

**Final judgment - Schengen Borders Code – Entry conditions for third-country nationals -  
Concept of ‘threat to public policy’ - Return decision issued to an illegally staying third-country  
national**

*(E.P. against the State Secretary of Security and Justice)*

In a reference for preliminary ruling the Administrative Jurisdiction Division of the Council of State of the Netherlands (Division) asked the ECJ for an interpretation of Article 6(1)(e), and more specifically the concept of ‘threat to public policy’, of Regulation 2016/399 of 9 March 2016 (Schengen Borders Code). The case concerns a foreign national who has been ordered to leave the EU because of suspected violations of the Dutch opium act. The question is *inter alia* whether, if pursuant to Article 6, first paragraph, preamble and under e of the Schengen Borders Code, lawful residence in the Netherlands has ended because the foreign national is considered to be a threat to public order, the State Secretary is required to justify that the personal conduct of this person constitutes a ‘genuine, present and sufficiently serious threat affecting one of the fundamental interests of society’.

The ECJ ruled on 12 December 2019 in case C-380/18, E.P. (Menace pour l’ordre public) that:

*‘Article 6(1)(e) of the Schengen Borders Code must be interpreted as not precluding a national practice under which the competent authorities may issue a return decision to a third-country national not subject to a visa requirement, who is present on the territory of the Member States for a short stay, on the basis of the fact that that national is considered to be a threat to public policy because he or she is suspected of having committed a criminal offence, provided that that practice is applicable only if, first, the offence is sufficiently serious, in the light of its nature and of the punishment which may be imposed, to justify that [foreign] national’s stay on the territory of the Member States being brought to an immediate end and, second, those authorities have consistent, objective and specific evidence to support their suspicions, matters which are for the referring court to establish.’*

Considering the ECJ judgment the Division rules in its final judgment that, based on these guidelines, the State Secretary does not need to substantiate that the foreign national still represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of the society of the Member State concerned ‘However, the principle of proportionality must be taken into account. It follows, first, that the infringement which the third-country national at issue is suspected of having committed must be sufficiently serious, in the light of its nature and of the punishment which may be imposed, to justify that national’s stay on the territory of the Member States being brought to an immediate end. Second, in the absence of a conviction, the competent authorities can invoke a threat to public policy only if there is consistent, objective and specific evidence that provides grounds for suspecting that that third-country national has committed such an offence. The Division judges the appeal of the State secretary to be well-founded. The District court decision is annulled.

Ultimately the Division assesses the grounds of appeal on which the District court has not yet given judgment or on which a decision has yet to be taken. The Division concludes that the foreign national has rightly argued on appeal that it is not clear from the return decision on the basis of what it has been established that he is staying in the Netherlands unlawfully. The appeal is well-founded. The return decision of 19 May 2016 is therefore annulled.

However, at the time the return decision was taken the requirements set by the ECJ judgment C-380/18 for the termination of the stay were met. From the point of view of ‘final dispute settlement’, the Division upholds the legal consequences of the annulled decision. This means that the decision will actually continue to apply.

In addition to this judgment, two other judgments of the Division of 2 September 2020 also concern public order in relation to EU law. In case 201705770/2/V1, ECLI: NL: RVS: 2020: 2069, V.G. (see: <http://www.aca-europe.eu/index.php/en/jurifast-en?id=3393&PAGE=DETAIL>) the central question is which requirements apply to the refusal of an application for entry and residence of a family member on grounds of public order, as referred to in Article 6(1) of the Family Reunification Directive. In case 201701883/2/V1, ECLI:NL:RVS:2020:2068, G.S. (see: <http://www.aca-europe.eu/index.php/en/jurifast-en?id=3394&PAGE=DETAIL>), the central question is which requirements apply to the withdrawal or refusal of extension of the period of validity of a residence permit of a family member for reasons of public policy, as referred to in Article 6(2) of the Family Reunification Directive.