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

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Answers to questionnaire: Spain

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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

SPAIN

I. Introduction.

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

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

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

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

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

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

II. Questions

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

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

The Spanish legal framework in line with the immigration of third-country nationals, regulating, within a general scope, issues concerning national security matters as well as public order affairs, is enshrined within: *Organic Law 4/2000*, of 11 January, with respect to the rights and freedoms of foreign nationals living in Spain and their social integration (https://www.boe.es/buscar/act.php?id=BOE-A-2000-544). Royal Decree 557/2011 of April 20th, approves the Regulation of Organic Law 4/2000, on the rights and freedoms of foreigners in Spain and their social integration, after its reform by Organic Law 2 2009 (https://www.boe.es/buscar/act.php?id=BOE-A-2011-7703).

With reference to the judicial organization of the courts responsible for immigration cases, in Spain the courts and tribunals competent to decide on these matters are those dealing with general administrative litigation within the existing jurisdiction in Spain, in accordance with what is provided in Articles 6 to 14 of Law 29/1998, of July 13th, regulating the Contentious-Administrative Jurisdiction

(https://www.boe.es/buscar/act.php?id=BOE-A-1998-16718&p=20160422&tn=2) .

Thus, in general: it corresponds to the Contentious-Administrative Courts the knowledge in the first instance of "all the decisions that are issued in matters of foreigners by the Peripheral Administration of the State or by the competent authorities of the Autonomous Communities, (Article 8.4 of the aforementioned Law 29/1998) are decided by the Litigation and Administrative Chambers of the Superior Courts of Justice"(...) in the second instance, those appeals filed against judgments and orders issued by the Litigation-administrative Courts of Justice (...) "(Article 10.2 of the aforementioned Law 29/1998). When the administrative decision has been issued by the diplomatic mission or consular office of Spain abroad it is up to the Contentious-Administrative Chamber of the High Court of Justice to hear in a single instance the contentious-administrative appeal filed (Article 10.1.m) of mentioned Law 29/1998). On the other hand, according to article 55.2 of Organic Law 4/2000, of January 11th:

"In cases of alleged participation in activities that are contrary to national security or which may harm Spain's relations with other countries, purposes contemplated in Article 54(1)(a), in accordance with what is established in the sanctioning procedure to be determined by regulation, sanction shall correspond to the Secretary of State for Security". These cases shall be heard in a single instance by the Contentious-Administrative Chamber of the Audiencia Nacional of the contentious-administrative, once an appeal is filed (Article 11.1.a) of the mentioned Law 29/1998. Judgments handed down in a single instance or on appeal by the Contentious-Administrative Chamber of the Audiencia Nacional and by the Contentious-Administrative Courts of the Superior Courts of Justice, are subject to appeal before the Contentious- Administrative court of the Supreme Court. In those cases provided for in arts. 86 and 87 of Law 29/1998, aiming for the Admission Section of the Contentious-Administrative Chamber of the Supreme Court agrees to give access for the appeal in question, when it has been assessed that the appeal it extends the scope for appeal to virtually all disputes and so contributes objectively to the creation of case-law.

There is always an **administrative procedure prior to the judicial process**.

Aside to the contentious-administrative courts and tribunals, yet not included among the bodies that are members of the judiciary, there is the **Constitutional Court**, supreme interpreter of the Constitution and with jurisdiction throughout the Spanish territory.

Given its sphere of competence, its resolutions may affect decisions affecting the concerned case (https://www.boe.es/buscar/act.php?id=BOE-A-1979-23709).

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

The **Spanish legal framework** on nationality issues is outlined in general terms in the Spanish Civil Code, within articles 17 to 28. One of the possible ways to acquire Spanish nationality is by residence in Spain (regulated in Articles 21, paragraphs 2, 3 , 4 and 22 of the Civil Code) by means of a concession granted by the Minister of Justice, which may deny it for reasons of public order or national interest. (Article 21.2 of the Civil Code).
https://boe.es/buscar/act.php?id=BOE-A-1889-4763&p=20151006&tn=1#tprimero

As regards the judicial organization, the jurisdiction to hear appeals against a decision denying the granting of Spanish citizenship by residence (among other reasons, for reasons of public order or national interest) corresponds to the Contentious-Administrative Chamber Of the National Court, in a single instance (article 11.1.a) of Law 29/1998). Their judgments (dictated in a single instance, as is the case, or on appeal) may be appealed before the Administrative Court of the Supreme Court, in the cases provided for in arts. 86 and 87 of Law 29/1998, provided that the Admission Section of the Contentious-Administrative Chamber of the Supreme Court agrees to introduce the appeal in question, when assessing that it has an objective interest rate for the creation of case law.
https://www.boe.es/buscar/act.php?id=BOE-A-1998-16718&p=20160422&tn=1#a6

There is always an **administrative procedure prior to the judicial process**.

Aside to the contentious-administrative courts and tribunals, yet not included among the bodies that are members of the judiciary, there is the **Constitutional Court**, supreme interpreter of the Constitution and with jurisdiction throughout the Spanish territory. Given its sphere of competence, its resolutions may affect decisions affecting the concerned case (https://www.boe.es/buscar/act.php?id=BOE-A-1979-23709).

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?

Taking note of the data provided by the General Council of the Judiciary, "Detailed report of Justice Data given by Year 2015" (since the data for 2016 are still pending): it was 1031 the number of **foreign affairs** entered in the **Administrative Litigation Chambers of the Superior Courts of Justice in 2015** while the number of foreign affairs entered in the **Contentious-Administrative Courts in 2015** was 22.177. The information available does not provide information on whether these matters affect only third-country nationals or also nationals of the UE or the distinction on which percentage issues of public order or national security were decisive, perhaps because they do not receive a separate registration, nor do they receive priority either in their processing or in their indication. The number of **nationality cases entered in the Contentious-Administrative Chamber of the National Court** can not be found, since the statistics published by the General Council of the Judiciary do not refer specifically to this matter. And, taking into account the data used in the internal application of Minerva, **the number of cases entered in the Contentious-administrative Chamber of the Supreme Court in matters of foreigners (and nationality) in 2015 was 551 and in the year 2016 was 457.**

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)?

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)?

The answer to questions 4 and 5 is a joint response, since in Spain the differences of proceedings of the judicial procedure in first or single instance are not determined in terms of alien affairs or nationality questions. Thus, **the general rule for the initiation of judicial proceedings dealing on first instance or deciding in single instance** (we have already seen that the Litigation and Administrative Chambers of the Superior Courts of Justice adopt their decisions in a single instance when dealing with alien citizens issues and that Litigation-Administrative Chamber of the National Court (Audiencia Nacional) dictates in a single instance denegatory resolutions banning the grant of Spanish citizenship in a regular **ordinary procedure** (articles 43 to 77 of Law 29/1998, of July 13, regulating the Contentious Administrative Jurisdiction). On the other hand, **the Contentious-Administrative Courts decide in the first instance on matters within their competence that are raised by aliens by the abbreviated procedure** (article 78 of Law 29/1998).

Briefly, the scheme that follows depicts each of these procedures:

Ordinary procedure (eminently written): act of interposition (usually a "written application to initiate proceedings") - examination of the formal correction of the act of interposition and rectification, where appropriate - publication of the notice of interposition, request for the Administration to create an Administrative file and to summon the interested parties - in their case, a writ of inadmissibility *in limine litis* of the appeal - demand and response -evidences - if applicable, written opinion or conclusions - judgment or other form of termination of the procedure (withdrawal, acquiescence, recognition by the sued administration of the applicant's claims or agreement between the parties).

Abbreviated procedure (mainly oral proceedings): demand (written) - if admitted, transfer to the defendant, summons to a court hearing and request to the Administration for the remission of the administrative file - usually seen, with examination of evidences, if pertinent.

Next, we will **answer the questions listed under (a) through (e) in questions 4 and 5 in a joint response:**

a) **There are no differences** in the initiation of proceedings of the corresponding judicial procedure (as described briefly above) due to the fact that the issued administrative decision challenged versed in immigration / nationality

b) **There are also no differences** in the proceedings of the corresponding judicial procedure by the mere fact that the elements of public order or national security are involved. Although there is a legal provision that, by reasoned resolution of the court, based on exceptional circumstances, preference may be given to the hearings in certain matters, which, being conclusive, may be preceded by the others whose date had not yet been designated. (Article 63.1 of Law 29/1998, of July 13th, regulating the Contentious-Administrative Jurisdiction).

c) Synthetically, **the elements that characterize the contentious-administrative jurisdiction in Spain are the following**: 1) it exercices control over the activity of the Administration (previous budget of the contentious-administrative process); (2) the contentious-administrative courts supervise the administrative activity from the parameter of legality, reason why article 71.2 of Law 29/1998 provides that: "The courts can not determine how to draft the principles of general provision replacing those which annul or can not determine the discretionary content of acts annulled. "; (3) nevertheless, such supervisory work is carried out in a plenary session, that is to say, that the judicial pronouncement is not merely an annulment of administrative action, since the applicant's claim does not have to be limited to requiring the annulment of the act or illegal provision and can be extended to the "recognition of an individualized legal situation and the adoption of appropriate measures for the full restoration of it", ex Article 31.2 of Law 29/1998, if such legal situation enjoys normative support; And 4) the contentious process is subject to the operative principle, although the court may introduce new elements in the process, but submitting them before the parties (articles 33.2 and 3 of Law 29/1998). In short, the Contentious-Administrative Court or Court that decides in the first or single instance of the appeals filed in matters of alienation or nationality may annul the contested administrative decision and declare the right of the claimant to be granted a certain situation with a legal basis. In principle, the effects of this statement are ex nunc; But if the nullity of the administrative resolution is full, the effects are ex tunc.

d) In the case of Spain, the final judicial instance is constituted by the Supreme Court, one of whose Chambers - the Third - is competent in contentious-administrative matters. It decides in a single instance some directly placed before the Court action appeals, appeals in cassation, and corresponding complaint proceedings and motions for review of final judgments issued by the Litigation-administrative Courts of the Superior Courts of Justice, the National Court and of the Supreme Court. In the case of the contentious-administrative appeal, the existing legal regulation has received an important modification under Organic Law 7/2015, of July 21st, and is currently regulated in articles 86 to 93 of Law 29/1998 (Whose entry into force occurred on July 22nd, 2016). We have already seen, in answering questions 1 and 2, that, with respect to the matters now concerned with immigration and nationality, the judgments and orders handed down by the Litigation-Administrative Chambers of the Superior Courts of Justice, that the judgments and orders handed down in a single instance by the **Contentious-Administrative Chamber of the Audiencia Nacional,** are subject **to appeal to the Contentious-Administrative Chamber of the Supreme Court**, in the cases provided for in Arts. 86 and 87 of Law 29/1998, provided that the Admissions Section of the Contentious-Administrative Chamber of the Supreme Court, invoking a specific violation of the legal system, whether procedural or substantive, or by virtue of jurisprudence, agrees to admit it. To process the cassation appeal in question, **it must have an objective cassational interest for the creation of case-law, as this is the cornerstone of the current regulation when assessing the admission of an contentious-administrative appeal in Spain.** As a proof of this, the *writ of admission* of the appeal will specify the question or issues in which it is understood that there is objective interest and identify the legal norm or rules that will be interpreted in principle, without prejudice to the judgment to be extended to others if required by the debate finally settled in the appeal (Article 90.4 of Law 29/1998), and the decision delivered in the sentence, if the Court would hand out one ""Shall determine the interpretation of those **State rules** or those established or clear in those of the European Union on which, in the writ of admission to proceedings, the pronouncement of the Supreme Court was considered necessary. And, in accordance with it and the other applicable rules, **it will resolve the issues and claims deduced in the process,**

canceling the judgment or order under appeal, in whole or in part, or confirming them. It may also, when its necessity is justified, **order the retroaction of actions** to a certain moment of the procedure of instance to follow the course ordered by law until its completion. [...] In the resolution of the specific legal dispute that is the subject of the proceedings, the Supreme Court may include in the facts admitted as proven by the Board of Appeal those that, omitted by it, are sufficiently justified according to the proceedings and which are necessary to assess the alleged infringement of the rules of law or case-law, including misuse of powers. [...] '(Article 93 of Law 29/1998).

e) **Legitimally entitled to lodge an appeal before the Contentious-Administrative Chamber of the Supreme Court are "**those who were parties to the proceedings, or should have been." (Article 93 of Law 29/1998).

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.

There is no legal definition of terms such as "public order" or "national security" in matters of alienation or nationality. The case-law of the Supreme Court has been pronounced in relation to such concepts.

Thus, in cassation appeals in which the administrative decision initially challenged before the National Court consisted in a denial of the application for acquisition of Spanish citizenship by residence "for reasons of public policy or national interest" (presumed case, as we have already seen in response to question 2, article 21.2 of the Civil Code), the Supreme Court has repeatedly pointed out that it is not a responsability of the Administration to provide exhaustive details on the activities of the Security Forces that may compromise the outcome of investigations in progress, but merely to provide a minimum of data on the reasons for the decision, in order to enable the appellant to articulate his/her defense against them, and allow the Court toverify and conform to the legality and rationality that must guide the exercise of administrative powers; In addition, this case law considered that, for the purposes concerned,

the invocation of the "reserved" nature of the CNI's reports was not admissible under Law 13/1968 of April 5th, Official Secrets. In this sense, judgments of July 4th, 2012, RC 5251/2009, of October 17th, 2011, RC 4776/2009, and of May 26th, 2014, RC 4736/2011; As well as judgments of June 20th, 2011, RC 4517/2008 and of October 24th, 2011, RC 5257/2009, although in these last two cases it was found that the Administration did provide such minimum data on the determinant reasons for their decision, which had allowed the appellant to articulate his/herdefense against them. Likewise, the judgment of 3rd June 2016, RC 149/2015, considered, in the case examined by it, that the two reports in the file did offer this minimum and essential concretion to consider justified the administrative decision appealed, "given the nature of the investigations - prevention of jihadist terrorism - it is unlikely that such reports would be required to provide ampliatory or more specific information that would not compromise anti-terrorist action."

In an act of expulsion agreed by the Secretary of State for Security after the the Commission observed a very serious infraction involving participation in activities contrary to national security or detrimental for Spain's relations with other countries (provided for in Article 54 (1) (a) of Organic Law 4/2000, dated 11th January, the Supreme Court found that: "The Court conducted the survey of the contested judgment, and appreciated the existence of sufficient evidence to charge the presumption of innocence (FD 6º), between them, the report denounces the works completed in the criminal case (...), followed in the Central Court of Instruction No. 1 of the National Court, the arrest warrant, the tax report and the provisional dismissal order. From this evidence, the Chamber of Appeal considered that sufficient evidence had been provided in the file to assess the existence of conduct in the appellant, which appears incardinated within a group of jihadist ideology, which by its very nature may be extremely serious for national security, as it is conducted and directed at the indoctrination and recruitment of people in the realm of an ideology being involved in the generation of violent acts of well-known terrorist character. They were getting to move to Algeria for integratedly reunite the organization, an objective that was not consummated, returning to Spain, where the defendant continued his radical activity through Facebook where he expressed his desire to become a martyr for the cause (global jihad). The judgment under appeal does not allow the presumption of innocence to be considered for being breached, after the results of the investigation, and the Court reasonably and consistently concluded that there was sufficient

evidence to assess the conduct that led to the expulsion agreement from the national territory. "(Judgment of November 8, 2016, RC 164/2016).

In the area of asylum, the Supreme Court ruling of May 30th, 2014, RC 3511/2013, dealt with a case of revocation of asylum granted to a foreign citizen, because of the declarations and acts of the latter in a strongly critical sense and even offensive towards the Muslim religion and those who profess it. The judgment values and weighs the content, scope and limits of the right to freedom of expression in relation to freedom of religious beliefs, and analyzes the projection that declarations and acts of the interested party may have for the protection and safeguard of interior and exterior security, of the nation and its citizens. A careful review is made of State and European case law in relation to these fundamental rights, and it concluded that "... according to these jurisprudential guidelines, we reject that the decision of the Board of Appeal can be characterized as constituting an unlawful interference in the protected area of the right to freedom of expression, guaranteed by Article 20th of the Constitution, and Article 10th of the European Convention for the Protection of Human Rights and Fundamental Freedoms, since confirmation of the legal validity of the resolution of the Minister of the Interior of 21st December 2012, which revoked refugee status to [...],based on the appreciation that there are good reasons to put an end to the international protection granted, taking into account the significant degree of danger to security activities of the holder of the right of asylum, which have the obligation of the State to preserve the peace, freedom, coexistence and security of its citizens, and to guarantee the juridical assets that underpin the collective life in Democracy. "

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

The question has been partly answered by answering number 6. Perhaps it is not possible to speak of an extension of the meaning of the concepts of "public order" and "national security" in Supreme Court jurisprudence, since they are not defined as such as in the abstract, but must be definied with a different sensitivity when it comes to assessing their

concurrence in the particular case examined and always taking into account the specific circumstances in each case.

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; Sí. El artículo 4.1 del RD 557/2011 establece que: "The entry of a foreigner into Spanish territory shall be conditional on compliance with the following requirements: g) Not to pose a danger to public health, public order, national security or international relations of Spain or other States with which Spain Has an agreement in that sense. "But article 4.2 of RD 557/2011 dictates that" The General Commissioner of Aliens and Borders may authorize the entry into Spain of foreigners who do not meet the requirements established in the previous section when there are exceptional reasons of humanitarian nature, public interest or fulfillment of commitments acquired by Spain. In these cases, a decision will be taken abroad to prove the authorization of entry for any of these causes. "In addition, in the event that an expulsion has already been agreed, and insofar as expulsion entails the prohibition of entry into Spanish territory (usually with a maximum of 5 years), there is a legal provision that "Exceptionally, when the foreigner poses a serious threat to public order, public safety, national security or public health , a period of prohibition of entry of up to ten years may be imposed "(Article 58.2 of Organic Law 4/2000).

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

Article 30.1 of RD 557/2011 states that: "The procedure and conditions for the issue of uniform visas and limited territorial validity shall be governed by European Union law."

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

Article 32 (1) (a) (vi) of Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13th July 2009 establishing a Community Code on Visas, which provides that the Visa if the applicant "is considered to be a threat to public policy, internal security or public health, as defined in Article 2 (19) of the Schengen Borders Code, or for the international relations of one of the Member States Member States, in particular if a description was entered in the national databases of a Member State for reasons of refusal of entry for the same reasons. "

d. to acquire nationality?

Yes. We have already seen in reply to question 2, that Article 21.2 of the Civil Code allows the Minister of Justice to refuse the application for acquisition of Spanish nationality by residence in Spain, for reasons of public order or national interest. There are no exceptions to this rule.

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);

Yes, this is provided for in Article 57.1 of Organic Law 4/2000. However, Article 57 (5) states that "The penalty of expulsion may not be imposed, unless the offense committed is that provided for in Article 54 (1) (a) - to engage in activities contrary to national security or May be detrimental to Spain's relations with other countries, or be involved in activities contrary to public order, which are considered to be very serious in Organic Law 1/1992 of 21 February, on the Protection of Citizen Security - or a repeat offense in the commission , within a period of one year, of an offense of the same nature punishable by expulsion, to aliens who are in the following cases: a) Those born in Spain who have legally resided in the last five years; B) Long-term residents. Before taking a decision on the expulsion of a long-term resident, consideration should be given to the length of time they reside in Spain and the links created, their age, the consequences for the person concerned and the members of their family, and the links With the country to be expelled; C) Those who were Spanish of origin and had lost Spanish nationality; D) Those who are beneficiaries of a permanent incapacity benefit for work as a result of an occupational accident or illness occurring in Spain, as well as those who receive a contributory unemployment benefit or are beneficiaries of a public health care benefit aimed at achieving their insertion or social or work reintegration. Nor can it be imposed or, if applicable, enforce the sanction of expulsion to the spouse of the alien who is in any of the situations indicated above and who has resided legally in Spain for more than two years, or their ascendants and minor children, Or persons with disabilities who are not objectively able to provide for

their own needs due to their health condition, who are in their charge; And section 57 (6) states that "expulsion may not be enforced when it violates the principle of non-refoulement or affects pregnant women when the measure may pose a risk to the mother's gestation or health . "

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

Yes. This is provided for in Article 63 of Organic Law 4/2000 and Articles 234 and 236 of RD 557/2011. No exceptions are foreseen.

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

The expulsion will entail, in any case, the extinction of any authorization to remain legally in Spain, as well as the filing of any procedure that has as its object the authorization to reside or work in Spain of the expelled foreigner. (Article 57.4 of Organic Law 4/2000). Article 57.5 (b) - referred to in subparagraph (a) above - sets out the nuances to be taken into account for long-term residents.

d. the loss of nationality that had been acquired?

Yes, in a way, although the terms of public order or national security are not used. Thus, article 25 of the Civil Code says that "1. The Spaniards who are not of origin shall lose their nationality: b) When they voluntarily enter the service of arms or exercise political office in a foreign State against the express prohibition of the Government. "And article 26.2 of the same text states that:" They may not recover or acquire, as the case may be, Spanish nationality without prior authorization granted by the Government, those who are involved in any of the cases provided for in the preceding article. " No exceptions are foreseen.

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

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

a. immigration cases;

b. citizenship cases.

The most frequent cases seen in the Supreme Court have so far referred to cases of refusal of the application for acquisition of Spanish citizenship by residence "for reasons of public order or national interest." They have already been quoted in answering Question 6. There have not been so many cases recently arrived at the Supreme Court in matters of foreigners, concerning public order and national interest; Perhaps it has influenced in this the existential competence regulation in the matter after the reform operated in the Law 29/1998 by the Organic Law 19/2003, because being the competence of the Contentious-administrative Courts the knowledge in the first instance of "all the resolutions issued in matters of foreigners by the Peripheral Administration of the State or by the competent bodies of the Autonomous Communities ", deciding in the second instance the Chambers of Contentious-Administrative Superior Courts, there was no access to the cassation appeal, which is now possible after the reform in Law 29/1998 by Organic Law 7/2015 (in force on July 22, 2016).

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.

These terms are specifically used in Article 15.5.d) of Royal Decree 240/2007 of 16th February on the entry, free movement and residence in Spain of citizens of the Member States of the European Union and of other States party to the Agreement on the European Economic Area, incorporating into Spanish law Directive 2004/38 / EC of the European Parliament and of the Council of 29th April 2004 on the right of citizens of the Union and their family members To move and reside freely within the territory of the Member States, which is not the subject of this seminar, as indicated in section I.2. However, such terms do not appear in the legal regulation on foreigners and nationality that was outlined when answering questions 1 and 2; The criteria used have been mentioned in answering questions 8 and 9.

In national case-law it is difficult to find criteria as such, although it is possible to identify the appreciation of these elements:

+ In the cases of refusal of the request for acquisition of Spanish nationality by residence "for reasons of public order or national interest" (a foreseen case, as we saw in answering question 2, in Article 21.2 of the Civil Code) and criteria such as "concrete aspect of the applicant's life history" (among others, in judgment of 4th July 2012, appeal cassation 5251/2009), "activities such as the ones appreciated in the case of the appellant here are incompatible with the clause of defense of public order and national interest "-these activities consisted in recording in a report of the CNI that the applicant for nationality had collaborated with the Intelligence Services of his country, having being detected activities of the same that aimed to inform the Moroccan ISs about activities of the Moroccan colony in Spain as well as (Judgment of 20 June 2011, appeal 4517/2008), "the appellant has carried out activities that merit an unfavorable judgment from the perspective of compliance with public order or national interest "- referring to the record of the applicant's membership in a group seeking the imposition of an Islamic State in Tunisia through the use of violence and whose military branch is the Tunisian Combatant group linked to the International Jihad, stating the realization Of activities such as attending a training camp for mujahedeen in Sudan (judgment of 24th October 2011, appeal cassation 5257/2009).

+ In cases of expulsion agreed by the Secretary of State for Security for the appraisal of the commission of a very serious infringement involving participation in activities contrary to national security or that may prejudice the relations of Spain with other countries (provided for in article 54.1 (a) of Organic Law 4/2000, dated 11 January), cited in section 6, the judgment of November 8th, 2016, appeal 164/2016, which could be extracted from the analysis of the "conduct" of the affected, having tried to fully and actively join a jihadist group in Algeria and,after failing, returned to Spain where he continued his radical activity through Facebook where he expressed his desire to become a martyr for the cause. - this analysis was also made in the judgment of 26 October 2015, appeal cassation 1631/2015-

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).

It is not possible to make an aprioristic assessment of the assumptions outlined, having to be to a case-by-case assessment of the concurrent circumstances in each case.

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.

The Constitutional Court of Spain has indicated that it is necessary the weighting of the personal and family circumstances of the appellant (in the case of an expelled agreement with a long-term resident ex Article 57.2 of Organic Law 4 / 2000- "Likewise, the foreigner has been sentenced, within or outside Spain, for intentional conduct constituting in our country an offense punishable by deprivation of liberty for more than one year, unless The criminal record had been canceled. "), Regardless of the specific legal nature of the expulsion measure adopted, taking into account the provisions of Council Directive 2003/109 / EC of 25 November 2003 on the statute Of long-term resident third-country nationals - Article 12 of which obliges the family circumstances to be weighed in any expulsion decision (also, therefore, in which it has no sanctioning nature) - judgment of the Constitutional Court of 28 November 2016 , Appeal of Amparo 201/2016 (FJ 3) and, in the same sense, judgment of January 30th, 2017, Amparo Appeal 1920 / 2015-

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?

This is a casuistry issue, there are some cases in which the Administrative Court of the Supreme Court has ruled on that protection of the child:

The judgment of the Supreme Court of January 10th, 2017, appeal 961/2013 - issued after the ruling by the ECJ in a judgment of 13th September 2016, case C-165/14 (ECJ 2016, 341), in which it was reasoned that, in view of what was declared by the Court of Justice of the Union, Article 31.4 of Organic Law 4/2000 should not apply to the case examined. It prohibited unconditionally granting residence to those who had a criminal record, a provision that had determined the dismissal of the administrative contentious appeal in the previous instance, coinciding with the Spanish High Court with the instance in which, given the circumstances involved, that is, being the parent of two children in his charge, Citizens of the European Union, fully educated and properly cared for by the parent, should have granted the applicant residence authorization for extraordinary As it was in process of cancellation of criminal records, as indeed happened later. In addition, the Supreme Court found that the applicant's children fulfilled the requirements of Article 7 (1) (d) of Directive 2004/38, while denying the father the residence permit he requested would mean leaving the territory of the European Union Their children, citizens of the Union.

The judgment of the Supreme Court of October 2nd, 2015, appeal in cassation 4089/2014. In a case where it was agreed that the Spanish national territory should be returned to a Moroccan national for failure to comply with the ban on entry into Spain and the rest of the European Schengen area after having been expelled, in the light of the appellants' allegations the restitution agreement, and his spouse, of Spanish nationality and, subsequently, the daughter of both, a minor, of Spanish nationality, born in Spain. The Supreme Court, taking into consideration the The Spanish Constitutional Court in Judgment 186/2013 of November 4th on the obligation of ordinary jurisdiction to respect the necessary integrated interpretation of Article 13, in relation to Article 8, both of the ECHR, should verify if it was proportional “given the circumstances of the specific case to adopt the decision of expulsion from the national territory and the sacrifice that leads to family coexistence is proportional to the purpose of this measure, which is no different that the question posed in the case of Article 57.2 LOEx tto ensure public order and public safety, in line with Directive 2001/140 / EC of 28 May, " The court appreciates that in the resolution of the appeal against the presumed dismissal of the request for the ex-officio review of the return order, the personal

and family circumstances of the appellants must be weighed, as well as the sacrifice that the said measure and its prohibition effect entry into Spanish territory meant for the right to family life and the protection of the family and minors, but given the impossibility of weighing the circumstances concurrent, failing to state the reasons that determined the expulsion order of the Spanish territory and prohibition of entry. It partially considers the cassation appeal, ordering the retroaction of the actions to the Administration, so that, after accreditation of the actionss that determined the expulsion previously agreed, resolves the request for an ex officio review of the return order, verifying whether, given the circumstances of the specific case, expulsion from the national territory and prohibition of entry and sacrifice for the family coexistence of the appellants and their minor children, is proportional to the seriousness of the facts and to the purpose that these measures are aimed at.

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;

This question was already answered in question 9.d). If applicable, the procedure for declaring lesivity of acts that can be annulled could be used. (Article 107 of Law 39/2015, of October 1st, of the Common Administrative Procedure of Public Administrations)https://www.boe.es/buscar/act.php?id=BOE-A-2015-10565

b) the denial of a residence permit or issuance of a return decision? Yes, in the theoretical aspect, although it would have to be a casuistic assessment of the concurrent circumstances in each case.

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 main rule in Spanish domestic law on asylum is **Law 12/2009, of October 30th, regulating the right of asylum and subsidiary protection**, which regulates in its articles 8 and 11 the causes of exclusion both from the Right of Asylum and subsidiary protection (substantially in accordance with Articles 8.2 and 11.1 with the provisions of Article 1.F of the 1951 Geneva Convention). For its part, article 37 of the law provides that: "The refusal to process or deny applications for international protection will determine, as appropriate, the return, restitution, expulsion, compulsory departure of Spanish territory or transfer to the territory of the State responsible for examining the application for asylum of the persons who requested it, unless, in accordance with Organic Law 4/2000, dated January 11, and its implementing regulations, any of the following Assumptions: a) That the interested person is eligible to stay in Spain in a situation of stay or residence; B) that their stay or residence in Spain should be authorized for humanitarian reasons, as defined in the regulations in force. "In contrast, revocation of international protection (among other cases, if one of the cases of exclusion of articles 8 and 11) "will entail the immediate application of the regulations in force in matters of immigration and immigration, and, where appropriate, the processing of the corresponding administrative sanctioning file for expulsion from the national territory of the person concerned, in accordance with the provisions of article 57 "of Organic Law 4/2000, of January 11th, and in its development regulations." Although "no revocation or eventual expulsion may determine the sending of the interested parties to a country in which there is danger to their life or their freedom or in which they are exposed to torture or to inhuman or degrading treatment or, where no protection has been provided against the return to the pursuing or risky country. "- Article 44 of Law 12 / 2009

-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 refer to the answer in questions 13 and 14.

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? An example of such tension was reflected in the judgment of the Supreme Court of 5th December 2012, appeal cassation 1723/2012. This was a denial of international protection as it was found that the applicant was a threat to the community (having been convicted in Spain for being a prominent member of a terrorist group, having actively collaborated with the leaders of a training camp Bosnia and Herzegovina). The majority decision of the chamber can be summarized as it was considered correct that the denial of international protection decision did not decide on the principle of non-refoulement, inasmuch as a decision had already been issued expulsion in a procedure for foreigners, Where the application of the same principle had already occurred. However, the judgment had an extensive Private Vote in which it was considered that the processing of a previous expulsion file did not constitute a procedural obstacle or material that prevented the examination of the question raised regarding the recognition of the principle of non-refoulement and concluded, in the case under examination,

that it was appropriate to recognize in the asylum file the implementation of that principle, consisting namely in giving express order that in no case should the expulsion of Spain determine the forced return to Syria.

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?

As it has been foreseen in answering the above questions, the motivation of the administrative decision based on reasons of public order or national security is required. For example, in answering Question 6, we have already seen how the Supreme Court interprets the requirement that the refusal of the request for acquisition of Spanish nationality by residence be made "for reasons of public policy or national interest" ex Article 21.2 of the Civil Code, and, among others, in the judgment of July 4, 2012, RC 5251/2009, where it was also pointed out that: "... a refusal resolution is not founded and justified as the one that is the subject of this process. That must be reasoned according to article 21.2 of the Civil Code, invoking reports that do not appear in its content and can not be assessed by the interested party or be subject to judicial control, preventing the judicial protection that generally guarantees Article 24 the Constitution. [...] ", and with respect to the invocation of different precepts of Law 9/1968, dated April 5th, Official Secrets, maintaining the" reserved "nature of the reports of the CNI and to provide information, even brief or summarized, on the content of those reports, the Council of Ministers should be asked for prior authorization, the Supreme Court replied that "... nothing would prevent the application of the reference authorization". On other occasions, as we have already seen in replying to question 6, the Supreme Court considered that the minimum amount of information on the reasons for its decision had been provided by the Administration or that the reports in the file did provide such minimum report informing on the essential reasonings to consider the administrative decision justified.

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?

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?

Questions 20 and 21: In principle, they all have the same access to the documents that they have in the administrative file, which served to justify the administrative decision based on reasons of public order or national security; Although article 48.6 of Law 29/1998 provides that the documents classified as official secrecy shall be excluded from the file sent to the judicial body, by means of a reasoned decision, and shall be recorded in the index of documents and at the place where the records are located the excluded documents.

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?

According to Law 9/1968, dated April 5th, of Official Secrets, "classified material" will be classified in the categories of secrecy and reserved according to the degree of protection they require; The cancellation of any such qualifications will be arranged by the body that made the respective declaration, usually the Council of Ministers. The refusal to do so may be appealed through a judicial process (denied access by the Council of Ministers, the jurisdiction to hear the appeal in a single instance corresponds to the Administrative Court of the Supreme Court, as occurred, inter alia, in the Appeal Litigation procedure No. 602/1996, terminated by judgment of April 4th, 1997, ordering the Government to cancel the classification as a secret matter).

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.

It is understood as answered in the answers given to questions 6 and 19 to 22; If a party (the foreigner) considers that the administrative decision is not sufficiently reasoned, he/she must go to court (although there is usually always the possibility of a previous administrative review), where, if some info is not included in the administrative file, the documents on which the administrative decision was based shall be claimed by the judge or the court. The State, Autonomous Communities, provinces, local authorities and other entities of public law may not refuse to issue certifications and testimony being requested by the courts or oppose to exhibit the documents they have in their offices and archives, except when the documents required are legally declared as classified or secretive. In this case, a reasoned statement will be addressed to the court. (Article 332.1 of Law 1/2000, of January 7th, on Civil Procedure, which is extrably applicable in contentious-administrative matters)

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).

Answered in questions 22 and 23.

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

We understand to have already answered in the previous questions.

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 the contentious-administrative area, all parties to the proceedings have the same access to documents and evidence in the judicial procedure itself (in the criminal sphere if the possibility is provided for the judge to declare in whole or in part the secrecy of the summary , That is, of the investigation, for all the personified parts); they also have equal access to the determinant reasoning of the judgment, which are contained in the sentence.

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

There are no differences

28. Are national security cases (immigration or citizenship) decided by a judge more quickly or given any priority when listed for hearing? No, as answered in answering in conjunction with questions 4 and 5, point (b).

Is every judge eligible to decide such cases or are there any special conditions provided by applicable law (e.g. security clearance)? The general rules of attribution of competency apply as indicated in answering questions 1 and 2.

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