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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: The Netherlands

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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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THE NETHERLANDS

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.

Relevant Legislation

- General Administrative Law Act (*Algemene wet bestuursrecht;* hereafter: Awb).
- Aliens Act 2000 (*Vreemdelingenwet 2000;* hereafter: Vw 2000).
- Aliens Decree 2000 (*Vreemdelingenbesluit 2000*; hereafter: Vb 2000).
- Aliens Act Implementation Guidelines 2000 (A) and (B) (*Vreemdelingencirculaire 2000*; hereafter: Vc 2000).
- General Intelligence and Security Service Act (*Wet op de inlichtingen- en veiligheden;* hereafter: Wiv 2002).

Entry and residence procedure (*toegang- en verblijfsprocedure*)
Refusal of entry on grounds of national security or public order: article 3, paragraph one, subsection b, Vw 2000; article 2.9, paragraph one, Vb 2000; paragraph A1/3 Vc 2000.

Issuance, extension and withdrawal of a residence permit (on non-asylum grounds, temporary or permanent) on grounds of national security or public order

- Issuance of a temporary residence permit: article 16, paragraph one, subsection d, Vw 2000; article 3.77 and 3.78 Vb 2000; paragraph B1/4.4 and B1/8.3.4 Vc 2000.
- Extension and withdrawal of a temporary residence permit (on non-asylum grounds): article 18, paragraph one, subsection e, Vw 2000; article 19 Vw 2000; article 3.86 Vb 2000; paragraph B1/6.2.2 Vc 2000.
- Issuance of a permanent residence permit (on non-asylum grounds): article 21, paragraph one, subsections c and d, Vw 2000; article 3.95 Vb 2000; paragraph B12/2.4 Vc 2000.
- Extension and withdrawal of a permanent residence permit (on non-asylum grounds): article 22, paragraph two, subsections c and d, Vw 2000; article 3.98 Vb 2000; paragraph B12/2.8 Vc 2000.

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Rejection of re-entry visa on grounds of national security or public order
Article 2x, paragraph one, subsection g, Vw 2000; paragraph A1/5.3 Vc 2000.

Withdrawal of an asylum residence permit (on non-asylum grounds, temporary or permanent)
Article 35, paragraph one, subsection b and d, Vw 2000; article 3.86, paragraph two, Vb 2000; paragraphs C2/10 and C5/4 Vc 2000.

Procedure and Organisation of the Courts
Articles 6:7 - 6:24, 8:1-8:119 Awb and articles 69-92a Vw 2000 provide the legal framework.

Generally, the alien involved will first have to raise objections against an individual decision of the Secretary of State of Security and Justice (*staatssecretaris van Veiligheid en Justitie;* hereafter: Secretary of State) about his or her residence permit within four weeks. This is the first – administrative – tier.

If the Secretary of State declares the objection to be unfounded, the alien can file an appeal against this decision at the Regional Court of The Hague or one of its other hearing locations within four weeks. The resulting judgment of the Regional Court is open to further appeal at the Administrative Jurisdiction Division of the Council of State (*Afdeling bestuursrechtspraak van de Raad van State;* hereafter: Administrative Jurisdiction Division), the court of last instance.

Please note that in asylum cases, there is no preceding administrative procedure: in those cases, the alien involved must directly file an appeal against a decision of the Secretary of State at the Regional Court of The Hague. The Regional Courts' judgment is then open to further appeal at the Administrative Jurisdiction Division.

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.

Relevant Legislation
- Dutch Nationality Act (*Rijkswet op het Nederlanderschap*; hereafter: RWN).
- Decree acquisition and loss Dutch Nationality (*Besluit verkrijging en verlies Nederlanderschap*).
- Guidelines Dutch Nationality Act 2003 (*Handleiding Rijkswet op het Nederlanderschap 2003*; hereafter: Guidelines RWN).

The administrative body will reject the request for the issue of the Dutch nationality by option or naturalisation, if on the basis of the behaviour of the person concerned, serious suspicions for a danger to public order or national security exist, unless international law dictates otherwise (article 6, paragraph four, and article 9, paragraph one, subsection a, RWN).

Dutch nationality can be withdrawn when serious suspicions exist that the person involved constitutes a danger to public order or national security (article 14 RWN).

See the answer to question 6 for additional legislation and policy rules.

Procedure and Organisation of the Courts
The person involved can lodge an objection against the decision of the administrative body on the application for the issue of the Dutch nationality or withdrawal of the Dutch nationality. If the Secretary of State declares the objection to be unfounded, this decision is open to appeal at the competent Regional Administrative Court and further appeal at the Administrative Jurisdiction Division, the court of last instance.

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?

<u>Number of non-asylum immigration cases brought before the courts in 2016</u>
District Courts: 6.535 cases (including EU nationals cases, excluding preliminary relief cases).
Administrative Jurisdiction Division of the Council of State: 1.404 cases (including EU nationals cases, excluding preliminary relief cases).

<u>Number of citizenship cases brought before the courts in 2016</u>
District Courts: 71 cases.
Administrative Jurisdiction Division of the Council of State: 19 cases.

Mentioned numbers are cases received in 2016.
It is not possible to provide information on the percentage of cases in which grounds related to national security and public order were decisive. Cases about issues related to national security or public order are not registered separately and are not given priority when listed for hearing.

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

The Vw 2000 distinguishes between asylum cases and non-asylum cases. One of the main differences between the legal procedures in these cases lies in the preceding administrative procedure: in non-asylum cases, such a procedure exists (as follows from article 7:1 Awb), while in asylum cases, the decision of the Secretary of State is directly open to appeal at the District Court (see the last part of the answer to question 1).

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

The general rules for the procedure of appeal for administrative cases can be found in chapter 8 of the Awb. Pursuant to article 83c, second paragraph, Vw 2000, most articles in this chapter are applicable to the judicial procedure in immigration cases as well (a few exceptions apply).

Immigration cases differ from other administrative cases when it comes to the following aspects:

- shorter terms for objection and appeal (article 69 Vw 2000);
- the circle of individuals eligible to file an objection or appeal is limited (article 70 Vw 2000);
- the court fee does not apply in certain cases (article 86, paragraph two, Vw 2000)
- the term for delivering a judgment in last instance is longer (23 weeks - article 89, paragraph two, Vw 2000);
- extended competence for a judge to make a final decision in cases regarding the application of a preliminary provision (*kortsluiting*; article 92 Vw 2000);
- limited appeal in last instance because of the so called 'grievance system' (*grievenstelsel*; article 85 and 91 Vw 2000).

Suspensive effect
As a general rule in Dutch administrative law, the lodging of an objection against an decision or an appeal does not have suspensive effect, unless otherwise provided by law (article 6:16 and 6:24 Awb). An exception to this basic rule applies in immigration cases.

Pursuant to article 73, paragraph one, Vw 2000, the lodging of an objection to a decision has suspensive effect. However, according to the second paragraph, subsection a of this article, the objection does not have suspensive effect when the alien poses a danger to national security or public order. As a general rule the lodging of an appeal in first instance of an *asylum* case will have suspensive effect (article 82 Vw 2000).

Further appeal will have no automatic suspensive effect on the decision concerned. The alien will have to apply for a preliminary provision to achieve this (*voorlopige voorziening*; article 8:81 Awb).[1]

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?

In general, the answer is negative. An exception applies when it comes to a decision which is based on an individual report, where the underlying evidence of the report is confidential. For more details, see the answer to question 23.

Furthermore, as stated under a, the objection and appeal against a decision of the Secretary of State will not have suspensive effect when the alien concerned is considered to pose a danger to national security or public order.

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*?

The judge of the first instance court has the power to control the legality of the decision and, if it deems necessary, (partly) quash an administrative decision and change it. After quashing a decision, the judge may also decide to leave the legal consequences of the decision intact. The judge may also order the administrative body to decide again on the matter with due regard to the judgment (article 8:72 Awb).

Pursuant to article 8:69, paragraph one, Awb the court shall give judgment on the basis of the notice of appeal, the documents submitted, the proceedings during the preliminary inquiry and the proceedings at the hearing. As a general rule in administrative cases, the judicial review is *ex tunc.* The judicial review of non-asylum immigration cases in first instance is *ex tunc*. In asylum cases, the judicial review is *ex nunc* (as follows from article 83 Vw 2000).

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).

[1] The Administrative Jurisdiction Division has asked preliminary questions to the European Court of Justice about automatic suspensive effect in asylum cases (application for a preliminary ruling of 29 March 2017, ECLI:NL:RVS:2017:858).

The court of last instance is the Administrative Jurisdiction Division of the Council of State (*Afdeling bestuursrechtspraak van de Raad van State*).

The Administrative Jurisdiction Division can quash the judgment of the court of first instance and return the case to this court or settle the case by itself.[2] Because of the importance of a quick settlement, the Administrative Jurisdiction Division usually decides, if possible, to settle the case by itself. The power of this court is similar of the court of first instance. However in further appeal a grievance system exists (as explained under a).

The appeal in last instance is a limited appeal and considered to be an instrument used to address questions regarding the uniformity of law, the development of the law or legal protection in general. In last instance, a judge can decide to deliver an unmotivated, so called article 91, paragraph two, Vw 2000-judgment, if the underlying case does not raise one (or more) of the questions mentioned above. Furthermore, the Administrative Jurisdiction Division can only use the article 91 Vw 2000-settlement when the grounds for appeal do not result in the annulment of the judgment of the court of first instance.

Pursuant to article 85 Vw 2000, the applicant needs to substantiate which part(s) of the judgment of the Regional Court he or she disagrees with and substantiate the grounds for appeal. When a notice of appeal does not meet aforementioned criteria, the appeal is inadmissible.

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)?

While it is possible for a party to request a hearing in every immigration case, it is up to the Administrative Jurisdiction Division to decide whether or not such a hearing will take place. As a result of the limited scope of further appeal (as explained under d) and limited capacity, in the majority of immigration cases a hearing does not take place. However, if an applicant raises a case-transcending question (as explained under d), it is likely a hearing will take place.

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

An alien can acquire Dutch citizenship by option or naturalisation (article 6 and 7 RWN).[3] The option procedure is faster than the naturalisation procedure and does not require the applicant to pass the civic integration exam, but is reserved for a limited group of people who have a special bond with the Netherlands, for example people who are of age and born in the

[2] Articles 8:115 and 8:116 Awb.
[3] Pursuant to article 3 RWN Dutch citizenship can also be acquired ipso jure.

Netherlands and lived in the Netherlands since they were born with a valid residence permit and people who are at least three years married with someone with the Dutch nationality and have lived at least fifteen years continuously with a valid residence permit in the Netherlands.

Option procedure
The option statement is received by the mayor of the municipality where the applicant resides.[4] The mayor examines (amongst other aspects) whether serious suspicions exists that the applicant constitutes a danger to public order or national security.[5] The mayor usually decides within 13 weeks after the reception of the option statement.[6] This period can be extended once with at most 13 weeks.

The applicant can lodge objection, then appeal at the Regional Administrative Court and further appeal at the Administrative Jurisdiction Division against the decision to reject the option request (which may be based, for example, on grounds of national security or public order). According to article 6, paragraph 2.8.1- 2.10, of the Guidelines Dutch Nationality Act 2003, the normal Awb-procedure applies (article 7:1 and 8:1 Awb).

Naturalisation procedure
Apart from option, an alien can file an application for the issue of the Dutch nationality to the mayor.[7] The mayor will deliver a written advice on the naturalisation request to the Secretary of State.[8] The Secretary of State examines whether the requirements for naturalisation are met and decides within one year on the request.[9]

The applicant can lodge objection, then appeal at the Regional Administrative Court and further appeal at the Administrative Jurisdiction Division against the decision to reject the nationalisation request. According to article 7, paragraph 3.11 and 3.12, and article 9, paragraph five, of the Guidelines Dutch Nationality Act 2003, the normal Awb-procedure applies.

Withdrawal procedure
The Secretary of State can decide to withdraw the Dutch nationality if serious suspicions exist that the person involved constitutes a danger to public order or national security. After the issue of a so called 'intended decision', the person involved will be given the opportunity to react. Subsequently, the State Secretary decides on the withdrawal within 16 weeks.[10] The foreign national can then lodge objection, appeal at the Regional Administrative Court and

[4] Article 21 and article 2 Decree acquisition and loss Dutch Nationality.
[5] Article 6, paragraph four, RWN and article 10 Decree acquisition and loss Dutch Nationality.
[6] Article 6, paragraph five, RWN.
[7] Article 21 RWN, article 2 Decree acquisition and loss Dutch Nationality, article 7, paragraph 2, Guidelines Dutch Nationality Act 2003.
[8] Article 36, paragraph five, Decree acquisition and loss Dutch Nationality, article 7, paragraph 3.9 and article 9, paragraph 8, Guidelines Dutch Nationality Act 2003.
[9] Article 9, paragraph four and five, RWN.
[10] Article 14 RWN, article 66 Decree acquisition and loss Dutch Nationality.

further appeal at the Administrative Jurisdiction Division against the decision to withdraw the Dutch nationality. According to article 14, paragraph 4.2 of the Guidelines Dutch Nationality Act, the decision to withdraw the Dutch nationality is a decision in the meaning of the Awb. Therefore the normal Awb-procedure applies.

A special procedure applies if the Dutch nationality has been withdrawn because of terroristic activities.[11] In such a case, the person involved can submit a direct appeal at the Regional Court of The Hague[12] and further appeal at the Administrative Jurisdiction Division[13].

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

See above.

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?

See above.

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*?

The judge of first instance can control the legality of the decision and has the power to quash the decision and also change it. This is similar to the immigration procedure as stated under question 1, subsection c. The judicial review is *ex tunc*.

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

This is similar to the immigration procedure as stated under question 1, subsection c. The judicial review is *ex tunc*.

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)?

[11] Article 14, paragraph four, RWN.
[12] Article 22a, paragraph one, RWN.
[13] Article 22a, paragraph four, RWN.

Every party can apply to be heard by the Administrative Jurisdiction Division. Unlike in immigration cases, a hearing will generally take place in every citizenship case (with a few exceptions).

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.

With regards to the rejection of an application for the issue of a temporary residence permit (on non-asylum grounds), article 16, paragraph one, subsection d, Aliens Act 2000 (*Vreemdelingenwet 2000*; hereafter Vw 2000) states that the permit can be rejected if the alien is a danger to the public order or national security. Article 3.77 of the Aliens decree 2000 (*Vreemdelingenbesluit 2000*; hereafter: Vb 2000) and paragraph B1/4.4 and B1/8.3.4 of the Aliens Act Implementation Guidelines 2000 (*Vreemdelingencirculaire 2000*; hereafter: Vc 2000) specify the serious offences resulting in a danger to public order. The application for the issue of the before mentioned residence permit can be rejected because of a danger to the public order in the following situations:

- if there are serious reasons to assume the alien involved has committed the conduct described in article 1F of the Refugee Convention;
- if the alien involved is a family member of an alien, residing in the Netherlands, with respect to whom there are serious reasons to assume that he has committed the conduct described in article 1F of the Refugee Convention;
- if the alien involved has been convicted to an unconditional prison sentence or another punishment, such as community service or a fine.

A danger to public order also includes a danger to public peace, public morality, public health, a danger to international relations or undesirable political activities. For the rejection of a temporary residence permit based on national security grounds a criminal conviction is not required. The rejection can be based on an individual report of the General Intelligence and Security Service (*Algemene Inlichtingen- en Veiligheidsdienst*; AIVD) or an (individual) report of another (foreign) ministry or intelligence service to determine the danger to national security.

With regards to the extension and withdrawal of a temporary residence permit, pursuant to article 18, paragraph one, subsection e, and article 19 Vw 2000 the permit can be rejected if the alien is a danger to the public order or national security. Article 3.86 Vb 2000 and paragraph B1/6.2.2 Vc 2000 specify the serious offences resulting in a rejection of an application for the extension or a withdrawal of a temporary residence permit. The years of

lawful residence and the statutory term of imprisonment of the serious offence concerned are important factors for the assessment of the application.

For the issuance, the extension or the withdrawal of a permanent residence permit different requirements apply: the permit can only be rejected or withdrawn if the alien is sentenced irrevocably of a serious offence which carries a statutory term of imprisonment of three years or more, or a community punishment or an order meant in article 37a Penal Code (*Wetboek van Strafrecht*), or the foreign equivalent (article 21, paragraph one subsections c and d, and article 22, paragraph two, subsections c and d, Vw 2000; articles 3.95 and 3.98 Vb 2000; paragraph B12/2.4 and 2.8 Vc 2000).

With regards to access to Dutch territory, pursuant to article 3, paragraph one, subsection b, Vw 2000 access is denied if the alien involved poses a threat to public order or national security. Pursuant to article 2.9, paragraph one, Vb 2000 the access will be denied if a sufficient basis exist to believe that the alien has committed or will commit an infringement to public order or national security, or if the alien has been signaled in the national list of wanted persons or for whom an alert has been issued in the Schengen Information System for the purposes of refusing entry. Paragraph A1/3 Vc 2000 states that each of the following situations constitute a threat to public order:
• danger to public peace;
• danger to morality;
• danger to public health.
If an alien has been signaled in the (N)SIS, this constitutes an indication that he poses a threat to public order, national security or international relations of the Schengen states.
Furthermore, a threat to public order exists in the following situations:
• the alien has been signaled in the OPS as "undesired alien";
• the alien is signaled in the (N)SIS for the purpose of refusing entry to the Netherlands or the Schengen area.

With regards to the rejection of an application for the issue of the Dutch nationality or the withdrawal of Dutch Nationality, there should be serious suspicions that the person involved constitutes a danger to public order or national security (article 6, paragraph four, Dutch Nationality Act (*Rijkswet op het Nederlanderschap*, RWN), article 9, paragraph one, subsection a, RWN and article 14 RWN) .
The Guidelines for the application of the Dutch Nationality Act of 2003 set out when serious suspicions exist that the applicant poses a threat to public order or national security. In short, the application shall be rejected in the following situations:
1. the applicants' residence permit can be revoked under the Aliens Act 2000;
2. article 1F of the Refugee Convention is applicable to the applicant;
3. there are serious suspicions that the applicant has committed a crime for which punishment (by a judge or by the public prosecutor or police) may follow. Serious suspicions as mentioned above exist in the following situations:

a. if, as a result of a criminal offense, a police report has been made up and the resulting criminal procedure has not been concluded;
b. if a criminal procedure is pending;
c. if the applicant is on probation;
d. if the applicant has been sentenced by a judge, where the judgment is still open to appeal.
4. In the timeframe of four years prior to the application for the issue of the Dutch nationality or the decision thereon, a criminal sanction has been executed or imposed on the applicant. In this context, 'criminal sanction' means:
a. a custodial sentence;
b. community service;
c. a fine equal to or greater than € 810,–;
d. a transaction offered by the public prosecutor which is equal to or greater than € 810,–;
e. a fine or transaction offered by the public prosecutor which is equal to or greater than € 405,–, if in the preceding period of four years multiple fines or transactions have been imposed, where the total amount of those preceding fines or transactions is equal to or greater than € 1.215,–;
f. a measure, intended to confiscate illegally obtained assets equal to or greater than € 810,–;
5. the applicants' marital position is contrary to Dutch civil public order (i.e. polygamous marriage);
6. there are serious suspicions that the applicant poses a threat to national security. Usually, this will be derived from information laid down in an individual report of the Intelligence and Security Service.
The Guidelines stress that deviation from the rules set out above is possible only under *very* special circumstances.

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

The meaning of these terms has evolved in Dutch national case law in recent years. The Administrative Jurisdiction Division has been involved in a number of preliminary procedures regarding this matter. The resulting CJEU-judgments in these cases (judgments of 11 June 2015, *Z.Zh. and I.O. v. the Netherlands*, ECLI:EU:C:2015:37714 and 15 February 2016, J.N. v. the Netherlands, ECLI:EU:C:2016:8415) have contributed to the evolution in national case law regarding the term 'public order'. To be more precise: in its judgment of 15 february 2016, the CJEU held that the concept of "public order" presupposes, in any event, the existence – in addition to the disturbance of the social order which any infringement of the law involves – of

a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. In its final judgment in this case[16], the Administrative Jurisdiction Division ruled that if the administrative body decides to detain an alien pending expulsion to his or her country of origin, it will have to motivate that the conduct of the person involved constitutes a genuine, present and sufficiently serious threat to the public order; the sole fact that the alien has been prosecuted for a criminal offense, is insufficient to uphold such a decision. This case illustrates that, as a result of jurisprudence of the CJEU, the scope of the term 'public order' has in fact become *narrower* rather than *wider* (as suggested in the question).

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

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

For the underlying national legislation, see the answer to question 6.

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)?

Generally speaking, public order/national security grounds may be applied in every case; there are no general exceptions. In specific cases, however, exceptions may apply, for example if a real risk exists that the person involved will be subjected to a treatment contrary to article 3 of the ECHR upon return to his country of origin.

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

[16] Judgment of 8 April 2016, ECLI:NL:RVS:2016:959.

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

See the answer to question 8. The judgment of 10 March 2016, ECLI:NL:RVS:2016:746, may illustrate that article 8 of the ECHR can play a role in cases like these.

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;

- judgment of 15 March 2017, ECLI:NL:RVS:2017:721 (withdrawal of a permanent residence permit): this is an example of a case where the residence permit of the alien involved was withdrawn and an entry ban had been issued because a large number of criminal convictions. In this case, the alien involved argued that due to recent developments in his personal life, he did not pose a genuine, present and sufficiently serious threat to public order anymore. He also argued that the withdrawal of his residence permit was in violation of article 8 of the ECHR. The outcome of the case was that the residence permit had rightfully been withdrawn.
- judgment of 10 March 2016, ECLI:NL:RVS:2016:746 (withdrawal of a permanent residence permit, issuing of a return decision with immediate effect and issuing of an entry ban): this case is similar to the before mentioned case when it comes to the underlying facts (a large number of criminal convictions). One of the question raised was whether the State Secretary could take into account the fact that a lot of the criminal acts had been committed in a period of time when the alien was addicted to illegal drugs. The Administrative Jurisdiction Division held that the State Secretary had rightfully taken this aspect into account and mentioned that the alien didn't succeed in proving that he had successfully shed his drug addiction. It also took into account that a number of the crimes committed were drug- and violence-related.

b. citizenship cases.

- judgment of 2 March 2016, ECLI:NL:RVS:2016:521 (rejection of an application for the issue of the Dutch nationality): this is an example of a case where the application had been rejected on the basis of a pending criminal procedure (the applicant hadn't (yet) been convicted). It clearly illustrates that in citizenship cases, regulations are strict and that the applicant cannot afford any missteps if he wants to acquire the Dutch nationality.

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, all these aspects are used to determine a threat to national security and public order in both immigration and citizenship cases.
In immigration cases, the conduct of the alien involved has to constitute a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. The administrative body has to involve aspects such as the nature and seriousness of the criminal offence, the amount of time that has passed since the crime was committed and the risk of recidivism. See for example the judgment of 8 April 2016, ECLI:NL:RVS:2016:959.
In citizenship cases, the threat to national security and public order will be based on expectations of the future conduct of the applicant. Those expectations shall be based on his or her conduct now and the recent past. These and other policy rules are laid down in the Guidelines for the application of the Dutch nationality Act of 2003 (see the answer to question 6 for a more detailed description). The Administrative Jurisdiction Division accepts these rules as the base or starting point when reviewing a decision which is based on these rules.

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).[17]

As mentioned before, the alien involved will have to pose a genuine, present and sufficiently serious threat to the public order. The sole fact that he or she has been prosecuted for a criminal offence, is insufficient to uphold such a decision. The administrative body will have to take into account several conditions, including the nature and seriousness of the criminal offence(s). In the majority of cases, the alien involved has committed multiple offences (rather than a single one). In such cases, a combination of offences which – on their own – would not be grave enough to constitute a threat as mentioned above, may be sufficient to deny a residence permit or issue a return decision on public order/national security grounds.

[17] We haven't found cases concerning the offences meant in g and i.

The offences mentioned in a, b and f may constitute a violation of public order, depending on the nature and seriousness of the offence. Generally speaking, the offences mentioned in c, d and e are not grave enough to justify the denial of a residence permit. The offence mentioned in h can probably constitute a violation of public order that will lead to a third-country national being denied a residence permit or the issue of a return decision.

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.

If the conduct of the alien involved constitutes a threat to public order, while he/she is involved in family/private life referred to in article 8 of the ECHR, removal or denial of a residence permit is dependent on a proportionality test. In the weighing of interests within the scope of article 8 of the ECHR, the guiding principles mentioned in the CJEU-judgments *Boultif v. Switzerland* and *Üner v. The Netherlands* (judgments of 2 August 2001, ECLI:CE:ECHR:2001:0802JUDO05427300 and 18 October 2006, ECLI:CE:ECHR:2006:1018JUDO04641099) have to be involved, i.e. the nationality of all those concerned, the interest and welfare of the children, the nature and seriousness of the offence(s), the duration of the residence, the amount of time that has passed since the offence(s), the conduct of the alien during that time and the strength of the social, cultural and family ties of the alien with the host country (the Netherlands) and the country of origin.

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?

When an alien poses a serious threat to public order or national security while he/she is involved in family/private life referred to in article 8 of the ECHR, removal or denial of a residence permit is dependent on a proportionality test. As mentioned before, in the weighing of interests within the scope of article 8 of the ECHR, the guiding principles mentioned in the CJEU-judgments *Boultif v. Switzerland* and *Üner v. The Netherlands* have to be involved, i.e. if there are children, if so, their age and the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the alien are likely to encounter in the country to which the alien is to be expelled.
As the CJEU held in the judgment of 8 March 2011, *Ruiz Zambrano* (C-34/09, EU:C:2011:124), article 20 of the TFEU precludes national measures which have the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of their status as Union citizens. The Court has already held that there are very specific

situations in which, despite the fact that the secondary law on the right of residence of third-country nationals does not apply and the Union citizen concerned has not made use of his freedom of movement, a right of residence must nevertheless be granted to a third-country national who is a family member of his since the effectiveness of citizenship of the Union would otherwise be undermined, if, as a consequence of refusal of such a right, that citizen would be obliged in practice to leave the territory of the European Union as a whole, thus denying him the genuine enjoyment of the substance of the rights conferred by virtue of his status. Article 20 of the TFEU does not affect the possibility of Member States relying on an exception linked, in particular, to upholding the requirements of public policy and safeguarding public security (see the judgment of 13 September 2016, C-165/14, ECLI:EU:C:2016:675). However, assessment of the situation must take account of the right to respect for private and family life. It must be held that, where refusal of the right of residence is founded on the existence of a genuine, present and sufficiently serious threat to the requirements of public policy or of public security, in view of the criminal offences committed by a third-country national who is the sole carer of children who are Union citizens, such refusal would be consistent with EU law. On the other hand, that conclusion cannot be drawn automatically on the basis solely of the criminal record of the person concerned. It can result, where appropriate, only from a specific assessment by the referring court of all the current and relevant circumstances of the case, in the light of the principle of proportionality, of the child's best interests and of the fundamental rights whose observance the Court ensures. That assessment must therefore take account, in particular, of the personal conduct of the individual concerned, the length and legality of his residence on the territory of the Member State concerned, the nature and gravity of the offence committed, the extent to which the person concerned is currently a danger to society, the age of the children at issue and their state of health, as well as their economic and family situation. It follows that article 20 of the TFEU must be interpreted as precluding national legislation which requires a third-country national who is a parent of minor children who are Union citizens in his sole care to be automatically refused the grant of a residence permit on the sole ground that he has a criminal record, where that refusal has the consequence of requiring those children to leave the territory of the European Union.

In The Netherlands we didn't yet have cases like this.

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, see the answer to question 6. As mentioned before, the alien involved will have to pose a genuine, present and sufficiently serious threat to the public order. The sole fact that he or she has been prosecuted for a criminal offence is insufficient to uphold such a decision. The administrative body will have to take into account several conditions, including the nature and

seriousness of the criminal offence(s).

Irrevocable sentences for terrorism and for criminal offences which can be punished with at least eight years imprisonment, may lead to loss of nationality.[18] The application for the issue of the before mentioned residence permit can be rejected because of a danger to the public order if the alien has been convicted to an unconditional prison sentence or another punishment, such as community service or a fine.[19]

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?

Yes, in Dutch national case law an alien that has been excluded from protection on the grounds of Art. 1F of the 1951 Refugee Convention, is considered to be a [serious] threat to public order or national security (see the answer to question 6). Because of its nature, an article 1F-threat is considered to be a present threat at all times. Aliens who have been excluded from protection on the grounds of art. 1F, are therefore automatically considered to pose a genuine, present and serious threat to the public order.[20] However, in its judgment of 9 June 2016, the regional court of The Hague has asked the CJEU the following preliminary questions:[21]

1.

Does article 27 (2) of Directive 2004/38/EC allow that a citizen of the European Union who falls under the scope of article 1F (a) and (b) of the 1951 Refugee Convention, is issued a declaration of undesirability because the exceptional seriousness of the offences article 1(F) refers to, leads to the conclusion that the threat the citizen involved poses to the fundamental interests of society, will – at all times – be a present threat?

2.

If the answer to question 1 is negative, in what way should the investigation, whether or not the involved citizen of the European Union poses a genuine, present and sufficiently serious threat to the fundamental interests of society, take place? To what extent is relevant that the article 1F-behaviour

[18] Article 14 of the Dutch Nationality Act of 2003.
[19] Article 3.77 Vb 2000.
[20] Judgment of 16 June 2015, ECLI:NL:RVS:2015:2008.
[21] ECLI:NL:RBDHA:2016:6389.

took place a long time ago (in this case, in the 1992-1994 timeframe)?

3.
In the decision making process regarding the issue of a declaration of undesirability because of article 1F-behaviour, in what way does the notion of proportionality play a role? Should the circumstances, mentioned in article 28 (1) of Directive 2004/38/EC have to be involved? Should the term of ten years of residence in the host country, mentioned in in article 28 (3) (a), also be taken into account? Should the aspects, mentioned in paragraph 3.3 of the Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC, be taken into account?

This may illustrate that the case law on this subject is currently under development.

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.

When an alien poses a serious threat to public order or national security while he/she is involved in family/private life referred to in article 8 of the ECHR, removal or denial of a residence permit is dependent on a proportionality test. As mentioned before, in the weighing of interests within the scope of article 8 of the ECHR, the guiding principles mentioned in the CJEU-judgments *Boultif v. Switzerland* and *Üner v. The Netherlands* have to be involved, i.e. if there are children, if so, their age and the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the alien are likely to encounter in the country to which the alien is to be expelled.
There are not really examples of cases in which family life or private life is given priority over national security or public order. It's important to know that the first question to answer is if the conclusion of the administrative body that the alien poses a serious threat to public order or national security is right and, in that scope, if the administrative body took the several conditions in account. In case the decision of the administrative body isn't sufficient motivated, you don't get to the question if family/private life is given priority over national security or public order. In the judgments of 2 May 2016, ECLI:NL:RVS:2016:1285 and ECLI:NL:RVS:2016:1286, the administrative body hadn't motivate sufficiently why the strong ties with the Netherlands and the lack or limited ties with the country of origin was outweighed by the circumstance that the alien at an early age committed criminal offences. The administrative body neither had taken the nature and seriousness of the criminal offences in his proportionality test. In such a case, it is conceivable that family life or private life could be given priority over national security or public order.

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?

If national security calls for the rejection of a residence permit, while at the same time the alien involved cannot be expelled because a real risk exists that he or she will be subjected to a treatment contrary to article 3 of the ECHR upon return to the country of origin, the alien will not be expelled but isn't granted a residence permit either. The administrative body has to judge whether or not this risk constitutes a permanent obstacle to removal. If so, the administrative body has to judge whether or not the permanent denial of a residence permit is disproportional. When deciding this, the administrative body has to include article 8 of the ECHR (if applicable).
If, in such a case, the administrative body decides that permanent denial of a resident permit is not disproportional, this results in a situation where the presence of the alien involved in the Netherlands will be illegal – but he cannot be removed. In these 'limbo situations', tension between fundamental rights and national security is definitely felt.

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?

Immigration cases
Generally, the Secretary of State can base the decision to reject or withdraw a residence permit on public order grounds, on a criminal judgment, an offer of an out-of-court settlement, a penalty order issued by a public prosecutor, or other information obtained from the Police Department or from (pending) criminal proceedings.[22]

If the rejection is based on national security grounds, the State Secretary usually bases its decision on individual reports of the General Intelligence and Security Service (*Algemene Inlichtingen- en Veiligheidsdienst; AIVD*) or, in some cases, (individual) reports of another ministry or intelligence service to determine the danger to national security. These individual reports can include specific information about, for example, the offence and facts of which the foreign national is suspected. Information originating from foreign intelligence services can be used as well.

The decision of the Secretary of State itself should contain a legal reasoning and the factual reasons that constitute the danger to the national security or public order. If the decision is based on classified information (from the AIVD of other intelligence services), the Secretary of State will not include that information in the decision. In such cases, a special procedure applies to limit access (of parties involved as well as the judge) to that information: see the answer to question 23.

[22] Paragraph B1/4.4 Aliens Act Implementation Guidelines 2000.

Citizenship cases
A nationality request can be rejected or the Dutch nationality can be withdrawn when strong presumptions exists that the foreign national constitutes a danger to public order or national security.[23] The strong presumptions should be based on the information provided by the applicant[24] and the research of the competent administrative body in the judicial register (*Justitiële documentatiedienst (JDD)*) or information obtained from the police chief (NSIS, OPS, HKD).[25] In order to establish that the person involved constitutes a danger to the public order or national security, a criminal conviction is not necessary. However, there should be sufficient indications for this danger, for example indicated in a report of the Intelligence and Security Service.[26] The fact that the person involved is or has been subjected to criminal prosecution, can be sufficient to turn down his nationality request. See also question 9 d).

The decision of the administrative body should contain a legal reasoning and the factual reasons that constitute strong presumptions for the danger to the national security or public order. With regard to classified information, the same exception applies as stated above under 'Immigration cases'.

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?

Generally, the judge and the party and his or her lawyer have the same access to the legal and factual reasons of the decision.

A decision of the administrative authority does not take effect until it is published (article 3:40 of the General Administrative Law Act; *Algemene wet bestuursrecht*; hereafter: Awb). The decision shall be made public by post or hand delivery to the person concerned (article 3:41 Awb). As a basic principle, the administrative body is obliged to provide the person concerned and the judge with all the relevant information of the case (article 7:4, paragraph two, Awb; article 8:42, paragraph one, Awb). This includes the decision containing the legal and factual reasons of the case.

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;

The evidence is not always disclosed to a judge. Although the administrative body is obliged to provide the judge with all the relevant information of the case (articles 8:27, 8:28 and 8:42,

[23] Article 6, paragraph 4, RWN; Article 9 and 14 RWN.
[24] Every optant needs to sign a declaration about his residency and behaviour and declare whether he has been in trouble with the police or the law and whether he has been married polygamous. Explanatory to article 6, paragraph 4, Guidelines to the Dutch Nationality Act 2003.
[25] Explanation to article 6, Guidelines to the Dutch Nationality Act 2003.
[26] Explanation to article 9, paragraph one, subsection a, in the Guidelines to the Dutch Nationality Act 2003.

paragraph one, Awb), he can reject the information request of a judge (article 8:29, paragraph one, Awb) if there are 'weighty reasons' (*gewichtige redenen*) to do so. See the answer to question 23 for a more detailed explanation.

b. a party to the procedure;

The administrative body can decide to withhold (part of) the evidence from a party (as stated under a). Furthermore, the administrative body has the competence to decide that certain evidence can only be disclosed to the judge (thereby withholding the evidence from the opposing party or his or her counsellor).

c. a counsellor (lawyer) representing a party?

As stated under b.

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?

The procedure of article 8:29 Awb applies to all administrative cases and judges handling these cases. In cases where the Administrative Jurisdiction Division serves as the competent supreme court, the request for nondisclosure of documents is handled by a special Secrecy Chamber of the Administrative Jurisdiction Division. This chamber decides solely on the lawfulness of this request and not on the merits of the case, unless consent is given by the parties (article 8:29, paragraph five, Awb). If the parties give permission to the judge to access the secret information or documents, every judge is allowed to have access to classified evidence. There is no special certificate or vetting process in the Netherlands.

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.

Article 8:29- procedure
Pursuant to article 8:27 and 8:28 Awb parties have an obligation to submit all requested information to the judge. A party can refuse to submit the requested information or the documents, or communicate to the court that only the judge and not the opposing party can

have access to the information or the documents (limited access). To justify the denial of the (limited) access to the evidence, the party has to prove that 'weighty reasons' exists for this denial and clarify sufficiently why those reasons prevail over the right to adversarial proceedings (article 8:29, paragraph one, Awb). Pursuant to article 8:29, paragraph three, it is up to the 'secrecy-judge' involved (note that in cases where the Administrative Jurisdiction Division is involved, the before mentioned Secrecy Chamber decides on these matters) to assess whether this secrecy of the evidence is justified.

If full confidentiality of information or documents to the party and the judge is considered legitimate, the obligation of article 8:27 and 8:28 Awb no longer applies. However, a full denial of access to information or documents is rare.[27] The fact that the 'secrecy-judge' is not allowed to have access to the classified information complicates the assessment of 'weighty reasons'.

In cases where the 'secrecy-judge' grants the limited access request (which implies only the judge and not the opposing party can have access to the information or the documents), the secret information or documents may only be used with the consent of the opposing party. Without this permission the judge is not allowed to give a judgment on the basis of the secret documents and has to return these documents to the party concerned. To avoid the appearance of bias, the case will be referred to another chamber (article 8:29, paragraph five, Awb). The rejection of the permission to use the secret information or documents implies a risk for the party concerned, because his appeal can be declared unfounded, because the judge could not consult all the relevant material of the case.

Unlike the United Kingdom, lawyers appointed to represent the interests of a foreign national contesting serious offences relating to national security in secret procedures (*special advocate*s), do not exist in the Netherlands. Furthermore, article 8:29 Awb does not guarantee (to a party) disclosure of secret (parts of) documents containing evidence brought against him. Therefore, this article restricts the principles of public access and 'equality of arms'. Nevertheless, according to the Administrative Jurisdiction Division, the article 8:29-procedure and the limitations to the disclosure of classified information that comes with it, has been substantiated with sufficient safeguards to ensure that the right to a fair trial, laid down in article 6 of the ECHR, is not (essentially) impaired.[28]

In the case of *A. v. the Netherlands*[29] the European Court of Human Rights found that the article 8:29 Awb-procedure did not violate article 13 ECHR. Although the underlying materials of the AIVD report were not accessible for the opposing party, the materials were, with the parties' consent, disclosed to the judge. Furthermore, the Court noted that this report

[27] See for an example of a successful appeal to full denial the judgement of the Administrative Jurisdiction Division of 25 November 1998, ECLI:NL:RVS:1999:AA4098 (published in AB Rechtspraak Bestuursrecht, no. 2000/393).
[28] Judgement of Administrative Jurisdiction Division of 28 March 2012, ECLI:NL:RVS:2012:BW0146.
[29] 20 July 2010, no. 4900/06, par. 160.

and the underlying materials did not, as such, concern the applicant's fear of being subjected to ill-treatment in Libya but whether he was posing a threat to the Dutch national security.

Previously, pursuant to article 87, paragraph one, first sentence, of the Law on the intelligence- and security services of 2002 (Wet op de Inlichtingen en Veiligheidsdiensten 2002; Wiv 2002) the Secretary of State had the exclusive right to decide on the legitimacy of the nondisclosure of (parts of) the documents. Therefore the judge could not assess the legitimacy by itself. In its judgement of 30 November 2011 (ECLI:NL:RVS:2011:BU6382) the Administrative Jurisdiction Division found, with reference to recent jurisprudence of the European Court of Human Rights, that article 87, paragraph one, first sentence, of the Wiv 2002 violates the rights laid down in article 6 ECHR. According to the Administrative Jurisdiction Division the situation in which a judge is not permitted beforehand to assess whether and to what extent the limited access to evidence was legitimate and the final judgement rests upon this evidence which is (partly) secret to one of the parties, does not meet the criteria of a fair trial as laid down in article 6 ECHR.

Possibility to dispute secret evidence
Although access to secret evidence can be limited on grounds of national security, a third country national has the possibility to oppose the facts brought against him, as stipulated in the decision of the administrative body.

According to well-established case-law of the Administrative Jurisdiction Division[30], Ministry of Foreign Affairs country reports, individual reports of the Ministry of Foreign Affairs and individual reports of the Intelligence and Security Service are considered to be expert advices to the Secretary of State. The Secretary of State can take the accuracy of the advice for granted if the advice has been given in an impartial, objective and clear manner, while being supported with an indicated source. An exception to this rule applies in case of a sufficient basis for doubts about the accuracy of the advice. A third country national seeking to challenge an individual report has to substantiate such doubts. In contrast with general jurisprudence about advices, a countercheck by another expert is not required. Therefore, even if the sources or (part of) the report itself is secret to the third country national, he or she has the possibility to challenge this report. However, the bare denial of the report is not sufficient to substantiate doubts about the accuracy of the report.[31] In its judgment of 1 December 2015 (ECLI:NL:RVS:2015:3795) the Administrative Jurisdiction Division found that the foreign national had successfully disputed the accuracy of a Ministry of Foreign Affairs country report.

Furthermore, the third country national can also request the administrative body to disclose the information or (parts of) the documents under the Dutch Public Access to Government Information Act (*Wet openbaarheid van bestuur;* hereafter: Wob). A request based on the

[30] Judgement of 12 October 2001, ECLI:NL:RVS:2001:AD5964.
[31] Jugdement of 13 November 2003, ECLI:NL:RVS:2003:AN9460 (not published).

Wob may be declined, for instance for security reasons. In contrast with the article 8:29-procedure concerning the access of a party to information in a judicial procedure, the Wob-procedures' purpose is public access to information about an administrative matter. A decline of a Wob-request does not guarantee secrecy in the Awb-procedure. However, no weighty reasons exists for an administrative body to refuse information or (parts of) documents, if the public access to this information is required under the Wob (article 8:29, paragraph two, Awb). The Wob-criteria are considered to be the lower limit.

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).

The judge is allowed to verify the lawfulness of the denial of the access of the evidence (see question 23). The judge has to strike a balance between the interests of the state (to keep evidence confidential) to the interests of the third country national (to access the evidence brought against him). The judge will have to take into account the nature of the case and the other possibilities for the opposing party to – in line with the requirements of an adversarial procedure and equality of arms – determine his position and to put forward his reasoning. After balancing these interests, the judge has to decide whether the denial of access to the evidence is legitimate.

Without permission of the administrative body concerned, the judge cannot disclose such evidence to the opposing party (see question 23).

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?

No, see question 23.

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?

Yes, full judgements are open to the parties and their counsellors (article 8:77-8:79 Awb). There are no restrictions.

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.

The article 8:29-procedure applies to all administrative law cases. It does not distinguish between EU citizens and third country nationals.

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

National security cases are handled in the same way as other cases. They are not given priority over other immigration or citizenship cases.