NACZELNY SĄD ADMINISTRACYJNY

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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: Montenegro

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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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I. Introduction.

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

1.2. The topic of this seminar does not cover the situation of refugees in cases where the procedure for international protection has not been finally completed, although the returning of unsuccessful asylum seekers is within the topic hereof. The situation of EU citizens and their family members is also not covered by this seminar, since they are not considered to be third-country nationals within the meaning of EU law. For these reasons when answering the questions please do not include information relevant to asylum seekers or EU nationals or their family members within the meaning of Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

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

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

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

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

II. Questions

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

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

National legal framework in the field of immigration of third-country nationals in relation to national security and public order is regulated by the Foreigners Law and Law on General Administrative Procedure. The Foreigners Law regulates the conditions of entry into, exit from, movement, stay and work of foreign citizens in Montenegro, while the Law on General Administrative Procedure regulates procedure through which administrative authorities decide on the above mentioned rights. Therefore, prior to a court proceeding there is an administrative procedure. When a party is not satisfied with the decision delivered by the administrative authorities, he/she can launch administrative dispute before the Administrative Court of Montenegro. The right to start an administrative dispute shall have a private or legal person, who believes that some of his/her rights or legally based interests have been violated by an administrative or other act. A party that was involved in an administrative dispute and state prosecutor or other competent authority may submit a request for extraordinary reconsideration of a court decision which will be decide by the Supreme Court of Montenegro in the panel of three judges.

Reasons for the existence of the obstacles in terms of national security are prescribed by the Foreigners Law. Thus, the existence of reasons, i.e. the obstacles in terms of national security shall be established by the National Security Agency, upon which it delivers the opinion to the Ministry of Interior Affairs or the police, if not otherwise provided by this law. The reasons, i.e. obstacles in terms of national security exist if the person:

1) Performs or having been performed the activities that could lead to the execution of crimes against humanity and other goods protected by international law;

2) Performs the activities that could lead to the commission of criminal offenses against the constitutional arrangement and security of Montenegro;

3) Belongs or belonged to organizations and groups that advocate violent change of constitutional arrangement or acts in a manner that endangers constitutionally determined human rights and freedoms;

4) Publicly advocated and spread the idea that incites national, religious or racial discrimination;

5) Belongs or belonged to organizations and organized crime groups that are preparing or committing crimes, or in any other way supports these organizations and groups;

6) has or had a relationship or maintain a connection with persons who in an unauthorized manner collected the secrets and other information, terrorists, saboteurs, members of organized criminal groups or individuals that are reasonably suspected to belong to such groups;

7) Does not respect the state of Montenegro and its symbols, do not carry out the decisions of the courts, public administration authority and other bodies, and

8) If other circumstances indicate that the person, upon the issuance of a temporary residence permit, a temporary residence and work permit and permanent residence permit would not abide by the legal system of Montenegro.

When the police or the Ministry issue a decision based on the opinion of the Agency that there are the reasons, i.e. the obstacles, the reasons for issuing the opinion does not comprise these ones.

In accordance with the Foreigners Law, reasons of national security and public order influence denial of entry, denial of exit, the restriction or prohibition of movement, requirement for obtaining an airport-transit visa, rejection of visa application, cancellation of visas, cancellation of stay of up to 90 days, temporary residence permit, temporary residence and work permit, termination of temporary residence, termination of temporary residence and

work permit, issuance of permanent residence permit, termination of permanent residence, rejection of the application for issuing a travel documents for foreigners and for temporary withholding of documents for personal identification.

Denial of Entry: One of the reasons for the denial of entry of a foreign person, prescribed by the Foreigners Law is reason of national security, public order and public health. The denial of entry shall be in person notified to a foreigner by the administrative authority in charge for police affairs.

Denial of Exit: One of the reasons for the denial of exit of a foreign person, prescribed by the Foreigners Law is reason of national security, public order and public health. The police shall issue a decision on denial of exit and such denial shall be entered into a travel document. Against this decision, an appeal may be file to the public administration authority responsible for internal affairs (Ministry) within eight days of receipt of the decision. The enforcement of a decision shall not be postponed by an appeal.

The Restriction or Prohibition of Movement: A foreigner shall be restricted or prohibited the movement in a particular area in Montenegro if thus required due to the reasons of national security, public order or public health, in accordance with the law.

Airport Transit Visa (A Visa): A foreigner who does not leave an airplane or international transit area of an airport during a stopover at the Montenegrin airport shall not be required to have a visa. However, the Government may require the nationals of certain countries to have their airport-transit visas, if required under the reasons of national security and public order.

Rejection of Visa Application: Reason of national security and public order are reasons for rejecting a visa application. The foreigner shall be verbally advised about the reasons why his/her visa was not issued.

Cancellation of Visas: A visa shall be cancelled by a diplomatic or consular mission of Montenegro or the Police if the existence of the reasons of national security and public order is subsequently determined. A cancellation of an issued visa shall be entered into the foreign travel document. Detailed manner of cancellation of the visas issued shall be prescribed by the public administration authority responsible for foreign affairs.

Cancellation of stay of up to 90 days: The residence of a foreigner in Montenegro pursuant to the provisions of this law shall include a: stay of up to 90 days; Temporary residence and Permanent residence. A stay of up to 90 days may be cancelled for a foreigner if, amongst the other reasons, it is required so due to the national safety and public order. The

cancellation of residence shall be decided by the Police and the cancellation of a stay is entered in the foreign travel document. The decision defines the period within which a foreigner must leave the territory of Montenegro and could prescribe a ban on the entry into Montenegro. An appeal against the decision may be filed to the Ministry of interior affairs, within eight days from the date of receipt of the decision. The enforcement shall not be postponed by an appeal. Against the decision delivered by the Ministry, a party has the right to start an administrative dispute.

Temporary residence permit or a temporary residence and work permit: a foreigner may be granted a temporary residence permit or a temporary residence and work permit if, amongst the other conditions, there are no restrictions due to the reasons of national security, public order or public health. A permit for temporary residence shall be issued by the Ministry of internal affairs, subject to prior opinion of the National Security Agency and the police on the existence of obstacles due to the reasons of national security or public order. The Agency and the Police are obliged to deliver to the Ministry the opinion referred without any delay and not later than seven days from a receipt of the request for an opinion. If the Ministry receives no opinions within the prescribed period, it shall be deemed that there are no obstacles for the issuance of a temporary residence permit. An application for a temporary residence permit issuance shall be decided within 40 days of filing a complete application. The refusal of application for the issuance of temporary residence shall be made by a decision. An appeal against the decision on the refusal of application may be filed to the Ministry, within eight days from the date of receipt of the decision. Temporary residence of a foreigner shall be concluded if it is subsequently determined that the reasons of national security and public order exist. The Police shall notify the Ministry of the reasons for cessation of temporary residence permits. The decision on termination of temporary residence permit shall be issued by the Ministry. Against the decision delivered by the Ministry, a party has the right to start an administrative dispute.

In addition, the Ministry will reject the application for a temporary residence and work permit if there are reasons of national security and public order, determined in the opinion of the Agency. An administrative dispute can be initiated against the decision rejecting the application for a temporary residence and work permit. The temporary residence and work permit ceases to be valid if it is subsequently determined that

the reasons of national security and public order exist. The Ministry shall issue a decision on the termination of the validity of the temporary residence and work permit.

Permanent Residence Permit: A foreigner may be granted a permanent residence permit if there are no restrictions for reasons of national security, public order or public health. A permanent residence permit shall be issued by the Ministry, followed by the prior opinion of the Agency and the police about the existence of obstacles due to the reasons of national security or public order. The Agency and the Police are obliged to deliver to the Ministry the opinion without any delay and not later than 60 days from a receipt of the request for an opinion. If the Ministry receives no opinion within the prescribed period, it shall be deemed that there are no obstacles for the issuance of a permanent residence permit. An application for a permanent residence permit issuance shall be decided within six months of filing a complete application. A rejection of the application for a permanent residence permit shall be stipulated by a decision. An administrative dispute may be initiated against the decision rejecting the application for a permanent residence permit.

The right of a foreign person to permanent residence shall be terminated if thus is required for reasons of national security or of public order. The decision on termination of permanent residence shall be issued by the Ministry. Administrative proceedings may be instituted against this decision of the Ministry.

Rejection of the application for issuing a travel documents for foreigners and for temporary withholding of documents for personal identification: travel documents for foreigners shall be issued if so required due to the reasons of national security, public order or public health. A decision rejecting the application for issuing a travel document to a foreigner shall be made by the Ministry. Against this decision, the foreigner may lodge an appeal to the Ministry, within eight days from the date of receipt of the decision.

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

The Law on Montenegrin Citizenship regulates the manner of and conditions for acquiring and cessation of Montenegrin citizenship, as well as the manner of keeping records

of Montenegrin citizens. Montenegrin citizenship shall be acquired: by origin; by birth on the territory of Montenegro; by admittance; based on international treaties and agreements.

Reasons of national security and defence are related to acquisition of Montenegrin citizenship by admittance. Thus, Montenegrin citizenship may be granted to a person, in accordance with the interests of Montenegro, if he or she submits a request for acquiring Montenegrin citizenship and if, amongst the other reasons, there are no obstacles for the reasons of national security and defence of Montenegro. These obstacles are prescribed by the Decision on criteria for determining conditions for the acquisition of Montenegrin citizenship by admittance. In accordance with the Decision, obstacles exist if a person:

1) Performs or having been performed the activities that could lead to the execution of crimes against humanity and other goods protected by international law;

2) Performs the activities that could lead to the commission of criminal offenses against the constitutional arrangement and security of Montenegro;

3) Belongs or belonged to organizations and groups that advocate violent change of constitutional arrangement or acts in a manner that endangers constitutionally determined human rights and freedoms;

4) Publicly advocated and spread the idea that incites national, religious or racial discrimination;

5) Belongs or belonged to organizations and organized crime groups that are preparing or committing crimes, or in any other way supports these organizations and groups;

6) has or had a relationship or maintain a connection with persons who in an unauthorized manner collected the secrets and other information, terrorists, saboteurs, members of organized criminal groups or individuals that are reasonably suspected to belong to such groups;

7) Does not respect the state of Montenegro and its symbols, do not carry out the decisions of the courts, public administration authority and other bodies, and

8) If other circumstances indicate that the person, upon the admittance in Montenegrin citizenship would not abide by the legal system of Montenegro.

On the existence of these obstacles, the Ministry of Internal Affairs may obtain opinion from the National Security Agency.

An adult Montenegrin citizen, who acquired a citizenship of another state, shall lose Montenegrin citizenship ex lege, if, amongst the other reasons he or she: is convicted for criminal offences against humanity and other values protected by international law; is

convicted for planning, organizing, financing or in any other way assisting or executing terrorist actions or providing a shelter for organizers, executors or participants of terrorist actions; is a member of an organization whose activities are directed against public order and security of Montenegro; is in voluntary service in military forces of another state; his or her behaviour seriously damages vital interests of Montenegro.

The competent authority for deciding on requests for establishing, acquiring or cessation of Montenegrin citizenship is Ministry of Internal Affairs. Decision on the request for acquiring or cessation of Montenegrin citizenship should be delivered within six months since the procedure started. A decision shall be brought in writing and shall contain a justification for doing so, as well as an advice on legal remedy. Administrative proceedings may be initiated against the final decision.

Therefore, as explained above, prior to the court proceeding, decision is made in the administrative procedure.

Link: http://www.mup.gov.me/en/library/zakoni?alphabet=lat

3. Please give the number of immigration and citizenship cases brought before the courts in 2016 (1 January to 31 December 2016) involving third-country nationals (please exclude cases concerning EU nationals and refugees). Please provide separately information on the number of cases brought before the court of last resort (the Supreme Administrative Court) and before the lower courts. If possible, please provide information on the percentage of cases in which grounds related to national security and public order were decisive. Are cases in which issues related to national security and to public order have to be considered registered with the court separately and are they given priority when listed for hearing?

Before the Administrative Court in 2016, there was 30 cases regarding citizenship, 21 temporary residence permit and 6 cases regarding permanent residence permit. Before the Supreme Court in 2016, there was 2 cases regarding citizenship and 1 case regarding temporary stay. Courts did not evoke reasons of national security and public order in their decisions.

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

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

There are no differences in the judicial procedure between immigration cases and other administrative cases.

b. Do the elements of national security and public order make procedures in immigration cases involving the issue of national security and public order different from the procedures in immigration cases in which an issue related to national security and public order does not exist?

The procedure is the same, regardless of the elements of national security and public order. However, there is a possibility to exclude public from hearing.

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

In an administrative dispute, the court decides on the legality of an administrative act. If the claim is adopted by the Administrative Court, challenged administrative decision will be annulled and returned to the competent administrative authority which will repeat procedure in accordance with the Court's decision. When the administrative decision is annulled, legal consequences which that decision had produced are not annulled. However, legal consequences of such administrative decision are disabled (ex nunc).

Under certain circumstances, the Administrative Court can make a decision in the Dispute of Full Jurisdiction (judgment on the merits).

If the Administrative Court has annulled the challenged enactment, and the nature of things so allows, it may decide on the subject administrative manner on its own if:

1) it has established facts on its own during the oral hearing;

2) annulment of the challenged enactment and reopening of administrative procedure would cause damage to the plaintiff which would be difficult to compensate;
3) on the basis of public hearings or other evidence in the case files, it is obvious that the facts are different from those established in administrative procedure;
4) the enactment has already been annulled in the same dispute and the defendant public authority has failed to fully act upon the judgement;
5) the enactment has already been annulled in the same dispute and the defendant public authority has failed to render a new enactment within 30 days from the day it has been annulled or within another time-limit set by the Administrative Court; or
6) the competent public authority has failed to render enactment within the time-limit set by the law.
In the case referred to in paragraph 1 items 4, 5 and 6, the Administrative Court may also establish facts on its own and render judgment on the basis of facts established in that way.

When the Administrative Court has annulled the challenged enactment once, it shall resolve the subject matter on its own, when a new claim is submitted against a new decision and when the nature of the matter permits so.

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

The court of the last resort is the Supreme Court of Montenegro. Within the Supreme Court, there is the Administrative department with a competence on deciding upon a motion to review a final decision of the Administrative Court.

The Supreme Court shall either adopt or reject the motion to review court decision by rendering the judgement. With the judgment on the basis of which the motion to review court decision has been adopted, the Supreme Court may either revoke or overturn decision rendered by the Administrative Court and annul the challenged ruling rendered by the defendant public authority.

If the Supreme Court revokes decision rendered by the Administrative Court, the case shall be returned to the Administrative Court for the purpose of reopening of proceedings and rendering decision. In the reopened proceedings, the Administrative

Court shall carry out all the procedural actions and deliberate on the matters pointed out to it by the Supreme Court.

The decision may not be overturned to the detriment of the party if the motion to review court decision has been filed only by that party.

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

This right is guaranteed against every final decision of the Administrative Court.

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

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

There are no differences in the judicial procedure between citizenship cases and other administrative cases.

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

The procedure is the same, regardless of the elements of national security and public order. However, public can be excluded from the hearing.

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

Please see the Answer on the 4. c Q.

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

Please see the Answer on the 4. d Q.

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

Please see the Answer on the 4. e Q.

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

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

The national law does not define terms: "public order" and "national security". However, the Law on public order and peace define public order and peace, but only in terms of that Law. According to this Law, public order and peace is harmonized state of mutual relations of citizens, created by their behavior in a public place and by the actions of bodies and organizations that exercise public authority to ensure equal conditions for the realization of the rights and freedoms protected by the Constitution.

In addition, the Foreigners law prescribes the reasons, i.e. obstacles in terms of national security. Thus, this reasons/obstacles exist if the person:

1) Performs or having been performed the activities that could lead to the execution of crimes against humanity and other goods protected by international law;

2) Performs the activities that could lead to the commission of criminal offenses against the constitutional arrangement and security of Montenegro;

3) Belongs or belonged to organizations and groups that advocate violent change of constitutional arrangement or acts in a manner that endangers constitutionally determined human rights and freedoms;

4) Publicly advocated and spread the idea that incites national, religious or racial discrimination;

5) Belongs or belonged to organizations and organized crime groups that are preparing or committing crimes, or in any other way supports these organizations and groups;

6) has or had a relationship or maintain a connection with persons who in an unauthorized manner collected the secrets and other information, terrorists, saboteurs, members of organized criminal groups or individuals that are reasonably suspected to belong to such groups;

7) Does not respect the state of Montenegro and its symbols, do not carry out the decisions of the courts, public administration authority and other bodies, and

8) If other circumstances indicate that the person, upon the issuance of a temporary residence permit, a temporary residence and work permit and permanent residence permit would not abide by the legal system of Montenegro.

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

As stated in the previous answer, the national law does not define terms: "public order" and "national security". However, the Foreigners law prescribes the reasons, i.e. obstacles in terms of national security. Therefore, when deciding, administrative authorities and courts pay attention to this legal provision related to the national security reasons i.e. obstacles. The Administrative Court of Montenegro follows the jurisprudence of the ECtHR and recalls its decisions in its own judgments as explained in the Q. 17.

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

a. to enter the territory of your state;

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

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

d. to acquire nationality?

Yes, please see Answer on Q. 1.

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

There are no exceptions if the third-country national is married to a national; however, there are exceptions in relation to temporary residence for humanitarian reasons. Thus, Temporary residence permit for humanitarian reasons may be granted to:

1) a foreigner who is assumed to be a victim of a criminal act of human trafficking or victim of the offense of domestic violence or violence in the family union;

2) a minor foreigner who was abandoned or was a victim of organized crime, or for other reasons left without parental care or unaccompanied;

3) a foreigner from particularly justified humanitarian reasons.

A foreigner is not obliged to fulfil the condition that there are no restrictions due to the reasons of national security, public order or public health.

The temporary residence permit issued due to the humanitarian reasons shall be issued on the basis of adequate evidence of an international organization, non-governmental organization or state authority that provides to the foreigner a support and protection, or an evidence of the competent state authority, which confirms that the foreigner cooperates in resolving process of the offenses.

However, the Administrative Court of Montenegro in its judgements follows the jurisprudence of the ECtHR. For example, the Administrative Court annulled the administrative decision in which administrative authorities refused to issue a permanent residence permit due to the existence of the national security reasons/obstacles. The Administrative Court reasoned this judgement invoking Art. 8 of the ECHR (Please see Q. 17).

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

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

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

c. the withdrawal of residence permits (temporary and permanent);

d. the loss of nationality that had been acquired?

Yes, please see Answer on Q. 1.

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

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

a. immigration cases;

b. citizenship cases.

The Administrative Court in its judgement did not refer to the terms "public order" and "national security" in connection with immigration cases and citizenship cases.

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

a. personal conduct;

b. the fundamental interest of society;

c. genuine, present and sufficiently serious threat;

d. other?

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

Yes, these criteria are used to determine a threat to national security and public order in both immigration and citizenship cases.

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

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

Please note that, in addition to reasons of national security and public order, Law on Foreigners prescribes other conditions for temporary and permanent residence permit. Thus, a foreigner may be granted a temporary residence permit or a temporary residence and work permit if in Montenegro, if, amongst the other conditions, he/she has not been legally sentenced to an imprisonment of more than six months for a criminal offense prosecuted ex officio, or the legal consequences of a conviction ceased; in the country of origin he/she has not been legally sentenced to an imprisonment of more than six months for a criminal offense prosecuted ex officio, or the legal consequences of a conviction ceased.

Similarly, the Montenegrin citizenship may be granted to a person, in accordance with the interests of Montenegro, if he or she submits a request for acquiring Montenegrin citizenship and fulfils, among the other requirements, the requirement that he or she has not received a prison sentence, either in Montenegro or in another state, exceeding one year, for criminal offence which is

subject of ex officio prosecution, or if the legal consequences of his or her conviction no longer apply.

Therefore, these reasons are different and separated from the reasons of national security and public order.

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

Protection of a family and private life is not prescribed by the law. However, the Administrative Court takes into account the Convention and the case law of the ECHR and it annuls decisions of the administrative bodies invoking article 8 of the Convention. This is possible in our legal system due to the constitutional provision which envisages that the ratified and published international agreements and generally accepted rules of international law shall make an integral part of the internal legal order, shall have the supremacy over the national legislation and shall apply directly when they regulate relations differently than the national legislation.

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

The law does not contain provision which regulates this type of situation. However, when deciding, the court takes into account the Convention and the case law of the European court of human rights, as stated above.

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

a) loss of nationality that had been acquired;

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

Yes.

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

a. personal conduct;

b. the fundamental interest of society;

c. genuine, present and sufficiently serious threat;

d. other?

We have not met this type of situation in practice yet.

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

In case No. 4134/2016, a plaintiff started an administrative dispute against the decision of the Ministry of Interior by which her application for the permanent residence permit was rejected due to the national security reasons. She was ordered to leave Montenegro within 30 days from the reception of the decision. In its decision the Ministry evoked opinion of the National Security Agency that there are the reasons, i.e. the obstacles in terms of national security. However, the decision of the Ministry did not contain concrete reasons why national security was endangered. The plaintiff was married to Montenegrin citizen from 1998 and she got first temporary residence permit in 2010. She is a mother of four children who are Montenegrin citizens and they live and go to school in Montenegro. The Administrative Court in its judgment annulled the decision of the Ministry of interior, stating that in accordance with the Law on General Administrative Procedure, reasoning of a decision must contain reasons why certain request of a party was not accepted, regulations and reasons which, on the basis of determined factual grounds, refer to the solution given in a disposition of a decision.
In addition, the Administrative Court in its judgement evoked the Article 8 of the European Convention and referred to the case of the European Court of Human Rights - Caushal and others v. Bulgaria, No. 1537/08.

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

We do not experience tension between the automatic protection given by Art. 3 of the ECHR and national security.

C. Procedural issues. Fairness of the procedure.

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

No, it does not always contain factual reasons. There is a provision contained in the Foreigners Law stating that when the police or the Ministry issue a decision based on the opinion of the Agency that there are the reasons, i.e. the obstacles in terms of national security, reasoning of the decision does not comprise these ones. However, in the case law of the Administrative Court, this type od decisions are being annulled, in accordance with the case law of the European Court.

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

Factual reasons collected by the National Security Agency are defined as confidential. In accordance with the Information Secrecy Act, a person subject to security clearance shall be entitled to inspect collected information, except data regarding sources and the manner of their clearance. In addition, this law prescribes that judges shall have access to classified information.

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

a. a judge;

b. a party to the procedure;

c. a counsellor (lawyer) representing a party?

Please, see Q. 20.

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

In accordance with the Information Secrecy Act, judges are allowed to have access to classified evidence without special certificate.

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

Please, see Q. 20.

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

Please, see Q. 20.

25. Is evidence admitted by judges during court procedures in immigration and citizenship cases always available to the parties with a view to adversarial argument or are special protective measures applied to sensitive documents that do not allow the disclosing of such

evidence to a party? Are there any special mechanisms applied to ensure 'equality of arms' between the parties to proceedings if a document is not disclosed to a party?

If evidence admitted by judges during court procedures are classified as confidential, Information Secrecy Act will be applied and in accordance with this act, only judges or persons who receive a special permission shall have access to this type of data.

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

Full judgements and their legal and factual reasons are always open to the parties and their counsellors. There are no restrictions regarding the reasons for judgement in relation a party or their counsellor when the judgment is based on national security or public order grounds.

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

There are no differences, the same standards are applied.

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

Cases are decided in the order of reception, except when prescribed by a special law that they require priority. Foreigners law and Law on Montenegrin citizenship, as well as the Law on administrative dispute do not prescribe urgent handling of these cases.