



**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”***

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**Answers to questionnaire: Serbia**



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**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

**ANSWERS TO QUESTIONNAIRE  
REPUBLIC OF SERBIA - ADMINISTRATIVE COURT**

**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 in the field of immigration cases encompasses the following laws:**

**Law on foreigners**

**Law on employment of foreigners**

**Law on asylum**

**Law on refugee**

**Criminal Code (Official Gazzete of the RS Nos. 85/04...94/14) defines criminal**

**Offence - Illegal Crossing of State Border and Human Trafficking**

**Article 350**

**114**

**(1) Whoever without a required permission crosses or attempts to cross the border of SaM, under arms or by use of force, shall be punished by imprisonment up to one year.**

**(2) Whoever enables another illegal crossing of the SaM border or illegal so journ or transit through SaM to a person who is not a citizen of SaM with intent to acquire a benefit for himself or another shall be punished by imprisonment of three months to six years.**



**(3) If the offence specified in paragraph 2 of this Article is committed by an organised group, by abuse of authority or in a manner endangering the lives and health of persons whose illicit crossing of the SaM border, sojourn or transit is being facilitated or if a larger number of persons is being smuggled the perpetrator shall be punished by imprisonment from one to ten years.**

**(4) The means intended or used for commission of the offence specified in paragraphs 1 through 3 of this Article shall be impounded.**

**The field of immigration of third-country nationals is defined by the Law on foreigners, Law on employment of foreigners, Law on immigration, Law on asylum and Law on citizenship.**

**When deciding on individual rights, obligation and interests of persons, which submit requests for exercising certain rights, with exception for citizenship, there is two instances procedures prescribed, then right to appeal and then right to submit a lawsuit in the administrative dispute upon which the Administrative court should decide.**

**In citizenship cases there is one instance administrative procedure and then a lawsuit may be brought before the Administrative Court.**

**The Administrative Court is single-instance Court with one Court Seat and three Court Units and against its decision an appeal may not be lodged.**

**A procedure resolved by a final judgment or resolution may be retried in legally stipulated cases upon an appeal, which is extraordinary legal remedy.**

**Law on administrative dispute defines possibility to file an extraordinary legal remedy before the Supreme Cassation Court – Motion to review a court decision, that may be lodged when it is prescribed by law, when the Administrative Court brought its decision in full jurisdiction or when the subject matter of an administrative dispute was decision of administrative authority against which there was not right to appeal in the administrative procedure.**

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.

**Already answered within answer to question no. 1.**

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?

**Please find attached reports per years both for immigration and citizenship cases. As to the cases, in which issues related to national security and to public order have to be considered, the Administrative Court of the Republic of Serbia does not deal with separate registration of mentioned cases, but if there some element of national security appears during the procedure such cases are given priority when listed for hearings.**

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

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

**There are not differences in the judicial procedure, because the procedure is initiating according to the Law on administrative dispute.**

- 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?



**Regarding cases regarding rights of foreigners, their employment and asylum cases if there is some level of secrecy, which relates to confidentiality, in such cases there is an obligation to decide panel of judges consist of judges who have certificates for acting upon such cases on that level of confidentiality.**

- 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*?

**Administrative Court may, in the control of the legality of challenged decision to accept the lawsuit, to annul challenged decision and to return a case to the authorized administrative body to decide again on it or if necessary it can decide again in full jurisdiction to accept the lawsuit, to annul the second instance administrative body decision, to grant the appeal, to annul first instance administrative body decision and to decide this administrative matter itself. Therefore, court decision replaces the decision of administrative body and it is a judicial review *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).

**The last instance Court is Supreme Cassation Court and it may, upon extraordinary legal remedy to review a court decision, and therefore to annul Administrative Court decision to return it to decide it again to modify it or it can reject motion to review a court decision if it is unfounded.**

- 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)?

**Already answered in the answer to question No.1.**



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

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

**There are not differences in the judicial procedure, because the procedure is initiating according to the Law on administrative dispute.**

- 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?

**It involves when on the administrative authority case there is notification of secrecy, upon them may act only judges who have certificate for it.**

- 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*?

**Administrative Court may, in the control of the legality of challenged decision to accept the lawsuit, to annul challenged decision and to return a case to the authorized administrative body to decide again on it or if necessary it can decide again in full jurisdiction to accept the lawsuit, to annul the second instance administrative body decision, to grant the appeal, to annul first instance administrative body decision and to decide this administrative matter itself. Therefore, court decision replaces the decision of administrative body and it is a judicial review *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).



**The last instance Court is Supreme Cassation Court and it may, upon extraordinary legal remedy to review a court decision, and therefore to annul Administrative Court decision to return it to decide it again to modify it or it can reject motion to review a court decision if it is unfounded.**

- 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)?

**Against the Administrative Court decisions no appeal may be lodged. Motion to review a court decision may be lodged before the Supreme Cassation Court in accordance to the conditions as described within answers to question 4 point e.**

**The Supreme Cassation Court decides in closed sessions.**

#### **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.

**Law on public order and peace (Official Gazette RS No. 6/2016) defines the public order and peace as harmonized condition of mutual relations caused by the behaviour on the public place and functioning of bodies and organizations in public life in order to ensure equal conditions for exercising human and minority rights and freedoms of individuals guaranteed by Constitution.**

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?



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;

**Law on foreigners Article 11**

**Denial of entry**

**Article 11**

**Entry into the Republic of Serbia shall be denied to a foreigner if:**

- 1) He/she does not have a valid travel document, or a visa if required;**
- 2) He/she does not have sufficient financial means to sustain him/her during the stay in the Republic of Serbia, to return to his/her country of origin or transit into the third country, and if he/she is not provided with means of livelihood in any other way during his/her stay in the Republic of Serbia;**
- 3) He/she is in transit, but does not meet the requirements to enter the third country;**
- 4) The protective measure of removal or the security measure of banishment is in effect, or if his/her permission to stay is cancelled, and/or other measures recognised in the domestic or international law, which include the prohibition of crossing the state border, are effective; this prohibition shall apply during the period in which the respective measure, or the cancellation of the permission to stay, is in force;**
- 5) He/she does not have the certificate of vaccination or other proof of good health, when arriving from areas affected by an epidemic of infectious diseases;**
- 6) Required so by reasons related to protection of the public order or the safety of the Republic of Serbia and its citizens;**
- 7) He/she is registered as an international felon in the relevant records;**
- 8) There is reasonable doubt that he/she will take advantage of the stay for purposes other than those declared.**

**The denial of entry shall be denoted in the respective foreigner's travel document.**

**The conditions referred to in paragraph 1, items 2), 5), 6) and 7) of this Law shall be prescribed more specifically by the Government.**

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

**the same Article of the Law on foreigners**

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



## Rejection of an application

### Article 39

**Permanent residence shall not be granted to a foreigner:**

- 1) Who fails to fulfil the requirements stipulated in Article 37 hereof;**
- 2) Who has been convicted of a criminal offence for which the perpetrator is prosecuted ex officio or in case that proceedings have been instituted for such an offence;**
- 3) Who does not have any means of subsistence;**
- 4) Who does not have health insurance;**
- 5) Who does not have place of residence;**
- 6) For reasons of safeguarding public order or security of the Republic of Serbia and its citizens.**

**A foreigner who has not been granted permanent residence owing to reasons referred to in paragraph 1, items 3–6 of this Article, shall receive cancellation of temporary residence as well.**

d. to acquire nationality?

### Law on citizenship in Article

**Article 29 defines: Release from citizenship of the Republic of Serbia shall not be granted if that is necessary for the reasons of security or defence of the country, for a reason of reciprocity or when that is requested by economic interests of Serbia.**

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)?

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?

**(Law on citizenship, Article 29)**

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

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

- a. immigration cases;
- b. citizenship cases.

**Not frequently.**

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.

**All conditions that are prescribed.**

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).

## **Article 39 Law on foreigners and Article 40 of the Law on Foreigners**

### **Rejection of an application**

#### **Article 39**

**Permanent residence shall not be granted to a foreigner:**

- 7) Who fails to fulfil the requirements stipulated in Article 37 hereof;**
- 8) Who has been convicted of a criminal offence for which the perpetrator is prosecuted ex officio or in case that proceedings have been instituted for such an offence;**
- 9) Who does not have any means of subsistence;**
- 10) Who does not have health insurance;**
- 11) Who does not have place of residence;**
- 12) For reasons of safeguarding public order or security of the Republic of Serbia and its citizens.**

**A foreigner who has not been granted permanent residence owing to reasons referred to in paragraph 1, items 3–6 of this Article, shall receive cancellation of temporary residence as well.**

### **Cancellation of permanent residence**

#### **Article 40**

**Stay in the Republic of Serbia shall be cancelled to a foreigner who has been granted permanent residence in the Republic of Serbia in the following cases:**

- 1) Under the circumstances referred to in Article 39, paragraph 1, items 3–5 hereof;**
- 2) Upon release from prison, if he/she has received the final unconditional sentence to imprisonment of more than six months for a criminal offence for which perpetrators are prosecuted ex officio;**
- 3) If the protective measure of removal or security measure of banishment has been imposed on him/her;**
- 4) If this is required for reasons of safeguarding public order or security of the Republic of Serbia and its citizens;**
- 5) If he/she has provided false data regarding his/her identity or has concealed circumstances relevant to issuing the permit.**

**Cancellation of stay shall be subject to the provisions of Article 35, paragraphs 2 and 3 hereof, as appropriate.**



**As an exception, time limit within which the foreigner referred to in paragraph 1 of this Article is obliged to leave the Republic of Serbia may be extended, out of humanitarian reasons, for up to six months.**

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.

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?

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, they may lead to the mentioned situations.**

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?

**Law on foreigners, Particle 11 paragraph 1 points 4), 6) i 7).**



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.

**We have no examples in our Case Law.**

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?

**Administrative Court decision No. 6304/16, please find attached an anonymized decision.**

### **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?

**Yes.**

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?

**If a decision contains part of documents which has high level of secrecy, the mentioned persons may not access these files, but only judges from the chamber with relevant certificates.**

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;

**only to judge who have a certificate.**

b. a party to the procedure;

c. a counsellor (lawyer) representing a party?



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?

**Data Secrecy Law defines it in Article 38:**

**Access to classified data without security clearance and special powers and duties**

**Article 38**

**State authorities appointed by the National Assembly, heads of state authorities appointed by the National Assembly, judges of the Constitutional Court and judges, shall be authorised to access data of all levels of classification that they need in order to perform tasks in their purview, without security clearance.**

**Exceptionally, the persons from paragraph 1 of this Article shall have the right to access classified data marked as “TOP SECRET” and “SECRET”, with prior security clearance from Article 53 items 2) and 3) of this Law, should it be necessary to perform tasks in their purview, if such data are related to:**

- 1) acts of preventing, discovering, investigating and prosecuting criminal offences, implemented by competent state authorities until the completion of investigation or prosecution;**
- 2) manner of applying special procedures and measures in obtaining security and intelligence information in the given case;**
- 3) members of the ministry of internal affairs and security services, who have secret identity, as long as it is necessary to protect the vital interests of these persons or members of their families (their life, health and physical integrity);**
- 4) identity of the present and former associates of security services or third parties, as long as it is necessary to protect the vital interests of these persons or members of their families (life, health and physical integrity).**

**Persons who have access to classified data under this Law in any proceedings that they are conducting and otherwise, shall be authorised and bound to protect in every meaningful way and from everyone, classified data of which they learned, and to personally access the classified data from paragraph 2 of this Article.**

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.

**There are no cases in our Case Law.**

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 confidentiality on grounds of its classified character (state secrecy or similar).

**There are no cases in our Case Law.**

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?

**There are no cases in our Case Law.**

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?

**Law on administrative dispute in Article 35 paragraph 2 defines that panel of judges may decide to exclude public hearing or part of it if there are reasons for the protection of national security, public order as well as to protect the interests of minors or the privacy of participants in the proceedings.**

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.

**In our legal system there are no differences and the same standards are applicable.**

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)?

**The priority depends on the level of secrecy and kinds of dispute.**

**Data Secrecy Law defines it in Article 38.**

**State authorities appointed by the National Assembly, heads of state authorities appointed by the National Assembly, judges of the Constitutional Court and judges, shall be authorised to access data of all levels of classification that they need in order to perform tasks in their purview, without security clearance.**

**Exceptionally, the persons from paragraph 1 of this Article shall have the right to access classified data marked as “TOP SECRET” and “SECRET”, with prior security clearance from Article 53 items 2) and 3) of this Law, should it be necessary to perform tasks in their purview, if such data are related to:**

- 5) acts of preventing, discovering, investigating and prosecuting criminal offences, implemented by competent state authorities until the completion of investigation or prosecution;**
- 6) manner of applying special procedures and measures in obtaining security and intelligence information in the given case;**
- 7) members of the ministry of internal affairs and security services, who have secret identity, as long as it is necessary to protect the vital interests of these persons or members of their families (their life, health and physical integrity);**
- 8) identity of the present and former associates of security services or third parties, as long as it is necessary to protect the vital interests of these persons or members of their families (life, health and physical integrity).**

**Persons who have access to classified data under this Law in any proceedings that they are conducting and otherwise, shall be authorised and bound to protect in every meaningful way and from everyone, classified data of which they learned, and to personally access the classified data from paragraph 2 of this Article.**

