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Press Release

on the Judgment of 16 November 2022 in case F-1776/2019

Competence of the SEM to order a ban on entry

Following the coming into force of the provisions of the Swiss Criminal Code relating to the federal popular initiative on the expulsion of foreign criminals, the powers of the State Secretariat for Migration in the matter of entry bans have been modified. The Federal Administrative Court has clarified these responsibilities in a recent judgment.

In 2015, a Tunisian national entered Switzerland and has stayed unlawfully on Swiss territory since then. Subsequently, in August 2017, he was sentenced to a twenty months' custodial sentence. Moreover, five summary penalty orders were issued against him on ground of his criminal behaviour. For this reason, the State Secretariat for Migration (SEM) ordered a seven-year ban on entry against him in April 2019. The appellant appealed the SEM decision to the Federal Administrative Court (FAC). He argued that the SEM was no longer empowered to order a ban on entry since the criminal authorities had refrained from ordering his expulsion for the same offences.

Mandatory and non-mandatory criminal expulsion

Following the adoption in 2010 of the federal popular initiative on the expulsion of foreign criminals, the legislature re-introduced expulsion for criminal offences into Swiss law. The system implemented distinguishes between mandatory expulsion, which must be ordered for qualified offences (murder, grievous bodily harm, etc.), and non-mandatory or optional expulsion, which may be ordered for certain other crimes and offences (simple theft, simple bodily harm, etc.).

Relationship between optional criminal expulsion and ban on entry

In its judgment in the case at hand, the FAC considered the power of the SEM to order a ban on entry to Switzerland against foreign nationals who do not have a residence permit. The Court holds that, when the criminal courts order an optional expulsion, the SEM no longer has the power to order a ban on entry for a longer term for the same offences. Similarly, if the criminal courts explicitly waive the right to order an optional expulsion, the SEM is bound by that decision. On the other hand, if the public prosecutor (the *ministère public*) refrains from explicitly ordering an expulsion in a summary penalty order, the SEM is empowered to issue a ban on entry. Where the public prosecutor's office deems

an expulsion necessary, it must refer the matter to a criminal court.

In the case at hand, the FAC established that the appellant had not committed any offences qualifying for mandatory expulsion. Moreover, the criminal judgment did not explicitly rule on optional expulsion. The FAC concludes that the SEM had the power to order a ban on entry and sets the term of the ban at twelve years. The more severe ruling is justified by the fact that, when it issued its decision, the SEM was not aware of the twenty-month custodial sentence against the appellant.

This judgment is final and may not be appealed to the Federal Supreme Court.

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About the Federal Administrative Court

Located in St. Gallen, the Federal Administrative Court (FAC) was established in 2007. With its staff of 365 employees (305.6 FTE) and its 72 judges (64.5 FTE) it is the largest federal court in Switzerland. The Federal Administrative Court has jurisdiction to hear appeals against decisions rendered by Swiss federal administrative authorities. In specific matters, the FAC may grant review on decisions rendered by cantonal authorities. Recourse actions are also reviewed by the Court. The FAC is composed of six divisions. It renders an average of 6,500 judgments every year.