# OPINION OF ADVOCATE GENERAL KOKOTT

delivered on 10 March 2005 [1]

## I — Introduction

1. In these Treaty infringement proceedings the Commission is claiming that the Kingdom of Spain has infringed Directive 64/221/EEC [2] in several respects. The directive lays down the conditions under which Member States are entitled to restrict the rights of entry and residence of nationals of other Member States and of members of their family on grounds of public policy, public security and public health.

2. The dispute concerns the administrative practice pursued in Spain of refusing entry to or rejecting visa applications for nationals of third countries, without carrying out any further verification of the individual case, if an alert for those persons has been entered in the computer-assisted Schengen Information System (hereinafter: 'SIS') for the purposes of refusing them entry. In the Commission's view, proceeding automatically to such a measure is incompatible with the above-mentioned directive where those third-country nationals are members of the family of citizens of the Union. In its defence, the Kingdom of Spain maintains in particular that its administrative practice complies with the specifications of the Convention implementing the Schengen Agreement [3] (hereinafter: 'the CISA'). The proceedings thus raise the issue of whether the relevant provisions of the Schengen *acquis* are compatible with Community law and of how any conflict between them is to be resolved.

## II — Relevant legislation

### A — *Directive 64/221*

3. The Commission complains that the following articles of the directive have been infringed:

1 — Original language: German.

2 — 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 (OJ, English Special Edition 1963-1964, p. 117).

3 — Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ 2000 L 239, p. 19). The convention, also known as 'Schengen II', was signed on 19 June 1990. The Kingdom of Spain acceded to the Schengen Agreement on 25 June 1991.

'*Article 1*

1. The provisions of this Directive shall apply to any national of a Member State who resides in or travels to another Member State of the Community, either in order to pursue an activity as an employed or self-employed person, or as a recipient of services.

2. These provisions shall apply also to the spouse and to members of the family who come within the provisions of the regulations and directives adopted in this field in pursuance of the Treaty.

*Article 2*

1. This 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.

2. Such grounds shall not be invoked to service economic ends.

*Article 3*

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.

...

*Article 6*

The person concerned shall be informed of the grounds of public policy, public security, or public health upon which the decision taken in his case is based, unless this is contrary to the interests of the security of the State involved.'

4. That directive will be superseded on 29 April 2006 by Directive 2004/38/EC. [4]

B — *The Schengen acquis*

5. The SIS is part of the Schengen *acquis*. It is a database application operating across the territories of specific States which consists of national sections and a central technical support function in Strasbourg. The SIS makes it possible for the authorities to call up information on persons and objects, in particular in the course of the procedure for issuing visas, in the context of checks at the external borders and of police and customs checks in the territory of the Schengen States. The system was set up to compensate for any security-related shortcomings resulting from the abolition of checks at their internal borders. These proceedings concern the issuing of alerts for aliens for the purposes of refusing them entry. The following provisions in particular of the CISA and a declaration of the Executive Committee established by the CISA are relevant in that regard:

1. The Convention Implementing the Schengen Agreement

6. Article 1 of the CISA defines the term 'alien' as any person other than a national of a Member State of the European Communities.

7. Article 5 of the CISA governs entry granted to aliens for stays for a limited period in the Schengen area. That provision states, inter alia:

'1. For stays not exceeding three months, aliens fulfilling the following conditions may be granted entry into the territories of the Contracting Parties:

...

(d) that the aliens shall not be persons for whom an alert has been issued for the purposes of refusing entry.

...

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

2. An alien who does not fulfil all the above conditions must be refused entry into the territories of the Contracting Parties unless a Contracting Party considers it necessary to derogate from that principle on humanitarian grounds, on grounds of national interest or because of international obligations. In such cases authorisation to enter will be restricted to the territory of the Contracting Party concerned, which must inform the other Contracting Parties accordingly.'

8. Articles 15 and 16 of the CISA contain provisions in line with Article 5 relating to the issue of visas. In principle, visas may be issued only if the condition laid down in Article 5(1)(d) of the CISA is fulfilled. However, in derogation from that principle, a visa may be issued on one of the grounds mentioned in Article 5(2) of the CISA, even if an alert has been issued for the purposes of refusing entry. In such cases, the validity of the visa is to be restricted to the territory of the Member State issuing the visa.

9. Article 96 of the CISA governs the category of alerts in the SIS that is relevant in this case, namely refusal of entry:

'1. Data on aliens for whom an alert has been issued for the purposes of refusing entry shall be entered on the basis of a national alert resulting from decisions taken by the competent administrative authorities or courts in accordance with the rules of procedure laid down by national law.

2. Decisions may be based on a threat to public policy or public security or to national security which the presence of an alien in national territory may pose.

This situation may arise in particular in the case of:

(a) an alien who has been convicted of an offence carrying a penalty involving deprivation of liberty of at least one year;

(b) an alien in respect of whom there are serious grounds for believing that he has committed serious criminal offences, including those referred to in Article 71, or in respect of whom there is clear evidence of an intention to commit such offences in the territory of a Contracting Party.

3. Decisions may also be based on the fact that the alien has been subject to measures involving deportation, refusal of entry or removal which have not been rescinded or

suspended, including or accompanied by a prohibition on entry or, where applicable, a prohibition on residence, based on a failure to comply with national regulations on the entry or residence of aliens.'

10. Article 94(3) of the CISA contains an exhaustive list of the information which can be entered in the SIS. It makes no provision for entering into the SIS the reasons for issuing an alert for the purposes of refusing entry.

11. Under Article 134 of the CISA, the provisions of the convention are to apply only in so far as they are compatible with Community law. Article 142 of the CISA provides that in the event of a conflict between the CISA and conventions concluded between the Member States of the European Communities, the CISA is to be replaced or amended.

2. The declaration on the concept of alien

12. The conditions for entering an alien in the SIS were laid down in detail in the Declaration of the Executive Committee of 18 April 1996 defining the concept of alien: [5]

'In the context of Article 96 of the [CISA],

Persons who are covered by Community law should not in principle be placed on the joint list of persons to be refused entry.

However, the following categories of persons who are covered by Community law may be placed on the joint list if the conditions governing such placing are compatible with Community law:

(a) family members of European Union citizens who have third-country nationality and are entitled to enter and reside in a Member State pursuant to a decision made in accordance with the Treaty establishing the European Community.

(b) ...

5 — SCH/Com-ex (96) decl. 5 (OJ 2000 L 239, p. 458), hereinafter referred to as *Declaration of the Executive Committee*.

If it emerges that Community law covers a person included on the joint list of persons to be refused entry, that person may only remain on the list if it is compatible with Community law. If this is not the case, the Member State which placed the person on the list shall take the necessary steps to delete his or her name from the list.'

C — *The Schengen Protocol*

13. The *acquis* resulting from cooperation between the Schengen States under international law was incorporated into the European Union upon entry into force of the Treaty of Amsterdam on 1 May 1999, whereupon the Schengen States were authorised to establish closer cooperation among themselves. The Protocol — concluded with a view to such cooperation — integrating the Schengen acquis into the framework of the European Union [6] provides inter alia in the preamble thereto:

'NOTING that the Agreements ... signed by some Member States of the European Union in Schengen on 14 June 1985 and on 19 June 1990 ... are aimed at enhancing European integration and, in particular, at enabling the European Union to develop more rapidly into an area of freedom, security and justice,

...

CONFIRMING that the provisions of the Schengen *acquis* are applicable only if and as far as they are compatible with the European Union and Community law,

...'.

14. In accordance with the second sentence of Article 1 of the Protocol, closer cooperation is to be conducted on the basis of the Schengen *acquis* within the institutional and legal framework of the European Union and with respect for the relevant provisions of the Treaty on European Union and of the Treaty establishing the European Community.

15. In accordance with the second sentence of the second subparagraph of Article 2(1) of the Protocol, the Council, acting unanimously, is to determine, in conformity with the relevant provisions of the Treaties, the legal basis for each of the provisions or decisions which constitute the Schengen *acquis*.

6 — OJ 1997 C 340, p. 93, hereinafter: 'Schengen Protocol'.

D — *Decision 1999/436/EC*

16. The Council largely satisfied that requirement of the Schengen Protocol by Decision 1999/436/EC.[7] In pursuance of that decision, Article 5 of the CISA, except for paragraph 1(e), was linked to Article 62(2)(a) EC. Article 62(2)(b) EC was determined as the legal basis for Articles 15 and 16 of the CISA.

17. However, the Council failed to agree on the legal basis for the provisions relating to the SIS (including, therefore, Article 96 of the CISA), for Articles 134 and 142 of the CISA and for the Declaration of the Executive Committee. These are therefore to be regarded, pursuant to the fourth subparagraph of Article 2(1) of the Schengen Protocol, as acts based on Title VI EU until such time as a decision otherwise has been adopted.

## III — Facts and pre-litigation procedure

18. The Commission initiated the pre-litigation procedure following complaints from two Algerian nationals, Mr Farid and Mr Bouchair. They had given the following accounts of the facts:

19. Mr Farid is married to a Spanish national and lives with his family in Dublin. Upon his arrival at Barcelona Airport on 5 February 1999 on a flight from Algeria, Mr Farid was refused entry into the territory of the Kingdom of Spain. The reason given for that decision was that the Federal Republic of Germany had entered an alert for Mr Farid in the SIS for the purposes of refusing him entry. A visa application lodged on 17 September 1999 with the Spanish Embassy in Dublin was refused by letter of 17 December 1999 for the same reason.

20. Mr Bouchair is also married to a Spanish national. He lives with her in London. In preparation for going away on holiday with his wife, Mr Bouchair applied to the Spanish Embassy for a visa for entry into Spanish territory. The application was rejected on 9 May 2000. A second application was likewise rejected. The reason given for each of those decisions was that Mr Bouchair had not fulfilled the conditions of Article 5(1) of the CISA. It emerged during the pre-litigation procedure that no visa was issued because an alert had been issued for that applicant too for the purposes of refusing him entry.

7 — Council Decision 1999/436/EC of 20 May 1999 determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the Schengen *acquis* (OJ 1999 L 176, p. 17).

21. According to the accounts given by the parties, the alerts issued for the purposes of refusing entry were in both cases attributable to previous criminal convictions. In 1994 a German court imposed a fine on Mr Farid for driving a motor vehicle without a driving licence. Mr Bouchair, on the other hand had been sentenced to five months' imprisonment because, prior to his marriage to the Spanish national, he had applied for asylum in the Federal Republic of Germany using a false identity.

22. By a letter of formal notice of 23 April 2001, the Commission called on the Kingdom of Spain to comment on the complaints. The Spanish Government responded by confirming the facts as described. However, it rejected the allegation that the administrative practice complained of infringes Directive 64/221. In its reasoned opinion of 26 June 2002 the Commission set out its position in greater detail. The Spanish Government nevertheless stood by its view of the law.

23. The Commission then brought an action on 27 November 2003 pursuant to the second paragraph of Article 226 EC.

## IV — Forms of order sought

24. The Commission claims that the Court should:

1. declare that, by refusing to issue a visa and allow entry into Spanish territory to two persons, both nationals of third countries, who are members of the family of European Union citizens, simply because they appear on the list in the Schengen Information System of persons for whom an alert has been issued (at the request of a Member State), and by failing to give adequate reasons for refusing to issue a visa and allow entry, the Kingdom of Spain has failed to fulfil its obligations under Articles 1, 2, 3 and 6 of 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;

2. order the Kingdom of Spain to pay the costs.

25. The Kingdom of Spain contends that the Court should:

1. dismiss the application;

2. order the applicant institution to pay the costs.

## V — Legal assessment

26. The Commission bases its application on two complaints. First it alleges that Spain's

administrative practice does not meet the substantive requirements of Community law — in particular of Directive 64/221 — according to which the free movement of foreign nationals may be restricted on grounds of public security and public policy. It also claims that the Spanish authorities failed to give adequate reasons for their various refusals.

27. The Spanish Government maintains, in its own defence, that the practice pursued by the Spanish authorities complies with the provisions of the CISA. Complaints, it adds, must be levelled *exclusively* against the Member State issuing the alert where the alert in question has been introduced into the SIS for the purposes of refusing entry to a member of the family of a citizen of the Union and that person is refused entry or a visa for that reason, even though the requirements of Directive 64/221 have not been met.

28. In that regard, it is essential, above all, to make clear that this action for failure to fulfil obligations under the Treaty does not concern the respective alerts issued for the purposes of refusing entry to the complainants, Mr Farid and Mr Bouchair. Under Article 105 of the CISA, responsibility for those alerts lies solely with the Member State issuing them, Germany in this case.

29. The subject-matter of these infringement proceedings is not the entry in the SIS but rather the related issue of the effects of such entry, in other words, whether it is compatible with Directive 64/221 for a Member State to refuse entry to or reject a visa application for a member of the family of a citizen of the Union without carrying out any further assessment and on the sole ground that an alert has been issued for that applicant by another Member State for the purposes of refusing him entry.

30. It is not disputed in that respect that the Spanish authorities have acted in accordance with the CISA. Indeed, Articles 5 and 15 of the CISA make no distinction as to whether or not the alien refused entry or a visa is a person covered by Community law. On the basis of the wording of *those* provisions alone, an entry in the SIS would therefore mean that entry into the territory would have to be refused or a visa application rejected. Thus, the Commission's allegations can be valid only if the provisions of the CISA do not override the requirements of Directive 64/221.

A — *Relationship between the CISA and Directive 64/221*

31. The Spanish Government points out several times that the relevant provisions of the CISA became part of Community law as a result of the integration of the Schengen acquis by the Treaty of Amsterdam. It

obviously infers from that fact that an administrative practice that is in conformity with the CISA could not infringe Community law. That view would in particular be valid if the provisions of the CISA on refusal of entry had precedence over Directive 64/221.

32. However, as regards the period prior to entry into force of the Treaty of Amsterdam and of the Schengen Protocol, it follows from Article 134 of the CISA itself that its provisions are to apply only in so far as they are compatible with Community law.[8] Accordingly, the decision to refuse entry to Mr Farid on 5 February 1999 — that is to say, before the Schengen *acquis* was integrated into Community law — must be assessed in accordance with Directive 64/221.

33. Nothing has changed in that respect since the integration of the Schengen *acquis*. The Schengen Protocol confirms the rule in Article 134 of the CISA. The first sentence of Article 1 of the Protocol authorises the Schengen States to establish closer cooperation among themselves within the scope of the Schengen *acquis*. Under the second sentence, that cooperation is to be conducted within the institutional and legal framework of the European Union and with respect for the relevant provisions of the Treaty on European Union and of the Treaty establishing the European Community. The third paragraph in the preamble to the Protocol confirms that the provisions of the Schengen *acquis* are applicable only if and as far as they are compatible with the European Union and Community law. Those rules correspond to the general provisions on closer cooperation which, under Article 43(e) EU, must not affect the Community acquis.

34. Consequently, the provisions of the CISA and Schengen Protocol themselves preclude any conflict between the CISA and Directive 64/221. Spain cannot, therefore, invoke the CISA to justify its practice.

B — *Directive 64/221*

35. It must therefore be examined whether the conduct of the Spanish authorities is compatible with Directive 64/221. To that end the plea concerning the refusal to allow entry and to issue a visa must be considered first, and then the plea alleging a failure to give adequate reasons for those decisions.

8 — Article 134 of the CISA ensured compliance with the judgments in Cases C-3/91 *Exportur* [1992] ECR I-5529, paragraph 8, and C-469/00 *Ravil* [2003] ECR I-5053, paragraph 37, with regard to the primacy of Community law over conventions concluded between Member States. One example of that rule was Council Directive 91/477/EEC of 18 June 1991 on control of the acquisition and possession of weapons (OJ 1991 L 256, p. 51) which prevails over the CISA in respect of Chapter 7 ('Firearms and Ammunition') under Title III ('Police and Security') thereof (Annex A, Footnote 2, to Decision 1999/436, cited in footnote 7). Apart from Article 134 of the CISA, Article 142 thereof provides for the primacy of conventions concluded between Member States of the Community with a view to the completion of an area without internal frontiers.

1. The complaint concerning the refusal to allow entry and to issue a visa.

36. The Commission takes the view that freedom of movement for Mr Farid and Mr Bouchair could be restricted on grounds of public security only in accordance with Directive 64/221. The Spanish authorities, it claims, have not met the requirements of that directive and have therefore infringed Community law by refusing to issue a visa and by refusing entry.

37. The legal position of nationals of third countries who are members of the family of citizens of the Union and are lawfully resident in a Member State [9] is largely approximated to that of citizens of the Union as regards freedom of movement. The Community legislature has recognised the importance of ensuring protection for the family life of nationals of the Member States in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the Treaty. Thus, in the regulations and directives on freedom of movement it extended the application of Community law relating to entry into and residence in the territory of the Member States to the spouse of a Member State national who is covered by those provisions. [10] Thus the parties do not dispute that members of the family of citizens of the Union are in principle entitled under Community law to enter the territory of the Member States or to obtain an entry visa.

38. However, as Community law stands at present, citizens of the Union and members of their family are not entitled to move and reside unconditionally within another Member State. [11] Community law, and Article 2 of Directive 64/221 in particular, permit Member States to adopt, with respect to nationals of other Member States, on grounds of public security and public policy, measures which they cannot apply to their own nationals. For instance, Member States may — subject to strict conditions — expel from their territory nationals of other Member States, but not their own nationals. [12]

9 — Case C-109/01 *Akrich* [2003] ECR I-9607, paragraph 49 et seq.

10 — Case C-459/99 *MRAX* [2002] ECR I-6591, paragraph 53 et seq., referring to Article 10 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475), Articles 1 and 4 of Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families (OJ, English Special Edition 1968 (II), p. 485) and Articles 1(c) and 4 of Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services (OJ 1973 L 172, p. 14). See also Directive 2004/38, cited in footnote 4.

11 — Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Others* [2004] ECR I-5257, paragraph 47.

12 — Case 41/74 *Van Duyn* [1974] ECR 1337, paragraph 22; Joined Cases 115/81 and 116/81 *Adoui and Cornuaille* [1982] ECR 1665, paragraph 7; Joined Cases C-65/95 and C-111/95 *Shingara and Radiom* [1997] ECR I-3343, paragraph 28; Case C-348/96 *Calfa* [1999] ECR I-11, paragraph 20; and Case C-100/01 *Olazabal* [2002] ECR I-10981, paragraph 40.

39. The Spanish Government considers that the refusal of entry and of visa applications is justified on grounds of public security and public policy if an alert for the alien concerned has been entered in the SIS for the purposes of refusing him entry.

40. My response to that argument, however, is that Directive 64/221 imposes stringent limits as regards recourse to grounds of public security and public policy. Under Article 3(1), measures taken on grounds of public policy or of public security are to be based exclusively on the personal conduct of the individual concerned. Furthermore, previous criminal convictions are not in themselves, pursuant to Article 3(2), to constitute grounds for the taking of such measures. Accordingly, it is not sufficient for the perturbation of the social order to be limited to a mere 'infringement of the law' [13] or to a previous criminal conviction. [14]

41. The Court of Justice has, therefore, consistently held that the public policy reservation constitutes a derogation — which is to be interpreted strictly — from the fundamental principle of freedom of movement and that its scope cannot be determined unilaterally by each Member State. [15] Consequently, measures taken on grounds of public policy and public security can justify a restriction of freedom of movement only if there is a genuine and sufficiently serious threat affecting one of the fundamental interests of society. [16] Member States may refuse entry into or residence in their territory only to those persons whose presence would in itself constitute a danger for public policy, public security or public health. [17]

42. It is in particular also necessary to apply that reservation restrictively in order to ensure protection for the family life [18] of nationals of the Member States. Ensuring such protection is, on the one hand, important for eliminating obstacles to the exercise of the fundamental freedoms

13 — Case 30/77 *Bouchereau* [1977] ECR 1999, paragraph 35, *Calfa* (cited in footnote 12, at paragraph 25) and *Orfanopoulos and Others* (cited in footnote 11, at paragraph 66).

14 — *Bouchereau* (cited in footnote 13, at paragraph 28); *Calfa* (cited in footnote 12, at paragraph 24); and *Orfanopoulos and Others* (cited in footnote 11, at paragraph 67).

15 — *Van Duyn* (cited in footnote 12, at paragraph 18); *Calfa* (cited in footnote 12, at paragraph 23); *Bouchereau* (cited in footnote 13, at paragraph 33); and *Orfanopoulos and Others* (cited in footnote 11, at paragraph 64). See also Case 67/74 *Bonsignore* [1975] ECR 297, paragraph 6; Case 36/75 *Rutili* [1975] ECR 1219, paragraphs 26 and 27; and Case C-54/99 *Scientology* [2000] ECR I-1335, paragraph 17. By contrast, the principle of freedom of movement is to be interpreted broadly; see, for example, on freedom of movement for workers, Case 139/85 *Kempf* [1986] ECR 1741, paragraph 13; Case C-292/89 *Antonissen* [1991] ECR I-745, paragraph 11; and Case C-344/95 *Commission* v *Belgium* [1997] ECR I-1035, paragraph 14.

16 — *Rutili* (cited in footnote 15, at paragraph 28); *Bouchereau* (cited in footnote 13, at paragraph 35); *Adoui and Cornuaille* (cited in footnote 12, at paragraph 8); *Calfa* (cited in footnote 12, at paragraph 21); and *Scientology* (cited in footnote 15, at paragraph 17). See also Cases C-363/89 *Roux* [1991] ECR I-273, paragraph 30, and C-355/98 *Commission* v *Belgium* [2000] ECR I-1221, paragraph 28.

17 — *Commission* v *Belgium* (cited in footnote 16, at paragraph 29); see also Cases 131/85 *Gül* [1986] ECR 1573, paragraph 17, and C-114/97 *Commission* v *Spain* [1998] ECR I-6717, paragraph 42.

18 — See, to that effect, the comments of Advocate General Geelhoed in his Opinion in Case C-109/01 *Akrich* [2003] ECR I-9607, at point 106 et seq.

guaranteed by the Treaty.[19] On the other hand, a decision to refuse a close family member entry into or residence in a Member State in which a citizen of the Union resides (for example, the spouse, who has availed himself of his right to freedom of movement) may amount to an infringement of the right of a citizen of the Union to respect for his family life.[20] [21]

43. Against that background it is obvious that an entry in the SIS cannot in any event constitute sufficient evidence of a 'genuine, present and significant threat affecting one of the fundamental interests of society' if the alert is based *solely* on Article 96 of the CISA. The alert does not, in principle, require fulfilment of the — strict — conditions that Community law imposes in respect of measures to restrict freedom of movement on grounds of public security and public policy. Thus, in accordance with Article 96(2)(a) of the CISA, an alert may be issued for an alien for the purposes of refusing him entry if he has been convicted of an offence carrying a penalty involving deprivation of liberty of at least one year. By contrast, Article 3(2) of Directive 64/221 categorically states that measures restricting freedom of movement *may not* be based on previous criminal convictions alone. Furthermore, under Article 96(3) of the CISA an alert may also be issued for the purposes of refusing entry where certain measures adopted under the regulations on aliens have been applied to an alien, irrespective of whether his presence in the territory of a Schengen State poses a threat to public security and public policy.[22]

44. The Spanish Government counters that argument by stating that a Member State may not issue an alert for an alien covered by Community law for the purposes of refusing him entry unless the conditions governing such a measure as laid down in Directive 64/221 are in fact met. An authority — it argues — is not therefore required to verify *once more* that the conditions of the directive are met if it intends to refuse entry into its territory to or a visa application for an alien entered in the SIS.

45. That view is based on the valid consideration that an alert issued in respect of an alien covered by Community law for the purposes of refusing him entry would itself infringe Community law if, at the time of issue of the alert, the conditions of Directive 64/221 were not met. The Declaration of the Executive Committee accordingly points out that alerts may not be issued for such aliens

19 — Case C-370/90 *Singh* [1992] ECR I-4265, paragraph 19 et seq., *MRAX* (cited in footnote 10, at paragraph 53) and Case C-60/00 *Carpenter* [2002] ECR I-6279, paragraph 38.

20 — That fundamental right — guaranteed by Article 8(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and by Article 7 of the Charter of Fundamental Rights of the European Union — is, according to the Court's settled case-law, and confirmed by the Preamble to the Single European Act and by Article 6(2) EU, protected in the Community legal order.

21 — See *Carpenter* (cited in footnote 19, at paragraph 41 et seq.) and *Akrich* (cited in footnote 9, at paragraph 58 et seq.).

22 — See also the first sentence of Article 96(2) of the CISA, which states that decisions concerning entry in the SIS *may* be based on a threat to public policy or public security.

for the purposes of refusing them entry unless the specified conditions are met. At first sight, one might therefore share the Spanish Government's view that alerts issued for aliens who are members of the family of citizens of the Union are entered in the SIS only if the presence of such persons in the Schengen area would constitute a genuine, present and significant threat affecting one of the fundamental interests of society and consequently justifing a refusal of entry pursuant to Directive 64/221. [23] Any Member State adopting that finding of the Member State which entered the alert, after consulting the SIS, would be observing the principle of cooperation in good faith, [24] as that principle applies — in the context of the fundamental freedoms — in the form of mutual recognition. [25]

46. However, the legal status of members of the family of a citizen of the Union, as it is apparent in particular from Directive 64/221, precludes recourse to mutual recognition — a principle intended to promote the fundamental freedoms — in a manner that restricts freedom, by refusing entry to such persons, unless the Member State concerned verifies that the conditions for taking a measure on grounds of public security or public policy under Directive 64/221 are met. [26]

47. That is obviously the case if the alert entered in the SIS is illegal, in which case recourse to the alert would perpetuate the infringement of Community law committed in the first place by the Member State issuing the alert and, at the same time, give rise to new infringements of the law.

48. The cases in question show, moreover, that even an alert issued for the purposes of refusing entry which may well be lawful at the outset does not necessarily constitute sufficient evidence of a threat to public security or public policy. There is no need to establish here whether the grounds for issuing an alert for Mr Bouchair — driving without a driving licence — and for Mr Farid — submitting a fraudulent asylum application — could, at the time of its issue, have justified refusal of entry if the two individuals were covered by Community law at the time their names were entered in the SIS. In any case, is not obvious that, at the time of refusal of entry into Spain or of rejection of the visa applications, those offences could have been sufficient evidence to suggest that the mere presence of the two men in the Schengen area would have posed a genuine, *present* and significant threat affecting one of the fundamental interests of society.

23 — See *MRAX* (cited in footnote 10, at paragraph 61), which requires evidence to suggest a risk to public security or public policy.

24 — See my Opinion in Joined Cases C-361/02 and C-362/02 *Tsapalos and Diamantakis* [2004] ECR I-6405, point 18.

25 — See Cases 178/84 *Commission* v *Germany (Purity requirement for beer)* [1987] ECR 1227, paragraph 40 et seq., and C-340/89 *Vlassopoulou* [1991] ECR I-2357, paragraph 16.

26 — The situation is otherwise in relation to the enforcement of certain administrative measures whose recognition by other Member States is expressly provided for by Community secondary legislation. See, in that connection, Joined Cases C-361/02 and C-362/02 *Tsapalos and Diamantakis* [2004] ECR I-6405.

49. Those individual cases cannot be regarded as exceptions either; they illustrate structural shortcomings in the management of data in the SIS as far as members of the family of citizens of the Union are concerned. To ensure that alerts issued for members of the family of citizens of the Union for the purposes of refusing them entry always meet the requirements of Directive 64/221 as regards grounds of public security and public policy, the Member State issuing such alerts would have to check continuously that they are still lawful. However, under the second sentence of Article 112(1) of the CISA, the Member State which issued the alert is not required to review the need for continued storage of the relevant data until three years after such data were entered.

50. Even if the Member State issuing the alert endeavoured continuously to review at least those alerts issued for aliens covered by Community law, as a rule it would be almost impossible in practice for it to do so. The person for whom the alert has been issued would, precisely on account of the alert, reside neither in the territory of the issuing State nor in the territory of any other Schengen State. Consequently, the issuing Member State would probably be completely unaware of the fact that an alien subsequently has become covered by Community law — for instance through marriage — or that the original grounds of public security and public policy no longer applied.

51. That situation is illustrated at least in the case of Mr Bouchair, who acquired the protection of Community law by reason of his marriage to a citizen of the Union subsequent to his entry in the SIS.[27] However, since he lives outside the Schengen area, in the United Kingdom, the Schengen States could not have known anything about his change in status until he tried to enter into Spanish territory. From a practical viewpoint, *at no stage* was a review carried out to establish whether the requirements of Directive 64/221 were met.

52. An entry in the SIS cannot therefore be regarded as sufficient indication of fulfilment of the substantive requirements that Community law imposes on the Member States for the adoption of a measure to restrict freedom of movement on grounds of public security and public policy.

53. Irrespective of whether the data in the SIS are up to date and accurate, the Spanish Government also fails to appreciate that the decision to take a measure on grounds of public security or public policy under Directive 64/221 cannot be delegated to another — that is to say, the alert-issuing — Member State. Citizens of the Union and members of their family are entitled under Directive 64/221 to expect the authority actually taking the decision whether to allow entry or issue a visa to *ascertain* in their

27 — It is not clear from the case-file whether Mr Farid also married a citizen of the Union after an alert had been issued for him.

individual case whether the restriction of freedom of movement is permissible on grounds of public security or public policy. [28] By contrast, an *automatic* refusal — for example, if the person concerned has a criminal conviction — would be incompatible with Directive 64/221. [29]

54. That conclusion follows from the fact that freedom of movement may be restricted on grounds of public security or public policy only if the genuine and significant threat to one of the fundamental interests of society is also a *present* threat. It must exist, therefore, on the date when the relevant measure is ordered to be taken. [30] A new decision is clearly necessary if, as in this case, *several years* have elapsed between the issue of an alert for a particular person by the competent authority of one Member State and, for example, the refusal to grant him entry at a border checkpoint of another Member State.

55. Furthermore, the 'general rule/exception' relationship between freedom of movement and measures taken on grounds of public security and public policy prohibits the competent authorities from taking decisions automatically, that is to say, without independent verification. The public policy reservation must be regarded not as a condition precedent to the acquisition of the right of entry and residence but simply as providing the possibility, in individual cases where there is sufficient justification, of imposing restrictions on the exercise of a right derived directly from the Treaty. [31] Thus, a member of the family of a citizen of the Union is, in principle, entitled to enter into and reside in the territory of the Member State and such entitlement may be restricted only as an exceptional measure on grounds of public security and public policy. The Court of Justice clearly defined the scope of the legal position of citizens of the Union and their family members when it established that Directive 64/221 permits restrictions of freedom of movement only in the *extreme cases* provided for therein. [32] The burden of justification in that regard lies with the Member State *taking the decision*.

56. However, the alert entered in the SIS does not make it possible in practice to verify whether there are grounds of public security or public policy for allowing a restriction of freedom of movement. Indeed, under Article 94 of the CISA, the data entered in the SIS merely indicate that the person concerned is to be refused entry; they do not, however, need to specify the reason.

28 — *Bouchereau* (cited in footnote 13, at paragraph 30). See also the Court's findings in *Orfanopoulos and Others* (cited in footnote 11, at paragraph 77), according to which the *competent national authorities* must *assess*, on a case-by-case basis, whether the measure or the circumstances which gave rise to a criminal conviction prove the existence of personal conduct constituting a present threat to the requirements of public policy.

29 — *Calfa* (cited in footnote 12, at paragraph 27) and *Orfanopoulos and Others* (cited in footnote 11, at paragraph 68). See also Case C-340/97 *Nazli* [2000] ECR I-957, paragraph 59.

30 — *Orfanopoulos and Others*, cited in footnote 11, at paragraph 78 et seq.

31 — Case 48/75 *Royer* [1976] ECR 497, paragraph 29, and Case 157/79 *Pieck* [1980] ECR 2171, paragraph 9.

32 — *Orfanopoulos and Others* (cited in footnote 11, at paragraph 81).

57. Consequently, automatic adoption of an alert contained in the SIS, that is to say, delegation of the decision to the authorities issuing the alert, would inevitably be contrary to the requirements of Directive 64/221 for the taking of measures on grounds of public security and public policy.

58. Furthermore, from the perspective of the Schengen States, it would not be consistent with the spirit and purpose of the Declaration of the Executive Committee for the issuing Member State *alone* subsequently to verify whether the refusal of entry or of a visa application was compatible with Directive 64/221. In view of the primacy of Community law over the Schengen acquis, the declaration was intended to guard against potential infringements of the law. The rights of family members of citizens of the Union therefore had to be *enhanced*. However, the declaration must not be used to release the authority imposing the restriction of freedom of movement from the obligation under Community law to carry out an independent verification. If the declaration were used in that way, it would, contrary to its objective, lead to a weakening in the position under Community law of members of the family of a citizen of the Union.

59. It should not be overlooked here that the SIS constitutes the main compensatory measure for the abolition of checks on persons at the internal borders of the Schengen area. Schengen cooperation is aimed at achieving one of the objectives of the European Community. Protective measures, such as the SIS, are indispensable to that end. However, the Spanish Government's fear that the position defended by the Commission in these proceedings will result in paralysis for the SIS and thus *jeopardise Schengen cooperation* is not justified. These proceedings do not put the operation of the SIS as a whole to the test of compliance with Community law; rather, they focus on whether the system meets the requirements of Community law purely in respect of the treatment of *specific* aliens, namely members of the family of citizens of the Union.

60. Even in relation to that category of persons, the SIS does not lose its effectiveness in complying with Directive 64/221 but can in fact promote the protection of public security and public policy. Directive 64/221 does not, after all, prohibit citing an alert contained in the SIS as a reason for investigating a possible threat to public security and public policy. In the course of such investigations the Member State calling up data can, as the Commission explains, request the information on the person concerned from the alert-issuing Member State over the Sirene network. [33] Recourse to Sirene, according to the Spanish Government, may indeed last 'a number of days, weeks or months'. However, it is for the

33 — See points 3.1.6, 4.6.1 and 4.6.2 of the Sirene Manual (OJ 2003 C 38, p. 1). Sirene (Supplementary Information Request at the National Entries) is the national facility supplementing the SIS which can be consulted prior to entry of an alert in the SIS but also for the purpose of transmitting supplementary information from other Schengen States.

Member States to arrange cooperation in that network so that information can still be obtained within a reasonable period. The Sirene Manual specifies a period of 12 hours for that purpose. [34]

61. Moreover, all Member States also have the right under Article 5(2) of Directive 64/221 to request from other Member States information concerning any previous police record of an applicant if that is considered essential for assessing his application. The period prescribed in that provision within which the requested information is to be supplied is two months. Finally, reference should also be made to Article 10 EC which imposes on the Member States the duty of cooperation in good faith when applying Community law.

62. In this case it should at least have been possible to process the visa applications of Mr Farid and Mr Bouchair in the light of such information, in particular if it is borne in mind that Mr Farid's application was not refused until three months after its submission. Moreover, an obligation to review the alert in the light of a visa application is apparent from Article 3(2) of both Directive 68/360 and Directive 73/148. [35] Under those provisions, Member States must afford to members of the family who do not have the nationality of a Member State *every facility* for obtaining a visa.

63. As far as entry into a Member State's territory is concerned, it is understandable that it is difficult in practice, given the current configuration of the SIS and the Sirene network, to obtain with the necessary speed information on the grounds for entry in the SIS. In such circumstances, however, the 'general rule/exception' relationship under Directive 64/221 comes into play: as long as there is no evidence of a threat to public security and public policy, entry into the territory must in principle be allowed.

64. That ensues in particular from the second subparagraph of Article 5(1) of Directive 64/221 under which a foreign national is to be allowed to remain *temporarily* in the territory of the Member State into which he is seeking entry pending a decision on his application for his first residence permit. Family members of a citizen of the Union are therefore entitled to remain in the Member State even though it has not been established at that stage whether their presence there poses a threat to public security or public policy. Thus, the Member State must primarily observe the fundamental principle of freedom of movement. It must accept a possible risk — albeit the necessary evidence is lacking — to public security and public policy and the problems that may arise if the person concerned is

34 — Point 2.2.1., under (a).

35 — Both directives are cited in footnote 10.

subsequently subject to an expulsion order.[36] Provision is made for such a possibility, moreover, in Articles 5(2) and 16 of the CISA, under which a Member State *may* at least permit entry into its own territory to a person for whom there is an entry in the SIS. In the event of doubt, those provisions would have to be construed as meaning *must*, in keeping with the provisions of Directive 64/221.

65. To summarise, the special status of aliens protected by Community law means that the authorities calling up information in the SIS must not — unlike in the case of 'ordinary' aliens — automatically refuse them entry or a visa because there is an entry for them in the SIS. On the contrary, they must first establish for themselves whether the person concerned poses a genuine, present and significant threat to one of the fundamental interests of society. After all, Community law requires not only the issuing Member State but also the Member State *having recourse to* the SIS to treat aliens entered in the system *in a differentiated manner* because they do not all share the same legal position. The Spanish authorities, however, have failed to take account of the fact that, as members of the family of citizens of the Union, the two aliens at issue in this case are covered by Community law.

66. The Kingdom of Spain has therefore infringed its obligations under Articles 1, 2 and 3 of Directive 64/221 by rejecting visa applications for and refusing entry into Spanish territory to two aliens who are married to citizens of the Union because alerts had been entered for those aliens in the Schengen Information System for the purposes of refusing them entry, without first establishing whether their presence in Spanish territory poses a genuine, present and significant threat to a fundamental interest of society.

2. The complaint concerning a failure to give adequate reasons

67. By that complaint the Commission objects that the Spanish authorities failed in their decisions to state the reasons of public security and public policy for which they refused entry and the visa applications.

36 — By contrary inference from Case C-357/98 *Yiadom* [2000] ECR I-9265, at paragraph 41, such temporary residence should not in any event form the basis for (further) rights under Article 9 of Directive 64/221 if the competent authorities allow no more than the period required for assessing the case to elapse before issuing the decision refusing entry. In the *Yiadom* case, temporary residence in excess of seven months was tolerated before entry was refused on grounds which were already known on the original date of entry into the territory. Thus the Court no longer regarded the measure as a refusal of entry but as a termination of residence.

68. Under Article 6 of Directive 64/221 the person concerned is to be informed of the grounds of public policy, public security or public health upon which the decision taken in his case is based, unless this is contrary to the interests of the security of the State involved. It is clear from the directive's objective that such notification of the grounds must be sufficiently detailed and precise to enable the person concerned to safeguard his interests. [37] Those requirements are not met by a purely stereotype statement of reasons.

69. In Mr Bouchair's case, insufficient reasons were given from the start for the decision on his application in that, as the Commission argues without challenge, the authorities merely stated that the applicant had not fulfilled the conditions of Article 5(1) of the CISA but did not specify *which* of the four situations under Article 15 of the CISA in which a visa application must be rejected applied to him. There could have been problems with the travel documents, a lack of information on the purpose and duration of the trip or on the means of subsistence, but the matter might also have involved grounds of public security or indeed an alert issued for the purposes of refusing entry. Without knowing the specific reason in his case for the refusal, Mr Bouchair was unable to safeguard his interests.

70. By contrast, the reason stated by the Spanish authorities for refusing entry to the complainant Mr Farid and for rejecting his subsequent visa application was that the Federal Republic of Germany had entered an alert for him in the SIS for the purposes of refusing him entry. That statement of reasons at least contains the actual reason for the decisions.

71. The Commission none the less takes the view that even that statement did not meet the requirements of Article 6 of Directive 64/221.

72. That provision indeed requires not just that the actual reasons for a decision must be stated but specifically that the *grounds of public policy, public security or public health* upon which the Member State is restricting the free movement of the person concerned must be disclosed. Furthermore, the statement of reasons must set out comprehensibly the factors to be taken into account under Directive 64/221, including those

37 — *Rutili* (cited in footnote 15, at paragraph 39) and *Adoui and Cornuaille* (cited in footnote 12, at paragraph 13). See also Article 30 of Directive 2004/38/EC (see footnote 4) which adopts that case-law.

relating to the expediency of the measure in question.[38] That obligation specifically to state the grounds therefore presupposes that a measure restricting freedom of movement on grounds of public policy can be adopted only if those grounds are known and that those grounds can also be notified.

73. The Spanish authorities did not meet that condition governing the formal legality of the decision. Ultimately, the presence of an alien in the territory of a Member State does not pose a threat simply *because an alert for that person has been entered in the SIS for the purposes of refusing him entry.* Rather, there was an entry in the SIS (in this case) on the basis of Article 96 of the CISA because Mr Farid had committed a criminal offence. Moreover, the Spanish authorities concluded from that entry in the SIS that he still posed a threat to public security and public policy on the date of their decisions. They should have commented to that effect in the reasons for their decisions.

38 — Cf. *Orfanopoulos and Others* (cited in footnote 11, at paragraph 105 et seq.).

74. As already indicated, the Spanish Government cannot, in its defence, assert a right to invoke the alert to reject the visa application without carrying out further investigations.

75. In conclusion, Spain has therefore infringed Articles 1, 2 and 6 of Directive 64/221 by failing to give adequate reasons for refusing entry into its territory to Mr Farid and for rejecting the applications of Mr Bouchair and Mr Farid.

## VI — Costs

76. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to pay the costs if they have been applied for. Since the Commission asked that Spain be ordered to pay the costs and Spain has been unsuccessful, it must pay the costs.

## VII — Conclusion

77. In the light of the foregoing considerations, I suggest that the Court should:

(1) declare that the Kingdom of Spain has failed to fulfil its obligations under Articles 1, 2, 3 and 6 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

— by rejecting visa applications for and refusing entry into Spanish territory to two aliens who are married to citizens of the Union because alerts had been entered for those aliens in the Schengen Information System for the purposes of refusing them entry, without first establishing whether their presence in Spanish territory poses a genuine, present and significant threat to a fundamental interest of society;

— by failing to give adequate reasons for refusing entry to Mr Farid and for rejecting the applications of Mr Bouchair and Mr Farid.

(2) order the Kingdom of Spain to pay the costs.