

# **Public order, national security and the rights of the third-country nationals in immigration and citizenship cases**

ACA seminar in Kraków (Cracow) 18–19 September 2017

## **I. Introduction.**

1.1. This seminar will focus on striking a balance between the rights of third-country nationals and the protection of national security and public order in immigration and citizenship cases. The most common categories of the administrative acts that are relevant to this topic are visa decisions, refusal of entry, entry bans, all types of decisions on granting a residence permit (permanent or temporary), return decisions, and decisions relating to the acquisition and loss of nationality.

1.2. The topic of this seminar does not cover the situation of refugees in cases where the procedure for international protection has not been finally completed, although the returning of unsuccessful asylum seekers is within the topic hereof. The situation of EU citizens and their family members is also not covered by this seminar, since they are not considered to be third-country nationals within the meaning of EU law. For these reasons when answering the questions please do not include information relevant to asylum seekers or EU nationals or their family members within the meaning of Directive 2004/38/EC 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.

1.3. Neither EU law nor the jurisprudence of the Court of Justice of the European Union (CJEU) or the European Court of Human Rights (ECtHR) give us a clear definition of public order and national security (external and internal security of the member states). It should also be noted that not one single term but instead often a number of different terms are used in relation to national security and public order. That alone may lead to a lack of consistency of judicial practice in Member States and cause confusion in terminology. For example, in Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for the returning of illegally present third-country nationals (referred to as the Returns Directive) in relation to an entry ban the term “a threat to public policy, public security or national security” is used, in Art. 11(3) thereof. In relation to refraining from granting a period for voluntary departure the term “a risk to public policy, public security or national security” is used, in Art. 7(4), and in relation to an entry ban which is more than five



years in length the term “a serious threat to public policy, public security or national security” is used, in Art. 11(2). In Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents the term “a threat to public policy or public security” is used and excludes the acquiring and maintaining of long-term resident status in a Member State, in Recital 8, Art. 6(1), Art. 9(7), Art. 17(1) and Art. 22(1)(3), and “actual and sufficiently serious threat to public policy or public security” is found in Art. 12 (1). The term “a threat to public policy or public security or public health” is used by Directive 2003/86/EC of 22 September 2003 on the right to family reunification and it is permitted to withdraw a family member’s residence permit or to refuse to renew the said permit (Recital 14, Art. 6 (2) of the Family Unification Directive). On the other hand, under Art. 8 (2) of the ECHR the right to family life may be denied, inter alia on the grounds of “national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”. The Visa Code (Regulation (EC) No 810/2009 of 13 July 2009 establishing a Community Code on Visas) allows the verification of entry conditions and risk assessments in the light of risks to the security of the Member States (Art. 21(1)) or whether a person constitutes a “threat to public policy, internal security or public health as defined in Art. 2(19) of the Schengen Borders Code or to the international relations of any of the Member States”, Art. 21(3d) and Art. 32(1a vi). One of the entry conditions for third-country nationals under the Schengen Borders Code (Regulation (EU) 2016/399 of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (the Schengen Borders Code)) is to not be considered to be “a threat to public policy, internal security, public health or the international relations of any of the Member States” (Art. 6(1e)). In Decision No 1/80 of the EEC/Turkey Association Council of 19 September 1980 on the Development of the Association “grounds of public policy, public security or public health” were invoked in relation to employment and the free movement of workers of Turkish nationality (Art. 14(1)).

1.4. Along with national security and public order, the term “public health” is often used. Since the focus of the questionnaire is on public order and national security only, issues related to the public health have not been included and there is no need to present them when answering the questions.



1.5. There are consequences of establishing risks to public order and national security from third-country nationals in both substantive and procedural immigration and citizenship laws in Member States. Many of those derive directly from EU law. It is important to examine not only whether there is a common understanding of these concepts but also their similarities and differences and how a judge in the administrative court can strike a balance between the rights of third-country nationals and the protection of national security and public order in immigration and citizenship cases.

## **II. Questions**

### **A. General questions. National judicial and legal framework in the field of migration of third-country nationals and in citizenship cases.**

1. What is the national legal framework in the field of immigration of third-country nationals in relation to national security and public order? Please provide in particular information on the relevant legislation, the organisation of the courts responsible for immigration cases (special tribunals, general administrative courts and others), the number of tiers of the court system and also at the administrative level, if there is a prior administrative procedure. Please give links to websites with the relevant national legislation, if available.

2. What is the national legal framework in the field of citizenship cases in relation to national security and public order? Please provide in particular information on the relevant legislation, the organization of the courts responsible for citizenship cases (special tribunals, general administrative courts and others), the number of tiers of the court system and also at the administrative level, if there is a prior administrative procedure. Please give links to websites with the relevant national legislation, if available.

3. Please give the number of immigration and citizenship cases brought before the courts in 2016 (1 January to 31 December 2016) involving third-country nationals (please exclude cases concerning EU nationals and refugees). Please provide separately information on the number of cases brought before the court of last resort (the Supreme Administrative Court) and before the lower courts. If possible, please provide information on the percentage of cases in which grounds related to national security and public order were decisive. Are cases in



which issues related to national security and to public order have to be considered registered with the court separately and are they given priority when listed for hearing?

4. Briefly describe the judicial procedure in immigration cases in your country. Please address in your answer, *inter alia*, the following questions:

- a. Are there any differences in the judicial procedure between immigration cases and other administrative cases?
- b. Do the elements of national security and public order make procedures in immigration cases involving the issue of national security and public order different from the procedures in immigration cases in which an issue related to national security and public order does not exist?
- c. What is the power of the judge of a first instance administrative court, in particular is he/she limited to control legality (conformity with law) of the challenged administrative decision or is the role of the judge broader and the judge has the power not only to quash an administrative decision but also to change it (judgement on the merits) and is it a judicial review *ex nunc* or *ex tunc*?
- d. What is the power of the court of the last resort? Please indicate which court that is (the Supreme Administrative Court, the Supreme Court or the Council of State or another court).
- e. Can a party in every immigration case apply for his/her appeal to be heard by the Supreme Administrative Court or is in some situations that right excluded or restricted (e.g. is leave required)?

5. Briefly describe judicial procedure in citizenship cases in your country. Please address in your answer, *inter alia*, the following questions:

- a. Are there any differences in the judicial procedure between citizenship cases and other administrative cases?
- b. Do the elements of national security and public order make the procedure in citizenship cases involving the issue of national security and public order different from the procedure in citizenship and immigration cases in which an issue related to national security and public order does not exist?



c. What is the power of the judge of a first instance administrative court, in particular is he/she limited to control legality or is the role of the judge broader and then judge has the power not only to quash an administrative decision but also to change (reform) it (judgement on the merits) and is it a judicial review *ex nunc* or *ex tunc*?

d. What is the power of a judge of the last resort court? Please indicate which court that is (the Supreme Administrative Court, the Supreme Court or the Council of State, or another court).

e. Can a party in every citizenship case apply for his/her appeal to be heard by the Supreme Administrative Court or is in some situations that right excluded or restricted (e.g. is leave required)?

## **B. Substantive issues. The notion of public order and national security.**

6. Does the national law in your country define such terms such as “public order”, “national security” or other terms that play a similar role in immigration and citizenship cases and aim to protect those values? Please quote definitions of such terms if possible. If those terms have been defined in case law only, please explain how they are understood in jurisprudence.

7. Has the meaning of the terms “public order” and “national security” evolved in case law in recent years? In particular, are both terms given wider comprehension in comparison to their scope in the past, and does a broader meaning result in them covering current situations that were unlikely to have constituted a risk to public order and national security in the past? Is this evolution a result of the jurisprudence of the ECtHR or the CJEU?

8. Does risk to public order and national security constitute grounds in your national law for refusing to allow a third-country national:

- a. to enter the territory of your state;
- b. to stay for 90 days in any 180-day period (short stay);
- c. to be granted resident permits (temporary or permanent);
- d. to acquire nationality?

If the answer to one of the above sub-questions is “yes”, please describe whether public order or national security grounds may be applied in every case or in some categories of cases only.



In particular, are there any exceptions if the third-country national is married to a national or there are strong family life concerns (Art. 7 of the Charter of Fundamental Rights of the European Union, Art. 8 of the ECHR) or prohibition of torture and inhuman or degrading treatment or punishment is at stake (Art. 4 of the Charter, Art. 3 of the ECHR)?

9. Does risk to public order and national security constitute grounds in your national law for decisions resulting in:

- a. the removal of a third-country national from the territory of the country (a return decision);
- b. the issuing of a return decision without providing an appropriate period for voluntary departure;
- c. the withdrawal of residence permits (temporary and permanent);
- d. the loss of nationality that had been acquired?

If the answer to one of the sub questions is “yes”, please describe whether public order or national security grounds may be applied in every case or in some categories of cases only. In particular, address whether there are any exceptions if the third-country national is married to a national or there are strong family life concerns (Art. 7 of the Charter of Fundamental Rights of the European Union, Art. 8 of the ECHR) or prohibition of torture and inhuman or degrading treatment or punishment is at stake (Art. 4 of the Charter, Art. 3 of the ECHR).

10. Please give examples from your court’s practice in often repeated situations that have fallen within the scope of the terms “public order” and “national security” in:

- a. immigration cases;
- b. citizenship cases.

11 Are the following criteria in your case law or the national law used to determine a threat to national security and public order:

- a. personal conduct;
- b. the fundamental interest of society;
- c. genuine, present and sufficiently serious threat;
- d. other?



Please specify whether the above are applicable in immigration or citizenship cases.

12. Would you consider the following to be a violation of public order that would lead a third-country national being denied a residence permit or given return decision if the third-country national cannot rely on the protection of family or private life and is found guilty of:

- a. shoplifting;
- b. drink driving;
- c. tax avoidance;
- d. fare avoidance;
- e. parking offences;
- f. traffic offences;
- g. smuggling small quantities of alcohol/cigarettes (duty avoidance);
- h. hate speech;
- i. contracting a marriage of convenience (a sham marriage).

13. If a third-country national can rely on the protection of family/private life, could the situations described above (in question 12, points a–i) ever lead to the denial of a residence permit or a decision on return? Could removal or denial of a residence permit be dependent on a proportionality test? Please differentiate between situations a–i if necessary.

14. How do you protect the best interests of a child with regard to national security and public order? Please illustrate with examples. Can a third-country national be removed from your country if he/she is the only ‘home maker’ guardian to a national of your country (for example, if the national of your country is a minor) and there are strong indications that the third-country national continuing to stay in your county is a threat to national security or public order?

15. Would you consider terrorism, smuggling of people, child abuse, trading in weapons, crimes committed by repeat offenders or drug dealing to be offences with regard to public order or national security that may lead to:

- a) loss of nationality that had been acquired;
- b) the denial of a residence permit or issuance of a return decision?



16. If a third-country national has been excluded from protection on the grounds of Art. 1F of the 1951 Refugee Convention, is he/she automatically considered to be a [serious] threat to public order or national security and does he/she have to be removed from the country without any additional examination of the actual and current risk? If a separate procedure is required in order to take a return decision, is it necessary to take into account the following criteria:

- a. personal conduct;
- b. the fundamental interest of society;
- c. genuine, present and sufficiently serious threat;
- d. other?

17. Can you give examples of cases in which family or private life is given priority over national security or public order? Please describe them briefly.

18. Do you experience tensions between the automatic protection given by Art. 4 of the Charter of Fundamental Rights of the European Union (Art. 3 of the ECHR) and national security that calls for removal? Could you give examples of your national practice?

### **C. Procedural issues. Fairness of the procedure.**

19. If a decision reviewed by a judge is based on national security or public order grounds, does it always contain legal and factual reasons? On what conditions can an administrative authority refrain in full or in part from justifying such a decision?

20. If a decision is based on national security or public order grounds, do the party, his/her lawyer and a judge reviewing a decision have the same access to the legal and factual reasons of this decision provided by the administrative authority?

21. Is evidence that substantiates the establishing of facts (grounds) that constitute a risk to national security or public order always open to:

- a. a judge;
- b. a party to the procedure;
- c. a counsellor (lawyer) representing a party?



22. Is every judge allowed to have access to classified evidence or is it necessary to obtain a special certificate (security clearance) and undergo a vetting process? Is this procedure mandatory for all judges or only to those who are ruling on national security cases and have access to classified evidence?

23. If facts or evidence that constitute a risk to national security or public order are not open to a party to a procedure and his/her counsellor (lawyer) representing the party, are there any mechanisms in your law or courts' practice that ensure 'Equality of Arms' between the parties to the proceedings and make evidence that was not disclosed to the party and his/her lawyer available in another way with a view to adversarial argument (e.g. a summary of the evidence is presented to the party or a specially vetted lawyer is allowed to see the case file in order to defend the interests of the third-country national)? Please describe how this mechanism works in practice, when it was established and its legal grounds.

24. If evidence that substantiates the establishing of facts (grounds) that constitute a risk to national security or public order is not open to a party to a procedure or his/her counsellor (lawyer), is the judge allowed to verify the lawfulness of the denial of access to such evidence and does the judge have the competence to disclose such evidence to the party to the procedure? Please describe the grounds and mechanism of judicial control in relation to the denial of access to a case file due to its confidentiality on grounds of its classified character (state secrecy or similar).

25. Is evidence admitted by judges during court procedures in immigration and citizenship cases always available to the parties with a view to adversarial argument or are special protective measures applied to sensitive documents that do not allow the disclosing of such evidence to a party? Are there any special mechanisms applied to ensure 'equality of arms' between the parties to proceedings if a document is not disclosed to a party?

26. Are full judgements and their legal and factual reasons in immigration and citizenship cases always open to the parties and their counsellors? Are there any restrictions regarding the reasons for a judgement in relation a party or their counsellor if that judgement is based on national security or public order grounds?



27. Are the same standards applied in relation to access to classified case files for nationals, EU citizens and their family members and third-country nationals? If there are differences in treatment of the third-country nationals in immigration and citizenship cases and other categories (nationals or EU nationals and their family members), please describe those differences.

28. Are national security cases (immigration or citizenship) decided by a judge more quickly or given any priority when listed for hearing? Is every judge eligible to decide such cases or are there any special conditions provided by applicable law (e.g. security clearance)?

