

OPEN Summary of an EMN Ad-Hoc Query No. 2016.1121

The implementation and execution of EU Directives concerning public order or public security

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1. BACKGROUND

The Advisory Committee for Migration Affairs (ACVZ) in the Netherlands is currently preparing a recommendation for the Dutch government on the application of public policy in migration affairs. By launching this EMN AHQ, the Committee wishes to enhance its understanding of the legislation and enforcement practices of public policy in other EU Member States.

The Qualification Directive, the Citizens Rights Directive and the Family Reunification Directive stipulate the rejection, withdrawal and refusal to renew of legal residence. The ACVZ would like to know how EU Member States have interpreted these legal provisions and how they have implemented them in their national systems.

2. MAIN FINDINGS/CONCLUSIONS

The Member States Austria, Belgium, Croatia, Czech Republic, Germany, Estonia, Finland, Hungary, Latvia, Lithuania, Luxembourg, Sweden, The Netherlands, The Slovak Republic and The United Kingdom have implemented most of the legal provisions on public policy and public security from the Qualification Directive, Citizens Rights Directive and Family Reunification Directive in their national systems. Most Member States have transposed the provisions on public policy and public security rather literally, not indicating precise criteria for determining the level of threat to public policy. Although sometimes provisions are not transposed by Member States into national

legislation it is possible to apply grounds of public policy, or public security or public health in practice. The application of these grounds is in general done on a case-by-case assessment. To determine whether the subject poses a genuine, present and sufficiently serious threat to public order all relevant circumstances are taken into account. Because of the different transposition of the Directives and variation in used criteria and national practice it is not possible to indicate best practices.

3. GENERAL OBSERVATIONS

Articles 14(4) and 17 of the Qualification Directive 2011/95/EU have been transposed into the respective national systems of the Member States. The Qualification Directive 2011/95/EU does not give an explicit explanation of the concept of a 'serious crime' or a 'particular serious crime' in article 14 and 17 of the QD. Although there is a differentiation between a particularly serious crime and a serious crime, Member States have different views on what constitutes a serious crime and particular serious crime in their national laws and practice. Several Member States apply criteria linked to their administrative practice or refer to their criminal law. For example Austria, Germany, the Netherlands and the Slovak Republic refer to different types of criminal offence and minimum duration of prison sentence or a custodial punishment as a threshold to apply these articles in the Qualification Directive. The Czech Republic refers

especially to attacks against life and health of persons (murder, rape, arson) to be considered as serious or particular serious crimes. However, the individual assessment of each case is necessary. Finland points to possible grounds for exclusion: the individual has been convicted of particularly aggravated crimes (homicides, violent crimes, sexual offences, narcotics offences). An individual assessment is made, that also takes into account repeat offending and other criminal offences. In Belgium 'serious crime' or 'particularly serious crime' haven't been elaborated further. A refugee status can be revoked on the basis of a particularly serious crime, but to do this a conviction by final judgment is necessary. An example is a ruling on June 7th 2016 of the Belgian Council for Alien Law Litigation (nr. 169 319). A Somali national is arrested at sea by Belgian soldiers because of piracy. He is brought to Belgium where he is convicted. Later he applies for asylum. Because he is convicted by final judgment for a particularly serious crime, refugee status is refused and he is excluded from subsidiary protection. A violation of article 14 of the directive 2011/95/EU is invoked, but the council rejects the appeal.

Member States have mostly transposed article 27 and 28 of the Citizens Rights Directive. Croatia has not explicitly transposed article 24(2), but in practice it offers to EU citizens equal treatment as Croatians. All Member States apply the criteria 'genuine, present and sufficiently serious threat to public order or public security' to EU citizens and their family members. There are common grounds in the Member States which aspects are taken into account to determine whether the subject poses a genuine, present and sufficiently serious threat to public order. Each case is assessed individually. The decision has to be based on all relevant individual circumstances and type of potential danger. Decisions are based on future behavior and likelihood of reoccurrence of criminal offence. For example Germany examines details of the individual offence, with a particular focus on the danger of repeat offences (e.g. drug offences related to a addiction); criminal records are routinely examined. If (part of) the prison sentence is suspended on probation, the legal prognosis shall be taken into account when gauging the danger. The Citizens Directive (articles 28(2) and 28(3)) does not give an explicit explanation of the concept 'serious grounds' or 'imperative grounds' of public policy or public security. Member States apply these concepts therefore on a case by case basis. The UK mentions in general that 'imperative grounds' must be interpreted

more widely than threats to the state or its institutions, and can, for example, include serious criminality, such as drug dealing as part of an organised group (see Tsakouridis EUECJ C-145/09). Latvia very rarely applies the concept of 'serious grounds' in practice. Lithuania has transposed the concept in article 28(3) in national law as a extreme threat to national security. The Netherlands has no elaboration on serious or imperative grounds as it depends on individual circumstances. In Hungary in such cases the law enforcement agencies have jurisdiction to assess the matter of public security. The concept of public policy in article 6 of the Family Reunification Directive is not well defined and therefore in general terms transposed in the Member States. In Luxembourg for example the term public policy is transposed in the Law on free movement of persons and immigration that transposes both Directives n° 2004/38/EC and n° 2003/86/EC. In Estonia both the Qualification Directive 2011/95/EU and the Directive 2003/86/EC on the right to family reunification are transposed into the Act on Granting International Protection to Aliens of the Republic of Estonia. When Member States make a decision they take, besides Article 17 of the Family Reunification Directive, also into consideration the seriousness or kind of offense against public order or public security committed by the family member, or danger which may result from such a person. For example in Sweden the Migration Court of Appeal (in case MIG 2008:46) made an assessment in determining whether an application for a residence permit on grounds of family reunification should be denied because the applicant constitutes a threat to public order and safety. In addition to the nature and extent of the crime and the ties with the family member, it also takes in account the time elapsed since the applicant last was convicted of crimes. The assessment shall take particular account of crime directed against the family member.

EMN NCPs participating: Austria, Belgium, Croatia, Czech Republic, Germany, Estonia, Finland, Hungary, Latvia, Lithuania, Luxembourg, Netherlands, Poland (not for wider dissemination), Sweden, Slovak Republic, United Kingdom (16 in total)