OPINION OF ADVOCATE GENERAL
BOT
delivered on 8 June 2010[1]

1. By this reference for a preliminary ruling, the Verwaltungsgerichtshof (Higher Administrative Court) Baden-Württemberg (Germany) asks the Court of Justice to specify the conditions for granting protection against expulsion under Article 28(3)(a) of Directive 2004/38/EC.[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.

2. In particular, the Court is asked whether the expression 'imperative grounds of public security' must be understood to include only considerations connected with the protection of the Member State and its institutions, and whether repeated and prolonged absences from the territory of the host Member State affect the calculation of the 10-year period required for the purposes of obtaining protection against expulsion.

3. In this opinion, I shall propose that the Court rule that Article 28(3)(a) of Directive 2004/38 is to be interpreted as meaning that the expression 'public security' does not have only the narrow sense of a threat to the internal or external security of the host Member State or the protection of its institutions, but also covers serious threats to a fundamental interest of society such as the values essential to the protection of its citizens, characterised by that State by means of the offences it establishes for their protection.

4. I shall also point out to the Court the specific conditions which, in my view, must be fulfilled for the competent national authority to be able lawfully to take an expulsion

1 — Original language: French.

2 — Directive of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77 and corrigenda in OJ 2005 L 197, p. 34).

decision, in particular in a situation such as that described in the main proceedings, in which the decision follows the enforcement of a criminal sanction.

5. I shall also explain to the Court the reasons why I think that, in general, temporary absences which do not undermine the strong link between the Union citizen and the host Member State — a matter which it is for the national court to determine — do not affect calculation of the 10-year period required under Article 28(3)(a) of Directive 2004/38.

6. I shall also say that, on the other hand, an absence of more than 16 months from the territory of the host Member State which, as in the present case, ended only with the enforced return of the Union citizen following a legal decision taken by the competent authorities of that State may, in my view, cause that citizen to lose the right to enhanced protection provided for in that article in so far as it reflects the breaking of the strong link between that citizen and that State, which it is for the national court to define.

I — Legal framework

A — *Primary law*

7. Article 3(2) TEU is worded as follows:

'The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.'

B — *Directive 2004/38*

8. 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.

9. The directive 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 by the nationals of other Member States.

10. Accordingly, Article 16(1) of Directive 2004/38 provides that Union citizens who have resided in the host Member State for a continuous period of five years shall have the right of permanent residence there. Article 16(3) of the directive states that continuity of residence shall not be affected by, inter alia, temporary absences not exceeding a total of six months a year.

11. According to Article 16(4) of the directive, the right of permanent residence, once acquired, shall be lost only through absence from the host Member State for a period exceeding two consecutive years.

12. Union citizens are also protected against expulsion. Directive 2004/38 strictly circumscribes the extent to which Member States may restrict the right of Union citizens to enter and reside, based directly on the relevant case-law of the Court of Justice.

13. Accordingly, under Article 27(1) of the directive, Member States may restrict that right on grounds of public policy, public security or public health, excluding grounds invoked to serve economic ends.

14. Reproducing the criteria laid down by the Court of Justice, 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 [3] and must be based exclusively on the personal conduct of the individual concerned by the

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

expulsion decision. [4] It is stated that 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. [5]

15. Article 28 of Directive 2004/38, concerning protection against expulsion, is worded as follows:

'1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.

2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.

3. 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; or

(b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989.'

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

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

C — *The German legislation*

16. The Law on the Freedom of Movement of Union Citizens (Freizügigkeitsgesetz/EU) of 30 July 2004 [6] 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.

17. 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.

18. 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.

19. According to Paragraph 6(5) of the FreizügG/EU, so far as concerns Union citizens and members of their family who have resided in Germany for the last 10 years and so far as concerns minors, 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 are present only where the person concerned has been finally sentenced on account of one or more intentional criminal acts to a period of imprisonment or youth detention of at least five years

6 — BGBl. 2004 I, p. 1950, as most recently amended by the Law of 26 February 2008 (BGBl. 2008 I, p. 215, 'the FreizügG/EU').

or a detention order was made at the time of his last final conviction, where the security of the Federal Republic is affected or where the person concerned is a terrorist risk.

II — Facts and the main proceedings

20. Mr Tsakouridis, who is a Greek national, was born in Germany on 1 March 1978. He has always lived in Germany and went to school in that Member State. Since October 2001, he has held a German residence permit of unlimited duration.

21. Mr Tsakouridis was sentenced to fines in 1998 for possession of a prohibited item, in 1999 for a dangerous assault, and in 2000 and 2002 for intentional assault involving the threat or use of force.

22. From March 2004 until the middle of October 2004, Mr Tsakouridis ran a crêpe stall in Rhodes (Greece). He then returned to Germany and worked there from December 2004. In the middle of October 2005, he went to Greece again and continued running his crêpe stall.

23. On 22 November 2005, the Amtsgericht (District Court) Stuttgart issued an international arrest warrant against Mr Tsakouridis. He was arrested in Rhodes on 19 November 2006 and transferred to Germany on 19 March 2007.

24. By judgment of 28 August 2007, the Landgericht (Regional Court) Stuttgart sentenced Mr Tsakouridis to imprisonment of six years and six months for prohibited drug dealing involving more than insubstantial amounts on eight occasions as part of a criminal gang. It is clear from information provided at the hearing that Mr Tsakouridis is currently on conditional release.

25. By order of 19 August 2008, the Regierungspräsidium (regional administration) Stuttgart determined that Mr Tsakouridis had lost the right to enter and reside in Germany and threatened to expel him to Greece.

26. The Regierungspräsidium Stuttgart considered that, in the light of the judgment delivered by the Landgericht Stuttgart on 28 August 2007, the five-year prison sentence threshold has been exceeded, giving rise to imperative grounds of public security within the meaning of Paragraph 6(5) of the FreizügG/EU. The Regierungspräsidium Stuttgart also considered that Mr Tsakouridis' personal conduct constitutes a present threat to public policy, since the drugs offences committed by him were exceptionally serious and there is a real risk of reoffending. The court added that society has a fundamental interest in the effective combating of drugs-related crime, which is particularly damaging to the social fabric. The Regierungspräsidium Stuttgart also considered that, in view of the fact that Mr Tsakouridis has recently spent time in Greece, he would not find it difficult to adapt to the way of life there.

27. On 17 September 2008, Mr Tsakouridis brought an action against that decision of 19 August 2008 before the Verwaltungsgericht (Administrative Court). Noting that the Landgericht Stuttgart, in its judgment of 28 August 2007, had held that Mr Tsakouridis was only a minor participant in the criminal gang and had been involved in the crime in order to support his family, and considering that he had grown up and gone to school in Germany, and that there was therefore no threat to public policy within the meaning of Paragraph 6(1) of the FreizügG/EU, and noting also that he has a very close relationship with his father who lives in Germany, the Verwaltungsgericht held the determination that Mr Tsakouridis' right to enter and reside in Germany was lost to be disproportionate.

28. By judgment of 24 November 2008, that court therefore annulled the decision of the Regierungspräsidium Stuttgart on the ground that, in the case of a Union citizen, the loss of the right to enter and reside can be determined only on grounds of public policy, public security or public health, and that a criminal conviction alone cannot justify such a loss. The court adds that there must be a genuine and sufficiently serious threat affecting one of the fundamental interests of society.

29. The Verwaltungsgericht also states that, since Mr Tsakouridis has lived in Germany for more than 10 years and did not lose the right of permanent residence owing to his stays in Greece, Paragraph 6(5) of the FreizügG/EU applied, meaning the loss of the right of residence could be determined only on imperative grounds of public security. However, those grounds were not present in this case, because the concept of public security covers only the internal and external security of a Member State and is therefore narrower than

the concept of public policy. Mr Tsakouridis may constitute a major threat to public policy but not in any sense to the existence of the Member State or its institutions or the survival of the population.

30. The Land Baden-Württemberg brought an appeal against that judgment before the Verwaltungsgerichtshof Baden-Württemberg.

III — The questions referred for a preliminary ruling

31. The Verwaltungsgerichtshof Baden-Württemberg decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is the concept of "imperative grounds of public security" employed in Article 28(3) of Directive 2004/38... to be interpreted as meaning that only irrefutable threats to the external or internal security of the Member State can justify an expulsion [decision], that is, only to the existence of the State and its essential institutions, their ability to function, the survival of the population, external relations and peaceful relations between nations?

(2) Under what conditions can the right to enhanced protection against expulsion achieved following 10 years of residence in the host Member State laid down in Article 28(3)(a) of Directive 2004/38 subsequently be lost? Is the condition for the loss of the right of permanent residence laid down in Article 16(4) of the directive to be applied mutatis mutandis in that context?

(3) If the question in point 2 above is to be answered in the affirmative and Article 16(4) of [the directive] to be applied mutatis mutandis: is the enhanced protection against expulsion lost by lapse of time alone, irrespective of the reasons for the absence?

(4) Also if the question in point 2 above is to be answered in the affirmative and Article 16(4) of [Directive 2004/38] to be applied: can an enforced return to the host Member State in the context of criminal proceedings before expiry of the two-year period have the effect of maintaining the right to increased protection against expulsion, even where following that return the fundamental freedoms cannot be exercised for some time?'

IV — Analysis

32. By its first question, the national court asks the Court of Justice whether it is necessary to draw a distinction between the concept of public security and the concept of public policy and whether the former is to be interpreted more narrowly than the latter, meaning that only an expulsion decision against a Union citizen who represents a threat to the very existence of a Member State and its institutions may be regarded as an expulsion decision based on imperative grounds of public security.

33. By its second, third and fourth questions, the national court asks, in essence, whether repeated absences from the host Member State and the enforced return of the Union citizen to that territory in connection with criminal proceedings may affect the right to enhanced protection provided for in Article 28(3)(a) of Directive 2004/38.

A — *Preliminary observations*

34. The preliminary observations will relate to two points, namely the spirit and structure of the system established by Directive 2004/38, and the horizontal nature of the fundamental principles of criminal law.

1. The spirit and structure of the system established by Directive 2004/38

35. Pursuant to recital 3 in the preamble to Directive 2004/38, the purpose of the directive is to simplify and strengthen the right

of free movement and residence of all Union citizens.

36. Freedom of movement of persons is one of the fundamental freedoms of the internal market, as stated in Article 45 of the Charter of Fundamental Rights of the European Union. Initially for the benefit of workers, freedom of movement within the Union was subsequently extended to Union citizens, whatever their status and whether or not they pursued an economic activity. Citizenship of the Union therefore gives every Union citizen the right to enter and reside on the territory of the Member States, subject to the restrictions expressly provided for in the final subparagraph of Article 20(2) TFEU.

37. Naturally, this right to freedom of movement must be exercised in compliance with the laws of each Member State. Accordingly, under Article 27(1) of Directive 2004/38, a Member State may restrict the freedom of movement of Union citizens in its territory on grounds of public policy, public security or public health. However, since that restriction on the freedom of movement undermines a fundamental principle of Union law, the conditions for applying it are strictly circumscribed. [7]

38. In fact, as we have already seen, Article 28 of the directive establishes an enhanced protection for Union citizens and, in certain cases, for the members of their family.

39. Accordingly, Article 28(1) of the directive provides that, where a Member State takes an expulsion decision against a Union citizen on grounds of public policy or public security, it must first take account of a series of considerations such as how long the citizen concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his or her links with their country of origin.

7 — See inter alia Case 41/74 *van Duyn* [1974] ECR 1337, paragraph 18, and Case C-441/02 *Commission* v *Germany* [2006] ECR I-3449, paragraph 34 and the case-law cited therein.

40. Under Article 28(2) of Directive 2004/38, where a Union citizen or a member of his family has acquired a right of permanent residence on the territory of the host Member State, that State may not take an expulsion decision against those persons except on serious grounds of public policy or public security.

41. Finally, according to Article 28(3)(a) of the directive, only imperative grounds of public security may justify an expulsion decision against a Union citizen who has resided in the host Member State for the 10 years preceding that decision.

42. Reading those three paragraphs, we notice at once that the length of residence is a decisive factor in granting enhanced protection against expulsion of the Union citizen.

43. That is explained by the fact that the Union legislature considered that the length of residence showed a degree of integration into the host Member State. [8] The longer the residence in that State, the closer the links with that State are assumed to be.

44. An expulsion decision taken against a Union citizen who has exercised his right to freedom of movement and is genuinely integrated into the host Member State may therefore cause him serious harm. [9]

45. That is why the citizen enjoys a degree of protection against expulsion which is enhanced according to the level of integration into the host Member State. The system described establishes the premiss that the level of integration depends on the length of residence. The longer the residence, the higher the level of integration is presumed to be and

8 — 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).

9 — See recital 23 of Directive 2004/38.

the more comprehensive will be the protection afforded against expulsion. [10]

2. The horizontal nature of the fundamental principles of criminal law

46. The particular features of the present case require not only that the decision contemplated by the Regierungspräsidium Stuttgart comply with the conditions laid down by Directive 2004/38, but that, since it is a decision taken as a consequence of a criminal conviction and after it has been enforced, it observe the fundamental principles concerning the function of criminal sanctions.

47. Although it is not disputed that the method of interpretation legitimately used by the Court leaves room, where appropriate, for a specific interpretation in the light of the purpose of each directive in order to ensure its effectiveness, fundamental rights and principles cannot be applied differently according to the area in which they are found, if they are not to lose their fundamental character. That fundamental character of a right or principle constitutes, on the contrary, a common standard from which, in the area of freedom, security and justice, questions connected, inter alia, with citizenship of the Union may not be excluded.

48. The idea, mooted since ancient times by theologians, philosophers and theorists, that a criminal sanction must contribute to the rehabilitation of the convicted person, is nowadays a principle which is shared and confirmed by all modern legal systems, including those of the Member States. [11] Also, in 2006, the Council of Ministers adopted a recommendation on the European Prison Rules [12] which provides that '[a]ll detention shall be managed so as to facilitate the reintegration into free society of persons who have

10 — See recital 24 of the directive.

11 — For example, in Germany, the function of reintegration into society performed by the prison sentence is established in Article 2 of the Law on the execution of sentences of imprisonment (Strafvollzugsgesetz). In Spain, Article 25(2) of the 1978 Constitution provides that terms of imprisonment and detention measures are geared to re-education and social rehabilitation. In Italy, the third paragraph of Article 27 of the 1948 Constitution provides that punishment must not involve inhuman treatment and must be designed to re-educate the convicted person.

12 — Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules, adopted on 11 January 2006.

been deprived of their liberty'.[13] The International Covenant on Civil and Political Rights, adopted by the United Nations General Assembly and signed in New York on 16 December 1966, also provides, in Article 10(3), that '[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation'.

49. The European Court of Human Rights has also held that '[o]ne of the essential functions of a prison sentence is to protect society, for example by preventing a criminal from re-offending and thus causing further harm. At the same time, the Court recognises the legitimate aim of a policy of progressive social reintegration of persons sentenced to imprisonment. From that perspective it acknowledges the merit of measures — such as temporary release — permitting the social reintegration of prisoners'.[14]

50. Observance of the principle that criminal sanctions must have the function of rehabilitation is indissociable from the concept of human dignity and, as such, I am of the opinion that it belongs to the family of general principles of Union law.

51. For the abovementioned reasons, I will now draw the Court's attention to the special features of the present case, which concerns an expulsion decision intended to be taken following a parole measure, which is a means of enforcing a criminal sanction based on reintegration.

52. In the light of all the abovementioned factors, the question is now whether Mr Tsakouridis, who was born and has lived half his life in Germany, may be expelled from Germany on the grounds that he was sentenced to a term of imprisonment of six years and six months for drug-trafficking as part of an organised gang.

13 — See Part I, point 6, of the Appendix to that recommendation.

14 — See European Court of Human Rights, judgment of 24 October 2002 *Mastromatteo v. Italy*, ECHR 2002-VIII, paragraph 72.

B — *The concept of imperative grounds of public security*

53. By its first question, the national court is asking, in essence, whether, under Article 28(3)(a) of Directive 2004/38, the reasons why Mr Tsakouridis is the subject of an expulsion decision may be regarded as imperative grounds of public security.

54. By that question, the national court is seeking in fact to find out whether it is necessary to draw a distinction between the concept of public security and the concept of public policy, and whether the former is to be interpreted more narrowly than the latter, meaning that only an expulsion decision against a Union citizen who represents a threat to the very existence of a Member State and its institutions may be regarded as an expulsion decision based on imperative grounds of public security.

55. For the reasons I shall give below, I do not believe that the concept of public security is to be interpreted exclusively in a narrow sense which refers only to the protection of a Member State or its institutions.

56. There is a certain amount of case-law of the Court concerning the concept of public security. During the 1980s and 1990s it had to examine on several occasions whether a Member State could justify a barrier to the free movement of goods on grounds of public security. [15] Similarly, the Court has had to rule whether national measures which discriminated against women could be justified on grounds relating to the protection of the public security of a Member State. [16]

57. In all those cases, the Court accepted that the national measure which hindered the free movement of goods or discriminated against women could be justified on grounds of public security. However, the Court never specified the content of that concept, but merely stated that, within the meaning of Article 30 EC, the

15 — See Case 72/83 *Campus Oil and Others* [1984] ECR 2727; Case C-367/89 *Richardt and 'Les Accessoires Scientifiques'* [1991] ECR I-4621; and Case C-83/94 *Leifer and Others* [1995] ECR I-3231.

16 — Case 222/84 *Johnston* [1986] ECR 1651, and Case C-273/97 *Sirdar* [1999] ECR I-7403.

concept covers both the internal and external security of a Member State. [17]

58. The concept of external security clearly concerns a Member State's security in its relations with other States. In *Leifer and Others*, in which what was at issue was a measure making the sale of chemical products to Iraq subject to obtaining a licence, the Court stated that the risk of a serious disturbance to foreign relations or to the peaceful coexistence of nations may affect the security of a Member State. [18]

59. On the other hand, the concept of internal security is more difficult to define. Is it necessary to draw a clear distinction between that concept and the concept of public policy, as the national court suggests, or are the two concepts in reality if not indissociable, at least intimately connected?

1. The concepts of public policy and public security

60. The Court has held that the particular circumstances justifying recourse to the concept of public policy may vary from one country to another and from one period to another, and that it is therefore necessary in this matter to allow the competent national authorities an area of discretion within the limits imposed by the Treaty. [19] It has also stated that no scale of values is imposed upon the Member States for assessing conduct contrary to public policy. [20]

61. In that regard, it should be pointed out that, under Article 3(2) TEU, the free movement of persons is to be ensured in conjunction with appropriate measures with respect to the prevention and combating of crime. The purpose of the Union is to create, inter alia, a secure area. In order to achieve that objective, each Member State has, first and foremost, the fundamental duty of watching over that secure area on its own territory.

17 — See *Richardt and 'Les Accessoires Scientifiques'*, paragraph 22; *Leifer and Others*, paragraph 26; and also Case C-285/98 *Kreil* [2000] ECR I-69, paragraph 17.

18 — See paragraphs 28 and 29 of the judgment.

19 — *van Duyn*, paragraph 18, and Case 36/75 *Rutili* [1975] ECR 1219, paragraph 28.

20 — See *Adoui and Cornuaille*, paragraph 8.

62. Therefore, Member States remain, in principle, free to determine the requirements of public policy and public security in the light of their national needs. [21]

63. Accordingly, the Court has held that the concept of public policy includes, inter alia, the prevention of violence in large urban centres, [22] prevention of the sale of stolen cars, [23] protection of the right to mint coinage [24] or respect for human dignity. [25]

64. From the point of view of national security, the Court acknowledged in *Johnston* that the ban on carrying arms applicable to women in the Northern Ireland Police force was justified on grounds of public security, since they might become a more frequent target in a context of serious internal disturbances. [26]

65. However, in my view, that judgment is an exception because, in most of the cases relating to public policy and public security in which it has been called upon to give a ruling, the Court does not make a clear distinction between those two concepts. [27]

66. That lack of distinction is even more obvious in the judgment in *Oteiza Olazabal*. [28] In that case, the Court held that prevention of the activity of an armed and organised group may be regarded as falling within the maintenance of public security. [29] However, it is from the point of view of public policy that the Court goes on to examine whether the expulsion order made against the protagonist in that case was justified.

67. Moreover, the very wording of Article 27(2) of Directive 2004/38, which reproduces the case-law concerning public policy, [30] seems to confuse the two concepts. That provision states that measures taken *on grounds of public policy or public security* are to comply with the principle of proportionality and

21 — *Rutili*, paragraph 26, and Case C-54/99 *Église de scientologie* [2000] ECR I-1335, paragraph 17.

22 — *Bonsignore*.

23 — Case C-239/90 *Boscher* [1991] ECR I-2023.

24 — Case 7/78 *Thompson and Others* [1978] ECR 2247.

25 — Case C-36/02 *Omega* [2004] ECR I-9609.

26 — See paragraphs 35 and 36 of the judgment, See also *Sirdar*, paragraph 17.

27 — See, inter alia, *Bonsignore*; Case 48/75 *Royer* [1976] ECR 497; and Joined Cases C-65/95 and C-111/95 *Shingara and Radiom* [1997] ECR I-3343.

28 — Case C-100/01 [2002] ECR I-10981.

29 — See paragraph 35 of the judgment.

30 — *Rutili*, paragraph 28.

are to be based exclusively on the personal conduct of the individual concerned, and that such conduct must represent a genuine, present and sufficiently serious threat affecting *one of the fundamental interests of society*. In my view, it is that concept of a fundamental interest of society which is the common denominator of the two concepts.

68. Therefore, even though, in the light of the case-law of the Court and in particular the judgments in *Johnston* and *Oteiza Olazabal*, it is clear that a State's internal security is connected with the fight against terrorism, it is difficult or even artificial to confine the concepts of public policy and public security each to a definition with an exhaustive content.

69. That is all the more evident because, as we have seen, the Member States are free to determine public policy and public security requirements in accordance with their national needs. They retain exclusive competence as regards the maintenance of public order and the safeguarding of internal security on their territory and enjoy a margin of discretion in determining, according to particular social circumstances and to the importance attached by those States to a legitimate objective under Union law, the measures which are likely to achieve results. [31]

70. Indeed, although it is true that the Court has competence to ensure compliance with a right as fundamental as the right to enter and reside in a Member State, the fact remains that it is for the Member States alone to assess the threats to public policy and public security on their own territory. [32]

71. In that regard, it is clear that the Union legislature, in accordance with the case-law of the Court of Justice, wished to leave a certain discretion to the Member States with regard to the content of the concept of public security. Accordingly, Article 28(3)(a) of Directive 2004/38 states that the expulsion decision

31 — Case C-265/95 *Commission* v *France* [1997] ECR I-6959, paragraph 33, and Case C-394/97 *Heinonen* [1999] ECR I-3599, paragraph 43.

32 — See to that effect *van Duyn*, paragraph 18.

must be based on imperative grounds of public security 'as defined by Member States'.

72. Consequently, whereas, for some Member States, the threat of armed independence groups on their territory compromises their internal security, for others, it is the fight against the scourge of drug-trafficking by organised gangs which becomes a priority in ensuring security on their territory.

73. Indeed, although the Court has included the fight against drug-trafficking in the concept of public policy, [33] I am of the opinion that, very often, that kind of trafficking constitutes a direct threat to the physical safety of the population simply because drug-traffickers do not hesitate to organise themselves into armed gangs, causing urban violence.

74. In my view there is a real difference between a person who buys drugs for his personal consumption, acting contrary to public policy in that way, and a person who participates in a trafficking network, with all the attendant dangers for the physical safety of the population.

75. The same applies in other spheres, such as for example child pornography. Although, when a person looks at paedophile photographs on the Internet, public policy is unquestionably undermined, a higher threshold is crossed when he participates in the paedophile ring which produced those photographs.

76. The fact that the Court has acknowledged that the campaign against various forms of criminality linked to alcohol consumption seeks to safeguard internal security [34] confirms that analysis. In *Heinonen*, the Finnish Government had justified its measure restricting the importation of alcohol by the fact that the consumption of alcohol in Finland, which had increased significantly, had inter alia made drunk driving common, caused violence to increase in both frequency and seriousness, and led illegal markets to appear and multiply. [35]

33 — See Case C-348/96 *Calfa* [1999] ECR I-11, and Joined Cases C-428/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257.

34 — *Heinonen*, paragraph 43.

35 — Ibidem, paragraph 18.

77. In my opinion, public security must therefore be understood to include not only the security of the Member State and its institutions, but also all the measures designed to counteract serious threats to the values essential to the protection of its citizens.

78. I therefore consider that the grounds regarded by the Court as included in the concept of public policy may equally be covered by the concept of public security.

79. The effect of that is not, however, to reduce the safeguards which circumscribe the taking of an expulsion decision against a Union citizen.

80. Thus, where a Union citizen has resided on the territory of the host Member State for the 10 years preceding the expulsion decision, only *imperative grounds* of public security, in accordance with the definition I have given in point 77 of this Opinion, may justify such a decision.

2. The concept of 'imperative grounds of public security' within the meaning of Article 28(3) of Directive 2004/38

81. Although the Court has recognised numerous interests as being imperative grounds of general interest, [36] the concept of imperative grounds has not been given a separate definition.

82. However, the Court has already held that a measure designed to protect public security is an overriding reason in the general interest, [37] in the same way as public policy and public health.

83. Furthermore, it should be pointed out that Article 4(8) of Directive 2006/123/EC [38] defines overriding reasons as 'reasons recognised as such in the case-law of the Court of

36 — For an inexhaustive list, see inter alia, on fair trading and consumer protection, Case C-126/91 *Yves Rocher* [1993] ECR I-2361; on the cohesion of the tax system, Case C-524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I-2107; on the protection of consumers and of public order with regard to gaming, Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891; and, on road safety, Case C-54/05 *Commission* v *Finland* [2007] ECR I-2473.

37 — See, inter alia, Joined Cases 430/99 and C-431/99 *Sea-Land Service and Nedlloyd Lijnen* [2002] ECR I-5235, paragraphs 39 and 41.

38 — Directive of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36).

Justice, including the following grounds: public policy; public security; public safety [and] public health'.

84. Although, by its very nature, a ground of public security is an overriding reason, I think that the use of that expression is in fact designed to indicate that the reasons justifying the national measure at issue must be necessary and proportionate.

85. Where a national measure infringes fundamental freedoms, the Court has always concerned itself with determining whether that measure was justified, whether it was necessary for achieving the desired objective and whether there were not less restrictive means of achieving that objective. [39]

86. In the particular case of a measure restricting a person's right to enter and reside on grounds of public policy or public security, the Court has held that the competent national authorities must carry out a proportionality test, bearing in mind that such a measure may be justified on those grounds only if it is necessary for the protection of the interests which it is intended to guarantee and only in so far as those objectives cannot be attained by less restrictive measures. [40]

87. The competent national authorities must therefore take into account, in their assessment of where the fair balance lies between the legitimate interests in issue, the particular legal position of persons subject to Union law and the fundamental nature of the principle of the free movement of persons. [41]

88. Similarly, according to Article 27(2) of Directive 2004/38, only the personal conduct of the individual concerned may provide grounds for his expulsion, and justifications that are isolated from the particulars of the

39 — See, inter alia, in respect of the free movement of goods, *Boscher,* paragraphs 22 and 23; in respect of the freedom to provide services, *Omega*, paragraph 36; and, in respect of the free movement of persons, *Oteiza Olazabal*, paragraph 43.

40 — *Oteiza Olazabal*, paragraph 43. See, as regards the free movement of capital, *Église de scientologie*, paragraph 18, and, as regards the free movement of goods, *Omega*, paragraph 36.

41 — *Orfanopoulos and Oliveri*, paragraph 96. See also the Communication from the Commission to the Council and the European Parliament on the special measures concerning the movement and residence of citizens of the Union which are justified on grounds of public policy, public security or public health (COM(1999) 372 final).

case or that rely on considerations of general prevention are not acceptable. [42]

89. Finally, also according to that provision, the threat to public security represented by that conduct must be a present threat. [43] In that regard, the Court has held that the requirement of the existence of a present threat must, as a general rule, be satisfied at the time of the expulsion. [44]

90. As we have seen in points 37 to 44 of this Opinion, Directive 2004/38 provides for protection against expulsion, a protection which is enhanced according to the length of residence of the Union citizen. Article 28(3) of the directive constitutes the final stage of protection and therefore the strongest.

91. Therefore, in view of the position of that paragraph in the structure of Article 28 of Directive 2004/38 and in the light of the length of time the Union citizen concerned has resided in the host Member State, I consider that the level of justification required when assessing proportionality must be high.

92. I also note that, under Article 28(3)(b) of Directive 2004/38, minors enjoy the same level of protection as persons who have resided in the host Member State for the 10 years preceding the expulsion decision. That clearly shows that such a decision may be adopted only as an exception, having regard to the extreme seriousness of the conduct alleged.

93. It is therefore for the competent national authority, and if appropriate the national court, to satisfy themselves that the decision to expel the Union citizen is based on reasons which relate specifically to the facts of each case and the seriousness of the threat to persons.

94. In the present case, which concerns an expulsion decision applicable on the expiry of the criminal sanction imposed, I consider that the proportionality test takes on a special significance which requires the competent

42 — See, inter alia, *Bonsignore*, paragraphs 5 and 6.

43 — *Bouchereau*, paragraph 28, and Case C-503/03 *Commission* v *Spain* [2006] ECR I-1097, paragraph 44.

44 — *Orfanopoulos and Oliveri*, paragraphs 78 and 79.

authority to take account of factors showing that the decision adopted is such as to prevent the risk of re-offending.

95. In my view, when that authority takes an expulsion decision against a Union citizen following the enforcement of the criminal sanction imposed, it must state precisely in what way that decision does not prejudice the offender's rehabilitation. Such a step, which relates to the individualisation of the sanction of which it is an extension, seems to me to be the only way of upholding the interests of the individual concerned as much as the interests of the Union in general. Even if he is expelled from a Member State and prohibited from returning, when released the offender will be able, as a Union citizen, to exercise his freedom of movement in the other Member States. It is therefore in the general interests that the conditions of his release should be such as to dissuade him from committing crimes and, in any event not risk pushing him back into offending.

96. In the main proceedings, the classification of the offence and the nature of the sanction imposed are indicators to be taken into account in assessing the fundamental nature, for society, of the interest protected. Similarly, the sanction imposed compared to the maximum possible sentence and Mr Tsakouridis' involvement in the drug-trafficking which led to his sentence are, in my view, further objective factors which will help the national court to determine the degree of seriousness of his conduct. Conversely, in order to achieve that fair balance, it is also necessary to weigh up Mr Tsakouridis' personal circumstances, such as, for example, the fact that his family resides in the host Member State, that he carries on an economic activity in that State and that he has links with his State of origin, as well as the effects produced or the information provided, regarding the degree of reintegration or the risk of re-offending, by the aid, advice and surveillance measures which accompanied his conditional release. The failure of those measures may justify the envisaged expulsion.

97. Therefore, in the light of all the foregoing considerations, in my opinion Article 28(3)(a) of Directive 2004/38 is to be interpreted as meaning that the concept of public security does not have only the narrow sense of a threat to the internal or external security of the host Member State or to the existence of its institutions, but also covers serious threats to a fundamental interest of society such as the values essential to the protection

of its citizens, characterised by that State by means of the offences it establishes for their protection.

98. It is for the competent national authority which takes the expulsion decision to give specific reasons for doing so on the basis of factual and legal circumstances which meet those criteria.

99. Furthermore, where, as in the present case, the expulsion decision is taken on the expiry of the criminal sanction imposed, the competent national authority must state in what respect that decision is not contrary to the rehabilitation function of the sanction.

C — *The length of residence condition*

100. By the second, third and fourth questions, the national court wishes to know, in essence, whether Mr Tsakouridis may enjoy enhanced protection even though his residence in Germany during the 10 years preceding the expulsion decision was interrupted by absences from that territory and his return to it is the consequence of a legal decision.

101. Under Article 28(3)(a) of Directive 2004/38, enjoyment of that protection is subject to having lived in the host Member State for the 10 years preceding the expulsion decision. However, that article is silent as regards the effects which absences from that territory during that period might have on the right to enhanced protection.

102. Therefore, the national court raises the question whether it is necessary to apply mutatis mutandis the conditions for the grant and loss laid down in Article 16 of that directive in so far as concerns the right of permanent residence.

103. Accordingly, the acquisition of enhanced protection would not be prevented by temporary absences which do not exceed a total of six months a year [45] and the right to enhanced protection could be lost only through absence from the host Member State for a period exceeding two consecutive years. [46]

104. The views of the governments of the Member States which have submitted written observations in this case differ on this point.

105. According to the Danish and Hungarian Governments, temporary absences from the host Member State have no effect provided that links with that State are not broken. The Danish Government considers that Article 16(4) Directive 2004/38 may be applied mutatis mutandis, whereas the Hungarian Government considers that that provision may play an indicative role in the assessment of the loss of the link with the host Member State.

45 — See Article 16(3) of Directive 2004/38.
46 — See Article 16(4) of that directive.

106. The United Kingdom Government takes the view that a Union citizen enjoys enhanced protection where he has acquired a right of permanent residence on the territory of the host Member State after a period of residence of five years and has subsequently resided lawfully in that State during a further five-year period.

107. According to the Belgian Government, no transposition mutatis mutandis is possible. It considers that, once a Union citizen has left the host Member State, his right to enhanced protection is lost, and no exception is allowed.

108. The Polish Government and the European Commission also both consider that an application mutatis mutandis of Article 16(4) of Directive 2004/38 is not possible. According to the Polish Government, the loss of enhanced protection is justified only by the breaking of all links with the host Member State. The Commission considers that it is necessary to examine whether the Union citizen's interests are still centred in the host Member State. In that case, short absences should not affect calculation of the length of residence.

109. In my view, having regard to the structure of Article 28(3)(a) of Directive 2004/38, it is not possible to apply Article 16(4) of the directive to it mutatis mutandis. I consider that it is the retention of a strong link with the host Member State which will be decisive.

110. As we have seen, the wording of Article 28(3)(a) of Directive 2004/38 does not make it clear what would be the consequence of absences from the host Member State on the benefit or loss of enhanced protection.

111. According to settled case-law, where the wording of a provision of Union law does not make it possible to determine exactly how that provision should be construed, it is necessary to take account of the scheme and objectives of the legislation of which it is part. [47]

112. Consequently, the questions raised by the national court are to be answered taking into account the context of the provision at issue, and the broad logic and objectives of Directive 2004/38.

113. Citizenship of the Union confers on every citizen of the Union a fundamental right to move and reside freely within the territory of the Member States. [48] The aim of the directive is to simplify and strengthen that right [49] so that Union citizens can move between Member States in the same way as nationals of a Member State moving around or changing their place of residence or job in their own country. [50]

114. The intention of the Union legislature is thus that Union citizens, after residing for several years on the territory of a Member State other than their Member State of origin, should feel genuinely integrated into their host State.

47 — See to this effect Case C-533/07 *Falco Privatstiftung Rabitsch* [2009] ECR I-3327, paragraphs 19 and 20. See also Case 292/82 *Merck* [1983] ECR 3781, paragraph 12; Case C-191/99 *Kvaerner* [2001] ECR I-4447, paragraph 30; and Case C-283/05 *ASML* [2006] ECR I-12041, paragraphs 16 and 22.

48 — See recital 1 in the preamble to Directive 2004/38.

49 — See recital 3 in the preamble to Directive 2004/38.

50 — See the proposal for a directive referred to in footnote 8.

115. Since expulsion from the host Member State may seriously harm such citizens, as we have seen the Union legislature has introduced a mechanism based on the principle of proportionality, to afford protection against expulsion. [51]

116. As the length of residence is a factor in integration, the Union legislature drafted Article 28 of Directive 2004/38 in such a way that the longer the period of residence in the host Member State, the stricter are the grounds on which that State may adopt an expulsion decision.

117. Under Article 28(1) of that directive, the host Member State may take an expulsion decision on grounds of public policy or public security against a Union citizen who does not have the right of permanent residence. [52] Union citizens who have acquired a right of permanent residence cannot be the subject of such a decision except on *serious grounds* of public policy or public security, in accordance with Article 28(2) of Directive 2004/38. Finally, under Article 28(3)(a) of the directive, if the Union citizen has resided in the host Member State for the 10 years preceding the expulsion decision, the decision can be based only on *imperative grounds* of public security.

118. I note, therefore, that the greater the degree of integration of Union citizens into the host Member State, having regard to the length of time they have resided in that State, the greater must be the degree of protection against expulsion. [53]

119. It seems to me that there must therefore be a link between the level of integration into that State and the level of protection afforded.

120. The Union legislature started from the presumption that a long period of residence in the host Member State shows a high level

51 — See recital 23 of Directive 2004/38.

52 — I should point out that, under Article 16(1) of the directive, the right of permanent residence is acquired following residence for a continuous period of five years in the host Member State.

53 — See recital 24 in the preamble to Directive 2004/38.

of integration. I therefore consider that, after at least 10 years' presence in the host Member State, integration may be presumed complete.

121. In my view, that level of integration, which is required at the final stage of protection against expulsion, cannot allow for absences from the host Member State which may break the close link between the Union citizen and that State.

122. However, it is impossible to impose a complete prohibition on absences on the Union citizen. It would be contrary to the objective of the free movement of persons pursued by Directive 2004/38 [54] to discourage Union citizens from exercising their freedom of movement on the ground that a mere absence from the host Member State may affect their right to enhanced protection against expulsion.

123. I therefore consider that temporary absences for work purposes or for holidays should not affect the period required at the highest level of protection against expulsion. Such absences do not appear to me likely to affect the close links between a Union citizen and the host Member State.

124. On the other hand, I consider that an absence of more than 16 months, such as that in the present case, may cause the loss of the enhanced protection granted under Article 28(3)(a) of Directive 2004/38 and that, therefore, it is not possible to apply mutatis mutandis Article 16(4) of the directive.

125. In the present case, the national court indicates that Mr Tsakouridis was absent from Germany, on the first occasion, from March 2004 until the middle of October 2004, that is for approximately six-and-a-half months and, on the second occasion, from the middle of October 2005 until March 2007, that is, a little over 16 months.

54 — See recital 2 in the preamble to that directive.

126. As regards Mr Tsakouridis' first absence, the file shows that he left in order to carry out what appears to be seasonal employment in Greece.

127. I consider that it may be conceded that an absence for that reason did not affect the period required for obtaining enhanced protection under Article 28(3)(a) of Directive 2004/38. In my view, it is then necessary to determine whether the link between the Union citizen concerned and the host Member State is still as strong, by checking for example on his return to that State whether he maintained links with members of his family also established in that State, whether he kept a home there or whether he took up long-term employment within a reasonable period.

128. In contrast, Mr Tsakouridis' second absence, from the middle of October 2005 until March 2007, which was interrupted not of his own accord but because he was subject to an enforced return to the host Member State following a legal decision, interrupted the 10-year period. I consider that such an absence shows, in actual fact, that the Union citizen established himself in another Member State and that, therefore, the link between him and the host Member State is no longer as strong and may even be totally broken.

129. In the light of the foregoing, I consider it unlikely that Mr Tsakouridis may rely on the right to enhanced protection provided for in Article 28(3)(a) of Directive 2004/38.

130. It should also be pointed out that Union citizens, whatever their length of residence in the host Member State, are not deprived of protection against expulsion. [55] Furthermore, Article 32(1) of the directive provides that persons excluded may submit an application for lifting of the exclusion order after a reasonable period and, in any event, after three years from enforcement of the final exclusion

55 — See Article 28(1) and (2) of Directive 2004/38.

order which cannot, under any circumstances, be imposed for life.[56]

131. In the light of the foregoing, I consider that Article 28(3)(a) of Directive 2004/38 is to be interpreted as meaning that, as a general rule, temporary absences which do not undermine the strong link between the Union citizen and the host Member State — a matter which it is for the national court to determine — do not affect calculation of the 10-year period required under Article 28(3)(a) of Directive 2004/38.

132. On the other hand, an absence of more than 16 months from the territory of the host Member State which, as in the present case, ended only with the enforced return of the Union citizen following a legal decision taken by the competent authorities of that State, is likely to cause that citizen to lose the right to enhanced protection provided for in Article 28(3)(a) of Directive 2004/38 in so far as it reflects the breaking of the strong link between that citizen and that State, which it is for the national court to define.

V — Conclusion

133. In the light of all the foregoing considerations, I propose that the Court give the following reply to the Verwaltungsgerichtshof Baden-Württemberg:

'Article 28(3)(a) 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

56 — See recital 27 in the preamble to that directive. See also the judgment in *Calfa*, paragraphs 18 and 29.

members to move and reside freely within the territory of the Member States, is to be interpreted as meaning:

— the concept of public security does not have only the narrow sense of a threat to the internal or external security of the host Member State or to the existence of its institutions, but also covers serious threats to a fundamental interest of society such as the values essential to the protection of its citizens, characterised by that State by means of the offences it establishes for their protection;

— it is for the competent national authority which takes the expulsion decision to give specific reasons for doing so on the basis of factual and legal circumstances which meet those criteria;

— where, as in the present case, the expulsion decision is taken on the expiry of the criminal sanction imposed, the competent national authority must state in what respect that decision is not contrary to the rehabilitation function of the sanction;

— temporary absences which do not undermine the strong link between the Union citizen and the host Member State — a matter which it is for the national court to determine — do not affect calculation of the 10-year period required in Article 28(3)(a) of Directive 2004/38;

— an absence of more than 16 months from the territory of the host Member State which, as in the present case, ended only with the enforced return of the Union citizen following a legal decision taken by the competent authorities of that State, is likely to cause that citizen to lose the right to enhanced protection provided for in Article 28(3)(a) of Directive 2004/38, in so far as it reflects the breaking of the strong link between that citizen and that State, which it is for the national court to define.'