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

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Answers to questionnaire: Italy

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

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ITALY

I. Introduction.

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

1.2. The topic of the seminar does not cover the situation of refugees as long as the procedure for international protection has not been finally completed, though returning of unsuccessful asylum seekers is within the subject. The situation of the EU citizens and their family members is also not under the topic since they are not considered third country nationals within the meaning of the EU Law. For these reasons, while answering the questions please do not include the information relevant to the asylum seekers and EU nationals or their family members within the meaning of the directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

1.3. Neither EU law nor the jurisprudence of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) gives us a clear definition of public order and national security (external and internal security of the member states). It should also be mentioned that not one but often different terms are used in relation to national security and public order. This fact alone may lead to a lack of consistency of the judicial practice in the Member States and cause confusion in terminology. For example, in the directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (the so called Return Directive) in relation to an entry ban the term “a threat to public policy, public security or

national security" is used - Article 11(3). In relation to refraining from granting a period for voluntary departure a term "a risk to public policy, public security or national security" is used - Article 7(4) and in relation to an entry ban that has exceeded a 5 years a term "a serious threat to public policy, public security or national security" is used - Article 11(2) Return Directive. In the directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, the term "a threat to public policy or public security" is used which excludes acquiring and maintaining long-term resident status in the Member State – Recital 8, Article 6(1), Article 9(7), Article 17(1), Article 22(1)(3) or "actual and sufficiently serious threat to public policy or public security" – Article 12 (1). The term "a threat to public policy or public security or public health" is employed by the directive 2003/86/EC of 22 September 2003 on the right to family reunification and it is allowed the withdrawal a family member's residence permit or to refuse to renew the said permit – Recital 14, Article 6 (2) Family Unification Directive. On the other hand, under Article 8 (2) ECHR the right to family life may be denied, inter alia, on the grounds of "national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others". The Visa Code (Regulation (EC) No 810/2009 of 13 July 2009 establishing a Community Code on Visas) allows verification of entry conditions and risk assessment in the light of a risk to the security of the Member States – Article 21(1) or whether he/she constitutes 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" - Article 21(3d), Article 32(1a vi). One of the entry conditions for third-country nationals under the Schengen Borders Code (Regulation (EU) 2016/399 of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) is to be not considered "a threat to public policy, internal security, public health or the international relations of any of the Member States" – Article 6(1e). In the Decision No 1/80 of the EEC/Turkey Association Council of 19 September 1980 on the Development of the Association "grounds of public policy, public security or public health" have been invoked in relation to employment and the free movement of workers of Turkish nationality - Article 14(1).

1.4. Along with national security and public order it is often used the term "public health". Since the focus of the questionnaire is on the public order and national security only therefore

issues related to the public health have not been included and there is no need to present them while answering the questions.

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

II. Questions

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

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

Answer no.1:

As regards visa and residence permits for persons from third countries, the laws are mainly based on Council Directive 2003/109/EC of 25 November 2003 on the status of third-country nationals who are long-term residents. It is transposed and implemented by legislative decree of 25 July 1998, no. 286 (Unique Text of immigration regulations and rules relating to the status of foreigners), enacted by the Government on the basis of Law of 6 March 1998, no. 40 (the so-called “Turco-Napolitano”): the formal “container” which still constitutes in Italy the consolidated single text of the legislative provisions in this matter. However, on the understanding that it has been amended several times, in particular by the Law of 30 July 2002, n. 189 (the so-called “Bossi-Fini”): until the Decree-Law of 17 February 2017, no. 13 (the so-called “Minniti”), transformed into the law of 13 April 2017, n. 46 for the acceleration of international protection procedures and for the contrast of illegal immigration.

Subsequently and over time, many government regulations have been enacted, along with many other administrative provisions.

In Italy, the jurisdiction over these matters is divided between the ordinary (judicial) court and the administrative court.

The former has jurisdiction for certain specific cases (e.g., in respect of residence and long-term residence papers as well as expulsion and refugees); the former has jurisdiction in most cases involving problems on residence permits and visas.

The case law of the Court of Cassation on this division of jurisdiction defines it as follows:

- for the administrative court: disputes concerning the granting, renewal or refusal of entry visas and residence permits (ordinary permits, EU residence permits for long-term residents), including refusals to enter the Schengen area. Exceptions include measures for minors, on grounds of family unity or international and humanitarian protection, under the jurisdiction of the ordinary court. As regards the choice of the competent State to examine the application for international protection under Regulation (EU) No. 604/2013 (of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person), the administrative court has jurisdiction according to the Council of State (Cons. Stato, III, n. 2015 n. 3825, n. 4685/2015 e n. 5469/2015; contra, III, n. 5738/2015)]

- for the ordinary court: disputes relating to the measures of expulsion and removal from Italian territory; with the exception those involving reasons of security of the State and public order, which are to be heard by the administrative courts;

- for the ordinary court: also disputes concerning the status of stateless persons; for the rest, they apply the rules of distribution.

Before the ordinary court, the judgment has three possible instances: Court, Court of Appeal and Court of Cassation.

The said decree-law of 17 February 2017, n. 13 provided for “specialised sections on immigration, protection of free and international movement of citizens of the European Union”, under ordinary courts of the place where the Courts of Appeal are located and comprising judges chosen from among the magistrates with specific competences; by virtue of this, the École supérieure de la magistrature will organise training courses for those who intend to acquire a specialisation in the matter. This decree also provides for an ad hoc discipline for the adjudication of appeals against decisions of the territorial committees in respect of international protection and the simplification of the rules governing the

notification of acts to asylum seekers, who may oppose the video surveillance of personal interviews. Finally, for the verification of the citizenship status, there is a procedure for comprehension and a predisposition for strengthening the diplomatic and consular network in the African continent.

Before the administrative court, the judgment can only have two possible instances: Regional administrative court and Council of State. Or, alternatively, a single instance (assent of the Council of State) if the extraordinary recourse to the President of the Republic is chosen.

In this area, no alternative mode of dispute resolution (ADR) is envisaged.

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 relevant legislation, organization of the courts responsible for citizenship cases (special tribunals, general administrative courts, others), number of tiers at the court system and also at the administrative level if there is a prior administrative procedure. Please give links to the websites with the relevant national legislation, if available.

Answer no.2:

Italian citizenship is regulated by the law of 5 February 1992, n. 91 (and its implementing regulations: d.P.R. 12 October 1993, No. 572 and 18 April 1994, No. 362).

The jurisdiction in question is divided between the ordinary court, which has jurisdiction in most cases, and the administrative court, which has jurisdiction for a few cases, such as for refusal on grounds of State security and public order.

3. Please give a number of immigration and citizenship cases incoming in 2016 to the courts (1 January-30 December 2016) concerning third country nationals (please, exclude cases concerning EU nationals and refugees). Please provide separately information on the number of cases incoming to the court of last resort (Supreme Administrative Court) and to the lower courts. If it is 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 at the court separately and are they given priority while listed for hearing?

As mentioned above, in Italy, the matter is divided between the ordinary court and the administrative court.

As far as the administrative court is concerned, in 2016, there were 4,957, new cases of immigration and citizenship, including 569 under the Council of State (including its Sicilian section). It is not possible to answer the rest of the question.

4. Could you briefly describe the judicial procedure in immigration cases in your country. Please include in your answer, *inter alia*, the following questions:

a. are there any differences in the judicial procedure between immigration cases and the other administrative cases?

b. do the elements of national security and public order make procedure in immigration cases different from the procedure in the other immigration cases in which an issue of national security and public order does not exist?

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

d. what is the power of the court of the last resort and please indicate what court it is (Supreme Administrative Court, Supreme Court or Council of State, or other)?

e. may a party in every immigration case bring his/her appeal to be heard by the Supreme Administrative Court or whether in some situations this right is excluded or restricted (eg. a leave is required)?

5. Could you briefly describe judicial procedure in citizenship cases in your country. Please, include in your answer, *inter alia*, the following questions:

a. are there any differences in the judicial procedure between citizenship cases and the other administrative cases?

b. do the elements of national security and public order make procedure in citizenship cases different from the procedure in the other citizenship and immigration cases in which an issue of national security and public order does not exist?

c. what is the power of the judge of the first instance administrative court, in particular whether it is limited to control legality, or whether the role of the judge is broader and a judge has a power not only to quash an administrative decision but also to change

(reform) it (judgement on the merits) and whether it is judicial review *ex nunc* or *ex tunc*?

d what is the power of the judge of the last resort court, please indicate what court it is (Supreme Administrative Court, Supreme Court or Council of State, or other)?

e. may a party in every citizenship case bring his/her appeal to be heard by the Supreme Administrative Court or whether in some situations this right is excluded or restricted (eg. a leave is required)?

Answer nos. 4 and 5:

Sub a), no, there are no differences, except a few specific assumptions before the ordinary court, as specified in point 1.

Sub b), no there are no differences for these procedures.

Sub c), the judgment is strictly in cassation, not on merit, whether it is of first or second instance; the effect of the award is *ex tunc*.

Sub d), for the administrative court, the second (and last) instance shall have the same powers as the first instance; for the ordinary court, the third instance is merely the annulment of the award on the merits.

Sub e), participation in the public hearing is possible, but in general the hearing of the applicant is not foreseen.

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

6. Does the national law in your country define such terms like "public order", "national security" or other terms that play a similar role in immigration and citizenship cases and aim at protecting the same values? Please quote definitions of such terms if possible. If these terms have been defined in the case law only, please explain how they are being understood in the jurisprudence.

Answer no. 6:

These expressions are used by the sectoral case law but do not have, in this matter, a different meaning in relation to the usual.

A recent criminal ruling of the Court of Cassation (Cass, 15 May 2017, n. 24084) upheld the wrongfulness of the conduct of a Sikh immigrant, who was fined because he carried a 18.5-cm knife that was suitable for attack, outside his own house and without a justified reason. The accused maintained that the possession of this knife (kirpan) was justified under his religion and invoked Article 19 of the Constitution on freedom of religious faith. But the

Court of Cassation asserted that: “In a multiethnic society, the coexistence of subjects of different ethnic groups requires the identification of a necessary common core in which immigrants and host society must believe”. Integration does not mean abandoning the culture of origin; however, there is a limit to the respect for human rights and legal civilisation of the host society. “For the immigrant, there is an essential obligation to conform his own values to those of the western world into which he has freely chosen to integrate, and to verify the compatibility of his own behaviour primarily with the origins that govern him and then the lawfulness of the behaviour in relation to the legal order that he is required to follow”. “The decision to establish himself in a society in which it is known, and one is conscious that that the values are different from your own, requires giving respect and it is unacceptable that attachment to your own values, although permitted under the existing laws of the country of origin, lead to the conscious violation of those of the host society”. One can not, for attachment to his own values, transgress the laws of the society where one has freely chosen to live. “A multiethnic society is a necessity but cannot lead to the formation of cultural archipelagos in conflict, depending on the ethnic group constituting it, as it opposes the uniqueness of the cultural and legal fabric of our country that determines public safety as a property to be defended and, for that purpose, prohibits the carrying of weapons and objects capable of offending”. Moreover, the ECHR recognises limits of public order i.e. health and morality. And so the European Court of Justice in the case of the Islamist veil called for curtailment of the freedom of religious manifestation if the use of this freedom conflicts with other rights.

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

Answer no. 7:

The notions of public order and security of the State have been examined, in the last years, in constitutional law especially in relation to the division of jurisdiction between the State and regions. As declared, with the reform of 2001, the new Art. 117 of the Constitution (on this distribution) made it clear that the matter of public order and public security comes under national jurisdiction and that of the administrative police under regional jurisdiction.

The Constitutional Court's interpretation of the concepts of “public order and security”, according to the constitutional reform of 2001, is characterised in a restrictive sense, either in relation to other types of security/safety , or in relation to the area of administrative police, which is excluded from national legislative jurisdiction.

Sentence n. 428 of 2004 of the Court extended the discipline of road traffic to the matter of “public order and security" in all that the "objective to prevent a series of crimes, such as imprudent murder and injuries by imprudence” and therefore “functional to the guardianship of personal integrity”.

Sentence n. 237 of 2006 held that the regulation of gambling, is due to the issue of public order and public security.

Sentence n. 51 of 2008 was made to be "the definition of activities necessary to ensure airport security”.

Sentence n. 21 of 2010, regarding a national law for all installations inside buildings, electrical, broadcasting, heating and other installations), in all that you turn to defend the users, affirmed that the matter of security under Art. 117, second paragraph, lett. H) of the Constitution “does not exhaust itself in the adoption of measures relating to the prevention and punishment of crimes, but includes guardianship of the general interest of the integrity of the people, and the safeguarding of property for which it requires uniform regulation throughout the national territory”.

The recent declarations thus introduce a close relationship with the notion of public integrity, in order to expand the field of application of the notions of public order and public security.

In the context of immigration and granting citizenship, the notion of *public order* and *State security* is particularly related to the social danger of the moment, deduced from the previous commission of crimes which justifies the refusal of the request.

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

a. to entry to the territory of your state

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

c. to the granting of resident permits (temporary or permanent)

d. to the acquisition of nationality

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

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

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

a. the removal of the third country national from the territory of the country (return decision)

b. issuing a return decision without providing for an appropriate period for voluntary departure

c. the withdrawal of the residence permit (temporary and permanent)

d. the loss nationality that was prior acquired

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

Answer nos. 8 and 9:

The answer is affirmative for all cases.

Reasons of public order block either the entry into the State or the residence permit and the granting of citizenship.

Art. 19 of the law, however, provides for a series of cases in which expulsion or displacement is prohibited. The law added cases in which there is a serious risk to the life of the foreigner because of his health condition. In these cases, a residence permit must be released.

The assumptions of Art. 19 are cases in which there may be a risk of persecution or in the case of minors or persons living under the same roof with second-degree relatives or with the spouse of Italian nationality. Finally, in case of pregnant women or within six months after the birth of the son.

The only exception to the prohibition of expulsion is the case of family links with Italian citizens, minors and pregnant women, which comprises expulsion by an act of the Minister because of reasons of public order and public security including Art. 13, paragraph 1.

Requirements for the protection of public order and public security may prevail over family ties with Italian citizens but not over the requirements for the protection from forms of persecution.

The answer is yes, except for the assumption sub d). Italian citizenship, once granted, cannot be revoked.

The loss of citizenship is provided for (Article 12 of Law No 91 of 1992) only in special circumstances: engagement of public employment or a public office of a State or foreign public body or an international body of which Italy is not a part, or military service for a foreign State in spite of the invitation to the person concerned.

Also in these cases, the assumptions of defence of expulsion are examined; they include Art. 19 of the law.

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

a. immigration cases

b. citizenship cases

Answer no.10:

One of the most frequent reasons for opposition against the release of residence permit is the existence of criminal convictions, particularly in matters concerning narcotics and violation of rules on copyright. (Cf. Consiglio di Stato, III, n. 320/2017). The law specifies the types of crimes preventing the release of residence permits. In other cases, the administration is obliged to assess the existence of reasons of public order and national security in order to assess the danger of the conduct of the applicants applying for a residence permit.

In the case of citizenship, it must first be said that, for citizenship for marriage with Italian citizens, among the causes for obstacles, beyond convictions for certain serious crimes, there is "subsistence in the specific case of the reasons inherent to the security of the Republic": Art. 6, lett. C), law n. 91 of 1992.

Vice versa, in the case of citizenship by naturalisation, the administration enjoys ample margin of discretion, under which it assesses the subsistence of criminal convictions as social danger index: it can handle past convictions and convictions for mild crimes, such as for example the guiding in an intoxicated state, or also for successively decriminalised cases.

The refusals motivated by reasons of public order and national security concern cases where there are intelligence reports that indicate proximity to Islamic terrorism or to extremist groups.

As regards the application of the protection of public order, for example, the existence of criminal convictions is one of the most frequent obstacles to the granting of a residence permit (e.g. Consiglio di Stato, III, 26 January 2017, No. 320: Within the meaning of Article 4 (3), d.lgs. 25 July 1998, no. 286, as amended by Art. 4 paragraph 1, lett. B), 30 July 2002, no. 189, a foreigner who is considered a threat to the public order and the State security or who is convicted is not allowed in Italy, even after the negotiation of penalty within the meaning of the Art. 444 C.P.P., for serious offences under Art. 380, (1) and (2) C.P.P., or in the case of offences involving narcotics. Furthermore, Art. 5 (5) of the same decree provides that the residence permit or the renewal thereof shall be refused and, if the residence permit has been issued, it shall be revoked, when he does not have the qualities required for the entry and residence of the applicant in the territory of the State, except as provided for in Art. 22 (9), and when no new elements have emerged which allow it to be released and which do not address remediable administrative irregularities.

With regard to citizenship, cf. e.g. Consiglio di Stato, III, 3 February 2016, n. 429: “Italian citizenship is not granted to a foreigner based purely on constitutive verification but, in view of public interest in particular; the granting of citizenship presupposes evaluations which may involve inter alia in-depth verifications of conduct, not just that is apparent, of the applicant; consequently, it is evident that the measure cannot be adopted as follow-up and/or for the effect of some natural occurrence, such as the simple passage of time; nor can it exclusively depend in any case on such factor and the verification, even in judicial office, of the past due date of a term. This does not mean, however, that the procedure that led to the final decision can be kept open beyond the term (though not conclusive) established by the same administration or even indefinitely”.

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. fundamental interest of the society

c. genuine, present and sufficiently serious threat

d. other

Please specify whether they are applicable in immigration or citizenship cases.

Answer no. 11:

The entry and residence of foreigners in Italy is generally subject to the existence of a purpose and the availability of adequate means of subsistence for the duration of the stay, which must be documented (Article 4, Legislative Decree, 25 July 1998, No. 286).

In the event that the foreigner has no family ties with subjects legitimately residing in Italy, an automatic effect preventing the entry and stay arises from the existence of a conviction for particularly serious offences, for which the criminal procedure law (Article 380 c.p.p.) stipulates compulsory arrest for flagrant offences and all offenses concerning narcotic drugs (Article 4, (3), legislative decree, 25 July 1998, No. 286 - cf. Cons. Stato, III, n. 320/2017), recognised as being of particular social concern, such as trade in counterfeit products and copyright and intellectual property infringements (thus preventing the issuance of an independent work permit, but not also for employment - Article 26, paragraph 7-bis, Legislative Decree, 25 July 1998, No. 286 - cf. Cons. Stato, III, n. 5014/2016).

In the case of convictions for several offences, this automatic arrest is not protected; however, the public security administration, to prevent entry or stay, has the discretion to determine whether entry or residence constitutes a threat to public order or security of the Italian State or of a Schengen country (Art. 4, paragraph 3, e 5, paragraph 5 e 5-bis, Legislative Decree, 25 July 1998, no. 286 - cf. Cons. Stato, III, n. 524/2017).

The fundamental criterion for assessing the existence of danger is the consideration of the personal conduct of the foreigner in relation to the public interests protected by the law through foreseeing offences.

The personal conduct to be considered is that which is verified by judicial measures or by administrative measures, from which it can be deduced that the permanence of the foreigner in Italy constitutes a threat to national security and public order.

The threat must have the characteristics of effectiveness, severity and timeliness: the motivation of the measure must therefore be based on the description of the facts and on the assessment, which may even be presumptive; pure assumptions or assertions not supported by objective elements are not sufficient;

Simple previous fines for small crimes are not considered sufficient, except for special reiterations of illegal behaviour over time; irreproachable conduct over a long period of time can deprive a crime committed several years ago of importance

Conversely, if the foreigner, even with convictions of the type which would include automatic foreclosure, has family ties in Italy, the right must be balanced in proportion to his family life

and his close ones with the legal right of the police and the requirement to prevent threats to public order. Thus, we have to evaluate a series of elements that can be deduced from the actual analysis of each case. For example, the nature and severity of the crime committed; the length of stay, time spent on the commission of the crime; the nationality of the persons concerned; the family situation of the foreigner and in particular the length of his marriage and other factors that testify the effectiveness of a family life in addition to the circumstance that the spouse knew of the crime at the time of the creation of the family relationship, the fact that the marriage resulted in the birth of sons and their age, difficulties encountered in the event of expulsion, interest and welfare of sons; the solidity of social, cultural and family ties with the host country (cf. Consiglio di Stato, III, n. 330/2017).

An assessment of danger to public order or State security is always requested when denying or revoking the EU residence permit for long-term residents (Article 9, Legislative Decree, 25 July 1998, n 286).: For this purpose, we need to take into account the convictions for crimes within the scope of Art. 380 (compulsory arrest for flagrant offences) and 381 (optional arrest for flagrant offences) c.p.p.; this must be compared with the length of stay in the national territory and the social, family and work integration of the foreigner (cf. Cons. Stato, III, n. 4353/2016).

The acquisition of Italian citizenship by the foreigner is barred (Article 6 Law 91/1992) in case of conviction for crimes of a special nature or seriousness provided for in the Criminal Code; intentional crimes for which the law provides for a sentence of at least a maximum of three years' imprisonment; non-political crimes with detention of more than one year by a foreign judicial authority, if the sentence has been recognised in Italy, or in the presence of "proven reasons inherent in the security of the Republic".

This parameter is similar to the one corresponding to the stay of foreigners.

However, the relative discretionary evaluation still has a broader base and will be exercised with great caution, since the measure once issued is not subject to revocation because of a new discretionary valuation and particularly since a citizen cannot be expelled, even if he hypothetically has a second citizenship (cf. Cons. Stato, III, n. 1084/2015).

12. Would you consider it as a violation of public order that would lead a third country national to the denial of residence permit or return decision if the third country national cannot rely on the protection of family or private life and is found responsible for :

a. shoplifting

b. drink driving

c. tax avoidance

d. fare avoidance

e. parking offences

f. traffic offences

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

h. hate speech

i. contracting a marriage of convenience (sham marriage)

Answer no. 12:

Among the offences indicated by the question, that - which seems to amount to "incitement of hatred" - of participation in organisations whose aims include encouraging discrimination on the grounds of racial, ethnic, national or religious discrimination [Art. 3, paragraph 3, law 13 October 1975, no. 654 (Ratification and implementation of the international convention on the elimination of all forms of racial discrimination, New York, 7 March 1966), as amended by Decree-Law 26 April 1993, No. 122, 205, falls within the scope of Article 380 (compulsory arrest for flagrant offences) c.p.p.: therefore, it prevents entry and residence, except in case of existence of family ties.

The Court of Cassation affirmed that there is no relation of specialty among the rules of said law n. 654/1975 and those of Legislative Decree of 25 July 1998, no. 286, because they protect different legal rights: the former intend to ensure the same social dignity to the citizens of each State and to penalise any behaviour that expresses racial or ethnic discrimination; the latter, which are part of the discipline on immigration, intend, on the one hand, to ensure a judicial mechanism capable of promptly bringing to an end through civil action any private or public administration conduct that leads to discrimination, and, on the other hand, to allow the possibility of compensation for consequential damages, even if not patrimonial (Cass. Pen., III, 5 December 2005, n.46783)

Even shoplifting (at par with home theft and theft with destruction) could fall within the scope of Art. 380 c.p.p.

Theft using violence on property, or property exposed to public faith is considered as such (Article 625, No. 2 and No. 7, c.p.), unless the value of stolen items is particularly modest (which is true when the merchandise is displayed on the shelves of a store, or else he eludes merchandise by taking away the safety devices against shoplifting).

The other behaviours indicated in question 12, rule, do not involve offences of such severity as to fall within the scope of Art. 380 cpp.

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

If the foreigner has documented the family ties with persons legally present in Italy, in one of the cases of question 12, we can deduce an automatic ban of entry and residence (Art. 5, paragraphs 5 and 5 *bis* of the *Unique Text*)

The important family ties are those with a spouse, children and dependent parents (Art. 29 of the *Unique Text*).

The relevance of other, more flexible relationships can be examined on the basis of particular facts.

In the presence of family ties, the administration is always obliged to make a comparative assessment of the value of maintaining the integrity of the family unit (taking into account the nature and effectiveness of the family ties of the foreigner and the existence of family and, in case of a foreigner already present in Italy, the length of his stay) and the value of security and public order.

In theory, any sentence can be considered part of this appropriate assessment as a contributory cause for affirming the primacy of the needs of public order and public security, in view of the prohibition of entry and residence.

However, some of the cases considered (fraudulent insolvency, Article ex 641 of the Penal Code, offences relating to the displacement or parking of a car) do not, as a general rule, assume a sufficient level of seriousness to cause a negative judgment.

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

Answer 14

The situation of unaccompanied minors is governed by the recent law n. 47/2017, which prohibits refusal of entry, the initial reception service, the appointment of a guardian, and (if the juvenile court, on the basis of investigations and relations of the social services, do not

provide for, in the interests of the child, assisted return with his family to the country of origin or to a third country) the inclusion in the security structure until the individual is an adult.
In these cases, a residence permit is issued for reasons of age (minor) and family.
On the contrary, if a parent or an adult looks after a parent who takes the responsibility of the minor, his position is determined by the minor's interest, which is assessed on a discretionary basis of the particular circumstances of the case.
The assessments by the Juvenile Court (ordinary courts) have a key role in determining the best interests of the child and the importance of family ties
Apart from this, the administration stresses the importance of coexistence, for the fulfilment of maintenance obligations, the duration and continuity of the relationship and the existence of other established personal relationships.
The case of the family relationship between an Italian citizen and a foreign adult who mainly or exclusively takes care of his personal needs is part of the answer to question 11.
The relationship between an Italian and a foreigner in the latter case is regarded as a reaons for family care or care service and is considered as an appropriate activity to generate sufficient income, as a factor that competes with others to assess the degree of social integration and work in Italy to compare with all criminal convictions.

15. Would you consider terrorism. smuggling of people, child abuse, trading weapon, crimes committed by repeat offenders, drug dealing as violation of public order or national security that my lead to:

a) a loss of nationality that was prior acquired

b) the denial of residence permit or return decision

The offences covered by request 15 are such that they lead to the refusal of a residence permit or the revocation of the one issued.
Conversely, citizenship can not be revoked following a conviction for these offences.
The loss of nationality is provided for (Art. 12 of the law 5 February 1992 n. 91 on citizenship) in special circumstances (due to the provision of public employment or public function by a State or a foreign public body or international organisation that is not active in Italy, or the abandonment of non-military service for a foreign State, despite the invitation to the person).

16. If the third country national has been excluded from the protection on the ground of Article 1F of the 1951 Refugee Convention is he/she automatically considered to be a [serious] threat of public order or national security and has to be removed from the country without additional examination of the actual and current risk? If the 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. fundamental interest of the society,

c. genuine, present and sufficiently serious threat,

d. other.

It should be recalled that all disputes relating to international protection may in principle be outside the jurisdiction of the administrative court, with the exception of questions concerning the determination of the State responsible for examining an application for international protection under EU Regulation 604/2013, and in particular, the identification of territorial jurisdiction of another State in accordance with Art. 3 (3) of the Legislative Decree of 28 January 2008, no. 25 (implementation of Directive 2005/85/EC on lesser rules for the procedures applied to Member States for the purposes of recognition and revocation of refugee status), adopted pursuant to "discretionary clauses" for the implementation of the "competent obligations of the Member States", called Articles 17 and 18 cited in Reg (EC) 26 June 2013, No 604/2013; See Consiglio di Stato, III, No. 572/2016)

In fact (within the framework defined by Article 32 of Legislative Decree No 25 of 2008, transposing Directive 2005/85/EC), the territorial commissions are expressly obliged to consider the consequences of a return of the foreigner to his country.

However, the administration (Questura, i.e. Prefecture of Police) no longer has any evaluative discretion with regard to the issuance of residence permits for humanitarian reasons (see Cass. civ., SS.UU., n. 5059/2017).

The residence permit for the asylum application makes it possible to work, but it can not automatically be converted into a work permit (Article 22 of Legislative Decree 18 August 2015, No. 142 - Implementation of the Directive 2013/33/EU on the rules governing the reception of applicants for international protection and of Directive 2013/32/EU on common procedures for the purposes of recognition and revocation of the international protection status).

However, the refusal to grant international protection does not prevent a residence permit for other reasons, if there are ordinary conditions.

A special procedure is not foreseen for this purpose.
The same negative assessment for citizenship does not preclude the renewal of the residence permit of the foreigner.
After five years of refusal, the foreigner may submit new applications for the granting of Italian citizenship. In the context of citizenship, the criteria are more restrictive and are therefore considered sufficient to refuse the granting of de facto citizenship which would not justify the refusal or revocation of a residence permit (see Consiglio di Stato, III , No. 742/2016).

17. Can you give examples of cases in which family or private life is given priority to national security or public order. Please describe them briefly.
In general, the interest in the integrity of the family unit of the foreigner is protected, if the person is a point of reference for the family or otherwise ensures their maintenance, unless the offence was just committed to the detriment of the family members, or is a symptom of an amoral character in personal relationships.
A criterion often used to give priority to the purposes of the application of the law comprises, along with the seriousness of the offenses, their recurrence, even after several years of entry into Italy, as an index of unavailability of social integration.
And the revocation of the residence permit was also considered legitimate when no coexistence that results from the equality of family status corresponds to a real communion.

18. Do you experience tensions between automatic protection given by Article 4 Charter of Fundamental Rights of the European Union (Article 3 ECHR) and national security that calls for removal? Could you give examples of your national practice.
Article 4 of the Charter of Fundamental Rights of the European Union (as well as Article 3 of the ECHR) prohibits torture and inhuman or degrading treatment or punishment.
It appears that the conflict between the needs of national security and the protection afforded by this prohibition has not given rise to disputes which fall under the administrative court.
Similar conflicts, in extreme cases, can be created by political acts of governments, not subject to judicial review, or by acts of public officials, a source of responsibility for damages (and thus subject to the jurisdiction of the judicial or civil court).

C. Procedural issues. Fairness of the procedure.

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

In principle, when an administrative measure is based on considerations relating to national security or public order, it must indicate the legal and factual reasons.

However, the Constitutional Court established that "the internal and external security of the State represents an essential and inescapable interest of the community, with a clear pre-eminence over all others". For this reason, when it is a question of safeguarding the interests of the State, secrecy may have its legitimacy as an instrument necessary to achieve the goal of such security and guarantee the existence, integrity and democratic framework of the State, which constitute values protected by Articles 1, 5, 52, 87 and 126 of the Constitution (Judgment No. 110 of 1998)

The possibility of removing acts from direct access by the court and the parties concerned for reasons of State security is, however, permitted provided that the content is illustrated in the trial in such a way as to ensure an adequate level of defence.

This principle was used in a case decided by the Administrative Court of Lazio (Rome), in which the reasons for the refusal were partly contained in an act which, even if it was not classified, was in any case removed from access. However, the Administration, by order of the administrative court, had illustrated during the course of the trial the contents of this act, the reasons of which had been recognised as adequate and appropriate by the court itself.

Also, in cases that will be examined successively (sub 21-25), concerning documents removed from access or classified for reasons of national security or public order, the administration must in any case adequately justify its decision.

The removal of the administrative act from the ordinary system of knowledge concerns the limits of dissemination of the act (or the information contained therein), but not the structure of the act and the necessary presence of all the essential elements of the same act, including the reference to the facts and legal reasons that constitute the grounds thereof.

20. If the decision is based on the national security grounds or public order, does 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?

When an administrative decision is based on reasons of national security or public order, either the court or the parties concerned shall have the same option to obtain to the statement of reasons in fact and in law of the measure in question.
If the decision is classified (ex art.42 of the Intelligence Reform Act 3 August 2007, No. 124 - Information system for the security of the republic and new discipline of secrecy), the court in principle orders the administration to produce in the judgment the related documents, in full and without "omissions", provided that the knowledge in full of the document is necessary to allow the defence of the requesting party (in this sense, ex multis, TAR Lazio (Rome), Ordinance 20 October 2016 No. 10451).
In this case, the Court reminds the parties that knowledge of the classified document is strictly limited in the proceedings and that the disclosure outside the process of information, the disclosure of which is prohibited may constitute an offence punishable under Article 262 of the Criminal Code.
In this way, during the trial, either the court or the parties concerned have access to the content of the classified document with the same level of knowledge.

21. Is evidence that substantiates establishing 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 the party.

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

23. If facts or evidence that constitute a risk to national security or public order are not open to a party to the procedure and his/her counsellor (lawyer) representing the party, are there any mechanisms in your law or court's 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 (eg. 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 nationals)? Please describe how this mechanism works in practice, when was it established and its legal grounds.

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

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

21-25. The documents and evidence underlying a decision of an administration are not always accessible to the court or the parties (or their advocates) if they relate to circumstances whose disclosure may constitute a risk to the State security or public order.

1.1 The Italian law (Law 3 August 2007 n.124 - Intelligence system for security of the Republic and new discipline of secrecy) generally controls the levels of confidentiality, inter alia, of classified documents: this refers to degrees of confidentiality (very secret, secret, very confidential, confidential) determined by a specific administrative authority that selects the parts of the document to be classified, which in this way remain subject to specific restrictions vis-à-vis access for a given period.

The security classification cannot prevent the any judicial authority from having the presentation of classified documents (in this sense Consiglio di Stato, I, Opinion 1 July 2014, n.1835, which clarifies that the the administrative authority must comply with the requirements of the court, either in the case of the delivery of documents for presentation to the requesting party or when, as in the case of an extraordinary appeal, the authority itself must do what is necessary to ensure access).

If the documents are acquired by the requesting judicial authority, it is the latter that "is responsible for its preservation with procedures that safeguard its confidentiality while safeguarding the rights of the parties during to refer to them without making copies thereof"

Therefore, the "confidential" classification does not justify the refusal to produce the documents required by the judicial authority, but it can only justify special precautions, which mainly concern the safeguarding of the confidentiality of third parties, which becomes important in any procedure of access to documents of the Administration and particularly sensitive for aspects that in any case involve defence of public security (Consiglio di Stato, VI, 5 July 2011, n.4035)

1.2 It is possible to compare the judicial authority (Constitutional Court excluded) to the parties vis-à-vis secrets of the State (art 39), which can refer to, among others, documents "whose dissemination is likely to harm the integrity of the Republic, also in relation to international agreements, the defence of constitutional institutions, the independence of the State from other States and relations with them, the military preparation and defence of the State".

The secrets of the State are affixed by the President of the Council of Ministers; after 15 years anyone with an interest can request for access. The President must provide access within thirty days, giving reasons for a possible extension of the restriction: which, in any case, cannot exceed thirty years. With a provision for the attention of the criminal court, it is provided that "if the judicial authority considers essential to the definition of the trial the knowledge of what is covered by the secret, it request for a confirmation of the existence of the State secret to the President and suspends any initiative aiming to obtain knowledge of the secret.

The President can confirm the secret, respecting a mandatory deadline and giving reasons for his decision, which may always be the subject of a conflict of jurisdiction before the Constitutional Court.

If the State secret opposed by a witness in a criminal trial is confirmed by the President of the Council of Ministers and if the knowledge of what is covered by State secrecy is essential to the definition of the trial, the court said that there is no need to proceed due to the existence of State secrecy (art. 202, paragraph 2, Criminal Code)

In any case, the Judicial Authority may proceed on the basis of autonomous and independent details from acts, documents and items covered by the secret.

1.3 Again, according to art. 2 of the decree of the Ministry for the Interior of 10 May 1994, n.415 (regulation for the discipline of the categories of documents exempted from the right of

access to administrative documents under Law 7 of August 1990, Article 24, paragraph 4, laying down new standards in matters of administrative law and the right of access to administrative documents): “within the meaning of Article 8 (5) (a) of the decree of the President of the Republic of 27 June 1992, No. 352 and in relation to the requirement to safeguard security, national defence and international relations, the following categories of documents are exempt from access: [...] d) documentation relating to procedures for concession, acquisition and re-acquisition of citizenship, knowledge of which may prejudice security, national defence or international relations), documentation relating to the procedures for recognition and revocation of refugee status, knowledge of which may prejudice security, national defence or international relations”.

The administrative case law distinguishes the administrative stage from the trial stage on the basis of the guarantee of the right of defence of the applicant, particularly in view of the so-called equality of arms in the proceedings.

In particular, in the presence of legal documents classified as confidential, aimed at the adoption of the decree refusing the granting of citizenship, the administration may accept to indicate its content, in order not to expand their knowledge to subjects without the prescribed authorisation of the authority entrusted with the guardianship of State secret. However, in compliance with the principle of adversarial proceedings and therefore the equality of the parties vis-à-vis the court (i.e. equality of arms), the knowledge of the document must be provided in any case during the judgment to the lawyer of the foreigner. In the final analysis, the presence of information classified as “confidential”, the referance ob relationem to the content of the same may meet the conditions of conformity of the statement of reasons, while the exercise of the rights of defence and the guarantee of a fair trial are satisfied by the disclosure during the procedure of information with safeguards and guarantees for protecting classified materials as confidential (Consiglio di Stato, III, January 20, 2015, n.130: constant orientation).

In addition, apart from acts concerning circumstances potentially dangerous to the security of the State and public order, access to administrative acts shall be prohibited in respect of which, during the preliminary investigation, the secrecy of criminal investigation will be in force.

In the latter case, only the prosecutor can authorise access (Consiglio di Stato, V, May 12, 2015, n.2357).

26. Is the full judgement with its legal and factual reasons in immigration and citizenship cases always open to the party and the counsellor? Are there any restrictions regarding reasons of the judgement in relation the party or the counsellor if the judgement is based on the national security grounds or public order?

In the Italian procedural system, the content of the administrative judgment is indicated by Art. 88 of the Code of Administrative Procedure, which includes, without exception, the summary exposition of the reasons in fact and in law for the decision, also with reference to previous cases with which it intends to comply.

The full statement of reasons of the judgment, even if it is based on reasons of national security, cannot be removed in any degree from the judgment to the full knowledge of the parties or their lawyers.

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

The rules illustrated above (answers 21-25) for accessing classified documents do not provide for different treatment for Italian citizens, and citizens of the European Union and third countries.

In particular, Article 24 of the Constitution (right to a fair trial) guarantees the equal right to a defence in a trial and, in general, a fair trial: not only to citizens but to all, including foreigners (Constitutional Court, Judgment No. 254, 2007 on the appointment of the interpreter for an accused foreigner; and Consiglio di Stato, III, January 14, 2015, No. 59 on the need to guarantee defence at the expense of the State - implication of the right to defence guaranteed by the Constitution - also to foreigners who are not in possession of a regular residence permit.

For this reason, when judging the acquisition of confidential documents, the judicial authority cannot decide on the basis that the person acting in the trial is a foreigner.

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

1. The Administrative Trial Code (2010) provides for an expedited procedure in immigration and citizenship matters.
The latter, on the basis of the new Article 3, paragraph 2 of Decree-Law 17 February 2017, n.13 (Urgent provisions for the acceleration of international protection procedures, as well as for the contrast of illegal immigration : transformed into law of 13 April 2017, n.46) is awarded, at least in part, to the ordinary court and, in particular, to the new sections of the civil courts specializing in immigration matters ("the specialised sections also have jurisdiction for disputes relating to the verification of statelessness or citizenship status").
In the case of opposition to the decree of the Minister for the Interior which, for reasons of public order or security of the State, provides for the expulsion of a foreigner even if he does not reside in the territory of the State, by informing the President of the Council of Ministers and the Minister for Foreign Affairs (art.13, paragraph 1, Legislative Decree 25 July 1998, No. 286), the ordinary rules for administrative trials are followed, which stipulate 60 days to refer the administrative provision.
1.2 On the other hand, in the case of expulsion adopted by the Prefect for reasons other than the security of the State and public order (art. 13 (2) and (8)), the matter can be referred to the ordinary judicial authority (justice of the peace), which has a summary procedure of knowledge (art. 702-bis, Code of Civil Procedure) within accelerated time-limits controlled by art. 18 of Legislative Decree 1 September 2009, n.150 on administrative transparency.
The appeal shall be submitted within thirty days of notification of the measure (60 if the applicant is residing abroad) and shall be notified at the same time as the decree fixing the hearing, at the chancellery of the court, at least five days before the hearing, to the authority which issued the decision, which may be created from the first hearing. The judgment shall be final, in any case, twenty days before the date of filing of the recourse.
2. The Administrative Court (generally the Italian court) hears disputes in which there are aspects of the State security and public order without the need for any filter (nothing is opposed, administrative or political authorisation) with the exception of responses 21-25 for the particular discipline provided for the acquisition during trial of documents and information covered by State secrecy.