Field:

Immigration law

BVerwGE: yes

Professional press: yes

Sources in law:

Residence Act	Sections 11, 55, 56
Association Council Decision 1/80	Article 7, 13, 14(1)
European Convention on Human Rights	Article 8
Basic Law	Article 2(1), Article 6
EU Charter of Fundamental Rights	Article 24(3), Article 47(1)
Directive 64/221/EEC	Article 9
Directive 2003/109/EC	Article 12
Directive 2004/38/EC	Article 31(1) and 3
Directive 2008/115/EC	Article 2, 3(4), Article 11(1) and (2), Article 13(1)
Code of Administrative Court Procedure	Sections 86, 108, 128, 137(2), 142
Additional Protocol to the EEC/Turkey Association Agreement	Article 41(1), Article 59

Headwords:

Application; principle of equivalence; Association law; right of residence under Association law; expulsion; protection from expulsion; time limit; principle of effectiveness; entry ban; threat; prognosis of danger; amendment of complaint; return decision; standstill; standstill clause; finding of fact; proportionality; separation of functions principle; risk of re-offending; probability standard; relevant date.

Headnotes:

1. The separation of functions principle contained in Article 9 of Directive 64/221/EEC is not applicable on the basis of the standstill clauses of Article 13 of Association Council Decision 1/80 and Article 41(1) of the Additional Protocol to expulsions of Turkish nationals who enjoy rights under Association law, if the expulsion was issued after the repeal of the Directive on 30 April 2006.

2. Since the amendment of Section 11(1) of the Residence Act by the Directive Implementation Act of 22 November 2011 (BGBl I p. 2258) has taken effect, foreigners are entitled to have the immigration authority, simultaneously with the issuance of an expulsion, set a time limit for the effects of the expulsion as mentioned in Section 11(1) first and second sentence (entry and residence bans, barrier to granting residence titles) (further development of case law in judgment of 14 February 2012 – BVerwG 1 C 7.11 – paras. 28 et seq.).

Judgment of the First Division of 10 July 2012 – BVerwG 1 C 19.11

I. Düsseldorf Administrative Court 16.01.2007 – Case: VG 27 K 4870/06 -
II. Münster Higher Administrative Court 05.09.2008 – Case: OVG 18 A 855/07 -

FEDERAL ADMINISTRATIVE COURT

IN THE NAME OF THE PEOPLE

JUDGMENT

BVerwG 1 C 19.11
OVG 18 A 855/07

Released
on 10 July 2012
Ms Wahl
as Clerk of the Court

in the administrative case

Translator's Note: The Federal Administrative Court, or *Bundesverwaltungsgericht*, is the Federal Republic of Germany's supreme administrative court. This unofficial translation is provided for the reader's convenience and has not been officially authorised by the *Bundesverwaltungsgericht*. Page numbers in citations of international texts have been retained from the original and may not match the pagination in the parallel English versions.

When citing this decision, it is recommended to indicate the court, the date of the decision, the case number and the paragraph: BVerwG, Judgment of 10 July 2012 – BVerwG 1 C 19.11 – para …

The First Division of the Federal Administrative Court
upon the hearing of 10 July 2012
by Presiding Federal Administrative Court Justice Eckertz-Höfer and
Federal Administrative Court Justices Prof. Dr Dörig, Prof. Dr Kraft,
Fricke and Dr Maidowski

decides:

The Complainant's appeal against the decision of the Higher Administrative Court for the State of North Rhine-Westphalia of 5 September 2008 is denied, with the proviso that the Respondent is ordered to set a time limit of seven years for the legal effects of expulsion as named in Section 11(1) first and second sentences of the Residence Act.

The Complainant shall bear 9/10 of the cost of these proceedings and the Respondent 1/10.

R e a s o n s :

I

1 The Complainant, a Turkish citizen born in 1964, appeals his expulsion for an indeterminate period.

2 The Complainant entered the Federal territory in 1976 to join his parents. His mother was employed as a worker from 1969 to 1982. After attending lower secondary school, he completed an apprenticeship as a businessman in electrical equipment. In December 1987 he received a residence entitlement. His marriage in March 1988 to a Turkish citizen has produced two daughters. The marriage has now been dissolved.

3 The Complainant has attracted the attention of the criminal authorities on multiple occasions. In November 2000, he was sentenced to one year's imprisonment and two months' probation for raping his then wife. In October 2005, the Krefeld Regional Court sentenced him to three years and eight months of imprisonment as an aggregate sentence on 11 counts of sexual abuse of a ward, and for bodily harm. It is indicated in the criminal judgment that beginning in January 2004, the Complainant took advantage of his wife's being absent for work reasons to commit sexual acts upon his elder daughter. When he noticed that this daughter had taken up contact with a boy in spite of a parental prohibition, he struck her in the face with his hand and fist.

4 The Respondent ordered the expulsion of the Complainant in an order dated 2 May 2006, and warned that he would be deported to Turkey in the event that he did not leave the country in good time. The Respondent held that the expulsion of the Complainant, who holds rights under the Turkey-EU Association, should be decided on a discretionary basis. Because his residence entitlement continued in effect as a settlement permit, the Complainant enjoyed particular protection from expulsion, so that he can be expelled only for serious reasons of public security and law and order. These reasons, the Respondent held, were present in a specifically preventive form, because protecting children from sexual offences and violent abuse is a community task of paramount importance, and affects a fundamental interest of society. The act constituting the reason for expulsion was of serious consequence; the abuse of a position of trust, the defencelessness of the victim, and the intensity of the commission of the deed carried particular weight. In view of the Complainant's overall personality and his prior conduct, there was a high risk of re-offending. He had been previously convicted of a similar offence and had not showed insight into the wrong he had committed, nor was it evident that he had reflected on the events or attempted to overcome his inclinations. Although he is deeply engaged in local circumstances and has family ties, expulsion is justified in view of the future threat that the Complainant poses to fundamental legally protected interests, including with regard to Article 8 of the European Convention on Human Rights. Expulsion was initially declared for an indeterminate period, as a definite term could be decided only after positive changes in the Complainant's person. The protest

against this decision was rejected by the Düsseldorf District Government on 25 August 2006.

5 The Administrative Court rejected the complaint in a judgment dated 16 January 2007. It held that the discretionary expulsion under Section 55 of the Residence Act und Article 14(1) of Decision 1/80 of the Turkey/EU Administrative Council was unobjectionable, because the Complainant's further residence represented a genuine and sufficiently serious threat affecting the fundamental interests of society. The specifically preventive expulsion was not founded on his criminal conviction alone. Rather, there was reason to believe that further misconduct by the Complainant represented a serious threat to public safety if he came into the environment with his family, and therefore also his younger, minor daughter, that made his criminal offences possible. Article 8 of the European Convention on Human Rights and Article 6 of the Basic Law had not been violated, the court held, because in the examination of the case, the nature and severity of the offences he committed, as well as the risk of re-offending, had counted significantly against the Complainant.

6 During the proceedings on appeal, the court for the execution of prison sentences refused in a decision of 7 March 2008 to commute the remaining term of incarceration, on the grounds of an increased risk of recidivism by the Complainant. The appeal he immediately filed against that decision was denied by the Düsseldorf Higher Regional Court in a decision of 13 May 2008.

7 The Higher Administrative Court denied the Complainant's appeal in a decision dated 5 September 2008. It embraced the grounds of the Administrative Court, and added that the expulsion proceedings following completion of the proceedings on the original protest were unobjectionable. It also held that the expulsion was substantively lawful, because the prognosis of danger – with reference to the date of the decision by the appellate court – remained valid. It held that the Complainant presented an elevated risk of recidivism. This, the court held, is made plain by the decisions of the court for the execution of prison sentences and of the Düsseldorf Higher Regional Court.

8 The present Court stayed proceedings in the Complainant's present appeal by an order of 25 August 2009 – BVerwG 1 C 25.08 – (Buchholz 451.901 Assoziationsrecht no. 53) and referred to the European Court of Justice (ECJ) the question of whether protection from expulsion under Article 14(1) of Association Council Decision 1/80 can be enjoyed by a Turkish national whose legal status derives from Article 7 of Association Council Decision 1/80 vis-à-vis the Member State where he has had his residence for the past ten years, under Article 28(3)(a) of Directive 2004/38/EC. The ECJ answered the question in the negative in a judgment in a parallel case, dated 8 December 2011 – Case C-371/08 – (Ziebell), and ruled that Article 14 of Association Council Decision 1/80 does not preclude an expulsion measure, in so far as the personal conduct of the individual concerned constitutes at present a genuine and sufficiently serious threat affecting a fundamental interest of the society of the host Member State, and that measure is indispensable in order to safeguard that interest. Thereupon, this Court revoked the referring order in a decision of 20 December 2011.

9 In his appeal to this Court, the Complainant complains of a violation of Article 9(1) of Directive 64/221/EEC (principle of separation of functions), which he says continues to apply under the standstill clause of Article 13 of Association Council Decision 1/80. The involvement of the protest authority subsequently to the expulsion, he says, does not suffice for this purpose. In the prognosis of danger, changes subsequent to the last decision by the authorities should also be taken into account in favour of the Complainant, who had undergone psychotherapeutic treatment after being released from incarceration in September 2009, and since then has conducted himself without offence. It was necessary to clarify, he said, what the ECJ means by the limit of the indispensability of expulsion in the Ziebell decision. Furthermore, an indeterminate expulsion violates the prohibition of excess, as well as Article 6 of the Basic Law and Article 8 of the European Convention on Human Rights. The Complainant is de facto a German, as he has become integrated economically and socially. Finally, the expulsion violates Article 24(3) of the Charter of Fundamental Rights. Alternatively, the Complainant seeks in these proceedings to have a time limit set on the effects of the expulsion, with immediate effect. He says he is entitled to a

time limit under the Return Directive and under Section 11(1) third sentence of the Residence Act in the version of the Directive Implementation Act of 2011.

10 The Respondent defends the appealed decision. The representative of the Federal interests before the Federal Administrative Court has entered into the proceedings and holds that the appeal is without merit.

II

11 The Complainant's appeal to this Court, which is procedurally allowable, meets with success only to a small degree. In ruling that the expulsion (1.) and the deportation warning (3.) were lawful, the appellate court did not contravene the law in any manner subject to appeal in this Court (Section 137(1) of the Code of Administrative Court Procedure). However, under Section 11(1) third sentence of the Residence Act in the version of the Directive Transposition Act of 2011, which took effect during the course of the present proceedings, the Respondent must be ordered to limit the effects of the expulsion, as indicated in the first and second sentences of that provision, to a term of seven years (2.).

12 The legal assessment of the expulsion, of the application seeking a time limit, and of the hitherto unexecuted deportation warning is in general to be based on the situation of fact and law at the date of the last oral hearing or decision by the court trying the facts, or in other words, in this case the appellate court, on 5 September 2008 (judgment of 15 November 2007 – BVerwG 1 C 45.06 – BVerwGE 130, 20 para. 12 for expulsion; judgment of 22 March 2012 – BVerwG 1 C 3.11 – para. 13 – publication in the BVerwGE collection planned – for the deportation warning). Changes in the law while the present appeal proceedings were pending must, however, be taken into account if the appellate court would have had to consider them if it were deciding in place of the Federal Administrative Court (judgment of 11 January 2011 – BVerwG 1 C 1.10 – BVerwGE 138, 371 para. 10 with further authorities). Therefore the relevant provisions are those of the Residence Act in the version promulgated on 25 February 2008 (BGBl I p. 162), last amended by the Act of 22 December 2011

(BGBl I p. 3044). Consequently, in particular, the amendments by the Act to Implement Residence- and Asylum-Related Directives of the European Union and to Adapt National Legal Provisions to the EU Visa Code of 22 November 2011 (BGBl I p. 2258) – hereinafter the Directive Implementation Act of 2011 – must also be given consideration.

13 1. The expulsion of the Complainant is lawful.

14 1.1 It has its basis in law in Section 55(1) and Section 56(1) second sentence of the Residence Act in conjunction with Article 14(1) of Decision no. 1/80 of the EEC-Turkey Association Council of 19 September 1980 (ANBA 1981, 4 = InfAuslR 1982, 33) – Association Council Decision 1/80 –. The Complainant holds a legal status under Article 7 of Association Council Decision 1/80. He entered the Federal territory by permission, for the purpose of family reunification, at the age of 12. The courts below have found that his mother was duly registered as belonging to the labour force from 1969 to 1982. The Complainant lived with his parents, and fulfilled the minimum duration-of-residence requirements under Article 7 first sentence of Association Council Decision 1/80. As he has completed an apprenticeship as a businessman in electrical equipment, Article 7 second sentence of Association Council Decision 1/80 also applies in his favour. Accordingly, pursuant to Article 14(1) of Association Council Decision 1/80, the Complainant may be expelled only if his personal conduct constitutes at present a genuine and sufficiently serious threat affecting a fundamental interest of the society of the Federal Republic of Germany, and that measure is indispensable in order to safeguard that interest (ECJ, judgment of 8 December 2011 – Case C-371/08, Ziebell – NVwZ 2012, 422). Such is the case here. Consequently, serious grounds pertaining to public security and law and order within the meaning of Section 56(1) third sentence of the Residence Act are also present.

15 1.2 This Court has already pointed out in its referring order of 25 August 2009 – BVerwG 1 C 25.08 – (Buchholz 451.901 Assoziationsrecht no. 53, para. 21) that the rape of his wife and the repeated sexual abuse of his elder daughter constitute a particularly weighty reason for expulsion. The Complainant's per-

sonal behaviour, which has been punished under criminal law, establishes a genuine and sufficiently serious threat that affects a fundamental interest of society, and that goes beyond the disruption of law and order that is associated with any violation of the law. The legally protected interests of sexual self-determination and bodily integrity that are concerned here rank very high in the hierarchy of values enshrined in fundamental rights, and, especially in cases of the sexual abuse of minors, impose duties on the state to provide protection, which may also be directed against parents.

16 In the referring order (loc. cit., para. 22) this Court furthermore stated that where legally protected interests of elevated significance are threatened, rather lower requirements apply for the risk of re-offending that the trier of fact is to determine as part of the prognosis (in the same sense, judgments of 2 September 2009 – BVerwG 1 C 2.09 – Buchholz 451.901 Assoziationsrecht no. 54 para. 17, and of 3 August 2004 – BVerwG 1 C 30.02 – BVerwGE 121, 297 <305 et seq.>). This differentiating standard of probability has been criticised in appellate court case law, because it is said not to do justice to the interest of the broadest possible effectuation of fundamental freedoms and the consequent imperative for narrow construction of the bases in Union law for terminating residence as an *ultima ratio* (Mannheim Administrative Court, judgments of 4 May 2011 – 11 S 207/11 – NVwZ 2011, 1210 and of 10 February 2012 – 11 S 1361/11 – NVwZ-RR 2012, 492). This Court is unable to concur in that reasoning, if only because under the general principles of the laws on averting danger, any prognosis of a threat under security law represents a correlation between the probability of occurrence and the (potential) extent of harm. The greater and more fraught with consequences the potential harm, the less stringent the requirements to be posed for the probability of harm (judgments of 6 September 1974 – BVerwG 1 C 17.73 – BVerwGE 47, 31 <40>; of 17 March 1981 – BVerwG 1 C 74.76 – BVerwGE 62, 36 <39> and of 3 July 2002 – BVerwG 6 CN 8.01 – BVerwGE 116, 347 <356>). As well, the assessment incumbent on the courts of the Member States, and to be made taking due account of all specific circumstances of the individual's situation, of whether the personal conduct of the individual concerned constitutes at present a genuine and sufficiently serious threat affecting a fundamental interest of society (ECJ, judgment of 8 De-

cember 2011, loc. cit.), cannot omit to consider the importance of the threatened legally protected interest when examining the necessary probability of harm, because that importance determines the potential degree of harm. But this does not mean that any possibility, however remote, establishes a risk of re-offending in the case of high-ranking legally protected interests. This Court has previously held, with regard to Section 12(3) of the Act on the Entry and Residence of the Nationals of Members States of the European Economic Area, that in light of the importance of the principle of freedom of movement, one must not set too low a bar for the sufficient probability that is differentiated according to the scope of potential harm (judgment of 27 October 1978 – BVerwG 1 C 91.76 – BVerwGE 57, 61 <65>).

17 The prognosis of a specific threat of re-offending on the part of the Complainant, as found by the Respondent and upheld by the courts below, suffices under these standards. The Respondent and the Administrative Court thoroughly assessed the circumstances of the offence, the structure of the Complainant's personality, which lacks insight into, engagement with and reflection upon what has happened, and his failure to overcome his inclinations with therapeutic support. The appellate court has embraced that assessment. In addition, it noted that because of the elevated threat of recidivism on the Complainant's part, the court for the execution of prison sentences declined to commute the remainder of his sentence and grant parole instead, and the correctional facility stated its opinion that merely granting a furlough from incarceration entailed unforeseeable safety risks. On the basis of these findings of fact, which are binding upon this Court (Section 137(2) of the Code of Administrative Court Procedure), regarding the elevated threat of recidivism on the Complainant's part, there is not even the rudiment of an indication that the appellate court applied too low a standard of probability, and therefore an inaccurate one, in arriving at its prognosis adverse to the Complainant. The detailed assessment of the Complainant's personality, and the threat of re-offending deriving from specific circumstances, demonstrate that the Respondent did not base the expulsion, which was motivated solely for specifically preventive purposes, on the Complainant's criminal conviction alone, but also took into account the threat posed by the Complainant in the future.

18 Contrary to the Complainant's opinion, the period of time that has lapsed between the decision of the Higher Administrative Court and the hearing before this Court, because of the stay of the proceedings and the referral of the question to the ECJ, does not justify either taking account of the new factual matters that he adduces in the present proceedings, nor a remand of the matter to the appellate court. Except in cases of justified procedural complaints, the Federal Administrative Court, in accordance with its mission that is limited primarily to reviewing matters of law, is bound under Section 137(2) of the Code of Administrative Court Procedure by the findings of fact made by the appellate court in the appealed decision. This restriction, which characterises the remedy of appeal to this Court, means that this Court does not review the matter in the same scope as the appellate court, and that therefore – in contrast to the appellate court (Section 128 of the Code of Administrative Court Procedure) – it does not take account of newly adduced facts and evidence (judgment of 3 June 1977 – BVerwG 4 C 37.75 – BVerwGE 54, 73 <75>). This limitation also fundamentally precludes any remand of the matter merely because of a subsequent change in the facts material to a decision. It is intended at the same time to forestall the risk of an 'endless' proceeding in the administrative courts, and to prevent the basis from being withdrawn retrospectively from an appellate decision that is unobjectionable in terms of the law (judgments of 28 February 1984 – BVerwG 9 C 981.81 – Buchholz 402.25 Section 1 Asylum Procedure Act no. 19 p. 48 <51 et seq.> and 20 October 1992 – BVerwG 9 C 77.91 – BVerwGE 91, 104 <105 et seq.>).

19 The barrier under Section 137(2) of the Code of Administrative Court Procedure against the supreme court's examination of new factual matters is not surmounted by the fact that Article 14(1) of Association Council Decision 1/80 requires the existence of a threat 'at present', i.e., currently, for the expulsion of a Turkish national holding Association rights (ECJ, judgment of 8 December 2011, loc. cit., paras. 80, 82 and especially 84). This addresses the relevant date for the assessment of the situation of fact, which applies only for decisions by the courts trying the facts, because of the separation between the courts trying the facts and the supreme court that tries solely on matters of law under the

Code of Administrative Court Procedure. Under Section 86(1) and (2) and Sections 108 and 128 of the Code of Administrative Court Procedure, investigating the background of fact and finding on the facts relevant to the decision is the province only of the courts trying the facts, through their free assessment of the evidence. This separation of functions between the courts that adjudicate the facts and the courts that adjudicate only on points of law is not modified by Union law, because under the settled case law of the ECJ, it is normally the task of the domestic legal system in the individual Member States to arrange court procedure, including to the extent that it is to safeguard individual rights that derive from Union law. Here the procedural rules cannot, however, be less favourable than in the case of a legal remedy founded on domestic law alone (the principle of equivalence). Moreover, under the principle of effectiveness, the exercise of the rights conferred by the EU legal system cannot be made impossible in practice, or excessively difficult (ECJ, judgments of 12 February 2008 – Case C-2/06, Kempter – ECR 2008, I-411 para. 57, and of 10 April 2003 – Case C-276/01, Steffensen – ECR 2003, I-3735 paras. 60 et seq. – each with further authorities). The binding of the supreme court under Section 137(2) of the Code of Administrative Court Procedure also satisfies both principles in the present instance. The initiation of a third level of appeal, directed solely to a review of the law, also does not contradict the right to an effective remedy under Article 47(1) of the Charter of Fundamental Rights of the European Union. The principle of effective judicial remedy set forth there opens up access for the individual to a court, not to multiple levels of jurisdiction (ECJ, judgment of 28 July 2011 – Case C-69/10, Samba Diouf – NVwZ 2011, 1380 para. 69). It does not require that an appeal, such as one to this Court, instituted under the law of a given Member State, must make it possible to review the facts as they currently stand. Moreover, with regard to the factual matters that have arisen since the appellate court’s decision, which may entail the cessation or a more than negligible reduction of the threat posed by the Complainant, the Complainant has the option of applying for a reduction of the time period that is already to be set by the immigration authority at the time of the expulsion, under Section 11(1) third through fifth sentences of the Residence Act (see 2 below on this point).

20 1.3 As the Complainant has a right of residence founded in Association law, he may be expelled only on the basis of a discretionary decision. The courts' review of that decision must be founded on the situation of fact and law at the time of the last oral hearing or decision by the court trying the facts (ECJ, judgment of 8 December 2011, loc. cit., para. 84; already held previously in the judgment of 3 August 2004 – BVerwG 1 C 29.02 – BVerwGE 121, 315 <320 et seq.>). The discretionary decision by the immigration authority on ordering an expulsion requires a proper reconciliation of the public interest in the foreigner's leaving the country with the foreigner's private interest in remaining in the Federal territory. In the foreigner's favour, due consideration must be accorded to the reasons for special protection from expulsion (Section 56 of the Residence Act) and to the duration of his lawful residence, as well as to his personal, economic and other ties in the Federal territory that are worthy of protection. Furthermore, the consequences of the expulsion for the foreigner's family members who are lawfully resident in the Federal territory and who live with him as part of a family must also be taken into account (Section 55(3) of the Residence Act). The concerns protected under Article 2(1) of the Basic Law, as well as Article 6(1) and (2) of the Basic Law and Article 8 of the European Convention on Human Rights, relating to respect for private and family life, must be taken into account in the overall consideration consistently with their import, while maintaining the principle of proportionality. This particularly applies to foreigners who were born and grew up in the Federal territory, especially if they have no ties to the country of their nationality.

21 In view of these requirements, this Court has already commented in its referring order of 25 August 2009 (loc. cit., para. 24) that the Respondent's exercise of discretion was unobjectionable. The statutory limits of discretion have not been exceeded, in view of the specific threat that the Complainant represents to the high-priority legally protected interests of sexual self-determination and the bodily integrity of women in his environment. It arouses no reservations that the Respondent gave greater weight to the public interest in terminating the Complainant's residence, which was guided by the safeguarding of legally protected interests and further reinforced by constitutional duties of protection, than it did to his interest in remaining in Germany. It is true that his lawful residence for

more than thirty years in the Federal Republic of Germany tells significantly to his advantage. Nevertheless, it must be taken into account that he has sufficient personal ties in Turkey that he can reasonably be expected to emigrate there. The protection of family life and parental care enjoys high importance, but becomes less significant if one also takes the welfare of his minor daughter into consideration, so that the termination of his residence is also justified having regard to Article 6 of the Basic Law, Article 8 of the European Convention on Human Rights and Article 24(3) of the EU Charter of Fundamental Rights. In the overall reconciliation of all contrary interests, the expulsion is proportionate and 'indispensable' within the meaning of the ECJ case law (judgment of 8 December 2011, loc. cit., para. 86). This is because with this concept, the ECJ merely addressed the imperative reconciliation of public interests with the private interests of the individual concerned, or in other words, his actually existent integration factors, with regard to the principle of proportionality (on the same lines, Mannheim Administrative Court, judgment of 10 February 2012 – 11 S 1361/11 – NVwZ-RR 2012, 492).

22 1.4 The remaining complaints in the appeal to this Court are without merit; in particular, the expulsion procedure was carried out without error. It is true that the 'principle of separation of functions' enunciated in Article 9(1) of Directive 64/221/EEC may be extended to Turkish nationals who enjoy the rights conferred by the Association Agreement (judgment of 13 September 2005 – BVerwG 1 C 7.04 – BVerwGE 124, 217 <221 et seq.> in accordance with ECJ, judgment of 2 June 2005 – Case C-136/03, Dörr and Ünal – Coll. 2005, I-4759 <paras. 61 et seq.> = NVwZ 2006, 72). In the case at hand, however, the Respondent issued the appealed decision on 2 May 2006, and therefore only after Directive 64/221/EEC was repealed as from 30 April 2006 (Article 38(2) of Directive 2004/38/EC). At that date, Article 9 of Directive 64/221/EEC no longer applied; instead, Article 12 of Directive 2003/109/EC is to be consulted as the frame of reference in Union law for the application of Article 14(1) of Association Council Decision 1/80 (ECJ, judgment of 8 December 2011, loc. cit., para. 79). According to Article 12(4) of Directive 2003/109/EC, judicial redress for review of an expulsion is to be available to long-term residents; there is no prescription

for the involvement of an independent agency in the expulsion proceedings to review the measure's suitability for its purpose.

23 Furthermore, before Directive 64/221/EEC was repealed, the ECJ justified the application of the 'principle of separation of functions' to Turkish nationals who enjoy rights under the Association Agreement on the grounds that the legal statuses conferred under Article 48 of the EC Treaty must be extended so far as possible to Turkish workers who enjoy rights under the Association Agreement. For these (substantive) rights to be effective, it must be possible for the Turkish nationals to be able to assert them before national courts. To ensure the effectiveness of that judicial protection, the court said, it is essential to grant them the same procedural guarantees as those granted by Community law to nationals of Member States. Therefore it must be possible for them to rely, among other provisions, on Article 9 of Directive 64/221/EEC, because the procedural guarantees are inseparably linked with the substantive subjective rights to which they relate (ECJ, judgment of 2 June 2005, loc. cit., paras. 62 and 67). As the considerations by the ECJ are founded on the procedural guarantees afforded to nationals of Member States under Community law, its case law on their extension to Turkish nationals who enjoy rights under the Association Agreement proves, even at its origin, to be open to cases of changes in the law that affect the status of citizens of the Union. For these citizens, Article 31(1) of Directive 2004/38/EC guarantees access to judicial and, where appropriate, administrative redress against any decision taken on the grounds of public security or public policy. In the redress procedures, under Article 31(3) first sentence of Directive 2004/38/EC the legality of the decision must be examined, as well as the facts and circumstances on which the decision was based. Under the second sentence, the redress procedures must ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28 of Directive 2004/38/EC. Accordingly, Union law no longer offers administrative review under the 'separation of functions principle' in cases of the expulsion of citizens of the Union. Consequently, according to the dynamically oriented case law of the European Court of Justice on the extension of rights to this group, Turkish nationals who benefit from the Association Agreement cannot claim a better procedural status.

24 By contrast, the Complainant invokes the standstill clause in Article 13 of Association Council Decision 1/80 and Article 41(1) of the Additional Protocol to the Agreement of 12 September 1963 establishing an Association between the European Economic Community and Turkey for the transitional stage of the Association (BGBl 1972 II p. 385) – the Additional Protocol. Under Article 13 of Association Council Decision 1/80, the Member States of the Community and Turkey may not introduce new restrictions on the conditions of access to employment applicable to workers and members of their families legally resident and employed in their respective territories. Under Article 41(1) of the Additional Protocol, the Contracting Parties are to refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services. The Complainant claims that these standstill clauses indicate that Article 9(1) of Directive 64/221/EEC continues to be applicable to the expulsion of Turkish nationals who enjoy rights under the Association Agreement. This Court does not agree.

25 The first factor that argues against the Complainant's interpretation is that by its very wording, Article 13 of Association Council Decision 1/80 obliges only the Member States, not the European Union. Article 41(1) of the Additional Protocol materially concerns only restrictions on the freedom of establishment and the freedom to provide services, not the residency status to be attributed to freedom of movement of workers under Article 7 of Association Council Decision 1/80. Furthermore, it appears questionable whether the standstill clauses tailored to address access to the labour market or to the domestic market contain any procedural rules whatsoever that pertain to termination of residence (see judgment of 30 April 2009 – BVerwG 1 C 6.08 – BVerwGE 134, 27 para. 20, on the statutory conditions for extinction of residence titles), and whether the repeal of the 'separation of functions principle' with regard to judicial review under Article 12(4) of Directive 2003/109/EC represents a perceptible deterioration of legal status. But we may set this question aside, because the continued application of Article 9 of Directive 64/221/EEC to Turkish nationals who enjoy rights under the Association Agreement would conflict with Article 59 of the Additional Protocol, even if one were to assume a legally material deterioration of status.

According to that provision, Turkey is not to receive more favourable treatment in the areas covered by the Protocol than that which Member States grant to one another pursuant to the Treaty establishing the Community. But that would indeed be the case if the ‘separation of functions principle’ were to continue to be applied, in comparison to the procedural rights of citizens of the Union under Article 31(1) and (3) of Directive 2004/38/EC – as explained above.

26 Furthermore, the protest proceeding conducted in the present case under Sections 68 et seq. of the Code of Administrative Court Procedure meets the requirements of the procedural guarantees under Article 9 of Directive 64/221/EEC (judgment of 13 September 2005, loc. cit., p. 221 et seq.). This Court holds to that case law, for lack of radical new arguments in the present appeal.

27 2. On the Complainant’s alternative application, in which he seeks to have a time limit set for the effects of expulsion, with immediate effect, the Respondent must be required to limit the effects of the expulsion indicated in Section 11(1) first and second sentences of the Residence Act to a duration of seven years. For the rest, the Complainant’s application is without merit.

28 2.1 The alternative application, which was first filed in the appeal to this Court, is procedurally allowable. The prohibition on amending complaints in supreme court appeals under Section 142 of the Code of Administrative Court Procedure does not stand in opposition to this finding. According to the intent and purpose of that provision, the court of ultimate appeal is fundamentally to be limited to examining the law on the matter at issue that has already been argued and prepared in the court below, so as not to be forced, by new applications filed for the first time in the ultimate appeal proceedings, to remand the case without further review of the law, under Section 144(3)(2) of the Code of Administrative Court Procedure (judgment of 14 April 1989 – BVerwG 4 C 21.88 – Buchholz 442.40 Section 6 Air Transport Act no. 21 = NVwZ 1990, 260 <261>). But no such situation is present here. In the course of the present proceedings, Section 11 of the Residence Act was amended by the Directive Implementation Act of 2011 in such a way that the Complainant is now entitled to a simultaneous setting of

a time limit for the effects of expulsion indicated in Section 11(1) first and second sentences of the Residence Act (see 2.2.2 below). The filed alternative application takes account of this change in substantive law. Nor does giving it consideration alter the matter at issue, because the entitlement to a time limit does in fact rest entirely on the application challenging the expulsion (see judgment of 26 January 1995 – BVerwG 3 C 21.93 – BVerwGE 97, 331 <342>).

29 2.2 The alternative application has merit only to a limited degree. Under Section 11(1) first sentence of the Residence Act in its new version, a foreigner who has been expelled cannot re-enter or stay in the Federal territory. Under the second sentence of the provision, he or she is not to be granted a residence title even if the requirements entitling him or her to a title in accordance with the Act are fulfilled. The third sentence of the provision requires that time limits must be applied to the effects of the Act, on application. According to the fourth sentence, the time limit is to be set according to the individual case concerned, and may exceed five years only if the foreigner has been expelled on the grounds of a criminal conviction or if he poses a serious threat to public safety or law and order. The setting of the time limit is to take due account of whether the foreigner has left the Federal Territory voluntarily and in good time (fifth sentence). According to the sixth sentence, the time limit begins upon the person's leaving the Federal territory. According to the seventh sentence, no time limit is to be applied if a foreigner has been deported from the Federal territory on account of a crime against peace, a war crime or a crime against humanity, or on the basis of a deportation order pursuant to Section 58a of the Residence Act.

30 2.2.1 Since Section 11 of the Residence Act took effect in the new version of the Directive Implementation Act of 2011, foreigners fundamentally have been entitled to have the immigration authority set a time limit for the associated ban on entry and residence, as well as the barrier to a residence title, at the same time as it issues an expulsion (further development of case law in the judgment of 14 February 2012 – BVerwG 1 C 7.11 – juris paras. 28 et seq.). This proceeds from the following considerations:

31 The provisions on setting a time limit for the effects of an expulsion and deportation have been continuously ameliorated in favour of the foreigners concerned since the Aliens Act of 1965. Under Section 15(1) second sentence of the Aliens Act of 1965, setting a time limit for the effects of expulsion and deportation was still left entirely to the discretion of the immigration authority. Section 8(2) third sentence of the Aliens Act of 1990 provided that on application, a time limit would as a rule be set (likewise Section 11(1) third sentence of the Residence Act of 2004); the length of the time limit was at the authority's discretion. This development demonstrates the legislature's increasing sensitivity to the proportionality of the legal effects of expulsion over time, in view of the drastic consequences for the foreigner's personal life and the social, family and economic disadvantages to which he or she may be exposed (see Federal Constitutional Court, decision of 18 July 1979 – 1 BvR 650/77 – BVerfGE 51, 386 <398 et seq.>). Typically, an expulsion for a limited time suffices to achieve the preventive purposes pursued with this administrative measure (judgments of 7 December 1999 – BVerwG 1 C 13.99 – BVerwGE 110, 140 <147> and 11 August 2000 – BVerwG 1 C 5.00 – BVerwGE 111, 369 <371 et seq.>).

32 Under the law formerly in effect, setting a time limit for the effects of expulsion was normally contingent on the prior departure of the foreigner from this country (decision of 17 January 1996 – BVerwG 1 B 3.96 – Buchholz 402.240 Section 45 Aliens Act 1990 no. 5; judgment of 7 December 1999, loc. cit., p. 147; see also BTDrucks 11/6321 p. 57 on Section 8(2) Aliens Act 1990). The legal system of expulsion and time limits was set up in two phases, since at the time of the issuance of an expulsion that was motivated (entirely or partly) by specifically preventive concerns, it typically could not readily be foreseen how the individual involved would behave in the future. But in addition to the gravity of the reason for expulsion, an allowance for the purpose of the expulsion, and consideration of the consequences with regard to the prohibition of excess, behaviour is one of the deciding factors for setting a time limit (judgment of 11 August 2000, loc. cit., p. 372 et seq.). The law's separation of the exclusion, on the one hand, from the time limit for its effects, on the other, has the consequence that an erroneous decision on a time limit does not render the expulsion unlawful, but may be challenged separately (decisions of 31 March 1981 – BVerwG 1 B

853.80 – Buchholz 402.24 Section 15 Aliens Act no. 3 and of 10 December 1993 – BVerwG 1 B 160.93 – Buchholz 402.240 Section 47 Aliens Act 1990 no. 2; judgment of 14 February 2012, loc. cit., para. 30).

33 This Court has decided on multiple occasions even under the previous status of the law that in order to maintain the proportionality of an expulsion, in some cases the immigration authority may be obliged even of its own accord to set a time limit for the effects of an expulsion at the time when it is declared. Whether this was necessary depended, in the case of a specifically preventive expulsion, on all the circumstances of the specific case, and particularly on the extent of the threat posed by the foreigner, the foreseeability of the future development of this threat, and the legally protected concerns of the foreigner and his or her family members (judgments of 15 March 2005 – BVerwG 1 C 2.04 – Buchholz 451.901 Assoziationsrecht no. 42, of 23 October 2007 – BVerwG 1 C 10.07 – BVerwGE 129, 367, para. 18, and of 2 September 2009 – BVerwG 1 C 2.09 – Buchholz 451.901 Assoziationsrecht no. 54, para. 25, as well as decision of 20 August 2009 – BVerwG 1 B 13.09 – Buchholz 402.242 Section 11 of the Residence Act no. 4, para. 8). By contrast, in the case of an expulsion on purely general preventive grounds of a foreigner who had special protection from expulsion, it was regularly imperative for the authority to decide spontaneously on the time limit for the effects of the expulsion at the same time as the expulsion itself. In these cases, it can already be determined at the relevant date for the expulsion how long the individual concerned must be kept away from the Federal territory, allowing for his legally protected private interests, in order to achieve the necessary general preventive effect, so that it would be disproportionate to keep him or her in uncertainty about a factor of such importance in planning one's life (judgment of 14 February 2012, loc. cit., para. 29). In both a generally preventive and a specifically preventive expulsion, the principle of proportionality, in conjunction with Article 6 of the Basic Law, may by exception even make a time limit of 'zero' necessary for the banning effects of an expulsion, without obligating the foreigner to leave the country previously (judgment of 4 September 2007 – BVerwG 1 C 43.06 – BVerwGE 129, 226 headnote 4 and para. 28).

34 The Directive Implementation Act of 2011 further improved the legal situation for the foreigners concerned. Section 11(1) third sentence of the Residence Act in the new version now provides the individual concerned – subject to the exceptions in the seventh sentence of the provision – with an unrestricted entitlement to a time limit that is subject to full judicial review, including with regard to the length of the time limit (judgment of 14 February 2012, loc. cit., paras. 32 et seq. – planned for publication in the BVerwGE collection of decisions). At the same time, with regard to the duration of the time limit, it provides that this must be set according to the circumstances of the individual case concerned, and may exceed five years only if the foreigner has been expelled on the grounds of a criminal conviction or if he or she poses a serious threat to public safety or law and order (Section 11(1) fourth sentence of the Residence Act, new version).

35 These changes in Section 11 of the Residence Act serve to implement Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 – the Return Directive (OJ EU L 348 of 24 December 2008, p. 98). This Directive, which is founded on Article 63(3)(b) of the Treaty establishing the European Community (now: Article 79(2)(c) of the Treaty on the Functioning of the European Union) and is intended to combat illegal immigration, adds to migration policy an effective return policy with clear, transparent and fair rules (fourth recital). Under its Article 2(1) – and subject to the opt-out clause in the second subsection of the Article – the Directive applies to third country nationals staying illegally on the territory of a Member State. Here it is irrelevant whether the third country nationals do not or no longer fulfil the conditions for entry or residence (fifth recital). According to general principles of EU law, decisions taken under this Directive should be adopted on a case-by-case basis and based on objective criteria (sixth recital). A common minimum set of legal safeguards for decisions related to return should be established to guarantee effective protection of the interests of the individuals concerned (eleventh recital). The effects of national return measures are to be given a European dimension (fourteenth recital). Article 3(4) of the Directive defines a ‘return decision’ as an administrative or judicial decision or act, stating or declaring the stay of a third country national to be illegal and imposing or stating an obligation to return. In the cases listed in Article 11(1) first sentence of the Directive, return decisions

are to be accompanied by an entry ban; according to the second sentence of the same sub-article, in other cases they may be accompanied by an entry ban. Article 3(6) of the Directive defines an entry ban as an administrative or judicial decision or act prohibiting entry into and stay on the territory of the Member States for a specified period, accompanying a return decision. Under Article 11(2) first sentence of the Directive, the length of the entry ban is to be determined with due regard to all relevant circumstances of the individual case, and shall not in principle exceed five years. Under the second sentence of that provision, however, it may exceed five years if the third country national represents a serious threat to public policy, public security or national security. Procedurally, Article 13(1) of the Directive guarantees the possibility of seeking an effective remedy against decisions under Article 12(1) of the Directive, or in other words, return decisions and, if applicable, entry-ban decisions and decisions on removal.

36 The statement of reasons attached to the draft of the Directive Implementation Act of 2011 presumes that large portions of the requirements contained in the Return Directive are already met by the provisions of the Residence Act that concern termination of residence. Because the Directive – in contrast to the applicable residence law, with its differentiation between duties to leave the country under an administrative act and under statute – requires a ‘return decision’ linked with various procedural or formal guarantees, adjustments of the law are necessary at some points, the statement says. But these adjustments have been made within the system already in effect, in that they are linked with the administrative act establishing the duty to leave the country (e.g., expulsion) or to the deportation warning under Section 59 of the Residence Act. Implementation of the Return Directive, moreover, requires the introduction of a regular upper limit of five years for the time limit on the ban on entry and stay under Section 11 of the Residence Act (BTDrucks 17/5470 p. 17).

37 These explanations make it clear that in the new version of Section 11 of the Residence Act, the legislature also oriented itself to the requirements for a return decision under Union law with regard to the legal consequences of expulsion as named under subsection 1, first and second sentences of the provision,

as well as the time limit for expulsion. In the model provided by the Directive, however, the entry ban is configured as a case-by-case decision that is independent from any application, that automatically accompanies a return decision, and in which the length of the time-limited ban on a stay is set in view of the circumstances of the specific case (Article 3(6) in conjunction with Article 11(1) and (2) first sentence of the Directive). The legislative intent to follow this model despite retaining the systematic separation between expulsion and the time limit has two consequences. First, Section 11(1) third sentence of the Residence Act in the new version requires a simultaneous issuance of the expulsion and the time limit. Second, any form of expression of wishes from the individual concerned by which that individual opposes an expulsion suffices for the application provided under this section (holding otherwise, still under Section 8(2) third sentence of the Aliens Act of 1990: decision of 14 July 2000 – BVerwG 1 B 40.00 – Buchholz 402.240 Section 8 Aliens Act no. 18). This interpretive finding of simple law at the same time takes due account of the special importance that setting a limit has for the proportionality of terminating residence, with a view to Article 2(1) and Article 6 of the Basic Law and Article 8 of the European Convention on Human Rights. This is because the European Court of Human Rights deems the question of time limits a significant criterion in examining expulsions under the standard of Article 8(2) of the European Convention on Human Rights (ECtHR, judgments of 17 April 2003 – no. 52853/99, Yilmaz/Germany – NJW 2004, 2147; of 27 October 2005 – no. 32231/02, Keles/Germany – InfAuslR 2006, 3 <4>; of 22 March 2007 – no. 1638/03, Maslov/Austria – InfAuslR 2007, 221 <223>; and of 25 March 2010 – no. 40601/05, Mutlag/Germany– InfAuslR 2010, 325 <327>). These aspects deriving from fundamental rights and human rights, together with the legislative intent to follow the model of the Return Directive, lead overall to the conclusion that issuing a decision to set a time limit on the effects of an expulsion under Section 11(1) third sentence of the Residence Act in the new version no longer presupposes that the foreigner must previously have left the country.

38 Against this, one cannot successfully object that Section 11(1) fifth sentence of the Residence Act indicates that the legislators still presuppose that a time limit should be set subsequently. Under that provision, the setting of the time limit is

to be set taking due account of whether the foreigner has left the Federal territory voluntarily and in good time. It is obvious that these circumstances cannot be determined until after the expulsion has been issued. Nevertheless, the provision is not moot if the expulsion and time limit are ordered simultaneously. This is because the immigration authority must, on application, review the time limit decision that was reached simultaneously with the expulsion, and that was based, among other factors, on a prognosis of the Foreigner's future conduct and took account of the consequences of expulsion with reference to the temporal prohibition of excess, and the authority must if applicable revise that decision if one of the relevant factors for setting the time limit has changed subsequently. Section 11(1) fifth sentence of the Residence Act identifies an additional point to be taken into account by the immigration authority, in addition to demonstrated changes in the situation of fact that are relevant to a decision, when a reduction of the time limit is applied for subsequently. Moreover, in their review of the lawfulness of a time-limit decision, which since the Directive Imposition Act of 2011 took effect is also no longer left to the discretion of the immigration authority with regard to setting the time limit (judgment of 14 February 2012, loc. cit., para. 31), the courts must also take account of the foreigner's voluntary and timely departure.

39 2.2.2 If the necessary time limit for the effects of the expulsion is absent, this does not have the consequence, even following the effective date of the Directive Implementation Act of 2011, that the expulsion must be suspended, if it was in itself lawful. Rather, at the same time as he or she challenges the expulsion, the foreigner may assert in court his or her entitlement to have a time limit set for the effects of the expulsion under Section 11(1) third sentence of the Residence Act (judgment of 14 February 2012, loc. cit., para. 30). This takes due account of the entitlement of the individual concerned, under substantive law, to a simultaneous decision on the expulsion and on the time limit for its effects, and ultimately ensures the proportionality of the termination of residence. This procedural configuration complies with the statutory system which still prescribes two separate administrative acts – the expulsion on the one hand, and the setting of a time limit for its effects, on the other (see above para. 32). Procedurally, this result is ensured in that if the expulsion is found lawful, the pro-

test filed against the expulsion is at the same time viewed – as a lesser included matter – as an (alternative) application for the immigration authority to be ordered to set a reasonable time limit for its effects, insofar as the immigration authority has not set such a limit already. Procedural law must ensure, in accordance with Section 11(1) third sentence of the Residence Act in the new version, that the foreigner is not required to begin a separate new proceeding. Therefore, in the event that the court upholds the expulsion, a decision must be reached at the same time on the alternative application for a time limit to be set for the effects of the expulsion.

40 If the court holds the expulsion to be lawful, it must, on the alternative application by the individual concerned, review in full the time limit decision of the immigration authority. If an immigration authority has set too long a time limit, or if – as in the present case – there is no time limit decision by the authority, the court must itself decide on the specific length of an appropriate time period, and must order the immigration authority to set a time limit for the expulsion accordingly (further development of the judgment of 14 February 2012, loc. cit., para. 31).

41 2.2.3 In the present case, this Court holds that a period of seven years – referred to the date of the decision of the appellate court, and on the basis of its findings of fact – is appropriate.

42 The time period, which is to be set solely from the viewpoint of preventive concerns, is to be decided according to the individual case concerned, pursuant to Section 11(1) fourth sentence of the Residence Act, and may exceed five years only if the foreigner has been expelled on the grounds of a criminal conviction or if he or she poses a serious threat to public safety or law and order (concerning the last requirement, see Article 11(2) second sentence of Directive 2008/115/EC). In deciding the length of the time period, the gravity of the reason for expulsion and the purpose being pursued by expulsion should be taken into account. There is a need for a prognostication, on a case-by-case basis, as to how long the behaviour of the individual concerned on which the expulsion ordered for specifically preventive purposes is based will play a role in the pub-

lic interest in averting a threat, with a view to the significant threshold of danger under Article 14(1) of Association Council Decision 1/80, which in the present case is considerable. However, the maximum time limit, based on the achievement of the purpose of the expulsion, must be measured, and where applicable mitigated, by higher law, i.e., by constitutional decisions on priorities (Article 2(1), Article 6 of the Basic Law) and the requirements under Article 7 of the EU Charter of Fundamental Rights and Article 8 of the European Convention on Human Rights. This normative corrective offers the immigration authority and the administrative courts a means under the rule of law for limiting the on-going radical consequences of a ban on entry and residence for the personal life of the individual concerned (see judgments of 11 August 2000 – BVerwG 1 C 5.00 – BVerwGE 111, 369 <373> and of 4 September 2007 – BVerwG 1 C 21.07 – BVerwGE 129, 243 para. 19 et seq.). Here, in particular, special attention must be paid to the legally protected interests of the foreigner as named in Section 55(3)(1) and (2) of the Residence Act. This consideration must be given in accordance with the principle of proportionality, on the basis of the circumstances of the individual case at the time when the decision was made by the authorities, or if applicable, must be reviewed by the administrative courts as of the date of the last oral hearing or the court's decision, or where there is no decision on a time limit by the authority – as here – by an independent consideration as a basis for pronouncing an order.

43 The maximum time period of five years named in Section 11(1) fourth sentence of the Residence Act is without significance in the present case, because at the time of the decision by the appellate court, the Complainant represented a serious threat to public safety or law and order, as is evident from the commentary on the requirements for expulsion. Because of the importance of the endangered legally protected interests, and the high risk of re-offending found by the appellate court, this Court holds it necessary, including in consideration of the Complainant's familial and personal ties within the Federal territory, to set a period of seven years in order to take due account of the high potential threat inherent in the person of the Complainant. Given the general danger of recidivism in offences of this kind, the Complainant's age, his conduct during and after the offence, without a therapeutic engagement with and reflection upon the events,

as well as his family environment, he cannot be expected to pass below the threshold of danger that is applicable here, under Article 14(1) of Association Council Decision 1/80, before the established time period expires. For clarification, this Court points out that the Respondent must review, in consideration of the application filed with it during the present proceedings for a time period to be set on the basis of the current status of fact, whether the Complainant's arguments on developments since 5 September 2008 offer indications for a reduction of the time period.

44 3. The deportation warning is lawful. The Complainant is obliged to leave the country (Section 50(1) of the Residence Act), because as a consequence of the expulsion, his residence entitlement, which remained in force as a settlement permit under Section 101(1) first sentence of the Residence Act, has lapsed (Section 51(1)(5) in conjunction with Section 84(2) first sentence of the Residence Act). In accordance with Section 59(1) first sentence of the Residence Act in the new version, this Court interprets in the Complainant's favour the time period of one month for leaving the country, set by the Respondent in the appealed decision, as meaning that a time period of 31 days shall be made available to the Complainant for voluntary departure.

45 4. The question of whether the expulsion, the setting of a time limit for its effects, and the deportation warning must be measured by the terms of the Return Directive may be left open in the present case. This Court has hitherto held that the Return Directive, which was to be implemented by the Member States by 24 December 2010 in accordance with Article 20(1) of Directive 2008/115/EC, lays no claim to apply to deportation warnings that were issued before then and challenged in a complaint (judgments of 14 February 2012, loc. cit., para. 35, and of 22 March 2012, loc. cit., para. 15; differing, Mannheim Administrative Court, judgment of 16 April 2012 – 11 S 4/12 – juris, paras. 49 et seq.; see also Vienna Administrative Court, judgments of 16 June 2011 – Case 2011/18/0064 – and of 20 March 2012 – Case 2011/21/0298). As to the material scope of application of the Return Directive, moreover, there is controversy as to whether an expulsion can be viewed as a return decision within the meaning of Article 3(4) of Directive 2008/115/EC (affirming: Basse/Burbaum/Richard,

ZAR 2011, 361 <364>; Hörich, ZAR 2011, 281 <284 fn. 45>; opposed: Mannheim Administrative Court, judgment of 7 December 2011 – 11 S 897/11 – NVwZ-RR 2012, 412; open: Münster Higher Administrative Court, judgment of 22 March 2012 – 18 A 951/09 – juris para. 88). All of this, however, may be left unanswered here, because even if one were to assume the intertemporal validity and the material applicability of the Return Directive to the (effects of) expulsion and the deportation warning, this offers no further comfort to the Complainant's appeal in the present case. As the Complainant, in his alternative application, can assert the time limit for the effects of his expulsion, which is required under Section 11(1) third sentence of the Residence Act in the new version, together with its review by the courts, the requirements of the Return Directive are ultimately satisfied. In the present case, the length of the entry ban was also able to exceed the regular time limit of five years because the Complainant represents a serious threat to public policy within the meaning of Article 11(2) second sentence of Directive 2008/115/EC.

46 5. The disposition as to costs is founded on Section 155(1) first sentence of the Code of Administrative Court Procedure. This Court weights the application challenging the expulsion and the deportation warning at 4/5 and the application for an order to the administrative authorities, seeking a time limit, at 1/5. However, as the Complainant has prevailed only partially in his alternative application, he is to bear 9/10 of the cost of these proceedings.

Eckertz-Höfer Prof. Dr Dörig Prof. Dr Kraft

Fricke Dr Maidowski