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"

Cracow 18 September 2017

Answers to questionnaire: Germany

Seminar co-funded by the «Justice » program of the European Union

ACA-Questionnaire

„Public order, national security and the rights of the third-country nationals in immigation and citizenship cases”

Answers by the Federal Administrative Court, Germany

Content

1. National Legal framework in the field of immigration

1.1. Issues relating to the immigration, residence and expulsion of third-country nationals are governed – in accordance with the guidelines of the european law – by the Act on the Residence – AufenthG - (Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory - Residence Act [http://www.gesetze-im-internet.de/englisch_aufenthg/englisch_aufenthg.html#p0009])

This regulation also covers issues of (national) security and public order.

The terms "national security" and/or "public order" are used in the law in various places, but are not defined in the definitions (Section 2 AufenthG).

1.2 A central regulation is Section 53 AufenthG, which regulates the expulsion. The precise wording of this regulation is:

> Section 53: Expulsion
>
> (1) A foreigner whose stay endangers public safety and law and order, the free democratic basic order or other significant interests of the Federal Republic of Germany shall be expelled if the balancing of the interests in the foreigner's departure with the foreigner's individual interests in remaining in the federal territory which is to be conducted taking account of all the circumstances of the particular case results in the public interest in the foreigner leaving overriding.
>
> (2) When balancing the interests pursuant to subsection 1 in accordance with the circumstances of particular case, consideration shall in particular be given to the length of the foreigner's stay, his or her personal, economic and other ties in the federal territory and in the country of origin or in another state prepared to receive him or her, the consequences of expulsion for his or her dependants and domestic partner, as well as whether the foreigner has abided with the law.
>
> (3) A foreigner who has been recognised as entitled to asylum, who enjoys the legal status of a foreign refugee, who possesses a travel document issued by an authority in the Federal Republic of Germany in accordance with the Agreement of 28 July 1951 on the Legal Status of Refugees (Federal Law Gazette 1953 II p. 559), who is entitled to a right of residence in accordance with the EEC/Turkey Association Agreement or who possesses an EU long-term residence permit may be expelled only if the personal conduct of the person concerned currently represents a serious threat to public safety and law and order which affects a fundamental interest of society and the expulsion is essential to protect that interest.
>
> (4) A foreigner who has filed an application for asylum may be expelled only under the condition that the asylum procedure has been concluded by incontestable decision without the foreigner being given recognition as a person entitled to asylum or without recognition of entitlement to international protection (Section 1 (1) no. 2 of the Asylum Act). The condition shall be waived if
>
> 1. there are facts justifying an expulsion pursuant to subsection 3 or
>
> 2. a deportation warning issued in accordance with the provisions of the Asylum Act has become enforceable

1.3 The public interest in an expulsion in Section 53 (1) AufenthG is specified, defined and weighted by the legislature in section 54 AufenthG for the purpose of balancing the possible interest in remaining and to ensure the proportionality of an expulsion. According to the nature and weight of the grounds for the expulsion, the law distinguishes between particularly serious expulsion interests (para. 1) and serious expulsion interests (para 2).[1]

[1] The presize wording of Section § 54 AufenthG is as follws:

Section 54
Interest in expulsion
(1) There shall be a particularly serious public interest in expelling the foreigner (Ausweisungsinteresse) within the meaning of Section 53 (1) where the foreigner
1. has been incontestably sentenced to a prison term or a term of youth custody of at least two years for one or more intentionally committed offences or preventive detention has been ordered in connection with the most recent incontestable conviction,
1a has been incontestably sentenced to a prison term or a term of youth custody of at least one year for one or more intentionally committed offences against life, physical integrity, sexual self-determination or property or for resisting enforcement officers if the criminal offence was committed using violence, using a threat of danger to life or limb, or with guile; there shall be a particularly serious interest in expulsion in the case of the commission of serial offences against property even if the perpetrator did not use violence, threats or guile,
2. threatens the free democratic basic order or the security of the Federal Republic of Germany; this shall be assumed to be the case where facts justify the conclusion that the foreigner is or has been a member of an organisation which supports terrorism or he or she supports or has supported such an organisation or he or she is, in accordance with Section 89a (2) of the Criminal Code, preparing or has prepared a serious violent offence endangering the state described in Section 89a (1) of the Criminal Code, unless the foreigner recognisably and credibly distances himself or herself from the activity which endangers the state,
3. was one of the leaders of an organisation which was incontestably banned because its purposes or its activity contravenes criminal law or it is directed against the constitutional order or the concept of international understanding,
4. is involved in violent activities in the pursuit of political or religious objectives or calls publicly for the use of violence or threatens the use of violence or
5. incites others to hatred against sections of the population; this shall be assumed to be the case where he or she exerts a targeted and permanent influence on other persons in order to incite or increase hatred against members of certain ethnic groups or religions, or he or she publicly, in a meeting or by disseminating writings in a manner which is suited to disturbing public safety and law and order,
a) incites others to undertake arbitrary measures against sections of the population,
b) maliciously disparages sections of the population and thus attacks the human dignity of others or
c) endorses or promotes crimes against peace, against humanity, war crimes or acts of terrorism of comparable severity,
unless the foreigner recognisably and credibly distances himself or herself from his or her actions.
(2) There shall be a serious interest in expelling the foreigner within the meaning of Section 53 (1) where the foreigner
1. has been incontestably sentenced to a prison term of at least one year for one or more intentionally committed offences,
1a. has been incontestably sentenced to a prison term or a term of youth custody for one or more intentionally committed offences against life, physical integrity, sexual self-determination or property or for resisting enforcement officers if the criminal offence was committed using violence, using a threat of danger to life or limb, or with guile; the interest in expulsion shall be serious in the case of the commission of serial offences against property even if the perpetrator did not use violence, threats or guile,
2. has been incontestably sentenced to youth custody for at least one year for one or more intentionally committed offences and enforcement of the penalty has not been suspended on probation,
3. has committed or attempted to commit, as a perpetrator or participant, the offence under Section 29 (1), sentence 1, no. 1 of the Narcotics Act,
4. uses heroin, cocaine or a comparably dangerous narcotic and is not prepared to undergo the necessary treatment which serves his or her rehabilitation or he or she evades such treatment,
5. prevents another person from participating in life in the Federal Republic of Germany on an economic, cultural or social level by reprehensible means, in particular through the use or threat of violence,
6. forces or attempts to force another person into entering into marriage,

1.4 Section 53 (1), Section 54 AufenthG also have importance for the issue of a residence title. The granting of a residence permit usually requires that no expulsion interest is given and that the interests of the Federal Republic of Germany are not affected or jeopardized (Section 5 (1) AufenthG) (in cases where there is no legal entitlement to the issuance of the title).[2]

1.5 Cases concerning immigation and citizenship are assigned to the general administrative courts. There is no particular jurisdiction for immigration/citizenship cases and/or special panels within the general administrative courts. Within the general administrative courts, the judicial cases distribution plan ("Geschäftsverteilungsplan"), which is adopted by the judges of the respective court before the beginning of each year, determines which judges have to decide on immigration/citizenship cases.

1.6 The general administrative jurisdiction is threefold. The first two levels are courts of the federal states ("Länder"). The highest level, the Federal Administrative Court, is a court of the federation. The classification and functional division between the Federation and the Länder also corresponds in principle to the establishment of the judiciary in other branches of German jurisdiction.

1.6.1. The first level of jurisdiction is the Administrative Court. It decides on legal and factual questions. Administrative Courts are obliged to investigate the facts without being bound by the evidence presented by the parties(inqusitorial procedure [„Amtsermittlungsgrundsatz"]).

1.6.2 The Second level of jurisdiction is composed of the Higher Administrative Courts. An appeal to the Higher Administrative Court is possible against decisions of the Administrative Court if it has been admitted by the Administrative Court or the Higher Administrative Court.

---

7. he or she, in the course of an interview which serves to clarify reservations against entry or continued residence, fails to reveal to the German diplomatic mission abroad or to the foreigners authority previous stays in Germany or other states, or intentionally furnishes no, false or incomplete information on key points regarding links with persons or organisations suspected of supporting terrorism or threatening the free, democratic order or security of the Federal Republic of Germany; expulsion on this basis shall be permissible only if the foreigner is expressly informed prior to the interview of the security-related purpose of the interview and the legal consequences of refusing to furnish information or of furnishing false or incomplete information,
8. in the course of an administrative procedure which was conducted by the authorities of a Schengen state in Germany or abroad
a) has furnished false or incomplete information in order to obtain a German residence title, a Schengen visa, an airport transit visa, a passport substitute, eligibility for exemption from the passport obligation or the suspension of deportation or
b) notwithstanding a legal obligation, has failed to cooperate in measures undertaken by the authorities responsible for implementing this Act or the Convention Implementing the Schengen Agreement, provided that the foreigner was informed beforehand of the legal consequences of such action or
9. has committed a not only isolated or minor breach of legal provisions, court rulings or orders, excepting isolated or minor breaches, or has committed an offence outside of the federal territory which is to be regarded as an intentionally committed serious offence in the federal territory.

[2] Section 5 (1) AufenthG (General preconditions for the granting of a residence title): "The granting of a residence title shall generally presuppose
1. und 1a […]
2. that there is no public interest in expelling the foreigner,
3. that, if the foreigner has no entitlement to a residence title, the foreigner's residence does not compromise or jeopardise the interests of the Federal Republic of Germany for any other reason and 4.[…]."

The admission of the appeal must be made under certain conditions, which are regulated in Section 124 (2) of the Administrative Court Procedure (VwGO).[3]

The High Administrative Courts are mainly courts of appeal. They re-examine decisions of the tribunals of first instance as to the facts and to the law. When an appeal was admitted, the case is to be re-examined under all aspects without without being bound by the legals reasons or the facts presented by the parties. The parties are allowed to bring new facts or new legal reasions before the court.

1.6,3 The third level of jurisdiction is the Federal Administrative Court or Supreme Administrative Court (Bundesverwaltungsgericht). The main function of the Bundesverwaltungsgericht is to rule on appeals on points of law (called Revision). The scope of the appeal encompasses the interpretation and application of federal law and ensures that the law is constantly developped further and applied uniformly. A Revision does not involve the establishment of new facts. The appeal on points of law has to be admitted by the Higher Administrative Court or the Federal Administrative Court in response to a complaint against non-admission.

According to Section 132 (2) Code of Administrative Court Procedure (VwGO) the appeal on points of law shall only be admitted if (1) the legal case is of fundamental significance, (2) the judgment deviates from a ruling of the Federal Administrative Court, of the Joint Panel of the supreme courts of the Federation or of the Federal Constitutional Court and is based on this deviation, or (3) a procedural shortcoming is asserted and applies on which the ruling can be based.

1.6.4 The Federal Administrative Court does have competence as a court of first instance in certain cases. Only in these it decides on the facts and the law. One of those specific cases is the „Deportation Order“ according to Section 58a AufenthG. This norm was adopted in 2005. Yet, up to 2016 there was only one case pending at the Court. In 2017 there have already been four applications in the first quarter of the year.

The Deportation order may be issued by the supreme authority of the federal states for a foreigner without a prior expulsion order based on the assessment of facts, in order to avert a special danger to the security of the Federal Republic of Germany or a terrorist threat; the deportation order shall be immediately enforceable; no notice of intention to deport shall be necessary. According to Section 58a (4) AufenthG: Following announcement of the deportation order, the foreigner is to be given an opportunity to establish contact with a legal adviser of his or her choice without delay, unless he or she has secured the services of a lawyer beforehand; the foreigner is to be informed of this entitlement, of the legal consequences of the deportation order and the available legal remedies. An application for temporary relief pursuant to the Code of Administrative Courts Procedure shall be filed within seven days of announcement of the deportation order. Deportation may not be enforced until expiry of the period in accordance with sentence 2 and, if an application for temporary relief is filed in time, until the time of the court's decision on said application.

---

[3] Section 124 (Appeal on points of fact and law)
(1) […]
(2) The appeal on points of fact and law shall only be admitted
1. if serious doubts exist as to the correctness of the judgment,
2. if the case has special factual or legal difficulties,
3. if the case is of fundamental significance,
4. if the judgment derogates from a ruling of the Higher Administrative Court, of the Federal Administrative Court, of the Joint Panel of the supreme courts of the Federation or of the Federal Constitutional Court, and is based on this derogation, or
5. if a procedural shortcoming subject to the judgment of the court of appeal on points of fact and law is claimed and applies on which the ruling can be based.

1.7 Decisions (“administrative acts”) in the field of immigration are released by administrative authorities. Before filing an application to court, the lawfulness and expedience of the administrative act shall be reviewed in preliminary proceedings (Section 68 VwGO), unless the state law determines by a statute, that such a a review shall not be required. Some states have abrogated the rescissory action (Widerspruch) and the following preliminary proceedings.In the other states the rescissory action must be lodged within one month after the administrative act has been announced. If the authority does not remedy the objection, a ruling on the objection shall be handed down. This shall be issued by the next higher authority unless another higher authority is determined by law.

2. National Legal Framework in the field of citizenship

2.1 The field of citizenship is covered by the Nationality Act (Staatsangehörigkeitsgesetz – StAG) (http://www.gesetze-im-internet.de/englisch_rustag/englisch_rustag.html#p0023).

The main principle is the acquisition by birth (Section 4 StAG). A child shall acquire German citizenship by birth if one parent possesses German citizenship. However, children of foreign parents shall acquire German citizenship by birth in Germany if one parent has been legally ordinarily resident in Germany for eight years and has been granted a permanent right of residence or as a national of Switzerland or as a family member of a national of Switzerland possesses a residence permit on the basis of the Agreement of 21 June 1999 between the European Community and its Member States on the one hand and the Swiss Confederation on the other hand on the free movement of persons. Questions related to national security and public order are indirectly relevant, because the permanent right of resicence may not be granted to parents, who present a „security risk“.

2.2 Questions of national security and public order are mainly relevant in the case of naturalization. According to Section 10 (1) StAG an foreigner is entitled to naturalization – inter alia – if he or she

> „1. confirms his or her commitment to the free democratic constitutional system enshrined in the Basic Law of the Federal Republic of Germany and declares that he or she does not pursue or support and has never pursued or supported any activities
>
> a) aimed at subverting the free democratic constitutional system, the existence or security of the Federation or a *Land* or
>
> b) aimed at illegally impeding the constitutional bodies of the Federation or a *Land* or the members of said bodies in discharging their duties or
>
> c) any activities which jeopardize foreign interests of the Federal Republic of Germany through the use of violence or preparatory actions for the use of violence,
>
> or credibly asserts that he or she has distanced himself or herself from the former pursuit or support of such activities, and […]
>
> 5. has not been sentenced for an unlawful act and is not subject to any court order imposing a measure of reform and prevention due to a lack of criminal capacity […].“

According to Section 11 StAG (Grounds for exclusion), naturalization shall not be allowed

> „1. if there are concrete, justifiable grounds to assume that the foreigner is pursuing or supporting or has pursued or supported activities aimed at subverting the free democratic constitutional system, the existence or security of the Federation or a *Land* or at illegally impeding the constitutional bodies of the Federation or a *Land* or the members of said bodies in discharging their duties or any activities which jeopardize foreign interests of the Federal Republic of Germany through the use of violence or preparatory actions for the use of violence, unless he or she credibly asserts that he or she has distanced himself or herself from the former pursuit or support of such activities, or

2. if a ground for expulsion applies pursuant to Section 54, nos. 5 and 5a of the Residence Act.“

Section 10 (1) (5) StAG is specified by Section 12a StAG (Decision in case of conviction for an offence):

„1) The following shall not be taken into consideration in the process of naturalization:

1. the imposition of educational or disciplinary measures under the Juvenile Court Act,

2. sentencing to fines of up to 90 daily rates and

3. the imposition of suspended sentences of up to three months' imprisonment which are waived after expiry of the probationary period.

Where more than one term of imprisonment or more than one fine have been imposed pursuant to sentence 1, nos. 2 and 3, they shall be cumulated, unless the court imposes a lower aggregate punishment; where a fine and imprisonment are imposed simultaneously, one daily rate equals one day’s imprisonment. If the punishment or the total of all punishments slightly exceeds the framework under sentences 1 and 2, it shall be decided on the merits of the individual case whether it can be disregarded. Where a measure of reform and prevention under Section 61, no. 5 or no. 6 of the Criminal Code has been imposed, it shall be decided on the merits of the individual case whether this measure of reform and prevention can be disregarded.

(2) Foreign convictions shall be considered if the offence concerned is to be regarded as liable to prosecution in Germany, the sentence has been passed in proceedings conducted in accordance with the rule of law and the sentence is commensurate. Such a conviction cannot be considered if its removal from the records would be required in accordance with the Federal Central Criminal Register Act. Sub-section 1 shall apply *mutatis mutandis*.

(3) If a foreigner who has applied for naturalization is under investigation on suspicion of having committed an offence, the decision on naturalization shall be deferred until conclusion of the proceedings, and in the case of conviction until the judgment becomes unappealable. The same shall apply if the imposition of youth custody is suspended pursuant to Section 27 of the Juvenile Court Act.

(4) Convictions abroad and criminal investigations and proceedings which are pending abroad shall be stated in the application for naturalization.“

2.3 Citizenship Cases are within the jurisdiction of the Administrative Courts. The same procedural rules apply as in cases in the field of immigation (s. above No. 1).

3. Immigration and citizenship cases before the courts

3.1 There is no valid information available about the number of immigration and citizenship cases brought before the courts in 2016.

In immigration matters involving third-country nationals there were in the year 2015 5.646 decisions of the Administrative Courts and1089 decisions of the Higher Administrative Courts (Appeals). Also, there were 1361 decisions of these courts in cases of complaints against decisions of Administrative Courts on interim orders or similar fast track provisional remedies. There is no seperate statistical information about the cases in which grounds related to national security and public order were decisive. The percentage of those cases is - roughly estimated – between 30% and 50%. In the year 2015 there were 33 cases brought before the Federal Administrative Court in immigration matters (without refugees, but including cases concerning EU nationals) and five cases concerning citizenship.

„Juris“ – a caselaw-database – indicates in the year 2016 103 decisions in expulsion cases (mostly related to national security) (Administrative Courts: 48; Higher Administrative Courts:

55; Federal Administrative Court: none), in the year 2015 95 decisions (Administrative Courts: 51; Higher Administrative Courts: 43; Federal Administrative Court: one).

3.2 There is no statistic of citizenship cases before the Administrative Courts available in public; the citizenship cases are not reported separately.

Juris“ – a caselaw-database – indicates in the year 2015 56 decisions in citizenship cases (Administrative Courts: 34; Higher Administrative Courts: 18; Federal Administrative Court: 5) and in the year 2016 52 decisions (Administrative Courts: 23; Higher Administrative Courts: 26; Federal Administrative Court: 3).

3.3 Cases in which issues related to national security and to public order are contained are not registered separately within the court and they are – in general - not given priority when listed for hearing. Cases involving such matters –however – may effort an interim order or a temporary relief due to general rules.

4. Judicial procedure in immigration cases[4]

4.1 There are no differences in the judicial procedure in immigration cases and other administrive cases in the Code of Administrative Court Procedure or other laws. There may be differences – inter alia - on the issues the court has to investigate by its duty to investigate the facts ex officio (for example: country of origin information in expulsion cases to estimate the risk of the danger of imposition or enforcement of the death penalty or whether a deportation is inadmissible under the terms of the Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms.

4.2 Elements of national security and public order have no influence on court procedures. As compared with „normal“ immigration cases there exist no specific differences to immigration cases in which issues related to national security and public are involved.

However, the obligation of the authorities to submit certificates or files, to transmit electronic documents and provide information concerning the case is generally restricted. According to Section 99 (1) (2) VwGO, the competent supreme supervisory authority may refuse the submission of certificates or files, the transmission of the electronic documents and the provision of information, If the knowledge of the content of these certificates, files, electronic documents or this information would prove disadvantageous to the interests of the Federation or of a *Land*, or if the events must be kept strictly secret in accordance with a statute or due to their essence. On request by a party concerned, the Higher Administrative Court shall find by order without an oral hearing whether the refusal to submit certificates or files, to transmit the electronic documents or to provide information is lawful; Section 99 (2) VwGO provides a specific prodedure („in camera-procedure).

4.3 The power of the judge of first instance administrative courts is limited to controll legality (conformity with law) of the challenged administrative decision. Insofar the administrative authority is empowered to act in its discretion, the court shall also examine whether the administrative act or the refusal or omission of the administrative act is unlawful because the statutory limits of discretion have been overstepped or discretion has been used in a manner not corresponding to the purpose of the empowerment (Section 114 (1) VwGO).

[4] Generally to the Judicial Review of administrative acts s. Kraft, Administrative Justice in Europe – Report for Germany (1.7.2016), Nrn. 21 to 50 – Appendix I.

The power of the judge is – however – not restricted to quash an administrive decision („Kassation“). Insofar as the rejection or omission of the administrative act is unlawful and the plaintiff’s rights are violated thereby, the court shall announce the obligation incumbent on the administrative authority to effect the requested official act if the case is mature for adjudication; otherwise, it shall hand down the obligation to notify the plaintiff, taking the legal view of the court into consideration (Section 113 (5) VwGO). The judge shall investigate the facts ex officio; he/she is not bound by the submissions or by the motions to take evidence of the parties.

It is a question of the „material“ law (not the procedure), whether the judicial review is ex nunc or ex tunc. Insofar as the rejection or omission of the administrative act is unlawful and the plaintiff’s rights are violated thereby, the judicial review is mainly ex nunc; the court has to prove whether the legal requirements and the facts, which are required by law, are fulfilled. Under the influence of the European Law and the jurisdiction of the ECtHR the Federal Administration Court shifted 2007/09 the relevant moment for judicial review of expulsion orders from the time of the administrative decision to the decision of the court.

4.4 The Federal Administrative Court (as the court of the last resort) is limited to control legality (conformity with law) in the same manner as the court of first instance. It has the power to change the decision of the administrative authority, insofar as the rejection or omission of the administrative act is unlawful and the plaintiff’s rights are violated thereby. The Federal Administrative Court – however – cannot consider new facts and it is bound by the factual findings handed down in the impugned judgment unless admissible, well-founded grounds for the appeal on points of law have been submitted in relation to these findings.

4.5 Access to the Higher Administrativ Courts and to the Federal Administrative Court is restricted. Necessary is an admission of the „Berufung“/Appeal on points of law and facts (Higher Administrative Court) or „Revision“(Appeal on points of law (Federal Administrative Court) by the courts. The non-admission of the appeal may be challenged by a complaint. The reasons for admission of the appeal are layed down in Section 124 (2) VwGO (Berufung) and Section § 132 (2) VwGO (Revision).

5. Judicial procedure in citizenship cases

There are no (significant) differences concerning the judicial procedure between citizenship cases, immigrant cases and other administrative cases; elements of national security and public order have no influence on the judicial procedure. In addition see No. 4 „Judicial procedure in immigration cases“.

6. The notion of public order and national security

6.1 The national law does not generally define terms as „public order“, „national security“ and similar terms by a statutory definition. The statutory law often uses the term „öffentliche Sicherheit oder Ordnung“ (public security or order) and differentiates between the levels of the risk (for example: „threat to the security of the Federal Republic of Germany“ [Section 47 (2) (1) AufenthG), „threat to the public safety and and law and order“ [Section 53 (1) AufenthG], „a serious threat to public safety and law and order which affects a fundamental interest of society and the expulsion is essential to protect that interest“ [Section 53 (3) AufenthG], „threatens ... the security of the Federal Republic of Germany“ [Section 54 (1) (2) AufenthG], „a danger to public safety and law and order“ [Section 56 (1) AufenthG], „a significant risk to internal security or to the life and limb of third parties“ [Section 56 (4) AufenthG], „a special danger to the security of the Federal Republic of Germany or a terrorist threat“ [Section 58a (1) AufenthG]; „serious danger to public safety or law and order“ [Section 59 (1) No. 2

AufenthG], „is detrimental to public safety and law and order or other substantial interests of the Federal Republic of Germany“ (Section 59 (7) No. 2 AufenthG], „for serious reasons, the foreigner is to be regarded as a threat to the security of the Federal Republic of Germany or constitutes a threat to the general public“ (Section 60 (8) AufenthG], „security check“ [Section 72a (1) AufenthG], „an order to ascertain the grounds for refusal pursuant to Section 5 (4) or to investigate other security reservations which speak against the granting of a visa“ [Section 72a (3) AufenthG], „on grounds of national security for the Federal Republic of Germany“ [Section 104a (7) AufenthG]).

6.2 The statuary law often specifies and concretizes the interests protected by „public safety“ or „public security“ by examples and rules, which were links to specific criminal offences, acitivities or situations. Only one example is Section 54 (1)/(2) AufenthG (s. above No. 1.*) and especially Section 54 (1) No. 2 AufenthG. This regulation stipulates, that a threat on free democratic basic order or the security of the Federal Republic of Germany „shall be assumed to be the case where facts justify the conclusion that the foreigner is or has been a member of an organisation which supports terrorism or he or she supports or has supported such an organisation or he or she is, in accordance with Section 89a (2) of the Criminal Code, preparing or has prepared a serious violent offence endangering the state described in Section 89a (1) of the Criminal Code, unless the foreigner recognisably and credibly distances himself or herself from the activity which endangers the state“.

6.3 The basic term „public safety and law and order“ is – as a term of general hazard prevention law - defined by case law. The term incorporates the internal und external security of the state, any violation of internal law and statues, especially criminal law and risk of terrorist acitivties. Insofar as the right of the European Union does not use the terms in a specific sense, based on European Law, which may come to a narrower interpretation, the traditional internal interpretation may be used in immigration cases. The legal consequences of a danger to the “public safety” or its violation depends on the decision to be made/the act of an administrative authority to be examined; the legal consequences always have to be proportional. It makes a significant difference, whether a person wants to get a short term visa or a person faces an expulsion order after having lived many years in Germany.

6.4 The term “(national or public) security of the Federal Republic of Germany” must be interpreted in a narrower way than „public safety and law and order“ . The “security of the Federal Republic of Germany” includes the inner and outer security and aims at protecting the existence and effectiveness of the state and its facilties including the protection against any influence through violence/force or the threat with violence/force.[5] Violent assaults concerning uninvolved persons aiming at creating uncertainty or insecurity of the population is considered to be a violation of security of the Federal Republic of Germany, especially with a terrorist background.

6.5 The term “terrorist danger” came into the law in reaction to the assaults of “September 2011” and the new type of threats incorporated with terrorist attacks. The definition of “terrorism” follows international and european law.

In spite of a the blurred concept of terrorism, according to the jurisprudence of the Federal Administrative Court, the pursuit of political goals by terrorist means prohibited under international law is given, if political objectives are pursued using homicidal, fatal weapons or by attacking the lives of uninvolved persons.

[5] BVerwG, B. v. 21.3.2017 - 1 VR 1/17.

7. Jurisdiction on “public order”/”national security”

There have been no significant changes in the jurisdiction of the Federal Administrative Court in recent years concerning questions of “public order” or “national securtity”. The jurisdiction - however – has had to “adjust” the abstract terms to concrete situations and new terms.

Since the statuary rules für expulsion had been changed with effect of January 2016 to bring them in accordance with the jurisdiction of the ECtHR and the CJEU, the Federal Administrative Court had to examine the legal consequences of the news system and the range of the changes (BVerwG, U. v. 22.2.2017 - 1 C 3.16). Several decisions relate to the preconditions of the expulsion of EU citizens (u.a. BVerwG, U. v. 14.12.2016 - 1 C 13.16; U. v. 28.5.2015 - 1 C 20.14; U. v. 25.3.2015 - 1 C 18.14) or persons entitled to a right of residence in accordance with the EEC/Turkey Association Agreement.

8. “public order” and “national security” as a barrier of entry

8.1 In order to enter and stay in the federal territory, foreigners are required to have a residence title - in the absence of any provisions to the contrary in the law of the European Union or a statutory instrument and except where a right of residence exists as a result of the agreement of 12 September 1963 establishing an association between the European Economic Community and Turkey (Federal Law Gazette 1964 II p. 509) (EEC/Turkey Association Agreement) (Section 4 (1) AufenthG).

One of the general preconditions for granting a residence title is - generally - that there is no public interest in expelling the foreigner (Section 5 (1) No. 2 AufenthG). A foreigner whose stay endangers public safety and law and order, the free democratic basic order or other significant interests of the Federal Republic of Germany shall be expelled if the balancing of the interests in the foreigner’s departure with the foreigner’s individual interests in remaining in the federal territory which is to be conducted taking account of all the circumstances of the particular case results in the public interest in the foreigner leaving overriding. For refusing a residence title (including visa) only the expulsion reason is required (no balancing with individual interest in remaining). “Risk to public order” or “national security” constitute a public interest in expulsion.

By granting residence for temporary protection or on humanitarian grounds, there is no low level “security check”. However: No temporary protection shall be granted if the conditions stipulated in Section 3 (2) of the Asylum Act or Section 60 (8), sentence 1 apply or in cases, where serious grounds warrant the assumption that the foreigner 1. has committed a crime against peace, a war crime or a crime against humanity within the meaning of the international instruments which have been drawn up for the purpose of establishing provisions regarding such crimes, 2. has committed an offence of considerable severity, 3. is guilty of acts contrary to the objectives and principles of the United Nations, as enshrined in the Preamble and Articles 1 and 2 of the Charter of the United Nations, or 4. represents a risk to the general public or a risk to the security of the Federal Republic of Germany.

A residence title shall be refused if there is a public interest in expelling the foreigner within the meaning of Section 54 (1) no. 2 or no. 4. Exemptions from sentence 1 may be approved in justified individual cases, if the foreigner divulges said activities or allegiances to the competent authorities and credibly distances himself or herself from his or her actions posing a threat to security.

8.2 Entering the territory of the Federal Republic of Germany generally requires the possession of a residence title required in accordance with Section 4. Persons without the residence

title are not allowed to enter. In cases, in which no residence title is required, foreigners may be refused entry at the border if there is a public interest in expelling the foreigner (which may be the case in any risk to public order and national security) or there is a well-founded suspicion that the foreigner does not intend to stay in the country for the stated purpose (Section 15 (2) AufenthG).

8.3 The preconditions for a stay for 90 days in any 180-day period (short stay) are regulated in the Visa Code (VO [EG] No. 180/2009 v. 13.7.2009). According to Section 32 (1) (vi), a visa shall be refused if the applicant "is considered to be a threat to public policy, internal security or public health as defined in Article 2(19) of the Schengen Borders Code or to the international relations of any of the Member States, in particular where an alert has been issued in Member States' national databases for the purpose of refusing entry on the same grounds".

8.4 In general, a precondition to be granted a residence permit/title (temporary or permanent) is, that there is no public interest in expelling the foreigner or that, if the foreigner has no entitlement to a residence title, the foreigner's residence does not compromise or jeopardise the interests of the Federal Republic of Germany for any other reason. Risks or threats to public order or national security shall be proved in every case, a third country national applies to a residence title.

If a foreigner has held a temporary residence permit for five years, he/she may apply to a Permanent settlement permit. A foreigner shall be granted the permanent settlement permit provided that - inter alia - the granting of such a temporary residence permit is not precluded by reasons of public safety or order, according due consideration to the severity or the nature of the breach of public safety or order or the danger emanating from the foreigner, with due regard to the duration of the foreigner's stay to date and the existence of ties in the federal territory (Section 9 (2) No. 4 AufenthG.

8.5 There are no general explicit exceptions if the third-country national is married to a national or there are strong family life concerns. The refusal of a visa or a resident tile must be - however - proportionate, especially if the foreigner lives already in the Federal Republic of Germany. In cases of applications for a residence title for family reasons, Section 5 (1) No. 2 AufenthG (no public interest in expelling the foreigner) may be waived. The administrative authority has to properly consider kind and weight of the family life aspects when meeting its discretionary decision.

8.6 If prohibition of torture and inhuman or degrading treatment or punishment is at stake, in general it is not a reason to grant access to the Federal Republic of Germany (s.a. CJEU, U. v. 7.3.2017 - C-638/16 PPU). However, a foreigner may not be deported if deportation is inadmissible under the terms of the Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms. This applies if a foreigner already lives in the Federal Republic of Germany (Section 60 (5) AufenthG). According to Section 25 (3) AufenthG, a foreigner should be granted a temporary residence permit if a deportation ban applies pursuant to Section 60 (5) or (7) AufenthG. The temporary residence permit shall not be granted if departure for subsequent admission to another state is possible and reasonable or the foreigner has repeatedly or grossly breached duties to cooperate. It shall, further, not be granted where serious grounds warrant the assumption that the foreigner 1. has committed a crime against peace, a war crime or a crime against humanity within the meaning of the international instruments which have been drawn up for the purpose of establishing provisions regarding such crimes, 2. has committed an offence of considerable severity, 3. is guilty of acts contrary to the objectives and principles of the United Nations, as enshrined in the Pre-

amble and Articles 1 and 2 of the Charter of the United Nations, or 4. represents a risk to the general public or a risk to the security of the Federal Republic of Germany. As a result, the grounds of risk to public order and national security have to be of a larger weight.

9. “public order” and “national security” and expulsion

9.1 Risk to public order and national security constitute grounds for decisions resulting in the removal of a third-country national from the federal territory (expulsion and deporation being a “return decision”), a return decision without an appropriate period for voluntary departure and - as a result of an expulsion decision - the withdrawl of residence permits (temporary and permanent).

In general, it is not a ground for the loss of nationality that had been acquired; exceotions are cases of withdrawal of an unlawful naturalization.

9.2 According to Section 53 AufenthG, a foreigner whose stay endangers public safety and law and order, the free democratic basic order or other significant interests of the Federal Republic of Germany shall be expelled if the balancing of the interests in the foreigner’s departure with the foreigner’s individual interests in remaining in the federal territory which is to be conducted taking account of all the circumstances of the particular case results in the public interest in the foreigner leaving overriding. The (public) interests in expulsion are specified in Section 54 AufenthG, the (private) interest in Section 55 AufenthG. Any expulsion decision has to be proportional.

9.3 There are no general exceptions from expulsion, if the third-country national is married to a national or has strong family life concerns. The aspects of Art. 7 ECFR oder Art. 8 ECHR are relevant for the process of balancing all the circumstances of the particular case.

A particularly serious individual interest in remaining in the federal territory with a large weight in the balancing process exists - inter alia -, where the foreigner possesses a temporary residence permit, has lawfully resided in the federal territory for at least five years and cohabits with a foreigner as designated in No. 1 (possesses a permanent settlement permit and has lawfully resided in the federal territory for at least five years) and 2 (possesses a temporary residence permit and was born in the federal territory or entered the federal territory as a minor and has lawfully resided in the federal territory for at least five years) as a spouse or in a registered partnership (Section 55 (1) No. 3 AufenthG) or cohabits with a German dependant or domestic partner in a family unit or a registered partnership, exercises his or her rights of care and custody for a minor, unmarried German or exercises his or her right of access to that minor (Section 55 (1) No. 4 AufenthG).

A serious interest in remaining shall be, where the foreigner exercises his or her rights of care and custody for an unmarried minor staying lawfully in the federal territory or exercises his or her right of access to that minor, or the foreigner is a minor and his or her parents or parent holding rights of care and custody are or is residing lawfully in the federal territory (Section 55 (2) No. 3 und 4 AufenthG.

Part of the balancing process are also reasons related to Art. 3 ECHR/Art. 4 ECFR. A particularly serious individual interest in remaining exists where the foreigner enjoys the legal status of foreigner entitled to subsidiary protection or possesses a temporary residence permit pursuant to Section 23 (4), Sections 24, 25 (4a), sentence 3, or pursuant to Section 29 (2) or (4) AufenthG (residence title granted for temporary protection or on humanitarian grounds).

9.4 In general, notice of intention to deport a foreigner shall be served specifying a reasonable period of between seven and 30 days for voluntary departure. By way of exception, a shorter period may be set or the granting of such a period may be waived altogether if, in individual cases, it is vital to safeguard overriding public interests, in particular where […] 2. the foreigner poses a serious danger to public safety or law and order (Section 59 (1) AufenthG).In cases of a special deportation order (Section 58a AufenthG) (special danger to the security of the Federal Republic of Germany or a terrorist threat) there is no reasonable period for voluntary departure to be given.

9.5 Risk to public order and national security is not an explicit, general reason to withdrawal of a residence permit/title. Any residence title shall expire- however - upon expulsion of the foreigner or upon announcement of a deportation order pursuant to Section 58a AufenthG (termination of lawful residence by law). The determining decision of the administrative authroty is the expulsion order, not the withdrawal of the residence title. The aspects of Art. 7 ECFR oder Art. 8 ECHR are relevant only to the expulsion order; once the expulsion order is issued, the residence title terminates automatically by law without any further balancing.

9.6 Risk to public order and national security have to by examined properly before naturalization. A withdrawal of naturalization only is possible, when the naturalization act was obtained under false pretences, by threat or bribery or by providing incorrect or incomplete information which determined the issuance of this administrative act (Section 35 (1) StAG); withdrawal is permissible only within five years after notification of the naturalization. This may by the case if the foreigner gives significant false information about activities, which constitute grounds for exclusion from naturalization (Section 11 StAG: inter alia “concrete, justifiable grounds to assume that the foreigner is pursuing or supporting or has pursued or supported activities aimed at subverting the free democratic constitutional system, the existence or security of the Federation or a *Land* or at illegally impeding the constitutional bodies of the Federation or a *Land* or the members of said bodies in discharging their duties or any activities which jeopardize foreign interests of the Federal Republic of Germany through the use of violence or preparatory actions for the use of violence”), or gives incomplete information about convictions abroad and criminal investigations and proceedings which are pending abroad (Section 12a (4) StAG).

Risks to public order and national security arising after naturalization (e.g. unlawful. criminal or terrorist activities) do not influence the naturalization; they are not a reason für withdrawal.

10. Jurisdiction of the Federal Administrative Court (examples)

10.1 The last couple of years the Federal Administrative Court decided only a small number cases concerning the terms “public order” or “national security” in Third-country nationalthird-country nationals immigrations cases or citizenship cases. There were decisions concerning EU nationals and foreigners who possess a right of residence in accordance with the EEC/Turkey Association Agreement. Supporting terrorism or terrorist organization is one focus of the decision, dealing with drugs is another.

10.2 A most recent verdict[6] was spoken in a case of a Turkish citizen of Kurdish nationality, who did not possess a right of residence in accordance with the EEC/Turkey Association Agreement. The plaintiff was granted asylum in October 1997; he has lived with his wife and seven children in Germany for 20 years. In December 2009 he was granted a residence

6 BVerwG, U. v. 22.2.2017 - 1 C 3.16.

permit. In January 2012, he was identified for the (indirect) support of a terrorist organization (PKK).

The Federal Administrative Court saw, based on the binding factual findings of the High Administrative Court, a particularly serious interest in the interpretation of Section 54 (1) (2) AufenthG on grounds of a threat to the security of the Federal Republic of Germany. For more than ten years he had been supporting the Kurdish Party PKK, a terrorist group, which has been operating in Turkey by activities in Germany. The plaintiff worked as a member of the board of directors in PKK-affiliated associations as well as a meeting leader and speaker at appropriate events. According to the findings of the Administrative Court, this shows that he is committed to the aims of the PKK and at least approves of its actions, which are to be treated as terrorist. The expulsion is proportionate despite the recognition of the plaintiff as a refugee and other matters in his favor, especially since an actual termination of his stay is not an option because of a mandatory ban on deportation (Article 3 ECHR). Thus, expulsion only leads to the cancellation of the residence permit.

10.3 In a case of a 44-year-old plantiff of Turkish nationality, who lived with his wife and seven children (one of them has German nationality), the Federal Administrative Court decided (BVerwG, U. v. 30.7.2013 - 1 C 9.12), that an expulsion order on account of the support of terrorism in the forefield (supported the Kurdish Workers Party (PKK) or its successor organizations, who had been classified as terrorists, by acting on the board of several Kurdish clubs and by participating in demonstrations and other events) does not fundamentally counter the fact that he has children of German nationality minor of age. Public interests can prevail over the private interests of the foreigner and his family.

10.4 The Federal Administrative Court also decided, that a former functionary of the "Islamic Community Milli Görüs" (IGMG) has no claim to naturalization as a German without a credible departure from anti-constitutional efforts (BVerwG, U. v. 2.12.2009 - 5 C 24.08). The exclusion from naturalization by supporting anti-constitutional aspirations (according to Section 11 (1) (1) StAG) leads to a forward shift of the protection of the liberal democratic basic order. According to this, the person-related assumption that the foreigner has supported or supports anti-constitutional aspirations is already opposed to naturalization. The necessary real evidence for this could arise not only from such actions, but also from active support of an organization such as the IGMG, which is an Islamic religious community not in conformity with the German Constitution. In this verdict the Federal Administraive Court clarified the conditions under which a former anti-constitutional organization would oppose naturalization, when a part of the members and functionaries for some time - as in the case of the IGMG, according to the constitutional protection reports of the federal states - had a liberal democratic reform course.

10.5 A verdict from 2007 (BVerwG, U. v. 22.2.2007 - 5 C 20.05) stated that the mere signing of a declaration entitled "Self-declaration: I am a PKK" does not exclude the right of a Turkish citizen of Kurdish nationality to naturalization as a German citizen on grounds of jeopardizing security or external interests, when - as in the cases decided - according to the circumstances of the case the signing aimed to support the "new", peaceful, nonviolent "line of the PKK", which has been peaceful for two years. The plaintiffs had not undertaken further activities in favor of the forbidden PKK organizations or supported this organization.

10.6 A Turkish citizen of Kurdish nationality, who had been living in Germany for more than twenty years, was the plaintiff in another citizenship case. In March 1989, the prosecutor's office prosecuted him for suspected support of a terrorist organization. The applicant was accused of falsifying passports for the Kurdistan Workers' Party (PKK), classified as a

terrorist group from 1988 to February 1994. In August 1994, the Prosecutor's Office prosecuted the low-debt procedure. His petition for naturalization submitted in July 1997 was rejected on the grounds that the applicant was an active high-ranking member of the PKK, which had supported extremist efforts through his conduct. The administrative authority did not believe that he had turned away from the former support of the PKK.

The Federal Administrative Court decided, that the behavior of a foreigner, which was the subject of a criminal prosecution, might be taken into account in the decision on naturalization. The broad prohibition of using information about criminal prosecution in cases the person was found guilty and has been convicted after a longer period of time does not prevent the exploitation of the underlying offense of a suspension of an investigation.

11. Criteria to determine a threat to national security and public ordner

11.1 In most cases a threat to national security and public order has to be an unlawful action by the foreigner (not necessarily a criminal action). Insofar the personal conduct is relevant to determine a threat to national security and public order. Concerning supporting terrorist acitivities or criminal or violent activities in or of organisations, the acitivities must not be unlaw by themselves. Section 54 (1) No. 2 AufenthG defines as a threat to the security of the Federal Republic of Germany, where facts justify the conclusion that the foreigner is or has been a member of an organisation which supports terrorism or he/she supports or has supported such an organisation or he/she is, in accordance with Section 89a (2) of the Criminal Code (StGB) (preparation of a serious violent offence endangering the state), preparing or has prepared a serious violent offence endangering the state described in Section 89a (1) German Criminal Code (StGB).[7]

11.2 A threat of “the fundamental interest of society” is a term first used on the European level. It is incorporated in Section 53 (3) AufenthG as a precondition for the expulsion e.g. of refugees, as a person who possesses an EU long-term residence permit or a person, who is entitled to a right of residence in accordance with the EEC/Turkey Association Agreement.

Section 89a StGB: Preparation of a serious violent offence endangering the state
(1) Whosoever prepares a serious offence endangering the state shall be liable to imprisonment from six months to ten years. A serious violent offence endangering the state shall mean an offence against life under sections 211 (Murder under specific aggravating circumstances) or 212 (Murder) or against personal freedom under sections 239a (Abduction for the purpose of blackmail) or 239b (Taking hostages), which under the circumstances is intended to impair and capable of impairing the existence or security of a state or of an international organisation, or to abolish, rob of legal effect or undermine constitutional principles of the Federal Republic of Germany.
(2) Subsection (1) above shall only be applicable if the offender prepares a serious violent offence endangering the state by
1. instructing another person or receiving instruction in the production or the use of firearms, explosives, explosive or incendiary devices, nuclear fission material or other radioactive substances, substances that contain or can generate poison, other substances detrimental to health, special facilities necessary for the commission of the offence or other skills that can be of use for the commission of an offence under subsection (1) above,
2. producing, obtaining for himself or another, storing or supplying to another weapons, substances or devices and facilities mentioned under No. 1 above,
3. obtaining or storing objects or substances essential for the production of weapons, substances or devices and facilities mentioned under No. (1) above, or
4. collecting, accepting or providing not unsubstantial assets for the purpose of its commission.
(3) to (7) …

11.3 For the catagories of persons mentioned above the higher expulsion threshold is also marked by the term “currently represents a serious threat to public safety and law and order” (or: genuine, present and sufficiently serious threat).

12. Case groups of violations of public order

12.1 Denials of entry or expulsion (return decision) always have to be proportional. “Every day-activities” without connection to terrorism, organized crime or similar threats to national security generally, which are not illegal, have no consequences in immigration cases of third-country nationals. Even breaches of law only being administrative offences/regulatory offences generally do not hinder a residence permit or lead to an expulsion. According to Section 54 (2) AufenthG – however – there shall be a serious interest in expelling the foreigner where the foreigner has committed a not only isolated or minor breach of legal provisions, court rulings or orders, excepting isolated or minor breaches, or has committed an offence outside of the federal territory which is to be regarded as an intentionally committed serious offence in the federal territory. „Found guilty“ of the listet activities presupposes, that the mentioned action is unlaw and has the quality of at least a regulatory offence (if not a criminal offence). In cases of tax avoidance or hate speech that might be doubtful.

The legal consequences in the field of immigration in cases of found guilty of one of the listet actions depend on the circumstances of the action (e.g.: nature and seriousness of the offence committed, damage caused, isolated/repetition, probability of repetition). Expulsion-decisions (return decisions) shall have the „Boultif-criteria“ (ECtHR, U. v. 2.8.2011 – No. 54273/00) in mind, which are relevant not only in cases relying on the protection of familiy or private life (e.g.: duration of the foreigner’s stay in the country from which he is going to be expelled) and require a fair balance between the relevant interests.

12.2 Shoplifting (lit. a) and – insofar being a criminal offence – drunk driving (lit. b), fare avoidance (lit. d), traffic offences (lit. f) and hate speech (lit. h) are violations of public order, which might regularly lead to denial of residence permit or expulsion (if proportional). Normally tax avoidance (lit. c), parking offences (lit. e) and smuggling small quantities of alcohol/cigarettes (duty avoidance) (lit. g) are not considered to be a criminal action (depending on the seriousness of the action committed); regulary they ar not a reason to deny a residence permit or to issue an expulsion order.

In cases of contracting a marriage of convenience (sham marriage (lit. i) there will not be a residence permit/title for family reasons and a withdrawal of a given residence permit/title. A marriage of convenience might also result in a criminal offence[8] and lead to an expulsion order.

13. Case groups of violations of public order (persons whon can rely on the protection of family/private life)

The activities/situations listed in question 12 (point a-i) could lead – in exceptional cases - to a denial of a residence permit/title or an expulsion order to a third-country national who can rely on the protection of family/private life. Denial or expulsion have to be – in any case – proportional. The required examination of proportionality will in most cases exclude those decisions. In case of repetition, especially shoplifting (lit. a), and – insofar being a criminal

[8] Section 95 (2) No. 2 AufenthG: „..furnishes or uses false or incomplete information in order to procure a residence title or a suspension of deportation for themselves or for another or to prevent the expiry or subsequent restriction of a residence title or the suspension of deportation or who knowingly uses a document procured in this manner for the purpose of deceit in legal matters

offence – drunk driving (lit. b) and hate speech (lit. h) make legal consequences in immigration cases of persons who can rely on the protection of family/private more probable.

14. Protect the best interest of a child

14.1 According to Section 24 ECFR (2) und (3), in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration; every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

In cases with regard to national security and public order, children themselves are not the recipients/adressees of the administrative act; the rights and interest of children are involved and to be protected, as far as administrative action ist taken against the parents or a single parental. The rights and interests of a child have importance for the propotionality of administrative actions (such as an expulsion order). The general preconditions for the granting of a residence title may be waived, if special circumstances relating to the individual case concerned show, that the rights or interest of a child require an execption. Mostly involved is the precondition, that the foreigner's subsistence is secure; it may also concerne public interest in expelling the foreigner, if the weight of the interest of expelling is low and the interest of the child is high.

14.2 Concerning the balancing of interests in expulsion decisions, the rights/interests of a minor are taken into account by the legislator. There shall be a particularly serious individual interest in remaining, where the foreigner cohabits with a German dependant or domestic partner in a family unit or a registered partnership, exercises his or her rights of care and custody for a minor, unmarried German or exercises his or her right of access to that minor (Section 55 (1) No. 4 Aufenth). There shall, in particular, be a serious individual interest in remaining where the foreigner exercises his or her rights of care and custody for an unmarried minor staying lawfully in the federal territory or exercises his or her right of access to that minor, the foreigner is a minor and his or her parents or parent holding rights of care and custody are or is residing lawfully in the federal territory or consideration is to be given to the interests or the well-being of a child.

14.3 A third-country national may - theoretically - even be removed from the country if he/she is the only "home maker" guardian to a national, insofar as there are strong indications, that the third-country national continuing to stay is a threat to national security or public order. An expulsion order may be justified (and proportional), if the expulsion interesst are extreme severe and the condition of living and development for the child in the country of origin of the foreigner make it not unreasonable for the child to go with the parental unit. In the last couple of years no such cases have became known. Custody for a "national minor" for itself - however - is not enough; there has to be a "living" relationship.

14.4 Section 32 to 35 AufenthG set the legal framework for the subsequent immigration of children and children's right of residence without referring to aspects of national security and public order. If a foreigner, who might be a threat to national security or public order, still has a residence title (no expulsion order), under the presumptions ruled in Sections 32 et sqq. AufenthG (minor) children child of a foreigner shall be granted a temporary residence.

15. Terrorism, smuggling og people and other offences a high level therats to public order or nationals security

15.1 Terrorism, smuggling of people, child absue, trading in weapons, crimes commited by repeat offeners or drug dealing (unless a minor case) are actions, that may lead to the denial of residence permit or an expulsion order (return decision). They constitute - as a rule - a particularly serious public interest in expelling the foreigner (Section 54 (1) AufenthG) of a high weight in the balancing process.

15.2 The criminal actions mentioned before may not lead to a loss of nationality that had been acquired, insofar as they are taken after naturalization. There is no “loss of nationality” only by committing serious crimes. They may make the naturalization unlawful and open the chance to withdrawal within five years, if the foreigner obtained naturalization under false pretences, by threat or bribery or by providing incorrect or incomplete information.

16. Reasons of Exclusion (Art. 1F 1951 Refugee Convention) and public order/national security

16.1 Third-country nationals who are excluded from refugee protection on the grounds of Art. 1F 1951 Refugee Convention are not automatically considered to be a (serious) threat to public order or national security. Reasons of exclusion from refugee protection look backwards and consider - as a rule - actions/crimes a person seeking protection has done/commited before entry of the country of protection (CJEU, U. v. 9.11.2010 - C-57/90; C-101/09). To be a threat to public order or national security, there must be an additional examination of the actual and current risk. Exclusion reasons in the past may - on a case-by-case basis - indicate, that there are significant threats to public order or national security in the present (and the future). This connection - however - is not mandatory or automatical.

16.2 Third-country nationals who are excluded from refugee protection on the grounds of Art. 1F 1951 Refugee Convention may face persecution in their country of origin relevant for Art. 3 ECHR/Art. 4 ECFR. According to Section 60 (5) AufenthG, a foreigner may not be deported if deportation is inadmissible under the terms of the Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms. This prohibits deportation to their country of origin. A foreigner should usually be granted a temporary residence permit if a deportation ban applies pursuant to Section 60 (5) AufenthG (Section 25 (3) AufenthG). A temporary residence permit - however - shall not be granted where serious grounds warrant the assumption that the foreigner fulfilled exclusion reasons in the past. This person may not be removed from the country, but will not achieve a secure legal status even when there is no actual and current risk.

16.3 With regard to third-country nationals who are excluded from refugee protection on the grounds of Art. 1F 1951 Refugee Convention it shall be proved on a case by case-basis, whether actual and current risk constitute grounds for refusing a (temporary or permanent) resident permit/title or demand/allow an expulsion order (return decision). This decision is separated from the asylum decision; insofar a separate procedure is required. In this procedure it is necessary to take into account the personal conduct, the question, whether fundamental interests of society are at stake and whether there is a genuine, present und sufficiently serious threat.

17. Examples for family/private life is given priority over national security/public order

There are no examples in the current jurisdiction of the Federal Administrative Court.

18. Tensions Art. 3 ECHR/Art. 4 ECFR to national securtity

18.1 The automatic protection given by Art. 3 ECHR/Art. 4 ECFR is absolute. That might resolve in a tension to national security, e.g. in cases a person constitutes a present, serious threat for the national security without sufficient evidence for criminal procedures and/or other measures of averting the danger.

18.2 Any tension betwenn security interests and protection granted by Art. 3 ECHR/Art. 4 ECFR shall not be solved by leading a foreigner into a situation where she/he has to face torture or inhuman or degrading treatment or punishment. Security interests must also be protected against nationals; the fact, that a foreigner, who might be deported, causes the same risks and threats, makes deportation an easier solution, but not the only solution to avert the danger. The law has to find measures, which fit to third-country nationals as well as to German citizens themselves. E.g., to have better control of persons who constitute a serious security risk prior to criminal offences right now there are discussed “electronic tags/ankle brachlets” in addition to monitoring electronic communication (Draft Law v. 16.3.2017, BT-Drs. 18/11546, Section 56a AufenthG).

19. Refraining legal or factual reasons

Decisions of an andministrive authority in immigration or citizenship cases shall be given reasons, that contain legal and factual reasons (Section 39 (1) VwVfG). The reason shall inform about all essential legal and factual reason. They are the basis for the judicial reviews by a judge. An administrative authority may not refrain in full or in part from justifiying such a decision only because grounds of national security or public order are involved. The administrative authority shall give enough reasons justifying the decision; it does not have to disclose all the factual reasons and information at its disposition, as long as it presents sufficient reasons to support the decision. By withholding factual reasons or information, the administrative authority runs the risk of objection by the court/judge. The administrative authority may not invoke grounds of national securtity or public ordner without giving factual reasons. The court/judge must be capable of reviewing the decision and must have all the information needed to do this.

20. Access to legal and factual reasons

If a decision is based on national security or public order grounds, the principles of legal hearing and “equality of arms” guarantee that the judge/court may only consider and use legal and factual information and reason, if the parties concerned (plaintiff, defendant [mostly administrative authority] or subpoenaed party) have had the same access. The foreigner itself and his/her lawyer must have the same access to all the legal and factual reasons and information available to the court/judge. It is the responsibility of the court to ensure the legal hearing. Insofar there is no difference between cases on national security or on public order grounds and other cases.

21. Access to evidence

21.1 Information and evidence, that substantiates the establishing of facts (grounds) that constitute a risk to national security or public order shall be open to the same extent to the foreigner (party to the procedure), a counsellor (lawyer) representing a party and the judge/court. The principle of legal hearing are - unrestricted - in effect also in cases of national security/public order.

21.2 The administrative authority - however - is not under an obligation to disclose any evidence or information it has about a case/a person. If the knowledge of the content of certificates, files, electronic documents or information, that shall be submitted to the court in general, would prove disadvantageous to the interests of the Federation or of a State, or if the events must be kept strictly secret in accordance with a statute or due to their essence, the competent supreme supervisory authority may refuse the submission of certificates or files, the transmission of the electronic documents and the provision of information (Section 99 (1) (2) VwGO). Submitting information to the court is setting the course: Insofar as an administrative authority submits information or evidence to the court/judge, it is open to the party and his/her lawyer. Insofar as an administrative authority refuses submitting information or evidence to the court/judge, the court/judge cannot use this information/evidence.

21.3 On request by a party concerned, the High Administrative Court (or a special panel of the Federal Administrative Court) shall find by order without an oral hearing whether the refusal to submit certificates or files, to transmit the electronic documents or to provide information is lawful. In a specific procedure so called “in camera-procedure” specialist panels, that shall be formed at the High Administrative Courts and the Federal Administrative Court, examine, whether the refusal to submit evidence or informaiton is lawful.

The judges in these specific panels shall not be judges involved in the case itself. The supreme supervisory authority shall submit the certificates or files refused in accordance with Section 99 (1) (2) VwGO on request by this panel of judges. The proceedings shall be subject to the provisions of substantive classification of information; the members of the court shall be obliged to maintain confidentiality. The specific panels make a binding decision whether the refusal to submit is lawful; the grounds for the decision may not provide an indication of the nature and content of the secret certificates, files, documents and information (Section 99 (2) VwGO).

22. Security Checks for judges

Insofar as classified information/evidence is submitted to the court, every judge is allowed to have access to this information/evidence. It is not necessary to obtain a specific certificate (security clearance) and/or undergo a vetting process. Even the judges who are members of the specific panels dealing with “in camera-procedures” mentioned in No. 21 do not need any security clearance.

23. ‘Equality of Arms’ concerning information/evidence

‘Equality of Arms’ concerning information/evidence is secured by the principle of legal hearing: the party and her/his lawyer shall have access to all the information/evidence disclosed to the judge. The judge shall not use information/evidence the party has had no access to. The refusal of legal hearing constitutes a procedural error, that may give grounds to a legal remedy.

24. Verifing the lawfulness of the denial of access

As mentioned above (No. 21), the administrative authority may refuse - under specific preconditions - to submit information/evidence to the court. Once an information/evidence is submitted to the court, the party and her/his lawyer has unrestricted access to it. The lawfulness of the denial to submit is examined in the specific procedure, so called “in camera-procedure” briefly described in No. 21.

25. Special protection measures to sensitive documents?

Insofar as sensitive documents/evidence are submitted to the court, the party and her/his lawyer have access to it; they have to be disclosed. There might be special protective measures applied to sensitive documents as regards the "handling" of this documents/evidence (e.g. by submitting to the lawyer or safe keeping/storage within the court). Nospecific protective measures shall restrain the legal hearing or the 'equality of arms'.

26. Disclosure of judgements

Judgements and their legal and factual reasons in immigration and citizenship cases shall always be open to the parties and their lawyers; a judgement pronounced orally to the public shall be presented in written form and sent to the parties. There is not any restriction in cases the judegemnt is based on national security or public order grounds.

27. Standards in classified case files

There are no differences in treatment of the third-country nationals in immigration and citizenship cases and other categories (e.g. nationals or EU nationals and their family members) concerning the standards applied in relation to access to classified case files.

28. Treatment of "national security cases"

28.1 The Code of Administrative Court Procedure and/or the Residence Act do not demand in any way that national security cases are decided more quickly or given any priority when listed for hearing. There might be reasons in/of the single case itself which "motivate" the responsible judge to accelerate the procedure (e.g. if a foreigner was taken into custody awaiting deportation).

28.2 According to general rules, immigrant or citizenship cases may be subject to an emergency and/or summary proceeding. That might be so in cases of extension order, where the suspensive effect of recourse is excluded from immediate execution according to law or a separate administrative order. Judges decide in summary proceedings much more quickly than in full proceedings; the decision - however - is preliminary.

28.3 Every judge of an Administrative Court is eligible to decide immigration and/or citizenship cases; there are no special conditions provided by applicable law (e.g. security clearance).