(2) Article 3 (2) of Directive No 64/221/EEC, according to which previous criminal convictions do not in themselves constitute grounds for the imposition of the restrictions on free movement authorized by Article 48 of the Treaty on grounds of public policy and public security, must be interpreted to mean that previous criminal convictions are relevant only in so far as the circumstances which gave rise to them are evidence of personal conduct constituting a present threat to the requirements of public policy.

(3) In so far as it may justify certain restrictions on the free movement of persons subject to Community law, recourse by a national authority to the concept of public policy presupposes, in any event, the existence, in addition to the perturbation to the social order which any infringement of the law involves, of a genuine and sufficiently serious threat affecting one of the fundamental interests of society.

Kutscher Sørensen Bosco Donner Mertens de Wilmars

Pescatore Mackenzie Stuart O'Keeffe Touffait

Delivered in open court in Luxembourg on 27 October 1977.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE-GENERAL WARNER DELIVERED ON 28 SEPTEMBER 1977

My Lords,

In this case the Court is once more called upon to interpret, in specific respects, the provisions of Community law under which Member States are enabled to make exceptions 'on grounds of public policy, public security or public health' to the general principles of non-discrimination between nationals of Member States and, more particularly, of freedom of movement for workers within the Community, that are enshrined in the EEC Treaty. The permissible scope

of such exceptions has already been defined to some extent by the decisions of the Court in Case 41/74 *Van Duyn* v *Home Office* [1974] 2 ECR 1337, Case 67/74 *Bonsignore* v *Stadt Köln* [1975] ECR 297, Case 36/75 *Rutili* v *Ministre de l'Intérieur*, ibid. p. 1219, Case 48/75 *Royer's* case [1976] ECR 497, Case 118/75 *Watson's* and *Belmann's* case, ibid. p. 1185 and most recently Case 8/77 *Sagulo's Brenca's* and *Bakhouche's* case (14 July 1977, not yet reported).

The present case comes to the Court by way of a reference for a preliminary ruling by a Metropolitan Stipendiary Magistrate, sitting at Marlborough Street Magistrates' Court in London. Pending before that Court are criminal proceedings against one Pierre Roger André Bouchereau, a French national who is now 21 years of age. Since May 1975, apart from a brief period of unemployment at the time of his arrest in March 1976, Mr Bouchereau has been employed in the United Kingdom as a motor mechanic.

There is in force in the United Kingdom a statute, the *Misuse of Drugs Act 1971*, which is discribed by its long title as making provision 'with respect to dangerous or otherwise harmful drugs and related matters, and for purposes connected therewith'. It replaces earlier United Kingdom legislation about the misuse of drugs. Section 5 of that statute makes it unlawful, subject to exceptions none of which is material here, for a person to have certain types of drugs in his possession. Mr Bouchereau has twice pleaded guilty before Magistrates' Courts in London to offences under that section. The first occasion was on 7 January 1976, when he pleaded guilty before the Marylebone Magistrates' Court to unlawful possession, on 10 December 1975, of small quantities of methyl amphetamine and of cannabis. For that offence he was conditionally discharged for 12 months and ordered to pay £5 costs. The effect of an order for conditional discharge under English criminal law is, shortly stated, that the person concerned is not punished for the offence unless he commits another offence during the period specified in the order. If he does so, he is liable to be sentenced both for the original offence and for the new one (see the *Powers of Criminal Courts Act 1973*, section 7, which replaces earlier legislation dating from 1948). On 10 March 1976 Mr Bouchereau was again found in unlawful possession of drugs: 28 tablets of LSD and 3 packets of salt of amphetamine. To those offences he pleaded guilty before the Marlborough Street Magistrates' Court on 9 June 1976. He has not yet been sentenced for them, or indeed for his first offence. It seems that the learned Magistrate has deferred sentence until he has decided whether to recommend Mr Bouchereau for deportation.

The power for a Court in the United Kingdom to recommend an alien for deportation is conferred by the *Immigration Act 1971*. This too is a statute that replaces earlier legislation, dating back to 1914. Before that the control of the movements of aliens was a matter that pertained, in the United Kingdom, to the Royal Prerogative. In other words it was governed by the common law.

The 1971 Act contains two distinct provisions laying down circumstances in which a person is to be 'liable to deportation from the United Kingdom'. The first is section 3 (5), under which a person who is not 'patrial' (i.e. is not a British subject having the right of abode in the United Kingdom) is to be so liable –

'(a) if, having only a limited leave to enter or remain, he does not observe a condition attached to the leave or remains beyond the time limited by the leave; or

(b) if the Secretary of State deems his deportation to be conducive to the public good; or

(c) if another person to whose family he belongs is or has been ordered to be deported.'

Manifestly that subsection has to be read subject to considerable modification in the case of a national of another Member State of the Community. But I need not pursue that topic in detail here, for the present case is not one where s. 3 (5) applies.

The second provision, which is material in this case, is section 3 (6), which is in these terms:

'Without prejudice to the operation of subsection (5) above, a person who is not patrial shall also be liable to deportation from the United Kingdom if, after he has attained the age of seventeen, he is convicted of an offence for which he is punishable with imprisonment and on his conviction is recommended for deportation by a court empowered by this Act to do so.'

The Courts empowered by the Act to recommend deportation are defined by section 6 (1). In short, they are the Courts empowered to sentence the person concerned for the offence in question.

The power to make an actual deportation order is contained in section 5 (1) of the Act. It is conferred on the Secretary of State and is expressed to arise 'where a person is under section 3 (5) or (6) above liable to deportation'.

The system of appeals differs according to whether the case is within section 3 (5) or section 3 (6).

In a case under section 3 (5) the Act envisages that, before any deportation order may be made, there should first be a 'decision' by the Secretary of State to make it. Against that decision the Act provides for an appeal to an Adjudicator and for a further appeal from him to the Immigration Appeal Tribunal. In certain circumstances the appeal is direct to the Tribunal. Not until the possibilities of appeal have been exhausted may a deportation order be made. On an appeal, the Adjudicator and the Tribunal may review all aspects of the case, including the merits of making a deportation order. (See sections 12 and 15 of the Act and the recent Judgment of the Queen's Bench Divisional Court in *Regina* v *Immigration Appeal Tribunal, Ex parte Ekrem Mehmet* [1977] 1 W.L.R. 795). Section 15 (3) of the Act makes an exception if the ground of the decision to make a deportation order is that the deportation of the alien concerned 'is conducive to the public good as being in the interests of national security or of the relations between the United Kingdom and any other country or for other reasons of a political nature'. In such a case there can be no appeal to an Adjudicator or to the Immigration Appeal Tribunal. Instead there is an extra-statutory procedure for reference of the case to a panel whose duty it is to advise the Secretary of State. (See as to this *Regina* v *Secretary of State for Home Affairs, Ex parte Hosenball* [1977] 1 W.L.R. 766). Of course the Adjudicators, the Immigration Appeal Tribunal and the Secretary of State himself are (as the cases to which I have referred of *Ex parte Ekrem Mehmet* and *Ex parte Hosenball* illustrate) at all stages subject to the supervisory jurisdiction of the High Court, in particular in proceedings for an order of certiorari. Certiorari will lie to quash a decision of an inferior court or tribunal, or of any public authority, where there is an error of law on the face of it, or where it is in excess or abuse of jurisdiction, or where it has been reached in a manner contrary to the rules of natural justice.

Where section 3 (6) applies the appeal system that I have just described is excluded. An appeal against a recommendation for deportation made by a court lies through the normal hierarchy of criminal courts, the recommendation being treated for this purpose as if it were a sentence (see section 6 (5) of the Act) and the appellate courts being free to review the recommendation on its merits (see *Regina* v *Akan* [1973] 1 Q.B. 491). There again, however, no actual

deportation order may be made so long as any appeal is pending (see section 6 (6)). But the recommendation enables the alien concerned to be detained 'pending the making of a deportation order in pursuance of the recommendation' unless the Court or the Secretary of State otherwise directs (see section 5 (5) of the Act und paragraph 2 of Schedule 3 thereto). I should perhaps emphasize that those are the only respects in which a recommendation for deportation is to be assimilated to a sentence. It has been laid down that a recommendation for deportation is not to be regarded as part of the punishment for an offence: the Court should impose on the defendant the sentence that he deserves and then deal with the question of deportation quite separately (see *Regina* v *Edgehill* [1963] 1 Q.B. 593 at p. 597). The point at which the procedure where section 3 (6) applies rejoins as it were, that where section 3 (5) applies, is when the Secretary of State comes to make a deportation order. He is then in either case amenable to the supervisory jurisdiction of the High Court that I have mentioned.

I should perhaps also emphasize that I have, in the foregoing, sought only to summarize the law as it applies in England. The procedure in Scotland is not in all respects the same. But we are not concerned in this case with the position in Scotland.

I revert to the facts of this case. It appears that, the learned Magistrate having indicated that he was minded to recommend Mr Bouchereau for deportation, and the case against him having been adjourned so as to enable the appropriate notice to be served on him (as required by section 6 (2) of the Act), it was submitted on his (Mr Bouchereau's) behalf that he was a worker to whom Article 48 of the Treaty applied and that, in the circumstances, Community law precluded his deportation. In the result the learned Magistrate, on 20 November 1976, made an Order referring three questions to this Court under Article 177 of the Treaty. There followed a delay while the question was considered how Mr Bouchereau could be afforded legal aid in the proceedings before this Court. That question was a novel one, since this is the first case ever to have been referred to the Court by an English criminal court. It was resolved by a decision of a Queen's Bench Divisional Court on 17 January 1977 holding that the legal aid order made in Mr Bouchereau's favour in the Magistrates' Court extended to the proceedings in this Court (see *Regina* v *Marlborough Street Stipendiary Magistrate, Ex parte Bouchereau* [1977] 1 W.L.R. 414). Following that decision the Order for Reference was received at the Registry of this Court on 2 March 1977.

Of the three questions referred to the Court by the learned Magistrate, the first two are questions of interpretation of Council Directive 64/221/EEC of 25 February 1964 (OJ L 850/64 of 4. 4. 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', an instrument that the Court has already had to consider in a number of the cases that I mentioned at the outset.

Your Lordships will remember that the first two paragraphs of Article 3 of the Directive provide:

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

The first question referred to the Court by the learned Magistrate is:

'Whether a recommendation for deportation made by a national court of a Member State to the executive authority

of that State (such recommendation being persuasive but not binding on the executive authority) constitutes a "measure" within the meaning of Articles 3 (1) and 3 (2) of EEC Directive 64/221.'

The Metropolitan Police, which is responsible for Mr Bouchereau's prosecution, submits that a recommendation for deportation made by a United Kingdom court to the Secretary of State does not constitute a 'measure' within the meaning of those provisions. In support of that submission the Metropolitan Police argues that 'in reality a recommendation for deportation is no more than a notification to the Secretary of State that a particular foreign national who is capable of being deported has been convicted of an offence punishable with imprisonment' and it draws attention to the fact that all previous reported cases in this Court regarding the interpretation of Article 48 of the Treaty and of the Directive concerned actual decisions leading directly to restrictions on the free movement of workers within the Community.

The United Kingdom Government, which assisted the Court with observations independent of those of the Metropolitan Police, concedes however that the argument put forward on behalf of the Metropolitan Police goes too far. A recommendation for deportation made by a United Kingdom court is not a mere notification to the Secretary of State of particular facts. If has legal consequences. Not only does it render the alien concerned liable to be detained, it empowers the Secretary of State to make a deportation order in respect of him without the need, in any circumstances, for the decision to that effect to be subjected to review by an Ajudicator or by the Immigration Appeal Tribunal.

The United Kingdom Government makes two submissions. The first is that a judicial decision by a national court, as distinct from action by the legislature or executive of a Member State, cannot constitute a 'measure' for the purposes of Articles 3 (1) and (2) of the Directive. Secondly the United Kingdom Government submits that, if a judicial decision can constitute a 'measure', a recommendation by a court, which does not bind the executive authority to which it is made, and which does not of itself terminate the right of the alien concerned to reside in that Member State, does not constitute a 'measure'. With those submissions the United Kingdom Government couples a concession that, nonetheless, it would not be open to a court in a Member State to ignore the provisions of the Directive, that such a court must have regard to those provisions in dealing with any matter to which they are relevant.

At first sight the attitude of the United Kingdom Government is puzzling. What can be the purpose of saying in one breath that a judicial decision is not a measure to which the Directive applies and, in the next breath, that the Courts of the Member States are bound by the provisions of the Directive?

It transpired that underlying that attitude was concern lest, of a decision of a court of a Member State were held to be a measure within the meaning of the Directive, the Member State itself might be held, under Article 169 of the Treaty, to have failed to fulfil an obligation under the Treaty if that decision were inconsistent with Community law. The United Kingdom Government referred in this connexion to the views expressed by one of Your Lordships in an article published in 1970 ('Proceedings against Member States for failure to fulfil their obligations' by J. Mertens de Wilmars and I. M. Verougstraete, 1970 Common Market Law Review p. 385, at pp. 389-390) and it emphasized that, whilst an executive authority in a Member State (such as the Secretary of State in the present context) was bound, before reaching a decision, to appraise itself of

all relevant factors, so as to ensure among other things that its decision was compatible with Community law, a court, or at all events an English court, had no such investigative powers: it could act only on the basis of the facts as presented to it by the parties.

In my opinion, it would be incorrect to say that particular action or inaction on the part of a court of a Member State could never constitute a failure on the part of that State to fulfil an obligation under the Treaty, nor do I read the article referred to as expressing that view. The *locus classicus* on this subject is, I think, the Opinion of Mr Advocate General Gand in Case 77/69 *Commission* v *Belgium* [1970] 1 ECR 237. I quote from the original (Rec. 1970 (1) at p. 247):

'Un tel raisonnement méconnaîtrait que les sujets de droits — ou d'obligations — sont les *États membres* de la Communauté. Ce sont eux qui, en vertu de l'article 5, doivent prendre 'toutes mesures générales ou particulières' propres à assurer l'exécution des obligations découlant du traité. L'engagement qu'ils ont ainsi contracté s'étend aux domaines les plus divers et peut, par suite, nécessiter de leur part des mesures de nature juridique très différentes: il s'agira d'instituer, de modifier ou d'abroger une législation ou une réglementation de portée générale, comme aussi bien de prendre des décisions de portée individuelle destinées à assurer l'exécution du traité et de ses textes d'application. Savoir si, dans un cas donné, cette exécution requiert le concours de l'un seulement ou de plusieurs des pouvoirs qui constituent la structure de l'État est une question dont la solution dépend du système constitutionnel de cet État, mais elle ne peut modifier l'étendue des obligations qui doivent s'imposer également à tous et les organes communautaires n'ont pas à en connaître. Sans doute ceux-ci, conformément à la pratique traditionnelle des relations internationales, n'ont-ils comme interlocuteurs que les gouvernements, mais il ne s'ensuit pas que seuls les actes ou les abstentions du pouvoir exécutif et des services placés sous son autorité constituent des manquements au sens de l'article 169 du traité. Ceux-ci peuvent exister dès lors que l'État membre ne s'acquitte pas des obligations qui lui incombent, sans qu'il y ait lieu de rechercher lequel de ses organes se trouve à l'origine de l'inexécution reprochée.'

That was followed by the Court, which held succinctly (see paragraph 15 of its Judgment, [1970] 1 ECR at p. 243):

'The obligations arising from Article 95 of the Treaty devolve upon States as such and the liability of a Member State under Article 169 arises whatever the agency of the State whose action or inaction is the cause of the failure to fulfil its obligations, even in the case of a constitutionally independent institution.'

To the same effect in substance are the Opinion of Mr Advocate-General Mayras and the Judgment of the Court in Case 39/72 *Commission* v *Italy* [1973] 1 ECR 101. No doubt the constitutionally independent institution whose action, or rather inaction, in each of those cases lay ot the root of the default of the Member State concerned was its Parliament, but the relevant principle, as there stated, is wide enough to apply also to the Judiciary of a Member State. Indeed it must logically do so. I am reminded that, in Case 9/75 *Meyer-Burckhardt* v *Commission* [1975] ECR 1171, at p. 1187, I felt no hesitation about that.

It is obvious on the other hand that a Member State cannot be held to have failed to fulfil an obligation under the Treaty simply because one of its Courts has reached a wrong decision. Judicial error, whether due to the misapprehension of facts or to misapprehension of the law, is not a breach of the Treaty. In the judicial sphere, Article 169 could only come into play in the event of a court of a Member State deliberately ignoring or disregarding Community law.

So I think that the United Kingdom Government's concern in this respect is ill-founded.

Were it correct, however, that judicial error could constitute a breach of the Treaty, I do not see how it could make any difference for present purposes whether one held that a decision of a court was a 'measure' within the meaning of the Directive or held that, whilst that was not so, a court was bound to have regard to the Directive. In either case the same possibility of judicial error would exist.

I can, I think, deal more shortly with the United Kingdom Government's alternative submission.

The word 'measure' is not one of precise import. Its interpretation requires a consideration of the context in which it is found. Plainly a recommendation by an official to his Minister would not constitute a 'measure' in the present context, for it would have no legal effect. But one cannot assimilate to such a recommendation a recommendation of the kind here in question, which does have legal effects. To hold that such a recommendation was not a relevant 'measure' would have bizarre consequences. It would mean, for instance, that, so far at all events as the express terms of the Directive were concerned, such a recommendation could be made on the ground of previous criminal convictions alone, even though the deportation order that it envisaged could not. On this, the semantic aspect of the case, if I may so describe it, it is no answer to say (as Counsel for the United Kingdom said at the hearing in answer to questions of mine and of one of Your Lordships) that a national court must in any event 'have regard' to the terms of the Directive. Indeed, assuming that 'must' here imports a legal obligation, that answer virtually contradicts the submission itself.

I should, I think, for the sake of completeness, lastly refer to some submissions that were made on behalf of the United Kingdom at the hearing, based on Article 8, 9 and 10 of the Directive. It does not seem to me that any of those Articles throws much light on the interpretation of Article 3. Articles 8 and 9 do not use the word 'measures'. In Article 10 the word 'measures' is used but clearly in a sense different from that in which it is used in Article 3: it relates to general legislative or administrative provisions, not to action taken in an individual case. (As regards the terms used, the foregoing is equally true as respects the Dutch, English, French and German texts of the Directive. In the Danish text the terms equivalent to 'measure' are different in Articles 3, 8, 9 and 10. In the Italian text the same term 'provvedimenti' is used in Articles 3, 8 and 9, whilst the term 'misure' is used in Article 10).

In the result I am of the opinion that, in answer to the first question referred to the Court by the learned Magistrate, Your Lordships should rule that a recommendation for deportation made by a court of a Member State to the executive authority of that State constitutes a 'measure' within the meaning of Articles 3 (1) and (2) of the Directive if, although not binding on that authority, it has legal consequences.

The learned Magistrate's second question is:

'Whether the wording of Article 3 (2) of EEC Directive 64/221, namely that previous criminal convictions shall not "in themselves" constitute grounds for the taking of measures based on public policy or public security means that previous criminal convictions are solely relevant in so far as they manifest a present or future propensity to act in a manner contrary to public policy or public security; alternatively, the meaning to be attached to the expression "in themselves" in Article 3 (2) of EEC Directive 64/221.'

It appears from the Order for Reference that the reason why that question is asked is that, before the learned Magistrate, it was submitted on behalf of Mr Bouchereau that Article 3 (2) meant that previous criminal convictions were solely relevant in so far as they manifested a present or future intention to act in a manner contrary to public policy or public security, and that there was no evidence to support such a conclusion in his case; whereas it was submitted on behalf of the prosecution that Article 3 (2) meant that the Court could not make a recommendation for deportation on grounds of public policy based on the fact alone of a previous conviction, but was entitled to take into account the past conduct of the defendant which resulted in the previous conviction.

I will say at once that, in my opinion, the prosecution was, in that respect, clearly right. Article 3 (2) cannot be interpreted in such a way that it would result in the existence of a conviction being a bar to deportation in circumstances in which the conduct of the person concerned would otherwise justify the step. Nor can it be interpreted as requiring evidence as to that person's intentions.

The question as framed by the learned Magistrate does not however refer to evidence of intentions. It refers to 'a present or future propensity'. The real question thereby posed is, I think, whether Articles 3 (1) and (2) read together mean that the conduct of the person concerned, in order to justify his deportation, must manifest a propensity on his part to act in a manner contrary to public policy or public security.

On behalf of the Commission, as well as, of course, on behalf of Mr Bouchereau, it is submitted in effect that that question should be answered in the affirmative. But on behalf of the United Kingdom Government, as well as on behalf of the Metropolitan Police, it is submitted that to give an affirmative answer to the question would be to lay down too narrow a test. The United Kingdom Government in particular points out that cases do arise, exceptionally, where the personal conduct of an alien has been such that, whilst not necessarily evincing any clear propensity on his part, it has caused such deep public revulsion that public policy requires his departure. I agree. I think that in such a case a Member State may exclude a national of another Member State from its territory, just as a man may exclude from his house a guest, even a relative, who has behaved in an excessively offensive fashion. Although therefore, in the nature of things, the conduct of a person relevant for the purposes of Article 3 will generally be conduct that shows him to have a particular propensity, it cannot be said that that must necessarily be so.

I accordingly agree with the United Kingdom Government's submission that this Court should adhere to the test that it laid down in the *Rutili* case, where it held (in paragraph 28 of the Judgment, [1975] ECR at p. 1231) that restrictions cannot be imposed on the right of a national of any Member State to enter the territory of another Member State, to stay there and to move within it unless his presence or conduct constitutes a genuine and sufficiently serious threat to public policy'. I observe that, in so declaring, the Court followed the view expressed by Mr Advocate-General Mayras not only in that case but in the earlier *Bonsignore* case where, specifically in relation to Article 3 of the Directive, he said (I cite from the original, Rec. 1975 at p. 311):

'Les auteurs de la directive ont donc voulu qu'indépendamment de toute condamnation les autorités nationales ne puissent décider l'expulsion que dans la mesure où le comportement personnel du ressortissant communautaire, auteur d'une infraction, ait comporté ou risque de comporter dans l'avenir une menace telle, pour l'ordre public national, que la présence de l'individu concerné sur le

territoire pays d'accueil devienne intolérable.'

and again (at p. 315):

'La directive exige en vérité que l'atteinte à l'ordre public national, en tant qu'elle résulte du comportement personnel, soit telle que l'expulsion s'impose soit parce que l'ordre public a été gravement perturbé par les faits commis, soit parce que le renouvellement d'actes anti-sociaux est à redouter de la part de l'intéressé.'

I am not of course saying that Mr Bouchereau's conduct has been such as to render his continued presence on United Kingdom territory intolerable. It is for the English Courts not for this Court to judge his conduct. But this Court must give to the learned Magistrate's question as comprehensive and accurate an answer as the circumstances allow.

I have one minor, verbal, reservation. The language of the *Rutili* case was French and the phrase used in the authentic text of the Judgment in that case 'une menace réelle et suffisamment grave pour l'ordre public' is of course unimpeachable French. But its literal translation into English involving as it does the use of the phrase a 'threat to public policy' reads somewhat oddly. In the present case, where the authentic text of the Judgment will be in English, it might be better to refer to 'a threat to the requirements of public policy'.

I am therefore of the opinion that Your Lordships should answer the learned Magistrate's second question by saying that Article 3 (2) of the Directive means that a deportation order on grounds of public policy or public security may not be based on the fact alone of the existence of previous convictions but that such an order can only be justified if the presence or conduct of the individual concerned constitutes a genuine and sufficiently serious threat to the requirements of public policy or of public security.

Inherent of course in the use there of the adverb 'sufficiently' is an allusion to the principle spelt out by the Court in the *Watson and Belmann* case, and reaffirmed in the *Sagulo* case, that measures taken by Member States in respect of nationals of other Member States must be reasonable and not disproportionate to the gravity of their conduct.

The third question referred to the Court by the learned Magistrate is in these terms:

'Whether the word "public policy" in Article 48 (3) of the Treaty establishing the EEC, upon the grounds of which limitations to the rights granted by Article 48 must be justified, are to be interpreted:
(a) as including reasons of state even where no breach of the public peace or order is threatened, or
(b) in a narrower sense in which is incorporated the concept of some threatened breach of public peace, order or security, or
(c) in some other wider sense.'

Three of the expressions there used seem to me to call for comment. The first is 'reasons of state', the second 'breach of the public peace' and the third 'order' or 'public order'.

'Reasons of state' (as distinct from 'Act of State') is not an expression that belongs to English legal terminology, nor do I know of any authority for its use in the context of Community law. The Court invited submissions at the hearing as to its meaning in the learned Magistrate's question, but Counsel were not able to give us much assistance. I think that probably Counsel for the United Kingdom came nearest to the answer when he said that he took it as intended to cover justification on grounds of public interest wider than breaches of the peace and public order. In my opinion, it is an expression of such indefinite import that it is best eschewed.

The use of the expression 'breach of the public peace' in the present context seems to have its origin in a mistranslation in the English text of the Judgment of the Court in the *Bonsignore* case, the second subparagraph of paragraph 6 of which reads (see [1975] ECR at p. 307):

'As departures from the rules concerning the free movement of persons constitute exceptions which must be strictly construed, the concept of "personal conduct" expresses the requirement that a deportation order may only be made for breaches of the peace and public security which might be committed by the individual affected.'

In the authentic text of the Judgment, however, which is the German text, the words corresponding to 'breaches of the peace and public security which might be committed by the individual affected' are 'Gefährdungen der öffentlichen Ordnung und Sicherheit ... die von der betroffenen Einzelperson ausgehen könnten', which, I understand, literally means 'threats to public policy and security that could be occasioned by the person affected', the expression 'öffentliche Ordnung' being that which corresponds to 'public policy' in Article 48 of the Treaty. The mistranslation is particularly unfortunate because, as was pointed out on behalf of the United Kingdom Government, 'breach of the peace' has a distinct meaning in English law, where it constitutes a criminal offence. In fairness to the Translation Service of the Court, I suspect that they resorted to the expression in order to avoid the oddity of using in English the phrase 'threats to public policy' — although they accepted that oddity when they came to translate the *Rutili* Judgment.

The use of the expression 'public order' seems to reflect a submission put forward on behalf of Mr Bouchereau to the effect that the expression 'public policy' in Article 48 should be given a narrow meaning akin to that of 'public order'. We were referred by Counsel for Mr Bouchereau to various international instruments, such as the European Convention on Human Rights, in the English text of which 'public order' is used, instead of 'public policy', where the French text has 'ordre public'. (See in particular Articles 6 and 9 of that Convention). All this might be helpful if 'public order' had a clear meaning in English legal terminology. But it does not. It is, so far as I am aware, an expression unknown to the common law. Its only use that I know of in statute law is in the title to the *Public Order Act 1936*, a statute of limited scope, which was passed to deal with the activities, in the 1930s, of the British fascist movement. As appears from the text of that statute, its main purposes were to prohibit the wearing of uniforms in connexion with political objects and the maintenance by private persons of associations of a military or similar character. It also made provision for the preservation of order on the occasion of public meetings and processions, particularly by the prohibition of the possession of offensive weapons, and of the use of threatening, abusive or insulting words or behaviour, on such occasions.

Unlike 'public order', 'public policy' is a concept known to the common law. We were referred on behalf of Mr Bouchereau to an illuminating article by Professor Lyon-Caen ('La réserve d'ordre public en matière de liberté d'établissement et de libre circulation', 1966 Revue Trimestrielle de Droit Européen at p. 693) in which he discusses the meaning of the phrase 'ordre public', which corresponds in the French text of the Treaty to 'public policy' in the English text, in the light of the laws of the six original Member States. Professor Lyon-Caen observes at the outset that the role of the concept of 'ordre public' is so wide that it has lost all precision. He discerns, as I understand him, three spheres in which it may be invoked. The

first is in relations between private persons. There it may be invoked to negative freedom of contract or the application of a foreign law that would normally be applicable. In this sphere it corresponds to the common law concept of 'public policy', the most usual manifestations of which are in the law of contract (to invalidate a contract that would otherwise be binding), in private international law (to exclude a foreign law that would otherwise be applicable and in the law of property (to invalidate a disposition that would otherwise be effective). Of course the 'public policy' here in question is the public policy not of Government but of the law, developed by the Courts. Nonetheless it has been described by eminent common law Judges as an 'unruly horse' for them to ride (see for instance per Burrough J. in *Richardson* v *Mellish* (1824) 2 Bing. 229, 252 and per Scrutton L. J. in *Foster* v *Driscoll* [1929] 1 K.B. 470, 498). The second sphere in which Professor Lyon-Caen discerns the application of the concept of 'ordre public' is that of 'public law'. There, he says, 'on y a recours pour restreindre ou supprimer une liberté au nom d'exigences supérieures'. This too sounds familiar to an English lawyer, even though the expression 'public law' has no technical meaning for him, and though he would generally tend, in the context of administrative law, to refer to the 'public interest' rather than to 'public policy'. A feature that Professor Lyon-Caen identifies as being common to the first two spheres in which 'ordre public' may be invoked, is that it there operates so as to make an exception to whatever legal rule would normally apply. In the third sphere in which it operates, however, that of the control of aliens ('police des étrangers'), that feature is absent. Reliance on 'l'ordre public' is there no longer the exception, but the very foundation of the law. It is seen as justifying the exercise by the executive of a virtually unlimited discretion. Professor Lyon-Caen calls this 'un ordre public 'spécial' '. It appears to me to correspond, in English terminology, to the 'public good' of which the *Immigration Act 1971* speaks.

Among the conclusions drawn by Professor Lyon-Caen is the valuable one that, in relation to those nationals of the Member States to whom the Treaty applies, the Treaty must be taken to have abolished that 'ordre public "spécial" '. 'L'ordre public', he says, 'est ramené à son rôle de mécanisme exceptionnel'. That must be right, since the role of 'public policy' (or 'ordre public') under the Treaty is to afford a ground for making an exception to the general principle of non-discrimination between such nationals. Professor Lyon-Caen's analysis also shows, I think, that, otherwise, little guidance as to the meaning of the phrases 'public policy', 'ordre public', 'öffentliche Ordnung', etc., in the Treaty, is to be derived from a consideration of their meanings in the national laws of the Member States.

There is another way in which the wording of the Treaty seems to me to give an indication of the scope of 'public policy' as there used. This lies in the collocation of phrases 'public policy, public security or public health', which shows, in my opinion, that the authors of the Treaty envisaged them as connoting three distinct concepts, albeit perhaps overlapping ones.

Beyond that, the authors of the Treaty appear to have left the concept of 'public policy' to be defined and developed by Community secondary legislation and by decisions of this Court.

The Judgments of the Court, particularly in the *Van Duyn* and *Rutili* cases make it clear, that, in the result, to quote from the Judgment in the latter case (paragraph 26, [1975] ECR at p. 1231) 'Member States continue to be, in principle, free to determine the requirements of public policy in the light of their national needs'. That freedom is however limited and its exercise is

subject to control by the institutions of the Community.

The problem confronting the learned Magistrate in the present case cannot therefore be solved without enquiring whether any specific provision of Community law limits, either expressly or by necessary implication, the discretion exercisable by a Member State in circumstances such as those of that case.

In that connexion the Commission referred in its written observations to paragraphs 1 and 2 of Article 4 of Directive No 64/221. The other parties did not, but the Court invited submissions from them thereon at the hearing. Those paragraphs are in the following terms:

'1. The only diseases or disabilities justifying refusal of entry into a territory or refusal to issue a first residence permit shall be those listed in the Annex to this Directive.
2. Diseases or disabilities occurring after a first residence permit has been issued shall not justify refusal to renew the residence permit or expulsion from the territory.'

The Annex referred to in paragraph 1 is in two parts. Part A, which is headed 'Diseases which might endanger public health' is not here in point. But Part B, headed 'Diseases and disabilities which might threaten public policy or public security', lists:

'1. Drug addiction;
2. Profound mental disturbance; manifest conditions of psychotic disturbance with agitation, delirium, hallucinations or confusion.'

Although I do not think it really relevant, I should, I think, record that we were told at the hearing on behalf of the United Kingdom Government that a first residence permit had been issued to Mr Bouchereau on 28 January 1977, i.e. long after the date of his second conviction and while the reference to this Court was pending. That fact was accepted on behalf of Mr Bouchereau.

Of more importance, in my Opinion, is the fact that it was agreed by everyone at the hearing that there was no evidence that Mr Bouchereau was a drug addict. There was evidence only that he had been in unlawful possession of drugs. This induced Counsel for the Commission to resile somewhat from the submission it had made in its written observations and to concede that Article 4 was not here directly relevant.

That ready consensus reflected the distinction that exists in English law between unlawful possession of harmful drugs, which is a criminal offence, and drug addiction, which, in itself, is not, though it may be a consequence of earlier criminal conduct. We were referred in that connexion to the *Misuse of Drugs (Notification of and Supply to Addicts) Regulations 1973 (S.I. 1973 No 799)* made by the Secretary of State under powers conferred by the *Misuse of Drugs Act 1971* and replacing earlier Regulations of the same kind made under previous legislation. Those Regulations, putting it shortly, enable a doctor to obtain from the Secretary of State a licence to supply drugs to a person whom he considers to be a drug addict upon furnishing to the Chief Medical Officer at the Home Office the name and certain other particulars of that person. Possession by an addict of drugs supplied to him under such a licence is not unlawful. An addict is defined for the purposes of the Regulations as one who 'has as a result of repeated administration become so dependent upon the drug that he has an overpowering desire for the administration of it to be continued'. The Regulations apply only to certain kinds of drugs, which are listed in a Schedule. It may be observed that they do not include any of the drugs that were found in Mr Bouchereau's possession, presumably because none of these is regarded as addictive (which, of course, is a different

thing from saying that it is not regarded as harmful).

So far as I have been able to ascertain there is nothing quite like those Regulations in the law of any other Member State. As one would expect, the law about drugs differs from Member State to Member State and, in some Member States at least, is very complex. It seems however that, in all Member States except Italy, the unauthorized possession of harmful drugs is a criminal offence. In Italy the only sanction against the unlawful possession of drugs, as such, is that they are liable to confiscation in so far as their quantity exceeds that compatible with use for therapeutic purposes (see article 80 of statute No 685 of 22 December 1975, Gazz. Uff. 30 December 1975, No 342). On the other hand, unlawful trafficking in drugs is a punishable offence in Italy, as in other Member States. There are two Member States, namely Denmark and the Netherlands, where, apparently, the possession by a person for his own use of cannabis or of its derivatives, as distinct from the possession of other drugs, is, whilst an offence, treated as a trivial one. There is, in most Member States, to be found an assimilation, to a greater or lesser degree, of drug addiction to illness and in two cases (namely the Federal Republic of Germany and Ireland) specifically, in certain respects, to mental illness. In many Member States provisions have been enacted to secure the medical treatment of addicts rather than their punishment: see in particular article 9 of the Belgian statute of 24 February 1921 as amended by the statute of 9 July 1975 (Moniteur Belge, 26 September 1975), the French statute No 70-1320 of 31 December 1970 (JO de la République Française of 3 January 1971, pp. 74-76) introducing new articles L 355-14 to L 355-21 and L 626 to L 630-2 into the Code de la Santé Publique, section 28 of the Irish Misuse of Drugs Act 1977, article 100 of the Italian statute to which I have already referred, and articles 23 to 30 of the Luxembourg statute of 19 February 1973 (Memorial A No 12 of 3 March 1973, p. 319).

Of more importance, I think, than the position in individual Member States is the approach of the Directive itself. Article 4, as its terms evince, applies only to 'diseases and disabilities'. The effect of paragraph 2 thereof is that no disease or disability whatever, occurring after a first residence permit has been issued, can justify expulsion. The significance of the Annex is that it lists a number of exceptional diseases and disabilities which, under paragraph 1, can justify refusal of entry or refusal to issue a first residence permit. No disease or disability not so listed can justify even that.

The argument put forward at the hearing on behalf of Mr Bouchereau, as I understood it, was, in a nutshell, that, if he were a drug addict, he could not be deported on that ground; *a fortiori* could he not be deported on the 'mere' ground that he had been found in unlawful possession of drugs. In my opinion that is a non sequitur. Certainly Mr Bouchereau, at all events if he became a drug addict after the issue to him of his first residence permit, could not be deported on that ground. But Article 4 does not forbid the deportation of a drug addict on grounds other than his drug addiction, unless of course such grounds consist in some other disease or disability. Suppose that a person were at once a scientologist and a drug addict. He could clearly be deported from the United Kingdom on the ground of his association with scientology, though not on the ground of his drug addiction. The unlawful possession of drugs is not a disease or disability, even though it shares with drug addiction a connexion with drugs. So Article 4 does not apply to it and does not exclude it as a ground for deportation. In a Member State where it is regarded as a criminal offence or otherwise as socially harmful, the provisions of the Directive that are relevant in relation to it are those of Article 3.

It remains to consider how Your Lordships should answer the learned Magistrate's third question. The United Kingdom Government suggests that it would be enough for Your Lordships to say that the concept of 'public policy' in Article 48 of the Treaty is not limited to the threatened breach of public peace, order or security. Perhaps it would, but I think that it might be more helpful if Your Lordships were somewhat more specific and added that that concept is not to be interpreted as excluding, as a potential ground for limiting the rights conferred on a worker by that Article, the fact of his having been found repeatedly in unlawful possession of harmful drugs.