administrative practices for which the Federal Republic of Germany is criticised in the present proceedings. The fact that the Commission cites specific cases does not in any way mean that no other cases should be regarded as being examples of infringement of Community law.

47 According to the Court's case-law, a failure to fulfil obligations may arise due to the existence of an administrative practice which infringes Community law, even if the applicable national legislation itself complies with that law, as follows from paragraphs 39 to 43 of the present judgment (see, in particular, Case C-278/03 *Commission* v *Italy* [2005] ECR I-3747, paragraph 13).

48 In that regard it must first be noted that, according to established case-law, in proceedings for failure to fulfil obligations, it is for the Commission to prove the existence of the alleged infringement and to provide the Court with the information necessary for it to determine whether the infringement is made out, and the Commission may not rely on any presumption for that purpose (see, in particular, Case C-287/03 *Commission* v *Belgium* [2005] ECR I-3761, paragraph 27).

49 With regard in particular to a complaint concerning the implementation of a national provision the Court has held that proof of a Member State's failure to fulfil its obligations requires production of evidence different from that usually taken into account in an action for failure to fulfil obligations concerning solely the terms of a national provision, and that in those circumstances the failure to fulfil obligations can be established only by means of sufficiently documented and detailed proof of the alleged practice of the national administration and/or courts, for which the Member State concerned is answerable (Case C-287/03 *Commission* v *Belgium*, paragraph 28).

50 The Court has also held that, although a State's action consisting in an administrative practice contrary to the requirements of Community law can amount to a failure to fulfil obligations for the purposes of Article 226 EC, that administrative practice must be, to some degree, of a consistent and general nature (see Case C-387/99 *Commission* v *Germany* [2004] ECR I-3751, paragraph 42; Case C-494/01 *Commission* v *Ireland* [2005] ECR I-3331, paragraph 28; and Case C-287/03 *Commission* v *Belgium*, paragraph 29).

51 The Commission has, however, failed to establish the existence in Germany of an administrative practice having the characteristics required under the case-law of the Court.

52 The Commission merely listed in its application a number of cases in which it alleged that administrative decisions had been taken in breach of the requirements of Community law. It did not provide the Court with the decisions in question, merely reproducing in its application a short extract from some of them. The Commission has therefore clearly failed to provide the Court with the evidence necessary for it to determine the existence of the alleged failure, especially since the German Government specifically challenges the reliability of the information relied on, citing in a number of cases decisions taken in response to official complaints by the persons concerned (*Condo*, *Ferri*, *Gaudino*, *Guaglianone*, *Marchese* and *Procopio* cases) against the decisions to which the Commission refers in its application.

53 Moreover, the fifty or so decisions listed by the Commission were taken, according to the information given in the application initiating proceedings, between December 1992 (*Torsello*) and January 2001 (*Sulimanov*), that is to say, over a period of almost nine years. The Court cannot in any event therefore find that there is a general and consistent practice contrary to Community law, since the Commission, which may not rely on any presumption, has been unable to provide it with the evidence needed in order to refute the German Government's assertion that these are isolated decisions and do not point to a general and consistent practice.

54 That conclusion is all the more compelling since, as the German Government contends, the general administrative provisions relating to the Ausländergesetz (Allgemeine Verwaltungsvorschrift zum Ausländergesetz), which are intended for, and apply to, the German administrative authorities, state, on the one hand, that a foreign national may be expelled on public policy grounds under Paragraph 12(1) of the Aufenthaltsgesetz/EWG only where that person gives cause for such a measure on account of his personal conduct, and the existence of a previous criminal conviction is insufficient to justify expulsion, and, on the other hand, that Paragraph 12(3) provides that expulsion is to be based only on the personal conduct of the foreign national and that it may be ordered only on specific preventive grounds and where there is a genuine and sufficiently serious threat to one of the fundamental interests of society.

55 Therefore, although the German Government does not deny that expulsion orders may have been made in isolated cases without the requirements of Community law being adequately taken into account, the Commission's complaint alleging the existence of an administrative practice incompatible with Community law must be rejected as being unfounded.

56 It follows that the first complaint must be rejected in its entirety.

Second complaint: German legislation and practice fail to take adequate account of the existence of a serious threat to public order in cases of expulsion of nationals of other Member States holding a limited residence permit

Admissibility

— Arguments of the parties

57 The German Government contends that the Commission, in its application, criticises the Federal Republic of Germany not only for failing to comply fully with

its obligation to transpose Directive 64/221 into domestic law, but also for establishing an administrative practice contrary to Community legislation. However, in its reasoned opinion, the Commission mentioned only the unclear transposition of the rules of Community law in Paragraph 12(1) of the Aufenthaltsgesetz/EWG and did not criticise it for an alleged administrative practice that is contrary to that law as regards implementation of that provision. The second complaint, it is submitted, is therefore inadmissible in so far as the Commission is seeking a ruling that such a practice exists, since the Court has consistently held that the Commission may not rely in its action on matters which were not raised at the pre-litigation stage.

58 The Commission rejects any allegation that it has extended the subject-matter of the dispute, maintaining that by its first three complaints it is objecting to the situation under German law regarding the expulsion of foreign nationals principally because the coexistence of occasionally conflicting provisions, which are a source of misunderstanding for the authorities responsible for applying the law, in practice regularly results in expulsion orders that are incompatible with Community law. In the same way that the lack of clarity regarding the legal situation results in the coexistence of those provisions, the expulsion orders based on those provisions are necessarily connected with those three complaints and cannot be dissociated from them.

— Findings of the Court

59 The Court has consistently held (see, inter alia, Case C-365/97 *Commission* v *Italy* [1999] ECR I-7773, paragraph 23) that the letter of formal notice sent by the Commission to a Member State, and the reasoned opinion issued by the Commission, delimit the subject-matter of the dispute, so that it cannot thereafter be extended. The opportunity for the Member State concerned to submit its observations, even if it chooses not to avail itself thereof, constitutes an essential guarantee intended by the EC Treaty, adherence to which is an essential formal requirement of the procedure for finding that a Member State has failed to fulfil its obligations.

60 Consequently, 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 (Case C-191/95 *Commission* v *Germany* [1998] ECR I-5449, paragraph 55). The reasoned opinion and the application must be based on the same grounds and pleas, with the result that the Court cannot examine a ground of complaint which was not formulated in the reasoned opinion (Case 76/86 *Commission* v *Germany* [1989] ECR 1021, paragraph 8), which for its part must contain a cogent and detailed exposition of the reasons which led the Commission to the conclusion that the Member State concerned had failed to fulfil one of its obligations under the Treaty (see, in particular, Case C-350/02 *Commission* v *Netherlands* [2004] ECR I-6213, paragraph 20).

61 However, there can be no requirement 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, where the subject-matter of the proceedings has not been extended or altered but simply limited (Case C-191/95 *Commission* v *Germany*, paragraph 56; Case C-365/97 *Commission* v *Italy*, paragraph 25; and Case C-177/04 *Commission* v *France* [2006] ECR I-2461, paragraph 37).

62 In the present case, the part of the second complaint alleging the existence of an administrative practice contrary to Community law corresponds in essence to the complaint contained in Point IV of the reasoned opinion, in which the Commission alleges that the Federal Republic of Germany adopted expulsion orders in cases where the existence of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society had not been proved. To this is added the fact that, in the part of the reasoned opinion entitled 'Threat to the requirements of public policy', the Commission does indeed allege that 'administrative practices' exist in Germany that are based on an interpretation of the first sentence of Paragraph 12(1) of the Aufenthaltsgesetz/EWG which fails to meet the conditions under which Community law permits restrictions on freedom of movement on public policy grounds.

63 In those circumstances, the Commission cannot be criticised for not repeating the exact wording of the complaints raised during the pre-litigation procedure in the form of order sought in the application initiating the proceedings, when it took care to align that form of order on the detailed statement of complaints.

64 The objection that the application is partially inadmissible must therefore be rejected.

Substance

— Arguments of the parties

65 The Commission claims that the Aufenthaltsgesetz/EWG, which is intended to transpose into German law the rules of Community law relating to restriction of freedom of movement on grounds of public policy, is not sufficiently clear as regards the rule laid down in Paragraph 12(1) of that Law, which is crucial in the present case. Whilst the first sentence of that provision states that a foreign national entitled to freedom of movement may be refused residence 'on grounds of public policy, public security or public health', the second sentence of Paragraph 12(1) provides, solely in the case of foreign nationals holding an 'unlimited EC residence permit', that they may be expelled only on 'serious' grounds relating to public security or public policy. The structure of the provision in question is, the Commission submits, misleading in so far as it might be understood and, as administrative practice shows, it is in fact understood to mean that simple grounds of public policy and public security are sufficient in order to expel persons entitled to freedom of movement who do not have an 'unlimited EC residence permit' and that the existence of serious grounds is required only in order to expel foreign nationals who hold such a permit.

66 There are numerous decisions which in principle constitute an incorrect interpretation of public policy within the meaning of the first sentence of Paragraph 12(1) of the Aufenthaltsgesetz/EWG. It is sometimes expressly stated in such decisions that it is unnecessary to ascertain the existence of serious public policy grounds because the existence of such grounds is required only in the case referred to in the second sentence of that provision, namely that of foreign nationals holding an 'unlimited EC residence permit'. The Commission cites seven cases as examples in support of this contention.

67 According to the Commission, the legal situation and administrative practice in Germany need to be specifically clarified in that regard, leaving no possible room for doubt regarding the requirement that, whatever the duration of the residence permit, an expulsion measure presupposes that the personal conduct of the person concerned will demonstrate the existence of a genuine and sufficiently serious threat to a fundamental interest of society (see, in particular, *Bouchereau*, paragraphs 33 to 35).

68 The German Government contends, by contrast, that Paragraph 12(1) of the Aufenthaltsgesetz/EWG transposes the requirements under the Community rules relating to restriction of freedom of movement with sufficient clarity.

69 With regard to the allegation that an administrative practice exists that is contrary to Community law, the German Government contends that, even if that part of the second complaint were admissible, it does not see how the Commission can conclude, solely on the basis of fewer than 20 individual cases listed in the application, that such an administrative practice exists and is implemented systematically throughout the Federal territory.

— Findings of the Court

Allegedly incorrect transposition

70 As noted in paragraph 35 above, the Court has consistently held that reliance by a national authority on the concept of public policy presupposes, in any event, the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine and sufficiently serious threat to one of the fundamental interests of society.

71 The first sentence of Paragraph 12(1) of the Aufenthaltsgesetz/EWG provides that nationals of other Member States who are entitled to freedom of movement under Community law may be expelled only on grounds of public policy, public security and public health and mentions in parenthesis Article 48(3) and Article 56(1) of the EC Treaty (now, after amendment, Article 46(1) EC). The second sentence of Paragraph 12(1) states that foreign nationals holding an 'unlimited EC residence permit' may be expelled only on 'serious' grounds relating to public security or public policy

72 Although the reference to primary Community law contained in the first sentence of Paragraph 12(1) of the Aufenthaltsgesetz/EWG may be considered to show adequately that the concept of public policy must be interpreted in the same way as it is interpreted in those articles of the Treaty, as implemented by Directive 64/221 and clarified by the case-law of the Court, the fact remains that the second sentence of Paragraph 12(1), since it adds that, in the case of Community nationals holding an unlimited residence permit, only 'serious' public policy grounds can justify expulsion, gives rise to doubt as to whether the requirements of Community law are properly taken into consideration in the case of Community nationals holding a limited residence permit.

73 According to settled case-law, the provisions of directives must be implemented with unquestionable binding force, and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty (see, in particular, Case C-159/99 *Commission* v *Italy* [2001] ECR I-4007, paragraph 32, and Case C-415/01 *Commission* v *Belgium* [2003] ECR I-2081, paragraph 21).

74 Paragraph 12(1) of the Aufenthaltsgesetz/ESG does not therefore transpose sufficiently clearly, with regard to nationals of Member States holding a limited residence permit, the requirements stemming from the case-law referred to in paragraph 70 above, under which expulsion is justified only in the case of a genuine and sufficiently serious threat affecting a fundamental interest of society.

75 The general administrative provisions relating to the Ausländergesetz, relied on by the German Government in support of its contention that the national legislation satisfies the requirement of the principle of legal certainty, do not cast doubt on that view.

76 In that regard, suffice it to say that the principle of legal certainty requires appropriate publicity for 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 (see, in particular, Case C-415/01 *Commission* v *Belgium*, paragraph 21). This is not the case so far as the general administrative provisions are concerned, since it is common ground that they are of an internal nature and are intended for the administration in order to ensure that it adopts a consistent approach to specific issues.

77 In those circumstances, the first part of the second complaint is well-founded.

The alleged administrative practice contrary to Community law

78 In paragraphs 49 and 50 above, the Court noted that, with regard to complaints concerning the implementation of a national provision, proof of a Member State's failure to fulfil its obligations requires production of evidence different from that usually taken into account in an action for failure to fulfil obligations concerning solely the terms of a national provision. In those circumstances, the failure to fulfil obligations can be established only by means of sufficiently documented and detailed proof of the alleged practice of the national administration and/or courts, for which the Member State concerned is answerable. Although a State's action consisting in an administrative practice contrary to the requirements of Community law can amount to a failure to fulfil obligations for the purposes of Article 226 EC, that administrative practice must be, to some degree, of a consistent and general nature.

79 The Commission merely listed 17 cases in which it alleged that administrative decisions had been taken in breach of the requirements of Community law. It did not provide the Court with the decisions in question or even reproduce any extracts from them to support its allegation. The Commission has therefore clearly failed to provide the Court with the evidence necessary for it to determine the existence of the alleged failure, especially since the German Government specifically challenges the reliability of the information relied on by reproducing, in particular, with regard to two of the cases to which the Commission refers in its application (*Moffa* and *Nardelli*), an extract from the decision in question designed to show that the requirements of Community law were taken into account.

80 On that ground alone the second part of the second complaint must be rejected as unfounded.

Third complaint: German legislation and practice take general preventive considerations into account in cases of expulsion

Admissibility

— Arguments of the parties

81 The German Government contends that the reasoned opinion did not contain any complaint that there was a lack of clarity in the German legislation regarding the prohibition on adopting general preventive measures, and so that part of the third complaint should be declared inadmissible.

82 The Commission's response is that it stated in the letter of formal notice that all decisions based on Paragraph 47(1) and (2) of the Ausländergesetz necessarily, due to the generally preventive aim of that provision, involve unlawful general preventive considerations and therefore infringe Community law. This complaint was maintained in the reasoned opinion and so the plea of inadmissibility should be rejected.

— Findings of the Court

83 The reasoned opinion and the proceedings brought by the Commission must be based on the same grounds and pleas (see, in particular, paragraph 60 above). That is so in the present case.

84 As the Advocate General observed in points 111 and 112 of her Opinion, the part of the third complaint concerning incorrect transposition into domestic law of the requirement that general preventive considerations cannot constitute grounds for the expulsion of Community nationals corresponds in essence to the complaint contained in point (III) of the conclusions of the reasoned opinion, in which the Commission alleges that the Federal Republic of Germany has failed to make sufficiently clear in its legislation that expulsion orders against citizens of the Union may not be based on a provision which provides for mandatory expulsion, or expulsion as a general rule, in the case of a definitive criminal conviction. In addition, in the part of the reasoned opinion entitled 'Deterrence', the Commission indeed alleges that all expulsion orders based on Paragraph 47 of the Ausländergesetz necessarily, due to the general preventive aim of that provision, involve unlawful general preventive considerations, with the result that it is thus referring directly to the legislation in question.

85 In those circumstances, the Commission cannot be criticised for not repeating the exact wording of the complaints raised during the pre-litigation procedure in the form of order sought in the application initiating the proceedings, when it took care to align that form of order on the detailed statement of complaints.

86 The objection that the third complaint is partially inadmissible must therefore be rejected.

Substance

— Arguments of the parties

87 The Commission asserts that the expulsion rules laid down in Paragraph 47(1) and (2) of the Ausländergesetz pursue general preventive aims, in that mandatory

expulsion or expulsion as a general rule is intended to deter other foreign nationals from committing offences that are the same or similar to those perpetrated by the foreign nationals who are expelled. All the decisions based on those provisions contain, by force of circumstances, an unlawful general preventive aspect, in view of the objective of that rule, and are for that reason alone contrary to Community law. The reference to Paragraph 12 of the Aufenthaltsgesetz/EWG, made simply as an additional reference, makes no difference to the fact that such decisions are based on a legal provision whose application is incompatible with Community law due to the general preventive aim which it pursues.

88 This general preventive aim pursued by mandatory expulsion is also expressly mentioned in a number of decisions, although it does not appear from the grounds for such decisions that they are based for other reasons on specific preventive grounds. In any event, such a distinction is not noticeable in some decisions, since they set out general preventive aims at the same time as specific preventive aims, as cumulative grounds, thereby indicating that the measure concerned is based on both types of consideration. In addition, in those decisions particular significance is sometimes assigned in the grounds to the general preventive effect. According to the Commission, it follows therefrom that that administrative practice amounts to basing the decisions in question also on general preventive grounds and is for that reason contrary to Community law (Case C-340/97 *Nazli* [2000] ECR I-957, paragraph 63).

89 In those circumstances, the legal situation and administrative practice in Germany need to be specifically clarified in that regard in order to leave no room for doubt regarding implementation of the national legislation. Unclear and ambiguous transposition of obligations under Community law is not in conformity with the requirements of correct transposition of Directive 64/221.

90 With regard to the complaint that the national legislation itself lacks clarity, the German Government responds that the legislation indicates clearly and unambiguously that Community nationals may not be expelled on grounds that pursue general preventive aims. The Commission, it submits, is disregarding the fact that the expulsion orders against such nationals are not based in law exclusively on Paragraph 47 of the Ausländergesetz, but must also comply with the provisions of Paragraph 12 of the Aufenthaltsgesetz/EWG, which are mandatory and take precedence over those of Paragraph 47. General prevention is provided for only in respect of nationals of non-member countries.

91 As regards the complaint that an administrative practice exists which is contrary to Community law, the German Government denies the existence of a series of incorrect individual decisions which constitute such a practice. The few cases the Commission mentions are not sufficient to conclude that there is an ongoing and general administrative practice contrary to Community law. It should be added that it is clear from the general administrative provisions relating to the Ausländergesetz, which have a decisive influence over whether an administrative practice exists since they are legally binding on the administration in its action, that it is prohibited for the administration to justify expulsion orders against Community nationals on the basis of the deterrent effect such expulsion has on other foreign nationals.

92 The fact that the German administrative authorities rely on general preventive grounds as well as specific preventive grounds is perfectly compatible with Article 3(1) of Directive 64/221, where the single requirement laid down in that provision, namely, to give adequate reasons regarding the person and conduct of the individual concerned, is met.

— Findings of the Court

Allegedly incorrect transposition

93 According to the case-law of the Court, Community law precludes expulsion of a national of a Member State on grounds of a general preventive nature, that is to say, expulsion which has been ordered for the purpose of deterring other foreign nationals (see, in particular, Case 67/74 *Bonsignore* [1975] ECR 297, paragraph 7, and *Nazli*, paragraph 59), in particular where such measure 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 (see *Calfa*, paragraph 27).

94 As was stated in paragraphs 39 to 43 above, the Aufenthaltsgesetz/EWG, being special legislation vis-à-vis the Ausländergesetz, prevails over the provisions of the Ausländergesetz in situations which it specifically seeks to regulate.

95 According to the first sentence of Paragraph 12(3) of the Aufenthaltsgesetz/EWG, measures for the expulsion of Community nationals entitled to freedom of movement under Community law may be adopted only where the person concerned gives cause for doing so on account of his personal conduct. It follows that any expulsion on general preventive grounds is prohibited as regards that category of persons.

96 Moreover, as was stated in connection with the first complaint (see paragraph 42 above), the Commission is not alleging in the present case that the legislation at issue has been the subject of different judicial constructions that may be taken into account, some leading to the application of that legislation in compliance with Community law, others leading to an application which is incompatible with it, with the result that such legislation is not sufficiently clear to ensure its application in compliance with Community law.

97 In those circumstances, there is no basis to the Commission's complaint alleging infringement of Community law on the ground that the German legislation does not provide sufficiently clearly that general preventive considerations must not be taken into account when expelling from the territory of the Federal Republic of Germany a national of another Member State entitled to freedom of movement under Community law.

An alleged administrative practice contrary to Community law

98 It is appropriate to observe that the Commission merely listed in its application a number of cases in which it alleged that the expulsion order had been adopted partly in order to pursue general preventive aims. It did not provide the Court with the decisions in question, but merely reproduced a short extract from just some of them. The Commission has therefore clearly failed to provide the Court with the evidence necessary for it to determine the existence of the alleged failure, especially since the German Government challenges the reliability of the information produced, citing a number of cases in which, in particular, decisions were taken in response to official complaints by the persons concerned (*Condo* and *Procopio*) against the decisions to which the Commission refers in its application.

99 Moreover, the 11 decisions mentioned by the Commission were taken, according to the information given in the application initiating proceedings, between March 1993 (*Sassano*) and November 1997 (*Pugliese*), that is to say, over a period of almost five years. The Court cannot in any event therefore find that there has been a general and consistent practice contrary to Community law, since the Commission, which may not rely on any presumption, has not been able to provide it with the evidence needed in order to refute the German Government's assertion that these are isolated decisions and do not point to a general and consistent practice.

100 That conclusion is all the more unavoidable when account is taken of the fact that, as the German Government contends, one of the general administrative provisions relating to the Ausländergesetz states that expulsion may be ordered only on specific preventive grounds and only in the case of a genuine and sufficiently serious threat to one of the fundamental interests of society.

101 Therefore, although the German Government does not deny that expulsion orders may have been made in isolated cases without the requirements of Directive 64/221 being taken adequately into account, the Commission's complaint alleging the existence of an administrative practice incompatible with Community law must, in the light of the case-law mentioned in paragraphs 48 to 50 above, be rejected as unfounded.

102 The third complaint must therefore be rejected in its entirety.

Fourth complaint: failure to take adequate account of the fundamental right to respect for family life when expulsion orders are adopted

Arguments of the parties

103 The Commission maintains that, when expelling Community nationals on the basis of the public policy exception governed by Directive 64/221, Member States have an obligation to take into consideration not only the fundamental principle of freedom of movement for persons, but also the impact of such expulsion on fundamental rights, in particular the right to respect for family life established by Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('the ECHR'), a right which the Court is required to uphold (see, in particular, Case C-60/00 *Carpenter* [2002] ECR I-6279, paragraph 41).

104 The Commission mentions in that regard a number of cases in which, in its view, the German administrative authorities have infringed the principle of proportionality in a particularly crude and blatant manner. It cites two cases in which those authorities did not examine the issue of proportionality, five cases in which they did not examine proportionality because they considered that automatic expulsion did not call for such an examination, and fourteen cases in which the significance of the fundamental right to respect for family life was not taken adequately into account.

105 The German Government contends that the Commission has not been able to demonstrate that an administrative practice exists which fails to strike the balance between the right to family life and the need to comply with public policy

requirements. This alleged administrative practice has not been proved since, in particular, the mere fact that there have been some expulsion orders where no mention has been made in the grounds of the family ties of the persons concerned does not support the conclusion that a general administrative practice exists.

106 Contrary to the Commission's assertions, the provisions governing the expulsion of Community nationals, in particular Paragraph 48 of the Ausländergesetz and Paragraph 12 of the Aufenthaltsgesetz/EWG, lay down an almost mandatory requirement to assess the proportionality of the expulsion order to take into account the overriding importance of protecting marriage and family life. Under Article 6 of the German Constitution, marriage and family enjoy the special protection of the Federal State and the administrative authorities are formally required to take that constitutional status into consideration when applying measures. The Commission is wrong to complain that those authorities did not assess the issue of proportionality and, in the cases in which the Commission found that the expulsion orders were disproportionate, the criteria which it applies are also incorrect, which almost inevitably leads it to draw incorrect conclusions.

Findings of the Court

107 According to the case-law of the Court, the examination on a case-by-case basis by the national authorities of whether there is personal conduct constituting a present threat to the requirements of public policy and, if necessary, of where lies the fair balance between the legitimate interests in issue must be made in compliance with the general principles of Community law (*Orfanopoulos and Oliveri*, paragraph 95).

108 In that regard, it is necessary to take into account the fundamental rights whose observance the Court ensures. Reasons of public interest may be invoked to justify a national measure which is likely to obstruct the exercise of the fundamental freedoms guaranteed by the Treaty only if the measure in question takes account of such rights (see, to that effect, Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 43; Case C-368/95 *Familiapress* [1997] ECR I-3689, paragraph 24; *Carpenter*, paragraph 40; and *Orfanopoulos and Oliveri*, paragraph 97).

109 In that context, the importance of ensuring protection of the family life of Community nationals in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the Treaty has been recognised under Community law. It is established, in particular, that the removal of a person from the country where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed by Article 8 of the ECHR, which is among the fundamental rights which, according to the Court's settled case-law, are protected in Community law (see, in particular, the ruling of the European Court of Human Rights of 2 August 2001 in *Orfanopoulos and Oliveri*, paragraph 98). Such interference will infringe the ECHR if it does not meet the requirements of Article 8(2), 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 (see, in particular, the ruling of the European Court of Human Rights of 2 August 2001 in *Boultif* v *Switzerland*, No 54273/00, §§ 39, 41 and 46, ECHR 2001-IX and *Carpenter*, paragraph 42).

110 The Commission has not demonstrated that an administrative practice exists in Germany that is contrary to the requirements regarding protection of the right to respect for family life and has the requisite level of consistency and generality as stipulated in the Court's case-law.

111 The Commission merely listed in its application a number of cases in which it alleged that the expulsion order had failed to take adequate account of the right to respect for family life, or failed to take that right into account at all. It did not provide the Court with the decisions in question, merely reproducing a short extract from only some of them. The Commission has therefore clearly failed to provide the Court with the evidence necessary for it to determine the existence of the alleged failure, especially since the German Government specifically challenges (in particular, in *Solimando*, *Racabulto* and *Condo*) the soundness of the Commission's assertion that insufficient account was taken of the right to respect for family life in all of the orders which the Commission cited.

112 Moreover, the 21 orders in question were made, according to the information given in the application initiating proceedings, between December 1992 (*Torsello*) and March 2001 (*Theodoridis*), that is to say, over a period of almost nine years. The Court cannot in any event therefore find that there is a general and consistent practice contrary to Community law, since the Commission, which may not rely on any presumption, has not been able to provide it with the evidence needed in order to refute the German Government's assertion that these are at most isolated decisions and not indicative of a general and consistent practice.

113 Therefore, although the German Government does not deny that isolated expulsion orders may have been adopted without the requirements relating to the right to respect for family life being adequately taken into account, the Commission's complaint alleging the existence of an administrative practice incompatible with Community law must, in the light of the case-law cited in paragraphs 48 to 50 above, be rejected as unfounded.

Fifth complaint: systematic use of immediate expulsion although the situation is not urgent

Arguments of the parties

114 The Commission contends that, where an expulsion order challenged before the courts concerns only the lawfulness of the measures or has no suspensive effect, the first subparagraph of Article 9(1) of Directive 64/221 requires, 'save in cases of urgency', prior implementation of a specific procedure before an independent authority, which is required to give an opinion. As German law relating to foreign nationals does not have a specific procedure within the meaning of that provision, it follows that in the case of expulsion of Community nationals, suspensive effect cannot be excluded under an administrative order issued under Paragraph 80(2)(4) of the VwGO except in 'cases of urgency' within the meaning of the abovementioned provision of Directive 64/221.

115 According to the Commission, such a case of urgency can be envisaged only where immediate enforcement is the sole means of averting a specific, imminent and serious risk of an offence against public policy. Since immediate expulsion constitutes an infringement of the fundamental right to freedom of movement and the right to respect for family life, the competent authority must prove in each individual case referred to it that the conditions laid down have been met. At least in the case of Community nationals who have been resident for a long time in the host Member State, the principle of proportionality dictates that immediate enforcement of an expulsion order should be ordered only as an exception and solely in cases of acknowledged seriousness and urgency.

116 The Commission contends that, under Paragraph 80(2)(4) of the VwGO, the suspensory effect of an expulsion order may be excluded in cases where the order

applies to a Community national who has appealed or brought an action for annulment, where there is specific interest that expulsion should be enforced immediately. Although that 'specific interest' must go further than the interest justifying expulsion itself, German administrative practice regularly establishes, almost automatically and without adequate grounds, that there is a specific interest in expulsion being enforced immediately. Examination of the cases submitted to the Commission by no means supports the conclusion that the administrative authorities have taken into account the urgency criterion required by Community law in order for enforcement to be effected immediately. The Commission mentions in that connection 17 cases which do not meet the requirements of Community law. In addition to almost systematic recourse to immediate enforcement, the unavoidable conclusion, according to the Commission, is that the existence of a specific interest of society in immediate enforcement, an interest which necessarily extends beyond the general interest justifying expulsion, is demonstrated by a brief statement rather than by specific evidence.

117 The legal situation and administrative practice in Germany therefore need to be clarified in order to leave no room whatsoever for doubt in that regard.

118 The German Government's response is that an order for immediate enforcement is made after individual determination of the specific requirements for so doing. The fact that expulsion orders are often accompanied by immediate enforcement orders, although they are independent of one another, is the almost inevitable result of the fact that Community nationals who meet the very strict requirements for an expulsion order to be made against them nearly always meet the requirements for that order to be enforced immediately also.

119 An order for immediate enforcement attaching to an expulsion order also does not conflict with the procedural safeguards provided under Community law. Not only

can nationals of other Member States protect themselves against an expulsion order using the same appeal procedures as those available to German nationals against administrative acts, but they are also entitled to apply for their appeal to have suspensory effect (Paragraph 80(5) of the VwGO). German law therefore meets the minimum requirements laid down by Article 9(1) of Directive 64/221 with regard to the suspensory effect of an appeal.

120 Moreover, the wide procedural safeguards which the Federal Republic of Germany provides against expulsion far exceed the minimum safeguards provided for in Article 9 of Directive 64/221 and offer effective protection for the subjective rights which Community nationals enjoy under Community law. First, the lawfulness and expediency of an administrative act complained of, even in the case of an expulsion order, are as a rule examined straightaway during preliminary proceedings before the administrative authority prior to any proceedings to have the act set aside. That procedural safeguard is still available even where the expulsion order is accompanied by an order for immediate enforcement. Second, review by the administrative courts is always possible, even in cases where there are no preliminary proceedings. The administrative court, on its own initiative, establishes the decisive facts and fully examines the legality of the expulsion order as regards both its formal aspects and its substance.

Findings of the Court

121 The purpose of Article 9(1) of Directive 64/221 is to provide minimum procedural safeguards for persons whose expulsion from the territory has been ordered. That article, which applies in three situations, namely in the absence of any possibility of an appeal to a court of law, where such an appeal relates only to the legality of the decision, or where it has no suspensory effect, provides for the intervention of a competent authority other than that empowered to take the decision. Save in cases

of urgency, the administrative authority may take its decision only after obtaining the opinion of the other competent authority (see, in particular, *Orfanopoulos and Oliveri*, paragraph 105).

122 The Commission has not demonstrated, moreover, that an administrative practice exists in Germany that is contrary to the requirements laid down in Article 9(1) of Directive 64/221 and has the requisite level of consistency and generality, as stipulated in the Court's case-law.

123 The Commission merely listed in its application a number of cases in which it alleged that an immediate expulsion order had been made in breach of the requirements laid down in Article 9(1). It did not provide the Court with the orders in question, merely a short extract from them that was reproduced in the application. The Commission has once more clearly failed to provide the Court with the evidence necessary for it to determine the existence of the alleged failure, especially since the German Government specifically challenges the Commission's assertion that examination of the cases submitted to it does not support the conclusion that the German authorities took into account the urgency criterion that must be respected under Community law before immediate enforcement is effected.

124 Moreover, the 17 orders mentioned by the Commission were made, according to the information given in the application initiating proceedings, between August 1993 (*Clarizia*) and July 2000 (*Moffa*), that is to say, over a period of seven years. The Court cannot in any event therefore find that there is a general and consistent practice contrary to Community law, since the Commission, which may not rely on any presumption, has not been able to provide it with the evidence needed in order

to refute the German Government's assertion that no general and consistent practice exists in the sense alleged by the Commission.

125 Therefore, the Commission's complaint alleging the existence of an administrative practice incompatible with Community law must, in the light of the case-law mentioned in paragraphs 48 to 50 above, be rejected as unfounded.

126 In the light of all the above considerations, it must be held that, by failing to transpose in sufficiently clear terms in Paragraph 12(1) of the Aufenthaltsgesetz/EWG the requirements under Community law with regard to restriction of freedom of movement, the Federal Republic of Germany has failed to fulfil its obligations under Article 39 EC, Article 3 of Directive 64/221 and Article 10 of Directive 73/148.

Costs

127 Under Article 69(2) of the Rules of Procedure, an unsuccessful party is to be ordered to pay the costs if they have been applied for in the other party's pleadings. Since the Federal Republic of Germany has applied for the Commission to be ordered to pay the costs and the Commission has been essentially unsuccessful in its pleadings, it must be ordered to pay the costs. Under the first subparagraph of Article 69(4) of the Rules of Procedure, Member States which intervene in the proceedings are to bear their own costs.

On those grounds, the Court (First Chamber) hereby:

1. **Declares that, by failing to transpose 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 (Gesetz über Einreise und Aufenthalt von Staatsangehörigen der Mitgliedstaaten der Europäischen Wirtschaftsgemeinschaft) of 21 January 1980 the requirements under Community law with regard to restriction of freedom of movement, the Federal Republic of Germany has failed to fulfil its obligations under Article 39 EC, Article 3 of 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 and Article 10 of 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;**

2. **For the rest, dismisses the application;**

3. **Orders the Commission of the European Communities to pay the costs;**

4. **Orders the Italian Republic to bear its own costs.**

[Signatures]