OPINION OF ADVOCATE GENERAL ELMER

delivered on 12 October 1995 *

1. The Court of Appeal, in a case concerning exclusion under the Prevention of Terrorism (Temporary Provisions) Act 1989 (hereinafter 'the Act'), has submitted to the Court for a preliminary ruling a number of questions on the interpretation of Article 9 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 (hereinafter 'the directive'). [1]

The relevant provisions of Community law

2. The directive was drafted pursuant to, *inter alia*, Article 56(2) of the Treaty and has as its main objective an approximation of the procedures followed in each Member State when invoking grounds of public policy, public security or public health in matters connected with the movement or residence of foreign nationals (second recital in the preamble). The third recital in the preamble also stresses that, in each Member State, nationals of other Member States should have adequate legal remedies available to them in respect of the decisions of the administration in such matters.

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

Article 7 of the directive provides that any decision to refuse the issue or renewal of a residence permit or to expel a person from the territory of a Member State must specify the period allowed to that person for leaving that territory. The directive is thus based on a distinction between the decision on, *inter alia*, expulsion and the implementation of that decision ('removal').

Under Article 8 of the directive, the person concerned must 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

* Original language: Danish.

1 — OJ, English Special Edition 1963-1964, p. 117.

State concerned in respect of acts of the administration.

Article 9 of the directive is worded as follows:

'*Article 9*

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.'

The national legislation

3. Section 7(1)(a) of the Act provides as follows:

'If the Secretary of State is satisfied that any person —

(a) is or has been concerned in the commission, preparation or instigation of acts of terrorism to which this Part of this Act applies ...

the Secretary of State may make an exclusion order against him.'

With regard to a person's right to make representations, section 4(4) brings into effect Schedule 2 to the Act, paragraph 3 of which provides as follows:

'(1) If after being served with notice of the making of an exclusion order the person against whom it is made objects to the order he may —

(a) make representations in writing to the Secretary of State setting out the grounds of his objections; and

(b) include in those representations a request for a personal interview with the person or persons nominated by the Secretary of State under subparagraph (5) below.

(2) Subject to subparagraphs (3) and (4) below, a person against whom an exclusion order has been made must exercise the rights conferred by subparagraph (1) above within seven days of the service of the notice.

(3) Where before the end of that period —

(a) he has consented to his removal under paragraph 5 below from Great Britain, Northern Ireland or the United Kingdom, as the case may be; and

(b) he has been removed accordingly,

he may exercise the rights conferred by subparagraph (1) above within fourteen days of his removal.

(4) ...

(5) If a person exercises those rights within the period within which they are required to be exercised by him, the matter shall be referred for the advice of one or more persons nominated by the Secretary of State.

(6) Where subparagraph (2) above applies, the person against whom the exclusion order has been made shall be granted a personal interview with the person or persons so nominated.

(7) Where subparagraph (3) or (4) above applies, the person against whom the exclusion order has been made shall be granted a personal interview with the person or persons so nominated if it appears to the Secretary of State that it is reasonably practicable to grant him such an interview in an appropriate country or territory within a reasonable period from the date on which he made his representations.'

Paragraph 4 of Schedule 2 to the Act is worded as follows:

'(1) Where the Secretary of State receives representations in respect of an exclusion order under paragraph 3 above he shall reconsider the matter as soon as reasonably practicable after receiving the representations and any report of an interview relating to the matter which has been granted under that paragraph.

(2) In reconsidering a matter under this paragraph the Secretary of State shall take into account everything which appears to him to be relevant and in particular —

(a) the representations relating to the matter made to him under paragraph 3 above;

(b) the advice of the person or persons to whom the matter was referred by him under that paragraph; and

(c) the report of any interview relating to the matter granted under that paragraph.

(3) The Secretary of State shall thereafter, if it is reasonably practicable to do so, give notice in writing to the person against whom the exclusion order has been made of any decision he takes as to whether or not to revoke the order.'

The facts of the case

4. John Gerald Gallagher is an Irish citizen. Between May 1987 and September 1989 he travelled on several occasions to England in order to look for work. He returned to England in April 1990. On this occasion he was successful in finding work in London, and set up house with his girlfriend in Eltham.

5. On 24 September 1991, Mr Gallagher was arrested by the police and detained at Paddington Green police station under the provisions of the Act. On 27 September 1991, the Secretary of State decided, pursuant to section 7 of the Act, to make an order excluding Mr Gallagher from the United Kingdom on the ground that he was satisfied that Mr Gallagher 'is or has been concerned in the commission, preparation or instigation of acts of terrorism connected with the affairs of Northern Ireland'. It appears from the documents in the case that the notification given to Mr Gallagher did not specify the particular grounds on which the decision to exclude him had been taken.

6. Mr Gallagher consented to his immediate removal to Ireland for family reasons. He wished to be with his girlfriend, who was about to give birth. After his removal, he exercised his right to make representations under subparagraph (3), in conjunction with subparagraph (1), of paragraph 3 of Schedule 2 to the Act. An interview was held on 6 December 1991 in the British Embassy in Dublin between Mr Gallagher and an adviser nominated by the Secretary of State. Mr Gallagher's solicitor, his wife and their child were also present during the interview, which lasted approximately one hour. The adviser in question did not reveal his name and did not give any particulars of the grounds on which the Secretary of State had relied in making the exclusion order. The Secretary of State reconsidered the case pursuant to paragraph 4 of Schedule 2 to the Act but refused to alter his decision.

The order for reference

7. Mr Gallagher thereupon brought the matter before the courts. By order of 10 February 1994, the Court of Appeal referred the following questions to the Court for a preliminary ruling:

'1. Does Article 9 of Directive 64/221 of 25 February 1964 prohibit the Secretary of State for the Home Department from making an exclusion order under section 7 of the Prevention of Terrorism (Temporary Provisions) Act 1989 before

receiving the opinion of a competent authority when the relevant provisions of Schedule 2 to the 1989 Act provide that

(a) an individual who is the subject of such an order is entitled to make representations to a competent authority and

(b) if such representations are made, the Secretary of State is obliged to consider the opinion of that competent authority and is obliged to reconsider the merits of making an exclusion order prior to the removal of the individual from the United Kingdom (unless the individual otherwise consents to removal from the United Kingdom)?

2. Does the fact that a person is appointed by the Secretary of State for the Home Department prevent that person from being a competent authority for the purpose of Article 9 of Directive 64/221 of 25 February 1964?'

Which is the relevant paragraph in Article 9 of the directive?

8. The national court refers in its questions to Article 9 of the directive, without specifying whether it is seeking an interpretation of the general rule in Article 9(1) or of the special rule in Article 9(2) concerning decisions to expel a person before the issue of a first residence permit. The uncertainty to which this point may give rise is attributable to the fact that, as the documents in the case make clear, Irish citizens do not require residence permits in order to be able to reside in the United Kingdom.

9. It does, however, appear to follow from the order for reference that the questions relate to Article 9(1). Thus, it is stated, *inter alia*, that 'as a matter of chronology the [Secretary of State] was undoubtedly in breach of [Article 9(1)]', [2] just as there is also reference to protection of workers 'where there is no ... right of appeal to a court of law', [3] an expression which occurs only in Article 9(1). Consistent with this, the United Kingdom and Mr Gallagher have set out their views solely on the interpretation of Article 9(1) of the directive. The Commission has stated its opinion that Article 9(1) must be applied in so far as Article 9(2) is applicable only in those cases where lawful residence depends on a residence permit.

2 — Page 13 of the order for reference.
3 — Page 14 of the order for reference.

10. It might be argued, in support of the contention that the present case comes within the scope of the simpler expulsion procedure under Article 9(2) of the directive, that the processing of an application for a residence permit provides an opportunity for the authorities dealing with foreign nationals to determine whether the residence of the person concerned in the country is compatible with public policy, public security and public health, and that the foreign national in question cannot, so long as that determination has not been made, have such an expectation of entitlement to remain in the country that he can justifiably be given the same procedural protection against expulsion on the above grounds as that to which he would be entitled after receiving a residence permit.

11. Against this, however, it should be stressed that the distinction between the procedural rules in Article 9(1) and those in Article 9(2) must be regarded as expressing a fundamental principle of the law governing aliens, namely that the longer the residence has lasted, the greater must be the protection against interference with the right of residence. Nor should the foreign nationals in question be placed at a disadvantage on the ground that the United Kingdom, by allowing them to reside without a residence permit, has precluded itself from determining at an early date whether their residence in the country is compatible with public policy, public security and public health. The authorities dealing with foreign nationals can in any case secure the information they require regarding foreign nationals' residence otherwise than by processing an application for a residence permit. Furthermore, the practical implementation of the right of persons to move freely may not lead to an undermining of the procedural protection which Article 9(1) confers on nationals of Member States against expulsion from other Member States.

12. I am therefore in agreement that Article 9(1) of the directive is the relevant provision for the purpose of replying to the questions submitted.

The first question

13. In its first question, the Court of Appeal seeks essentially to determine whether the opinion which must, under Article 9(1) of the directive, be obtained if there is no right of appeal to a court of law against a decision to expel a person, or where such appeal may be only in respect of the legal validity of the decision, or where the appeal cannot have suspensory effect, has to be obtained before the decision to expel that person is taken, or whether it is sufficient that it is not obtained until after that date, when the authority which has taken the decision is required, following the making of representations, to reconsider the decision and, if appropriate, may alter it.

14. The United Kingdom argues that it is sufficient that the person in question should be able to exercise the rights set out in Arti-

cle 9(1) at the time of reconsideration of the case by the Secretary of State pursuant to paragraph 4 of Schedule 2 to the Act. It is only at the time of reconsideration that a final decision to expel the person is taken.

15. Mr Gallagher and the Commission, in contrast, contend that the directive is to be understood as meaning that such an opinion must be obtained before the decision ordering expulsion is taken and that it is not sufficient for it to be produced only at the time when the authority in question is reconsidering a decision which has already been taken. The Commission points out in this connection that the purpose of Article 9(1) is to ensure that a second, independent authority will assess the circumstances of the particular case so that the administrative authority can take this assessment into account when addressing the issue of whether a decision ordering expulsion should be taken. This procedural guarantee can be effective only if the opinion is obtained from the competent authority before the administrative authority takes its decision.

16. In cases where a decision to expel a person is subject to a right of appeal to a court of law (the English translation of the phrase 'recours juridictionnels' in the French version) which does not relate only to the legal validity of the decision and which has suspensory effect, the foreign national in question is guaranteed an opportunity to have the legality and reasonableness of the decision subjected to an independent and disinterested examination.

17. The rule in Article 9(1) of the directive on obtaining an opinion from a competent authority must provide a minimum procedural guarantee in cases where no such right of appeal exists. This minimum guarantee lies in the fact that a second, independent authority, before which the person concerned has the opportunity to set out his defence and to have assistance or representation, must deliver an opinion before a decision is taken to expel that person. I am overlooking in this connection, and in what follows, the proviso regarding cases of urgency, which has not been pleaded in the present instance and which in any event cannot justify a general departure from the above rule.

18. To my mind, the United Kingdom's view that this opinion need be obtained only if the foreign national in question makes representations amounts to a dilution of this minimum procedural guarantee without any basis in the text of the directive. According to the wording of the directive, this minimum guarantee must also apply even in cases where the foreign national in question does not make representations. In such cases too there is a decision ordering expulsion within the meaning of the directive (see, for example, Article 7, which implies that such a decision can, after expiry of the period for leaving the country, form the basis for removal). In addition, it may be expected that the opinion of the competent authority will have a much greater prospect of influencing the decision of the administrative authority as to whether expulsion should take place if the administrative authority can take a fresh look at the case and has not already reached a conclusion.

19. The language used in Article 9(1), when compared with Article 9(2), also makes it clear that the opinion of the competent authority in the situations referred to in Article 9(1) must be obtained before any decision whatsoever has been taken to expel the person. The distinction between Article 9(1) and Article 9(2) is precisely that the opinion, in situations covered by Article 9(1), must be obtained before the decision is taken, whereas in situations covered by Article 9(2) the opinion is obtained after the decision has been taken and only if the foreign national concerned so requests, that is to say, after he has made representations. Were Article 9(1) to be understood as having the meaning attributed to it by the United Kingdom, the special rule contained in Article 9(2) would be bereft of any separate substance.

20. The Court's case-law is in line with what has just been said. Thus, Advocate General Capotorti set out in his Opinion in *Pecastaing* [4] the circumstances in which the competent authority must give an opinion:

'In the case of a refusal to renew a residence permit or an expulsion from the territory of persons who have already obtained such a permit the decision cannot be taken until the matter has been submitted for consideration as mentioned above or until the [competent] authority has issued its opinion, save in cases of urgency'

and

'On the other hand, the protective measures provided for by Article 9(2) of the said directive, like the procedure for obtaining an opinion provided for in Article 9(1), have the effect of suspending the expulsion order which cannot be confirmed (in the case referred to in paragraph (2)) or taken (in the case referred to in paragraph (1)) unless the appropriate ... authority has delivered its opinion.'

In its judgment of 5 March 1980 in *Pecastaing*, the Court ruled that:

'With regard to the interpretation of Article 9 ... it should be recalled ... that the procedure of appeal to a "competent authority" referred to in that article must *precede the decision* ordering expulsion, save in cases of urgency' (paragraph 17, emphasis added).

In its judgment of 22 May 1980 in *Santillo*, [5] the Court ruled that the object of the provisions of Article 9:

'is to ensure a minimum procedural safeguard for persons affected by one of the

4 — Case 98/79 *Pecastaing* v *Belgium* [1980] ECR 691, at pages 722 and 723 to 724.

5 — Case 131/79 *Regina* v *Secretary of State for Home Affairs*, ex parte *Santillo* [1980] ECR 1585.

measures referred to in the three cases set out in paragraph (1) of that article. Where the right of appeal relates only to the legal validity of a decision, the purpose of the intervention of the "competent authority" referred to in Article 9(1) is to enable an exhaustive examination of all the facts and circumstances including the expediency of the proposed measure to be carried out before the decision is finally taken' (paragraph 12),

and referred to

'the requirement contained in Article 9(1) that *any* decision ordering expulsion must be preceded by the opinion of a "competent authority" ...' (paragraph 14, emphasis added).

Finally, the Court has most recently ruled in its judgment of 18 October 1990 in *Dzodzi* [6] regarding the opinion of the 'competent authority' that:

'the object of Article 9(1) of Directive 64/221 is to ensure a minimum procedural safeguard for persons affected by a decision refusing renewal of a residence permit or ordering the expulsion of the holder of a residence permit from the territory. That provision, which applies only 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, provides for the intervention of a competent authority other than the authority 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 that consultative body' (paragraph 62, emphasis added).

21. In the light of the foregoing, I propose that the Court's answer to the first question should be that Article 9(1) of the directive must be understood as meaning that the opinion of a competent authority, which must be obtained if there is no right of appeal to a court of law against a decision ordering expulsion, or where such appeal may be only in respect of the legal validity of the decision, or where the appeal cannot have suspensory effect, must, save in cases of urgency, be obtained before the administrative authority takes any decision whatsoever to expel a person on grounds of public policy, public security or public health.

The second question

22. In its second question, the national court seeks essentially to determine whether Article 9 of the directive is to be understood as meaning that a person appointed by the same authority as that which takes the decision

6 — Joined Cases C-297/88 and C-197/89 *Dzodzi* v *Belgium* [1990] ECR I-3763.

ordering expulsion cannot be a competent authority for the purpose of that provision.

23. Mr Gallagher submits that Article 9 of the directive must be interpreted as including a requirement that the competent authority be independent such as to preclude the competent authority's appointment by the same administrative authority as that which, *inter alia*, takes the decision ordering expulsion.

24. Against this, the United Kingdom argues that Article 9 of the directive imposes requirements only with regard to how the competent authority is to perform its duties and does not contain any rules governing the appointment of that authority. The fact that a person is nominated by the same administrative authority as that which, *inter alia*, takes the decision ordering expulsion cannot preclude that person from being a 'competent authority'.

25. The Commission similarly takes the view that it is not *per se* contrary to Article 9 that the competent authority is appointed by the same administrative authority as that which, *inter alia*, takes the decision ordering expulsion. This appointee must, however, be absolutely independent of the appointing authority and the national court must be in possession of adequate information to establish that this is the case.

26. In its judgment in *Santillo*, cited above, the Court ruled, with regard to the term 'competent authority' in Article 9, that:

'the directive leaves a margin of discretion to Member States for defining the "competent authority". Any public authority independent of the administrative authority called upon to adopt one of the measures referred to by the directive, which is so constituted that the person concerned enjoys the right of representation and of defence before it, may be considered as such an authority' (paragraph 19).

With regard to the criteria governing the competent authority, the Court further ruled in its judgment in *Dzodzi*, also cited above, that:

'the directive does not specify how the competent authority referred to in Article 9 is appointed. It does not require that authority to be a court or to be composed of members of the judiciary. Nor does it require the members of the competent authority to be appointed for a specific period. The essential requirement is, first, that it should be clearly established that the authority is to perform its duties in absolute independence and is not to be directly or indirectly subject, in the exercise of its duties, to any control by the authority empowered to take the measures provided for in the directive ... and, secondly, that the authority should follow a procedure enabling the person concerned, on the terms

laid down by the directive, to put forward his arguments in defence' (paragraph 65).

27. The Court has thus held that the decisive criteria governing the designation of a competent authority for the purposes of Article 9 are that it is clearly established that the authority can perform its duties in absolute independence in such a way that it cannot, when performing those duties, be subject either directly or indirectly to the authority taking the decision ordering expulsion, and that the person concerned enjoys rights of defence and the right to assistance or representation before the competent authority.

28. The fact that the 'competent authority' is appointed by the authority taking the decision cannot *per se*, in my opinion, mean that the 'competent authority' is unable to be regarded as satisfying the requirement of independence developed in the Court's case-law. The members of the judiciary in many Member States, for instance, are appointed by the Government without this being liable to affect their absolute independence of the Government following their appointment.

29. On the other hand, it should be evident that a person who is simply employed in a position subordinate to the administrative authority in question, for instance as a civil servant in the relevant government department, cannot be regarded as satisfying the requirement of being able, beyond any doubt, to perform his duties as the 'competent authority' in absolute independence of that authority. This requirement dictates, *inter alia*, that the administrative authority cannot in any way whatever exercise powers to issue instructions to, supervise or monitor the person appointed as the competent authority, and also that there must be no circumstances which may give the foreign national in question grounds for believing that the competent authority is unable to perform its duties in absolute independence of the administrative authority.

30. When the national court comes to consider whether the 'competent authority' can be regarded as being in a position to perform its duties in absolute independence, a measure of importance may also presumably be attached to the question whether the person or persons concerned are appointed to function as a competent authority in all cases concerning refusal of entry/expulsion over an extended period of time, or whether individual appointments of different persons are made on a case-by-case basis for the purpose of applying this minimum procedural safeguard.

31. I also share the Commission's view that, in order to enable the national court to determine whether the competent authority is absolutely independent, it is necessary that the national court be provided with all relevant information regarding the identity and other functions of the person or persons appointed. Given the context in which this case has come before the Court, it is neither necessary nor possible for the Court to consider in greater detail how this should be done.

32. The answer to the second question should therefore be that Article 9(1) of the directive is to be interpreted as not precluding the competent authority from being appointed by the same administrative authority as that which, *inter alia*, takes a decision ordering expulsion, provided that the competent authority in question is in a position to perform its duties in absolute independence of the administrative authority. It is for the national court to determine in each individual case whether that requirement has been satisfied.

Conclusion

33. I accordingly propose that the Court's answers to the questions submitted should be that 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 is to be interpreted as meaning that:

(1) The opinion of a competent authority, which must be obtained if there is no right of appeal to a court of law against a decision ordering expulsion, or where such appeal may be only in respect of the legal validity of the decision, or where the appeal cannot have suspensory effect, must, save in cases of urgency, be obtained before the administrative authority takes any decision whatsoever to expel a person on grounds of public policy, public security or public health;

(2) Article 9(1) does not preclude the competent authority from being appointed by the same administrative authority as that which, *inter alia*, takes a decision ordering expulsion, provided that the competent authority in question is in a position to perform its duties in absolute independence of the administrative authority. It is for the national court to determine in each individual case whether that requirement has been satisfied.