

Decision of the European Ombudsman closing his inquiry into complaint 1909/2009/BEH against the European Commission

Decision

Case 1909/2009/BEH - **Opened on** 27/08/2009 - **Recommendation on** 14/12/2011 -
Decision on 31/10/2012

The background to the complaint

1. The complainant is an attorney representing Mr X., a British citizen who, in January 2004, took up residence in Austria.
2. Considering that he constituted a threat to public security, in May 2005, the competent Austrian authorities took Mr X. into custody pending deportation and issued a decision excluding him from Austrian territory for life (the 'expulsion decision').
3. According to the complainant, the expulsion decision was solely based on the fact that Mr X., in 2000, was convicted and sentenced to imprisonment by a Czech court for crimes he had committed in 1997 ('sexual abuse' and 'threat to the moral upbringing of the youth'). In the complainant's view, contrary to the requirements of Article 3 of Directive 64/221 [1], the Austrian authorities did not perform an individual assessment as to whether Mr X. posed a threat to public security due to a propensity to act in the same way in the future. When deciding to expel Mr X. from Austrian territory, they had only unofficial translations of fragments of the judgments rendered by the aforesaid Czech court at their disposal and were thus not in a position to perform such an assessment.
4. The complainant also considered that the competent Austrian authorities, contrary to Article 9(1) of Directive 64/221, denied any suspensory effect to Mr X.'s appeal against the expulsion decision. In addition, contrary to Article 7 of Directive 64/221, that decision did not indicate a period for leaving Austrian territory. As a result, Mr X. was deported to Great Britain only a few days after he had been taken into custody.
5. In the complainant's view, Mr X.'s deportation amounted to a gross violation of EU law which had not been remedied by Austrian courts and authorities, including the Austrian Constitutional Court and the Supreme Administrative Court. He considered that Mr X.'s expulsion obviously



served the purpose of circumventing a statutory prohibition to extradite him to the United Kingdom. In the given context, the complainant pointed out that the British authorities searched for Mr X. on account of a crime he had allegedly committed some 40 years ago, but which had become time-barred in Austria. According to him, the Austrian authorities took action in relation to Mr X.'s case only after their attention had been drawn to it by the British authorities.

6. On 16 February 2009, the complainant submitted a complaint to the European Commission and asked it to take action and, if necessary, bring an action for infringement of EU law against Austria before the Court of Justice. In his infringement complaint, the complainant pointed out that, pursuant to Austrian law, the decision excluding Mr X. from Austrian territory for life could be lifted *ex officio* at any time.

7. On 16 July 2009, the Commission informed the complainant of the legal requirements for expulsions under EU law. The Commission moreover stated that it could not investigate the circumstances of an individual case, as this was the task of the Austrian judiciary. The latter had the possibility or, as regards courts of last instance, the obligation to request a preliminary ruling from the Court of Justice of the EU.

8. On 27 July 2009, the complainant turned to the European Ombudsman. He disagreed with the Commission's reply and submitted that, as the "Guardian" of the Treaties, it is required to intervene in obvious and gross infringements of EU law, given that the latter would otherwise remain unenforced.

The subject matter of the inquiry

9. In his complaint, the complainant submitted the following allegation and claim:

Allegation:

The Commission failed properly to deal with his infringement complaint, which he submitted on behalf of Mr X.

Claim:

The Commission should open infringement proceedings against Austria.

The inquiry

10. The complaint was forwarded to the President of the Commission for an opinion. The Commission's opinion was forwarded to the complainant with an invitation to make observations, which he sent on 28 February 2010. In light of these observations and the Commission's opinion, further inquiries by the Ombudsman proved necessary. Thus, in a letter of 5 May 2010, the Ombudsman requested the Commission to provide him with further



information concerning the complainant's allegation and claim.

11. The Commission's reply was forwarded to the complainant with an invitation to make observations. On 10 August 2010, the complainant sent his observations.

12. On 23 November 2010, the Ombudsman informed the complainant that it had not yet been possible to complete the assessment of the case. He explained that he would inform the complainant of the further steps in relation to the complaint by the end of February 2011 at the latest.

13. Having examined the Commission's reply against the background of the complainant's observations, the Ombudsman considered that there was still a need for further clarification. By letter of 22 February 2011, he therefore requested the Commission to provide him with further information concerning the complaint.

14. The Commission sent its reply on 18 May 2011. That reply was forwarded to the complainant with an invitation to make observations.

15. On 20 May 2011, Mr X. contacted the Ombudsman. He inquired about the Commission's reply and asked to be provided with a copy of it. The Ombudsman complied with that request. On 21 June 2011, Mr X. submitted his 'personal observations' on the case. He pointed out that those observations should be considered in addition to the observations his lawyer would submit on the Commission's reply. On 30 June 2011, the complainant sent his observations.

16. On 14 December 2011, the Ombudsman made a draft recommendation to the Commission and requested it to submit a detailed opinion. The Commission submitted its detailed opinion on 28 March 2012 which was forwarded to the complainant with an invitation to make observations. On 19 May 2012, Mr X. submitted his 'personal observations' on the Commission's detailed opinion and on 31 May 2012, the complainant submitted observations.

The Ombudsman's analysis and conclusions

Preliminary remarks

17. In its opinion, the Commission pointed out that the complainant's infringement complaint and his complaint to the Ombudsman bore the same date, namely, 16 February 2009. The Commission thus submitted that it appeared that the complainant, at a time when he had not yet received its reply, had come to the conclusion that the Commission had failed properly to handle his infringement complaint. In his observations, the complainant pointed out that the date given on his complaint to the Ombudsman resulted from a clerical error. It was obvious that he had not submitted his complaint to the Ombudsman on the date of his infringement complaint, given that his complaint to the Ombudsman made reference to the Commission's letter of 16 July 2009, which he also enclosed with that complaint. The Ombudsman does not consider the



Commission's remarks to amount to a challenge to the admissibility of the complaint. Other than stating that he received the complainant's complaint on 27 July 2009, there is therefore no need for him further to address the Commission's remarks on what appears to be a clerical error.

18. In his observations, the complainant stated that the Commission did not react to his infringement complaint at first. Given that he referred to this aspect in the framework of the alleged infringement of substantive EU law forming the subject-matter of his complaint, it does not appear as though he wishes to submit a separate further allegation in this context. The Ombudsman's decision therefore does not include this aspect.

19. In its opinion, the Commission also commented on the issue of the duty of national courts of last instance to refer questions on the interpretation of EU law to the Court of Justice for a preliminary ruling. In the given context, the Commission appeared to argue that opening infringement proceedings for failure to refer "*would be a very subjective exercise, extremely difficult to be proven*". The Commission also explained that its practice is not to open proceedings, "*unless there is a recurring problem in a Member State to get the courts involved, a manifest misunderstanding or an intentional and firm opinion of national jurisdiction*". In his observations, the complainant submitted that the Commission missed the point to the extent that it referred to a possible infringement of the duty to refer a question to the Court of Justice for a preliminary ruling. According to him, there was no question concerning the interpretation of EU law which should have been referred to the Court of Justice, given that the applicable EU law was clear and not in dispute. The complainant thus made it clear that his infringement complaint was not about a failure to refer a question for a preliminary reference. Therefore, there is no need for the Ombudsman to address this aspect in the present decision.

20. In its opinion, the Commission remarked that the complainant's infringement complaint was solely relying on judgments of the Austrian Supreme Administrative Court and the Austrian Constitutional Court in this matter, neither of which examined the merits of Mr X.'s case. However, the complaint did not contain copies of the relevant decisions by the competent administrative authorities and courts. The Commission added that further documentation was only provided to it by virtue of the complaint which the complainant submitted to the Ombudsman. In his observations, the complainant retorted that he explicitly stated in his infringement complaint that, for the sake of minimising work, he only enclosed Mr X.'s complaints to the Austrian supreme courts as well as the decisions taken by those courts. At the same time, he had also made it clear that he remained at the Commission's disposal if they required further documentation. He pointed out that the Commission did not, at any point, request further documentation from him. The Ombudsman takes note of the complainant's statements. It is undisputed that the Commission, in the course of the Ombudsman's inquiry, obtained all the documents which the complainant considers relevant to Mr X.'s case. The Ombudsman therefore sees no need to examine whether the Commission should have requested further documentation from the complainant.

21. Given their factual connection, the complainant's allegation and claim will be considered together.



22. To avoid any misunderstanding, it is important to recall that Article 228 of the Treaty on the Functioning of the EU empowers the European Ombudsman to inquire into possible instances of maladministration in the activities of Union institutions, bodies, offices and agencies. The Statute of the European Ombudsman specifically provides that no action by any other authority or person may be the subject of a complaint to the Ombudsman. The Ombudsman therefore has no mandate to consider complaints against other institutions or bodies, such as national tax authorities or courts. The present decision therefore deals exclusively with the complaint against the Commission.

A. The Commission's handling of the infringement complaint

Legal Framework

23. Directive 64/221 contains the following provisions:

" 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.

Article 7

The person concerned shall be officially notified of any decision to refuse the issue or renewal of a residence permit or to expel him from the territory. The period allowed for leaving the territory shall be stated in this notification. Save in cases of urgency, this period shall be not less than fifteen days if the person concerned has not yet been granted a residence permit and not less than one month in all other cases.

(...)

Article 9



1. Where there is no right of appeal to a court of law, or where such appeal may be only in respect of the legal validity of the decision, or where the appeal cannot have suspensory effect, a decision refusing renewal of a residence permit or ordering the expulsion of the holder of a residence permit from the territory shall not be taken by the administrative authority, save in cases of urgency, until an opinion has been obtained from a competent authority of the host country before which the person concerned enjoys such rights of defence and of assistance or representation as the domestic law of that country provides for.

This authority shall not be the same as that empowered to take the decision refusing renewal of the residence permit or ordering expulsion. (...)"

24. Directive 2004/38 [2] entered into force on 30 April 2004 and repealed, among other pieces of legislation, Directive 64/221. Pursuant to Article 40(1) of Directive 2004/38, Member States were obliged to transpose that directive into national law by 30 April 2006. Directive 2004/38 contains the following provisions:

" Article 27

General principles

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

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

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

Article 28

Protection against expulsion

1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin. (...)



Article 30

Notification of decisions

- 1. The persons concerned shall be notified in writing of any decision taken under Article 27(1), in such a way that they are able to comprehend its content and the implications for them.*
- 2. The persons concerned shall be informed, precisely and in full, of the public policy, public security or public health grounds on which the decision taken in their case is based, unless this is contrary to the interests of State security.*
- 3. The notification shall specify the court or administrative authority with which the person concerned may lodge an appeal, the time limit for the appeal and, where applicable, the time allowed for the person to leave the territory of the Member State. Save in duly substantiated cases of urgency, the time allowed to leave the territory shall be not less than one month from the date of notification.*

Article 31

Procedural safeguards

- 1. The persons concerned shall have access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health.*
- 2. Where the application for appeal against or judicial review of the expulsion decision is accompanied by an application for an interim order to suspend enforcement of that decision, actual removal from the territory may not take place until such time as the decision on the interim order has been taken, except:*
 - where the expulsion decision is based on a previous judicial decision; or*
 - where the persons concerned have had previous access to judicial review; or*
 - where the expulsion decision is based on imperative grounds of public security under Article 28(3).*
- 3. The redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based. They shall ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28.*
- 4. Member States may exclude the individual concerned from their territory pending the redress procedure, but they may not prevent the individual from submitting his/her defence in person, except when his/her appearance may cause serious troubles to public policy or public security or*



when the appeal or judicial review concerns a denial of entry to the territory. "

Arguments presented to the Ombudsman

25. The complainant alleged that the Commission failed properly to deal with his infringement complaint, which he submitted on behalf of Mr X. He claimed that the Commission should open infringement proceedings against Austria.

26. In its opinion, the Commission referred to the following sequence of events: Mr X. sent an initial handwritten letter to it in March 2008, in which he asked for clarifications on several points of EU law, most of which related to his conviction in the Czech Republic. Moreover, he briefly described his arrest and subsequent deportation to the UK, in spite of never having committed a crime in Austria. In a second letter sent in June 2008, Mr X. asserted that he was expelled from Austria for having failed to comply with Austrian registration formalities.

27. In its replies of 24 April and 8 August 2008, the Commission explained the EU legal framework concerning the expulsion of Union citizens residing in a Member State other than that of which they hold citizenship, and pointed out that expulsion measures may not be taken solely on the grounds of a prior criminal conviction or a Union citizen's failure to report his or her presence.

28. The Commission went on to state that, in his infringement complaint, the complainant asserted that Mr X.'s expulsion was based on a prior conviction and thus disregarded that expulsions could lawfully only be ordered on the basis of an individual and current threat assessment. It emerged from his complaint that the complainant also considered that Austria had infringed EU law by deporting Mr X. from Austrian territory within a few days after being arrested.

29. In reply to the infringement complaint, the Commission, in a letter of 16 July 2009, pointed to Article 27 of Directive 2004/38, according to which measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall exclusively be based on the personal conduct of the individual concerned; previous convictions shall not in themselves constitute grounds for taking such measures. The Commission also pointed to the preliminary reference procedure.

30. Against the above sequence of events, the Commission submitted that the two letters Mr X. addressed to it expressed his concerns in a general way and did not contain any supporting evidence. As regards the complainant's infringement complaint, the Commission stated that, on the basis of the information provided, it was not in a position to conclude that EU law had been infringed by a final decision of the Austrian authorities, for which reason it decided not to open infringement proceedings against Austria in this case. The Commission added that, also on the basis of the documentation obtained in the course of the Ombudsman's inquiry, it was not in a position clearly to identify an infringement of EU law.



31. Noting that the complainant exhausted all national remedies, the Commission pointed out that its own role, as defined in the Treaties, is not that of another appeals body, considering that it does not have the authority to carry out investigations in individual cases for which national courts are far better placed. It also emphasised that it could not substitute its own factual findings and assessments for those of national courts.

32. In his observations, the complainant submitted that, in the present case, a grave infringement of substantive EU law by Austrian authorities and courts was at issue. The latter had either paid lip service to EU law only or ignored it outright. It was incomprehensible how the Commission could arrive at the conclusion that there was no infringement. In the complainant's view, the Commission did not address, even in a rudimentary manner, the detailed arguments raised in his complaint as well as in the framework of the proceedings on the national level.

33. With his observations, the complainant enclosed copies of the decisions taken by the competent Austrian authorities, police files and the two judgments by Czech courts which, according to him, served as the basis for Mr X.'s expulsion. As regards the latter documents, he pointed out that English translations prepared by British police had only recently been found by Mr X. The authentic Czech language versions of the judgments could not yet be found, but would be submitted to the Ombudsman in case they were to be found.

34. The complainant took the view that the Austrian authorities and courts based their decisions on mere fragments of translations into German of the said judgments which, as mere fragments, were meaningless. Moreover, it was not known who had prepared these translations. According to the complainant, the Austrian authorities showed no interest in obtaining the said judgments which was clear evidence of the fact that Mr X.'s conviction alone served as the basis for his expulsion. Had the Austrian authorities considered the complete judgments, they would have had to take into account a number of factual elements emerging from those judgments, such as, for instance, that only three out of the seven juvenile victims at the centre of Mr X.'s conviction were under 14 years of age, the minimum age for sexual relations in Austria.

35. The complainant submitted that, on the basis of the above elements, the Austrian authorities and courts could under no circumstances have arrived at the conclusion that Mr X.'s conduct represented a genuine, present and sufficiently serious threat for children in Austria which could have justified (i) his expulsion; (ii) not granting suspensory effect to his appeal and (iii) leaving him no time to leave Austrian territory. Mr X. did not commit any crime in Austria, and the mere existence of a previous conviction could not justify the expulsion of a Union citizen.

36. In conclusion, the complainant maintained his view that it was the Commission's task to take action in the face of an obvious and gross infringement of EU law.

37. In his first request for further information, the Ombudsman put a number of questions to the Commission. In particular, he asked the Commission, against the background of Articles 27(2) and 30(3) of Directive 2004/38, to give reasons for its view that there was no infringement in the



present case.

38. In its reply, the Commission pointed out that, on the basis of the information provided to it, it was not in a position to conclude that the decisions of the Austrian authorities infringed EU law and that the Czech court judgments in themselves, instead of an individual and current threat assessment, constituted the reason for Mr X.'s expulsion. The Commission recalled that Article 27(2) of Directive 2004/38 precludes that previous convictions automatically lead to expulsions. However, that provision does not rule out taking into account previous convictions to establish the threat a person presently poses. In particular, past conduct could be taken into account where there is a likelihood of reoffending. The Commission emphasised the role of national authorities in that assessment and it also underlined that these authorities enjoyed a degree of discretion in this context [3] . It added that the expulsion decision had been checked by national judicial bodies (the *Unabhängige Verwaltungssenate* [henceforth referred to as 'independent administrative board' or 'board'] of Lower Austria and Burgenland, the Federal Supreme Administrative Court, and the Austrian Constitutional Court), which examined and upheld the relevant decisions of the national authorities. The Commission submitted that these "*assessments entail an evaluation of the threat [Mr X.] as a person presently constitutes*".

39. The Commission reiterated that its role is not that of an appeals body concerning the misapplication of EU law in an individual case. It also stated that it has limited authority to carry out investigations in isolated cases and to supersede the findings of national courts, which are mindful of the individual circumstances and specificities of the case.

40. In his observations, the complainant stated that he did not deny that, in assessing whether a person constitutes a threat to public security, national authorities could take into account previous convictions. However, there was nothing to suggest that Mr X. posed a serious threat to Austrian society and he had explained at length that the Austrian authorities based the expulsion decision exclusively on Mr X.'s previous conviction. This was confirmed by the fact that the fragments of the Czech court judgments relied on by the Austrian authorities did not include those elements which would have allowed for an assessment of Mr X.'s conduct. Apart from restating truisms, the Commission, in his view, did not take into account the arguments submitted by him.

41. The complainant submitted that the Commission, moreover, did not take into account that it was not sufficient for national authorities and courts merely to quote applicable EU law but that the latter also had to be correctly applied. He further pointed out that the Commission did not once address the issue that Austrian authorities infringed EU law by: (i) not allowing his client a period of one month to leave Austrian territory; and (ii) not granting suspensory effect to his appeal.

42. The complainant submitted that, even if Mr X.'s case was an isolated one, the gross and obvious violation of EU law should not go unsanctioned. He also stated that the Commission's statements suggested that it applied a policy of starting infringement proceedings only in the face of repeated infringements, but not in individual cases. If this were indeed the case, the Commission should make that clear. Should the Ombudsman consider such a practice to be in



line with EU law, the complainant would have to accept it, even though the fact would remain that Mr X.'s freedom of movement had been infringed.

43. In his second request for further information, the Ombudsman asked the Commission to address the complainant's views on the procedural aspects of Mr X.'s expulsion, namely, that Austria infringed EU law by: (i) not allowing him a period of one month to leave Austrian territory; and (ii) not granting suspensory effect to his appeal. Given that the present case involves the fundamental right of free movement, guaranteed by Article 45 of the Charter of Fundamental Rights, the Ombudsman also considered it necessary and appropriate to ask the Commission to further explain its reasoning. He therefore asked the Commission to indicate: (i) the conditions which, in its view, ought to be fulfilled by individual analysis, to be undertaken by national authorities pursuant to Article 27(2) of Directive 2004/38; and (ii) how, in its view, the Austrian authorities and courts complied with these requirements in the present case.

44. In its reply, the Commission stated that, pursuant to Article 30(3) of Directive 2004/38, the notification of an expulsion decision has to specify a period of time allowed for the person concerned to leave the country which, in general, should not be less than one month. However, the aforesaid provision also provided for an exception to this rule in urgent cases.

45. As regards the suspensory effect of an appeal against an expulsion decision, the Commission pointed out that, according to Article 31 of Directive 2004/38, removal from the territory, in principle, cannot take place until a decision on a request to suspend enforcement of the former decision has been taken. At the same time, the Commission stated that Article 31(2) of Directive 2004/38 departs from that general rule in several cases, such as: when the expulsion is based on a previous judicial decision; following prior access to judicial review; or where an expulsion decision is based on imperative grounds of public security. The Commission recalled that the latter concept extends to a Member State's internal and external security [4] . The Commission also pointed out that the degree of protection against expulsion measures should increase in relation to the degree of integration of a Union citizen in the host Member State [5] . The Commission noted that, in Case C-145/09, the Court of Justice left it to the national court to ascertain whether, taking into account the above considerations, the case would fall under the concept of public security [6] . Previously, in an earlier case, the Court of Justice had pointed out that the circumstances justifying recourse to the concept of public security may vary from one country to another and one period to another; it was therefore necessary to allow the competent national authorities an area of discretion [7] .

46. In view of the above, the Commission submitted that the assessment of the procedural aspects of a case, notably whether an exception to Article 30(3) and Article 31 is pertinent, is to be undertaken on the basis of a comprehensive legal and factual appreciation of the case in which national authorities need to take all factors into account. Concerning this complex appreciation, Member State authorities enjoy a certain margin of discretion, also bearing in mind that they have a better knowledge of the individual circumstances of the case. The Commission stated that the case had been checked by national judicial bodies, which also carried out an assessment as to whether the fact that Mr X. had to swiftly leave Austrian territory was in line with the exceptions provided for in Directive 2004/38. The Commission added that the case



appeared to be an individual one and that it had received no comparable complaints. It was not in a position to conclude, on the basis of the information received, that the assessment by Austrian authorities was not in line with EU law.

47. In reply to the Ombudsman's question as to the criteria, which the individual assessment needs to meet, the Commission stated that, pursuant to Article 27(2) of Directive 2004/38, the conduct of the person must constitute a genuine, present and sufficiently serious threat to a fundamental interest of society. Restrictive measures could not be adopted on general preventive grounds but had to be based on an actual threat [8] , meaning that there was a likelihood of a serious prejudice to the requirements of public policy or public security. Expulsions following a criminal conviction must take into account the personal conduct of the offender and the threat it represents for the requirements of public policy [9] . Past conduct could be taken into consideration where there is a likelihood of reoffending [10] . The Commission added that the threat must exist when the restrictive measure is adopted by the national authorities or reviewed by the courts.

48. Against the background of the above, the Commission submitted that the Austrian authorities carried out a threat assessment, which was checked by national courts, notably the independent administrative board of Burgenland. That board recalled that, in accordance with the case-law of the Court of Justice, justifications cannot rely merely on considerations of general prevention and examined the individual threat assessment undertaken by the Austrian authorities. Moreover, the independent administrative board of Lower Austria pointed out that criminal convictions cannot in themselves justify expulsion measures and subsequently examined the threat which Mr X. would pose to Austrian society.

49. The Commission concluded that, in view of its responsibilities and the information at its disposal, it did not reach the conclusion that it should intervene against the decisions of the national courts. It therefore decided not to launch infringement proceedings against Austria in Mr X.'s case.

50. In his observations, the complainant pointed out that the expulsion of Mr X. had been ordered in May 2005. Given that Directive 2004/38 only had to be transposed into national law by 29 April 2006, it was not that directive, but Directive 64/221, which was applicable to Mr X.'s case. At the same time, the complainant stated that this situation did not affect the substance of the case, bearing in mind that Directive 2004/38 aimed at codifying the law on that matter. The complainant also submitted that, contrary to what had been stated by the Commission, the independent administrative board of Burgenland had only dealt with Mr X.'s detention pending deportation, but not with his expulsion. The latter issue had only been dealt with by the independent administrative board of Lower Austria, and subsequently by the Supreme Administrative Court and the Constitutional Court.

51. Commenting on the procedural aspects of Mr X.'s case, the complainant took the view that the Commission did not once address the gist of his complaint, the main part of its reply setting out the legal background, which was not in dispute. It was equally undisputed that national judicial authorities had reviewed the handling of the case by national authorities.



52. However, the Commission's view that the national courts also assessed whether the fact that Mr X. had to swiftly leave Austrian territory was in line with the exceptions provided for in Directive 64/221, was incorrect. In this regard, the complainant asserted that Austrian authorities and courts had not even paid lip service to EU law but instead blatantly ignored the complainant's relevant arguments. The complainant pointed out that the independent administrative board of Lower Austria merely asserted that there was a proven urgency in this case, without giving any reason and/or putting that view into the context of EU law. The complainant added that it was not sufficient for a proper application of EU law merely to quote the relevant provisions.

53. As regards the Commission's view that Mr X.'s case was an individual case, the complainant maintained his earlier line of reasoning (see paragraph 42 above). He also observed that the Commission's decision not to intervene had not been based on the fact that Mr X.'s case was an individual one. Instead, the Commission clearly stated that the Austrian authorities' decision not to: (i) grant suspensory effect to Mr X.'s appeal; and (ii) allow him any time for leaving Austrian territory, was in conformity with EU law. However, the Commission did not give any reasons for that view. The complainant stated that referring to the relevant requirements under EU law and the fact that the case had been reviewed by national judicial authorities and that no similar complaints had been received, did not amount to providing reasons why the Austrian authorities acted in conformity with EU law. In particular, the Commission would have had to give reasons for its view that the national authorities' position as regards the urgency of the case was plausible. It would also have had to give reasons as to why not allowing Mr X. any time for voluntarily leaving Austrian territory complied with the requirement that a period of time must be granted to this effect (Article 7 of Directive 64/221). While the complainant accepted that national authorities enjoy a degree of discretion, he insisted that it was the Commission's role to assess the exercise of that discretion. In his view, the Commission had not lived up to this role.

54. As regards the expulsion itself, the complainant argued that the Commission did not enter into the substance of his arguments and instead limited its comments to restating the legal background. Although the expulsion decision had been checked by the judicial authorities, this fact alone was insufficient. It was also necessary to provide reasons as to why Mr X.'s expulsion for an unlimited duration was plausible in light of the facts of the case, which were fully available to the Commission. Also in relation to this aspect of the case, the Commission would have been required to assess the exercise of the discretion exercised by the national authorities.

55. Therefore, the Commission would have had to give reasons, including a justification for the assumption that the complainant's case concerned a matter of particular urgency, for its view that the expulsion for life was plausible in light of the following facts:

- The expulsion decision was solely based on the fact that Mr X., in 2000, had been convicted in the Czech Republic for crimes he had committed in 1997;
- Mr X. had lawfully resided in Austria for almost one and a half years without committing any wrongdoings;
- a current individual threat assessment had at no time been undertaken by the Austrian



authorities;

- The sole fact that Mr X. had been convicted in the Czech Republic made the Austrian authorities conclude that he represented a threat to public security;
- The Austrian authorities merely had fragments of the judgments given by the Czech courts at their disposal. It was not clear who had prepared the uncertified translations of those fragments into German. Moreover, those fragments only contained the operative parts of those judgments and therefore provided no information relevant to an individual threat assessment for the future. This notwithstanding, the Austrian authorities and courts had at no point shown any interest in obtaining complete copies of the aforesaid judgments, even though this fact had been criticised by Mr X.;
- It was apparent from those parts of the aforesaid judgments which were not available to the Austrian authorities that Mr X. could not - and certainly not in 2005 - be considered to represent a genuine and sufficiently serious threat for children in Austria.

The complainant submitted that the Commission would have had to explain, in view of the above, for which reasons it believed that the expulsion decision was not solely based on the fact that the complainant had a prior conviction which was handed down to him a considerable number of years ago.

56. In conclusion, the complainant submitted that it would be the Commission's task to regulate what he considered to be an obvious and grave infringement of EU law, given that such infringements would otherwise go unpunished.

57. In his personal observations, Mr X. pointed out that he lived in Austria from January 2004 until May 2005 without committing any criminal offence. He also stated that, during that period, Austrian police were fully aware of his former criminal record, given that they had been informed accordingly by the British Embassy in Vienna. In spite of their awareness, the Austrian police took no action against him other than occasionally stopping his car and checking the identity cards of his passengers. According to a report prepared by the Austrian police at the time, the youngest passengers in his company were young men in their late teens or twenties, but no children.

58. Mr X. moreover explained that the situation changed when journalists from a British newspaper paid a visit to Austrian police authorities. According to him, that newspaper had struck a deal with the British police, which were seeking to have him returned to the United Kingdom to face charges of sexual abuse of minors. At that point, the charges in question were almost forty years old. Given that the alleged crimes had become time-barred under Czech and Austrian laws, the only way to have him returned to the United Kingdom was to secure his expulsion by the Austrian police authorities. Mr X. pointed out that, as a former disc-jockey at a British national radio station, he was regarded as a celebrity by British media. Given the public interest in his case, the British police promised the aforesaid journalists exclusive information in return for their support in securing his expulsion.

59. The journalists visited Austria on 23 April 2005. On the following day, a double-page article appeared in their newspaper. Just 17 days later, he was arrested and subsequently deported.



On arrival in the United Kingdom, the British police were waiting for him at the airport and charged him with the aforesaid charges.

60. Mr X. submitted that the proximity of the above events was not a co-incidence, but, rather, it explained why he was taken into custody and deported directly to London, instead of being simply ordered to leave the country. Mr X. stated that his indefinite expulsion infringed EU law and also amounted to an " *extradition by the backdoor* ", which is prohibited under British law.

61. Mr X. noted that the Commission seemed to accept the view of the Austrian authorities, according to which his case had been urgent. However, the Austrian police had monitored his behaviour for several months, but had found no evidence to suggest that he was carrying out any criminal activities. Had the motive of the Austrian police merely been to expel him from Austria, they could have given him a month to leave Austrian territory. Since they did not do so, it was obvious that the real reason for his expulsion was to ensure his safe arrival in the United Kingdom and to aid the British police. He also stated that the Austrian authorities never undertook an analysis of the full facts of his case. Their analysis was confined to incomplete copies of the Czech court judgments and the assumption that paedophiles could never change which, in his case, was not correct. He also observed that, after his expulsion, the Austrian authorities referred to justifications for his immediate deportation, which differed from those relied on before.

62. Mr X. finally stated that he was in increasingly poor health and had decided to cease all criminal activity. Feeling protected by the statute of limitations there, he had decided to live a safe and crime-free retirement in Austria and did not expect to be deported to the United Kingdom for old offences. It appeared from documents served on him in 2005 that he was arrested and held in custody for erroneously failing properly to register in Austria, although he was fully registered with utility companies there. It would therefore be ridiculous to assume that he sought to abscond in Austria. Mr X. pointed out that this again demonstrated the true aim of his expulsion, namely to carry out a covert extradition where, due to the passage of time, no formal extradition or a European Arrest Warrant would have been possible.

The Ombudsman's assessment leading to a draft recommendation

Preliminary remark

63. In the course of the Ombudsman's inquiry, reference has been made to Directive 64/221 as well as Directive 2004/38 as regards the applicable legal framework. Mr X.'s expulsion took place in May 2005. As correctly submitted by the complainant, Directive 2004/38 was to be transposed into national law by 30 April 2006. For this reason, Directive 64/221 must be considered to apply to Mr X.'s case, provided that, at the time of Mr X.'s expulsion from Austrian territory, Austria had not already transposed Directive 2004/38 into national law. It appears that Directive 2004/38 was transposed into Austrian law by virtue of various legislative measures, commonly referred to as " *Fremdenrechtspaket 2005* ", which entered into force on 1 January



2006. It follows that Directive 64/221 must be considered applicable to Mr X.'s case.

Assessment

64. The Ombudsman recalled that complaints from citizens constitute one of the most important sources of information on possible infringements of EU law by Member States. Complaints from citizens enable the Commission better to fulfil its role as "Guardian" of the Treaties.

65. It is good administrative practice for the Commission to deal with infringement complaints as diligently as possible. If citizens are unhappy with the way in which the Commission has dealt with their complaints, they can complain to the Ombudsman about either how the Commission has acted, or how it has failed to act.

66. The scope of the Ombudsman's mandate in relation to such complaints is, however, limited to examining whether the Commission acted with diligence in relation to the infringement complaint submitted to it.

67. It followed from the aforesaid that the Ombudsman cannot and will not assess, in the present case, whether or not the Austrian authorities have misapplied EU law, as submitted by the complainant in his infringement complaint. The same reasoning applied to Mr X.'s argument that his expulsion amounted to an "*extradition by the backdoor*", which is prohibited under British law.

68. Instead, the Ombudsman had to assess whether the Commission has given plausible reasons in support of its position.

69. In the course of the inquiry, the Commission submitted that Mr X.'s case was an isolated one. In the given context, it was useful to recall that, if the Commission considers that there has been an infringement of EU law, it has, according to the case-law of the Union courts, a wide margin of discretion to decide whether or not to pursue the alleged infringement. While the fact that a case amounts to an isolated infringement could, in principle, be taken into account in the Commission's exercise of discretion and induce the Commission to decide not to pursue that infringement, it is immaterial in assessing whether or not there has been an infringement.

70. The Commission submitted that its role is not that of an appeals body concerning the misapplication of EU law in an individual case which could, if taken at face value, possibly suggest that there has been an infringement in the present case. Nevertheless, it made it clear throughout the inquiry that, in its view, there was no infringement of EU law in the present case. The complainant challenged that position on three counts. Thus, according to him, the Commission did not take into account that the Austrian authorities:

(i) did not, contrary to EU law, perform an individual assessment as to whether Mr X. constituted a genuine, present and sufficiently serious threat to public security;

(ii) did not, contrary to EU law, allow the complainant a period of time for leaving Austrian



territory;

(iii) did not, contrary to EU law, grant suspensory effect to Mr X.'s appeal against the expulsion decision.

71. In assessing whether the Commission has given plausible reasons in support of its view, the Ombudsman examined the Commission's position in relation to the aforementioned three aspects in turn.

The individual assessment

72. Article 3 of Directive 64/221 requires measures taken on grounds of public security to be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions may not, in themselves, constitute grounds for adopting such measures. The Ombudsman noted that all parties concerned are in agreement as regards this legal situation, as confirmed in the case-law of the Court of Justice, which requires national authorities to undertake an individual assessment of the personal conduct of the person concerned.

73. In his infringement complaint as well as his complaint to the Ombudsman, the complainant asserted that no individual assessment, as required by Article 3 of Directive 64/221, had been undertaken by Austrian authorities. In the course of the Ombudsman's inquiry, he also expressed the view that the assessment undertaken by the Austrian authorities was flawed, given that there was nothing to suggest that Mr X. posed a threat to public security. The Ombudsman therefore understood the complainant's position to be that the Commission should have taken into account that the Austrian authorities did not perform an individual assessment which would meet the requirements of Directive 64/221.

74. Against this background, the Ombudsman assessed whether the Commission gave plausible reasons in support of its view that an individual assessment in conformity with Directive 64/221 had been undertaken.

75. The Ombudsman noted that the expulsion decision was issued by the regional administrative authority (" *Bezirkshauptmannschaft* ") of Wiener Neustadt on 11 May 2005. The expulsion decision stated that Mr X. was considered to pose a threat to public security due to his conviction by Czech courts " *and, in particular, due to the nature of the crimes committed* ". The authority issuing the expulsion decision considered it to be proven that Mr X., due to his sexual orientation, had sexual relations with male minors and adolescents which were contrary to criminal law. The issuing authority went on to state that there were no plausible reasons to assume that Mr X.'s sexual orientation and disposition would change within a foreseeable period which, according to general experience, was not to be expected. The regional administrative authority moreover referred to a judgment of the Austrian Supreme Administrative Court, according to which a period of three years was much too short in order to draw any conclusions on the future good conduct of a person convicted of molesting minors.

76. The independent administrative board of Burgenland decided on Mr X.'s appeal against the



decision to take him into custody pending deportation on 24 June 2005. The complainant correctly pointed out that the expulsion decision as such was not considered in that decision. However, while the board, in its decision, stated that the expulsion decision was not to be reviewed in the framework of the review of the remand into custody, it also pointed out that, in order to assess the legality of that remand, it was necessary for it to exclude, on a preliminary basis, the fact that the expulsion decision was to be considered unlawful from the outset. In performing that latter assessment, the board considered, among other things, that Mr X.'s misconduct in its entirety had to be taken into consideration. In reply to Mr X.'s argument to this effect, it took the view that the expulsion decision did not suggest that considerations of general prevention, as distinct from Mr X.'s personal behaviour, triggered that decision. In the given context, the board noted that even before issuing the remand, the competent authority had at its disposal a translation covering essential parts of the Czech judgment. The independent administrative board reasoned further that the protection of minors which Member States need to guarantee must evidently be considered to be of high importance. The fact that Mr X. was found guilty of sexual abuse of minors and the production of pornographic materials involving children meant that the public interest to be protected by the Member State had been interfered with. The board also stated that the fact that Mr X. had already served his prison sentence was irrelevant, given that an expulsion decision had to be based on a prognosis of the complainant's conduct, which was to be undertaken regardless of a conviction based on criminal law.

77. The independent administrative board of Lower Austria decided on Mr X.'s appeal against the expulsion decision on 19 March 2007. In its decision, the independent administrative board essentially considered that Mr X. was correct in pointing out that his previous criminal conviction could not, in itself, constitute grounds for issuing an expulsion decision against him. At the same time, it recalled that the authority issuing the expulsion decision did not exclusively rely on the conviction, but instead assessed the complainant's conduct on the basis of the Czech judgments. Given Mr X.'s personal conduct, the nature and seriousness of the crimes committed and the kind of personality established by the facts as they emerged from the Czech judgments, the independent administrative board of Lower Austria considered it to be evident that he would pose a threat to public security. The board specified that, by sexually abusing minors and producing pornographic material involving children, Mr X. had been found guilty of extremely grave and despicable crimes against morality. The board added that the interest in the protection of minors would have to be considered to be of high importance. The board also considered the length of the sentence, which he was given when he was convicted, to be significant and an expression of his danger. The nature and seriousness of the crimes, the multitude of sexual offences committed and the fact that he committed these crimes on a number of occasions vis-à-vis minors, suggest a personality with a disposition towards committing such crimes. In addition, due to the lack of any indication suggesting a change in the situation, the board concluded that Mr X. was to be considered a genuine, present and sufficiently serious danger to a fundamental interest of society. The board added that there was no indication that that danger had vanished or diminished.

78. As far as the decisions of Austrian supreme courts are concerned, the Ombudsman noted that, by virtue of an order of 25 October 2006, the Supreme Administrative Court rejected the complainant's application concerning the independent administrative board of Burgenland's



decision, essentially reasoning that the board had not deviated from its case-law. By virtue of an order of 17 July 2008, the Supreme Administrative Court refused to deal with the complainant's application concerning the independent administrative board of Lower Austria's decision, essentially because the latter did not raise legal issues of principle which would be decisive for deciding on Mr X.'s case. On 12 June 2011, the Austrian Constitutional Court rejected the complainant's application concerning the independent administrative board of Burgenland's decision. That court essentially argued that the issues raised did not require specific questions of constitutional law to be addressed. To the extent that the complainant had alleged an insufficient transposition of Directive 64/221 into national law, the Austrian Constitutional Court essentially reasoned that secondary EU law could not serve as a measure of the control exercised by it.

79. The Ombudsman noted that the Commission, in the course of the inquiry, submitted that it was not in a position to conclude that the Czech court judgments in themselves, as opposed to an individual and current threat assessment, constituted the basis for Mr X.'s expulsion. It also recalled that Directive 64/221 does not rule out taking into account previous convictions to establish the threat a person presently constitutes. This was borne out by the settled case-law of the Court of Justice, according to which the existence of a previous criminal conviction can only be taken into account in so far as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy [11]. The Ombudsman considered that the decisions adopted by the Austrian authorities, as reviewed above, support the Commission's position in that they: (i) contain an analysis of Mr X.'s personal conduct, taking into account, for instance, the multitude of the crimes and the fact that he committed these crimes on a number of occasions, as well as Mr X.'s personality, with a view to evaluating the threat he posed; and (ii) provide no indication that the decisions were based on grounds of general prevention. The Commission's view that the assessments by the Austrian authorities and courts entailed an evaluation of the threat Mr X. constituted was therefore borne out by the facts of the case. It followed that there was no basis for the complainant's view that the Commission disregarded that the expulsion decision was based on the Czech judgments alone or that the national authorities were merely quoting applicable EU law, without actually applying it. Against this background, the complainant's argument that Mr X. did not commit a crime in Austria equally did not call into doubt the Commission's assessment.

80. The complainant also took the view that the Commission should have taken into account that the assessment performed by the Austrian authorities was flawed, given that there was nothing to suggest that Mr X. constituted a serious threat to Austrian society. In the given context, he (i) considered that the fragments of the Czech judgments available to the Austrian authorities were an insufficient basis for any assessment. Moreover, he (ii) referred to a number of passages taken from the Czech court judgments which, in his view, established that the Austrian authorities were not entitled to consider Mr X. as a threat to Austrian society.

81. The Ombudsman recalled that the Commission, in the course of the inquiry, submitted that its role is not that of another appeals body. It could not, therefore, substitute its own factual findings and assessments for those of national authorities and courts. The complainant did not contradict this view as regards the principle at issue. The Ombudsman considered that, when



arguing that the Commission should have taken into account a number of elements derived from the Czech judgments, the complainant, in fact, expressed disagreement with the assessment performed by the national authorities and courts and asked the Commission for its own assessment. In these circumstances, the Commission's position that it cannot substitute its own assessment for that of the national authorities was clearly reasonable.

82. As the Commission pointed out, Member States have a margin of discretion when being required to perform what is a sensitive balancing of interests. This does not exclude that one could arrive at a different outcome following that assessment, as the complainant considered should be the case. However, the fact remained that the Commission is not to substitute its own assessment for that of the national authorities and courts, and there was nothing to suggest that its view that there is no evidence to show that the national authorities would have exceeded their discretion in the present case constitutes a manifest error of assessment.

83. As regards the other argument submitted by the complainant, it equally appeared to be primarily the task of the national authorities to consider precisely which information they need in order to conduct an individual assessment. Contrary to what the complainant submitted, although there was a possibility that the Austrian authorities might not have the complete judgments at their disposal, the Commission was not required to call into doubt their decisions. In any event, the complainant's view that the Austrian authorities only had the operative parts of these judgments at their disposal was not supported by the documents submitted to the Ombudsman. Moreover, none of the factual elements from the complete Czech judgments on which the complainant relied suggested that the Commission would have been required to take action in view of the assessment performed by the Austrian authorities and courts.

84. In view of the above, the Ombudsman concluded that the Commission had given plausible reasons in support of its position that the Austrian authorities and courts carried out an individual assessment as to whether Mr X. constituted a threat to public security, in line with Directive 64/221.

The period of time for leaving Austrian territory

85. According to Article 7 of Directive 64/221, the person concerned shall be officially notified of any expulsion decision and a period for leaving the territory shall be stated in that notification. Save in cases of urgency, this period shall not be less than fifteen days if the person concerned has not yet been granted a residence permit and not less than one month in all other cases.

86. In the course of the inquiry, the Commission submitted that the Austrian authorities made use of the above-mentioned exception for urgent cases. According to the complainant, however, the Austrian authorities were not even paying lip service to EU law when deciding on the urgency of the case and instead merely asserted that there was a proven urgency.

87. The Ombudsman noted that, in the expulsion decision, the regional administrative authority of Wiener Neustadt reasoned that Mr X. constituted a threat to public order and security. It held that it was therefore not justified to grant him a period of one month to leave Austrian territory.



The regional authority invoked a provision of the Austrian Foreigners Act, according to which citizens of the European Economic Area, in the case of their expulsion, *ex officio* have to be granted a period of one month for leaving Austrian territory, save where their immediate departure is necessary in the interest of public order and national security. In view of that provision, the Austrian authority argued that Mr X.'s conduct justified the assumption that his residing in Austria jeopardised public order. His immediate departure was therefore required in the interest of public order.

88. In its decision on Mr X.'s appeal against the order to take him into custody pending deportation, the independent administrative board of Burgenland referred to the same provision of the Austrian Foreigners Act which the administrative authority of Wiener Neustadt had invoked. It considered that this rule did not provide for a compulsory period of one month to be granted for leaving Austrian territory and noted that this legal situation is in line with Directive 2004/38. It concluded that it was lawful not to grant Mr X. a period of one month to leave Austrian territory.

89. In the Ombudsman's view, it followed from the above that the Austrian authorities considered that, in Mr X.'s case, an exception to the usual period of one month for leaving Austrian territory, should be applied. The Commission's view that the Austrian authorities relied on an exception to that rule therefore, in principle, appeared to be correct.

90. At the same time, the Ombudsman recalled that, pursuant to Article 7 of Directive 64/221, the usual period of one month is to be applied, **save in cases of urgency**. It was thus clear that if a person is to be given less than one month to leave the territory of a MemberState, there needs to be a legitimate case of urgency. It was further clear that the authorities of the MemberState concerned are required to give reasons for their view that such urgency exists. However, in light of the contents of the decisions by the Austrian authorities reviewed above, the Ombudsman considered that the Commission did not give plausible reasons in support of its view that the Austrian authorities properly respected Article 7 of Directive 64/221 when ordering Mr X.'s immediate departure from Austrian territory.

91. The Ombudsman considered it to be true that the Commission's role is not that of another appeals body and it is therefore not called upon to substitute its own factual findings and assessments for those of national authorities and courts (see paragraph 81 above). On the other hand, if national authorities, for the sole reason that they consider a Union citizen to constitute a threat to public security, could deny that citizen any time for leaving the territory of the Member State concerned, Article 7 of Directive 64/221 would be rendered entirely nugatory.

92. It followed from the foregoing that the Commission failed properly to address the complainant's infringement complaint to the extent that it was directed at the decision by the Austrian authorities not to allow Mr X. a period of time for leaving Austrian territory. In particular, the Commission did not give any plausible reasons for its view that the Austrian authorities and courts duly assessed whether Mr X.'s case concerned a matter of particular urgency, within the meaning of Article 7 of Directive 64/221.



The suspensory effect

93. According to Article 9 of Directive 64/221, where an appeal cannot have suspensory effect, a decision ordering the expulsion of the holder of a residence permit from the territory shall not be taken by the administrative authority, save in cases of urgency, until an opinion has been obtained from a competent authority of the host country before which the person concerned enjoys such rights of defence and of assistance or representation as the domestic law of that country provides for.

94. The complainant took the view that the Commission did not give any reasons for its view that the national authorities' position as regards the urgency of the case is plausible.

95. In the course of the inquiry, the Commission referred to Article 31(2) of Directive 2004/38 which does not require appeals against expulsion measures to have suspensory effect where the expulsion decision is based on a previous judicial decision or on imperative grounds of public security.

96. The Ombudsman noted that, in the expulsion decision, the regional administrative authority of Wiener Neustadt reasoned that, in view of the fact that Mr X. constituted a threat to public security, no suspensory effect was to be granted to his appeal.

97. In its decision on Mr X.'s appeal against the expulsion decision, the independent administrative board of Lower Austria reasoned that it could not object to the denial of suspensory effect by the regional administrative authority of Wiener Neustadt. In this context, the board argued that, in view of the threat and danger posed by Mr X., there was a "*proven urgency*" requiring him to leave Austrian territory with immediate effect.

98. Bearing in mind that Directive 64/221, and not Directive 2004/38, is applicable to Mr X.'s case, the Ombudsman considered that Article 31(2) of Directive 2004/38 as such could not sufficiently explain the Commission's position that there was no infringement of EU law in the given context. In any event, the Ombudsman noted that neither the regional administrative authority of Wiener Neustadt nor the independent administrative board of Lower Austria referred to this provision in their decisions.

99. However, the Commission and the complainant appeared to be in agreement that the suspensory effect of an appeal against an expulsion decision may be ruled out in urgent cases. The Ombudsman had already addressed, in the framework of the period of time to be allowed for leaving Austrian territory, the issue of urgency (see paragraphs 90-91 above). In view of the contents of the relevant decisions by the Austrian authorities, the same considerations applied *mutatis mutandis* to the issue of a suspensory effect of an appeal against an expulsion decision.

100. In view of the above, the Ombudsman considered that the Commission failed properly to address the complainant's infringement complaint to the extent that it was directed at the decision by the Austrian authorities not to grant a suspensory effect to Mr X.'s appeal against



the expulsion decision.

Conclusions

101. For the above reasons, the Ombudsman concluded that the Commission:

(i) gave plausible reasons in support of its position that the Austrian authorities and courts carried out an individual assessment as to whether Mr X. constituted a threat to public security, in line with Directive 64/221;

(ii) did not give plausible reasons in support of its position that the decisions by Austrian authorities (a) not to allow Mr X. a period of time for leaving Austrian territory; and (b) not to grant suspensory effect to his appeal against the expulsion decision, were in line with Directive 64/221.

The failure identified in point (ii) above constituted an instance of maladministration. The Ombudsman, therefore, made the following draft recommendation, in accordance with Article 3(6) of the Statute of the European Ombudsman:

" The Commission should re-examine the complainant's infringement complaint in so far as it concerns the decisions by Austrian authorities (a) not to allow the complainant a period of time for leaving Austrian territory; and (b) not to grant suspensory effect to his appeal against the expulsion decision."

The arguments presented to the Ombudsman after his draft recommendation

102. In its detailed opinion, the Commission, regarding the period of time granted to Mr. D for leaving Austrian territory, acknowledged that, in principle, a period of one month applies, save in cases of urgency. The Commission therefore had to examine whether the Austrian authorities and courts assessed the urgency of the case at stake and to decide whether it was necessary to initiate infringement proceedings.

103. The Commission pointed out that it is generally accepted that, in case of urgency, an immediate removal from the territory of a Member State is permitted. It conceded that, in order not to render the requirement of granting a period of one month nugatory, immediate removal from the territory of a Member State cannot be the automatic consequence of a determination that a person constitutes a threat to public policy or security. At the same time, the Commission submitted that *" this does not mean that considerations pertinent for assessing whether the person would constitute a threat to public policy or security could not also be linked to assessing whether the person concerned should be removed immediately. Indeed, in most cases, the assessment of the need for immediate removal would be based on the assessment of the threat the person currently poses, in connection with private factors such as the need to give notice at work or to arrange for the settlement of his/her children "*.



104. According to the Commission, the regional administrative authority of Wiener Neustadt examined, following a threat assessment, whether a period of one month for leaving Austrian territory was to be granted. It reached the conclusion that, in view of the threat the complainant would pose to public policy and security, that period was not to be granted. It also considered the private and family situation of Mr X., stating that it was not aware of any private or family ties in Austria. The regional administrative authority of Wiener Neustadt concluded that the conditions for granting a period of one month for leaving Austrian territory were not met in Mr X.'s case.

105. The Commission moreover submitted that neither the independent administrative board of Burgenland nor the independent administrative board of Lower Austria questioned the assessment by the Austrian authorities. While the independent administrative board of Burgenland pointed to the fact that, in urgent cases, an immediate removal would be permitted, the independent administrative board of Lower Austria stated that, in view of the assessment of Mr X.'s personality and the massive real and present threat and the endangerment of public interest, there would be proven urgency which would require Mr X.'s immediate removal. The Commission added that neither the Supreme Administrative Court nor the Austrian Constitutional Court questioned this conclusion.

106. Against this background, the Commission stated that the urgency of Mr X.'s case had been assessed, notably in view of the current threat he would pose, and on the basis of an assessment taking into account the applicant's personality and individual circumstances. The Commission also pointed to the fact that these findings had been reached by national authorities, and confirmed by the national judiciary, which appear to be better placed to carry out an analysis of the specific characteristics of a given case. The Commission moreover referred to the margin of appreciation enjoyed by national authorities when performing what is a sensitive examination of interests and facts, and confirmed by the Ombudsman in his draft recommendation. The Commission finally reiterated that, in view of the isolated nature of the case, it was not aware of any offending practice of a general nature in Austria.

107. The Commission concluded by saying that there were no grounds to open an infringement procedure and asked the Ombudsman to re-examine his findings in view of the clarifications provided.

108. Regarding the assessment of the Austrian authorities whether or not to grant a suspensory effect to the complainant's appeal, the Commission submitted that the aforementioned considerations whether the case was of an urgent nature are equally relevant for the question here at issue.

109. The Commission concluded by saying that, for the above reasons, it decided not to open an infringement procedure against Austria in the present case, which it had duly assessed.

110. In his observations, the complainant criticised the Commission for contenting itself with outlining the undisputed legal framework and quoting from the relevant decisions of the



competent Austrian authorities. He considered the Commission's conclusion as to the existence of urgency to be apodictic, incorrect and not in line with the facts of the case.

111. The complainant stated that the Austrian authorities did not even bother to mention EU law requirements as regards the period required for leaving Austrian territory and the denial to grant a suspensory effect. Instead, in spite of the complainant's insistence, the Austrian authorities had patently ignored these requirements. Thus, the independent administrative board of Lower Austria simply asserted that there was a case of "*proven urgency*", without giving any reasons whatsoever for its view, or linking its position to EU law requirements. The same was true of the regional administrative authority of Wiener Neustadt and of the independent administrative board of Burgenland. Moreover, both the Supreme Administrative Court and the Austrian Constitutional Court had rejected the complainant's applications, without any examination as to their merits.

112. The complainant reiterated that a reference to the letter of the law could not substitute for the correct application of EU law. An actual threat could not reasonably have been assumed, given that, at the relevant point in time, Mr X. had already lawfully been residing in Austria for 1.5 years, without having committed any offence. The complainant also repeated his view that the infringement of EU law, as described in his complaint, obviously was intended to serve the purpose of circumventing the statutory ban on deporting Mr X. to the United Kingdom (see paragraph 60 above).

113. Referring to the Commission's position that Mr X.'s case was of an isolated nature and that its services had received no comparable complaints, the complainant reiterated his criticism of this view (see paragraph 42 above). The complainant observed that the Commission considered the Austrian authorities' decision not to allow Mr X. any period of time for leaving Austrian territory and not to grant suspensory effect to his appeal against the expulsion decision to be in line with EU law. However, it did not give convincing reasons in support of its view and, in any event, did not rely on the isolated nature of Mr. D's case.

114. According to the complainant, the discretion enjoyed by national authorities does not entitle them to provide spurious reasons or relieve them from their duty to explain why, in addition to the threat underlying the expulsion decision, there was sufficient urgency to justify not allowing Mr X. a period of time for leaving Austrian territory and not granting his appeal a suspensory effect. As regards the statements made by the Commission in its detailed opinion in this regard, the complainant considered them to amount to general observations which were not in line with the facts. In particular, the complainant criticised the Commission for not explaining why reducing the period of time for leaving Austrian territory to zero would be in line with EU law. In this regard, the complainant recalled that Article 7 of Directive 64/221 specifically makes reference to a "*period allowed for leaving the territory*" which, save in cases of urgency, shall not be "*less than one month*". The wording of Article 7 of Directive 64/221 was therefore clear in requiring Member States to grant a certain period of time for leaving their territory, whereas a period of zero days could not be said to amount to a period at all.

115. In view of the above arguments and bearing in mind the Commission's role as Guardian of



the Treaties, the complainant asked the Ombudsman to stand behind his draft recommendation and to recommend to the Commission to reassess his infringement complaint as regards the **decisions by Austrian authorities (a) not to allow Mr X. a** period of time for leaving Austrian territory; and (b) not to grant suspensory effect to his appeal against the expulsion decision.

116. In his personal observations, Mr. D pointed out that the reason for not being allowed a period of one month to leave Austrian territory which Austrian officials had initially given to him was related to his registration status and the fact that he had omitted to register his second address in Austria. According to him, the aforesaid Austrian officials pointed out to him that, because of that omission, he was considered unreliable. Therefore, it was feared that he might abscond to Slovakia or Hungary. Mr X. stated that he only realised later that it would have been nonsensical to worry about his absconding to another country, when the true objective of his deportation was to assist the British police. He added that the now stated reason for his not being granted one month within which to leave Austrian territory did not appear in any documents " *until some time after my forced deportation* ". Mr X. pointed out that this meant that the Austrian authorities themselves had come to realise that the initial justification for not granting him the aforesaid period of time for leaving Austrian territory was ludicrous and false.

117. Referring to the Commission's detailed opinion, according to which the Austrian authorities were unaware of any private or family ties of his, Mr X. essentially stated that they could not possibly be aware of such ties, given that they never asked about his private life. Concerning the Commission's reference to an assessment that the Austrian authorities had undertaken with regard to his personality and individual circumstances, Mr X. submitted that he was never interviewed or assessed in Austria in this regard.

118. Mr X. also stated that he does not know about the period of time during which a secret surveillance of his activities was carried out in Austria. However, it emerged from a report on that surveillance that he " *was never seen with anyone under the age of 18* ". According to him, this fact alone ruled out " *the Commission's justification of 'urgency'* " and instead confirmed his view that he was subject to a gross miscarriage of justice.

119. Mr X. concluded by asking the Ombudsman to disregard the Commission's request that he re-examine his findings. Instead, he requested the Ombudsman to " *now proceed on his existing decisions* ".

The Ombudsman's assessment after his draft recommendation

Preliminary remarks

120. In his draft recommendation, the Ombudsman called on the Commission to **re-examine the complainant's infringement complaint in so far as it concerns the decisions by Austrian authorities (a) not to allow Mr X. a** period of time for leaving Austrian territory; and (b) not to grant suspensory effect to his appeal against the expulsion decision. In its detailed opinion, the Commission submitted that it properly addressed the complainant's infringement



complaint as regards the aforesaid aspects and provided reasons in support of its view. In the following, the Ombudsman therefore needs to assess whether the Commission has provided a convincing response to his draft recommendation.

121. In his observations on the Commission's detailed opinion, the complainant reverted to certain statements made before the Ombudsman issued a draft recommendation. Thus, he reiterated his criticism that the existence of an actual threat posed by Mr X. could not have reasonably been assumed. To the extent that this statement is addressed to national authorities, the Ombudsman recalls that the scope of his inquiry is limited to examining the Commission's actions in the case at hand (see paragraph 66 above). In so far as the complainant's statement is addressed to the Commission, the Ombudsman points out that, in his draft recommendation, he considered that the Commission gave plausible reasons in support of its position that the Austrian authorities and courts carried out an individual assessment as to whether Mr X. constituted a threat to public security, in line with Directive 64/221. He therefore sees no reason to revert to that issue in his assessment below.

122. As regards the submission reiterated by both the complainant and Mr X., namely, that Mr X.'s expulsion from Austrian territory was intended to serve the purpose of circumventing the statutory ban on deporting Mr X. to the United Kingdom, the Ombudsman recalls that he is not entitled to make any assessments as to whether or not national authorities have misapplied EU law. The same consideration applies to certain remarks made by Mr X. concerning the administrative procedure in Austria, namely, that he was not interviewed or assessed in relation to certain factual elements later used in the decisions of Austrian authorities.

The Ombudsman's assessment

123. In his draft recommendation, the Ombudsman considered that Directive 64/221 provides that Member States may deviate from the general rule of allowing a period of one month for leaving the territory of the MemberState concerned and for granting suspensory effect to an appeal against an expulsion decision in legitimate cases of urgency. The Ombudsman moreover considered it to be clear that the authorities of the MemberState concerned are required to give reasons for their view that such urgency exists. It follows that the issue whether the Commission has provided plausible reasons in support of its view that there was urgency should be assessed in relation to both aspects, that is, the period for leaving Austrian territory and the suspensory effect of an appeal. For the sake of clarity, it should be noted that, in its detailed opinion, the Commission maintained its view that there was no infringement of EU law in the present case (see paragraph 30 above), and that it was for this reason that it did not open an infringement procedure against Austria.

124. Before assessing the Commission's detailed opinion, it seems appropriate to address the complainant's argument that, contrary to the Commission's submissions, an immediate removal of a Union citizen would not be lawful, given that Article 7 of Directive 64/221 requires a period for leaving the territory to be stated in the expulsion decision. In the Ombudsman's view, this requirement does not rule out the lawfulness of an immediate removal, given that Article 7 of Directive 64/221, unlike for cases which are not urgent, does not provide for a minimum period



to leave the territory of the MemberState concerned in cases of urgency.

125. The Ombudsman is pleased to note that, in its detailed opinion, the Commission concurred with the view set out in his draft recommendation, namely, that in order not to render the requirement of urgency nugatory, immediate removal cannot be the automatic consequence of a finding by a Member State authority that a person constitutes a threat to public policy or security. At the same time, the Commission also submitted that the assessment whether there is urgency is linked to the threat assessment to be undertaken by the competent national authorities and includes taking into account aspects relating to the private life of the person concerned. In this regard, the Ombudsman considers that it is not in dispute that the question as to whether there is urgency indeed cannot be entirely detached from the considerations taken into account by national authorities in the course of the threat assessment. Nevertheless, as highlighted in the Ombudsman's draft recommendation, Member States are obliged to give reasons if they take the view that there is a case of urgency which must be specific and thus go beyond a mere reference to the outcome of the threat assessment. These reasons must make it possible to understand and, ultimately, to review, the considerations underlying the relevant decision of a MemberState authority.

126. In its detailed opinion, the Commission, arguing in support of its view that the Austrian authorities had duly assessed the urgency of the case, referred to the expulsion decision of the regional administrative authority of Wiener Neustadt and to the decisions of the independent administrative board of Lower Austria and of Burgenland, which the Ombudsman had analysed in his draft recommendation. It also relied on the fact that Mr X.'s case had been examined by the Supreme Administrative Court and the Austrian Constitutional Court. It therefore appears appropriate to analyse the Commission's response to the Ombudsman's draft recommendation in relation to each of these decisions.

127. The Ombudsman recalls that, in his draft recommendation, he noted that the regional administrative authority of Wiener Neustadt considered Mr X. to constitute a threat to public order and security and decided that it was therefore not justified to grant him a period of one month to leave Austrian territory and to grant suspensory effect to a possible appeal against the expulsion decision. In its detailed opinion, the Commission referred to the expulsion decision and stated that "[t]he Austrian authorities reached the conclusion that, in view of the threat to public policy and security the complainant would pose, a one month period [for leaving Austrian territory] was not to be granted". In the Ombudsman's view, it would thus appear to be clear that the Commission does not dispute that granting Mr X. a period of one month to leave Austrian territory was refused on the grounds that he was considered to constitute a threat to public order and security, without any additional reasoning as to the existence of urgency.

128. It is true that the Commission also referred to the absence of private or family ties which the regional administrative authority of Wiener Neustadt considered in its expulsion decision. The expulsion decision taken by that authority indeed states that there is an absence of private or family ties (" *Es sind keine privaten oder familiären Beziehungen zu Österreich bekannt.* "). However, it should be noted that this issue is only discussed in the context of deciding whether the competent Austrian authority should exercise its discretion in such a way as to exclude Mr



X. from Austrian territory. However, there is no mention of private or family ties in connection with whether Mr X.'s **immediate** removal from Austrian territory and the refusal to grant his appeal a suspensory effect was necessary. In any event, it would appear not to be immediately understandable how the absence of private and family ties could establish that there is urgency in a particular case.

129. The Ombudsman further recalls that, in his draft recommendation, he noted that the independent administrative board of Burgenland essentially confirmed that it was lawful not to grant Mr X. a period of one month to leave Austrian territory. The Ombudsman also noted that the independent administrative board of Lower Austria found itself unable to object to the denial of suspensory effect by the regional administrative authority of Wiener Neustadt. The latter board argued that, in view of the threat and danger posed by Mr X., there was a "*proven urgency*" requiring him to leave Austrian territory with immediate effect. In its detailed opinion, the Commission stated that the independent administrative board of Burgenland did not question the assessment made by the regional administrative authorities of Wiener Neustadt and pointed to the fact that, in urgent cases, an immediate removal would be permitted. The Ombudsman considers that the fact that an immediate removal is permitted in cases of urgency could not possibly substitute for the need to ascertain that there was indeed urgency in a particular case.

130. In its detailed opinion, the Commission also referred to the decision of the independent administrative board of Lower Austria. According to the latter, in view of Mr X.'s personality and the massive real and present threat and endangerment of public interests, there would be a proven case of urgency. The Ombudsman considers that, unlike the decisions of the regional administrative authority of Wiener Neustadt and of the independent administrative board of Burgenland, the decision of the independent administrative board of Lower Austria may be considered to specifically address the issue of urgency. While the latter decision refers to a number of considerations in this regard, which include the result of the threat assessment, it is not explained for which precise reasons the independent administrative board of Lower Austria arrived at the conclusion that there was "proven urgency".

131. Lastly, the Ombudsman notes that both the Supreme Administrative Court and the Austrian Constitutional Court rejected Mr X.'s applications without entering into the merits of the case. It follows that these judgments are inconclusive as to the existence of a case of urgency.

132. In his personal observations, Mr X. also appears to submit that the Commission was prevented from assuming that there was urgency in his case, given that, according to a police report, he "*was never seen with anyone under the age of 18*" during a certain period of time while in Austria. The Ombudsman considers this argument to be inconclusive and not able by itself to question the Commission's reliance on the existence of urgency in the present case.

133. On the basis of the above analysis, the Ombudsman concludes that the Commission did not provide a convincing response to his draft recommendation. As a consequence, the Ombudsman maintains the finding of maladministration contained in his draft recommendation.



134. If the Ombudsman does not consider that the detailed opinion he receives from an institution or body in response to a draft recommendation is satisfactory, he may have recourse to Article 3(7) of the Ombudsman's Statute which provides that he may submit a special report to the European Parliament. The submission of a special report gives Parliament, as a political body which derives its legitimacy from its direct election by citizens, and which exercises an important role in the Union's constitutional order, the opportunity to take a position on the Ombudsman's views and conclusions, and on the case at hand.

135. In his Annual Report for 1998, the Ombudsman pointed out that being able to present a special report to the European Parliament is of inestimable value for his work. He added that special reports should not, however, be presented too frequently, and they should be put forward only in relation to important matters where Parliament is able to take action in order to assist the Ombudsman. The Annual Report for 1998 was submitted to, and approved by the European Parliament.

136. The present case involves the Commission's handling of an infringement case in what appears to be an individual case. In the course of the Ombudsman's inquiry, the Commission submitted that, in its view, there was no infringement of EU law in the present case. The Commission moreover pointed to the isolated nature of the case which is illustrated by the fact that it did not receive any similar complaints. The complainant did not contradict the latter assessment, but insisted that the Commission should open an infringement procedure in the present case. It is true that the Commission could still open an infringement procedure. In the given context, the Ombudsman recalls that, pursuant to Article 258 TFEU, the infringement procedure consists of a pre-litigation stage, which involves the Commission and the Member State concerned, and, to the extent that the Commission decides to bring a case before the Court of Justice, a litigation stage. It is generally accepted that the Commission enjoys discretion in deciding whether or not to bring a case before the Court of Justice once it considers that there has been an infringement. However, there appears to be nothing which would prevent the Commission in the present case from contacting the Austrian authorities in order to obtain further clarification as to whether there was urgency in the present case. Still, given its isolated nature, the Ombudsman takes the view that the present case has limited general implications. Therefore, he considers that it would not serve a useful purpose to bring the case to Parliament's attention in its role as a political body designed to represent EU citizens. Accordingly, the Ombudsman considers it more appropriate to close the case with a critical remark which he will make below.

B. Conclusions

On the basis of his inquiry into this complaint, the Ombudsman closes it with the following critical remark:

Principles of good administration require that the Commission properly addresses



infringement complaints received and gives plausible reasons when it decides not to open an infringement procedure in relation to a particular complaint.

In the present case, the Commission failed properly to address the complainant's infringement complaint to the extent that it was directed at the decision of the Austrian authorities (a) not to allow the complainant a period of time for leaving Austrian territory and (b) not to grant suspensory effect to his appeal against the expulsion decision. This constitutes an instance of maladministration.

The complainant and the Commission will be informed of this decision. A copy of the decision will also be sent to Mr X.

P. Nikiforos Diamandouros

Done in Strasbourg on 31 October 2012

[1] Directive 64/221/EEC of the Council of 25 February 1964 on the co-ordination 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 1964, p. 850.

[2] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ 2004 L 158, p. 77.

[3] Case 30/77 *Bouchereau* [1977] ECR 1999, paragraph 34.

[4] Case C-145/09 *Tsakouridis* [2010] ECR I-11979, paragraph 43.

[5] Case C-145/09 *Tsakouridis* [2010] ECR I-11979, paragraph 25.

[6] Case C-145/09 *Tsakouridis* [2010] ECR I-11979, paragraph 55.

[7] Case 30/77 *Bouchereau* [1977] ECR 1999, paragraph 34.

[8] Case 67/74 *Bonsignore* [1975] ECR 297, paragraphs 5-7.

[9] Case C-348/96 *Calfa* [1999] ECR I-11, paragraphs 17-27.

[10] Case 30/77 *Bouchereau* [1977] ECR 1999, paragraphs 25-30.

[11] Case C-441/02 *Commission v. Germany* [2006] ECR I-3449, paragraph 33; Case 30/77



Bouchereau [1977] ECR 1999, paragraph 28; Case C-348/96 *Calfa* [1999] ECR I-11, paragraph 24; and Case C-503/03 *Commission v Spain* [2006] ECR I-1097, paragraph 44.