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Public Policy Restrictions in EU Free Movement and Migration Law

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Content

Public Policy Restrictions in EU Free Movement and Migration Law

Introduction

Being convicted of a criminal offence may have consequences for the residence status of a migrant or a refugee. Migration law generally allows states to expel such people on the ground that they form a risk to public policy or national security. On these grounds, states may also issue return decisions, as well as impose entry bans for up to five, ten, or twenty years, and apply various options for detention. But while such measures may serve the public interest in protecting public order and security, they may also have severe personal consequences for the migrants and their families, especially migrants who have been residing in the host state for a long period of time and who have lost most of their social, emotional and economic ties with their state of nationality.

Fundamental rights norms seek to balance the competing interests of states and individual migrants. While states generally have the competence to determine their own policies regarding the expulsion of criminal migrants, both the European Convention of Human Rights (ECHR) and European Union (EU) law have set specific limits on state sovereignty. The best known of these limits is the right to respect for family and private life (Article 8 ECHR and Article 7 of the EU Charter of Fundamental Rights (CFR or the Charter), which, as we know on the basis of European Court of Human Rights (ECtHR) case law of 1985, requires national authorities *inter alia* to assess the proportionality of expulsion measures in every individual case. In this assessment, states must strike a fair balance between the competing interests of the state (national security) and the individual (exercising family life in the host state).

Since the adoption of Directive 64/221, EU law has protected EU citizens against public policy- and public security-based limitations on their right to freedom of movement. Over the next four decades, the protection provided by this Directive was gradually specified and expanded in the case law of the Court of Justice of the European Union (CJEU), with this case law being codified in 2004 in the Citizens Directive

2004/38. Various instruments of secondary EU migration law, both regarding EU citizens and third-country nationals, currently set limits on national authorities' discretion in this field in a manner different from the limits imposed by Article 8 ECHR, both regarding EU citizens and third-country nationals. Firstly, instruments of EU migration law specifically define the concept of public order, with national authorities having to assess whether a migrant individually meets the relevant definition of public order as laid down in applicable EU law. Secondly, EU law requires national authorities to respect the EU principle of proportionality.

There are two reasons why these combined legal frameworks pose problems of legal interpretation. First of all, while recent CJEU case law emphasizes the principle of proportionality, it does not always give clear guidance on the meaning of this principle for different categories of third-country nationals, and on how the EU principle relates to the proportionality test based on the ECHR. Consequently, it is not clear to what extent these tests overlap and to what extent they require national authorities to act differently. Secondly, various instruments in EU migration law define the concept of public order differently or do not offer a clear definition of this concept. This leaves its interpretation open to continual litigation at both the national and European level. This tendency has regrettably been exacerbated by recent CJEU case law, in which the Court has moved away from uniformly defining the scope of the concept. While the CJEU had held in various earlier rulings that the concept had to be interpreted in accordance with the definition of the Citizens Directive, it ruled in *E.P* and *G.S. and V.G.* (C-380/18 and joined cases C-381/18 and C-382/18) that the scope of the concept of 'grounds of public policy' depends on the wording, context, and objectives pursued by the legislative instrument of which it forms a part. Consequently, standards applying to different categories of third-country nationals may differ, depending on the applicable EU law.

On the one hand, the existence of diverging standards may raise concerns from the perspective of the protection of fundamental rights. It is worth recalling the CJEU's consideration in *H.T. v. Land Baden-Württemberg* (C-373/13) that 'The extent of the protection a society intends to afford to its fundamental interests cannot vary depending on the legal status of the person that undermines those interests' (point 77). The question of who is and who is not a risk to public policy should be determined on the basis of individual behaviour, not on the basis of that person's legal status. On the other hand, there may be legitimate reasons to apply diverging standards, such as a choice to afford greater legal protection to migrants after a period of legal residence in the host state. Of greater concern, however, is the lack of legal certainty that currently exists in this field of EU migration law, with the EU legal framework's opacity potentially resulting in diverging practices between, or even within, Member States and adversely affecting the right to effective judicial protection.[1]

The purpose of this publication is to provide a systemic reading of EU law and CJEU case law in order to identify common standards and principles with regard to the use of public policy restrictions in EU migration law. We firstly submit that, despite all the existing differences, common standards and principles can be distilled from EU law as it stands. In identifying these principles, we aim to emphasize convergences in the applicable legal standards under EU law, rather than to highlight the differences. Secondly, we submit that these common standards and principles amount to concrete obligations for national authorities, with a clear added value to the assessment under Article 8 ECHR. These standards and principles should be leading all practices of decision-making within the scope of EU law. The current practices, where Article 8 ECHR assessments are predominant, incorrectly disregard EU law standards, which comes at the detriment of the fundamental rights of migrants.[2]

1 See Jacek Chlebny, *Public Order, National Security and the Rights of Third-Country Nationals in Immigration Cases, European Journal of Immigration and Law* 20 *(2018)* p. 115-134.

2 See Eva Hilbrink, *Adjudicating the Public Interest in Immigration Law: A Systematic Content Analysis of Strasbourg and Luxembourg Case Law on Legal Restrictions to Immigration and Free Movement, PhD Thesis, VU Amsterdam (2017).*

The publication is structured as follows. Chapter 1 provides a short history of public order and security clauses in EU migration law. Chapter 2 describes the scope of protection provided by Article 8 ECHR. Chapter 3 addresses the development of the concept of public policy in CJEU case law as applied to EU citizens, and how this concept is currently codified in the Citizens Directive. In Chapter 4, we discuss how the CJEU has interpreted the concept of public policy with regard to EU migration law concerning third-country nationals. Chapters 3 and 4 also discuss the EU principle of proportionality and how this applies to different categories of migrants. Lastly, we provide a summary and overview of the conclusions drawn in this publication and formulate recommendations for national authorities and courts dealing with public policy restrictions in migration law in practice.

Chapter 1

Short history of public order and security clauses in EU free movement and migration law

The first directive on the free movement of workers in 1961, which codified EEC workers' right to admission, residence, and employment in other Member States, explicitly did not affect provisions on public order and public security in the immigration legislation of the then six Member States.[3] In 1964, the Member States agreed to two important restrictions of their competence on this point when adopting Directive 64/22, whereby 'Measures taken on grounds of public policy or of public security shall be based exclusively on the personal conduct of the individual concerned' and 'Previous criminal convictions shall not in themselves constitute grounds for the taking of such measures.'[4] Over the next four decades, the protection provided by these clauses was gradually specified and expanded in Court of Justice case law, without the directive ever being amended. In 2004, this case law was codified in Article 27 of Directive 2004/38, which also expanded the protection afforded to Union citizens against abuses of rights and fraud in Article 28 and replaced the 1964 directive.

Since 2008, the UK had pleaded in the EU Council of Ministers for (partial) renationalisation of the public order rules[5] and was joined in this respect in 2013 by Germany, the Netherlands, and Austria.[6] On two occasions, this initiative met with opposition from the Commission and found insufficient support from other Member States in the Council. Three years later, as part of the 2016 pre-Brexit-referendum deal between the then UK prime minister Cameron and the European Council, the Commission promised to propose a considerable 'softening' of the public

3 Article 8(c) of the Directive of 16 August 1961, *O.J.* 13.12.1961, p. 1514/61.

4 Article 3(1) and (2) of Directive 64/221/EEC.

5 Council Document 15903/08 of 8 November 2008 as part of the discussions following the Metock judgment.

6 In a letter to the Council, Council document 10313/13 of 31 May 2013.

order clauses in Directive 2004/38 if the UK remained in the EU.[7] The UK finally achieved its aim during the Brexit negotiations. For EU nationals in the UK and for British nationals in the EU with residence rights under the EU-UK Withdrawal Agreement (WA), the protection against expulsion on public order grounds will be reduced to the level of the national legislation for conduct occurring after 2020.[8] This full renationalisation severely limits the acquired rights of the millions of Union citizens who used their free movement rights to move to or from the UK before 2021.

After 2000, the Union legislator adopted a series of directives and regulations on migration and asylum to regulate the entry, admission, residence status, and expulsion of third-country nationals. Some of these measures established a new EU residence status (the Long-Term Residents Directive or the Blue Card Directive) or granted residence rights and other rights in Member States (the Family Reunification Directive or the Qualification Directive). Other measures deal with entry (the Visa Code and Schengen Border Code), procedural matters (the Asylum Procedures Directive and Dublin Regulation), large databases (SIS, VIS, Eurodac, EES), or expulsion (the Return Directive). Clauses allowing for exceptions on the grounds of public order, public policy, or public security are present in most of these measures. The wording of the relevant clauses sometimes varies depending on the context (entry, admission, or expulsion) regulated in the instrument, with the same rather general wording sometimes also being used in measures applying in completely different situations.

7 EUCO (European Council document) 10/16, 19 February 2016, Part D, p. 21 and Annex VII, p. 36; see also *O.J.* 2016 C 69/1-16 and K. Groenendijk, Brexit: Free Movement of Union Citizens and the Rights of Third-Country Nationals under Threat? In: C. Grütters, S. Mantu and P. Minderhoud (eds.), *Migration on the Move,* 2017, Leiden/Boston (Brill), p. 286-302 at 290-291.

8 The relevant Article 20(2) WA reads 'The conduct of Union citizens or United Kingdom nationals, their family members, and other persons, who exercise rights under this Title, where that conduct occurred after the end of the transition period, may constitute grounds for restricting the right of residence by the host State or the right of entry in the State of work in accordance with national legislation.' See *O.J.* 2019, C 384 I/14 and C. Grütters et al., Brexit and Migration (EP-LIBE study) 2018, p. 35-36.

When drafting proposals for various directives granting residence rights or creating an EU residence status, the Commission included public order clauses formulated in similar or identical terms as those developed in the CJEU's case law on the clauses in Directive 64/221 on the free movement of Union citizens, as later codified in Directive 2004/38. During the negotiations on some of these legislative proposals, the Council, which until 2009 acted as the sole legislator in this field, deleted certain elements of the proposed clauses, without explaining the exact consequences of deleting the words or sentence in question. When the CJEU was asked to interpret public order or public policy clauses in these new instruments, it chose the same wording that had been used in judgments on the free movement of EU citizens. The first time this happened was in 2015 in the *Zh. and O.* judgment (C-554/13) concerning a public order and public policy clause in the Return Directive. By using the same wording, and emphasizing that this concept must be interpreted strictly, the CJEU seems in these cases to have followed the principle emphasized by Advocate General Sharpston in her opinion on the *Zh. and O.* case, namely that the risks of public order being violated by a certain behaviour cannot depend on the legal status of the person concerned.

The CJEU repeated this strict interpretation of public order clauses in *H.T. v. Land Baden-Württemberg* with regard to the Qualification Directive (C-373/13) and in *J.N.* with regard to clauses on detention in the Reception Conditions Directive. In two judgments in December 2019 (*G.S. and V.G.* and *E.P.*), however, the CJEU started to differentiate when explicitly confronted with the question of whether the public order clauses in the Family Reunification Directive and the Schengen Border Code should be interpreted as having the same meaning as the public order clause in Article 27(2) of Directive 2004/38. But shortly afterwards, in two 2020 judgments, the CJEU appeared to return to its pre-2019 case law, to which it explicitly referred (*WM/Stadt Frankfurt* on the Return Directive), qualifying this as 'settled case-law of the Court' (*UQ & SI*, point 40, in a case relating to the Long-Term Residents Directive).

Chapter 2

Right to family life in Article 8 ECHR and public order restrictions

2.1 ECtHR's approach to Article 8 ECHR in expulsion cases

Article 8(1) ECHR guarantees the right to respect for private and family life. Article 8(2) ECHR establishes that there shall be no interference by public authority with the exercise of this right except such as is in accordance with the law, pursues a legitimate aim, and is 'necessary in a democratic society.'

General legal framework

Expulsion measures in migration law have obvious consequences for the family life of migrants. Expulsion, especially when it concerns settled migrants, may force families to separate and to live apart. That this may lead to a violation of Article 8 ECHR was recognized by the ECtHR in the landmark *Abdulaziz* judgment of 1985.[9] The basic principles set out in this judgment are still applied by the ECtHR today. Famously, the ECtHR considered that:

> States are entitled, as a matter of international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there.

Following this premise of state sovereignty on matters of immigration control, the ECtHR found that Article 8 ECHR:

> ... cannot be considered as extending to a general obligation on the part of a Contracting State to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in that country.[10]

9 ECtHR 28 May 1985, appl. 9214/80, 9473/81 and 9474/81, Abdulaziz, Cabales and Balkandali v. UK.

10 Abdulaziz, para. 68.

In other words, the right to family life does not entail the right to family life in a country of choice. Consequently, a Contracting State may consider that family life can be exercised elsewhere in the absence of any insurmountable obstacles to this.

Nonetheless, a decision to revoke a residence permit and expel the migrant from the state's territory constitutes an interference within the scope of Article 8 ECHR if that migrant is exercising family life in the host state. Such a decision may even interfere with the private life of a migrant who has developed strong ties to the host state. These decisions must therefore be justified by the criteria mentioned in Article 8(2) ECHR: they must have a legal basis, pursue a legitimate aim and be necessary in a democratic society.

In public order expulsion cases, the requirement for a legal basis and a legitimate aim is usually met without any great difficulty. National legislation typically provides a basis for expelling migrants who have been convicted of criminal offences. The ECtHR accepts such decisions as pursuing a legitimate aim, namely the aim of preventing disorder or crime. Most legal cases, therefore, concern only the requirement for the measures to be necessary in a democratic society.

The ECtHR has interpreted this requirement as amounting to a proportionality assessment, where Contracting States must strike a 'fair balance' between the competing interests (i.e. the interest in protecting against disorder or crime versus the interest of exercising family life in the host state). The Court grants Contracting States a margin of appreciation in this assessment.

Guiding principles

The question remains as to what the proportionality assessment entails in concrete terms. Under what circumstances should an expulsion order be deemed proportionate or disproportionate? It is inherent in the principle of proportionality that this question remains open and can only be addressed in individual cases. But without any general guidance, the right to family life risks becoming subject to inconsistent and arbitrary decision-making. For this reason, the ECtHR has sought to clarify the proportionality assessment in public order cases by setting out a list of guiding principles that states should take into consideration in individual cases.[11] These principles, which should guide national decision-making and ensure more consistency in the proportionality assessment based on Article 8 ECHR, are:

- The nature and seriousness of the offence committed by the applicant;
- The length of the applicant's stay in the country from which he or she is to be expelled;
- The time elapsed since the offence was committed and the applicant's conduct during that period;
- The nationalities of the various persons concerned;
- The applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life;
- Whether the spouse knew about the offence at the time of entering into a family relationship;
- Whether there are children of the marriage and, if so, their age;
- The seriousness of the difficulties that the spouse is likely to encounter in the country to which the applicant is to be expelled;
- The best interests and well-being of the children, in particular the seriousness of the difficulties that any children of the applicant are likely to encounter in the country to which the applicant is to be expelled, and
- The solidity of social, cultural and family ties with the host country and with the country of destination.

By setting out these principles, the ECtHR has formulated procedural rather than material rights. It stipulates the factors that should be taken into account, rather than defining the specific weight that should be attached to these principles. For the ECtHR, the proportionality assessment should be made by national authorities themselves. The ECtHR can then test whether national authorities have conducted an appropriate assessment in accordance with the above guiding principles and whether this assessment has resulted in a fair balance between the competing interests. On the basis of the margin of appreciation left to the contracting parties, it is not for the ECtHR – according to the Court itself – to substitute its own assessment for that of the national authorities, unless it sees 'strong reasons' for doing so.[12]

11 ECtHR Boultif v. Switzerland, 2 August 2001, appl. 54273/00; Maslov v. Austria, 23 June 2008, appl. 1638/03 and ECtHR Üner v. the Netherlands, 18 October 2006, appl. 46410/99, para. 54.

12 ECtHR Ndidi v. United Kingdom, 14 September 2017, appl. 41215/14, para. 76.

First admission

Where an applicant has not resided legally in the host state or applies for first admission, the ECtHR has consistently held that the expulsion or non-admission of that person technically cannot be considered to constitute an interference in his or her right to respect for family and private life. Yet the ECtHR has established that there may nevertheless be a positive obligation to enable family life in a host state. In such cases, therefore, national authorities are obliged to conduct a similar proportionality assessment. Nonetheless, the ECtHR will only find a violation of Article 8 ECHR in exceptional cases. The ECtHR justifies this 'exceptionality criterion' by pointing out that illegally residing immigrants must know their residence status to be insecure. Applicants cannot confront national authorities with family life as a *fait accompli*.[13]

Strengths and weaknesses of Article 8 ECHR in public order cases

From the perspective of protecting the fundamental rights of migrants, we can point out some strengths and weaknesses of the application of Article 8 ECHR in public order cases. To begin with its strengths: firstly, the right to respect for private and family life has a broad scope of application in that it applies to all cases involving family and private life. As we will see in the next chapter, this is not the case in EU law, which by its very nature has a narrower scope of applicability. Secondly, Article 8 ECHR requires public authorities to always assess the proportionality of decisions involving family and private life, even when a state has not technically interfered with this right, given that Article 8 ECHR may also impose positive obligations on a state to enable family life. This is not always necessary in EU law.

13 In, for example, Jeunesse the ECtHR considered that the expulsion of a Surinamese applicant from the Netherlands violated Article 8 ECHR because, inter alia, the applicant had previously held Dutch nationality, had lived in the Netherlands for several decades and took care of her three Dutch children on a daily basis. The ECtHR considered that despite the family being able to settle in Suriname, forcing it to do so was likely to cause it to experience a degree of hardship. Finding the situation to be exceptional, the ECtHR concluded that the Dutch authorities had failed to secure the applicant's right to respect for her family life.

But Article 8 ECHR also has notable limitations. Firstly, and in contrast to EU law, Article 8 ECHR does not set a standard for the concept of public order. Under the ECHR, states remain free to determine who qualifies as a risk to public order, as long as they respect the principle of proportionality. Secondly, the fact that the ECtHR's assessment is limited to the principle of proportionality makes this assessment vulnerable to inconsistencies, given that an inherent feature of this principle is that it may lead to diverging interpretations and arbitrary application. Thirdly, the principle of proportionality is interpreted by the ECtHR in a way that centres on state sovereignty and limits the significance of migrants' right to family life. The ECtHR simply assumes the state's sovereign right to control migration and does not refrain from expecting migrants to be able to exercise family life elsewhere. This framing of the proportionality principle puts the state's interest first and the migrant's right to family or private life second.[14] As we will see in the next chapter, however, EU law is not based on these core assumptions of the proportionality test and should therefore be interpreted and applied differently.

Article 8 ECHR: Right to respect for family and private life

Strengths

— Broad scope of application
— Proportionality assessment in all situations involving family and private life
— Guiding principles to ensure consistent individual examinations

Weaknesses

— No right to family reunification
— Proportionality assessments vulnerable to inconsistent practices
— Margin of appreciation for states
— Centres on state sovereignty rather than on the right to respect for family and private life
— No standard for 'risk to public order' as such

14 See Eva Hilbrink, *Adjudicating the Public Interest in Immigration Law: A Systematic Content Analysis of Strasbourg and Luxembourg Case Law on Legal Restrictions to Immigration and Free Movement, PhD Thesis, VU Amsterdam (2017)*.

Chapter 3

Free movement of EU citizens and their family members: general principles

This chapter addresses the public order clauses in EU migration law regarding EU citizens and their family members. The first section provides an overview of how these clauses have developed since 1961. This is followed by a description of the current legal framework for EU citizens and their family members, as provided for in Articles 27 and 28 of the Citizens Directive.

3.1 Article 27(2) Citizens Directive (2004/38): general principles

Article 27(2) of the Citizens Directive is worded as follows:

General principles

2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.

The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.

This provision amounts to a codification of CJEU case law regarding the expulsion of EU citizens on grounds of public order. The strict standard ('a genuine, present and sufficiently serious threat'), first formulated by the CJEU in *Bouchereau* (1977), can be understood as following from EU citizens' special position in EU migration law. As EU citizens enjoy freedom of movement within the EU, an expulsion decision against such citizens and their family members entails a derogation from

the principle of free movement. This already indicates a different legal framework for EU law compared to the framework applying under Article 8 ECHR, where it is not the freedom of movement, but rather state sovereignty that is the starting point.

Secondly, the provision sets a procedural standard: each and every decision should be made on an individual basis and should be based on 'personal conduct' instead of on 'considerations of general prevention'. Thirdly, the measure must comply with the EU principle of proportionality.

What do these standards amount to in concrete cases? To better understand their meaning, it is worth revisiting the foundational judgments of the CJEU in this regard.

Present threat

A present threat has to be based on a concrete risk that the migrant will engage in future criminal conduct. Conduct or convictions in the past cannot, in general, constitute a present threat. In *Bouchereau*, the CJEU declared that the existence of a previous criminal conviction can be taken into account only insofar as the circumstances that gave rise to that conviction are evidence of personal conduct constituting a *present* threat to the requirements of public policy.

Given the requirement for the person concerned to pose a present threat to public policy or public security, even a serious offence may in itself be insufficient to justify a measure on these grounds, if the person is not expected to commit the same offence again. The CJEU ruled accordingly in *Bonsignore*, in which a person had accidentally, but fatally injured his brother with a pistol, and in which the national criminal court had not imposed a punishment because it did not consider the applicant likely to commit such an offence again. According to the CJEU, only considerations of special prevention (i.e. connected to the likelihood that the person concerned will re-offend) and not considerations of general prevention aimed at deterring people other than the applicant may be invoked against nationals of Member States to justify measures adopted on grounds of public policy and for maintaining public security.

Serious threat

In *Polat,* the CJEU ruled that a sufficiently serious threat cannot follow from a multitude of offences that are in themselves insufficiently serious. The case in question concerned the public order restrictions included in Decision 1/80 with regard to the rights of Turkish labour migrants, to which the same standards as provided in Directive 64/221 were applied. In this judgment, the CJEU extended the principle that previous convictions cannot in themselves justify a measure on grounds of public policy or public security by considering that neither, too, could a multitude of previous offences in themselves be considered sufficient. This case concerned the question of whether a multitude of offences, which, taken individually, were not sufficient to constitute an actual and sufficiently serious threat to a fundamental interest of society, could justify expulsion because of their number and because the person concerned is expected to reoffend.

Although the ruling in *Polat* does not mean that a history of reoffending cannot contribute to the conclusion that a person poses a sufficiently serious threat to public policy or public security, its importance lies in the conclusion that minor offences, even a great number of them, cannot constitute a sufficiently serious threat to public or public security. Furthermore, and based on the principle of equal treatment, the CJEU has found that the conduct that the Member State is seeking to prevent with regard to migrants should also give rise to punitive measures or genuine and effective measures to combat such conduct with regard to the Member State's own nationals.[15]

Individual examination based on personal conduct

The requirement to individually examine decisions based on public policy was first formulated by the CJEU in *Bouchereau*. Based on the predecessor of the Citizens Directive, Directive 64/221, the CJEU found that invoking the concept of public policy to derogate from the free movement of workers is acceptable only if the concept of public policy means more than the perturbation of the social order that any infringement of the law involves. Mere infringement of criminal law is insufficient to conclude that a person poses a certain threat to public policy. Consequently, this restriction imposes on Member States an obligation to conduct an individual assessment in each and every case.

15 CJEU Olazabal, C-100/01, 26 November 2002, point 45.

CJEU case law on general protection (currently Article 27(2) Citizens Directive)

A strict application of the public policy and public security grounds in the area of free movement entails that:

- National authorities must individually assess whether a person represents a genuine and sufficiently serious threat to the requirements of public policy affecting a fundamental interest of society;
- A serious offence may in itself be insufficient to justify a measure on these grounds if the person is not expected to commit the same offence again;
- The general nature of certain types of offences cannot be equated with the threat posed by an individual in a concrete case;
- Offences that are individually insufficient to form the basis of an actual and sufficiently serious threat to a fundamental interest of society cannot constitute such a threat by being taken as a multitude, and
- Considerations of general prevention are prohibited.

In *Calfa*, the CJEU considered that the general nature of certain types of offences cannot be equated with the threat posed by an individual in a concrete case.[16] In *Orfanopoulos and Oliveri*, it ruled accordingly in relation to the significance that may be attached to a certain type of sanction and be used to justify the conclusion that a person poses a certain threat to public policy or public security.[17] At the same time, the CJEU ruled in *Tsakouridis*, when dealing with expulsion based on Article 28 of the Citizens Directive, that crimes linked to drug trafficking may be covered by the concept of 'imperative grounds of public security'.

16 CJEU C-348/96, Calfa, points 26-29.

17 CJEU joined cases C-482/01 and C-493/01, Orfanopoulos and Oliveri, points 69-71.

EU principle of proportionality

As we have seen, the CJEU has dismissed 'prefab' arguments relating to the balancing of competing interests as part of the principle of proportionality. General lines of argumentation are incompatible with the requirement to make an individual examination. Precisely this point illustrates the divergence of EU law standards with the test under Article 8 ECHR. As was explained in Chapter 2, the ECtHR allows states to define and pursue their interests in very general terms ('state sovereignty', 'immigration control'), only violating the ECHR if individual circumstances make the decision-making disproportional.

EU law starts from a different premise. In EU law, the principle of proportionality starts from the individual right as protected in EU law instead of the state's sovereignty to control borders. When dealing with migrants' rights of residence and the balance of interests, EU law will generally, therefore, put third-country nationals in a stronger position than the position they have under Article 8 ECHR. On various occasions, the CJEU has consequently dismissed national policies in which expulsion is considered the rule in the event of certain offences or sentence durations, with scope for exceptions being available only if individual interest-related aspects such as family life indicate otherwise. Under such circumstances, the public interest is taken as given - legislation requires expulsion, except where individual interests such as family reasons are at stake. It follows from *Calfa* that only taking into account individual interest-related aspects, while expulsion remains the norm, does not count as adopting a case-by-case approach to the threat posed by an individual's conduct.[18] This calls for a different framing of the *fair balance* assessment under Article 8 ECHR.

Additionally, the EU principle of proportionality requires an assessment of the necessity and suitability of every individual decision. Concretely, this means that a measure cannot go beyond what is necessary to protect public order. The following figure schematizes the differences between ECHR and EU proportionality. In section 4.2 we further flesh out these differences with regard to the right to family life (Article 8 ECHR) and the right to family reunification (Family Reunification Directive).

18 CJEU C-348/96, Calfa, point 27.

ECHR Proportionality

Fair balance between

Individual interests ——— **State interests**

EU Principle of Proportionality
Suitability and necessity assessment

Measure must be suitable and cannot go beyond
what is necessary to protect public order.

Proportionality *stricto sensu*
Proper balance between the effects of the measure
and the interests affected.

3.2 Article 28 Citizens Directive: Additional protection after continued residence

The general principles of the Citizens Directive indicate the factors that may and may not be taken into account to substantiate the conclusion that a person poses a certain threat to public policy or public security. Article 28(2) and (3) of Directive 2004/38 provides enhanced protection for EU citizens and their family members in certain specific situations:

Article 28(2) and (3), Directive 2004/38 - Protection against expulsion

2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.

3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:
   (a) have resided in the host Member State for the previous ten years; or
   (b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989.

Article 28 provides additional protection for beneficiaries of the Citizens Directive with the right of permanent residence, with further protection available after ten years of residence and for minors. Observe that while Article 28(2) applies to Union citizens and their family members, the scope of Article 28(3) is limited to Union citizens only. In the *P.I.* judgment, the CJEU held that criminal offences mentioned in Article 83(1) TFEU are covered by the concept of 'imperative grounds of public security'. This provision includes crimes such as drug trafficking, money laundering and organised crime.[19]

Protection framework of Articles 27 and 28 of the Citizens Directive

General protection
- EU citizens or EU citizens' family members must represent a genuine, present and sufficiently serious threat to a fundamental interest of society.
- Decisions should be made on the basis of individual conduct.
- Decisions should be made in accordance with the EU principle of proportionality.

Additional protection
- EU citizens or EU citizens' family members with a permanent right of residence: expulsion decision to be based only on serious grounds of public policy or public security.
- EU citizens with ten years of residence or who are minors: expulsion decision only **on imperative grounds of public security.**

19 CJEU 22 May 2012, *P.I.*, C-348/09

Chapter 4

Public order and public security in EU migration law: Differentiation in rights and status

The previous chapter discussed the development of EU free movement law regarding the legal protection of EU citizens and their family members in cases concerning public order. This chapter addresses the legal protection of third-country nationals (TCNs) in EU law.

There is no EU law referring to third-country nationals as such. Rather, EU migration law consists of directives and regulations covering specific categories of third-country nationals, such as family migrants, students, and refugees. The question of how, and to what extent, these categories of migrants are protected by the same standards as EU citizens against expulsion orders has been the subject of various European Court of Justice (CJEU) rulings.

In this chapter, we argue that it follows from CJEU case law that EU law currently distinguishes between three groups of third-country nationals. The first group consists of third-country nationals covered by Article 27(2) Citizens Directive, or by an EU legal instrument on the basis of which the CJEU has applied this provision by analogy. The second group consists of third-country nationals covered by the Family Reunification Directive. The third group consists of third-country nationals who apply for a visa or are covered by the Schengen Borders Code.

4.1 Analogous application of Article 27(2) Citizens Directive

This section discusses those categories of third-country nationals for whom the standard of Article 27(2) of the Citizens Directive (i.e. a genuine, present, and sufficiently serious threat to a fundamental interest of society) has been applied analogously.

Turkish workers and their family members

In 1980, the Association Council EEC-Turkey adopted its Decision

1/80 granting Turkish workers and their family members, after several years of lawful employment or residence in a Member State, a right to continued residence in that Member State. The Decision explicitly states that the provisions of the relevant section 'shall be applied subject to limitations justified on grounds of public policy, public security or public health.'[20] The CJEU held in a series of judgments that this public order exception should be interpreted by analogy with the public order exception in the rules on free movement of EU workers. It somewhat restricted this analogy in *Ziebell* in 2011, holding that the reinforced protection of Union citizens against expulsion provided for in Article 28(3)(a) of Directive 2004/38 after ten years of lawful residence does not apply to Turkish workers and their family members.[21] Regarding, however, the acquisition and loss of the residence rights, the same public order criterion applying to EU citizens and their family members does apply to Turkish migrant workers: in other words, such migrant workers, too, must represent a genuine, present, and sufficiently serious threat to a fundamental interest of society before they can be expelled.[22]

Long-term residents

Under Article 6 of the Long-Term Residents Directive 2003/109, Member States may refuse to grant long-term resident status to third-country nationals on the basis of public policy or public order grounds. In addition, Article 12 of this Directive provides that a decision to expel a long-term resident may be taken only if the person constitutes an actual and sufficiently serious threat to public policy or public security. This latter criterion aligns, therefore, with the standard set in Article 27(2) of the Citizens Directive.

The CJEU stated in *Ziebell* that factual matters occurring after the expulsion decision may detract from the conclusion that a person poses a present threat to public policy or public security, and must consequently be taken into account. This case, dealing with the expulsion of a long-term resident Turkish migrant, did not fall directly within the scope of

20 Article 14(1), Association Council Decision No. 1/80.

21 CJEU C-371/08, Ziebell, point 74.

22 See CJEU, C-467/02, Cetinkaya, point 36, for acquisition of residence rights and CJEU, C-340/97, Nazli, points 57-58, for loss of residence rights.

Article 27(2) of the Citizens Directive. While the CJEU was asked to interpret Article 14(1) of Association Council Decision No. 1/80, it developed its criteria by applying Article 12 of Directive 2003/109 and by referring, by analogy, to the case law dealing with the strict interpretation of public policy exceptions in the area of free movement of workers.

In *Pastuzano*, the CJEU affirmed that, on the basis of Article 12 Directive 2003/109, a Member State may decide to expel a long-term resident, but only if the person constitutes an actual and sufficiently serious threat to public policy or public security, and that, before taking any such decision, the Member State must take into account the duration of residence in the territory, the person's age, the consequences for the person and his or her family members, and links with the country of origin.[23] According to the CJEU, a decision to expel a third-country national must not be based on the sole reason that the person has been sentenced to a term of imprisonment of more than one year.

In September 2020, in *UQ and SI*, the CJEU answered preliminary questions from a Spanish court on the refusal to grant long-term resident status on public order grounds under Article 6(1) of Directive 2003/109.[24] The CJEU held that such refusal requires a certain number of factors to be considered and weighed up, such as, firstly, the seriousness of the offence committed by the person and the threat the person presents to the public policy or public security, and, secondly, the length of the person's residence in the host Member State and any ties he or she has with that Member State. According to the CJEU, the assessment of all these elements involves a case-by-case assessment, which precludes refusing to grant long-term resident status on the sole ground that the person has previous convictions, whatever their nature.[25]

Refugees, asylum seekers, and reception conditions

In EU law, the Qualification Directive 2011/95 sets minimum standards for third-country nationals and stateless persons to qualify as or enjoy the status of refugees or obtain other forms of international protection. This Directive includes provisions on the conditions for revoking residence permits if there are 'reasonable grounds for regarding

23 C-636/16, 7 December 2017, points 25-29.

24 Joined cases C-503/19 and C-592/19, 3 September 2020.

25 C-503/19 and C-592/19, points 38-39.

him or her as a danger to the security of the Member State in which he or she is present' or if 'he or she, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that Member State' (Article 14). Furthermore, Article 24 provides that 'as soon as possible after international protection has been granted, Member States shall issue to beneficiaries of refugee status a residence permit which must be valid for at least 3 years and renewable unless compelling reasons of national security or public order otherwise require.'

In *H.T. v. Land Baden-Württemberg,* the CJEU explicitly referred to Directive 2004/38, and specifically Articles 27(2) and 28, for the concept of public policy and security to be applied to revocation of a residence permit granted to a refugee. While recognizing that the Citizens Directive pursues different objectives to those pursued in the Qualification Directive, the CJEU stressed that the risks of the public order being violated by a certain behaviour cannot vary depending on the legal status of the person concerned.[26] This principle had previously been emphasized by Advocate General Sharpston in her opinion on the *Zh. and O.* case in 2015 (C-554/13).

In *J.N. v. Staatssecretaris van Justitie* (C-601/15), the CJEU explicitly framed the detention of asylum seekers under Article 8(3)(e) of the Reception Directive 2013/33 as a measure limiting the exercising of the right to liberty entrenched in Article 6 of the Charter. Subsequently, with regard to the concept of public order and public policy, the CJEU referred to the above case of *Zh. and O.* and to Articles 27 and 28 of Directive 2004/38.[27]

In this judgment, the CJEU thus emphasized that, in view of the requirement for necessity, placing or keeping an asylum applicant in detention under Article 8(3) of the Reception Directive on the grounds of a threat to national security or public order is justified only if the 'applicant's conduct represents a genuine, present and sufficiently serious threat, affecting a fundamental interest of society or the internal or external security of the Member State concerned.'[28]

26 *H.T.,* points 76-77.

27 *J.N.,* point 65.

28 *J.N.,* point 66.

Return of irregular migrants

Article 11 of the Return Directive governs the opportunity to impose an entry ban for reasons of public order and public security. Issuing an entry ban is not mandatory in the event of public policy and public security grounds. If, however, an entry ban is being considered, Article 11(2) prescribes that the Member State shall determine the length of the entry ban with due regard to all relevant circumstances of the individual case. The CJEU has not yet ruled on the concept of public order and public policy in relation to the issuing and the duration of entry bans under Article 11 of the Return Directive. In the case, however, of Zh. and O., it discussed this concept in relation to the issuing of an entry ban if no period of voluntary return is granted as provided for in Article 7(4) of the Return Directive.[29] A period for voluntary departure is of vital interest for the migrant, whereas an entry ban must be issued if such a period has not been granted.[30] This obligation follows from the goal of the Return Directive that illegally staying third-country nationals should, in principle, be granted a period for voluntary departure and that such people should be returned in a humane manner with full respect for their fundamental rights and human dignity.

The CJEU emphasized in *Zh. and O.* that the concept of public policy in these cases must be interpreted strictly, with the result that its scope cannot be determined unilaterally by each Member State without any control by the EU institutions. The CJEU made reference in this respect to the EU context in which the measure was at issue, and the circumstance that the measure derogated from an obligation designed to ensure fundamental rights. The CJEU further addressed the proportionality principle to be applied throughout all the stages of the return procedure, and subsequently applied an assessment clearly corresponding to the notion of public policy and public security as laid down in Article 27(2) of Directive 2004/38. This means that a Member State must assess the risk to public policy, within the meaning of Article 7(4) of Directive 2008/115, on a case-by-case basis in order to ascertain whether the third-country national's personal conduct poses a genuine and present risk to public policy.

29 *O.J.* L 348, 24.12.2008, p. 98-107.

30 Article 11(1)a Return Directive.

The CJEU acknowledged in *Zh. and O.* that Member States 'retain essentially the freedom to determine the requirements of public policy in accordance with their national needs, which can vary from one Member State to another and from one era to another.' Nevertheless, the requirements of public policy must be interpreted strictly, according to the CJEU, particularly when relied upon as justification for derogating from an obligation to ensure that the fundamental rights and dignity of third-country nationals are respected when such individuals are removed from the European Union (see recitals 2 and 11 in the preamble and points 47-48 of the judgment in *Zh. and O.*).

The following table provides an overview of the categories of persons and measures covered by the general principles on public policy and security as included in Article 27(2) Citizens Directive, as well as the legal basis for concluding that this is indeed the case. For specific categories, a separate explanation regarding the applicability of the general principles is provided below, with reference to the relevant case law.[31]

Category protected by the general principles on public policy and security [32]	**Legal basis**
Union citizens within the scope of Directive 2004/38	Article 27(2), Directive 2004/38
TCN family members of Union citizens within the scope of Directive 2004/38	Article 27(2), Directive 2004/38
TCN family members of Union citizens within the scope of Article 20 TFEU	C-165/14, *Rendón Marín*, points 81-87
Turkish workers and their family members within the scope of Decision 1/80	C-303/08, *Bozkurt*, point 56
Long-term resident TCNs within the scope of Directive 2003/109	Article 6(1) and 12, Directive 2003/109 C-371/08, *Ziebell*, points 49-50 C-503/19 and C-592/19, *UQ and SI*
Refugees within the scope of Directive 2011/95 (withdrawal of refugee status or expulsion)	C-373/13, *H.T.*, points 76-77
Asylum seekers within the scope of Directive 2013/33 (detention on grounds of public policy or public security)	C-601/15, *J.N.*, point 65
TCNs considered illegal within the meaning of Directive 2008/115 (refusal to grant a period for voluntary departure/ imposing an entry ban on grounds of public policy or public security)	C-554/13, *Zh. and O.*, points 47-50

31 For an extended analysis, see the report of the Dutch Advisory Committee on Migration Affairs (ACVZ), *Gewogen gevaar. De belangenafweging in het vreemdelingrechtelijk openbare-ordebeleid,* The Hague: 2018.

32 Irrespective of possible special protection against specific public policy or public security measures.

4.2 No analogous application of Article 27(2) Citizens Directive

Family Reunification Directive

The Family Reunification Directive (Directive 2003/86/EC) provides minimum standards for exercising the right to family reunification. The scope of the Directive is limited to sponsors with the nationality of a third state.[33]

Article 6 of the Family Reunification Directive (FRD) allows Member States to reject an application for entry and residence of family members on grounds of public policy, public security or public health and, for the same reason(s), to withdraw a family member's residence permit. This provision also states that, when taking the relevant decision and in addition to Article 17, the Member State must consider the severity or type of the offence committed by the family member against public policy or public security, or the dangers emanating from such person. In a similar manner as in Directive 2003/109, the public policy exception in the FRD appears not to allow for mere abstract considerations of public policy when it comes to concrete decision-making. In this respect, it is important to note that, in the case of *Chakroun*, the CJEU has already set out the starting points for the approach to restricting the right to family reunification. An important aspect of the *Chakroun* judgment is that, in relation to the requirement for sufficient means, the CJEU was strict on prohibiting automatic decision-making.[34] It follows from the above-mentioned principle that the subjective right to family reunification, as provided for in the FRD, should be considered as the general rule. Therefore, as restrictions to the right to family reunification must be applied strictly, it is arguable that this consideration applies not only to the sufficient means requirement, but also to the public policy restriction

33 In the Netherlands, the Directive is also applied to sponsors with Dutch nationality.

34 See also the following comment in relation to the Family Reunification Directive made in the Commission Staff Working Document, Fitness Check on EU Legislation on legal migration: 'In Sweden, the renewal of the residence permit under Art. 6(2) may be refused if the family member has been engaged in any type of criminal activity. This could go beyond the possibility of refusing a residence permit on the basis of public order and security and gives rise to conformity concerns.' SWD(2019)1055 final, p. 342.

in Article 6 of the FRD. This means that the right to family reunification must be protected unless a limitation of this right is justified by a strict and individual assessment of the case. Furthermore, and because of the inherent connection with the fundamental right to respect for family and private life as guaranteed in Article 7 of the Charter, it is arguable that the assessment of public order and public policy measures based on the FRD should comply with the general principles of Article 27(2) of Directive 2004/38.

G.S. and V.G. judgment

In a judgment of 12 December 2019, the CJEU seems to have adopted a more nuanced approach.[35] In *G.S. and V.G.*, dealing with the FRD, the CJEU held that national authorities applying Article 6(1) and (2) of the FRD are not required to establish that the third-country national represents 'a genuine, present and sufficiently serious threat'. Furthermore, according to the CJEU, even if Article 6(2) of Directive 2003/86 obliges Member States to 'consider, in particular, the severity or type of the offence against public policy committed by that individual or the dangers that are emanating from him or her', this obligation is a standard 'that is markedly less stringent' than the standard applied within the context of the right of free movement of EU citizens and their family members.[36]

The CJEU's judgment is remarkable, given that the Court explicitly rejected the existence of a general public order concept in EU law. This is at odds with the rulings discussed above, where the Court chose to apply the public order concept of Article 27(2) Citizens Directive by analogy. Nonetheless, the test formulated in *G.S. and V.G.* deserves proper attention. Whereas the CJEU rejected a general application of the Union Citizenship 'public order' concept within the FRD context, this judgment nonetheless provides additional criteria with regard to public order decisions within the framework of the FRD. Firstly, referring to the general principle of EU law on proportionality, the CJEU underlines that the application of public order grounds cannot go beyond what is necessary to ensure that public policy is safeguarded. Secondly, national authorities cannot 'automatically take the view that a third-country

35 Joined cases C-381/18 and C-382/18, *G.S.* and *V.G.*, point 63.

36 Joined cases C-381/18 and C-382/18, *G.S.* and *V.G.*, point 57.

national is a threat to public policy … merely because he or she has been convicted of some or other criminal offence.' In other words, the CJEU still emphasized the common standards and principles as protected in EU law.

Article 17 FRD and the EU principle of proportionality

Article 17 FRD requires national authorities to conduct an individual assessment taking 'due account of the nature and solidity of the person's family relationships and the duration of his residence in the Member State and of the existence of family, cultural and social ties with his/her country of origin.' The wording of this provision suggests an assessment at least equivalent to the proportionality assessment under Article 8 ECHR, given that the factors mentioned also feature in the guiding principles formulated by the ECtHR (see Chapter 2).

Both regarding first admission (Article 6(1)) and withdrawal of residence permits (Article 6(2)), the CJEU found that the offence that warranted the criminal conviction must be sufficiently serious to establish that it is necessary to rule out residence of that applicant and that the relevant authorities must carry out the individual assessment provided for in Article 17 FRD. The CJEU has repeatedly held that, under this Article 17, 'The Member State concerned must first examine, on a case-by-case basis, the situation of the family member concerned, by making a balanced and reasonable assessment of all the interests in play.'[37] In *Y.Z. and others*, the Court considered that, while Member States enjoy a certain discretion for the purposes of the assessment laid down in Article 17, the assessment must be conducted in compliance with the right to respect for family and private life in Article 7 of the Charter.[38] This consideration still leaves unanswered the question of the precise added value of this balancing assessment. The lack of guidance is most prominent in *G.S. and V.G.*, where the CJEU refrained from answering an explicit question raised by the Dutch Council of State on the matter. This means that the CJEU has not so far clarified the precise relationship between Article 17 FRD and Article 8 ECHR.

37 CJEU 6 December 2012, O and Others, joined cases C-356/11 and C-357/11, EU:C:2012:776, point 81, and CJEU 21 April 2016, Khachab, C-558/14, EU:C:2016:285, point 43.

38 CJEU 14 March 2019, *Y.Z.* and others, C-557/17, point 53.

Nonetheless, we submit there are pressing reasons to believe the Article 17 FRD, which effectively articulates the EU principle of proportionality, requires more from Member States than Article 8 ECHR. First of all, the FRD protects a far stronger right than Article 8 ECHR (ensuring a subjective *right* to family reunification compared to *respect* for family life). According to the CJEU, the FRD entails 'precise positive obligations, with corresponding clearly defined individual rights.'[39] This is not the case under Article 8 ECHR, where states in principle remain sovereign to control family migration as they see fit. As different rights are at stake, a different proportionality assessment has to be made. A second reason why the EU principle of proportionality is not equivalent to the ECHR *fair balance*-test relates to the structure of EU proportionality. In fact, EU proportionality entails not only a balancing assessment, but also an assessment of necessity and suitability. These assessments require national practices to be suitable and not to go beyond what is necessary to ensure the goals that the measure aims to achieve (in this case, safeguarding public policy). The relevance of the necessity assessment follows from *G.S. and V.G.*, where the CJEU found that the criminal conviction must be sufficiently serious to establish the need to deny the right to family reunification. A third reason why the EU proportionality principle may differ from the fair balance test in Article 8 ECHR can be found in *Y.Z. and others*. In this case, concerning the withdrawal of a residence permit on the grounds of fraud, the CJEU considered that the applicability of the EU proportionality principle follows from the fact that the withdrawal of a residence permit is a discretionary decision of the competent authorities: the authorities *may* withdraw the permit, which implies that Member States have discretion on such withdrawal (point 51). This indicates a more concrete proportionality assessment than in Article 8 ECHR. Whereas Article 8 ECHR requires an abstract proportionality test between the interests of the individual and those of the state, Article 17 FRD requires a concrete proportionality test between the interests of the individual (exercising the subjective right to family reunification) and the necessity and proportionality of the use of a specific ground in the FRD to deny the right to family reunification. Both the individual interests and the state interests are framed differently in Article 17 FRD.

39 Joined cases C-381/18 and C-382/18, *G.S.* and *V.G.*, point 61.

Article 8 ECHR
Right to respect for family life

Fair balance between

Family interests —— **State interests**
Exercising of family life in host state — Controling immigration

According to the guiding principles of *Boultif* and *Üner*.

EU principle of proportionality / Article 17 FRD
Right to family reunification.

Suitability and necessity assessment
Denial of **right to family reunification** must not go beyond what is necessary to protect public order. This is only the case if the criminal conviction is **sufficiently serious.**

Proportionality *stricto sensu*
Balanced and reasonable assessment of all the interests at play:

Family interests —— **State interests**
Exercising right to family reunification — Protection of public order

4.3 Entry and first admission

With regard to the application of the public order concept in EU migration law, a third category can be distinguished, based on the applicable EU law and CJEU case law. This concerns third-country nationals without residence rights or who apply for a temporary residence permit, such as a student visa, or an entry visa or short-term visa for the purpose of entry on the basis of the Schengen Borders Code or Visa Code.

Admission of students

An example of a less strict investigation of a threat to public policy or public security is the case of *Fahimian*. In that judgment, the CJEU made it clear that the admission of students on the basis of the Students Directive should not be considered in the same way as a measure derogating from free movement of Union citizens.[40]

Acknowledging the difference between Article 27(2) of Directive 2004/38 and the provisions on public policy in the Students Directive, now replaced by the Directive 2016/801 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training and so on,[41] the CJEU did not altogether dismiss Member States' obligation to substantiate the occurrence of a threat to public policy or public security. Thus, even where national authorities are considered to have wide discretion in the assessment of facts for decisions on the issuing of student visas, the CJEU made it clear that Member States must guarantee that a refusal on grounds of public policy or public security is based on sufficient grounds and a sufficiently solid factual basis,[42] also so as to ensure judicial review by national courts is possible (see below).

Schengen Borders Code and Visa Code:
Entry and the issuing of short-term visas

The Schengen Borders Code (SBC) sets out the rules governing border controls and entry conditions for people crossing the Schengen territory's external borders. Under Article 6 SBC, third-country nationals

40 CJEU 4 April 2017, C-544/15, Fahimian (EU:C:2017:255), points 40-43.

41 *O.J.* L 132, 21.5.2016.

42 Fahimian, points 45 and 50.

will be refused entry if they are considered to be 'a threat to public policy, internal security, public health or the international relations of any of the Member States'. In addition, Article 32(1)(a)(vi) of the Visa Code provides that a short-term (or Schengen) visa will be refused if the applicant is considered to be 'a threat to public policy, internal security or public health'. Whereas the SBC provides a uniform definition of a 'threat to public health', it does not define a 'threat to public order, internal security or international relations'.[43] Similarly, the Visa Code does not include a definition of 'public policy'. Despite this discretionary power available to Member States, Article 4 SBC requires that when applying the SBC, the Member States must act in full compliance with EU law (including the Charter), international law (including the Refugee Convention) and fundamental rights. Article 4 additionally states that, in accordance with general principles of EU law, every decision under the SBC must be taken 'on an individual basis'. Meanwhile, Article 7 requires border controls to be carried out professionally and respectfully and 'proportionate to the objectives pursued'.

With regard to entry refused on the basis of the SBC in the absence of a criminal conviction, the CJEU held in its judgment in *E.P.* of 12 December 2019 that, based on the principle of proportionality, 'The infringement which the third-country national is suspected of having committed must be sufficiently serious, in the light of its nature and of the punishment which may be imposed, to justify that national's stay on the territory of the Member States being brought to an immediate end.'[44] The CJEU emphasized that also national practices based on the SBC, must comply with the principle of proportionality, which is a general principle of EU law. National authorities may invoke a threat to public policy only if there is 'consistent, objective and specific evidence that provides grounds for suspecting that that third-country national has committed such an offence.'

43 Article 2 defines a 'threat to public health' as 'any disease with epidemic potential as defined by the International Health Regulations of the World Health Organization and other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the Member States.'

44 CJEU C-380/18, *E.P.* (EU:C:2019:1071) points 47-49.

This criterion adds to the one formulated by the CJEU in the above-mentioned *Fahimian* judgment regarding the notion of public security on the basis of the former Students Directive. In this case, the CJEU underlined that in order to determine whether an applicant for a student visa 'represents a threat, if only potential, to public security', Member States should 'perform an overall assessment of all the elements of that person's situation' (point 43). According to the CJEU in the *Fahimian* judgment, refusals of student visas based on public security must be based on 'an extensive knowledge of his country of residence and on the analysis of the various documents and of the applicant's statements' (point 41). Whereas in the *Fahimian* judgment, the CJEU indicated that a 'potential risk' for security might be sufficient for refusing a student visa, the CJEU does not apply this notion with regard to refusals of entry based on the SBC.

Requirement for substantiated decision-making and access to effective judicial protection

The requirement for substantiated decision-making is closely related to the need to ensure the individual right to effective judicial protection as included in Article 47 CFR. The CJEU has confirmed this in several judgments, including in *Fahimian,* when it held that while taking account of the distribution of the burden of proof as described above, national courts must 'ascertain in particular whether the contested decision is based on a sufficiently solid factual basis.' Even though in view of national authorities' discretionary power, judicial review is limited to the absence of manifest error, courts must be able to assess compliance with the necessary procedural guarantees, including authorities' obligation, firstly, to examine 'carefully and impartially all the relevant elements' of the individual situation and, secondly, to state the reasons for the decision allowing the judiciary to assess whether 'the factual and legal grounds' for the decision at stake were present.[45] In the *El Hassani* case, too, the CJEU emphasized that the right to legal remedies as provided for in the Visa Code must be protected in accordance with Article 47 CFR, meaning that visa applicants are entitled to a hearing by an independent and impartial tribunal.[46] Compliance with that right

45 Case C-544/15, points 45-47.

46 Case C-403/16, 13 December 2017 (EU:C:2017:960).

assumes that a decision by an administrative authority 'that does not itself satisfy the conditions of independence and impartiality must be subject to subsequent control by a judicial body that must, in particular, have jurisdiction to consider all the relevant issues.'[47]

This necessity of access to effective legal remedies was re-emphasized by the CJEU in 2020 in the *R.N.N.S.* case, dealing with consultation procedures on the basis of the Visa Code.[48] According to Article 22 of the Visa Code, Member States may submit a list of third countries to the European Commission and require that if nationals from one of these countries apply for a visa for another Member State, the issuing state's visa authorities must first consult the authorities from the other Member State. If the consulted state subsequently objects to the issuing of a visa, the consulting state must refuse the short-term visa even if the applicant does not intend to visit the objecting state. In practice, this means that the consulting state may refuse a visa on public order or public security grounds without knowing the objecting state's grounds for objection. In November 2020, the CJEU ruled on two cases in which the Dutch visa authorities had refused a short-term visa to third-country nationals following objections from other Member States (Hungary and Germany, respectively). In its judgment, the CJEU emphasized that to ensure the right to judicial protection is effective, the person concerned must be able to ascertain the reasons on which the decision taken in his or her respect was based, either by reading the decision itself or by requesting and obtaining notification of those reasons.[49] The CJEU emphasized the obligation of the Member State refusing a visa to ensure that the visa applicant's rights of defence and right to a remedy are guaranteed. This includes the obligation for the visa refusal decision to indicate the Member State that raised the objection, the specific grounds for refusal on the basis of that objection, and, 'where appropriate', the essence of the reasons for that objection. With regard to reviewing the merits of the objection, the CJEU found that the courts of the Member State adopting the final decision cannot examine the substantive legality of the objection raised by another Member State to the issuing of the visa. Nevertheless,

47 Case C-403/16, points 39-42.

48 Joined Cases C-225/19 and C-226/19, *R.N.N.S.* and *K.A.* (EU:C:2020:951).

49 C-225/19 and C-226/19, points 43-56.

to enable the visa applicant to exercise his or her right to challenge such an objection in accordance with Article 47 CFR, the Member State that adopted the final decision to refuse a visa, should provide information on the authority whom the applicant may contact in order 'to ascertain the remedies available in that other Member State.'

Schengen Information System (SIS) II Regulation: National alerts for the purpose of refusing entry

Under Article 6(1)(d) SBC, a third-country national to whom an SIS alert is issued for the purpose of refusing entry must be refused entry. Accordingly, Article 32 of the Visa Code (Regulation 810/2009) provides that a short-term visa will be refused to a third-country national for whom an alert has been issued in the SIS for the purpose of refusing entry. In accordance with the SIS II Regulation, third-country nationals can be reported into the SIS for the purpose of refusing them entry, either based on a national decision related to public policy or public security grounds, or on an entry ban issued in accordance with the Return Directive. In practical terms, this means there are three different situations to assess when deciding whether a third-country national is considered a threat to public order in the context of entry, admission, and residence rights. Firstly, if the national authorities of a Member State decide, for the purpose of refusing entry or stay, to report a person into SIS on the basis of Article 24(2) SIS II Regulation. Secondly, as explained below, if the authorities have to decide, within the framework of the Return Directive, whether or not to grant a voluntary period of return, and this results in an entry ban being reported into the SIS on the basis of Article 24(3) SIS II Regulation. And, thirdly, at the external borders, when border guards (or visa authorities) have to decide, on the basis of the SBC or Visa Code, whether the person constitutes a threat to public policy and should be refused entry. Even, therefore, in the absence of an SIS alert for the purpose of refusing entry, a third-country national arriving at the external borders or applying for a visa may be refused entry because of being considered a public order or public security risk (on the basis, for example, of a national alert).

While neither the SIS II Regulation nor the Return Directive defines 'public order or public security' for the purpose of issuing SIS alerts or entry bans, Article 24 SIS II Regulation provides two different categories of grounds for recording third-country nationals into SIS II. Firstly, under

Article 24(2), an SIS alert will be issued if the person is considered 'a threat to public policy or public security or to national security'. Secondly, under Article 24(3), an SIS alert may be entered into SIS 'based on the fact that the third-country national has been subject to a measure involving expulsion, refusal of entry, or removal which has not been rescinded or suspended, that includes or is accompanied by a prohibition on entry or … residence.' Until recently there was no explicit legal basis for reporting entry bans under the Return Directive 2008/115, and Member States' duty to do so derived only from recital 18 of the Return Directive, which states that Member States' sharing of information on entry bans will take place through the SIS. Article 24 of the amended version of the SIS III Regulation of 2018 now explicitly provides for this second category of SIS alerts based on the Return Directive.[50]

Article 24(2) SIS II Regulation: Public policy and security grounds

Article 24(2) of the SIS II Regulation provides for the issuing of SIS alerts for the purpose of refusing entry on the basis of public policy, public security or national security grounds. There are two main criteria for which these alerts can be issued. Firstly, such an alert can be based on a person having been convicted in a Member State of an offence punishable by a term of imprisonment of at least one year. Secondly, an SIS alert can be based on serious grounds for believing that the third-country national 'has committed a serious criminal offence or in respect of whom there are clear indications of an intention to commit such an offence in the territory of a Member State.' This means that, under Article 24(2), a third-country national can be issued an SIS alert merely because of having been convicted in a Schengen state, even where the offence is relatively minor (as long as the crime is punishable by deprivation of liberty for at least one year), or if there are serious grounds for believing that the person has committed a serious criminal offence or there are clear indications of the person's intention to commit such an offence in the territory of a Member State.[51] In general, it is up to the reporting state to assess whether evidence is sufficient to conclude that serious grounds exist for believing that a third-country national has committed or will commit a serious crime.[52] If the situation is considered to amount to a threat to public policy, public security or national security, the text of Article 24(2) SIS II Regulation implies that the issuing of the SIS alert is *mandatory*.[53] An SIS alert based on the criterion in Article 24(2) can be issued without the third-country national ever having entered or resided in a Schengen state. This is an important difference with regard to the grounds for SIS alerts as referred to in Article 24(3): these alerts concern only third-country nationals who have previously stayed within the Schengen territory.

Article 24(3) SIS II Regulation: Entry bans issued under the Return Directive 2008/115

Article 24(3) includes a second category of SIS alerts related to non-compliance with national immigration measures, such as expulsion or refusal of entry or removal decisions. In general, this category of alerts is not related to the question of whether the third-country national involves a threat to public policy, public security or national security. However, as discussed earlier in respect of the *Zh. and O.* case, the concept of public order and public security may become relevant where an SIS alert follows an entry ban issued on the basis of the Return Directive.

Under the Return Directive, Member States are *obliged* to issue a return decision to illegally staying third-country nationals.[54] In normal situations, third-country nationals who are issued a return decision will

50 Regulation 1861/2018, *O.J.* L 312, 7.12.2018; see further below.

51 This latter category also covers situations where the person is the object of a restrictive measure to prevent entry into or transit through the territory of Member States, including a travel ban issued by the Security Council of the United Nations; such situations are not discussed in any more detail here.

52 A European Migration Network Ad Hoc Inquiry published on 20 April 2015 found not only differences in national practices and the numbers of SIS alerts for the purpose of refusal, but also that many Member States could not provide statistics on SIS alerts submitted and whether these concerned Article 24(1) or 24(2) alerts.

53 'An alert shall be entered where the decision referred to in paragraph 1 is based on a threat to public policy or public security or to national security which the presence of the third-country national in question in the territory of a Member State may pose.

54 As we mentioned above, the adopted proposal of the Regulation on the use of the SIS for the return of illegally staying third-country nationals (2016/0407(COD)) means that not only the issuing of return decisions is mandatory, but also their systematic reporting into SIS II as an 'alert for the purpose of return'.

be granted a period of voluntary return of between 7 and 30 days. Under Article 7(4) of the Return Directive, however, Member States may refrain from granting a voluntary period of return in three situations: (1) if there is a risk of absconding, (2) if the application for a legal stay is dismissed as manifestly unfounded or fraudulent, or (3) if the person poses a risk to public policy, public security or national security. If no voluntary period of return is granted in such cases, Member States *must* accompany a return decision with an entry ban that is to be reported in the SIS II (Article 11(1)(a) and (b)). In other cases, Member States *may* decide to adopt an entry ban following the return decision (Article 11(1), last sentence).[55] This means that entry bans issued in accordance with the Return Directive may but do not necessarily have to be related to public order or security grounds. Member States can decide to report entry bans into SIS even if the person has been granted a voluntary period of return, or if there is a risk of absconding, or based on a previous fraudulent application for legal stay.

Requirement for individual assessment and proportionality

Under the SIS II Regulation, two further criteria must be fulfilled before any SIS alert can be issued for the purpose of refusing entry or stay. Firstly, Article 24(1) provides that every SIS alert for the purpose of refusing entry or stay must be based on a national decision taken in accordance with the national rules of procedures and on the basis of an individual assessment. Secondly, in accordance with the proportionality clause in Article 21 and before issuing an alert, Member States must determine whether the case is 'adequate, relevant, and important enough'. These two criteria are in line with the requirements defined by the CJEU in *Zh. and O.* with regard to the principle of proportionality and the case-by-case assessment (see points 49 and 75).

55 Under Regulation 2018/1860 on the use of the SIS for the purpose of entering return decisions in accordance with the Return Directive 2008/115, it will also become mandatory to report return decisions into SIS 'for the purpose of return'.

SIS alerts and right to free movement of third-country national family members of EU citizens

With regard to SIS alerts on third-country national family members of EU citizens, it is important to add that the stricter conditions of the Citizens Directive must be applied in order to protect these family members' right to freedom of movement. This was already underlined by the CJEU in 2006, in *Commission v. Spain*. In this case, the CJEU dealt with the Spanish refusal, on the basis of an SIS alert, to allow a visa to be issued and to allow entry into the Schengen Area, respectively, to two Algerian spouses of EU citizens.[56] By failing to give adequate reasons for refusing a visa or allowing entry, and without first verifying whether the presence of those persons constituted a genuine, present and sufficiently serious threat affecting a fundamental interest of society, Spain did not fulfil its obligations under the then Articles 1 to 3 and 6 of the Council Directive 64/221 (now the Citizens Directive 2004/38). The CJEU found that whereas an entry in the SIS in respect of a third-country national who is the spouse of an EU national may indeed constitute evidence to justify refusing the person entry into the Schengen Area, such evidence must be corroborated by information enabling a Member State that consults the SIS to establish, before refusing entry into the Schengen Area, that the presence of the person concerned in that area constitutes a 'genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.'

56 C-503/03, Judgment of 31 January 2006, [2006] ECR I-1097.

Chapter 5

Summary and conclusions

5.1 Summary

This publication has set out to explore how the various provisions in EU free movement and migration law on public policy and public security grounds relate not only to one another, but also to the concept of public order as deployed in ECtHR case law in immigration cases based on Article 8 ECHR. In particular, we have sought to clarify the position of third-country nationals regarding protection against measures on grounds of public policy and public security.

Following a short history of public order and security clauses in EU migration law in Chapter 1, and an explanation of the scope of protection of Article 8 ECHR in Chapter 2, Chapter 3 described the general principles developed on the concept of public policy and public security in EU law. The CJEU's case law shaping the general principles of the concept of public policy and public security has consistently focused on committing Member States to give reasons, every time they consider taking measures on grounds of public policy or public security, so as to prevent Member States from applying automatic decision-making by substituting a case-specific assessment of the circumstances of the case at hand with general considerations. The essence of strictly applying the public order and public security concepts in this way entails the obligation to make individual examinations and to respect the principle of proportionality.

Chapter 4 provided an overview of the general principles on public policy and public security's scope of application to measures directed at third-country nationals. On the basis of CJEU case law, we found that three categories of protection have to be distinguished: firstly, third-country nationals who are protected by the general principles laid down in Article 27(2) of Directive 2004/38 (Turkish labour migrants, refugees or persons who otherwise need international protection; those protected by the right to liberty within the framework of the Return Directive, and third-country nationals with EU long-term resident status with regard to a decision of removal); secondly, third-country nationals who apply

for a residence permit under the Family Reunification Directive; and, thirdly, third-country nationals without legal residence who apply for entry or first admission.

In the case of the first category, we have seen, that with regard to expulsion decisions involving long-term resident third-country nationals, a Member State may decide to expel a long-term resident only where he or she constitutes an actual and sufficiently serious threat to public policy or public security, and that, before taking such decision, the Member State must take account of the duration of residence in the territory, the age of the person concerned, the consequences for the person concerned and family members, and the person's links with the country of origin. Furthermore, a decision to expel a long-term resident third-country national cannot be based solely on the grounds that the person has been sentenced to a term of imprisonment of more than one year.

With regard to the second and third categories, and even if Member States may apply a less stringent standard than applied within the context of the Citizens Directive, the CJEU has defined strict criteria that must be applied by national authorities in immigration decision-making. In dealing with the Family Reunification Directive the CJEU underlined that any restricting of the right to family reunification cannot go beyond what is necessary to ensure that public policy is safeguarded. National authorities cannot 'automatically take the view that a third-country national is a threat to public policy … merely because he or she has been convicted of some or other criminal offence.' There must be an individual assessment 'taking due account of the nature and solidity of that person's family relationships, of the duration of his or her residence in the Member State and of the existence of family, cultural and social ties with his or her country of origin.' With regard to the refusal to grant long-term resident status, the CJEU has held that Member States must consider and balance a certain number of factors, such as, firstly, the seriousness of the nature of the offence committed by the person, and the threat the person presents to the public policy or public security, and, secondly, the length of the residence in the host Member State and any ties the person has with that Member State. According to the CJEU, the assessment of all these elements requires a case-by-case assessment that precludes refusing to grant long-term-resident status solely on the grounds that the person has previous convictions of any nature.

Thirdly, we considered the application of the public order concept with regard to first admission decisions based on the Schengen Borders Code or the Visa Code relating to third-country nationals without residence rights as provided for in the first two categories. With regard to this latter category, the CJEU underlined that, despite the wider discretionary powers of national administrations, automatic decision-making is prohibited and decisions are bound by the principle of proportionality. Lastly, we have seen that Member States must ensure the right to effective judicial protection as included in Article 47 CFR, also with regard to immigration decisions where national authorities have wide discretionary powers. This involves not only the requirement for substantiated decision-making, but also the opportunity for national courts to assess compliance with the necessary procedural guarantees, including authorities' obligation, firstly, to examine "carefully and impartially all the relevant elements" of the individual situation and, secondly, to state the reasons for the decision in such a way that the judiciary can assess whether "the factual and legal grounds" for the decision were present.

5.2 Principles and Guidelines

Our analysis brings us to the following principles and guidelines.

General conclusions

— Every decision based on EU immigration law, including refusing visas, entry at the borders, expulsions or issuing alerts in SIS for the purpose of refusing entry or stay, must be based on an **individual assessment.** This means that automatic decision-making is prohibited. National authorities cannot automatically regard a third-country national as a threat to public policy merely because the person has committed a criminal offence.
— Every decision must be adopted in accordance with the **principle of proportionality** (the application of public order grounds must not go beyond what is necessary to ensure that public policy is safeguarded) and be based on sufficiently solid factual grounds. Every proportionality assessment must be made in conformity with the specific requirements of the EU principle of proportionality. This proportionality principle

requires more from Member States than the fair balance assessment under Article 8 ECHR.

— National authorities must **substantiate grounds** for refusing or withdrawing residence permits or admission. This requirement for substantiated decision-making ensures the individual of the **right to effective judicial protection,** as provided for in Article 47 CFR, and enables courts to effectively assess all the factual and legal grounds of immigration decisions based on public policy and public security grounds. Even where national authorities have discretionary power, such as on the basis of the Visa Code, and where judicial review is limited to the absence of manifest error, national courts must be able to assess compliance with the necessary procedural guarantees, including the authorities' obligation, firstly, to examine "carefully and impartially all the relevant elements" of the individual situation and, secondly, to state the reasons for the decision, so that the judiciary can assess whether "the factual and legal grounds" for the decision were indeed present.

Specific conclusions

— **Turkish labour migrants, refugees** or persons who otherwise need international protection**,** those protected by the right to liberty within the framework of the **Return Directive** and third-country nationals with **long-term EU resident status** are protected by the general principles laid down in Article 27(2) of Directive 2004/38 with regard to a decision of removal, such that the question of whether that person represents a genuine, present and sufficiently serious threat to a fundamental interest of society has to be verified.

— Decisions based on the **Family Reunification Directive** require an individual assessment "taking due account of the nature and solidity of that person's family relationships, of the duration of his or her residence in the Member State and of the existence of family, cultural and social ties with his or her country of origin". Decisions to withdraw a residence permit must take account of the severity or type of offence committed, in addition to the requirement in Article 6(2) Family Reunification Directive for Member States, when taking the relevant decision, to consider "the dangers that are emanating from such person".

— Every **SIS alert** for the purpose of refusing entry or stay must be based on a national decision taken in accordance with the national rules of procedures, and on an individual assessment. In accordance with the proportionality clause in Article 21 of the SIS II Regulation, Member States must also determine, before issuing an alert, whether the case is "adequate, relevant, and important enough".

MEIJERS COMMITTEE
STANDING COMMITTEE OF EXPERTS ON INTERNATIONAL IMMIGRATION, REFUGEE AND CRIMINAL LAW

Migration law generally allows states to expel migrants who have committed criminal offences on the ground that they form a risk to public policy or national security. But this general state competence is limited by fundamental rights norms that follow from the European Convention of Human Rights and European Union law.

In legal practice, judges, attorneys and policymakers wrestle with the precise meaning of public policy restrictions and the balancing between public interests and individual fundamental rights. The lack of legal certainty in this field of EU migration law, result in diverging practices between, or even within, Member States.

This publication sets out to give a systematic reading of EU law and CJEU case law to identify common standards and principles regarding the use of public policy restrictions in EU migration law. On this basis, the publication identifies the common standards and principles that should be leading in all practices of decision-making within the scope of EU law.

We submit that common standards and principles are identifiable in EU law, which amounts to concrete obligations for national authorities and which safeguards go beyond the protection of the ECHR framework.

Evelien Brouwer, Kees Groenendijk and Eva Hilbrink are members of the Meijers Committee. Pieter Boeles was a member until September 2020. Willem Hutten is the Meijers Committee's executive secretary.