JUDGMENT OF THE COURT (Fifth Chamber)
29 April 2004 *

In Joined Cases C-482/01 and C-493/01,

REFERENCE to the Court under Article 234 EC by the Verwaltungsgericht Stuttgart (Germany) for a preliminary ruling in the proceedings pending before that court between

Georgios Orfanopoulos,

Natascha Orfanopoulos,

Melina Orfanopoulos,

Sofia Orfanopoulos

and

Land Baden-Württemberg (C-482/01),

* Language of the case: German.

and between

Raffaele Oliveri

and

Land Baden-Württemberg (C-493/01),

on the interpretation of Article 39(3) EC and Article 9(1) 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) (C-482/01), and of Article 39 EC and Article 3 of the same directive (C-493/01),

THE COURT (Fifth Chamber),

composed of: A. Rosas (Rapporteur), acting for the President of the Fifth Chamber, A. La Pergola and S. von Bahr, Judges,

Advocate General: C. Stix-Hackl,
Registrar: M.-F. Contet, Principal Administrator,

after considering the written observations submitted on behalf of:

— Mr Orfanopoulos and Others, by R. Gutmann, Rechtsanwalt,

— Land Baden-Württemberg, by K.-H. Neher, Leitender Regierungsdirektor,

— the German Government, by W.-D. Plessing and B. Muttelsee-Schön, acting as Agents,

— the Italian Government, by I.M. Braguglia, acting as Agent, and M. Fiorilli, avvocato dello Stato,

— the Commission of the European Communities, by C. O'Reilly, D. Martin and W. Bogensberger, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Orfanopoulos and Others, and Mr Oliveri, represented by R. Gutmann, and of the Commission, represented by W. Bogensberger, at the hearing on 12 June 2003,

after hearing the Opinion of the Advocate General at the sitting on 11 September 2003,

gives the following

Judgment

1 By orders of 20 November and 4 December 2001, received at the Court on 13 December 2001 (Case C-482/01) and 19 December 2001 (Case C-493/01) respectively, the Verwaltungsgericht (Administrative Court) Stuttgart referred to the Court for a preliminary ruling under Article 234 EC two questions in each case on the interpretation of Article 39(3) EC and Article 9(1) 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) (C-482/01), and of Article 39 EC and Article 3 of the same directive (C-493/01).

2 Those questions were raised in the course of two actions, one between Mr Orfanopoulos, a Greek national, and his children and Land Baden-Württemberg (Case C-482/01) and the other between Mr Oliveri, an Italian national, and that same authority (Case C-493/01), regarding the decisions of expulsion from German territory taken by the Regierungspräsidium (regional administration) Stuttgart (hereinafter 'the Regierungspräsidium').

3 By order of 30 April 2003, the President of the Fifth Chamber of the Court ordered, pursuant to Article 43 of the Rules of Procedure, the joinder of the two cases for the purposes of the oral procedure and the judgment.

Legal framework

Community legislation

4 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.

5 Under Article 39 EC:

'1. Freedom of movement for workers shall be secured within the Community.

...

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

...

(b) to move freely within the territory of Member States for this purpose;

(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.

...'

6 Article 46(1) EC relating to freedom of establishment and applying in the field of freedom to provide services under Article 55 EC states that '[t]he provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health'.

7 Directive 64/221 applies, as provided in Article 1 thereof, 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 that directive apply also to the spouse and to members of the family of such a national in so far as they come within the provisions of the regulations and directives adopted in this field in pursuance of the Treaty.

8 According to Article 2 thereof, Directive 64/221 relates to all measures concerning, particularly, 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.

9 Article 3 of Directive 64/221 provides:

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

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

...'

10 Under Article 8 of that directive:

'The person concerned shall 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.'

11 Under Article 9 of Directive 64/221:

'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.'

12 Under the first subparagraph of Article 1(1) of Council Directive 90/364/EEC of 28 June 1990 on the right of residence (OJ 1990 L 180, p. 26), Member States are to 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 Article 1(2) of that directive, 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 of the host Member State during their period of residence.

13 The third subparagraph of Article 2(2) of that directive provides that Member States may not derogate from the provisions thereof save on grounds of public policy, public security or public health. In that event, Directive 64/221 is to apply.

International legislation

14 The European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (hereinafter 'the ECHR'), provides, in Article 8, for a right to respect for private and family life.

National legislation

15 Paragraph 47(1)(2) of the Ausländergesetz (German Law on aliens, BGBl. 1990 I, p. 1354), in the version of 16 February 2001 (BGBl. 2001 I, p. 266), provides that an alien is to be expelled if he has been finally sentenced, under the

Betäubungsmittelgesetz (Law on narcotics) or for a breach of the public peace, to a term of youth custody of at least two years or to a term of imprisonment, and the sentence has not been suspended.

16 Paragraph 47(2)(1) of the Ausländergesetz lists the cases in which an alien must, as a rule, be the subject of an expulsion order.

17 Paragraph 47(3) of the Ausländergesetz provides that, as a rule, an alien entitled to special protection against expulsion under Paragraph 48(1) of that law is to be the subject of an expulsion order in the cases set out in Paragraph 47(1) of that law.

18 Paragraph 48(1)(4) of the Ausländergesetz provides for special protection from expulsion for aliens who live in a family relationship with a German national. The first sentence of that subparagraph states that such aliens may be expelled from the territory only on serious grounds of public security and public policy. Under the second sentence of that subparagraph, such grounds exist in the cases set out in Paragraph 47(1) of that law.

19 According to the German Government's observations, the Aufenthaltsgesetz/EWG (Law on the residence of nationals of the Member States of the European Community, BGBl. 1980 I, p. 116), in the version of 27 December 2000 (BGBl. 2000 I, p. 2042), applies, as a special law, to Community nationals and to their family members. Consequently, the Ausländergesetz applies to aliens who are entitled to freedom of movement under Community law only to the extent that Community law and the Aufenthaltsgesetz/EWG do not contain derogations.

20 Paragraph 12(1) and (3) of the Aufenthaltsgesetz/EWG provides:

'(1) In so far as this Law grants freedom of movement and does not already provide for restrictive measures in the above provisions, refusal of leave to enter and refusal to issue or extend an EC residence permit, restrictive measures referred to in Paragraph 3(5), the 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). Aliens 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 an alien gives cause for doing so on account of his personal conduct. This shall not apply to decisions or measures adopted to protect public health.'

21 Under the first sentence of Paragraph 7(1) of the Ausländer- und Asylverfahrenzuständigkeitsverordnung (Regulation on jurisdiction over proceedings relating to aliens and asylum), Regierungspräsidien have jurisdiction over the expulsion of foreign offenders where they have been held in prison by order of a court or on remand for over a week.

The main proceedings and the questions referred for a preliminary ruling

Case C-482/01

22 Mr Orfanopoulos, a Greek national born in 1959, lived in Greece until he was 13. In 1972, he entered Germany to join his parents. He has remained there ever since, except for a period of two years during which he performed his military service in Greece. In August 1981, he married a German national. Three children, who are the other plaintiffs in the main action, were born of that marriage.

23 During his periods of residence in Germany, Mr Orfanopoulos was in possession of fixed-period residence permits, the most recent of which was valid until 12 October 1999. In November 1999, he applied for an extension of his residence permit.

24 Mr Orfanopoulos has no professional training qualifications. Since 1981, he has pursued various activities as an employed person. The periods of employment in question have been interrupted by periods of prolonged unemployment.

25 It is clear from the order for reference that Mr Orfanopoulos is a drug addict. He has been convicted on nine occasions of offences against narcotics legislation and for committing acts of violence. In 1999, he was imprisoned for six months. In January 2000, he was hospitalised for detoxification and has also undergone, on two occasions, an attempt at cure in a specialised establishment. In both cases, he was discharged from the establishment in question for disciplinary reasons. He has been serving, since September 2000, a sentence of imprisonment imposed by the judgments against him.

26 Between 1992 and 1998, Mr Orfanopoulos received several warnings as to the possible consequences of his conduct under the law relating to aliens. In February 2001, the Regierungspräsidium ordered his expulsion and rejected his application for extension of his residence permit. It informed him that he would be deported on his release from prison.

27 The expulsion decision was based on the number and seriousness of the offences committed by Mr Orfanopoulos and by the real risk of him offending in future, by reason of his dependency on drugs and alcohol. According to the Regierungspräsidium, the statutory conditions for mandatory expulsion under Paragraph 47 (1)(2) of the Ausländergesetz were satisfied. Although Mr Orfanopoulos was entitled, according to that authority, to special protection from expulsion provided for by Paragraph 48(1)(4) of the Ausländergesetz, the second sentence of that subparagraph provides that, in general, in the cases to which Paragraph 47(1) (2) of that law applies, there are serious grounds of public security and public policy. The result of Paragraph 47(3) of the Ausländergesetz is, however, to reduce the mandatory expulsion and transform it into expulsion as a general rule.

28 The Regierungspräsidium considered that, taking into account the personal circumstances of Mr Orfanopoulos, it was not appropriate to apply the derogating provisions and that, even if it should be held that the conditions for derogating were satisfied, he should be expelled. He has some knowledge of the Greek language. The general interest in public security and public policy are more important than his individual interest in continuing to reside in Germany. His expulsion is, therefore, an appropriate means to attain the intended purpose.

29 Since they considered that the expulsion decision taken by the Regierungspräsidium was based on provisions of the Ausländergesetz incompatible with Community law, Mr Orfanopoulos and his three children, on 21 March 2001, brought an action against that decision before the referring court.

30 In those circumstances, the Verwaltungsgericht Stuttgart decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is a restriction on the freedom of movement of a foreign EU national with many years' residence in a host State, ordered on account of a criminal offence under the Betäubungsmittelgesetz (Law on narcotics), in conformity with European law in terms of Article 39(3) EC on grounds of public policy, public security or public health, where, on account of his personal conduct, there is a justified expectation that he will also commit future criminal offences and where the spouse of the EU national and his children cannot reasonably be expected to live in his State of origin?

(2) Does Article 9(1) of Council Directive 64/221/EEC ... preclude national legislation which no longer provides for objection proceedings in which an examination of expediency is also carried out in relation to a decision of an administrative authority to expel the holder of a residence permit from the national territory, if a special body which is independent of the administrative authority adopting the decision has not been established?'

31 By letter of 10 April 2002, counsel for Mr Orfanopoulos and his children informed the Court Registry that, by order of 28 March 2002, the Landgericht (Regional Court) Heilbronn (Germany) had ordered Mr Orfanopoulos to be released so long as he does not reoffend.

Case C-493/01

32 Mr Oliveri, an Italian national, was born in Germany in 1977. He has resided there continuously since his birth. He did not obtain a certificate of completion of studies.

33 It is clear from the order for reference that Mr Oliveri has been a drug addict for several years. Because of that drug addiction, he became infected with HIV and chronic hepatitis C. He did not present himself for a detoxification cure which should have started in May 1999.

34 Mr Oliveri has committed numerous offences and has already been the subject of criminal sanctions for thefts and illegal sale of narcotics. In November 1999, he was imprisoned. The sentence was subsequently suspended for a period of treatment in a hospital. Mr Oliveri, however, interrupted that treatment and the suspension was terminated. In April 2000, he was again arrested and has since then been imprisoned.

35 In May 1999, Mr Oliveri received a warning as to the possible consequences of his conduct under the German law relating to aliens. In August 2000, the Regierungspräsidium ordered his expulsion and threatened to deport him to Italy without fixing a time-limit for his voluntary departure. The expulsion decision was based on the frequency and seriousness of the offences committed by Mr Oliveri, and of the real risk of reoffending in the future because of his dependency on drugs. It stated that the fact that he twice failed to follow a detoxification cure shows that he is neither willing nor able successfully to complete such treatment. Mr Oliveri meets the requirements set out in Paragraph 47(1)(2) of the Ausländergesetz under which expulsion is mandatory. By contrast, he does not meet the requirements which give rise to the right of special protection such as that provided for by Paragraph 48(1) of that law.

36 According to the Regierungspräsidium, Mr Oliveri lived until his arrest with his parents but his criminal conduct shows that his links with them were already loose. The fact that he has become infected with HIV does not mean that he is completely dependent on his parents' assistance. It is appropriate to assume that he has a basic knowledge of the Italian language. Expulsion is not disproportionate to the objective sought.

37 On 25 September 2000, Mr Oliveri brought an action before the Verwaltungsgericht Stuttgart against the Regierungspräsidium's decision. He claims that there is no risk of reoffending because he has gained in maturity in the interval, as a result of the difficult life he led in prison. He wishes to undergo a detoxification cure.

38 The documents before the Court show that the medical service of the Hohenasperg (Germany) prison hospital states, by letter of 20 June 2001, that Mr Oliveri is very seriously ill and that he is likely soon to die of his illness. It is to be feared that he would not receive the appropriate and necessary medical care in Italy.

39 In those circumstances, the Verwaltungsgericht Stuttgart decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

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

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

Preliminary observations

40 There are, for both cases, three preliminary observations which must be made, on the description of the national legislation forming the background to the questions referred for a preliminary ruling, on the applicable Community legislation and on the order in which these two cases should be considered.

41 First of all, as regards the national legislation, the German Government has disputed the description of that legislation by the Verwaltungsgericht Stuttgart in the two orders for reference.

42 In that regard, is it sufficient to point out that it is not for the Court, in the context of a reference for a preliminary ruling, to rule on the interpretation of national provisions or to decide whether the referring court's interpretation thereof is correct (see, to that effect, Case C-58/98 *Corsten* [2000] ECR I-7919, paragraph 24). The Court must take account, under the division of jurisdiction between the Community courts and the national courts, of the factual and legislative context, as described in the order for reference, in which the questions put to it are set (see Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, paragraph 10, and Case C-153/02 *Neri* [2003] ECR I-13555, paragraphs 34 and 35).

43 The questions referred must, therefore, be considered within the legislative framework as described by the Verwaltungsgericht Stuttgart.

44 Moreover, even assuming that the framework of the national legislation, as set forth by the German Government, were correct, the questions referred by the Verwaltungsgericht Stuttgart would remain pertinent in view of the indications in

the order for reference relating to the administrative practice which, according to that court, is followed by the competent authorities.

45 It is, in any event, for the referring court, before which the dispute has been brought and which must assume responsibility for the subsequent judicial decision, to check the soundness of its interpretation of the relevant national legislation and the correctness of the statements relating to that administrative practice.

46 Next, as regards the Community legislation, the national court starts from the premiss that Article 18 EC, on European citizenship, Article 39 EC, which establishes the principle of freedom of movement for workers, and Directive 64/221 apply in the circumstances of both sets of main proceedings. Mr Orfanopoulos's and Mr Oliveri's right to freedom of movement is said to arise directly from Article 18 EC. They also are said to come within the scope of Directive 64/221, given that they reside in Germany intending to pursue an activity there as employed persons.

47 In that regard, it must be noted that, as Community law stands at present, the right of nationals to travel to and reside in another Member State is not unconditional. That follows, first, from the provisions on the free movement of persons and services contained in Title III of Part Three of the Treaty, namely Articles 39 EC, 43 EC, 46 EC, 49 EC and 55 EC, and the secondary legislation adopted to give them effect and, second, from the provisions of Part Two of the Treaty, more specifically Article 18 EC, which, while granting citizens of the Union the right to move and reside freely within the Member States, expressly refers to the limitations and conditions laid down in the Treaty and by the measures adopted to give it effect (see, to that effect, Case C-356/98 *Kaba I* [2000] ECR I-2623, paragraph 30, and Case C-466/00 *Kaba II* [2003] ECR I-2219, paragraph 46).

48 As regards the limitations and conditions laid down in the Treaty and by the measures adopted to give it effect, it is important to note particularly the provisions of Directive 90/364 and the secondary legislation on migrant workers.

49 So far as concerns migrant workers who are nationals of a Member State, their right of residence is subject to the condition that the person remains a worker or, where relevant, a person seeking employment (see, to that effect, Case C-292/89 *Antonissen* [1991] ECR I-745, paragraph 22), unless they derive that right from other provisions of Community law (see *Kaba II*, cited above, paragraph 47).

50 Moreover, in respect more particularly of prisoners who were employed before their imprisonment, the fact that the person concerned was not available on the employment market during such imprisonment does not mean, as a general rule, that he did not continue to be duly registered as belonging to the labour force of the host Member State during that period, provided that he actually finds another job within a reasonable time after his release (see, to that effect, Case C-340/97 *Nazli* [2000] ECR I-957, paragraph 40).

51 It is clear that Mr Orfanopoulos has made use of the right to freedom of movement for workers and has pursued several activities as an employed person in Germany. In those circumstances, it must be held that Article 39 EC and Directive 64/221 apply in circumstances such as those of the main proceedings in Case C-482/01.

52 As for Case C-493/01, it cannot be established with certainty from the information available to the Court whether Mr Oliveri can rely on the provisions of Article 39 EC or on other provisions of the Treaty and of secondary legislation on the freedom of movement for persons or the freedom to provide services.

53 On the other hand, it is common ground that, as a citizen of the Union, Mr Oliveri enjoys, under Article 18 EC, the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and by the measures adopted to give it effect.

54 In those circumstances, it is for the national court to determine the provisions of Community law, if any, other than Article 18(1) EC, on which a national of a Member State such as Mr Oliveri may rely in the circumstances of the proceedings which gave rise to Case C-493/01. In that regard, it must, in particular, establish whether the person concerned comes within the scope of Article 39 EC, either as a worker, or as a person otherwise entitled, under the provisions of the secondary legislation adopted to give effect to that article, to freedom of movement, or whether he may rely on other provisions of Community law, such as Directive 90/364 or Article 49 EC, which applies particularly to recipients of services.

55 Directive 64/221 applies in all the situations mentioned in the above paragraph. As regards more particularly Directive 90/364, it is important to remember the provisions of Article 2(2) of that directive.

56 Lastly, as regards the order in which the two cases should be considered, the national court is asking the Court, in Case C-493/01, about the compatibility with Community law of a national provision which requires the competent authorities to expel nationals of other Member States who have received certain sentences for specific offences. Several interested parties, which have submitted written observations in Case C-482/01, consider that that question or, in any event, a similar question also arises in the latter case.

57 In those circumstances, it is appropriate to consider, first of all, Case C-493/01 and, then, Case C-482/01.

The questions referred for a preliminary ruling

Case C-493/01

First question

— Scope of the question

58 By its first question, the national court is asking whether Article 39(3) EC and Article 3 of Directive 64/221 preclude national legislation which requires the competent authorities to expel nationals of other Member States who have been finally sentenced to a term of youth custody of at least two years or to a custodial sentence for an intentional offence against the Law on narcotics, where the sentence has not been suspended.

59 It is clear from the file, that, by its question, the national court is referring to Paragraph 47(1) of the Ausländergesetz (duty to expel), which is the legal basis of the decision to expel Mr Oliveri.

— Observations submitted to the Court

60 The Italian Government and the Commission submit that Article 39(3) EC and Directive 64/221 preclude mandatory expulsion, since such expulsion does not allow for the exercise of any discretion.

61 According to the German Government, there is no procedure, under the national law in force, for automatic or summary expulsion. Checking that an expulsion order is proportionate is ensured by the combined application of Paragraphs 47(1) (2) and 48(1)(4) of the Ausländergesetz, and of Article 12 of the Aufenthaltsgesetz/EWG.

— Reply of the Court

62 The principle of freedom of movement for workers, enshrined in Article 39 EC, forms one of the foundations of the Community (see, among others, Case 139/85 *Kempf* [1986] ECR I-1741, paragraph 13). It is established that a measure providing for expulsion of nationals of other Member States is an obstacle to the exercise of that freedom. None the less, such an obstacle may be justified, under Article 39(3) of Directive 64/221, on grounds of public policy (see, to that effect, Joined Cases C-65/95 and C-111/95 *Shingara and Radiom* [1997] ECR I-3343, paragraph 28).

63 Here it is necessary to consider whether the obligation to expel nationals of other Member States who have received certain sentences for specific offences can be justified on grounds of public policy.

64 In that regard, the Court has consistently held that the principle of freedom of movement for workers must be given a broad interpretation (see, to that effect, *Antonissen*, cited above, paragraph 11, and Case C-344/95 *Commission* v *Belgium* [1997] ECR I-1035, paragraph 14), whereas derogations from that principle must be interpreted strictly (see, to that effect, Case 41/74 *Van Duyn* [1974] ECR 1337, paragraph 18; Case 67/74 *Bonsignore* [1975] ECR 297, paragraph 6; *Kempf*, cited above, paragraph 13; and Case C-357/98 *Yiadom* [2000] ECR I-9265, paragraph 24).

65 It must be added that a particularly restrictive interpretation of the derogations from that freedom is required by virtue of a person's status as a citizen of the Union. As the Court has held, that status is destined to be the fundamental status of nationals of the Member States (see, in particular, Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 31, and Case C-138/02 *Collins* [2004] ECR I-2703, paragraph 61).

66 Concerning measures of public policy, it is clear from Article 3 of Directive 64/221 that, in order to be justified, they must be based exclusively on the personal conduct of the individual concerned. It is stated in the same provision that previous criminal convictions cannot in themselves justify those measures. As the Court has held, particularly in Case 30/77 *Bouchereau* [1977] ECR 1999, paragraph 35, the concept of public policy presupposes 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 the requirements of public policy affecting one of the fundamental interests of society.

67 While it is true that a Member State may consider that the use of drugs constitutes a danger for society such as to justify special measures against foreign nationals who contravene its laws on drugs, the public policy exception must, however, be interpreted restrictively, with the result that the existence of a previous criminal conviction can justify an expulsion only in so far as the circumstances which gave

rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy (see, in particular, Case C-348/96 *Calfa* [1999] ECR I-11, paragraphs 22 to 24).

68 The Court has therefore concluded that Community law precludes the deportation of a national of a Member State based on reasons of a general preventive nature, that is one which has been ordered for the purpose of deterring other aliens (see, in particular, *Bonsignore*, cited above, paragraph 7), 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, and *Nazli*, paragraph 59).

69 The question asked by the national court refers to national legislation which requires the expulsion of nationals of other Member States who have received certain sentences for specific offences.

70 It must be held that, in such circumstances, the expulsion 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.

71 In the light of the foregoing, the answer to the first question must be that, provided that it is confirmed that the applicant in the main proceedings comes within the scope of one of the provisions of Community law referred to in paragraph 54 of this judgment leading to the application of Directive 64/221, which it is for the national court to determine, those provisions and particularly

Article 3 of that directive preclude national legislation which requires national authorities to expel nationals of other Member States who have been finally sentenced to a term of youth custody of at least two years or to a custodial sentence for an intentional offence against the Law on narcotics, where the sentence has not been suspended.

Second question

— Scope of the question

72 By its second question, the national court is asking, in essence, whether Article 3 of Directive 64/221 precludes a national practice whereby the courts of a Member State cannot take into consideration, in reviewing the lawfulness of the expulsion of a national of another Member State, factual matters and a positive development in that person which occurred after the final decision of the competent authorities.

73 The national court states that, under the settled case-law of the Bundesverwaltungsgericht (Federal Administrative Court, Germany), the national courts can and must base their decisions on evidence which has become available after the final decision taken by the administration only where such evidence supports the decision taken by the administration. That principle means, in the circumstances of the main proceedings, that Mr Oliveri's argument in the course of these proceedings could not be taken into consideration, namely that he was suffering from AIDS and must expect to die in the near future.

74 Mr Oliveri also argued before the national authorities that there was no longer any risk of reoffending because he had gained in maturity as a result of the difficult life he led in prison.

— Observations submitted to the Court

75 The Italian Government and the Commission suggest that the question should be answered in the affirmative. The Commission relies particularly on Case C-131/79 *Santillo* [1980] ECR 1585 from which it is clear that the court or authority concerned must at least take into account a positive development in the person concerned and, thus, of the lifting of the actual threat, if a lengthy period has elapsed between the date of the expulsion order and that of the review of that decision by the competent court.

76 The German Government argues the opposite. It submits that the lawfulness of an expulsion order can be reviewed only in the light of the factual circumstances and legal rules applying when the final decision is taken by the administration, given that the latter cannot take account, in its decision, of subsequent developments. It argues, however, that certain regulations enable new facts or the positive development of the person concerned since the date of the administration's final decision to be taken into account, such as the taking into consideration of matters likely to present an obstacle to the expulsion at the time of its execution.

— Reply of the Court

77 For the purposes of deciding whether a national of another Member State may be expelled under the exception based on reasons of public policy, the competent

national authorities must assess, on a case-by-case basis, whether the measure or the circumstances which gave rise to that expulsion order prove the existence of personal conduct constituting a present threat to the requirements of public policy (see, in particular, *Calfa*, cited above, paragraph 22). As the Advocate General points out in point 126 of her Opinion, no more specific information as to what constitutes the 'presence' of the threat is evident from the wording of Article 3 of Directive 64/221 or the Court's case-law.

78 It is not disputed that, in practice, circumstances may arise between the date of the expulsion order and that of its review by the competent court which point to the cessation or the substantial diminution of the threat which the conduct of the person ordered to be expelled constitutes to the requirements of public policy.

79 As is clear from paragraphs 64 and 65 of this judgment, derogations from the principle of freedom of movement for workers must be interpreted strictly, and thus the requirement of the existence of a present threat must, as a general rule, be satisfied at the time of the expulsion.

80 While it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, the fact remains that those rules must not be such as to render virtually impossible or excessively difficult the exercise of rights conferred by Community law (see, to that effect, Case 33/76 *Rewe* [1976] ECR 1989, paragraph 5, and Case C-129/00 *Commission* v *Italy* [2003] ECR I-14637, paragraph 25).

81 A national practice such as that described in the order for reference is liable to adversely affect the right to freedom of movement to which nationals of the Member States are entitled and particularly their right not to be subjected to expulsion measures save in the extreme cases provided for by Directive 64/221. That is especially so if a lengthy period has elapsed between the date of the decision to expel the person concerned and that of the review of that decision by the competent court.

82 In the light of the foregoing, the reply to the second question must be that Article 3 of Directive 64/221 precludes a national practice whereby the national courts may not take into consideration, in reviewing the lawfulness of the expulsion of a national of another Member State, factual matters which occurred after the final decision of the competent authorities which may point to the cessation or the substantial diminution of the present threat which the conduct of the person concerned constitutes to the requirements of public policy. That is so, above all, if a lengthy period has elapsed between the date of the expulsion order and that of the review of that decision by the competent court.

Case C-482/01

First question

— Scope of the question

83 By its first question, the national court is asking whether the restriction on the freedom of movement of a foreign Community national with many years'

residence in the host Member State, imposed by invoking the derogation for public policy set out in Article 39(3) EC, is compatible with Community law where it can be expected, in view of his personal conduct, that he will reoffend and where it cannot be expected of that national's spouse and children that they live in his State of origin.

84 It is clear from the order for reference that Mr Orfanopoulos meets the requirements for mandatory expulsion as provided for by Paragraph 47(1) of the Ausländergesetz. None the less, since he lives in a family relationship with a German national, he is entitled to the special protection provided for by Paragraph 48(1) of that law. In those circumstances, the effect of Paragraph 47(3) of the Ausländergesetz is to transform the mandatory expulsion into expulsion as a general rule.

85 The national court does not question the compatibility, with Community law, of the legal basis of the expulsion order against Mr Orfanopoulos. Indeed, it makes clear that the competent administrative authority, after considering the circumstances of the case and particularly the danger to society represented by the person concerned, reached the conclusion that it was not appropriate to disregard the presumption established by Paragraph 47(1)(2) of the Ausländergesetz. The national court is asking rather whether, in view of Mr Orfanopoulos's long residence in Germany, of the particular importance of the principle of the freedom of movement in Community law and of the protection of family life, his expulsion is compatible with the general principles of Community law, particularly with the principle of proportionality. Several interested parties which have submitted written observations none the less question the compatibility of that legal basis with Community law.

— Observations submitted to the Court

86 Mr Orfanopoulos and his children, the Italian Government and the Commission submit that it is necessary to ascertain, at the outset, whether a national provision which provides for expulsion as a general rule in respect of nationals of other Member States who have been sentenced to certain penalties for specific offences is compatible with Community law. They submit that such is not the case.

87 The German Government points to some omissions in the description of the national legislation contained in the order for reference and argues that the question referred is irrelevant given that, according to the national law in force, there is no procedure for automatic or summary expulsion. Moreover, it points out that it is not for the Court to review, on a reference for a preliminary ruling, the lawfulness or the proportionality of a national measure. The Land Baden-Württemberg supports the latter position.

88 In relation to the question referred by the national court, Mr Orfanopoulos and his children, the Italian Government and the Commission submit that the derogations from the principle of freedom of movement provided for by Community law must be determined in compliance with the right to the protection of family life. The national legislation in question can apply the exception on grounds of public policy, laid down in Article 39(3) EC and specified by Directive 64/221, only if that legislation complies with the fundamental rights whose observance the Court guarantees.

89 Those principles are not disputed by the German Government. It maintains, nevertheless, that the applicable national law has taken sufficient account of the requirements arising from the principle of proportionality and of the specific importance of the freedom of movement for persons in Community law, and of the fundamental rights relating thereto, such as respect for family life.

— Reply of the Court

90 Although the question referred starts from the premiss that in the main proceedings account was taken of the personal conduct of the person subject to the expulsion order, it is appropriate to consider at the outset, as suggested by several interested parties which submitted observations, the question whether Article 39 EC and Directive 64/221 preclude national legislation which provides for expulsion as a general rule in respect of nationals of other Member States who have received certain sentences for specific offences and who are entitled to special protection on the ground that they live in a family relationship with a German national.

91 As is clear from paragraph 71 of this judgment, Article 39 EC and Article 3 of Directive 64/221 preclude national legislation which requires national authorities to order the expulsion of nationals of other Member States who have been sentenced to a term of youth custody of at least two years or to a custodial sentence for an intentional offence against the German Law on narcotics, where the sentence has not been suspended.

92 In the present case, it seems, at first sight, that in spite of family circumstances being taken into account, the system of expulsion described in the order for reference contains an element of automatism or, in any event, a presumption that the person should be expelled. As is clear from the first sentence of Paragraph 48 (1) of the Ausländergesetz, persons entitled to special protection may be expelled from the territory only on serious grounds of public security and public policy. However, such grounds exist, under the second sentence of that subparagraph, in the cases set out in Paragraph 47(1) of that law.

93 If the system in question does indeed have such an effect, that means that the expulsion of a national of another Member State who has received a particular sentence for specific offences is ordered, in spite of family considerations being taken into account, on the basis of a presumption that that national must be expelled, without proper account being taken of his personal conduct or of the danger he represents for the requirements of public policy.

94 It follows that such a system is contrary to Article 39 EC and Article 3 of Directive 64/221.

95 So far as the question referred by the national court is concerned, it must be pointed out that 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.

96 It is for the competent national authority to take into account, in its assessment of where lies the fair balance between the legitimate interests in issue, the particular legal position of persons subject to Community law and of the fundamental nature of the principle of the free movement of persons (see, to that effect, *Bouchereau*, cited above, paragraph 30).

97 Moreover, 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 freedom of movement for workers 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; and Case C-60/00 *Carpenter* [2002] ECR I-6279, paragraph 40).

98 It must be noted, in that context, that the importance of ensuring the 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 clear 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, *Carpenter*, cited above, paragraph 41).

99 Finally, the necessity of observing the principle of proportionality must be emphasised. To assess whether the interference envisaged is proportionate to the legitimate aim pursued, in this instance the protection of public policy, account must be taken, particularly, of the nature and seriousness of the offences committed by the person concerned, the length of his residence in the host Member State, the period which has elapsed since the commission of the offence, the family circumstances of the person concerned and the seriousness of the difficulties which the spouse and any of their children risk facing in the country of

origin of the person concerned (see, as regards Article 8 of the ECHR, *Boultif* v *Switzerland* (54273/00) [2001] ECHR 493, paragraph 48).

100 Having regard to the foregoing considerations, the answer to the first question and to the preliminary point raised therein is:

— Article 39 EC and Article 3 of Directive 64/221 preclude legislation and national practices whereby a national of another Member State who has received a particular sentence for specific offences is ordered to be expelled, in spite of family considerations being taken into account, on the basis of a presumption that that person must be expelled, without proper account being taken of his personal conduct or of the danger which he represents for the requirements of public policy;

— However, Article 39 EC and Directive 64/221 do not preclude the expulsion of a national of another Member State who has received a particular sentence for specific offences and who, on the one hand, constitutes a present threat to the requirements of public policy and, on the other hand, has resided for many years in the host Member State and can plead family circumstances against that expulsion, provided that the assessment made on a case-by-case basis by the national authorities of where the fair balance lies between the legitimate interests at issue is made in compliance with the general principles of Community law and, in particular, by taking proper account of respect for fundamental rights, such as the protection of family life.

The second question

— Scope of the question

101 By its second question, the national court is asking, in essence, whether Article 9 (1) of Directive 64/221 precludes legislation, such as that in force in the Land Baden-Württemberg, which does not provide, in relation to an expulsion decision by a Regierungspräsidium, for objection proceedings in which an examination of the expediency of that decision is also carried out, if a special body which is independent of that administrative authority has not been established.

102 It is clear from the order for reference and from the German Government's observations that the lawfulness and expediency of an administrative act adversely affecting an individual are, as a general rule, reviewed in Germany by the administration in a pre-litigation procedure, before an action for annulment is commenced. However, according to the first sentence of Paragraph 68(1) of the Verwaltungsgerichtsordnung (Code of Administrative Proceedings), a decree, even a regional decree, may derogate from that principle. The Land Baden-Württemberg has made use of that possibility in adopting Paragraph 6a of the Ausführungsgesetz zur Verwaltungsgerichtsordnung (Law implementing the Code of Administrative Procedure). By virtue of that provision, which took effect on 1 July 1999, a pre-litigation procedure is excluded where an administrative act has been adopted by a Regierungspräsidium.

— Observations submitted to the Court

103 Mr Orfanopoulos and his children, the Italian Government and the Commission propose that that question be answered in the affirmative. It is clear from the Court's case-law that the provisions of Directive 64/221 must enable nationals of the Member States to obtain an exhaustive examination of all the facts and circumstances, including the expediency of the measure envisaged, before the expulsion decision is definitively adopted.

104 The German Government maintains that Article 9(1) of Directive 64/221 does not preclude legislation such as that in force in the Land Baden-Württemberg, if it is guaranteed that the administration's decision is subject to a detailed review of the relevant law within time-limits. It cites, in that regard, *Shingara and Radiom*, cited above. Protection from expulsion is ensured in that Land under the administrative procedure and its review is guaranteed in the context of judicial proceedings. The review carried out by the administrative courts covers, first, the question whether the substantive conditions for expulsion are met in law and in fact, including the question whether the competent administration has exceeded its discretionary powers, and, secondly, the merits.

— Reply of the Court

105 The object of Article 9(1) of Directive 64/221 is to ensure a minimum procedural safeguard for persons affected by a decision ordering their expulsion from the territory. That article, which applies in three cases, namely where there is no right of appeal to a court of law, where such an appeal may be only in respect of the

legal validity of the decision, or where the appeal cannot have 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 not take its decision until an opinion has been obtained from the other competent authority. The person concerned must enjoy such rights of defence before the latter authority and of assistance or representation as the domestic law of that country provides for (see, to that effect, Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-3763, paragraph 62, and *Yiadom*, cited above, paragraphs 29 to 31).

It is clear from the Court's case-law that the intervention on the part of the 'competent authority' mentioned in Article 9(1) must make it possible for an exhaustive examination to be made of all the facts and circumstances, including the expediency of the measure in question, before the decision is definitively adopted (*Santillo*, cited above, paragraph 12, and Joined Cases 115/81 and 116/81 *Adoui and Cornuaille* [1982] ECR 1665, paragraph 15). The Court has also stated that, save in urgent cases, the administrative authority may not take its decision until an opinion has been obtained from the competent authority (Case 98/79 *Pecastaing* [1980] ECR 91, paragraph 17, and *Dzodzi*, cited above, paragraph 62).

In this case, it is not disputed that the review of the expulsion decisions taken by the Regierungspräsidien is undertaken, in the Land Baden-Württemberg, by administrative courts in judicial proceedings.

The national court starts from the premiss that neither the complaints procedure nor the judicial proceedings against expulsion decisions involve, in that Land, an examination of the expediency of the expulsion decision in question. However, it admits to a certain doubt in respect of these actions.

109 First of all, the Court rejects the German Government's argument that it is sufficient, in order to comply with the provisions of Article 9(1) of Directive 64/221, that the administrative authority's decision is subject to a detailed substantive review within time-limits.

110 Such an interpretation does not permit persons affected by decisions ordering their expulsion the safeguard of an exhaustive examination of the expediency of the measure in question and does not meet the requirements of sufficiently effective protection (see, to that effect, Case 222/84 *Johnston* [1986] ECR 1651, paragraph 17, and Case 222/86 *Heylens and Others* [1987] ECR 4097, paragraphs 14 and 15). It would, indeed, be likely to deprive Article 9(1) of Directive 64/221 of its practical effect.

111 On the other hand, it would be different if the administrative authority's decision were subject to a detailed review of its substance as well as an exhaustive examination of the expediency of the measure in question.

112 In view of the doubt left by the national court as to the extent of the review carried out by the competent courts, namely the Verwaltungsgerichte, it is for that court to establish whether those courts are able to consider the expediency of expulsion orders.

113 Were it to be the case that, in the circumstances of the main proceedings, the actions brought to challenge the decision of expulsion relate only to its legal validity, it would be necessary to establish whether the requirement is met for the intervention of a competent authority other than that empowered to take the

decision and, as the case may be, whether such intervention satisfies the conditions set out in paragraph 106 of this judgment.

114 Directive 64/221 does not define the expression 'independent authority'. As is clear from paragraph 19 of the judgment in *Santillo*, cited above, the directive leaves a discretion to the Member States as regards the designation of the authority. Any public authority independent of the administrative authority called on to adopt any of the measures provided for by that directive may be regarded as such an authority; it must be organised in such a way that the person concerned has the right to be represented and to defend himself before it.

115 In this case, examination of the file has not enabled it to be established that, between the adoption of the decision in question by the Regierungspräsidium and the judicial review carried out afterwards by the administrative courts, an independent authority within the meaning of Article 9(1) of Directive 64/221 intervenes. Nor has that examination led to the conclusion that, in circumstances such as those which gave rise to the main proceedings, there was a case of urgency.

116 Having regard to the foregoing considerations, the answer to the second question must be that Article 9(1) of Directive 64/221 precludes a provision of a Member State which provides neither a complaints procedure nor an appeal, comprising also an examination of expediency, against a decision to expel a national of another Member State taken by an administrative authority, where no authority independent of that administration has been put in place. It is for the national court to establish whether courts such as the Verwaltungsgerichte are able to examine the expediency of expulsion orders.

Costs

117 The costs incurred by the German and Italian Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main action, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Verwaltungsgericht Stuttgart, by orders of 20 November and 4 December 2001, hereby rules:

1. It is for the national court to determine the provisions of Community law, if any, other than Article 18(1) EC, on which a national of a Member State such as Mr Oliveri may rely in the circumstances of the proceedings which gave rise to Case C-493/01. In that regard, it must, in particular, establish whether the person concerned comes within the scope of Article 39 EC, either as a worker, or as a person otherwise entitled, under the provisions of the secondary legislation adopted to give effect to that article, to freedom of

movement, or whether he may rely on other provisions of Community law, such as Council Directive 90/364/EEC of 28 June 1990 on the right of residence or Article 49 EC, which applies particularly to recipients of services.

2. 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 precludes national legislation which requires national authorities to expel nationals of other Member States who have been finally sentenced to a term of youth custody of at least two years or to a custodial sentence for an intentional offence against the Law on narcotics, where the sentence has not been suspended.

3. Article 3 of Directive 64/221 precludes a national practice whereby the national courts may not take into consideration, in reviewing the lawfulness of the expulsion of a national of another Member State, factual matters which occurred after the final decision of the competent authorities which may point to the cessation or the substantial diminution of the present threat which the conduct of the person concerned constitutes to the requirements of public policy. That is so, above all, if a lengthy period has elapsed between the date of the expulsion order and that of the review of that decision by the competent court.

4. Article 39 EC and Article 3 of Directive 64/221 preclude legislation and national practices whereby a national of another Member State who has received a particular sentence for specific offences is ordered to be expelled, in spite of family considerations being taken into account, on the basis of a presumption that that person must be expelled, without proper account being taken of his personal conduct or of the danger which he represents for the requirements of public policy.

5. Article 39 EC and Directive 64/221 do not preclude the expulsion of a national of another Member State who has received a particular sentence for specific offences and who, on the one hand, constitutes a present threat to the requirements of public policy and, on the other hand, has resided for many years in the host Member State and can plead family circumstances against that expulsion, provided that the assessment made on a case-by-case basis by the national authorities of where the fair balance lies between the legitimate interests at issue is made in compliance with the general principles of Community law and, in particular, by taking proper account of respect for fundamental rights, such as the protection of family life.

6. Article 9(1) of Directive 64/221 precludes a provision of a Member State which provides neither a complaints procedure nor an appeal, comprising also an examination of expediency, against a decision to expel a national of another Member State taken by an administrative authority, where no authority independent of that administration has been put in place. It is for the national court to establish whether courts such as the Verwaltungsgerichte are able to examine the expediency of expulsion orders.

Rosas La Pergola von Bahr

Delivered in open court in Luxembourg on 29 April 2004.

R. Grass V. Skouris

Registrar President