Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

22 May 2012 *

(Freedom of movement for persons — Directive 2004/38/EC — Article 28(3)(a) — Expulsion decision — Criminal conviction — Imperative grounds of public security)

In Case C-348/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Oberverwaltungsgericht für das Land Nordrhein-Westfalen (Germany), made by decision of 20 August 2009, received at the Court on 31 August 2009, in the proceedings

P. I.

v

Oberbürgermeisterin der Stadt Remscheid,

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues (Rapporteur), K. Lenaerts, J.-C. Bonichot, U. Lõhmus, Presidents of Chambers, A. Rosas, E. Levits, A. Ó Caoimh, L. Bay Larsen, T. von Danwitz, A. Arabadjiev and C. Toader, Judges,

Advocate General: Y. Bot,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 10 January 2012,

after considering the observations submitted on behalf of:

— Mr I., by G. L. Pagliaro and A. Caramazza, Rechtsanwälte,

— the German Government, by T. Henze and J. Möller, acting as Agents,

— the Belgian Government, by L. Van den Broeck, acting as Agent,

— the Danish Government, by C. Vang, acting as Agent,

— the Estonian Government, by M. Linntam, acting as Agent,

— the Irish Government, by D. O'Hagan and J. Kenny, acting as Agents, and D. Conlan Smyth, Barrister,

* Language of the case: German.

— the Italian Government, by G. Palmieri, acting as Agent, and S. Varone, avvocato dello Stato,

— the Netherlands Government, by C. Wissels and M. Noort, acting as Agents,

— the Polish Government, by M. Szpunar, acting as Agent,

— the European Commission, by D. Maidani and S. Grünheid, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 6 March 2012,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of 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 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 OJ 2004 L 229, p. 35 and OJ 2005 L 197, p. 34).

2 The reference has been made in proceedings between Mr. I., an Italian national, and the Oberbürgermeisterin der Stadt Remscheid (Germany), concerning the latter's decision determining the loss of Mr I.'s right of entry and residence in Germany and ordering him to leave Germany, failing which he would be deported to Italy.

Legal context

European Union law

Directive 2004/38

3 Recitals 23 and 24 in the preamble to Directive 2004/38 are worded as follows:

'(23) Expulsion of Union citizens and their family members on grounds of public policy or public security is a measure that can seriously harm persons who, having availed themselves of the rights and freedoms conferred on them by the [EC] Treaty, have become genuinely integrated into the host Member State. The scope for such measures should therefore be limited in accordance with the principle of proportionality to take account of the degree of integration of the persons concerned, the length of their residence in the host Member State, their age, state of health, family and economic situation and the links with their country of origin.

(24) Accordingly, the greater the degree of integration of Union citizens and their family members in the host Member State, the greater the degree of protection against expulsion should be. Only in exceptional circumstances, where there are imperative grounds of public security, should an expulsion measure be taken against Union citizens who have resided for many years in the territory of the host Member State, in particular when they were born and have resided there throughout their life. In addition, such exceptional circumstances should also apply to an expulsion measure taken against minors, in order to protect their links with their family, in accordance with the United Nations Convention on the Rights of the Child of 20 November 1989.'

4 Article 27(1) and (2) of Directive 2004/38 provide as follows:

‘1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.

2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.

The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.’

5 Article 28 of Directive 2004/38 provides 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.’

6 Article 33 of Directive 2004/38 is worded as follows:

‘1. Expulsion orders may not be issued by the host Member State as a penalty or legal consequence of a custodial penalty, unless they conform to the requirements of Articles 27, 28 and 29.

2. If an expulsion order, as provided for in paragraph 1, is enforced more than two years after it was issued, the Member State shall check that the individual concerned is currently and genuinely a threat to public policy or public security and shall assess whether there has been any material change in the circumstances since the expulsion order was issued.’

Directive 2011/93/EU

7 The purpose of Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA (OJ 2011 L 335, p. 1) is to establish minimum rules concerning the definition of criminal offences and sanctions in the area of sexual abuse and sexual exploitation of children, child pornography and solicitation of children for sexual purposes. It also introduces provisions to strengthen the prevention of those crimes and the protection of the victims thereof.

National legislation

8 Paragraph 6 of the Law on general freedom of movement of citizens of the Union (Gesetz über die allgemeine Freizügigkeit von Unionsbürgern) of 30 July 2004 (BGBl. 2004 I, p. 1950), as amended by the Law amending the Federal Police Law and other laws (Gesetz zur Änderung des Bundespolizeigesetzes und anderer Gesetze) of 26 February 2008 (BGBl. 2008 I, p. 215), provides as follows:

'(1) Loss of the right under Paragraph 2(1) may, without prejudice to Paragraph 5(5), be determined and the document attesting to the right of residence or permanent residence under Community law withdrawn and the residence permit or permanent residence permit revoked only on grounds of public policy, security or health (Articles 39(3) and 46(1) of the Treaty …). Entry may also be refused on those grounds. A determination on grounds of public health may be made only if the illness occurs within the first three months from entry.

(2) The existence of a criminal conviction shall not in itself constitute a sufficient ground for the adoption of the decisions or measures referred to in subparagraph 1. Only criminal convictions which have not yet been erased from the Central Register may be taken into account, and only in so far as the circumstances on which they are based disclose personal conduct which constitutes a present threat to public policy. There must be a genuine and sufficiently serious threat affecting a fundamental interest of society.

(3) When a decision under subparagraph 1 is made, account must be taken in particular of how long the person concerned has resided in Germany, his age, state of health, family and economic situation, social and cultural integration in Germany and the extent of his ties to his country of origin.

(4) Once a right of permanent residence has been acquired, a determination under subparagraph 1 may be made only on serious grounds.

(5) In the case of Union citizens and their family members who have resided in Federal territory for the previous 10 years, and in the case of minors, a determination under subparagraph 1 may be made only on imperative grounds of public security. In the case of minors, this does not apply where the loss of the right of residence is necessary for the best interests of the child. Imperative grounds of public security may exist only if the person concerned, after being convicted of one or more intentional offences, has been definitively sentenced to at least five years' imprisonment or youth custody or if, on the occasion of the most recent definitive conviction, a term of preventive detention was ordered, where the security of the Federal Republic of Germany is affected or the person concerned poses a terrorist risk.

…'

The dispute in the main proceedings and the question referred for a preliminary ruling

9 Mr I. was born in Italy on 3 September 1965 and has lived in Germany since 1987. In April 1987, he was granted his first residence permit, which has been subsequently extended on a number of occasions. He is single and has no children. He has never gained a school-leaving certificate or professional qualifications and has been employed in Germany only occasionally. Mr I. has five siblings, some of whom live in Germany and some of whom live in Italy. Since his arrest in April 2006, his mother has lived partly in Germany and partly in Italy.

10 By judgment of 16 May 2006, which became definitive on 28 October 2006, the Landgericht Köln (Regional Court, Cologne) sentenced Mr I. to a term of imprisonment of seven years and six months for the sexual assault, sexual coercion and rape of a minor. The acts which gave rise to that

conviction took place between 1990 and 2001. From 1992, Mr I. compelled his victim to have sexual intercourse with him or perform other sexual acts on an almost weekly basis by using force and threatening to kill her mother or brother. The victim of the criminal offences was his former partner's daughter, who was 8 years old when the offences commenced. Mr I. has been in custody since 10 January 2006 and is due to complete his sentence on 9 July 2013.

11 By decision of 6 May 2008, the Oberbürgermeisterin der Stadt Remscheid, the defendant in the main proceedings, determined that Mr I. had lost the right to enter and reside in Germany, ordered that that measure be immediately enforceable and ordered Mr I. to leave the territory, failing which he would be deported to Italy.

12 The defendant in the main proceedings states that Mr I. had been relentless in his criminal conduct and caused his victim 'endless suffering' through abuse lasting many years. The possibility cannot be ruled out that, in similar circumstances, he will re-offend, committing acts of the same or similar nature to those he engaged in before his arrest, on account in particular of the extended period during which the offences were perpetrated and the continuing lack of remorse on Mr I.'s part. The interests of Mr I. which merit protection have nevertheless been taken into consideration and there has been no particular economic or social integration into German society.

13 On 12 June 2008, Mr I. brought an action against the expulsion decision of 6 May 2008 and requested that enforcement of the order be suspended. By judgment of 14 July 2008, the Verwaltungsgericht Düsseldorf (Administrative court, Düsseldorf) dismissed that action, considering in particular that the acts which warranted the conviction revealed personal conduct which gave rise to fears of a present, genuine and sufficiently serious threat to one of the fundamental interests of society, namely the protection of girls and women from sexual assault and rape. Mr I. had been relentless in his criminal conduct, having regard in particular to the lengthy period during which the offences were committed, the age of the victim and the measures he took to prevent the offences being discovered, by continually threatening his victim and isolating her.

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

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

Consideration of the question referred

15 At paragraph 56 of its judgment in Case C-145/09 *Tsakouridis* [2010] ECR I-11979, the Court held that Article 28(3) of Directive 2004/38 must be interpreted as meaning that the fight against crime in connection with dealing in narcotics as part of an organised group is capable of being covered by the concept of 'imperative grounds of public security', which may justify a measure expelling a Union citizen who has resided in the host Member State for the preceding 10 years.

16 In response to a written question put by the Court following the judgment in *Tsakouridis*, the referring court stated that doubts remained in the main proceedings as to whether and, if so, under what conditions, the fight against other forms of crime than drug-related crime as part of an organised group may also constitute an 'imperative ground of public security' within the meaning of Article 28(3) of Directive 2004/38.

17 The referring court asks, in particular, whether it is possible to expel from the host Member State Union citizens who, whilst not belonging to a group or any other kind of criminal organisation, have committed extremely serious criminal offences which affect individual interests benefiting from legal protection, such as sexual autonomy, life, freedom and physical integrity, where there is a high level of risk that they will re-offend, committing other similar offences.

18 As regards public security, the Court has already held that this covers both a Member State's internal and its external security (*Tsakouridis*, paragraph 43 and the case-law cited).

19 According to the Court, it follows from the wording and scheme of Article 28(3) of Directive 2004/38 that, by subjecting all expulsion measures in the cases referred to in that provision to the existence of 'imperative grounds' of public security, a concept which is considerably stricter than that of 'serious grounds' within the meaning of Article 28(2), the European Union legislature clearly intended to limit measures based on Article 28(3) to 'exceptional circumstances', as set out in recital 24 in the preamble to that directive (*Tsakouridis*, paragraph 40).

20 The concept of 'imperative grounds of public security' presupposes not only the existence of a threat to public security, but also that such a threat is of a particularly high degree of seriousness, as is reflected by the use of the words 'imperative grounds' (*Tsakouridis*, paragraph 41).

21 It should also be noted that European Union law does not impose on Member States a uniform scale of values as regards the assessment of conduct which may be considered to be contrary to public security (see, by analogy, Case C-268/99 *Jany and Others* [2001] ECR I-8615, paragraph 60).

22 Article 28(3) of Directive 2004/38 provides that imperative grounds of public security are to be 'defined by Member States'.

23 While Member States essentially retain the freedom to determine the requirements of public policy and public security in accordance with their national needs, which can vary from one Member State to another and from one era to another, particularly as justification for a derogation from the fundamental principle of free movement of persons, those requirements must nevertheless be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the institutions of the European Union (see, inter alia, Case C-33/07 *Jipa* [2008] ECR I-5157, paragraph 23; C-430/10 *Gaydarov* [2011] ECR I-11637, paragraph 32; and Case C-434/10 *Aladzhov* [2011] ECR I-11659, paragraph 34).

24 In order to determine whether offences such as those committed by Mr I. may be covered by the concept of 'imperative grounds of public security', the following factors must be taken into account.

25 Article 83(1) TFEU provides that the sexual exploitation of children is one of the areas of particularly serious crime with a cross-border dimension in which the European Union legislature may intervene.

26 Reflecting that objective, the first recital in the preamble to Directive 2011/93 states that sexual abuse and sexual exploitation of children constitute serious violations of fundamental rights, in particular the rights of children to the protection and care necessary for their well-being, as provided for by the United Nations Convention on the Rights of the Child of 20 November 1989 and the Charter of Fundamental Rights of the European Union.

27 The serious nature of those kinds of offences is also apparent from Article 3 of Directive 2011/93, which provides, in Article 3(4), that engaging in sexual activities with a child who has not reached the age of sexual consent is to be punishable by a maximum term of imprisonment of at least 5 years, and Article 3(5)(i), which states that engaging in such activities where abuse is made of a recognised position of trust, authority or influence over the child is to be punishable by a maximum term of imprisonment of at least 8 years. Under Article 3(5)(iii), where use is made of coercion, force or

threats, that term of imprisonment must be at least 10 years. In accordance with Article 9(b) and (g) of Directive 2011/93, the fact that the offence was committed by a member of the child's family, a person cohabiting with the child or a person who has abused a recognised position of trust or authority and that the offence involved serious violence or caused serious harm to the child are to be regarded as aggravating circumstances.

28 It is apparent from the above that it is open to the Member States to regard criminal offences such as those referred to in the second subparagraph of Article 83(1) TFEU as constituting a particularly serious threat to one of the fundamental interests of society, which might pose a direct threat to the calm and physical security of the population and thus be covered by the concept of 'imperative grounds of public security', capable of justifying an expulsion measure under Article 28(3) of Directive 2004/38, as long as the manner in which such offences were committed discloses particularly serious characteristics, which is a matter for the referring court to determine on the basis of an individual examination of the specific case before it.

29 Should the referring court find that, according to the particular values of the legal order of the Member State in which it has jurisdiction, offences such as those committed by Mr I. pose a direct threat to the calm and physical security of the population, that should not necessarily lead to the expulsion of the person concerned.

30 Under the second subparagraph of Article 27(2) of Directive 2004/38, the issue of any expulsion measure is conditional on the requirement that the personal conduct of the individual concerned must represent a genuine, present threat affecting one of the fundamental interests of society or of the host Member State, which implies, in general, the existence in the individual concerned of a propensity to act in the same way in the future.

31 It should be added that where an expulsion measure has been adopted as a penalty or legal consequence of a custodial penalty, but is enforced more than two years after it was issued, Article 33(2) of Directive 2004/38 requires the Member State to check that the individual concerned is currently and genuinely a threat to public policy or public security and to assess whether there has been any material change in the circumstances since the expulsion order was issued.

32 Lastly, as is clear from the terms in which Article 28(1) of Directive 2004/38 is couched, before taking an expulsion decision on grounds of public policy or public security, the host Member State must 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 that State and the extent of his/her links with the country of origin.

33 In the light of the foregoing considerations, the answer to the question referred is that Article 28(3)(a) of Directive 2004/38 must be interpreted as meaning that it is open to the Member States to regard criminal offences such as those referred to in the second subparagraph of Article 83(1) TFEU as constituting a particularly serious threat to one of the fundamental interests of society, which might pose a direct threat to the calm and physical security of the population and thus be covered by the concept of 'imperative grounds of public security', capable of justifying an expulsion measure under Article 28(3), as long as the manner in which such offences were committed discloses particularly serious characteristics, which is a matter for the referring court to determine on the basis of an individual examination of the specific case before it.

34 The issue of any expulsion measure is conditional on the requirement that the personal conduct of the individual concerned must represent a genuine, present threat affecting one of the fundamental interests of society or of the host Member State, which implies, in general, the existence in the individual concerned of a propensity to act in the same way in the future. Before taking an expulsion

decision, the host Member State must 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 that State and the extent of his/her links with the country of origin.

Costs

35 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

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 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, must be interpreted as meaning that it is open to the Member States to regard criminal offences such as those referred to in the second subparagraph of Article 83(1) TFEU as constituting a particularly serious threat to one of the fundamental interests of society, which might pose a direct threat to the calm and physical security of the population and thus be covered by the concept of 'imperative grounds of public security', capable of justifying an expulsion measure under Article 28(3), as long as the manner in which such offences were committed discloses particularly serious characteristics, which is a matter for the referring court to determine on the basis of an individual examination of the specific case before it.

The issue of any expulsion measure is conditional on the requirement that the personal conduct of the individual concerned must represent a genuine, present threat affecting one of the fundamental interests of society or of the host Member State, which implies, in general, the existence in the individual concerned of a propensity to act in the same way in the future. Before taking an expulsion decision, the host Member State must 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 that State and the extent of his/her links with the country of origin.

[Signatures]