Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 6 March 2012 [1]

Case C-348/09

P.I.
v
Oberbürgermeisterin der Stadt Remscheid

(Reference for a preliminary ruling from the Oberverwaltungsgericht für das Land Nordrhein-Westfalen (Germany))

(Directive 2004/38/EC — Right of citizens of the Union and their family members to move and reside freely within the territory of the Member States — Protection against expulsion — Concepts of 'public policy' and 'public security' — Concept of 'imperative grounds of public security' — Criminal conviction for sexual abuse of a 14 year old minor, sexual coercion and rape)

1. By this reference for a preliminary ruling, the Oberverwaltungsgericht für das Land Nordrhein-Westfalen (Germany) asks the Court to specify, in the light of the judgment in *Tsakouridis*, [2] the conditions for granting protection against expulsion under Article 28(3)(a) of Directive 2004/38/EC. [3]

2. That provision states that an expulsion decision may be taken against a Union citizen who has resided on the territory of the host Member State for the previous 10 years only on imperative grounds of public security.

3. The Court is asked to rule whether that provision is to be interpreted as meaning that sexual abuse of a 14 year old minor, sexual coercion and rape are covered by the concept of imperative grounds of public security. More particularly, since the Court acknowledged in the judgment in *Tsakouridis*, that the fight against trafficking in narcotics as part of an organised group is capable of being covered by that concept, the question here is whether an act carried out alone, such as that committed by Mr I. in the main proceedings, namely sexual abuse of a 14 year old minor, sexual coercion and rape, is also capable of being covered by that concept.

4. In this opinion, I shall explain the reasons why I consider that Article 28(3)(a) of Directive 2004/38 is to be interpreted as meaning that sexual abuse of a 14 year old minor, sexual coercion and rape are not covered by the concept of imperative grounds of public security where those acts do not directly threaten the calm and physical security of the population as a whole or a large part of it.

5. I shall then state why, in my view, Article 28(2) and (3) is to be interpreted as meaning that a Union citizen cannot rely on the right to enhanced protection against expulsion under that provision where it is shown that that citizen derives that right from offending conduct constituting a serious disturbance of the public policy of the host Member State.

1 — Original language: French.

2 — Case C-145/09 *Tsakouridis* [2010] ECR I-11979.

3 — 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, corrigenda in OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34).

I – Legal framework

A – *Directive 2004/38*

6. Before the entry into force of Directive 2004/38, there were several directives and regulations concerning the free movement of persons and the right of residence of European nationals. This directive consolidated and simplified the relevant Union legislation.

7. It removes the obligation of Union citizens to obtain a residence permit, introduces a right of permanent residence for those citizens and limits the possibility for Member States to restrict residence within their territory of the nationals of other Member States.

8. In particular, on the basis of the criteria laid down by the case-law of the Court of Justice, Directive 2004/38 gives Union citizens protection against expulsion.

9. Accordingly, under Article 27(1) of the directive, Member States may restrict the right of movement and residence of Union citizens on grounds of public policy, public security or public health, excluding grounds invoked to serve economic ends.

10. Article 27(2) of the directive provides that measures taken on grounds of public policy or public security are to comply with the principle of proportionality [4] and must be based exclusively on the personal conduct of the individual concerned by the expulsion decision. [5] Previous criminal convictions shall not in themselves constitute grounds for taking such measures. Moreover, the personal conduct of the individual subject to an expulsion decision must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. [6]

11. Article 28(3)(a) of Directive 2004/38, concerning protection against expulsion, is worded as follows:

‘An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:

(a) have resided in the host Member State for the previous 10 years;’

B – *The German legislation*

12. The Law on the Freedom of Movement of Union Citizens (Gesetz über die allgemeine Freizügigkeit von Unionsbürgern), of 30 July 2004, [7] transposes the provisions of Directive 2004/38 into the German legal order. In particular, Paragraph 6(1) of the FreizügG/EU provides that the loss, by a Union citizen, of the right to enter and reside in Germany may be determined only on grounds of public policy, public security or public health. According to Paragraph 6(2) of the FreizügG/EU, criminal convictions which have not yet been erased from the central register may be taken into account in order to justify the expulsion decision, provided that the circumstances underlying those convictions reveal personal conduct which represents a present threat to public policy, on the basis that this must be a genuine and sufficiently serious threat affecting one of the fundamental interests of society.

13. Paragraph 6(3) of the FreizügG/EU states that, for the purposes of an expulsion decision, it is necessary to take account of considerations such as how long the individual concerned has resided on German territory, his/her age, state of health, family and economic situation, social and cultural integration in Germany and the extent of his or her links with their country of origin.

4 — Joined Cases 115/81 and 116/81 *Adoui and Cornuaille* [1982] ECR 1665.

5 — Case 67/74 *Bonsignore* [1975] ECR 297.

6 — Case 30/77 *Bouchereau* [1977] ECR 1999.

7 — BGBl. 2004 I, p. 1950; law as amended by the Law amending the Federal Police Law and other laws (Gesetz zur Änderung des Bundespolizeigesetzes und anderer Gesetze) of 26 February 2008 (BGBl. 2008 I, p. 215, ‘the FreizügG/EU’).

14. Under Paragraph 6(4) of the FreizügG/EU, loss of the right to enter and reside in Germany may be determined, after a right to permanent residence has been acquired, only on serious grounds.

15. According to Paragraph 6(5) of the FreizügG/EU, so far as concerns Union citizens and also members of their family who have resided in Germany for the last 10 years, the determination under Paragraph 6(1) of the FreizügG/EU may be made only on imperative grounds of public security. That rule does not apply to minors where loss of the right of residence is necessary in the minor's interest. Imperative grounds of public security can exist only if the person concerned has been sentenced by a binding judgment to imprisonment or youth custody of at least five years for one or more intentional criminal offences or a preventive detention order was made at the time of the last binding conviction, if the security of the Federal Republic of Germany is affected, or if the person concerned gives rise to a terrorist risk.

II – The main proceedings and the question referred for a preliminary ruling

16. Mr I., an Italian national, was born on 3 September 1965 in Licata, Italy. He has lived in Germany since 1987. In April 1987 he was granted a residence permit, which has been extended periodically. He is single and has no children. He has never gained a school-leaving certificate or professional qualifications and has been employed in Germany only occasionally in simple, unskilled jobs. Prior to his imprisonment, he worked most recently helping out his former partner, who was a cleaner. Mr I. has five siblings, some of whom live in Germany and some of whom live in Italy. Since his arrest his mother has lived partly in Germany and partly in Italy.

17. On 16 May 2006, the Landgericht Köln sentenced Mr I. to a term of imprisonment of a total of seven years and six months for sexual abuse of a 14 year old minor, sexual coercion and rape. That judgment has been definitive since 28 October 2006. The acts took place between 1990 and 2001. The victim, the daughter of Mr I.'s former partner, was eight years' old when they started. The national court states that Mr I. compelled her to perform regular sexual intercourse or other sex acts on an almost weekly basis, by threatening inter alia to kill her mother or brother.

18. Mr I. has been in custody since 10 January 2006 and is due to complete his sentence on 9 July 2013.

19. By decision of 6 May 2008, the Oberbürgermeisterin der Stadt Remscheid declared forfeit Mr I.'s right to enter and reside pursuant to Paragraph 6(1) of the FreizügG/EU, on the ground that, as a consequence of his conviction, the applicant satisfied the requirements laid down in Paragraph 6(5) of the FreizügG/EU and that, moreover, he had acted with considerable energy and caused his victim endless suffering through abuse lasting many years. Furthermore, the Oberbürgermeisterin der Stadt Remscheid considers that the possibility that he would re-offend could not be ruled out, since he had regularly raped and sexually coerced his victim over a long period, and showed a continuing lack of remorse. According to a communication from the prison authorities, the Mr I. considered that he was the real victim and he was still unwilling to accept the enormity of the wrong he had committed. The Oberbürgermeisterin der Stadt Remscheid ordered that the decision of 6 May 2008 be immediately enforceable, and ordered Mr I. to leave the territory, failing which he would be deported to Italy.

20. On 12 June 2008, Mr I. brought an action against that decision, on the ground that there were no imperative grounds of public security for a declaration of forfeiture of his right to enter and reside.

21. By judgment of 14 July 2008, the Verwaltungsgericht dismissed that action, considering that there were imperative grounds of public security and that Mr I.'s conviction revealed personal conduct which gave rise to fears of a present, genuine and sufficiently serious threat to one of the fundamental interests of society, namely to protect girls and women from sexual assault and rape.

22. Mr I. lodged an appeal against that judgment before the Oberverwaltungsgericht für das Land Nordrhein-Westfalen, which decided to stay proceedings and refer the following question to the Court of Justice for a preliminary ruling:

'Does the term "imperative grounds of public security" contained in Article 28(3) of Directive 2004/38/EC cover only threats posed to the internal and external security of the State in terms of the continued existence of the State with its institutions and important public services, the survival of the population, foreign relations and the peaceful co-existence of nations?'

III – Analysis

23. By its question, the national court is asking, in essence, whether acts of sexual abuse of a 14 year old minor, sexual coercion and rape committed within the family constitute imperative grounds of public security which may justify the expulsion of a Union citizen who has lived for more than 10 years on the territory of the host Member State.

24. In the following analysis, I shall set out, first, the reasons why I think that an offence such as that committed by Mr I. is not covered by the concept of 'imperative grounds of public security' within the meaning of Article 28(3) of Directive 2004/38. Secondly, I shall explain why, in my view, Mr I. nevertheless cannot rely on the enhanced protection conferred by that provision and by Article 28(2) of that same directive.

A – *The concept of imperative grounds of public security*

25. In its judgment in *Tsakouridis*, the Court held that Article 28(3) of Directive 2004/38 is to be interpreted as meaning that the fight against crime in connection with dealing in narcotics as part of an organised group is capable of being covered by the concept of 'imperative grounds of public security' which may justify a measure expelling a Union citizen who has resided in the host Member State for the preceding 10 years.

26. It stated, first of all, that dealing in narcotics as part of an organised group was a diffuse form of crime with impressive economic and operational resources and frequently with transnational connections.[8] As regards the devastating effects of crime linked to such dealing, the first recital in the preamble to Framework Decision 2004/757/JHA[9] states that illicit drug trafficking poses a threat to health, safety and the quality of life of citizens of the European Union, and to the legal economy, stability and security of the Member States.[10] The Court then explained, after stating that drug addiction represents a serious evil for the individual and is fraught with social and economic danger to mankind, that such trafficking could reach a level of intensity that might directly threaten the calm and physical security of the population as a whole or a large part of it.[11]

27. The question now is whether a crime such as that committed by Mr I., namely sexual abuse of a 14 year old minor, sexual coercion and rape within the family, may also fall within the scope of the concept of imperative grounds of public security, even though it is an act carried out alone, independently of any participation, by its perpetrator, in any network.

28. Although it is indisputable that sexual abuse of a 14 year old minor, sexual coercion and rape constitute a particularly serious threat to one of the fundamental interests of society, I do not think that this type of act is covered by the concept of 'public security' within the meaning of Article 28(3) of Directive 2004/38.

8 — See paragraph 46.

9 — Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, OJ L 335, p. 8.

10 — *Tsakouridis*, paragraph 46.

11 — Ibid., paragraph 47.

29. In that regard, I think it is relevant to draw attention to the philosophy of Directive 2004/38, it being a matter here of comparing its concepts with the reality and specific nature of the criminal law.

30. The purpose of this directive is to facilitate the fundamental right of every citizen of the Union to move and reside freely within the territory of the Member States. That fundamental right derives from citizenship of the Union and is exercised subject to the limitations and restrictions laid down by that directive. [12]

31. Since the length of residence gives rise to the presumption that the Union citizen is integrated within the host Member State, Directive 2004/38 provides that a right of permanent residence shall be acquired after a continuous period of five years. [13]

32. That right of permanent residence confers on its beneficiary protection against measures of expulsion, which can be taken against him only on serious grounds of public policy or public security. [14]

33. A cumulative duration of residence of at least 10 years confers on the Union citizen concerned enhanced protection in respect of those measures which therefore can be taken only for imperative reasons of public security. [15] The difference between 'serious grounds' and 'imperative grounds' already seems to indicate the intention of the Union legislature. [16]

34. Furthermore, a comparison of paragraphs 2 and 3 of Article 28 of Directive 2004/38 clearly shows that its wording establishes a clear difference between the concept of public policy and that of public security, the second having a higher degree of seriousness than the first, preventing the enhanced protection enjoyed by the Union citizen.

35. Applied to criminal matters, these two concepts correspond to different criminological realities.

36. By its criminal law, each Member State sets the framework of its public policy, since it defines the conduct which it prohibits under pain of sanctions. It is clear, in that regard, that the rules of criminal law are all public policy rules in the sense that, as they are essentially imperative rules, an individual's will cannot preclude them. They are specifically made to oppose an individual's will in so far as it would have consequences considered harmful for the values of society.

37. An infringement of those rules therefore causes a disturbance to the public policy established by the Member State, a lesser or greater disturbance depending on the nature of the act committed, the disturbance caused to public policy normally being reflected in the degree of severity of the penalty laid down by the national legislature to sanction the prohibited conduct. In each case, this assessment finds its expression and, depending on the circumstances, its weighting, in the penalty actually inflicted, reflecting, in the light of the circumstances of each case, the level of disturbance actually caused.

38. The reference to the concept of public security clearly seems to derive not automatically merely from the fact of having committed an offence, but from criminal conduct which is particularly serious in principle and also in its effects, which go beyond the individual harm caused to the victim or victims. The two concepts are therefore not the same and although any conduct which creates a threat to public security by definition disturbs public policy, the opposite is not true, even if, once known, the act committed may give rise in public opinion to an emotion which reflects the disturbance caused by the offence.

39. It is important, at this stage, to state that the question of whether an offender, by his conduct, constitutes a threat to public security therefore depends not only on the gravity of the offence committed, which is indicated by the penalty incurred or imposed, but above all on its nature.

12 — Joined Cases C-424/10 and C-425/10 *Ziolkowski and Szeja* [2011] ECR I-14035, paragraph 35 and the case-law cited.

13 — See Article 16(1) of the directive.

14 — See Article 28(2) of the directive.

15 — See Article 28(3)(a) of Directive 2004/38.

16 — *Tsakouridis*, paragraph 40.

40. At this stage of a general analysis, taking into account the risk of reoffending is not in itself important. What offence does not involve the risk of reoffending? There is no such thing as an offence without risk of reoffending. Also, in the light of the threat to public security, it is rather the very nature of that threat which must be taken into account. If the nature of the conduct creates a threat so that there are imperative reasons for warding it off in order to avert it, the conditions of Article 28(3) of Directive 2004/38 will be satisfied. The likelihood of reoffending may indeed be taken into account by the court or competent authority, but in order to assess, in addition to, or weighed against, the other conditions or criteria laid down by that directive and the case-law of the Court, whether it is actually necessary to order expulsion. [17]

41. Which, then are the offences capable of constituting such threats to public security? The Court gave a definition of them in the judgment in *Tsakouridis*.

42. As we have seen in point 26 of this opinion, the Court considered that dealing in narcotics as part of an organised group was a diffuse form of crime and could reach a level of intensity that might directly threaten the calm and physical security of the population as a whole or a large part of it.

43. Are the acts committed by Mr I. covered by the definition thus given by the Court? However much we may wish to reply in the affirmative, such is the spontaneous disapproval and repulsion aroused from a moral point of view by the acts committed, the legal analysis seems to me to call for a negative response.

44. Indeed, I think it cannot be disputed that, particularly from a criminological point of view, that kind of conduct, which is set in an exclusively family context, cannot be treated in the same way as that of 'sexual predators'. [18] Although Mr I. is undoubtedly a threat in the family sphere, it has not been established, by the nature of the act committed, that he is a threat to the security of the citizens of the Union, an expression taken from paragraph 46 of the judgment in *Tsakouridis*. However repellent it may be, the act of incest does not seem to me to involve, as regards public security, the same kind of threat as that defined by the Court in that judgment.

45. To decide otherwise would amount to acknowledging that only the objective seriousness of a criminal offence, determined by the penalties incurred or imposed for it, may constitute justification of an expulsion measure on imperative grounds of public security.

46. However, it must be said that this approach does not seem to me to accord with the philosophy of Directive 2004/38. Moreover, the creation of a common space for living and moving also requires account to be taken, in the overall interest of that communal space, that is to say the social cohesion of the Union, of the phenomenon of delinquency, even if it means developing common means of preventing and combating it. I think that is the task and ambition of the space of freedom, security and justice. That space cannot be constructed on the basis of returning any severely punished offender to the Member State of origin, solely on grounds of the penalty imposed. Moreover, this point of view seems to me to be the one expressed by that directive through the precautions which it requires the Member States to take before carrying out an expulsion. [19]

47. It might be considered that Mr I.'s presence in the host Member State might create conditions for the recurrence of the initial acts against the victim and that, therefore, it is necessary to expel him in order to protect the victim. Such a possibility, which cannot be automatically excluded, could only be covered by legislation specific to the space of freedom, security and justice within the framework of post-sentence control measures, the legal basis of which is, moreover, found in Directive 2004/38. Since this matter has not been the subject of an exchange of arguments, I shall not discuss it here because otherwise I think it would be necessary to re-open the hearing.

17 — Ibid., paragraphs 49 to 53.

18 — A particularly dangerous category of criminals categorised by conduct such as that revealed in the *Dutroux* and *Fourniret* cases.

19 — See, inter alia, Article 27(2) of that directive.

48. In contrast, the question of whether the benefit of enhanced protection under Article 28 of Directive 2004/38 is applicable to Mr I. has the subject of an exchange of arguments and must be examined.

B – *The benefit of enhanced protection under Article 2(2) and (3) of Directive 2004/38*

49. Like the Netherlands Government,[20] I think that Article 28(3) of Directive 2004/38 does not apply to the case of Mr I., since his conduct and the way in which the acts were committed show that the true position is that he was not actually integrated and cannot, therefore, benefit from the enhanced protection provided for in that provision.

50. In that regard, I consider that the parallel drawn by the Netherlands Government with the *Kol* case[21] is relevant, since, in that very different case, the Court admitted that fraudulent conduct could deprive its perpetrator of the benefit of a residence permit.

51. The Court states, in the judgment in *Kol*, that employment under a residence permit issued as a result of fraudulent conduct which has led to a conviction cannot give rise to any rights in favour of the Turkish worker, or arouse any legitimate expectation on his part.[22]

52. I believe that this case-law may be applied to the present case.

53. It is apparent from recital 23 in the preamble to Directive 2004/38 that the expulsion of Union citizens and their family members on grounds of public policy or public security can seriously harm persons who, having availed themselves of the rights and freedoms conferred on them by the EC Treaty, have become *genuinely integrated*[23] into the host Member State.[24]

54. That is why that directive, as follows from its recital 24, establishes a system of protection against expulsion measures which is based on the degree of integration of those persons in the host Member State, so that the greater the degree of integration of Union citizens and their family members in the host Member State, the greater the degree of protection against expulsion should be.[25]

55. As we have seen, Article 28(3) of Directive 2004/38 constitutes the highest level of protection against expulsion, the most important, because it benefits the Union citizen who has resided on the territory of the host Member State during the 10 years preceding the expulsion measure.

56. That provision contains, in my view, a simple presumption of integration, which is rebutted here by the facts themselves.

57. The Union legislature worked on the assumption that the length of residence shows a degree of integration into the host Member State.[26] After a period of 10 years spent on the territory of that State, the links between the Union citizen who has exercised his freedom of movement and that State are presumed to be close, to the point that they give that citizen the feeling that he is an integral part of the society of that State, and that, let us remember, is in order to promote social cohesion, which is one of the fundamental objectives of the Union.[27]

20 — See point 37 et seq. of the observations.

21 — Case C-285/95 *Kol* [1997] ECR I-3069.

22 — Paragraph 28.

23 — Emphasis added.

24 — *Tsakouridis*, paragraph 24.

25 — Ibid., paragraph 25.

26 — See the Proposal for a European Parliament and Council directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (COM(2001) 257 final).

27 — See recital 17 in the preamble to Directive 2004/38.

58. I think it is indisputable, in the present case, that if the acts, having regard to their date, had been known about since they began, Mr I. would have been prosecuted, convicted and, possibly, expelled, without, of course, being able to invoke the benefit of Article 28(3) of Directive 2004/38.

59. With effect from his third year of residence on the territory of the host Member State — and therefore before the five years of legal residence which govern the right to permanent residence — Mr I. began to abuse his partner's minor child, and continued until 2001, that is, within the 10-year period which preceded the expulsion measure taken against him. [28]

60. Although the integration of a Union citizen is, in fact, based on territorial and time factors, it is also based on qualitative elements. [29] Now, it seems clear to me that Mr I.'s conduct, which constitutes a serious disturbance of public policy, shows a total lack of desire to integrate into the society in which he finds himself and some of whose fundamental values he so conscientiously disregarded for years. Today he relies on the consequences of having completed a period of 10 years which was not interrupted because his conduct remained hidden owing to the physical and moral violence horribly exercised on the victim for years.

61. An offence of that nature, just because it has lasted a long time, cannot create a right. Furthermore, Directive 2004/38 itself provides, in Article 35, that the Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by the directive in the case of abuse of rights or fraud. In this case, it should be for the Court to draw the appropriate conclusions from such fraud.

62. To acknowledge that Mr I. may derive from his criminal conduct the right to the enhanced protection provided for in Article 28(2) and (3) of that directive would, in my view, conflict with the values on which citizenship of the Union is based.

63. None the less, Mr I. must clearly have the benefit of the safeguards of his rights according to the provisions of Article 28(1) of that directive and according to the principles of the Court's case-law concerning the safeguarding of the fundamental rights, principles reiterated in the judgment in *Tsakouridis*, particularly in paragraph 52.

64. In the light of all the foregoing considerations, I think that Article 28(2) and (3) of Directive 2004/38 is to be interpreted as meaning that a Union citizen cannot rely on the right to enhanced protection under that provision where it is shown that that citizen is deriving that right from criminal conduct constituting a serious disturbance of the public policy of the host Member State.

IV – Conclusion

65. In the light of all the foregoing, I propose that the Court reply as follows to the Oberverwaltungsgericht für das Land Nordrhein-Westfalen:

Article 28(3) 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, is to be interpreted as meaning that sexual abuse of a 14 year old minor, sexual coercion and rape are not covered by the concept of 'imperative grounds of public security' where those acts do not directly threaten the calm and physical security of the population as a whole or a large part of it.

28 — See paragraphs 31 and 32 of the order for reference.

29 — See Case C-325/09 *Dias* [2011] ECR I-6387, paragraph 64.

Article 28(2) and (3) is to be interpreted as meaning that a Union citizen cannot rely on the right to enhanced protection against expulsion under that provision where it is shown that that citizen is deriving that right from criminal conduct constituting a serious disturbance of the public policy of the host Member State.