JUDGMENT OF THE COURT (Third Chamber)

7 June 2007 *

In Case C-50/06,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 31 January 2006,

Commission of the European Communities, represented by M. Condou-Durande and R. Troosters, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of the Netherlands, represented by H.G. Sevenster and M. de Grave, acting as Agents,

defendant,

* Language of the case: Dutch.

THE COURT (Third Chamber),

composed of A. Rosas (Rapporteur), President of the Chamber, J. Klučka, J.N. Cunha Rodrigues, P. Lindh and A. Arabadjiev, Judges,

Advocate General: E. Sharpston,
Registrar: R. Grass,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 By its application, the Commission of the European Communities asks the Court to declare that, by not applying to citizens of the Union 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 (OJ, English Special Edition 1963-

1964, p. 117), but by applying to them general legislation relating to foreign nationals which makes it possible to establish a systematic and automatic connection between a criminal conviction and a measure ordering expulsion, the Kingdom of the Netherlands has failed to fulfil its obligations under that directive.

Legal context

Community law

2 Article 18(1) EC provides that every citizen of the Union has the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the EC Treaty and by the measures adopted to give it effect.

3 Article 1 of Directive 64/221 provides that the directive is to apply to any national of a Member State who resides in or travels to another Member State of the Community, either in order to pursue an activity as an employed or self-employed person, or as a recipient of services. The provisions of the directive are to apply also to the spouse and to the members of the family of such a national, to the extent to which they come within the provisions of the regulations and directives adopted in this field in pursuance of the Treaty.

4 Article 2 of Directive 64/221 provides that the directive relates to all measures concerning entry into their territory, issue or renewal of residence permits, or expulsion from their territory, taken by Member States on grounds of public policy, public security or public health.

5 Article 3(1) and (2) of the directive provide that:

'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.'

6 According to Article 8 of Directive 64/221, the person concerned is to have the same legal remedies in respect of any decision concerning entry, or refusing the issue or renewal of a residence permit, or ordering expulsion from the territory, as are available to nationals of the State concerned in respect of acts of the administration.

7 The purpose of Article 9 of the directive is to provide minimum procedural safeguards for nationals of Member States refused issue or renewal of a residence permit, or whose expulsion from the territory has been ordered.

National legislation

8 Article 1 of the Law on Foreign Nationals (Vreemdelingenwet) of 23 November 2000 (Stb. 2000, No 495) provides:

'In this law and in the provisions which are based upon it, the following definitions apply:

...

(e) Community nationals:

1. nationals of the Member States of the European Union who, under the Treaty establishing the European Community, are entitled to enter and reside on the territory of another Member State;

2. members of the families of the persons referred to in subparagraph 1 who are nationals of a third State and who, on the basis of a decision taken in application of the Treaty establishing the European Community, are entitled to enter and reside on the territory of a Member State;

...

(m) Foreign national:

any person who does not hold Netherlands nationality and who by law is not entitled to be treated as a Netherlands national.'

9 Under Article 8(e) of that law, foreign nationals are not lawfully resident in the Netherlands as Community nationals except where their residence is based on a rule adopted under the Treaty or under the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3).

10 Article 63 of the Law on Foreign Nationals provides that a foreign national who is not lawfully resident in the Netherlands and who has not voluntarily left the Netherlands within the period laid down by that law may be expelled, pursuant to Article 27(1)(b) or Article 45(1)(b) of that law.

11 In accordance with Article 67 of that law:

'1. A foreign national may be declared undesirable by our minister:

(a) if he is not lawfully resident in the Netherlands and if he has repeatedly committed acts punishable under this law;

(b) if he has been convicted by a judgment which has become final for offences in respect of which he is liable to a sentence of imprisonment of three years or more or if he is the subject of a measure of the kind provided for in Article 37a of the Wetboek van Strafrecht (Netherlands Criminal Code);

(c) if he represents a danger to the requirements of public policy or national security and if he is not lawfully resident in the Netherlands for the purposes of paragraphs (a) to (e) of Article 8 or paragraph (l) thereof;

(d) pursuant to a treaty; or

(e) in the interests of the international relations of the Netherlands.

...

3. By derogation from Article 8, a foreign national who has been declared undesirable cannot be lawfully resident [in the Netherlands].'

12 That article reproduces, in substance, the terms of Article 21 of the Law on Foreign Nationals of 1965, to which the Commission refers in its application.

13 Article 1:5, paragraph 1, of the Decree on Foreign Nationals (Vreemdelingenbesluit) of 23 November 2000 (Stb. 2000, No 497) provides as follows:

'In respect of a decision on an objection or on an administrative appeal, our minister will seek the opinion of the Advisory Board for matters concerning foreign nationals ..., if the contested decision refuses a Community national entry to the Netherlands or if it is declared that a Community national is not lawfully resident in the country for the purposes of Article 8(e) of the law or if such lawful residence is terminated on grounds relating to a threat to the requirements of public policy, public security or public health within the meaning of Directive 64/221 ...'

14 Article 8:13 of that decree states:

'1. A Community national shall not be expelled for as long as it is not clear that the person concerned does not enjoy a right of residence or that his right of residence has lapsed.

2. A foreign national who is a national of one of the contracting States to the Treaty establishing the European Community or to the Agreement on the European Economic Area, or a member of his family, and who does not enjoy a right of residence as a Community national, or whose right of residence has lapsed, shall be expelled only after a period of at least four weeks has been granted to him to leave for a country, other than the Netherlands, into which he is guaranteed entry.

3. The expulsion of the foreign national referred to in paragraph 2 may not be carried out before a decision has been taken on any objection lodged within the prescribed period to a decision for the purposes of paragraph 2.

4. It is possible to derogate from paragraphs 2 and 3 in urgent cases.'

15 Point B10/7.3.2 of the Circular on Foreign Nationals (Vreemdelingencirculaire) (Stcrt. 2000, No 64, p. 17) provides that nationals of the Union and members of their families who are lawfully resident in the Netherlands may be expelled only by the minister (Article 63(2) of the Law on Foreign Nationals). The safeguards provided by Articles 1:5 and 8:13 of the Decree on Foreign Nationals must be taken into account in that context. On the other hand, with regard to nationals and members of their families who are not or who are no longer lawfully resident in the country in accordance with Community law or with any other rule, point B10/7.3.1 of the circular provides that the general rules relating to departure and expulsion apply, that is Articles 61 to 65 of the Law on Foreign Nationals.

16 The Law on Foreign Nationals, the Decree on Foreign Nationals and the Circular on Foreign Nationals entered into force on 1 April 2001.

Pre-litigation procedure

17 A number of Union citizens who were sentenced to imprisonment in the Netherlands complained to the Commission about measures taken against them by the Netherlands authorities declaring them undesirable on public policy grounds. After examining those complaints, the Commission concluded that the general legislation of the Netherlands relating to foreign nationals, which is equally applicable to nationals of other Member States, was not, as concerns citizens of the Union, consistent with Directive 64/221, in so far as it made it possible to establish a systematic and automatic connection between a criminal conviction and a measure ordering expulsion from the territory. As a result, on 19 December 2002, the Commission sent a letter of formal notice to the Kingdom of the Netherlands, inviting it to submit its observations.

18 In its reply of 6 March 2003, the Netherlands Government disputes the Commission's complaint. Citizens of the Union who do not enjoy a right of residence under Community law provisions do not fall within the scope of Directive 64/221. They are subject on that assumption to the provisions of national law. This is the case in particular for nationals of other Member States who do not provide evidence of their nationality by means of a valid passport or identity card. The same applies to nationals of other Member States, such as the complainants, who have been reliant on public funds in the Netherlands, since that circumstance automatically entails the loss of the right of residence.

19 The Netherlands Government also submits that the national authorities are not under an obligation to expel foreign nationals who have been convicted of a criminal offence, but that they retain a discretion which allows them to balance the various interests in question. The family situation of the person concerned is taken into account before the expulsion order is made.

20 As that reply did not convince the Commission, it sent a reasoned opinion to the Kingdom of the Netherlands, on 9 July 2004, reiterating the complaint made in the letter of formal notice and inviting it to take the measures necessary to comply with the opinion within a period of two months from the date of its notification.

21 Since the Netherlands Government in its reply of 24 September 2004 to the reasoned opinion essentially maintained its previous position, the Commission decided to bring the present action.

The action

Admissibility

22 In its defence, the Kingdom of the Netherlands raises an objection of inadmissibility, based on the extension of the subject-matter of the action.

23 According to the Netherlands Government, the Commission in its letter of formal notice of 19 December 2002 and its reasoned opinion of 9 July 2004 criticises it only for applying to citizens of the Union not the provisions of Directive 64/221 but general legislation relating to foreign nationals which makes it possible to establish a systematic and automatic connection between a criminal conviction and a measure ordering expulsion. On the other hand, in its application, the Commission argues in a general way that that legislation is not consistent with Community law on the ground that it fails to distinguish between, on the one hand, foreign nationals in general and, on the other hand, nationals of other Member States, Moreover, it complains that the defendant failed to transpose Directive 64/221 correctly into national law.

24 In its reply, the Commission asserts that its action is concerned only with the systematic and automatic connection which the legislation in question makes it possible to establish between a criminal conviction and a measure ordering expulsion from the national territory in respect of citizens of the Union.

25 That assertion is borne out by the wording of the form of order sought in the application initiating proceedings by which the Commission claims that the Court should declare that, by not applying Directive 64/221 to citizens of the Union but by applying to them general legislation relating to foreign nationals which makes it possible to establish a systematic and automatic connection between a criminal conviction and a measure ordering expulsion, the Kingdom of the Netherlands has failed to fulfil its obligations under that directive.

26 In those circumstances, the Netherlands Government cannot complain that the Commission extended the subject-matter of the action as defined by the pre-litigation procedure.

27 The objection of inadmissibility must therefore be rejected.

Substance

28 As indicated in paragraph 25 of this judgment, the Commission complains that the Kingdom of the Netherlands has failed to fulfil its obligations under Directive 64/221 by applying to citizens of the Union not the provisions of that directive but general legislation relating to foreign nationals which makes it possible to establish a systematic and automatic connection between a criminal conviction and a measure ordering expulsion.

29 The Commission submits that every citizen of the Union must be able to rely on the substantive and procedural safeguards provided for by Directive 64/221, irrespective of his situation with regard to the right of residence. Under Article 3 of that directive, the expulsion of such a citizen on grounds of public policy must be based on his personal conduct and may not be justified by previous criminal convictions in themselves. According to settled case-law, Member States may expel nationals of other Member States on such grounds only where the person concerned represents a genuine and sufficiently serious threat affecting one of the fundamental interests of the society in question.

30 According to the Commission, the Kingdom of the Netherlands has failed to fulfil its obligations under Directive 64/221 even if it can be shown that the general legislation of the Netherlands relating to foreign nationals does not provide for automatic expulsions and that a balancing of the various interests at stake is carried out in that context. It cannot be ruled out that the national authorities presume that foreign nationals convicted of a criminal offence must be expelled, unless special circumstances dictate otherwise.

31 The questions to be examined are therefore, first, whether citizens of the Union may rely on the safeguards provided by Directive 64/221 independently of their status as residents and, second, the supposed systematic and automatic connection which the legislation in question makes it possible to establish between a criminal conviction and a measure ordering expulsion.

32 It should be recalled, first of all, that the status of citizen of the Union is destined to be the fundamental status of nationals of the Member States (Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraphs 30 and 31, and Case C-209/03 *Bidar* [2005] ECR I-2119, paragraph 31). Under Article 18(1) EC, every citizen of the Union has the right to move and reside freely within the territory of the Member States. A national of a Member State who does not enjoy a right of residence in the host Member State as a result of other provisions of the Treaty or of provisions

adopted to give it effect may, simply by virtue of being a citizen of the Union, enjoy a right of residence there in direct application of that article (see, to that effect, Case C-413/99 *Baumbast and R* [2002] ECR I-7091, paragraph 84, and Case C-456/02 *Trojani* [2004] ECR I-7573, paragraph 31).

33 That right is not however unconditional. Article 18(1) EC provides that it is conferred only subject to the limitations and conditions laid down in the Treaty and by the measures adopted to give it effect (see in particular *Trojani*, paragraphs 31 and 32, and Case C-406/04 *De Cuyper* [2006] ECR I-6947, paragraph 36).

34 Among the limitations and conditions laid down or authorised by Community law, Directive 64/221 permits Member States to expel nationals of other Member States from their territory on grounds of public policy or public security, subject to compliance with the substantive and procedural safeguards laid down by that directive and with the general principles of Community law (see to that effect Case C-459/99 *MRAX* [2002] ECR I-6591, paragraphs 61 and 62, and Case C-503/03 *Commission* v *Spain* [2006] ECR I-1097, paragraphs 43 and 44).

35 As is apparent from the case-law, the safeguards provided by Directive 64/221 call for a broad interpretation as regards the persons to whom they apply (see to that effect *MRAX*, paragraph 101). Member States must take all steps to ensure that the safeguard of the provisions of the directive is available to any national of another Member State who is subject to a decision ordering expulsion (see to that effect Case C-136/03 *Dörr and Ünal* [2005] ECR I-4759, paragraph 49). To exclude from the benefit of those substantive and procedural safeguards citizens of the Union who are not lawfully resident on the territory of the host Member State would deprive those safeguards of their essential effectiveness.

36 That interpretation is borne out by the judgment in *MRAX*, in which the Court held that a national of a non-member State who is a member of the family of a Community national, but who does not fulfil the conditions necessary for lawful residence, must be able to rely on the procedural safeguards provided for by Directive 64/221.

37 It must therefore be held that an interpretation to the effect that the provisions of Directive 64/221 apply only to citizens of the Union who are lawfully resident on the territory of the host Member State is not consistent with Community law.

38 As regards next the question of the systematic and automatic connection which the general Netherlands legislation relating to foreign nationals makes it possible to establish, in respect of citizens of the Union, between, on the one hand, a criminal conviction and, on the other hand, a measure ordering expulsion from the territory, it should be pointed out that under Article 67 of the Law on Foreign Nationals, read in conjunction with Article 1(m) of that law, a foreign national, that is anyone who does not have Netherlands nationality, may be declared undesirable by the competent Netherlands authorities if inter alia he has been convicted by a judgment which has become final for offences in respect of which he is liable to a sentence of imprisonment of three years or more.

39 While it is true that, under the legislation in question, as interpreted by the Circular on Foreign Nationals, the safeguards provided for in Articles 1:5 and 8:13 of the Decree on Foreign Nationals must be taken into account in the case of nationals of the Union and members of their families, the fact remains that that rule applies only to persons who are lawfully resident in the Netherlands.

40 Since Directive 64/221 applies also to citizens of the Union who are not lawfully resident in the territory of the host Member State, such persons may be expelled on grounds of public policy or public security only within the strict limitations laid down by the directive.

41 Under Article 3(1) of Directive 64/221, measures taken on grounds of public policy or of public security are to be based exclusively on the conduct of the person concerned. Article 3(2) specifies that previous criminal convictions are not in themselves to constitute grounds for the taking of such measures. A previous criminal conviction can therefore be taken into account only in so far as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy (see inter alia Case 30/77 *Bouchereau* [1977] ECR 1999, paragraph 28; Case C-348/96 *Calfa* [1999] ECR I-11, paragraph 24; *Commission* v *Spain*, paragraph 44, and Case C-441/02 *Commission* v *Germany* [2006] ECR I-3449, paragraph 33).

42 The Court has always emphasised that the public policy exception constitutes a derogation from the fundamental principle of freedom of movement for persons, which must be interpreted strictly and the scope of which 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; *Commission* v *Spain*, paragraph 45, and Case C-441/02 *Commission* v *Germany*, paragraph 34).

43 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; *Commission* v *Spain*, paragraph 46, and *Commission* v *Germany*, paragraph 35).

44 According to the Court, Community law also precludes provisions of national law based on a presumption that nationals of other Member States who have received a particular sentence for specific offences must be expelled (see *Orfanopoulos and Oliveri*, paragraph 93).

45 Although it is not possible to ascertain in this case whether there is under the general Netherlands legislation relating to foreign nationals an absolutely automatic connection between, on the one hand, a criminal conviction and, on the other hand, a measure ordering expulsion from the territory, the fact remains that that legislation makes it possible to expel from the territory of the Kingdom of the Netherlands citizens of the Union who have been convicted of an offence, without regard to the substantive and procedural safeguards provided by Directive 64/221. It cannot be ruled out that a decision to expel such a person would be taken, in spite of family considerations being taken into account, without regard either to their personal conduct or to whether there exists a genuine and sufficiently serious threat to the requirements of public policy.

46 It must therefore be held that the general Netherlands legislation relating to foreign nationals makes it possible to establish a systematic and automatic connection between a criminal conviction and a measure ordering expulsion in respect of citizens of the Union.

47 Finally, the Netherlands Government indicates in its defence that it has reconsidered its position in the light of the later case-law of the Court. It accepts that every citizen of the Union falls within the scope of Directive 64/221 and must be able to enjoy the substantive and procedural safeguards it lays down. According to that Government, national legislation should be made consistent with Community law in the course of the transposition into national law of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and Corrigendum OJ 2004 L 229, p. 35).

48 Suffice it in that regard to point out that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation

prevailing in the Member State at the end of the period laid down in the reasoned opinion and that the Court cannot take account of any subsequent changes (see, inter alia, Case C-200/88 *Commission* v *Greece* [1990] ECR I-4299, paragraph 13; judgment of 14 April 2005 in Case C-22/04 *Commission* v *Greece*, not published in the ECR, paragraph 19, and Case C-433/03 *Commission* v *Germany* [2005] ECR I-6985, paragraph 32).

49 In this case, it is common ground that the Kingdom of the Netherlands had not adopted the measures necessary to end the alleged failure to fulfil its obligations by the expiry of the period laid down in the reasoned opinion.

50 Having regard to the foregoing considerations, the action brought by the Commission is well founded.

51 It must therefore be declared that, by not applying Directive 64/221 to citizens of the Union, but by applying to them general legislation relating to foreign nationals which makes it possible to establish a systematic and automatic connection between a criminal conviction and a measure ordering expulsion, the Kingdom of the Netherlands has failed to fulfil its obligations under that directive.

Costs

52 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Netherlands has been unsuccessful, the latter must be ordered to pay the costs.

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

1. **Declares that, by not applying to citizens of the Union 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, but by applying to them general legislation relating to foreign nationals which makes it possible to establish a systematic and automatic connection between a criminal conviction and a measure ordering expulsion, the Kingdom of the Netherlands has failed to fulfil its obligations under that directive;**

2. **Orders the Kingdom of the Netherlands to pay the costs.**

[Signatures]