Reports of Cases

OPINION OF ADVOCATE GENERAL
PITRUZZELLA
delivered on 11 July 2019 [1]

Cases C-381/18 and C-382/18

G.S. (C-381/18)
V.G. (C-382/18)
v
Staatssecretaris van Justitie en Veiligheid

(Request for a preliminary ruling
from the Raad van State (Council of State, Netherlands))

(Reference for a preliminary ruling — Border controls, asylum and immigration — Immigration policy — Right to family reunification — Requirements for the exercise of the right to family reunification — Withdrawal or refusal to renew the residence permit of a family member on grounds of public policy — Concept of 'grounds of public policy')

1. While Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2] may impose specific positive obligations on the Member States, corresponding to clearly defined individual rights, [3] it also allows them to refuse family reunification in certain cases. The question arises, then, of the limits of the discretion they exercise. In these two joined cases, the Court is asked to determine whether, where the national authorities decide, on grounds of public policy [*ordre public*], to reject an application for entry into the territory of the European Union, or to withdraw or refuse to renew a residence permit, they must base their decision on the personal conduct of the third-country national, a member of the family of another third-country national who is already, and legally, within the territory of the European Union, and whether that conduct must constitute a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

I. Legal framework

A. Directive 2003/86

2. Article 3(3) of Directive 2003/86 provides that 'this Directive shall not apply to members of the family of a Union citizen'.

3. Article 6(1) and (2) of that directive read as follows:

'1. The Member States may reject an application for entry and residence of family members on grounds of public policy, public security or public health.

1 Original language: French.

2 OJ 2003 L 251, p. 12.

3 See judgment of 9 July 2015, *K. and A.* (C-153/14, EU:C:2015:453, paragraph 46 and the case-law cited).

2. Member States may withdraw or refuse to renew a family member's residence permit on grounds of public policy or public security or public health.

When taking the relevant decision, the Member State shall consider, besides Article 17, the severity or type of offence against public policy or public security committed by the family member, or the dangers that are emanating from such person.'

4. Article 17 of that directive provides that 'Member States shall take 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 where they reject an application, withdraw or refuse to renew a residence permit or decide to order the removal of the sponsor or members of his family'.

B. The appraisal framework established by Dutch law

5. The appraisal framework used by the Dutch authorities to determine an application for entry and residence made by a third-country national wishing to rejoin a family member who is already within EU territory, as laid down in national law, is apparent from a reading of Article 3.77 of the Besluit van 23 november 2000 tot uitvoering van de Vreemdelingenwet 2000 (Order of 23 November 2000 implementing the Aliens Law 2000 ('the AO 2000'),[4] in conjunction with Article 16(1)(d) of the Aliens Law 2000 ('the AL 2000') of 23 November 2000.[5] Such an application may be refused on the grounds of a threat to public order if that third-country national is convicted of an offence and punished by way of a community service order or a fine which is not suspended. It is apparent from the request for a preliminary ruling in Case C-382/18 that the rule that, once five years have passed since the date of the last offence, an application can no longer be refused, does not apply where the third-country national's conviction constitutes recidivism.

6. The national law appraisal framework used by the Dutch authorities when the need arises to determine whether to withdraw the residence permit of a family member, or whether to refuse to renew such a permit, within the meaning of Directive 2003/86, is apparent from a reading of Article 3.86 of the AO 2000, in conjunction with Article 19 of the AL 2000. Under that appraisal framework, a residence permit granted for the purposes of family reunification may be withdrawn or not renewed on the ground of a threat to public order where the sentence imposed on the third-country national wishing to rejoin a family member in EU territory is sufficiently severe by comparison with the duration of lawful residence in the Netherlands. This relationship between the duration of the sentence and the duration of residence is referred to as the 'sliding scale'.[6]

II. The disputes in the main proceedings and the questions referred for a preliminary ruling

A. Case C-381/18

7. G.S. is an Indian national who has held an ordinary limited-duration residence permit in the Netherlands, granted on the basis of family reunification, since 2009. That permit was renewed on 9 March 2010, until 28 August 2014. In 2012, G.S. was sentenced in Switzerland to a term of four years and three months' imprisonment for participation in drug trafficking activities in a period ending no later than September 2010.

4 Stb. 2000, 497.

5 Stb. 2000, 495.

6 For more detail on the sliding scale, see point 61of this Opinion.

8. By decision of 24 September 2015, the Staatssecretaris van Justitie en Veiligheid (Secretary of State for Justice and Security, Netherlands, 'the Secretary of State') withdrew the ordinary limited-duration residence permit, rejected an application for renewal of that permit, and imposed an entry ban on G.S. On 21 October 2016, the Secretary of State rejected, as unfounded, an appeal against the decisions withdrawing the temporary residence permit and refusing to renew that permit. The Secretary of State did consider that G.S.'s appeal against the entry ban was well founded, but went on to declare G.S. to be undesirable.

9. On 3 February 2017, the rechtbank Den Haag, zittingsplaats Amsterdam (District Court of the Hague, sitting in Amsterdam, Netherlands) held, contrary to the submissions advanced by G.S. by reference, inter alia, to the judgments in *Zh. and O.*[7] and *T.*,[8] that the Secretary of State was not required to give reasons justifying his withdrawal of the residence permit and his refusal to renew that permit, on grounds of public policy, on the basis that G.S.'s conduct constituted a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Thus, it was held at first instance that the Secretary of State had complied with the obligation to give reasons imposed by Article 6 of Directive 2003/86 by referring to G.S.'s conviction in Switzerland and to the fact that the offence he had committed was considered to be particularly serious because of its impact on Dutch society. It was also held that the requirements of Article 17 of that directive had been met.

10. The point in dispute before the referring court is whether a decision withdrawing or refusing to renew a residence permit held by a member of the family of a third-country national who is within EU territory must, where it is based on grounds of public policy, be justified, pursuant to Article 6(2) of Directive 2003/86, by a statement of reasons relating to the personal conduct of the family member concerned, which must constitute a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. In that regard, the referring court reads the judgments in *Zh. and O.*[9] and *T.*[10] as requiring a case-by-case assessment and narrowing the scope of the discretion enjoyed by Member States where the decision to be made constitutes a derogation provided for by EU law. A decision refusing to renew or withdrawing a residence permit obtained for the purposes of family reunification could be regarded as derogating from a general rule in favour of family reunification. Bearing in mind that the objective of Directive 2003/86 is to promote family reunification, simply making reference to public policy cannot amount to giving sufficient reasons for a decision withdrawing or refusing to renew a residence permit issued on the basis of family reunification. The referring court also considers it to be clear from the case-law of the Court that it requires the authorities, in all cases,[11] to base their decision on the personal conduct of the individual, which must constitute a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

11. However, the referring court notes that the sliding scale which guides the Dutch authorities in making their decision appears to strike an adequate balance between the relevant interests, in accordance with the case-law of European Court of Human Rights ('the ECtHR'), and particularly the judgments in *Boultif v. Switzerland* and *Üner v. Netherlands*.[12] It takes the view that it follows from the judgment in *Parliament* v *Council*[13] that the striking of such a balance would be satisfactory to the

7 Judgment of 11 June 2015 (C-554/13, EU:C:2015:377).

8 Judgment of 24 June 2015, (C-373/13, EU:C:2015:413).

9 Judgment of 11 June 2015 (C-554/13, EU:C:2015:377).

10 Judgment of 24 June 2015 (C-373/13, EU:C:2015:413).

11 Here the referring court cites, in particular, the judgments of 24 June 2015, *T.* (C-373/13, EU:C:2015:413, paragraph 79), and of 15 February 2016, *N.* (C-601/15 PPU, EU:C:2016:84, paragraph 65).

12 Respectively, ECtHR, 2 August 2001 (CE:ECHR:2001:0802JUD005427300), 'the judgment in *Boultif*') and ECtHR, 18 October 2006 (CE:ECHR:2006:1018JUD004641099), 'the judgment in *Üner*'.

13 Judgment of 27 June 2006 (C-540/03, EU:C:2006:429).

Court, on the basis that it has held that the discretion enjoyed by the Member States in complying with their obligations under Directive 2003/86 does not differ from the discretion left to them under the case-law of the ECtHR on Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (the 'ECHR').

12. In those circumstances, the Raad van State (Council of State, Netherlands) decided to stay the proceedings and, by decision received at the Court Registry on 11 June 2018, referred the following questions to the Court for a preliminary ruling:

'(1) Must Article 6(2) of Directive [2003/86] be interpreted as meaning that the withdrawal of or the refusal to renew the residence permit of a family member on grounds of public policy requires that reasons be stated as to why the personal conduct of the family member concerned poses a genuine, present and sufficiently serious threat to one of the fundamental interests of society?

(2) If question 1 is to be answered in the negative, what are the requirements under Article 6(2) of Directive [2003/86] that apply to the reasons for the withdrawal or the refusal to renew the residence permit of a family member on grounds of public policy?

Must Article 6(2) of Directive [2003/86] therefore be interpreted as precluding a national practice according to which the residence permit of a family member can be withdrawn or the renewal thereof can be refused on grounds of public policy if the penalty or measure to which the family member concerned has been sentenced is sufficiently high in relation to the duration of the lawful stay in the Netherlands …, so that, on the basis of the criteria laid down [by the ECtHR in the judgments in *Boultif* and *Üner*], a balance is struck between the interest of the family member concerned to exercise the right to family reunification in the Netherlands, on the one hand, and the interest of the Netherlands State to protect public policy, on the other hand?'

B. Case C-382/18

13. V.G. is an Armenian national who was resident in the Netherlands — in part lawfully — between 1999 and 2011. In 2011 he was surrendered to the Armenian authorities in connection with drug offences. On 28 July 2016, V.G.'s wife, a Dutch national residing in the Netherlands, made an application to the Secretary of State for entry and temporary residence for the purposes of family reunification within the meaning of Article 6(1) of Directive 2003/86.

14. By decision of 19 September 2016, the Secretary of State, having applied the national law appraisal framework, refused to grant the permit sought on grounds of public policy. His decision was based in particular on the fact that V.G. had been fined in 2000, 2008 and 2009, and had been the subject of a community service order in 2010. The policy that applications for family reunification are not to be rejected where five years have passed since the date of the last offence did not apply to V.G., whose convictions constituted recidivism. After balancing the various interests concerned, taking account of the type of offences, the nature and solidity of the family relationships, the duration of residence and the existence of family, cultural or social ties to V.G.'s country of origin, the Secretary of State took the view that V.G. represented a threat to public order.

15. V.G. appealed against that decision, and, after the Secretary of State rejected that appeal, brought an action before the rechtbank Den Haag, zittingsplaats Amsterdam (District Court of The Hague, sitting in Amsterdam), which, by judgment of 23 June 2017, declared the action to be unfounded. The court of first instance did not accept V.G.'s submission that under the case-law of the Court, whenever an individual decision refusing entry is made on grounds of public policy, it is necessary to establish that the personal conduct of the foreign national concerned constitutes a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. The court of first

instance held, in particular, that the judgment in *Fahimian*[14] was not authority for that proposition. It also stated that Article 6 of Directive 2003/86 made a distinction between rejecting an application for entry and residence (Article 6(1) of that directive) and withdrawing or refusing to renew a residence permit (Article 6(2) of that directive), in that the requirement to consider the severity or type of offence against public policy, and the dangers emanating from the foreign national currently within EU territory, only applied in Article 6(2) cases.

16. V.G. brought an appeal against that judgment before the referring court. The referring court asks, first, whether the Court has jurisdiction to answer its questions, bearing in mind that while Directive 2003/86 provides, in Article 3, that it does not apply to members of the family of a Union citizen, there is a clear and unconditional intention on the part of the national legislature to apply it to situations where the sponsor is a Dutch citizen who has not exercised his freedom of movement. Although it considers that the Court's jurisdiction to interpret Article 6 of Directive 2003/86 would enable it, in Case C-382/18, to ensure that that provision is interpreted in a uniform manner synonymous with equal treatment in the cases covered by that provision, the referring court has doubts stemming from the judgment in *Nolan*,[15] in which the Court held that the Union could not be said to have an interest in ensuring such uniform interpretation of a measure in situations which the EU legislature itself has excluded from the scope of that measure.

17. Supposing that the Court declares itself to have jurisdiction, the referring court then asks whether, where leave to enter and remain is sought by a third-country national for the purposes of family reunification recognised by Directive 2003/86, and where such leave is refused on grounds of public policy, Article 6(1) of Directive 2003/86 requires that reasons be stated as to why the personal conduct of the family member concerned poses a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. In that regard, the referring court endorses the analysis developed before it by the Secretary of State, which, drawing on the judgments in *Koushkaki*[16] and *Fahimian*,[17] concludes that the national authorities have a broad discretion. They must make the same complex evaluations as were considered in the judgment in *Koushaki*,[18] in order to decide whether a family member's application for entry and residence can be rejected on grounds of public policy. In the view of the referring court, there is a difference between decisions adopted on the basis of Article 6(1) of Directive 2003/86, which concern persons not yet within EU territory, and decisions adopted on the basis of Article 6(2) of that directive, which concern persons already granted permission to stay in the European Union. Since a decision under Article 6(2) would put an end to an existing family life, a more detailed assessment is required as to the nature or seriousness of the offences committed against public policy. However, V.G.'s situation falls within Article 6(1) of Directive 2003/86. The referring court notes that the national appraisal framework which guides the Dutch authorities in making their decisions, while it does not go so far as to require them to give reasons, by way of justification of a refusal, as to why the personal conduct of the family member concerned poses a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, does appear to strike an adequate balance between the interests at stake, for the purposes of the case-law of the ECtHR, particularly the judgments in *Boultif* and *Üner*. It therefore considers that the Secretary of State gave due consideration to V.G.'s convictions dating from a previous stay in the Netherlands and struck a balance between, on the one hand, the interest of V.G. and his family member within the European Union in pursuing their family life in the Netherlands, and, on the other hand, the interest of the Netherlands in protecting its public policy.

14 Judgment of 4 April 2017 (C-544/15, EU:C:2017:255).

15 Judgment of 18 October 2012 (C-583/10, EU:C:2012:638).

16 Judgment of 19 December 2013 (C-84/12, EU:C:2013:862).

17 Judgment of 4 April 2017 (C-544/15, EU:C:2017:255).

18 Judgment of 19 December 2013 (C-84/12, EU:C:2013:862).

18. The referring court nevertheless entertains some doubt as to whether that analysis is correct, in the light of another strand of jurisprudence, evident in the judgments in *Zh. and O.*,[19] *T.*[20] and *N.*,[21] according to which a refusal on grounds of public policy must *always* be supported by reasons as to why the personal conduct of the family member concerned constitutes a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. A decision derogating from the fundamental right to family reunification should accordingly be supported by a more detailed statement of reasons.[22]

19. In those circumstances, the Raad van State (Council of State) decided to stay the proceedings and, by decision received at the Court Registry on 11 June 2018, referred the following questions to the Court for a preliminary ruling:

'(1) Does the Court of Justice, having regard to Article 3(3) of Directive [2003/86] and the *Nolan* judgment (C-583/10, EU:C:2012:638), have the jurisdiction to answer questions referred for a preliminary ruling by a Netherlands court on the interpretation of certain provisions of that directive in a dispute concerning an application for entry and residence of a family member of a sponsor who has Netherlands nationality, if that directive was declared to apply directly and unconditionally to such family members in Netherlands law?

(2) Must Article 6(1) of Directive [2003/86] be interpreted as meaning that the rejection of an application for entry and residence of a family member on the grounds of public policy requires that reasons be stated as to why the personal conduct of the family member concerned poses a genuine, present and sufficiently serious threat to one of the fundamental interests of society?

(3) If question 2 is to be answered in the negative, what are the requirements under Article 6(1) of Directive [2003/86] that apply to the reasons for rejecting an application for entry and residence of a family member on the grounds of public policy?

Must Article 6(1) of Directive [2003/86] therefore be interpreted as precluding a national practice according to which an application for entry and residence of a family member can be rejected on grounds of public policy on the basis of convictions during an earlier stay in the Member State concerned, so that, on the basis of the criteria laid down in the judgments of the [ECtHR in *Boultif* and *Üner*], a balance is struck between the interest of the family member concerned and the sponsor concerned to exercise the right to family reunification in the Netherlands, on the one hand, and the interest of the Netherlands State to protect public policy, on the other hand?'

III. Procedure before the Court

20. By order of the President of the Court of 3 July 2018, Cases C-381/18 and C-382/18 were joined for the purposes of the written and oral procedure and of the judgment.

21. Written submissions were lodged by G.S., V.G, the Netherlands, German, and Polish governments, and the European Commission.

22. At a hearing of 2 May 2019, the Court heard oral submissions from G.S., V.G., the Netherlands and German Governments and the Commission.

19 Judgment of 11 June 2015 (C-554/13, EU:C:2015:377).

20 Judgment of 24 June 2015 (C-373/13, EU:C:2015:413).

21 Judgment of 15 February 2016 (C-601/15 PPU, EU:C:2016:84).

22 The referring court also refers to the judgment of 4 March 2010, *Chakroun* (C-578/08, EU:C:2010:117).

IV. Analysis

A. The first question in Case C-382/18

23. The question whether the Court has jurisdiction to interpret Directive 2003/86 in a situation such as that at issue in Case C-382/18, which involves a sponsor of Netherlands nationality who has not exercised her freedom of movement and a member of her family who is a third-country national, when it is apparent, on reading Article 2(c) in conjunction with Article 3(3) of that directive, that it does not apply to members of the family of a Union citizen,[23] can be answered straightforwardly by reference to the judgment in *C and A*,[24] which was delivered on a previous reference for a preliminary ruling from the same court as the present references. Indeed, that court states, in its request for a preliminary ruling, that the grounds on which it refers the question of the Court's jurisdiction are largely identical to those of its request in *C and A*.[25]

24. It is apparent from paragraphs 28 to 44 of the judgment in *C and A*[26] that, although the EU legislature has expressly provided that Directive 2003/86 does not apply to a third-country national who is a family member of a Union citizen who has not exercised his freedom of movement, the Court has jurisdiction to give a ruling on a request for a preliminary ruling in situations where, although the facts in the main proceedings do not fall directly within the scope of that right, the provisions relating to it have been made applicable to those facts in national law, by means of a direct and unconditional reference made in national law to their content. In such a case, the Union has a clear interest in forestalling future differences of interpretation, and in ensuring that the relevant provisions of EU law are interpreted uniformly. The Court held that such an interest could not 'vary depending on whether the scope of the relevant provision was limited by a definition of the cases to which it refers or by means of certain exclusions from its scope, since both legislative techniques may be used interchangeably'.[27]

25. It is common ground that the national legislature intended to apply the requirements of Directive 2003/86 to cases of family reunification in which the sponsor is a Dutch citizen who has not exercised his freedom of movement, and who wishes to be joined in the national territory by a family member who is a third-country national. Accordingly, and in the light of the guidance in the judgment in *C and A*,[28] the Court has jurisdiction under Article 267 TFEU to interpret Article 6(1) of Directive 2003/86 in a situation such as that at issue in the main proceedings, in which the referring court is called on to rule on the refusal of an application for entry and residence made by a third-country national who is a family member of an EU citizen who has not exercised his freedom of movement, because that provision has been made directly and unconditionally applicable to such situations by national law.

B. The remaining questions

26. I propose to deal with the questions raised in Cases C-381/18 and C-382/18 together, because they have a common theme: the extent of the discretion enjoyed by the national authorities where, on grounds of public policy, they refuse a third-country national who is a member of the family of another third-country national falling within the scope of Directive 2003/86 entry into the territory of a Member State (Case C-382/18), or refuse to renew, or withdraw, the residence permit of such a family member (Case C-381/18).

23 See judgment of 8 May 2013, *Ymeraga and Others* (C-87/12, EU:C:2013:291, paragraph 27).

24 Judgment of 7 November 2018 (C-257/17, EU:C:2018:876).

25 Judgment of 7 November 2018 (C-257/17, EU:C:2018:876).

26 Judgment of 7 November 2018 (C-257/17, EU:C:2018:876).

27 Judgment of 7 November 2018, *C and A* (C-257/17, EU:C:2018:876, paragraph 39).

28 Judgment of 7 November 2018, *C and A* (C-257/17, EU:C:2018:876).

27. Furthermore, as I understand the second question in Case C-381/18 and the third question in Case C-382/18, the referring court is not asking about the obligation to give reasons as such, but inviting the Court to identify the criteria which are to guide the assessments made by national authorities in making decisions refusing entry, or refusing to renew or withdrawing a residence permit, on grounds of public policy.

28. I will begin my analysis with a consideration of the literal, historical and purposive interpretation of Directive 2003/86, going on to examine the requirement in the case-law of the Court that, where there has been a criminal conviction, there must be a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. I will then consider the possible limitations on the discretion of the national authorities, apart from the requirement for such a threat, and draw the appropriate conclusions for these two cases.

1. Literal, historical and purposive interpretation of Directive 2003/86

29. Directive 2003/86 enshrines the right to family reunification of third-country nationals who have been lawfully resident for a certain period within the territory of the European Union. Its legal basis is Article 63(3)(a) EC, which provided for the adoption of 'measures on immigration policy', particularly in the area of 'conditions of entry and residence, and standards on procedures for the issue by Member States of long term visas and residence permits, including those for the purpose of family reunion'.

30. Recital 2 of Directive 2003/86 states that 'measures concerning family reunification should be adopted in conformity with the obligation to protect the family and respect family life enshrined in many instruments of international law'. More particularly, recital 2 makes express reference to Article 8 of the ECHR, and that directive must therefore be read in the light of that article, as well as in the light of the Charter of Fundamental Rights of the European Union (the 'Charter').[29] That directive also states that family reunification is 'a necessary way of making family life possible' and 'helps to create sociocultural stability facilitating the integration of third country nationals in the Member State'.[30] Family reunification may be refused 'on duly justified grounds',[31] for example where the person wishing to *enter* the Union is a threat to public policy.[32] Under the terms of that directive, the notion of 'public policy' may cover a conviction for committing a serious crime.[33]

31. The Court has consistently held that, in interpreting a provision of EU law, it is necessary to consider not only its wording, but also the context in which it occurs and the objectives pursued by the rules of which it forms part.[34]

32. In that regard, it should be noted that Article 6 of Directive 2003/86 — the provision which the Court is asked to interpret in the present case — appears in Chapter IV of that directive, which is headed 'Requirements for the exercise of the right to family reunification'. The first paragraph of that article deals with the rejection of an application for entry and residence of a family member, and provides that Member States may reject such an application on grounds of public policy. The second paragraph of that article deals with the withdrawal of or refusal to renew a permit granted on the basis of family reunification, and similarly provides that Member States may withdraw such a permit, or refuse to renew it, on grounds of public policy.[35] This paragraph contains a further stipulation that,

29 See judgment of 4 March 2010, *Chakroun* (C-578/08, EU:C:2010:117, paragraph 44).

30 Recital 4 of Directive 2003/86.

31 Recital 14 of Directive 2003/86.

32 See recital 14 of Directive 2003/86.

33 See recital 14 of Directive 2003/86.

34 See, amongst many others, judgments of 24 June 2015, *T.* (C-373/13, EU:C:2015:413, paragraph 58), and of 4 April 2017, *Fahimian* (C-544/15, EU:C:2017:255, paragraph 30 and the case-law cited).

35 First subparagraph of Article 6(2) of Directive 2003/86.

when taking the relevant decision, the Member State must 'consider … the severity or type of offence against public policy' committed by the family member, or (in the French version), the dangers that the person whose residence permit is withdrawn or not renewed is '*susceptible*' or liable to cause.[36] Neither Article 6 nor the preamble to Directive 2003/86 contain a definition of public policy grounds.

33. It is apparent from the wording and structure of Article 6 of Directive 2003/86 that the EU legislature intended to make separate provision for cases of refusal of entry and residence, as distinct from cases of withdrawal or non-renewal of a residence permit, on grounds of public policy. Nevertheless, it is not apparent from the wording of that article that there is a requirement, in either case, for there to be personal conduct of the individual concerned which constitutes a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. The use of the word '*susceptible*', while it is not decisive, seems more apt to refer to a potential than to an actual threat.[37]

34. A historical interpretation of Directive 2003/86 reveals that, although the proposal for a directive envisaged an express reference to such conduct, the EU legislature ultimately decided otherwise.[38] Neither in cases falling within Article 6(1) of that directive nor in cases falling within Article 6(2) did the legislature intend to restrict the public policy grounds capable of being invoked by the national authorities to situations where the personal conduct of the family member in question constitutes a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

35. It is true that the Commission document 'The relationship between safeguarding internal security and complying with international protection obligations and instruments', which it presented in 2000, shortly after releasing its three proposals for directives on lawful immigration, states that all of those proposals (including the one relating to the right to family reunification) contain 'public order' [*ordre public*] clauses which, as the Commission envisaged matters, were only to be invoked on the basis of the personal conduct of the third-country national concerned.[39] That, however, does not alter the fact that the lack of any reference to such conduct in Directive 2003/86 reflects a conscious decision on the part of the EU legislature.

36. As to the guidance for application of Directive 2003/86 published by the Commission after the report on the application of that directive,[40] this states that 'a person who wishes to be granted family reunification should not constitute a threat to public policy'[41] while recognising that the definition of public policy grounds was largely left to the Member States, within the limits established in the case-law of the ECtHR and the Court of Justice. Nonetheless, the guidance also envisages the application, *mutatis mutandis*, of the case-law on public policy grounds developed in the context of the interpretation of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC

36 My italics.

37 The reason why it cannot be decisive is that the language versions do not all appear to contain this nuance, in so far as — without claiming to be exhaustive — Article 6(2)(2) of Directive 2003/86 refers to the '*peligro que impliqua dicha persona*' (Spanish language version), the '*discoli rapintati da questa persona*' (Italian language version), the '*het risico dat van die persoon uitgaat*' (Dutch language version) or the 'dangers that are emanating from such person' (English language version).

38 Compare Article 6(3) of the amended proposal for a Council Directive on the right to family reunification (COM(2002) 225 final) (OJ 2002 C 203 E, p. 136) and Article 8(2) of the amended proposal for a Council Directive on the right to family reunification (COM(2000) 624 final) (OJ 2001 C 62 E, p. 99).

39 See paragraph 4.4 of 'The relationship between safeguarding internal security and complying with international protection obligations and instruments', Commission working document (COM(2001) 743 final of 5 December 2001).

40 Respectively the Communication from the Commission to the European Parliament and the Council on guidance for application of Directive 2003/86/EC on the right to family reunification (COM(2014) 210 final of 3 April 2014) ('the guidance for application of Directive 2003/86') and the Report from the Commission to the European Parliament and the Council on the application of Directive 2003/86 (COM(2008) 610 final of 8 October 2008).

41 Paragraph 4.1 of the guidance for application of Directive 2003/86.

and 93/96/EEC.[42] That case-law is, essentially, the source of the referring court's doubts, in that the notion of a 'genuine, present and sufficiently serious threat affecting one of the fundamental interests of society' was first developed, in the case-law of the Court, in relation to EU citizens, and later applied, with minor changes, to other situations which were governed by EU law, but did not necessarily relate to EU citizens. Since the analysis of Directive 2003/86 has not revealed anything to suggest a requirement for such a threat, I now turn to consider the case-law of the Court of Justice.

2. The requirement for a present, genuine and sufficiently serious threat affecting one of the fundamental interests of society, in cases where there is suspected offending or a criminal conviction, in the case-law of the Court

(a) The case-law of the Court

37. It was in the judgment in *Bouchereau*[43] that the Court first held that the existence of a previous criminal conviction could only be taken into account, so as to restrict the free movement of Member State nationals on grounds of public policy, in so far as the circumstances which gave rise to that conviction were evidence of 'personal conduct constituting a present threat to the requirements of public policy'.[44] It went on to state that although 'in general, a finding that such a threat exists implies the existence in the individual concerned of a propensity to act in the same way in the future, it is possible that past conduct alone may constitute such a threat to the requirements of public policy',[45] which was a question for the national courts to consider 'in the light of the particular legal position of persons subject to community law and of the fundamental nature of the principle of the free movement of persons'.[46] Earlier in the judgment, the Court had pointed out that the directive it was asked to interpret, which was intended to coordinate national rules on the control of aliens, sought to protect Member State nationals 'from any exercise of the powers resulting from the exception relating to limitations justified on grounds of public policy … which might go beyond the requirements justifying an exception to the basic principle of free movement of persons'.[47]

38. Thus, the requirement for a decision derogating from a fundamental freedom to be based on personal conduct of the individual concerned constituting a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society first emerged in the context of free movement of persons, and was then reiterated,[48] before being codified, as we know, in Directive 2004/38.[49]

39. Nevertheless, the Court has repeatedly widened the applicability of the requirement so as to include areas which are less directly connected — or not at all connected — with the freedom of movement of EU citizens.

42 OJ 2004 L 158, p. 77.

43 Judgment of 27 October 1977 (30/77, EU:C:1977:172).

44 Judgment of 27 October 1977, *Bouchereau* (30/77, EU:C:1977:172, paragraph 28). Such a requirement had already been recognised in the judgment of 28 October 1975, *Rutili* (36/75, EU:C:1975:137), in relation to a decision restricting an Italian national's freedom of movement in France, on the basis of his political and trade union activities (see, in particular, paragraph 28 of the judgment).

45 Judgment of 27 October 1977, *Bouchereau* (30/77, EU:C:1977:172, paragraph 29).

46 Judgment of 27 October 1977, *Bouchereau* (30/77, EU:C:1977:172, paragraph 30).

47 Judgment of 27 October 1977, *Bouchereau* (30/77, EU:C:1977:172, paragraph 15).

48 See, amongst many others, judgments of 29 April 2004, *Orfanopoulos and Oliveri* (C-482/01 and C-493/01, EU:C:2004:262, paragraph 66).

49 See in particular Article 27(2) of Directive 2004/38.

40. Thus, in its judgment in *Commission* v *Spain*,[50] the Court held that a Member State failed to fulfil its obligations, under the same directive it had interpreted in the judgment in *Bouchereau*,[51] where it refused to allow a third-country national who was the spouse of an EU citizen to enter the territory of the European Union, on the sole ground that that national had been the subject of an alert in the Schengen Information System ('the SIS'). After reiterating that the public policy exception was a derogation from the fundamental principle of free movement of persons which had to be interpreted strictly and could not be left to be determined unilaterally by the Member States,[52] the Court ruled that reliance by a national authority on the concept of 'public policy' 'presupposes, *in any event*, the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society'.[53] The Court also made the link, in that judgment, between the strict interpretation of the concept of 'public policy' and the protection of the right of an EU citizen to respect for his family life.[54] In those circumstances, a third-country national who was the spouse of an EU citizen could only be refused entry if the entry in the SIS was corroborated by information showing that the presence of that third-country national constituted a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.[55]

41. The Court has also held, in relation to Article 7(4) of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals,[56] under which Member States can curtail the period for voluntary departure where the person concerned poses a 'risk to public policy', that the concept of risk to public policy must be assessed on a case-by-case basis, in order to ascertain whether the personal conduct of the third-country national concerned poses a genuine and present risk to public policy.[57] Holding that it was unacceptable to rely on any general practice or assumption, the court ruled that the fact that a third-country national 'is suspected, or has been criminally convicted, of an act punishable as a criminal offence under national law cannot, *in itself*, justify a finding that that national poses a risk to public policy within the meaning of Article 7(4) of Directive 2008/115'.[58] Nevertheless, where there has been a criminal conviction, a Member State may find that there is a risk to public policy if that conviction, '*taken together with other circumstances* relating to the situation of the person concerned, justifies such a finding'.[59] In the same vein, the mere suspicion that a third-country national has committed an act punishable as a criminal offence may, 'together with other factors relating to the case in question',[60] form a proper basis for a finding that he poses a risk to public policy within the meaning of Article 7(4). In so holding, the Court observed that the Member States essentially retained the freedom to determine the requirements of the concept of 'public policy' in accordance with their national needs.[61] Against that background, the justification for adopting the *Bouchereau*[62] approach appears to have lain neither in the derogation from the free movement of EU citizens, nor in their right to family reunification, but in the fact that that directive created a derogation from an obligation which had been designed to ensure that the fundamental rights of third-country nationals were respected when they were removed from the European Union.[63]

50 Judgment of 31 January 2006 (C-503/03, EU:C:2006:74).

51 Judgment of 27 October 1977 (30/77, EU:C:1977:172)

52 See judgment of 31 January 2006, *Commission* v *Spain*, (C-503/03, EU:C:2006:74, paragraph 45).

53 Judgment of 31 January 2006, *Commission* v *Spain*, (C-503/03, EU:C:2006:74, paragraph 46). My italics.

54 See judgment of 31 January 2006, *Commission* v *Spain*, (C-503/03, EU:C:2006:74, paragraph 47).

55 See judgment of 31 January 2006, *Commission* v *Spain*, (C-503/03, EU:C:2006:74, paragraph 53; see also paragraph 55).

56 OJ 2008 L 348, p. 98.

57 See judgment of 11 June 2015, *Zh. and O.* (C-554/13, EU:C:2015:377, paragraph 50).

58 Judgment of 11 June 2015, *Zh. and O.* (C-554/13, EU:C:2015:377, paragraph 50). My italics.

59 Judgment of 11 June 2015, *Zh. and O.* (C-554/13, EU:C:2015:377, paragraph 51). My italics.

60 Judgment of 11 June 2015, *Zh. and O.* (C-554/13, EU:C:2015:377, paragraph 52).

61 Judgment of 11 June 2015, *Zh. and O.* (C-554/13, EU:C:2015:377, paragraph 52).

62 Judgment of 27 October 1977 (30/77, EU:C:1977:172).

63 Judgment of 11 June 2015, *Zh. and O.* (C-554/13, EU:C:2015:377, paragraph 48).

42. In its judgment in *N.*,[64] the Court referred to its by then well-established case-law on the concept of public order, pointing out that that concept entails, in any event, the existence — in addition to the disturbance of the social order which any infringement of the law involves — of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society,[65] in the context of the interpretation of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.[66] Thus, placing or keeping an applicant for international protection in detention on grounds of public order could only be justified where 'the applicant's individual conduct represents a genuine, present and sufficiently serious threat, affecting a fundamental interest of society'.[67] In that context, the Court's wish to confine the powers of national authorities within strict limits[68] is due to the exceptional nature of detention, which is to be used only as a last resort.[69]

43. Invited, in *T.*,[70] to interpret the concept of 'public order' in the context of Directive 2004/83/EC,[71] the Court, after pointing out that that concept was not defined in that directive, restated the interpretation it had given to it in the context of Directive 2004/38. While those two directives pursued different objectives, the Court held that the case-law relating to the latter was relevant to the case before it, on the ground 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'. It went on to rule that a national authority could not deny a refugee his residence permit, on grounds of public order, solely on the basis of his support for a terrorist organisation, because in such a case, the authority would not have carried out an 'individual assessment of the specific facts'.[72]

(b) Conclusions to be drawn for the analysis of the present cases

44. At this stage, if a tentative systematisation of the Court's case-law on grounds of public policy were to be put forward, it might be suggested that the Court has generalised the *Bouchereau*[73] approach so as to give a uniform interpretation to grounds of public policy, where such grounds are relied on as bringing a matter within a derogation from a fundamental freedom or fundamental right. On that basis, grounds of 'public policy' would always presuppose the existence of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, based on the personal conduct of the individual concerned.

45. In my view, however, that would be too hasty.

46. One must first ask whether such a generalisation of the requirement for a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society could be reconciled with another recurring feature of the Court's case-law — the observation that while it is inconceivable for grounds of public policy to be defined unilaterally by the Member States, the Member States do retain the freedom to determine the requirements of public policy in accordance with their national needs.[74]

64 Judgment of 15 February 2016 (C-601/15 PPU, EU:C:2016:84). In that case, the applicant in the main proceedings had been convicted of various offences on 21 occasions between 1999 and 2015.

65 See paragraph 65 of the judgment of 15 February 2016, *N.* (C-601/15 PPU, EU:C:2016:84).

66 OJ 2013 L 180, p. 96. More specifically the judgment of 15 February 2016, *N.* (C-601/15 PPU, EU:C:2016:84) concerned Article 8(3)(e) of Directive 2013/33.

67 Judgment of 15 February 2016, *N.* (C-601/15 PPU, EU:C:2016:84, paragraph 67).

68 See judgment of 15 February 2016, *N.* (C-601/15 PPU, EU:C:2016:84, paragraph 64).

69 See judgment of 15 February 2016, *N.* (C-601/15 PPU, EU:C:2016:84, paragraph 63).

70 Judgment of 24 June 2015, (C-373/13, EU:C:2015:413).

71 Council Directive of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12).

72 Judgment of 24 June 2015, *T.* (C-373/13, EU:C:2015:413, paragraph 89).

73 Judgment of 27 October 1977 (30/77, EU:C:1977:172).

74 See, in particular, judgment of 11 June 2015, *Zh. and O.* (C-554/13, EU:C:2015:377, paragraph 48).

47. Furthermore, such a conclusion would be at odds with another strand of the case-law, represented by the judgment in *Fahimian*.[75] The question addressed in that judgment was whether a Member State could refuse entry to an Iranian national who had applied for a visa to pursue studies in Germany,[76] without being required to base its decision on personal conduct of the individual concerned and a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society alleged to arise from that conduct. In that case, the Court expressly declined to take the approach in *Bouchereau*,[77] essentially for two reasons: first, because one of the recitals to the directive in question contemplated that the threat might be no more than potential,[78] and secondly, because the assessment of the individual situation of an applicant for a visa may involve complex evaluations, and it is therefore necessary for the national authorities to enjoy a wide discretion when assessing the relevant facts.[79]

48. In his Opinion in the Fahimian case,[80] Advocate General Szpunar had observed that the context in that case was 'simply other than that of the internal market', and that 'the specific context of EU immigration law implies that a third-country national does not benefit from the same rights as a national of a Member State, i.e. an EU citizen'.[81]

49. There are, in effect, two possibilities. We might regard grounds of public policy as concentric circles with the EU citizen at their centre; the further we move from that centre and from the fundamental status accorded to EU citizens, the wider the discretion accorded to Member States in the assessment of grounds of public policy.

50. Alternatively, we might regard the discretion enjoyed by the Member States as being limited when it is exercised in the context of a restriction on a fundamental right, such as the right to pursue family life, guaranteed by Article 7 of the Charter and by Article 8 of the ECHR, which is at issue in the present case. On that view, it would not be the fundamental status of EU citizen that received special protection under EU law, so much as holders of the right to respect for family life, which is not limited to EU citizens.

51. However, in the same vein as Advocate General Szpunar, I think it is necessary to take the contextual difference between the present cases and *Bouchereau*[82] into account. In my view, this difference, arising in particular from the legal basis of Directive 2003/86, referred to above,[83] and from the lack of any express mention[84] of such a requirement in the wording of Article 6 of that directive — which, as has been seen, reflects a positive intention on the part of the EU legislature — means that the approach taken in the *Bouchereau*[85] judgment cannot be followed in the cases now before the Court.

52. That having been said, I remain convinced that it is possible, without requiring reasons to be given as to why the personal conduct of the third-country national constitutes a present, genuine and sufficiently serious threat affecting one of the fundamental interests of society, to impose limits on the discretion of the national authorities, so as to prevent arbitrariness and ensure the enjoyment of the fundamental rights of third-country nationals.

75 Judgment of 4 April 2017 (C-544/15, EU:C:2017:255).

76 The visa application was based on Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service (OJ 2004 L 375, p. 12).

77 Judgment of 27 October 1977 (30/77, EU:C:1977:172).

78 See judgment of 4 April 2017, *Fahimian* (C-544/15, EU:C:2017:255, paragraph 40).

79 See judgment of 4 April 2017, *Fahimian* (C-544/15, EU:C:2017:255, paragraphs 41 and 42).

80 Judgment of 4 April 2017 (C-544/15, EU:C:2017:255).

81 Point 59 of the Opinion of Advocate General Szpunar in *Fahimian* (C-544/15, EU:C:2016:908). See, in the same vein, point 119 of the Opinion of Advocate General Saugmandsgaard Øe in *K. and H.* (C-331/16 and C-366/16, EU:C:2017:973).

82 Judgment of 27 October 1977 (30/77, EU:C:1977:172).

83 See point 29 of this Opinion.

84 In marked contrast to Directive 2004/38.

85 Judgment of 27 October 1977 (30/77, EU:C:1977:172).

3. The limits of the discretion enjoyed by Member States

53. To my mind, those limits emerge clearly enough from the considerations set out below.

54. First, in relation to Directive 2003/86, the Court has already held that family reunification covers both forming a family and keeping the family unit together.[86] Since authorisation of family reunification is the general rule, the latitude allowed to the Member States must not be used in a manner which would undermine the very purpose of the directive, which is to promote family reunification, as well as its effectiveness.[87]

55. Secondly, as noted above, Directive 2003/86 is expressed to respect Article 8 of the ECHR, which corresponds to Article 7 of the Charter.[88] The ECtHR has held that, in order to be compatible with Article 8 of the ECHR, decisions of the Contracting States must, 'be necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued'.[89] The ECtHR therefore satisfies itself that the decisions in question strike 'a fair balance between the relevant interests, namely the applicant's right to respect for his family life, on the one hand, and the prevention of disorder or crime, on the other'.[90] To that end, it has established 'guiding principles in order to examine whether the measure in question was necessary in a democratic society'.[91] Thus, the ECtHR considers the particular situation of the individual to whom the contested decision relates, and in particular, 'the nature and seriousness of the offence committed …; the duration of the applicant's stay in the country from which he is going to be expelled; the time which has elapsed since the commission of the offence and the applicant's conduct during that period; the nationalities of the various persons concerned; the … family situation, such as the length of the marriage; other factors revealing whether the couple lead a real and genuine family life; whether the spouse knew about the offence at the time when he or she entered into a family relationship; and whether there are children in the marriage and, if so, their age'.[92] The court also considers 'the seriousness of the difficulties which the spouse would be likely to encounter in the applicant's country of origin'.[93]

56. Thirdly, the second subparagraph of Article 6(2) of Directive 2003/86 requires the Member States, when withdrawing a residence permit or refusing to renew it on grounds of public policy, to consider 'the severity or type of offence against public policy … committed by the family member, or the dangers that are emanating from such person'. The parties to these proceedings differ as to whether that subparagraph applies only to decisions taken pursuant to Article 6(2) of that directive, or whether it also applies to decisions taken pursuant to Article 6(1) of that directive, that is to say, decisions rejecting applications for entry. In view of the structure of Article 6(2) of that directive, it might be thought that compliance with the second subparagraph of that provision is only required where the decision concerns a family member who is already in EU territory. However, since Directive 2003/86 must be implemented in accordance with Article 8 of the ECHR, as interpreted by the ECtHR,[94] and

86 See judgment of 4 March 2010, *Chakroun* (C-578/08, EU:C:2010:117, paragraph 62).

87 See judgment of 4 March 2010, *Chakroun* (C-578/08, EU:C:2010:117, paragraph 43). See also judgment of 9 July 2015, *K and A* (C-153/14, EU:C:2015:453, paragraph 50).

88 See the Explanation on Article 7 of the Charter (OJ 2007 C 303, p. 2).

89 Judgment, *Boultif* (CE:ECHR:2001:0802JUD005427300, § 46 and the case-law cited).

90 Judgment *Boultif* (CE:ECHR:2001:0802JUD005427300, § 47).

91 Judgment *Boultif* (CE:ECHR:2001:0802JUD005427300, § 48).

92 ECtHR of 2 August 2001, *Boultif v. Switzerland* (CE:ECHR:2001:0802JUD005427300, § 48). See also judgment of the ECtHR of 18 October 2006, *Üner v. The Netherlands* (CE:ECHR:2006:1018JUD004641099, § 57). The criteria established by the ECtHR have recently been reiterated once again: see judgment of the ECtHR of 9 April 2019, *I.M. v. Switzerland* (CE:ECHR:2019:0409JUD002388716, § 69 and 70).

93 ECtHR of 2 August 2001, *Boultif v. Switzerland* (CE:ECHR:2001:0802JUD005427300, § 48). See also judgment of the ECtHR of 18 October 2006, *Üner v. The Netherlands* (CE:ECHR: 2005: 0705JUD004641099, § 57).

94 See judgment of 4 March 2010, *Chakroun* (C-578/08, EU:C:2010:117, paragraph 44).

since the ECtHR requires precisely those factors to be considered, without limiting them to cases of withdrawal of a residence permit or refusal to renew,[95] they also appear to be relevant when a decision is taken on an application for a residence permit made with a view to entering EU territory for the purposes of family reunification.

57. Fourthly, Article 17 of Directive 2003/86 provides that in the event of rejection of an application for residence, or of withdrawal or non-renewal of a residence permit — in other words in any of the situations contemplated by Article 6 of that directive — and also in the event of removal of the sponsor or members of his family, 'Member States shall take 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'.

58. Fifthly, and finally, the Court has held that, in implementing Directive 2003/86, and particularly in exercising the discretion accorded to them by that directive, Member States must observe the principle of proportionality.[96]

4. Application to the present cases

59. It follows from the foregoing considerations that Article 6 of Directive 2003/86 requires the national authorities to assess each individual situation in the light of the circumstances which characterise it. Because of the impact of a decision under that article on the right to family reunification, and the need to maintain the effectiveness of that directive, any decision-making practice leading, in reality, to systematic rejections based on considerations of a general nature — and thus unrelated to the individual situation to be examined — or on presumptions, would be contrary to that provision.

60. What therefore remains to be done is to determine whether, in the light of those considerations, the practice of the Dutch authorities, who are required to make their decisions in accordance with the appraisal framework laid down in national law, is compatible with those requirements. While that is primarily a task for the referring court, the following considerations can be put forward at this stage.

61. As regards the case of G.S., the Dutch authorities were entitled to withdraw the residence permit granted to him as a family member already within EU territory, on grounds of public policy, if he represented a threat to public order. In deciding to do so, the Dutch authorities used a sliding scale which serves to determine, where there has been a final judgment in a criminal matter, whether the permit can be withdrawn. The sliding scale relates the severity of the sentence to the duration of residence. In other words, the longer the third-country national has been lawfully resident in the Netherlands, the greater the protection accorded to him against a decision to withdraw the permit. The Netherlands Government states that if, and only if, one of the stated thresholds is reached, an overall assessment is carried out so as to determine whether it is appropriate to withdraw the residence permit, such that withdrawal of the permit does not seem to be an automatic consequence of the imposition of a sentence of a duration which is significant by comparison with the duration of residence in the Netherlands. There are three different sliding scales, one for minor offences (less than 6 years' imprisonment), one for serious offences (more than 6 years' imprisonment), and one for cases of recidivism. Where the period of residence is greater than 10 years, the residence permit is only withdrawn in the event of a very serious offence. In G.S.'s case, the permit could only be withdrawn if a sentence of at least 3 years' imprisonment was imposed by final judgment, the period of residence being at least 3 years. The Netherlands Government emphasises that, even then, withdrawal is not automatic, and that the sliding scales serve only to identify cases where withdrawal is possible, and do

95 For an application of the criteria identified in the judgments in *Boultif* and *Üner* to a decision rejecting an application for a residence permit, see judgment of the ECtHR of 1 March 2018, *Ejimson v. Germany* (CE:ECHR:2018:0301JUD005868112, § 56 and 57).

96 See judgment of 9 July 2015, *K and A* (C-153/14, EU:C:2015:453, paragraph 51).

not exempt the national authorities from the ensuing obligation to strike a balance between the relevant interests, with particular regard to the criteria established by the ECtHR in relation to Article 8 of the ECHR, before making a decision. It is for the national court to satisfy itself that the decision-making process is not automatic, and that the withdrawal of a residence permit is indeed based on the particular facts and circumstances of the case. Subject to that, it therefore appears that Article 6(2) of Directive 2003/86, read in conjunction with Article 17 of that directive, does not preclude the appraisal framework which is laid down in Dutch law to guide the national authorities in their decision-making.

62. As regards V.G., it is apparent from the request for a preliminary ruling that the basis on which he was refused a residence permit was that he represented a threat to public order in the Netherlands. The Dutch authorities based their decision on the fact that V.G had received a community service order in 2010 and had been fined in 2000, 2008 and 2009. While, as a general rule, an application for a residence permit made for the purposes of family reunification can no longer be rejected once five years have passed since the date of the last offence, the referring court states that this does not apply to V.G., because his convictions constitute recidivism. However, a rule under which the simple fact of recidivism was a sufficient basis for the automatic rejection of an application for entry made by a third-country national, a family member of another third-country national [97] already within EU territory, would inevitably be contrary to Article 6(1) of Directive 2003/86, read in conjunction with Article 17 of that directive. [98] If it ultimately transpires — and this will be a matter for the referring court to verify — that, as the Netherlands Government maintains, the rejection of such an application on such grounds is not automatic, in that the Dutch authorities remain under an obligation to strike a balance between the relevant interests, that is, the protection of public order and the right to respect for family life, having regard in particular to the criteria established by the judgments of the ECtHR and set out above, and carrying out an appraisal of each case in the light of the specific facts and circumstances known to them, [99] it will equally transpire that that decision-making practice is compatible with those provisions.

V. Conclusion

63. In the light of all the foregoing, I propose that the Court should answer the questions referred for a preliminary ruling by the Raad van State (Council of State, Netherlands) as follows:

(1) The Court of Justice has jurisdiction, pursuant to Article 267 TFEU, to interpret Article 6 of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification in a situation such as that at issue in the main proceedings, where the referring court is called on to rule on the refusal of an application for entry and residence made by a third-country national who is a family member of an EU citizen who has not exercised his freedom of movement, if that provision has been made directly and unconditionally applicable to such situations by national law.

(2) Article 6(2) of Directive 2003/86, read in conjunction with Article 17 of that directive, does not preclude a national practice under which, where a third-country national holding a residence permit granted for the purposes of family reunification, to enable him to reunite with another third-country national already within EU territory, has been sentenced to a term of imprisonment, a decision is taken, on grounds of public policy, to withdraw or not to renew his residence permit, if the case-by-case assessment carried out by the national authorities is based not only on the seriousness of the offence and the severity of the sentence, which they are

97 Or of a national of the Member State in question, as in the present case.

98 If that were the practice of the national authorities, there would not be full compliance with the case-law of the ECtHR requiring the period that has elapsed since the commission of the offence, and the conduct of the person concerned during that period, to be taken into account.

99 In the case of an application for first entry, the information available to the national authorities for the purposes of appraising the specific case may be more limited.

required to compare with the duration of residence in the Member State concerned, but also on a balancing of the relevant interests. To that end, the national authorities must have due regard to all the relevant facts, particularly the nature and solidity of the family ties, and the existence of family, cultural and social ties in the country of origin of the third-country national whose residence permit they are considering withdrawing or refusing to renew. It is for the referring court to satisfy itself that the practice of the national authorities meets those requirements.

(3) Article 6(1) of Directive 2003/86, read in conjunction with Article 17 of that directive, does not preclude a national practice under which a third-country national who is a member of the family of another third-country national who is within the territory of a Member State, and who wishes to join that person on the basis of family reunification, but is a recidivist with several convictions, is refused a residence permit, if the case-by-case assessment carried out by the national authorities is based not only on the criminal history of the applicant, but also on a balancing of the relevant interests. To that end, those authorities must have due regard to all the relevant facts, so far as available to them, particularly the nature and solidity of the family ties, and the existence of family, cultural and social ties in the country of origin. It is for the referring court to satisfy itself that the practice of the national authorities meets those requirements.