

Bundesverwaltungsgericht, Urteil vom 03. August 2004, - Az. 1 C 30.02 -

The plaintiff, a Portuguese national born in 1971, has resided continuously in Germany since 1976. He is married to a German national and has an eight year old son.

Between 1990 and 1998 the plaintiff committed several criminal offences. He was sentenced to one year and six month imprisonment for extortionate robbery, one year for robbery and three years for offences against narcotics legislation. After his release the plaintiff continued to use drugs and was sentenced to another five months imprisonment. In October 1998 the competent authority rejected his application for the extension of his residence permit and issued a permanent expulsion order (according to the German law on Aliens such orders are the general rule in cases where offences against narcotics legislation are concerned). The order was based on the number and seriousness of the plaintiff's criminal offences and the real risk of him reoffending in future.

The plaintiff brought proceedings and submitted that the German Law on Aliens infringed Community law, especially the right to freedom of movement for workers (Art. 39 EC Treaty) and the right to respect for family life (Art. 8 of the ECHR). The High Administrative Court quashed the expulsion order and referred the matter back to the authority on the ground that the latter had not sufficiently established whether the particular conditions for the expulsion of EU citizens were satisfied. Moreover, the court suggested that a permanent expulsion might not be justified since the plaintiff's family was completely socialised in Germany. However, due to certain provisions of German procedural law the court did not take into consideration factual matters that occurred after the decision of the authority.

The authority appealed to the Federal Administrative Court and submitted that the expulsion order was in accordance with the German law on Aliens and that a time-limit could not be granted ex officio but only upon specific application.

The Federal Administrative Court applied the principles which the European Court of Justice had developed in "Orfanopoulos and Oliveri" (cases C-482/01 and C-493/01) and held that Community law precludes a national provision which prescribes the expulsion of EU citizens who have contravened narcotics legislation as a general rule. Derogations from the principle of freedom of movement for workers must be interpreted strictly, thus, the German administrative practice is to be changed and the authority is to establish in every single case whether the public interest to protect the social order outweighs the individual interest of the EU citizen to stay in the respective Member State. In taking its decision the authority shall take into account - inter alia - the EU citizen's personal conduct after his release from prison, his family background and his employment situation.

Still drawing on "Orfanopoulos and Oliveri" the Federal Administrative Court furthermore held that in reviewing the lawfulness of an expulsion order the courts of first and second instance must take into consideration not only the situation as it was at the time of the authority's expulsion decision but also factual matters which occurred afterwards.

Against this background the Court referred the case back to the High Administrative Court.