NACZELNY SĄD ADMINISTRACYJNY

ACA EUROPE

# Seminar organized by the Supreme Administrative Court of Poland and ACA-Europe

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

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## Answers to questionnaire: Czech Republic

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**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

# Replies of the Supreme Administrative Court of Czech Republic

## Questionnaire

### 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.**

*The most important legal regulation in the field of immigration of third-country nationals in relation to national security and public order is Act No. 326/1999 Coll., on the Residence of Foreign Nationals in the Territory of the Czech Republic (see https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/act_no_326_on_residence_of_foreign_nationals_en_1.pdf and http://www.czechlegislation.com/en/326-1999-sb). Additional useful information on immigration is here: http://www.mvcr.cz/mvcren/article/immigration.aspx Furthermore, the Ministry of Interior has launched „Immigration Portal" (http://www.imigracniportal.cz/index.php?Lang_set=1) which is supposed to serve as a guide for foreign nationals and members of the professional community who are looking for information on migration and integration of foreign nationals in the Czech Republic. There is also a specific website with information about adaptation integration courses: http://www.vitejtevcr.cz/index.php/en/*

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*As regards organisation of the courts responsible for immigration cases, the Czech Republic employs a two-tier system of administrative judiciary with regional courts and the Supreme Administrative Court. The Supreme Administrative Court has in particular jurisdiction to decide on cassation complaints against the decisions of regional courts on actions and on petitions dealing with protection of public subjective rights. It deals in the first instance with some specific fields of law, but in immigration cases, both instances take part.*

*The relevant national legislation comprises of Act No. 150/2002 Coll., Code of Administrative Justice (in Czech), Act No. 151/2002 Coll., Act Amending Certain Laws in Relation to the Adoption of the Code of Administrative Justice (in Czech), Act No. 99/1963 Coll., Code of Civil Justice (in Czech), Act No. 549/1991 Coll., on Court Fees (Czech).*

**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.**

*The most important legal regulation in the field of citizenship cases in relation to national security and public order is Act No. 186/2013 Coll., on Czech Citizenship and on Amendment to Some Other Acts (not available in English). Nevertheless, administrative courts still deal with cases concerning preceding legal regulation (Act No. 40/1993 Col.). Additional information is published on-line here: http://www.mzv.cz/london/en/visa_and_consular_information/consular_information/certficate_of_czech_citizenship/new_nationality_legislation_of_the_czech/index.html*

*Organisation of the courts responsible for citizenship cases is the same as in immigration cases.*

**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?**

*There is no official statistics regarding the number of immigration and citizenship cases brought before the courts in 2016, but estimated numbers reveal approximately 850 cases decided by the regional courts and 350 cases decided by the Supreme Administrative Court (out of these approx. 1200 cases, merely 25 fall in the citizenship disputes). In these cases, public order or national security was referred to in approx. 120 cases altogether (approx. 30 before the SAC), but this does not imply national security and public order were decisive in all these cases.*

*Cases in which issues related to national security and to public order have to be considered are not registered with the court separately. However, cases concerning decisions on detention of a foreigner, his removal from the territory, return decision or other decision with effect of restriction on rights of a third-country national are given priority in general.*

**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)?**

*There are no significant differences in the judicial procedure between immigration cases and other administrative cases. At the regional courts, some matters (including cases concerning decisions on detention of a foreigner, his removal from the territory, return decision or other decision with effect of restriction on rights of a third-country national) are decided by a sole judge instead of a senate composed of three judges, but this does not create a major difference in procedure. Moreover, cases concerning decision with effect of restriction on rights of a third-country national are free from any court fees. The elements of national security and public order make no difference in the court proceedings.*

*The judge of a first instance administrative court is limited to control legality of the challenged administrative decision and does not have the power to change it. The same applies to the powers of the Supreme Administrative Court which may quash the judgment of the first instance court or even quash the administrative decision. It is possible to appeal to the Supreme Administrative Court in every immigration case. A minor difference from a common judicial procedure comes from application of the non-refoulement which requires the judges to take into account even facts concerning situation in the country of origin after the administrative decision was issued.*

**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)?**

*There are no significant differences in the judicial procedure between immigration cases and other administrative cases. Unlike immigration cases, citizenship cases are decided by a senate composed of three judges and are subject to the court fees. The elements of national security and public order make no difference in the court proceedings.*

*The judge of a first instance administrative court is limited to control legality of the challenged administrative decision and does not have the power to change it. The same applies to the powers of the Supreme Administrative Court which may quash the judgment of the first instance court or even quash the administrative decision. In every immigration case, it is possible to appeal to the Supreme Administrative Court.*

**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.**

*There is no definition of "public order" and "national security" in law and the terms have been defined exclusively in case law. Usually, the jurisprudence does not distinguish between public order and national security and since there are only a few cases that deal with national security matters, courts often refer to the wide concept of "public order and national security". As a result, the interpretation focuses on definition of "public order". This does not mean that "national security" is conceived under the concept of "public order", but the Czech jurisprudence had far more opportunities to interpret meaning of "public order" and "national security" stands slightly aside the attention.*

*According to the Supreme Administrative Court, public order does not constitute such a generally existing category in order to speak of "public order in the present Czech Republic". Individual laws that use the term "public order" (eg § 5 of Act No. 3/2002 Coll., On Freedom of Religion and the Status of Churches and Religious Societies, or Section 10 of Act No. 128/2000 Coll., On Municipalities) do not refer to a single "public order" of the Czech legal order. The concept is to be understood and interpreted in the context of the legislation in question and based on its purpose. Moreover, all provisions of Act No. 326/1999 Coll., on the Residence of Foreign Nationals in the Territory of the Czech Republic, cannot, according to the jurisprudence, be treated uniformly. In interpreting the term "public order", therefore, it is necessary to look at this concept not only in the context of a particular law and its purpose, but also in the context of a given provision, and to examine the purpose of the provision in question, the circumstances of its origin and origin, etc. Specific conclusions concerning one provision cannot be simply taken over and applied without any other provision. It is necessary to take into account the specifics of each individual legal provision.*

*However, there are some common conclusions regarding violation of the public order in the case law. Serious violation of public order cannot be in general identified with any illegal act of a foreigner. The act must be really serious (taking into account the intensity or significance of the protected interest against which it is directed) and actual. The intensity required differs from one legal provision to another. For example the Ministry will reject an application for a permanent residence permit if the foreigner seriously undermines public order or threatens*

*the security of another Member State of the European Union, provided that this decision is proportionate to the interference with the private or family life of the alien. In this case, the intensity of the act must be serious, but not that much as in case of administrative expulsion, which is considered more restrictive towards the foreigner. The purpose of particular legal provisions differs which is reflected in the case law.*

*According to the settled case law, for example, to cancel the validity of a permanent residence permit, a single, even if very serious, disruption of public order is not sufficient. This violation must be repeated. Acts may constitute repeated violations of public order despite being considered a single criminal conduct in criminal law.*

*The courts held that it is not possible without further standardize which specific behaviour of a foreigner constitutes violation of public order, and which does not. Repeated committal of intentional criminal offenses may not always constitute a repeated violation of public order in a serious manner and it is always necessary to evaluate the behaviour of the foreigner in a particular case, regardless of whether or not he was prosecuted and sentenced. Several factors, such as the significance of the breached standard, the form of fault, etc., play a role in assessing the severity of the conduct. At the same time, when assessing a particular case, care must be taken to maintain the proportionality between the intensity of the breach and the consequence. Such a consequence may be, for example, interference with the private and family life of a foreigner. The assessment of the intensity of public interest disturbances is therefore inherently related to the assessment of how the foreigner's private and family life will be affected by the decision issued.*

*As regard definition of national security, criminal jurisprudence is applicable using an analogous interpretation. Its conclusions for example imply that the condition of serious grounds for threatening the state security is fulfilled in the case of property crimes, when such criminal activity is such as to threaten sovereignty, autonomy, territorial integrity, defense or protection of the democratic foundations of the state. Serious reasons for endangering state security are given in particular in crimes against the security of the Czech Republic or if the perpetrator committed another crime against the Czech Republic or against other interests threatening the security of the state (for example violence against such a public authority). This means that intense threat directed primarily towards the protection of public values is*

*required (judgment of the Supreme Court of the Czech Republic of 29 March 2012, No 6 Tdo 1466 / 2011-81).*

**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?**

*The meaning has evolved significantly during recent years. The definition of the term "public order" has been addressed several times by the case law of the Supreme Administrative Court and there was more than one approach how to interpret and apply the legal regulation concerned. The inconsistent earlier case law of the Supreme Administrative Court on the interpretation of this term was especially addressed by the extended Senate of the Supreme Administrative Court in its resolution of 26 July 2011, No. 3 As 4/2010 - 6. The definition obviously received broader scope but most importantly is conceived in a way described above, which means that it requires a detailed consideration of all the facts and circumstances.*

*The jurisprudence of the ECtHR has undoubtedly a huge impact on the interpretation of the national regulation. For example, the Supreme Administrative Court held in its numerous case law (see, for example, Supreme Administrative Court judgments Court of 30 January 2014, No. 3 As 84/2013 - 24, of 31 March 2015, No 8 Azs 175/2014 - 29, of 15 April 2015, No 6 Azs 216/2014 - 34, of 17 September 2015, No 1 Azs 107/2015 - 56, of 19 November 2015, No. 4 Azs 222/2015 - 42) s that in cases where the question of forced foreigner's travel and possible violation of the right to respect for family and private life is resolved, it is necessary to rely primarily on the case-law of the European Court of Human Rights relating to Article 8 of the Convention.*

**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;**

*Yes, according to § 9(1)h, i (general clause for foreigners) and § 9(3)b/3, 4 (family member of a national) of Act No. 326/1999 Coll., on the Residence of Foreign Nationals in the Territory of the Czech Republic.*

**b. to stay for 90 days in any 180-day period (short stay);**

*Yes, termination of a temporary stay in the territory for which the visa is not required, is possible on the grounds of violation of the public order according to § 19(1)a of Act No. 326/1999 Coll., on the Residence of Foreign Nationals in the Territory of the Czech Republic. A family member of a citizen of the European Union who is not a citizen of the European Union and intends to travel together with the citizen of the European Union or travel for that citizen already residing in the territory shall not be granted a short stay visa if there is a reasonable risk that he or she may threaten the national security or seriously disrupt public order [§ 20(5)c].*

**c. to be granted resident permits (temporary or permanent);**

*At this point, the Act on the Residence of Foreign Nationals in the Territory points to the abovementioned provisions and states that the visa for staying over 90 days will not be granted provided that the foreigner presents a threat to public order national security [§ 56(1)g]. Furthermore, the Act lists reasons for which the Ministry shall cancel the validity of the visa, mainly if the foreigner has been convicted of committing an intentional crime, fails to fulfil the purpose for which the visa was issued; or requests the cancellation of the visa. This applies to both temporary and permanent resident permits.*

**d. to acquire nationality?**

*Citizenship of the Czech Republic may be granted to an applicant who, in the last 3 years preceding the date of filing, has not seriously breached the obligations arising from other legislation governing the entry and residence of foreigners in the Czech Republic, public health insurance, social security, pension insurance, employment, Customs duties, levies and fees, maintenance obligation towards a child permanently residing in the Czech Republic, or public duties to the municipality in which the applicant is registered for residence, in the case*

*of duties imposed by municipalities in a separate jurisdiction. Therefore, risk to public order and national security constitute indirect grounds for refusing to allow a third-country national 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)?**

*According to legal regulation and corresponding case law (for example judgment of the Supreme Administrative Court of 18 April 2013, No. 5 As 73/2011 - 148), the official authorities must take into account all relevant circumstances that may affect the severity of the foreigner's conduct. Such factors include not only the nature and seriousness of the criminal offense but also other circumstances such as the place of the offense and, in particular, the time that has elapsed since the commission of the offense, the behaviour of the complainant after the imprisonment, the length of his stay in the Czech Republic or whether or not he has committed further criminal or other illegal activities upon his arrival in the Czech Republic. The provisions governing the long-term residence permit for the purpose of family cohabitation also transpose EU framework legislation on the right to family reunification. The importance of the foreigner's family life in assessing the adequacy of a decision governing the long-term residence of a foreigner for the purposes of family cohabitation has been dealt with in detail by the Supreme Administrative Court in many cases (for example judgment of 19 April 2012, No. 7 As 6/2012 - 29).*

*The court has stated that respect for family life is a core element of the right to family reunification and that the concept of "disproportionate interference in family and private life" is a question of interpreting the law and its application must reflect criteria laid down in the ECtHR case. The request for a proper judicial review of a decision on administrative expulsion in relation to Article 8 of the Convention has been often emphasized in the Czech case law. The autonomy of the administrative authorities when deciding on expulsion is*

*limited by the fundamental rights of the foreigners concerned and the related international obligations of the Czech Republic (see the Constitutional Court's ruling of December 9, 2008, No. PL ÚS 26/07, the resolution of the Enlarged Supreme Administrative Court. 3. 2005 No. 6 A 25/2002 - 42, , and Supreme Administrative Court judgments of 19 July 2004, No. 5 Azs 105/2004 - 72, of 26 October 2007, No. 4 As 10/2007 - 109, and of 3rd October 2008, No. 8 As 56/2007 - 151). § 174a of Act No. 326/1999 Coll., on the Residence of Foreign Nationals in the Territory of the Czech Republic, titled "Adequacy", states that "(i)n assessing the adequacy of the impact of a decision under this Act, the administrative authority shall take into account in particular the seriousness or type of offense foreigners, length of residence in the territory, their age, state of health, the nature and strength of family relations, economic relations, social and cultural ties linked to the territory and the intensity ties to the state, which the alien is a citizen, or if it is a stateless person, the State of habitual residence."*

**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);**

*As regards return decision with a residence limit up to 60 days, it is based on the end of visa or withdrawal of the residence permit, not a risk to public order and national security itself, but this still constitutes indirect grounds for the decision.*

*As regards decision on the obligation to leave the territory, § 50a of Act No. 326/1999 Coll., on the Residence of Foreign Nationals in the Territory of the Czech Republic states that "(w)here a foreigner holding a valid residence permit issued by another Member State of the European Union is illegally in the territory, the police shall issue a decision on his / her obligation to leave the territory. The procedure pursuant to paragraph 1 shall not apply if the alien could threaten the state's security or seriously undermine public order during his / her stay in the territory."*

*As regards withdrawal of a permanent residence permit, the Ministry revokes the validity of the permanent residence permit if the foreigner repeatedly seriously undermines public order or the rights and freedoms of others, or is likely to endanger the security of the state.*

*Even though the particular provisions do not expressly refer to protection of family life and other important factors, the abovementioned conclusions apply in these cases, too. § 174a of Act No. 326/1999 Coll., on the Residence of Foreign Nationals in the Territory of the Czech Republic, covers all decision under this Act and imposes obligation on the administrative authorities to consider impact of the decision on the personal life of the foreigner.*

**d. the loss of nationality that had been acquired?**

*No, there is no such provision that constitutes grounds for the loss of nationality based on risk to public order and national security. According to Section 14 of the Czech Citizenship Act, one of the conditions for being granted Czech citizenship is demonstrating knowledge of the Czech language (Article 4) and demonstrating basic knowledge of the Czech constitutional system and a basic understanding of Czech culture, society, geography and history (Article 5). This knowledge is demonstrated by passing the Czech Citizenship Exam. The Czech Citizenship Act expressly states that there is no legal entitlement to being granted Czech citizenship. However, once the citizenship is granted, it cannot be reclaimed as a punishment. The Czech Constitution states in Art. 12/2 that no person may be deprived of his citizenship against his will. Czech nationals are even permitted to have dual and multiple nationalities. In line with the trend prevailing in the EU, the Czech Republic does no longer insist on single nationality.*

**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).**

*See above. Same conclusions apply.*

**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;**

*In often repeated situation, a residence permit is withdrawn because various illegal activities of a foreigner constitute serious danger to public order. The foreigner has usually spent couple of years in the Czech Republic and points out that the decision would have disproportionate impact on his private and family life. The authorities and courts consider for example whether the criminal activity was carried out with the use of weapons and violence or motivated by selfish reasons, whether the foreigner's family ties had to be broken by his stay in prison when his family had to take care of itself when he was absent. The age and needs of children are considered as well.*

**b. citizenship cases.**

*The Supreme Administrative Court's practice in citizenship cases that have fallen within the scope of the terms "public order" and "national security" is basically nonexistent since there are only a few cases dealing with citizenship matters and none of these concerns "public order" or "national security". Usually, these cases focus on whether the citizen fulfilled requirements of residence and integration for granting the citizenship. The cases closest to the topic deal with problem of dual citizenship (bipolitism) or unity of the family (as one of the reasons for granting citizenship). According to the settled jurisprudence which is applicable in all the citizenship matters, there is no right to obtain Czech citizenship, but the official authorities cannot base their considerations on arbitrariness and discriminate the applicants. They must follow administrative practice and provide specific reasons in their decision.*

**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?**

*All these criteria are considered, or should be considered according to settled case law. However, the administrative bodies and the administrative courts usually do not deal with each criterion separately (a checklist approach) and employ an overall approach instead. Two main factors are decisive - whether the threat is sufficiently serious and whether it is present. This means that the emphasis is put on the quantity and scale of the actions committed by the foreigner and the time period.*

*Judgment of the Supreme Administrative Court of April 19, 2012, No. 7 As 6/2012 - 29, provides an example: At the first level of the administrative judiciary, the Municipal Court in Prague found that certain foreigner's actions present a sufficient threat to public order. These can be summarized as follows: 1) the effort to stay in the Czech Republic "at all costs", which resulted in rejection of the application for a permanent residence permit for the purpose of joining a family with a minor, as it was found that the foreigner did not share a common household with this minor; 2) unauthorized stay in the territory of the Czech Republic between 18 January 2005 and 5 December 2005; 3) a criminal offense of infringement of copyright and related rights, for which the foreigner has imposed a fine of CZK 40.000; 4) administrative offense of distributing products without the CE marking, for which the Czech Trade Inspectorate imposed a fine of CZK 5.000 on the foreigner; (5) unauthorized entry into the territory of the Federal Republic of Germany; 6) an offense against the safety and fluency of traffic on the road, for which a fine of CZK 500 was imposed by the Police Inspectorate. The Supreme Administrative Court, however, opted for a different conclusion and stated that the foreigner did not present a serious threat to public order, in particular because of the lower severity of his actions and the fact that these relate to his approximately 15 years of residence in the territory of the Czech Republic. The court also stated that rejecting an application for a long-term residence permit cannot be based on speculation.*

*Very often, only the level of seriousness of the threat is challenged and the courts do not deal with other factors. For example in judgment of 5 October 2016, No. 6 Azs 191/2016 - 45, the Supreme Administrative Court confirmed that the foreigner did present a serious threat to public order as he was repeatedly convicted of committing intentional offenses under the*

*influence of an addictive substance (alcohol, marijuana, cocaine and pervitin) and repeatedly committing a crime of obstruction of enforcement of the official decision and driving a motor vehicle despite a ban and changing identity and standing for another person. In another recent judgment (of March 30, 2017, No. 9 Azs 313/2016 - 41), the Supreme Administrative Court rejected the foreigner's argument that his actions were not serious violent crimes but merely a tax offenses and cannot be considered relevant. The Court concluded that this was a repeated criminal offense of illegal importation of cigarettes in order to avoid payment of import duties and excise duty. The amount of damage was estimated in the first case to exceed CZK 9 million and in the latter case to over CZK 13 million. The essential, permanent and serious interests of each state undoubtedly include the proper fulfilment of tax obligations. According to the court, there were no doubts as regards serious disturbance of the public order in this particular case.*

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

*Immigration law only (see above).*

**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:**

*It is difficult to draft any general conclusions regarding specific crimes because according to the settled case law, all circumstances of the foreigner's activity and personal situation must be assessed. Nevertheless, even minor crimes may present serious risk to public interest. The courts have for example stated that the public interest of the state in the proper functioning of its economy is a fundamental interest of the whole society. In such case, the objects of the crime do not have to be the most important interests protected by the Criminal Code, such as the protection of human life, health, privacy and dignity. As a result, a large scale criminal activity or a combination of various minor crimes may provide grounds for the withdrawal of residence permits or the issuing of a return decision.*

*Usually, the official authorities and administrative courts deal with cases concerning combination of various crimes and minor offences. For example a foreigner which was sentenced in total seven times from 2000 to 2013 for the commission of criminal offenses (one of which was infringement of the rights to the trademark, trade name and protected designation of origin, six times theft) and ignored the administrative expulsion twice (judgment of the Supreme Administrative Court of 6 October 2015, No. 6 Azs 188/2015 - 23).*

**a. shoplifting;**

*We are not aware of case law concerning shoplifting. Recently, the Supreme Administrative Court was dealing with case concerning a foreigner who was sentenced for 3 years of imprisonment for participation at two robberies (judgment of 2nd February 2017, No. 10 Azs 315/2016 - 29). This was considered a serious risk to public order and resulted in withdrawal of the permanent residence permit. However, the court did focus merely on procedural issues and did not consider the questions of public order.*

**b. drink driving;**

*We are not aware of case law concerning drink driving.*

**c. tax avoidance;**

*The courts have stated that the scale and nature of the economic crimes committed may reach very serious and dangerous levels and stand against the fundamental economic interests of the State, which are undoubtedly the proper collection of taxes, the regulation of exports and imports of selected products and the protection against counterfeiting and protection of the consumers.*

**d. fare avoidance;**

*We are not aware of case law concerning fare avoidance.*

**e. parking offences;**

*We are not aware of case law concerning parking offences.*

**f. traffic offences;**

*There are a few cases dealing with traffic offences and similar minor offences as a serious danger to public order. However, these offences are always considered together with more serious illegal behaviour and do not present the grounds for decision themselves. In such situation of assessing various activities, the administrative authorities and the courts have to provide detailed conclusion which particular activities and in which way constitute threat to public order or national security (for example Supreme Administrative Court judgment of 25 August 2011, No. 7 As 91/2011 - 101).*

**g. smuggling small quantities of alcohol/cigarettes (duty avoidance);**

*Smuggling small quantities of alcohol/cigarettes was not subject to judicial review as a violation of public order. However, the courts have been dealing with larger quantity smuggling. For example a case in which the foreigner was a member of an organized group of offenders who illegally imported cigarettes into the Czech Republic from which they produced cigarettes that they issued for cigarettes of renowned brands and subsequently sold them. The foreigner within this group illegally smuggled tobacco into the Czech Republic and managed to carry at least 87 tons of tobacco as well as providing the necessary machinery for the treatment of tobacco brought from Hamburg. By the activities of the organized group, the Czech Republic incurred a loss of CZK 35,314,153, the applicant acted deliberately and for profit. This activity was considered in breach of national security, given that the foreigner also participated in a false fatherhood.*

**h. hate speech;**

*There is no case law concerning hate speech as a possible violation of public order.*

**i. contracting a marriage of convenience (a sham marriage).**

*Court usually state that the sham (purposeful) marriage cannot be considered a violation of public order itself, as it is not actual and sufficiently serious threat to one of the fundamental interests of society. However, the other hand the general behaviour of the foreigner which is related to this sham marriage (unauthorized entry into the Czech Republic without a travel document and visa, unauthorized stay in the territory without a visa while long-term living with a citizen of the Czech Republic, and failure to respect the obligation to travel on the basis of a previous administrative expulsion imposed, abuse of the status of a family member of a citizen of the Czech Republic with the aim of legalizing residence on the territory of the Czech Republic or, respectively, in the territory of the EU Member State) cans reached such intensity that it can be regarded as a serious breach of public order.*

**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.**

*Once again, there are no strict criteria as regards proportionality test and all the circumstances of the foreigner's activity and personal situation must be assessed. Protection of family or private life is one of the most emphasised and decisive factors. However, it does not completely rule out the possibility that the protection of public order prevails. The Supreme Administrative Court has repeatedly dealt with the adequacy of the interference with private or family life (for example, Supreme Administrative Court judgments of 19 April 2012, No. 7 As 6/2012 - 29, of 6 December 2011, No. 8 As 32/2011 - 60, of 18 April 2008, No. 2 As 19/2008 - 75). According to this case law, numerous factors must be taken into account in foreign affairs: (1) the nature and gravity of the public interest in question (eg the seriousness of a public offense or a criminal offense committed by the foreigner); (2) length of stay of the foreigner in the Czech Republic; (3) the period that has elapsed since the breach of public policy or the commission of the offense and behaviour of the foreigner during that period, (4) the family situation (eg. marriage duration and other factors expressing the effectiveness of the couple's family life); (5) the number of minors and their age; (6) the extent to which the foreigner's private or family life would be impaired (ie, the effect on the economic, personal and family life of the individual, including the effect on other family members who would*

*otherwise have the right to remain in the Czech Republic on the basis of a separate residence permit); (7) extent and intensity of links to the Czech Republic (relatives, visits, language skills, etc.); (8) the immigration history of the persons concerned (eg violations of immigration rules in the past); And (9) the age and health of the foreigner concerned. In this respect, the Supreme Administrative Court and other administrative courts often refer to the ECtHR case law (in particular cases Rodrigues da Silva and Hoogkamer v. The Netherlands, Üner v. The Netherlands, Konstantinov v. The Netherlands or Nunez v. Norway).*

*The abovementioned criteria were created primarily in connection with the review of the expulsion of foreigners, but the Supreme Administrative Court has extended their applicability to the withdrawal of residence permits. Even the abolishment of a residence permit can, in certain circumstances, constitute, by its very consequences (such as the existence of a threat to the foreigner and his or her family), intense interference with the private and family life. As regards family members or permanent partners of the EU citizens, slightly different conditions apply, following the EU law and jurisprudence (for example judgment in Ruiz Zambrano).*

**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?**

*According to settled case law, among factors that must be taken into account in immigration matters rank also the complainant's family situation (eg marriage duration and other factors expressing the effectiveness of the couple's family life); the number of minors and their age; the extent to which the private and / or family life of an alien would be impaired (ie the effect on the individual's economic, personal and family life, including the influence on other family members who would otherwise have the right to remain in the host Member State on the basis of an independent Residence permit); the extent and intensity of links to the host state (relatives, visits, language skills, etc.). To illustrate this, in judgment of March 4, 2015, No. 1 Azs 160/2014 - 37, the Supreme Administrative Courts concluded that as regards the criteria*

*concerning the foreigner's private and family life in this particular case, it is necessary to take into account the complainant's claim that he has a girlfriend since 2013. However, at the time of the administrative decision, he was by no means in a long-lasting relationship of a high intensity. This was even confirmed by the administrative control. The relationship was founded by the foreigner (if at all) at a time when both of them knew he was staying illegally, and that their relationship was therefore uncertain from the outset. In addition, the foreigner does not have children in the Czech Republic. Therefore, administrative expulsions would not constitute a very substantial scale of intervention, as would have been the case for a long-term relationship from which descendants would emerge.*

*As regards best interests of a child, the right to family life and the best interests of the child is necessarily reflected in the fact that public policy reasons for which a long-term residence permit can be rejected for the purposes of family reunification must indeed be very serious (see judgment of the Supreme Administrative Court of 19 April 2016, No. 5 Azs 39/2016 - 31). This does not mean, however, that the interests of the child always prevail over the protection of public order and national security. For example in recent judgment of January 25, 2017, No. 6 Azs 197/2016 - 48, the Supreme Administrative Court was dealing with a situation of a mother and a daughter, both of Ukrainian citizenship. The mother was issued a return decision, but argued that her removal from the territory would be against the best interests of her daughter. The Municipal Court in Prague concluded that, having regard to the low age of the daughter, that the daughter could not build fundamental social and cultural ties in the Czech Republic. Neither the mother, nor the daughter had been granted any kind of residence permit. The mother, when issuing her daughter's birth certificate, stated the nationality of Bulgaria on the basis of the mother's fake travel documents. The Supreme Administrative Court agreed with these conclusions and added that the daughter was three years old, at the age when she did not even start compulsory school attendance, and could hardly be assumed to have any other substantial links in the territory except for the family. Although the obligation to travel and live in a new environment undoubtedly strongly affects the child who must leave the territory with his or her mother, it is necessary to point out that the daughter did not have any authorized residence permit in the territory. Since she was born, she has been illegally staying in her territory. The Supreme Administrative Court did not deny that the presence of the grandmother and aunts of the child was important for the child, however, the lack of any residence permit does not present a good condition for the growth of the child.*

*The mother was able to take care of herself and stayed on the territory for a long time without her mother (grandmother to the child), which makes it possible to conclude that living with her mother is not crucial.*

*Provided that the foreigner is the only 'home maker' guardian to a national of our country, the situation is different. The parents of a Czech citizen, on condition that they actually take care of the child, have a privileged position on the territory of the Czech Republic compared to other foreigners. Their residency status can be legalized by a number of means granted to them by the Czech Republic in respect of new facts (for example, Title IVa of the Act on the Residence of Aliens governing the residence of the EU citizen and his family members in the territory). Furthermore, Article 20 of the Treaty on the Functioning of the European Union (TFEU) in principle precludes a Member State from denying a national of a non-Member State to whom its low-age children who are Union citizens are entitled to a right of residence in a Member State The State in which those children reside and has their nationality, since such decisions would have given them the possibility of actually benefiting from a substantial part of the rights attaching to the status of Union citizen (Ruiz Zambrano, Grand Chamber of the Court of Justice of 8 March 2011, C-34/09, EU: C: 2011: 124). This is also respected in the case law of the Czech administrative court (see, in this respect, for example judgment of the Supreme Administrative Court of 2nd March 2017, No. 10 Azs 315/2016 - 29).*

**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;**

*No. As mentioned above, it is not possible to deprive any person of his or her citizenship against his or her will despite the seriousness of the crimes this person has committed.*

**b) the denial of a residence permit or issuance of a return decision?**

*Yes, these crimes usually present sufficiently serious threat to one of the fundamental interests of society. However, real and current danger must be assessed as well as the foreigner's overall life situation. The case law usually deals with crimes that are not that serious.*

**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?**

*We are not aware of case law concerning this issue. However, legal regulation does not provide grounds for automatic consideration on seriousness of the threat to public order or national security and removal from the country without any additional examination of the actual and current risk, even if the foreigner has been excluded from protection on the grounds of Art. 1F of the 1951 Refugee Convention. These two regimes work side by side and a separate procedure is required in order to take a return decision. In this case, it is necessary to take into account not only the overall purpose of the given legal regulation but also to take into account particular circumstances of the case origin. The violation of public order can only be such as to constitute a real, current and sufficiently serious threat to one of the fundamental interests of society and it is also necessary to take into account the individual circumstances of the foreigner's overall life situation.*

**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.**

*Cases in which family or private life is given priority over national security or public order do not reach the courts given that the foreigner usually does not have a reason to challenge administrative decision and retains his or her residence status. In some cases, the assessment of family or private life is challenged but the courts cannot replace the decision of the administrative body. Therefore, the significant case law only suggest that there are some major flaws in conclusion of the administrative decision.*

*There are some recent cases in which the Supreme Administrative Law criticized lower courts or administrative bodies for lack of reasons regarding assessment of family life of the foreigner. For example in judgment of 6 February 2013, No. 3 As 75/2012 - 28, it stated that the foreigner as a biological mother cannot primarily be placed in the position of the person obliged to prove the maternal interest in her child just because she does not live with a child in a common household. She definitely has some relationship with her daughter. Whether it is of a lower intensity, is not especially important, and definitely decisive in the present case. The court cannot be satisfied with the speculative denial of the foreigner's motherly behaviour on the basis of a piecemeal and superficial evidence of the facts that have been taken into account in the present proceedings before the administrative authorities and the municipal court. Linking the foreigner's motherhood with her forbidden residence in the territory of the Czech Republic was according to the court inappropriate and clearly ignored the natural aspects of human life. Without a thorough examination of the circumstances, the degree of integration of the foreigner in the Czech Republic, her personal and family circumstances, age, length of stay in the territory, health status or ties to the country of origin, as well as concrete working, housing, material and other conditions of her life, it is not possible to conclude upon motivation or even necessity of her actions. It is also not possible to exclude the fact that she acted adequately with her options, since even occasional maternal contact with the child and care for them through a third person cannot be considered, historically or actually, as a rarity or even denial of a maternal relationship.*

**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?**

*In cases where the protection of public order or national security calls for removal of the foreigner, the Ministry provides statement regarding situation in the country of origin and the official authorities consider the risks the foreigner faces in the country of origin, including torture and inhuman or degrading treatment or punishment. Applicable legal provisions state that in cases of reasonable concern that if the alien was returned to the State of which he is a national or, if he is a stateless person, to the State of his last permanent residence, he would*

*be in danger of serious harm and that he or she is unable or unwilling to take advantage of the protection of the State of which he is a national or of his last permanent residence because of such a danger. Serious danger is considered a death sentence, torture or inhuman or degrading treatment or punishment, serious threat to life or human dignity due to arbitrary violence in situations of international or internal armed conflict, or if the foreigner's departure would be contrary to the international obligations of the Czech Republic. There are judgments dealing for example with political situation in Ukraine (no danger currently, but in past due to the armed conflict) or possible persecution in Vietnam (no danger).*

**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?**

*The administrative decision must always provide sufficient consideration on both legal and factual reasons and the administrative authorities must not refrain fully or partly from justifying such 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?**

*In such case, part of the file which contains sensitive information regarding national security would be rated classified (confidential) and the party (his/her lawyer) would not have access to this part of the file. However, the administrative decision and the court decision must provide detailed reasons for the conclusions in order to be reviewable and provide the party the right to a fair trial. All the judges are deemed eligible from the security point of view for access to the confidential part of the file and can therefore see and consider all the facts the administrative decision is based upon.*

*Nevertheless, this does not happen in the immigration and citizenship cases brought before the courts. In these cases, to our knowledge, matters of national security in narrow sense have*

*not been raised in the court proceedings. Classified information is often part of the national security clearance cases, but does not appear elsewhere.*

**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?**

*The evidence that substantiates the establishing of facts (grounds) that constitute a risk to national security or public order is open to a judge, a party to the procedure and a counsellor representing a party with exception of classified information (see above) which is open only to the judges. In practice, this exception is not applied.*

**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?**

*According to § 58 of Act No. 412/2005 Coll., President of the State, Members of the Parliament and Senate, Members of the Government, Ombudsman and his deputy, judges, President, Vice-president and members of the Supreme Audit Office have full access to all levels of classified information without need to obtain a special certificate (security clearance) and undergo a vetting process. Since his or her appointment, every judge is deemed eligible from the security point of view for access to the confidential part of the file and can therefore see and consider all the facts the administrative decision is based upon.*

**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.**

*The administrative decision and the court decision must provide detailed reasons for the conclusions in order to be reviewable and provide the party the right to a fair trial. Nevertheless, the party to a procedure and his or her counsellor are restricted from access to particular classified information and specific reasons for the decision.*

*This issue has been most notably reflected in the still running case* ***Regner v. Czech Republic*** *which reached the ECtHR (application no. 35289/11). In September 2006 the National Security Authority decided to revoke the security clearance which Mr Regner had been granted to perform his duties as deputy to a Vice-Minister of Defence, on the grounds that he was a risk to national security. However, the decision made no reference to the confidential information on which it was based; the information in question was classified as "restricted" and, in accordance with the law, could not be disclosed to him. On an appeal by Mr Regner, the President of the Authority confirmed the existence of the risk. An application by Mr Regner for judicial review was subsequently rejected by the Municipal Court in Prague, to which the documents in question had been transmitted by the Authority. Mr Regner and his lawyer were not authorised to consult them. The Supreme Administrative Court rejected his subsequent appeal, holding that the disclosure of the information would result in exposure of the intelligence service's working methods, disclosure of sources of information or attempts by the applicant to influence potential witnesses. Mr Regner then lodged an appeal with the Constitutional Court, complaining that the proceedings had been unfair. The Constitutional Court dismissed his appeal in November 2010, finding that it was not always possible to ensure all the procedural guarantees of fairness where confidential information relating to national security was at stake.*

*Relying on Article 6 § 1 (right to a fair trial) of the European Convention on Human Rights, Mr Regner complained that the administrative proceedings in his case were unfair in that it was impossible to have access to a decisive piece of evidence classified as confidential which had been made available to the courts by the defendant. In its Chamber judgment of 26 November 2015, the European Court of Human Rights held, unanimously, that there had been*

***no violation of Article 6 § 1 of the Convention****, finding that, as far as possible, the decision-making procedure had complied with the requirements of adversarial proceedings and equality of arms and incorporated adequate safeguards to protect Mr Regner's interests.*
*On 2 May 2016 the Grand Chamber Panel accepted the applicant's request that the case be referred to the Grand Chamber.*

**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 confidentially on grounds of its classified character (state secrecy or similar).**

*No, judges are not entitled to classify the information themselves and consequently are allowed to disclosure classified information to the parties to a procedure. The judges may only be deprived of confidentiality by the decision of the Minister of Justice based on opinion of the responsible authority active in the field into which the requested classified information belongs.*

**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?**

*Generally, the evidence admitted by judges during court procedures in immigration and citizenship cases is available to the parties. However, in practice there is usually no reason to deal with more (sensitive) documents or other evidence beyond that already included in the administrative file which becomes part of the court file during the court proceedings. This comes from the basic legal duties of the administrative bodies to base their decisions on the*

*grounds of available evidence and to share this evidence with the parties. With the exception of classified information, 'equality of arms' is therefore ensured.*

**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?**

*Full judgements and their legal and factual reasons in immigration and citizenship cases are always open to the parties and their counsellors. Moreover, both regional administrative courts and the Supreme Administrative Court publish their electronic version in the on-line database, making them available to the wide public.*

**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.**

*There are no such differences as regards standards applied in relation to access to classified case files for nationals, EU citizens and their family members and third-country nationals.*

**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)?**

*According to § 56 of Act. No. 150/2002 Coll., Code of Administrative Justice, some cases must be given preference (for example complaints concerning asylum, decisions on detention of a foreigner and decisions on the termination of special protection, petitions for adjudication of suspensory effect etc.) and some cases might be given preference provided there are specific reasons.*