NACZELNY SĄD ADMINISTRACYJNY

ACA EUROPE

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

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

Cracow 18 September 2017

Answers to questionnaire: Poland

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

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

ACA seminar in Kraków (Cracow) 18–19 September 2017

Replies of the Supreme Administrative Court of Poland

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.

1.1.
Immigration matters are regulated by:

- the Act of 12 December 2013 on Foreigners (Journal of Laws of 2016, item 1990 as amended) – hereinafter referred to as: the Foreigners Act; available at: http://isap.sejm.gov.pl/DetailsServlet?id=WDU20130001650
- the Act of 13 June 2003 on Granting Protection to Foreigners within the Territory of the Republic of Poland (Journal of Laws of 2016, item 1836 as amended) – hereinafter referred to as: the Act on the Protection of Foreigners; available at: http://isap.sejm.gov.pl/DetailsServlet?id=WDU20031281176

Administrative proceedings in matters regulated by the aforementioned acts are two-instance proceedings. A decision of a first-instance authority may be appealed against before a second-instance authority (or a request for re-examination by the same authority may be filed, if this is envisaged by the applicable act). The competence of specific authorities depends on the type of case.

Matters regulated by the Foreigners Act:

- A Schengen visa or a national visa is revoked or cancelled, by means of a decision, by a consul, the commanding officer of a Polish Border Guard unit, the commanding officer of a Polish Border Guard post (Article 92(1) of the Foreigners Act).
  A decision on revocation or cancellation of a Schengen or a national visa issued by:
  1) a consul – may be responded with a request for re-examination of the case by the same authority;
  2) the commanding officer of a Polish Border Guard unit or the commanding officer of a Polish Border Guard post – may be appealed against before the Chief Officer of Polish Border Guard (Article 93(1) of the Foreigners Act).

- A voivodship governor is a first-instance authority in matters regarding:
  - granting a temporary residence permit, refusing to grant it or revoking it (Article 104 of the Foreigners Act),
  - granting a permanent residence permit, refusing to grant it or revoking it (Article 201(1) and (3) of the Foreigners Act),
  - granting a long-term resident's EU residence permit, refusing to grant it or revoking it (Article 218 of the Foreigners Act).

  The Head of the Office for Foreigners is a higher-instance authority in relation to a voivodship governor (Article 22(2) of the Foreigners Act).
- The commanding officer of a Polish Border Guard unit or the commanding officer of a Polish Border Guard post is a first-instance authority in matters regarding:
  - imposing a return obligation on a foreigner, extending a deadline for voluntary return and revoking a re-entry ban issued with respect to the territory of the Republic of Poland and other Schengen states (Article 310 of the Foreigners Act),
  - granting a residence permit for humanitarian reasons, refusing to grant such a permit and revoking such a permit and granting a permit for tolerated stay within the Republic of Poland, refusing to grant such a permit and revoking such a permit (Article 355(1) of the Foreigners Act).

  The Head of the Office for Foreigners is a higher-instance authority in relation to the aforementioned authorities (Article 321 and 355(2) of the Foreigners Act).
- Upon a request filed by the Police Commander in Chief, the Head of the Internal Security Agency or the Head of the Military Counterintelligence Service, the Minister responsible for internal affairs issues a decision imposing a return obligation on a foreigner in respect of whom there is a concern that such a foreigner may conduct terrorist or spying activities or is suspected of committing one of such crimes (Article 329a of the Foreigners Act); the decision is subject to immediate enforcement; a request for re-examination may be filed in respect of the decision, with such request being considered by the minister as well.

Matters regulated by the Act on the Protection of Foreigners:

- The Head of the Office for Foreigners is a competent authority for: granting or refusing refugee status, granting subsidiary protection, revoking refugee status or subsidiary protection (Article 23 of the Act on the Protection of Foreigners).

  The Refugee Council is a public administration authority considering appeals against decisions and interlocutory appeals to orders issued by the Head of the Office for Foreigners in the aforementioned matters (Article 89p(1) of the Act on the Protection of Foreigners).
- Decisions on granting and revoking asylum are issued by the Head of the Office for Foreigners (Article 94(1) of the Act on the Protection of Foreigners).

1.2. Judicial review for immigration matters is exercised by administrative courts according to general rules pursuant to the Act of 30 August 2002 – Law on Proceedings before Administrative Courts (Journal of Laws of 2016, item 718 as amended) – hereinafter referred to as the Law on Proceedings before Administrative Courts,
available at: http://isap.sejm.gov.pl/DetailsServlet?id=WDU20021531270

English versions of acts related to the Polish administrative judiciary is available at: http://www.nsa.gov.pl/download.php?id=423

Court proceedings are two-instance proceedings. When appeal measures against administrative decisions issued in administrative proceedings and orders issued in administrative proceedings which are subject to interlocutory appeal or which conclude the

proceedings, as well as against orders ruling on the merits of the case are exhausted, a party may raise an appeal to a voivodship administrative court, and any order issued by such a court may be appealed against (by means of a cassation appeal or interlocutory appeal) to the Supreme Administrative Court.

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.

2.1. Matters of being granted and deprived of Polish citizenship and confirming it or its loss are regulated by the Act of 2 April 2009 on Polish Citizenship (Journal of Laws of 2012, item 161 as amended) – hereinafter referred to as: the Polish Citizenship Act; available at: http://isap.sejm.gov.pl/DetailsServlet?id=WDU20120000161

A threat to national security or public order constitutes a reason for refusing Polish citizenship to a foreigner and deciding not to reinstate Polish citizenship to a foreigner.

In the aforementioned matters, two-instance administrative procedures apply.

The competent first-instance public administration authority for matters consisting in acknowledgement of Polish citizenship is a voivodship governor (Article 36(1) of the Polish Citizenship Act). A decision of a voivodship governor may be appealed against before the minister responsible for interior affairs, currently: the Minister of the Interior and Administration (Article 10(4) of the Polish Citizenship Act).

The competent authority for matters related to reinstatement of Polish citizenship is the minister responsible for interior affairs (Article 39(1) of the Polish Citizenship Act). A first-instance decision issued by the minister may not be appealed against, but a party dissatisfied with a decision may file a request to that authority for re-examination of the case; the provisions on appeals against decisions apply accordingly to such requests (Article 127(3) of the Act of 14 June 1960 – Code of Administrative Proceedings, Journal of Laws of 2016, item 23 as amended; hereinafter referred to as the Code of Administrative Proceedings).

2.2 See point 1.2.

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?

In 2016, 41 cassations appeals in immigration and citizenship cases were brought to the Supreme Administrative Court of Poland.

In case of the courts of first instance, in 2016 251 complaints in immigration and citizenship cases were brought to the all 16 voivodeship administrative courts.

The such detailed statistics concerning percentage of cases in which grounds related to national security and public order were decisive are not provided.

Cases in which issues related to national security and to public order have to be considered are not registered separately and they have no 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:

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

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

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

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

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

a) As a rule, court proceedings on immigration matters are no different than other cases before administrative courts. The only differences in a court procedure include the following:
   - In cases related to granting protection to foreigners, a complainant is released, by law, from the obligation to pay court fees (Article 239(1)(1)(g) of the Law on Proceedings before Administrative Courts).
   - Cases related to granting protection to foreigners and imposing an obligation to return are considered by the Supreme Administrative Court in the order of lodging that is separate from other cases (§ 42(2)(6) of the resolution of the General Assembly of Judges of the Supreme Administrative Court of 8 November 2010 on the internal rules of procedure of the Supreme Administrative Court, Official Gazette of 2010, No. 86, item 1007 as amended).
   - It is a rule that filing an appeal to a voivodship administrative court does not suspend the enforcement of the appealed decision. If a foreigner has filed an appeal against a return decision together with a request for suspending the enforcement of the return decision, the deadline for voluntary return or forced enforcement of the decision is extended by law until the date on which the voivodship administrative court issues an order in response to the request. This does not apply to situations in which the return decision was issued due to a threat to national security or public order (Article 331(1) and (2) of the Foreigners Act).

b) Court proceedings in which the issue of national security and public order are referred to are treated no different than other immigration cases in which this element is not referred to.

c) A judge of a voivodship administrative court adjudicates within the limits of a given case, but is not bound by claims and requests raised in the appeal and legal grounds quoted therein (Article 134(1) of the Law on Proceedings before Administrative Courts). This means that the Court may grant the appeal due to irregularities other than those referred to by the party, and it may also declare, for instance, invalidity of the appealed act, even if the appealing party requested that the act be revoked. If the Court grants the appeal, it may take actions in respect of any proceedings conducted within the limits of the case (Article 135 of the Law on Proceedings before Administrative Courts). Apart from revoking a decision or order, declaring its invalidity or stating that it has been issued with a breach of law (Article 145(1) of the Law on Proceedings before Administrative Courts), the Court may also decide on the substance of the case and revoke the appealed decision and discontinue the administrative proceedings (Article 145(3) of the Law on Proceedings before Administrative Courts). The Court may also impose an obligation on an authority to issue a decision or order by the deadline specified, indicating the manner in which the case is to be handled or resolved (Article 145a(1) of the Law on Proceedings before Administrative Courts). Eliminating the decision from legal transactions as a consequence of a revoking judgment results in an *ex nunc* effect for the future, from the moment when the judgment becomes effective and final. Declaring the decision invalid results in an *ex tunc* effect, which means that the decision is eliminated from legal transactions retroactively, as if it had not been issued.

d) The Supreme Administrative Court is the second-instance court considering appeal measures against the rulings of voivodship administrative courts. The Supreme Administrative Court considers cases within the limits of the cassation appeal, which means that it cannot examine whether any other provision than the one quoted in the cassation appeal was breached, and only invalidity of proceedings is taken into account *ex officio* (Article 183 of the Law on Proceedings before Administrative Courts). If granting the cassation appeal, the Supreme Administrative Court revokes the appealed ruling and forwards the case for re-examination to the court that issued the ruling (Article 185(1) of the Law on Proceedings before Administrative Courts). If the Supreme Administrative Court revokes the appealed decision, it may also examine the appeal and issue one of rulings envisaged for the first-instance courts (Article 188 of the Law on Proceedings before Administrative Courts).

e) A judgment issued by a voivodship administrative court or an order concluding the proceedings may be appealed against with a cassation appeal by a party to the proceedings, as well as a public prosecutor, Commissioner for Human Rights or the Ombudsman for Children. For the persons named above, the right to file a cassation appeal is not limited or excluded. The only condition is that the cassation appeal must be drafted by a lawyer or a legal counsel, unless drafted by a judge, public prosecutor, notary public, counsel of the General Counsel to the Republic of Poland or a professor or an assistant professor of legal studies, who is a party, representative or attorney of a party, or the cessation appeal is filed by a public prosecutor, the Commissioner for Human Rights or the Ombudsman for Children (Article 175(1) and (2) of the Law on Proceedings before Administrative Courts). The Law on Proceedings before Administrative Courts does not provide for any pre-trial institution or any other filtering mechanism.

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

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

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

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

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

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

Cases related to citizenship are no different in terms of court procedures.
See point 4 (without sub-point (a))

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.

As far as immigration matters and citizenship matters are concerned, the terms of “national security” and “public order” are referred to in the following acts: the Foreigners Act, the Act on the Protection of Foreigners and the Polish Citizenship Act. “National security” and “public order” are often referred to in Polish legislation acts, but in the context of immigration and citizenship cases there are no legal definitions that would specify their consistent designation and meaning. These terms are intentionally used as general clauses, which is related to their broad meaning, and at the same time allows for adjusting legislation to changing social, economic and political circumstances that affect their understanding. As there are no definitions of “national security” and “public order” in the legislation, in the cases in question the terms are specified each time by public administration authorities enforcing the law; the authorities must quote specific grounds that justify a real threat to national security or public order posed by a foreigner. It is a role of administrative courts to control whether public administration authorities in a given case were correct in stating that the existence of specific circumstances fulfils the conditions of a threat to national security and public order.

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 there are no statutory definitions of “national security” and “public order”, it is difficult to indicate clearly the evolution of the terms in recent years. Neither are the terms defined in the jurisprudence of administrative courts (see question 6).

Undoubtedly, the meaning of the terms should be now broader than in the past as a consequence of dynamic changes in various domains of social life and state system, in particular in terms of a social, economic and political situation. The evolution of the terms is also shaped by the jurisprudence of the European Court of Human Rights and the Court of Justice of the European Union.

It should be emphasised that in many cases the occurrence of a threat to national security or public order is established on the basis of documents that include classified information (provided, for instance, by the Internal Security Agency) and to this extent the statement of grounds to the decisions of public administration authorities do not include references to such circumstances. For this reason, it is difficult to track the evolution of the terms in recent years.

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?

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)?

In immigration and citizenship cases, a threat to national security and public order:

a) constitutes a basis to refuse the entry to the state territory (Article 28(1)(10) of the Foreigners Act), also in the context of local border traffic regime (Article 41(1)(7)),
b) constitutes a ground for refusal to issue a national visa authorising to enter the territory of the Republic of Poland and stay within the territory once or several times subsequently for a period no longer than 90 days within the validity period of the visa (Article 65(1)(5) of the Foreigners Act),
c) constitutes a ground for refusal to grant a temporary residence permit or permanent residence permit (Article 100(1)(4) and Article 197(1)(4) of the Foreigners Act), and it constitutes a ground for refusal to grant a long-term resident’s EU residence permit (Article 214(1)(2) of the Foreigners Act),

d) constitutes a ground for refusal to acknowledge Polish citizenship (Article 31(2) of the Polish Citizenship Act) and deciding not to reinstate Polish citizenship (Article 38(3) of the Polish Citizenship Act).
e) In situations described in points a–d, a threat to national security or public order may occur in any case, without any exceptions whatsoever.

In the cases described, a threat to national security or public order constitutes a negative premise for granting a permit (authorisation, etc.) applied for. This means that a public administration authority is required to refuse the application, if the existence of the threat is established. However, the law-maker has not provided for a situation that an authority cannot refuse to grant the request of a party if a foreigner is married to a Polish citizen or a citizen of another EU state or if there is a risk that the foreigner's right to family life or prohibition of tortures or inhuman treatment may be breached.

Irrespective of the above, the decisions described in points a–c require the assessment of circumstances of an applicant, taking into account the requirements of protection of family life (Article 7 of the EU Charter of Fundamental Rights, Article 8 of the European Convention on Human Rights), as well as the prohibition of tortures and inhuman treatment (Article 3 and 3 of the ECHR).

A decision to refuse to acknowledge Polish citizenship and not to reinstate Polish citizenship does not worsen the situation of a foreigner as it does not deprive the foreigner of any rights, but it only leads to not granting all the rights related to acquiring citizenship. For this reason, it seems unnecessary in cases of this type to assess the compliance with the requirements of family life protection (under Article 7 of the EU Charter and Article 8 of the ECHR), as well as the prohibition of tortures and inhuman treatment (Article 3 and 4 of the ECHR).

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?

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).

In immigration and citizenship cases, a threat to national security and public order:

a) constitutes a ground for removal of a foreigner under the Act of 13 June 2003 on Foreigners (Journal of Laws of 2011, No. 264, item 1573 as amended; Article 88(1)(5) – hereinafter referred to as: the Foreigners Act of 2003 – which became ineffective on 1 May 2014); in the currently applicable Foreigners Act, there is no concept of removal,
b) constitutes a ground for imposing a return obligation on a foreigner (Article 302(1)(9) of the Foreigners Act),

c) constitutes a ground for revoking a temporary residence permit or permanent residence permit (Article 101(3) in conjunction with Article 100(1)(4) and Article 197(1)(4) of the Foreigners Act), and it constitutes a ground for revoking a long-term resident's EU residence permit (Article 215(1)(2) of the Foreigners Act),
d) does not constitute a ground for being deprived of citizenship; it should be clarified that the rules of relative irrevocability of Polish citizenship expressed in Article 34(2) of the Constitution of the Republic of Poland implies that it is prohibited to deprive a person of citizenship by means of a unilateral action by a public authority, and the only possible manner in which citizenship may be lost is as a result of voluntary renunciation.

In respect of a return obligation imposed on a foreigner, the Foreigners Act introduces the following exceptions:

- In the cases in which the Act requires that a return decision be issued (Article 302(1) of the Foreigners Act), the decision is not issued to a foreigner, if:
  - the foreigner is married to a Polish citizen or a foreigner holding a permanent residence permit or long-term resident's EU residence permit valid within the territory of the Republic of Poland and it is not in breach of national defence or national security or the protection of public order and safety, unless the purpose of marriage or of its existence is to circumvent this Act (Article 303(1)(4) of the Foreigners Act), or
  - the foreigner holds a residence permit or any other authorisation allowing the foreigner to stay issued by another Schengen state and it is not against the reasons of defence or national security or the protection of public order and safety, unless the foreigner fails to immediately move to the territory of the Schengen state after being instructed on the obligation to move to the territory of the state as referred to in Article 314 (Article 303(1)(7) of the Foreigners Act).

  Therefore, in both cases the recognition of a threat to public order and security is a ground for issuing a return decision in respect of the foreigner, even if positive conditions of issuing a residence permit are satisfied.
- A deadline for voluntary return is not specified in a return decision, if this is required for reasons of defence or national security or the protection of public order and safety (Article 315(2)(2) of the Foreigners Act).
- Forced enforcement of a return decision happens, among others, if after the return decision is issued, any further stay of a foreigner may pose a threat to defence or national security or the protection of public order and safety (Article 329(2)(2)(b) of the Foreigners Act).
- A return decision is not enforced if a foreigner is married to a Polish citizen or to a foreigner holding a permanent residence permit or long-term resident's EU residence permit valid within the territory of the Republic of Poland and it is not in breach of national defence or national security or the protection of public order and safety, unless the purpose of marriage was or of its existence is to circumvent this Act (Article 330(1)(6) of the Foreigners Act),

Apart from the situations described above, the conditions of a threat to national security or public order may occur in any case; the law-maker failed to provide for the situation that a public authority cannot issue a decision if a foreigner is married to a Polish citizen or a citizen of another EU state or if there is a risk of breaching the right to family life or the prohibition of tortures and inhuman treatment.

See question 16 for certain exceptions in this regard.

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.

In court proceedings related to immigration matters, the conditions of a threat to national security or public order occur usually as grounds for refusal to grant a temporary residence permit (judgment of the Supreme Administrative Court of 9 September 2016, II OSK 538/15, judgment of 1 July 2016, II OSK 2652/14; judgment of 29 September 2016, II OSK 3193/14 – published in the Central Database of Administrative Courts' Judgments – CBOSA: http://orzeczenia.nsa.gov.pl), if a foreigner breached Polish public order several times by committing crimes such as theft with burglary, driving under the influence, theft of fuel.

Pursuant to the Act of 15 February 1962 on Polish Citizenship (Journal of Laws of 2000, No. 28, item 353 as amended; the Act on Polish Citizenship of 1962), a threat to national security or public order constituted a ground for refusal to accept a statement of intention to acquire Polish citizenship (Article 10(1) of the Polish Citizenship Act of 1962) and similar cases reappeared in Polish judicial practice (judgment of the Supreme Administrative Court of 18 March 2011, II OSK 538/10; judgment of 30 August 2011, II OSK 2532/10; judgment of 20 October 2011, II OSK 1939/10; judgment of 24 April 2012, II OSK 888/11; judgment of 11 May 2012, II OSK 1098/11). The number of citizenship cases in which the circumstances of a threat to national security or public order are referred to, but related to the institutions of the new Polish Citizenship Act, is very limited. Therefore, it is difficult to indicate repeated cases where such premises would reoccur. In cases that were subject to judicial review, the premises constituted grounds for the refusal of acknowledging Polish citizenship (judgment of the Supreme Administrative Court of 15 December 2016, II OSK 1251/16).

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.

It is emphasised in judicial jurisprudence that the behaviour of a foreigner is of paramount importance in the process of assessing whether the foreigner's stay in the country poses a risk to national security and public order.

In case (Case File II OSK 129/09; judgment of the Supreme Administrative Court of 22 December 2010, unpublished) related to refusal to grant a temporary residence permit, administration authorities and courts of both instances emphasised that the fact that the foreigner had committed a socially harmful crime of participation in an organised crime group intending to commit crimes related to illegal trade of narcotic drugs (for which the foreigner had been sentenced and which constituted crimes against public order) harms legal good as referred to in Article 57(1)(5) of the Foreigners Act.

The Supreme Administrative Court emphasised that not every instance of behaviour of a foreigner, even if it constitutes a breach of law, may indicate that in the future the foreigner will pose a threat to values protected under the quoted provision. It is necessary to assess

expected behaviour of a foreigner in terms of whether after being granted a temporary residence permit, during a legal stay within the territory of the Republic of Poland, there are grounds for assuming that the applicant will fail to respect public order and will refuse to obey existing and universally acknowledged social norms. Authorities should assess the complainant's behaviour after imprisonment and clarify the current complainant's family circumstances (family life). In the opinion of the Supreme Administrative Court, Article 57(1)(5) of the Foreigners Act does not sanction the very fact of committing an intentional crime and being convicted, but it requires proving that specific negative behaviour of the foreigner has specific features (they pose a threat to national security and public order).

Case II OSK 2000/14 (judgment of the Supreme Administrative Court of 12 April 2016, published at the CBOSA) concerned a foreigner who applied for a time-limited residence permit. Authorities and courts decided that the foreigner had committed multiple violent crimes (extortion by force, involvement in a fight), caused so-called minor injury, committed crimes against public order, including illegal possession of weapon, as well as crimes against credibility of documents consisting in modifying the document and using deception in order to obtain attestation of false information from a public officer. Additionally, he was charged with further crimes. In these circumstances, authorities and courts decided that, first and foremost, it was necessary to protect social interest by assuming that the foreigner posed a threat to public order.

In Case II OSK 1251/16 (judgment of the Supreme Administrative Court of 15 December 2016) regarding the acquisition of Polish citizenship, administration authorities and courts noted the irreversible nature of the consequences of the decision on the acquisition of citizenship. They emphasised that the charges against the foreigner (obtaining financial benefits from another person's prostitution) are intentional crimes subject to imprisonment up to 5 years and it is not a minor offence that could be related to lack of caution in the action of the complainant that may happen on a daily basis to many other people. For the purpose of assessing the infringement of legal order, it is essential to take into account the nature of behaviour and the (irreversible) nature of the decision applied for by the foreigner.

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).

Not all foreigner's actions, even if they constitute a breach of law, may indicate that such a person will pose a threat to national security or public order in the future, which would justify refusal to grant a temporary or permanent residence permit, revocation of such permits or issue of a return decision. Naturally, the fact of conviction must be taken into account, as well as the type and severity of punishment, which reflect, among others, the assessment of harmfulness of a committed act by a criminal court, criminal proceedings against the

foreigner (charges), period of time passed since the crime was committed and behaviour of the foreigner since then.

When applying the premise analysed, it is also necessary to assess:

- frequency and nature of prohibited acts committed, social harmfulness of such acts,
- time when prohibited acts were committed and accompanying circumstances, the level to which the foreigner was involved in criminal activities,
- prospective behaviour of the foreigner in terms of whether during further stay in Poland the foreigner will not respect legal order and will refuse to respect existing and universally acceptable social norms.

Therefore, it depends on the circumstances of a specific case whether the specific infringement of legal order will be regarded as satisfying the aforementioned premises. It should be assumed that a single (not repeated) infringement of lesser severity (e.g. minor offence) should not be seen as a threat to national security or public order. This applies to: shoplifting, driving under the influence, failure to pay public liabilities other than taxes, parking offences, road offences.

If similar infringements of legal order happen repeatedly, it cannot be ruled out that the frequency of prohibited acts committed by the foreigner and the foreigner's attitude will be arguments for recognising the foreigner as a threat to public order.

In Case II OSK 116/14 (judgment of the Supreme Administrative Court of 24 September 2015), administration authorities and courts of both instances assumed that the foreigner infringes legal order to the extent that justifies refusal to grant a time-limited residence permit. Authorities argued that 12 judicial rulings had been issued in respect of the foreigner for order-related offences, and the social inquiry report carried out in the place of residence had shown that residents were afraid of the foreigner because of his behaviour. There were also 2 judgments issued sentencing the foreigner for violence and an insult against a police officer. Additionally, there were criminal proceedings pending against the foreigner in the matter of crimes related to trading and possessing narcotic drugs. Even though earlier sentences with respect to the foreigner were expunged, the fact that the foreigner committed multiple offences during his stay in Poland had a negative impact on the assessment of the foreigner's behaviour in the future, according to the authority.

Failure to pay taxes constitutes a separate ground for a refusal to grant a temporary residence permit or a permanent permit residence, irrespective of a threat to national security or public order (Article 100(1)(6) and Article 197(1)(8) of the Foreigners Act). For this reason, outstanding taxes should not be seen as a situation leading to the satisfaction of the premise related to a threat to national security or public order.

Also entering into marriage to circumvent the provisions of the act is not an argument for a threat to national security or public order. This situation is explicitly referred to by the law-maker in Article 165(1) of the Foreigners Act, which stipulates that apart from cases referred to in Article 100(1)(1–5) of the Foreigners Act, a foreigner is refused a temporary residence permit:

1) for a family member – a citizen of the Republic of Poland – in the case of a foreigner married to a citizen of the Republic of Poland, or
2) for the purposes of family reunification – in the case of a foreigner married to a foreigner referred to in Article 159(1)(1) of the Foreigners Act;
3) if such a marriage has been entered into in order to circumvent the Act.

Since a "fake" marriage is a separate reason for refusal of a temporary or permanent residence permit, it should not be considered within the category of a threat to public order.

A similar norm was included in the Foreigners Act of 2003, and in this context, both authorities and courts of both instances considered it necessary to verify whether or not the

marriage was entered into in order to circumvent legal regulations (see, among others, judgment of the Supreme Administrative Court of 1 July 2016, II OSK 2660/14, published at the CBOSA).

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.

Refusal of a permanent or temporary residence permit or withdrawal of such a permit on the ground of national security or public order may be considered justified, as long as it is additionally proven that a decision was taken in compliance with the requirement of proportionality. Public administration authorities must take into consideration legally protected interest of the members of the foreigner's family and decide whether an infringement of the foreigner's right to family life and protection of private life as a result of applying administration sanctions is balanced by the necessity to protect national security or order. Even if it is assumed that in a given situation refusal to grant a temporary or permanent residence permit or withdrawal of such a permit would not be a proportional measure in light of the infringement of rights specified in Article 8 of the ECHR, such a circumstance cannot constitute an independent ground for granting a temporary or permanent residence permit, if positive conditions of granting such a permit are not satisfied and if, at the same time, negative conditions, being threat to national security and public order, are met. The provision of Article 8 of the ECHR cannot be interpreted in a manner that would lead to imposing on a state an obligation to respect the place of residence chosen by a foreigner, in spite of a threat that the foreigner's stay poses for the protection of national security and public order.

In a return procedure, it is examined, among others, whether there are reasons for granting a residence permit on humanitarian grounds, and if such reasons exist, a return decision is not issued (Article 303(1)(2) of the Foreigners Act). A foreigner is granted a permit to stay within the territory of the Republic of Poland for humanitarian reasons, among others, if a return obligation would breach the foreigner's right to family or private life and if it would breach the rights of the child to the extent that is significantly harmful for the child's psychological and physical development (Article 348(2) and (3) of the Foreigners Act). If, however, the reason for the previous refusal (or withdrawal) of a temporary or permanent residence permit was a threat to national security or public order, it is impossible to grant the foreigner a residence permit for humanitarian reasons since such circumstances also constitute grounds for refusal (Article 349(1)(4) of the Foreigners Act).

In cases related to granting a temporary or permanent residence permit or a return obligation where a threat to national security or public order is referred to, national legislation does not provide for any institution that would make a foreigner's interest and the protection of a foreigner's family and private life an absolute priority over the protection of national security or public order, and therefore that would make it possible for a foreigner to stay legally in Poland in spite of posing a threat.

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 protection of the child's interest in immigration cases in which a threat to national security or public order is raised is significantly limited. Assurance of the rights of the child cannot be pursued without taking into consideration the rights and obligations of the child's parents and must follow legal regulations applicable in the host country.

An example of taking the child's interest into account is a possibility of extending the deadline for a voluntary return of a parent who takes care of the child to allow the child to complete education in a given school year (Article 316 of the Foreigners Act) and issuing a return decision in respect of the entire family (judgment of the Supreme Administrative Court of 25 January 2016, II OSK 1136/16).

A return decision issued for a minor foreigner is enforced, if:

1) the foreigner, in the country where he or she is obliged to return, will be provided with care by his or her parents, other adults or care institutions in accordance with the standards set out in the Convention on the Rights of the Child adopted by the UN General Assembly of 20 November 1989;

2) a return is conducted under a custody of a statutory representative or such a foreigner is transferred to a statutory representative or a representative of competent authorities of the country of return (Article 332 of the Foreigners Act).

National provisions do not provide for the possibility of securing the child's interest by making legal the stay of a foreigner who poses a threat to national security or public order, if such a foreigner is the only legal guardian of the child. The aforementioned circumstances constitute an obstacle in granting a residence permit for humanitarian reasons or a tolerated stay permit.

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?

Irrespective of the fact that in each case specific circumstances of the case must be taken into account (see question 12), due to the extent of social harmfulness of an act and nature of the legal good breached, the commitment by the foreigner of crimes related to terrorism, human smuggling, against children, weapon trade, recidivism, human trafficking or drug trafficking should be treated as posing a threat to national security or public order, and therefore, should justify refusal to grant a temporary or permanent residence permit or a return decision. The above view is also reflected in the jurisprudence of the Supreme Administrative Court, among others in judgment of 17 November 2011, II OSK 553/14 (published at the CBOSA).

However, the commitment of the aforementioned crimes cannot justify the loss of citizenship – see question 9.

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?

The Foreigners Act introduces a separate procedure related to a return obligation in respect of a foreigner. Article 302 of the Foreigners Act specifies positive conditions for issuing a return decision. Articles 303 and 330 of the Foreigners Act specify negative conditions whose occurrence result in refraining from a return decision or, if the decision had been issued, in refraining from its enforcement.

Pursuant to Article 303(1)(2) of the Foreigners Act, a foreigner is not to be required to return, among others, if the foreigner is granted a residence permit for humanitarian reasons or a tolerated stay permit or if there are reasons for granting such permits. This means that in any case related to a return obligation, the authority is required to examine whether a foreigner may be granted a residence permit for humanitarian reasons or a tolerated stay permit.

A residence permit for humanitarian reasons may be granted (Article 348 of the Foreigners Act) if a return obligation:

1) can be made solely to the state in which within the meaning of the ECHR:
a) his/her right to life, freedom and personal security might be threatened, or
b) he/she could be subject to torture or inhumane or degrading treatment or punishment, or
c) he/she could be subject to forced labour, or
d) he/she could be deprived of the right to a fair trial or be punished without a legal basis, or
2) would violate his/her right to family or private life within the meaning of the ECHR, or
3) would violate the rights of the child, as defined in the Convention on the Rights of the Child, adopted by the General Assembly of the United Nations on 20 November 1989, to the extent that may represent a serious threat to his/her psychophysical development.

Such a permit is not granted if a foreigner committed a crime against peace, war crime or crime against humanity, within the meaning of international law, or is guilty of actions contradictory with the objectives and rules of the United Nations specified in the Preamble and Articles 1 and 2 of the UN Charter, or if a foreigner committed a serious crime within the territory of the Republic of Poland, or committed an act, outside the territory, which constitutes a serious crime according to Polish law or poses a threat to defence or national security or the protection of public order and safety, or if a foreigner incited or was otherwise involved in perpetration of a serious crime or acts specified in Article 348(1–3) of the Foreigners Act (Article 349 of the Foreigners Act). A foreigner who, prior to entering the territory of Poland, committed another aforementioned act that is subject to imprisonment under Polish law, may be refused a residence permit for humanitarian reasons if such a foreigner left his country of origin exclusively for the purpose of avoiding punishment.

Conditions of granting a tolerated stay permit are shaped in a very similar manner to a permit for humanitarian reasons (Article 351 of the Foreigners Act).

Article 352 of the Foreigners Act stipulates that a tolerated stay permit is refused to a foreigner in cases referred to in Article 351(2) or (3) of the Foreigners Act, if the foreigner's stay within the territory of Poland may pose a threat to defence or national security or the protection of public order and safety.

Therefore, the Foreigners Act specifies that if conditions set forth in the Convention of 1951 regarding the granting of a residence permit for humanitarian reasons are satisfied, and

at the same time there are reasons for refraining from granting the same permit due to circumstances provided for in Article 349 of the Foreigners Act, including a threat to security and public order, there is a possibility of granting a tolerated stay permit. This means that it is necessary to consider such circumstances as the behaviour of a foreigner, social interest and actual situation in the country of origin.

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 the judgment of 8 April 2009, Case II OSK 624/08 (published at the CBOSA) in the matter of withdrawal of a settlement permit in respect of the complainant (who entered into marriage with a citizen of Poland) and specifying the deadline for leaving the territory of the Republic of Poland, the Supreme Administrative Court, when revoking the appealed decision, referred to the rule of proportionality and stated that for the purpose of issuing a correct decision it is necessary to assess personal and family circumstances of a foreigner as it cannot be assumed *a priori* that circumstances considered by a criminal court that decided about punishment, which were arguments for a negative prospect for the complainant's behaviour, are not different and that on the date of issuing a decision related to the withdrawal of a settlement permit in respect of the complainant there are still concerns that the complainant poses a threat to public order and safety. The Supreme Administrative Court decided that it was a mistake to leave out the assessment of the complainant in the period after a crime was committed and ignore the fact that a relatively short period of marriage with a Polish citizen was preceded by a long-term informal relationship.

In Case II OSK 1140/09 (judgment of 26 November 2009 published at the CBOSA), authorities and the first-instance court decided that the complainant's stay constitutes a breach of public order and safety, and the authority decided not to provide the statement of grounds to the decision due to an existing threat and information included in the case file that was classified as "restricted" and "confidential". The foreigner argued in his application for a residence permit that it is his intention to stay with his wife and daughter who were Polish citizens. Quoting Article 8 of the ECHR and the jurisprudence of the European Court of Human Rights (Al-Nashif v. Bulgaria, Application No. 50963/99; Boultif v. Switzerland, Application No. 54273/00) decided that it was necessary to explain whether the foreigner has a family life in Poland within the meaning of the ECHR. The Supreme Administrative Court assumed that for the purpose of the case it was necessary to assess whether public administration authorities established findings related to: the complainant's private life; the nature of relationship between the complainant and his wife and child suggesting the existence of a real family life; barriers related to carrying out a family life outside Poland; whether or not a necessary balance was preserved in the assessment of contradiction between the interest of the complainant himself and the interest of national security.

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?

The contradictions between the protection under Article 4 of the EU Charter of Fundamental Rights and threats to national security and public order were partially described in question 16. They consist in that a foreigner may be granted a tolerated stay permit, even if

such a foreigner poses a threat to public order and safety, if otherwise such a foreigner would be removed to a country in which, within the meaning of the ECHR:

a) his/her right to life, freedom and personal security might be threatened, or
b) he/she could be subject to torture or inhumane or degrading treatment or punishment, or
c) he/she could be subject to forced labour, or
d) he/she could be deprived of the right to a fair trial or be punished without a legal basis;

If such a permit is granted, a return decision cannot be issued.

The jurisprudence does not cover any example of issuing such a permit.

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?

A statement of reason is an obligatory element of any administrative decision (Article 107(3) of the Code of Administrative Proceedings), but the law-maker introduced exceptions to this obligation, both in the Code of Administrative Proceedings and in separate acts.

One of such exceptions is provided for in Article 3c of the Act of 24 March 1920 on the Acquisition of Real Estate by Foreigners (Journal of Laws of 2016, item 1060): the authority issuing a decision or order within proceedings conducted under the provisions of the Act may decide not to provide a factual justification if this is required by defence or national security.

Article 6(1) of the Foreigners Act stipulates that the authority issuing a decision or order within proceedings conducted under the provisions of the Foreigners Act may decide not to provide a statement of reasons in its part related to factual reasons, if this is required by defence or national security or the protection of public order and safety. A statement of reasons cannot be omitted in its part related to recognition of the Polish origin of a foreigner (Article 6(2) of the Foreigners Act).

A voivodship governor and a minister responsible for internal affairs may also refrain from justifying decisions issued under the Act, if this is required by defence or national security or the protection of public order and safety (Article 11 of the Polish Citizenship Act).

Statements of reasons to decisions, in their part related to factual grounds, are not drafted when the issues of defence, national security and public order arise from classified evidence.

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?

Any documents and evidence, apart from classified ones, may be accessed equally by parties to proceedings, their attorneys and adjudicating judges. Restrictions in this regard exist only with respect to classified documents.

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?

Any evidence that is to support the existence of a threat to national security and public order is available to: 1) judges,
2) public administration bodies, 3) attorneys of the parties;

An exception to this rule is the exclusion of classified documents' availability.

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?

Each judge has access to classified information without separate certificates and vetting procedure (Article 34(10)(11) of the Act of 5 August 2010 on the Protection of Classified Information, hereinafter referred to as the Classified Information Act). Before the Act entered into force, judges were subject to a vetting procedure, which sparked controversies. Doubts were dispersed by the resolution of 7 judges of the Supreme Court of 28 September 2000, Case III ZP 21/00, OSNP 2001, No. 2 item 30 (available at the CBOSA: http://orzeczenia.nsa.gov.pl).

Before proceeding to their duties, a judge is required to become acquainted with the provisions on the protection of classified information and make a statement confirming the acknowledgement of such provisions. A judge is also required to respect such provisions, which arises from Article 85(1) of the Act of 27 July 2001 on the System of Common Courts (Journal of Laws of 2015, item 133), which, pursuant to Article 29 of the Act of 25 July 2002 – Law on the System of Administrative Courts (Journal of Laws of 2016, item 1066 – Law on the System of Administrative Courts) is applied accordingly to administrative court judges. Classified information may be made available to a judge only to the extent indispensable for the purpose of executing the judicial office, function or tasks entrusted. An obligation to keep such information confidential is binding also after such a judge retires or is retired. In the case of judges of the Supreme Administrative Court, analogical rights arise from Article 49 of the Law on the System of Administrative Courts in conjunction with Article 8 and 35(4) of the Act of 23 November 2002 on the Supreme Court (Journal of Laws of 2013, item 499 as amended).

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 counselor (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.

If the issue of national security and public order is proven by evidence categorised as classified information, access of the parties to the proceedings to such evidence may be limited. Article 74(1) of the Code of Administrative Proceedings indicates that reviewing

administrative acts and obtaining copies of documents included therein may be limited in cases referring to classified information categorised as "secret" or "top secret". In other cases including "confidential" or "restricted" clauses, a public administration authority may exclude the possibility of access (to documents covered by such clauses) due to a significant state interest.

Any such documents may be made available exclusively to a person who provides a guarantee of keeping information confidential and only to the extent indispensable for the purpose of performing their work or serving their office within the position occupied or tasks entrusted. Therefore, as a rule, a party to administrative proceedings is unequal in its procedural circumstances to a public administration authority. The Classified Information Act provides for the possibility of making classified information available to a person who provides a guarantee to keep the information confidential to the extent indispensable for the purpose of performing their work or tasks entrusted and the provisions apply equally to the attorneys of parties. An attorney may access documents categorised as classified after making themselves subject to a vetting procedure specified in the Classified Information Act. The Classified Information Act specifies that depending on the position or the tasks entrusted as applied for by a person, a regular vetting procedure or an extended vetting procedure is conducted (Article 22 of the Classified Information Act).

A regular vetting procedure is conducted with respect to persons who apply for access to classified information categorised as "confidential". An extended vetting procedure is conducted with respect to people who apply for access to information categorised as "secret" or "top secret". A vetting procedure is to be establish whether a person subject to the procedure provides a guarantee to keep information confidential.

During the procedure, an authority checks whether there are any reasonable doubts concerning circumstances such as: 1) participation, cooperation or endorsement by a person under verification any spying, terrorist, sabotage activities or other activities against Poland; 2) threat in respect of a person under verification from foreign secret services consisting in recruitment attempts or contact attempts; 3) respecting the constitutional order of the Republic of Poland, and first and foremost, whether a person under verification participated or participates in any activities of political parties or other organisations referred to in Article 13 of the Constitution of the Republic of Poland or cooperated or cooperates with such parties or organisations; 4) hiding information or providing, intentionally and illegally, false information significant for the protection of classified information in a personal security survey or in the vetting procedure by a person under verification; 5) circumstances causing vulnerability of a person under verification to blackmailing or pressure; 6) inappropriate handling of classified information, if: this resulted in direct disclosure of such information to unauthorised persons; was intentional; caused a real threat of unauthorised disclosure and was not of incidental character; caused by a person covered by particular requirements under the Classified Information Act: a security representative, a deputy of a security representative or the head of a secret office.

Within the extended vetting procedure, it is also established whether there are any doubts concerning: 1) the quality of life of the person under verification that seems to exceed the income obtained; 2) information about psychological disorder or any other disturbances of psychological activities that could limit mental capacity and may negatively affect the person under verification's capacity of performing their work related to access to classified information; 3) dependence on alcohol, narcotic drugs or psychotropic substances (Article 24(2) and (3) of the Classified Information Act).

The vetting procedure is ended with the issuing of a security clearance (in a form of an administrative decision), refusal to issue such a clearance or discontinuation of the proceedings.

A security clearance authorises a person who obtained it to access classified information with a clause level specified on the clearance or the lowest existing level.

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).

A refusal to provide a party access to a case file, including access to documents categorised as classified, has a form of an order that may be appealed against (Article 74(2) of the Code of Administrative Proceedings). If means of administrative proceedings are exhausted, a party may appeal to a voivodship administrative court, and if the result is not satisfactory to the party, it may file a cessation appeal.

The reasons for refusal to provide access to the case file depend on the categorisation of documents (Article 5(1)–(3) of the Classified Information Act).

Classified information is categorised as "top secret" if unauthorised disclosure thereof causes an extraordinarily serious harm to the Republic of Poland in such a manner that it:

1) will threaten the independence, sovereignty or territorial integrity of the Republic of Poland;
2) will threaten internal security or constitutional order of the Republic of Poland;
3) will threaten allies or international position of the Republic of Poland;
4) will weaken the defence preparedness of the Republic of Poland;
5) will lead or may lead to identification of functionaries, soldiers or employees of services responsible for intelligence or counter-intelligence activities who are involved in operational and exploratory activities, if this will threaten the safety of activities performed or may lead to identification of persons assisting them in this regard;
6) will threaten or may threaten life or health of officers, soldiers or employees who are involved in operational and exploratory activities or persons assisting them in this regard;
7) will threaten or may threaten life or health of protected witnesses or their closest relatives, persons covered by protection and assistance measures under the Act of 28 November 2014 on the Protection and Assistance for Injured Parties and Witnesses (Journal of Laws of 2015, item 21) or witnesses referred to in Article 184 of the Act of 6 June 1997 – Code of Criminal Procedure or their closest relatives.

Classified information is categorised as "secret" if unauthorised disclosure thereof causes a serious harm to the Republic of Poland in such a manner that it:

1) renders the tasks related to the protection of the Republic of Poland's sovereignty or constitutional order impossible;
2) worsens the relations between the Republic of Poland and other states or international organisations;
3) disturbs the defence preparation of the state or the functioning of the Polish Armed Forces;
4) hinders the operational and exploratory activities aimed at ensuring national security or prosecuting crime perpetrators by competent services or institutions;
5) otherwise disturbs the functioning of law enforcement authorities and the judiciary;
6) results in a significant loss in economic interest of the Republic of Poland.

Classified information is categorised as "confidential" if unauthorised disclosure thereof causes a harm to the Republic of Poland in such a manner that it:

1) renders the conduct of current foreign policy of the Republic of Poland more difficult;
2) renders the performance of defence undertakings more difficult or negatively affects the defence capacity of the Polish Armed Forces;
3) disturbs public order or threatens the security of citizens;
4) renders the performance of tasks conducted by services or institutions responsible for the protection of security or basic interests of the Republic of Poland more difficult;
5) renders the performance of tasks conducted by services or institutions responsible for the protection of public order, the safety of citizens or prosecution of perpetrators of crimes and tax crimes and judiciary authorities more difficult;
6) threatens the stability of the Republic of Poland's financial system;
7) negatively affects the functioning of national economy.

The "reserved" clause is assigned to information if it is not assigned any higher level of confidentiality, but its unauthorised disclosure may have a negative impact on the performance of tasks in the areas of national defence, foreign policy, public security, compliance with the rights and freedoms of citizens, judiciary or Poland's economic interests by public authorities or other organisational units.

Access to documents categorised as confidential or restricted may be refused only if this is justified by a significant national interest. An administration authority must indicate the existence of the significant national interest in the statement of reasons to the refusing order. When reviewing such an order, an administrative court takes into account that the authority cannot disclose the contents of the documents in the statement of reasons to the order. Therefore, judicial review is very difficult and it is required that the court acquaints itself with the content of the classified documents before assessing whether the decision made by the administration authority was correct (see, among others, judgment of the Supreme Administrative Court of 31 March 2017, II OSK 1914/15 and judgment of 9 September 2016, II OSK 61/15).

In the case of reviewing decisions refusing access to case files in situations in which classified documents were categorised as "secret" and "top secret", an administrative court does not have the same freedom of acting according to its own discretion. The provisions specify that an administrative authority is required to refuse access to such documents to parties to proceedings, unless an attorney of the party possesses an applicable security clearance. Therefore, a condition to disclose the content of such documents is to establish that the last requirement is satisfied.

A judge cannot waive or change the level of confidentiality.

According to Article 12a(2) of the Law on Proceedings before Administrative Courts, case files are accessible to the parties of proceedings who are entitled to review them and obtain true copies, copies or excerpts. No reference is made there (contrary to Article 74(1) of the Code of Administrative Proceedings) to restrictions of access in respect of case files with classified information. This does not mean, however, that when adjudicating in cases in which such documents appear the court is not bound by the provisions of specific acts, here by the provisions of the Act on the Protection of Classified Information. In practice, it is assumed that classified information assigned with a specific level of confidentiality may be made available exclusively to a person authorised under the act to access information of a specific level of confidentiality. The complainant or their attorney are not persons authorised to review the case file categorised as "secret" (unless they possess a respective security clearance), and the judge has no right to disclose such documents (see judgment of the Supreme Administrative Court of 29 June 2016, II OSK 1554/14, published at the CBOSA).

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?

Any evidence gathered by administration authorities and administrative courts are, as a rule, available to all parties of proceedings. An exception to this rule is evidence categorised as classified documents (see question 24).

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?

In immigration and citizenship cases, judgments are public, irrespective of evidence and circumstances taken into consideration by an administration authority and an administrative court in making their decisions.

Restriction of the public nature of the judgment may apply to the statement of reasons to the judgment, if the conclusion is based on information categorised as classified. In this part, the statement of reasons cannot be made available to parties of proceedings, and even more so, to entities who do not enjoy such a status and who do not satisfy criteria allowing them to have access to such files (security clearance).

The Law on Proceedings before Administrative Courts specifies that a voivodship administrative court drafts statements of reasons to judgments *ex officio* (except for cases where the appeal was dismissed, in which the statements of reasons are drafted upon a request filed by a party within 7 days of the date of judgment publication – Article 141(2) of the Law on Proceedings before Administrative Courts). The very fact of analysing circumstances related to the rule of national security and public order is not enough to justify making the statement of reasons secret.

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.

Neither the Law on Proceedings before Administrative Courts, nor the Code of Administrative Proceedings introduces any differences in access to case files and documents for Polish citizens, EU citizens and third country nationals and their families.

Differences in proceedings before administrative court exist only in respect of persons (parties to proceedings) that reside abroad and failed to appoint an agent for service in the country. In such circumstances, the court requests that the agent for service be appointed under the pain of leaving the correspondence in the case file and considering it effectively delivered. Failure to follow the instruction will result in the party's depriving itself of its actual possibilities of participating in the proceedings, including access to the case file.

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)?

There are no legal grounds to treat cases related to the issue of national security and public order in a different manner. Pursuant to § 42 of the internal regulations of the Supreme Administrative Court's functioning, cases in the matter of granting protection to foreigners or return obligations are considered in the order of lodging separate from other cases. An adjudicating judge is not allowed to change the order of hearings. Such rights are enjoyed by the President of the Court (voivodship administrative court and Supreme Administrative Court), who may decide, in response to a justified request of a party, to change the order of cases, including in particular to reschedule an open hearing for an earlier date.

Such cases are treated as priorities by administration authorities. Article 39(1)(5) of the Act on the Protection of Foreigners specifies that the application for international protection is processed in an expedited manner if the applicant poses a threat to national security and public order or was removed from Poland on the same grounds.

Within a normal procedure, the processing of an application for international protection lasts 6 months (Article 34(1) of the Act on the Protection of Foreigners).