Reports of Cases

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

Case C-380/18

Staatssecretaris van Justitie en Veiligheid
v
E.P.

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

(Reference for a preliminary ruling — Border control, asylum and immigration — EU Code on the rules governing the movement of persons across borders — Crossing of external borders and conditions of entry — Decision declaring the end of the legality of a stay because of a threat to public policy — Decision to return a third-country national whose stay is illegal — Concept of threat to public policy — Discretion of the Member States)

1. When they adopt a decision whereby they find that the condition for entry to the territory of the European Union set out in Article 6(1)(e) of Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code, 'the SBC') [2] is not or is no longer fulfilled, are the national authorities required to assess the personal conduct of the national of a third State concerned and to conclude that there is a genuine, present and sufficiently serious threat affecting a fundamental interest of society or may they rely on a mere suspicion that that national has committed a serious criminal offence? That, in essence, is the issue in the present reference for a preliminary ruling.

I. Legal context

A. The Convention implementing the Schengen Agreement

2. The Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed at Schengen on 19 June 1990 ('the CISA') [3], as amended by Regulation (EU) No 610/2013 of the European Parliament and of

1 Original language: French.
2 OJ 2016 L 77, p. 1.
3 OJ 2000 L 239, p. 19.

the Council of 26 June 2013,[4] provides, in Article 20, paragraph 1, that 'aliens not subject to a visa requirement may move freely within the territories of the Contracting Parties for a maximum period of 90 days in any 180-day period following the date of first entry, provided that they fulfil the entry conditions referred to in Article 5(1)(a), (c), (d) and (e) [of the CISA]'.

B. The Schengen Borders Code

3. In the words of recital 6 of the SBC, 'border control is in the interest not only of the Member State at whose external borders it is carried out but of all Member States which have abolished internal border control. Border control should help to combat illegal immigration and trafficking in human beings and to prevent any threat to the Member States' internal security, public policy, public health and international relations'.

4. Recital 27 of the SBC provides that, 'in accordance with the case-law of the [Court], a derogation from the fundamental principle of free movement of persons must be interpreted strictly and the concept of public policy presupposes the existence of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.'

5. Article 6(1) of the SBC provides:

'For intended stays on the territory of the Member States of a duration of no more than 90 days in any 180-day period, which entails considering the 180-day period preceding each day of stay, the entry conditions for third-country nationals shall be the following:

…

(d) they are not persons for whom an alert has been issued in the SIS for the purposes of refusing entry;

(e) they are not considered to be a threat to public policy, internal security, public health or the international relations of any of the Member States, in particular where no alert has been issued in Member States' national data bases for the purposes of refusing entry on the same grounds.'

II. The dispute in the main proceedings, the questions for a preliminary ruling and the procedure before the Court

6. E.P. is an Albanian national who entered the territory of the Netherlands as a tourist, after having passed through Denmark and Sweden, according to him, on 22 April 2016. On 18 May 2016, he was caught in the act in a residential property containing a cannabis farm, then placed in police custody pending criminal proceedings, before being taken into custody by the immigration authorities. Since large quantities of drugs had been found at the scene, E.P. was suspected of having committed an offence classified as a serious offence under Netherlands criminal law.

7. On 19 May 2016, the staatssecretaris van Justitie en Veiligheid (State Secretary for Justice and Security, the Netherlands, 'the State Secretary'), being of the view that E.P. no longer fulfilled the conditions laid down in Article 6(1)(e) of the SBC and that he constituted a threat to public policy, adopted a decision ordering him to leave the territory of the European Union within 28 days. E.P. brought an action against that decision before the rechtbank Den Haag, zittingsplaats Amsterdam

4 Amending Regulation (EC) No 562/2006 of the European Parliament and of the Council establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), the Convention implementing the Schengen Agreement, Council Regulations (EC) No 1683/95 and (EC) No 539/2001 and Regulations (EC) No 767/2008 and (EC) No 810/2009 of the European Parliament and of the Council (OJ 2013 L 182, p. 1).

(District Court, The Hague, sitting in Amsterdam, Netherlands), which, by judgment of 13 September 2016, annulled the return decision and ordered the State Secretary to adopt a fresh decision. The District Court, The Hague, sitting in Amsterdam, held, in particular, that the State Secretary had not properly stated the reasons for his view that E.P.'s legal stay in the Netherlands, on the basis of exemption from a visa,[5] had come to an end pursuant to Article 6(1)(e) of the SBC on the ground that E.P. was now considered to be a threat to Netherlands public policy because he was suspected of having committed an offence against the drugs legislation. According to the District Court, which relied on the judgments in *Zh. And O.*[6] and *N.*,[7] the State Secretary ought to have based his decision on a case-by-case assessment in order to ascertain that E.P.'s personal conduct constituted a genuine, present and sufficiently serious threat affecting a fundamental interest of society, and not on the mere existence of a suspicion.

8. The State Secretary appealed against that judgment before the referring court. He disputes, in particular, that the requirement of a genuine, present and sufficiently serious threat affecting a fundamental interest of society can be transposed to decisions based on Article 6(1)(e) of the SBC, finding that an individual has ceased to fulfil the conditions of entry to the territory of the Union.

9. It was in those circumstances that the Raad van State (Council of State, Netherlands) decided to stay proceedings and, by order for reference, received at the Court Registry on 11 June 2018, to submit the following questions to the Court for a preliminary ruling:

'(1) Must Article 6(1)(e) of [the SBC] be interpreted as meaning that, when establishing that a legal stay of no more than 90 days within a period of 180 days has been terminated because a foreign national is considered to be a threat to public policy, reasons must be given as to why the personal conduct of the foreign national 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 which, pursuant to Article 6(1)(e) of [the SBC], apply to the reasons as to why the foreign national is considered to be a threat to public policy? Must Article 6(1)(e) of [the SBC] be interpreted as precluding a national practice according to which a foreign national is considered to be a threat to public order on the sole ground that it has been established that the foreign national concerned is suspected of having committed a criminal offence?'

10. E.P., the Netherlands, Belgian and German Governments and the European Commission, and also the Swiss Confederation, took part in the written procedure before the Court.

11. At the hearing before the Court on 2 May 2019, E.P., the Netherlands, Belgian and German Governments and the Commission presented oral argument.

5 It is apparent from Regulation (EU) No 1091/2010 of the European Parliament and of the Council of 24 November 2010 amending Council Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (OJ 2010 L 329, p. 1) that Albanian nationals are exempt from the requirement to be in possession of a visa when crossing the external borders of the Union.

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

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

III. Analysis

12. Let me state at the outset that I shall deal with the questions before the Court today together, since it follows from my reading of the second question that it does not relate to the obligation to state reasons as such but, rather, asks the Court to determine the criteria that should guide the assessment of the national authorities when they adopt a decision finding that the conditions of legal entry to and stay on the territory of the European Union are no longer fulfilled because the individual concerned is considered to be a threat to public policy.

13. In order to answer the questions submitted to the Court, as thus envisaged, it will be necessary to clarify, in the first place, the relationship between the SBC, the CISA and 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.[8] It will then be necessary, in the second place, to interpret Article 6(1)(e) of the SBC in accordance with its wording, its context and the objectives pursued by the SBC. The intermediate conclusion which I shall draw will then, in the third and last place, have to be compared with the lessons to be learnt, where appropriate, from the Court's case-law on the requirement of a genuine, present and sufficiently serious threat affecting a fundamental interest of society.

A. The relationship between the SBC, the CAAS and Directive 2008/115

14. The SBC lays down the rules applicable to the border checks of persons crossing the external borders of the Member States of the Union, it being understood that once those borders have been crossed, movement between the Member States will be facilitated by the absence of internal border controls.[9] When acting on the basis of the SBC, Member States are clearly required to observe fundamental rights as guaranteed by EU law, and therefore by the Charter of Fundamental Rights of the European Union.

15. Article 6(1) of the SBC lists the conditions of entry to the territory of the Union for nationals of third States for a maximum stay of 90 days in a 180-day period. Thus, those nationals must be in possession of a valid travel document and, where appropriate, be in possession of a valid visa.[10] They must, in addition, justify the purpose and conditions of the intended stay and have sufficient means of subsistence, not be persons for whom an alert has been issued in the SIS for the purposes of refusing entry and, last, not be considered to be a threat to public policy.[11]

16. Although the questions for a preliminary ruling refer to Article 6(1) of the SBC and the possibility for Member States to refuse *entry* to their territory when the individual concerned represents a threat to public policy, it must be pointed out that what is at issue here is not a decision refusing entry to E.P., as he is already present on Netherlands territory.

17. Such a situation is governed, rather, by Article 20(1) of the CISA, as amended by Regulation No 610/2013, which states that 'aliens who hold valid residence permits issued by one of the Contracting Parties may, on the basis of that permit and a valid travel document, move freely for up to 90 days in any 180-day period within the territories of the other Contracting Parties, provided that they fulfil the entry conditions referred to in Article 5(1)(a), (c), (d) and (e) [of the CISA]'. Article 5(1)(e) requires that the individual is not 'considered to be a threat to public policy … of any of the Contracting States' and therefore adopts the condition of entry laid down in Article 6(1)(e) of

8 OJ 2008 L 348, p. 98.

9 See Article 1 of the SBC.

10 See Article 6(1)(a) and (b)of the SBC.

11 See Article 6(1)(c), (d) and (e) of the SBC.

the SBC. It follows that the conditions for first entry are also the conditions that must be fulfilled during the stay. Accordingly, where the entry conditions are no longer satisfied during the stay, the presence of the national of a third State on the territory of the Union constitutes an illegal stay, as also provided for in Article 3(2) of Directive 2008/115. [12]

18. Since E.P. ceased to fulfil the conditions of legal entry and stay, the Netherlands authorities were required to adopt a return decision. [13] Under Directive 2008/115, a decision on the ending of a legal stay may be adopted at the same time as a return decision, provided that the procedural safeguards afforded by that directive are observed. [14] To my mind, the decision at issue in the main proceedings, dated 19 May 2016, is therefore to be understood as a decision whereby the Netherlands authorities declared that E.P.'s stay was no longer legal and at the same time ordered his return. It is therefore based on the CISA, indirectly on the SBC and on Directive 2008/115. [15]

19. A return decision must state in writing the reasons in fact and in law on which it is based and must contain information about available legal remedies. [16] The information on reasons in fact may be limited 'where national law allows for the right for information to be restricted, in particular … for the prevention, investigation, detection and prosecution of criminal offences'. [17] Since the return decision establishes the illegal nature of the stay, and since, as provided for in Article 20 of the CISA, that irregularity arises from the failure to satisfy one of the conditions laid down in Article 5 of the CISA, and reproduced in Article 6 of the SBC, the Netherlands authorities were required to explain in that decision which condition no longer appeared to be fulfilled by E.P.

20. To that end, the State Secretary considered that E.P. now constituted a threat to Netherlands public policy on the ground that he was suspected of having infringed the Netherlands legislation on drugs. [18] For that reason, he was considered to be a threat to public policy.

21. The entire issue here is whether the State Secretary was entitled to rely on a mere suspicion that a serious offence had been committed in order to arrive at that conclusion, or whether he was required to base his decision on an assessment of E.P.'s conduct as constituting a genuine, present and sufficiently serious threat affecting a fundamental interest of society.

22. The referring court is of the view that that might be the case in the light of the Court's case-law, in particular developed, before being expanded, in the context of its interpretation of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the rights 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 and 93/96/EEC. [19] Before analysing that case-law, let us first of all address the wording and the context of Article 6(1)(e) of the SBC and the context which it pursues.

12 I note that Article 5 of the 2006 version of the SBC corresponds to the present Article 6 of the 2016 SBC.

13 See Article 6(1) of Directive 2008/115.

14 See Article 6(6) of Directive 2008/115.

15 See the definition of 'return decision' in Article 3(4) of Directive 2008/115.

16 See Article 12(1) of Directive 2008/115.

17 The second subparagraph of Article 12(1) of Directive 2008/115.

18 See paragraph 6 of this Opinion.

19 OJ 2004 L 158, p. 77. See, more specifically, Article 27 of that directive.

B. The 'public policy' reason in the SBC

23. As I stated above, Article 6 of the SBC is closely linked to Article 20 of the CISA, which itself refers to Article 5 of the CISA. The public policy reason cannot therefore be interpreted differently in the context of the SBC or in the context of the CISA. Furthermore, since in the examination of an application for a uniform visa, it must be ascertained whether the conditions laid down in Article 6(1)(a) and (c) are fulfilled,[20] and since the consulate is required to ensure that the applicant is not considered to be a threat to public policy,[21] the public policy reason must be given the same definition, whether for the CISA, the SBC or the Visa Code.

24. Neither the CISA nor the SBC defines public policy. Although recital 27 of the SBC states that 'the concept of public policy presupposes the existence of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society', that threat is required in the case of a 'derogation from the fundamental principle of free movement of persons'.[22]

25. From a literal viewpoint, it must be observed that Article 6(1)(e) of the SBC does not contain an explicit reference to the requirement of a genuine, present and sufficiently serious threat affecting a fundamental interest of society. It does not specify the degree of the threat or restrict that threat to a situation in which a fundamental interest of society is in danger. Furthermore, it is couched in negative terms: the individual *should not be considered* to be a threat to public policy. Such a choice of words appears to leave more scope for manoeuvre to the Member States when they must assess the absence of a threat to public policy.[23] From a textual viewpoint, the condition relating to the absence of a threat to public policy laid down in Article 6 of the SBC therefore appears to be very far removed from the wording of Article 27 of Directive 2004/38.

26. From the viewpoint of the context of Article 6 of the SBC and the objective which it pursues, I observe that it governs the conditions of entry of nationals of third States who wish to stay for a short period on the territory of the EU without having to state a particular reason for their stay. Compliance with those conditions is in principle checked at the time of issue of the visa when it is required or at the time of crossing the external borders of the Union. Recital 6 of the SBC states that 'border control is in the interest not only of the Member State at whose external borders it is carried out but of all Member States which have abolished internal border control'. In addition, Article 6 of the SBC applies to nationals of third States who in principle have no connections with the territory of the European Union and who have been held by the Court not to have a fundamental right to enter or to reside in a particular country.[24]

27. At this stage of my analysis, there is nothing to indicate that the EU legislature intended to restrict the discretion of the national authorities, when they adopt a decision refusing entry to a national of a third State or declaring the end of the legal stay on the territory of the Union owing to a threat to public policy, to the extent of requiring that such a decision be based on the personal conduct of that national which must constitute a genuine, present and sufficiently serious threat affecting a fundamental interest of society.

20 See Article 21 of Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas ('Visa Code') (OJ 2009 L 243, p. 1).

21 See Article 21(3)(d) of the Visa Code.

22 The checks required by the SBC take into consideration the difference in status between individuals, since Article 8(6) of the SBC provides that those checks, when they concern 'a person enjoying the right of free movement under Union law[,] shall be carried out in accordance with Directive 2004/38/EC'.

23 See, with regard to a comparable formulation, Opinion of Advocate General Szpunar in Joined Cases *Abcur* (C-544/13 and C-545/13, EU:C:2015:136, point 58).

24 See judgment of 27 June 2006, *Parliament* v *Council* (C-540/03, EU:C:2006:429, paragraph 53).

28. That may also be explained by practical considerations. In fact, when the authorities check compliance with the entry conditions listed in Article 6 of the SBC, whether when the individual concerned crosses the external borders of the Union or when they issue a visa, the information which they have about that individual is limited. The various Governments which have intervened in these proceedings have on a number of occasions put forward that argument, with which I have some sympathy. The same applies, ultimately, to the check carried out by the national authorities when they find that the entry conditions are no longer fulfilled during the stay of a national of a third State on Union territory. In the specific case of E.P., apart from the fact that the latter was alleged to have committed a serious offence, the State Secretary had no further information that would enable him to substantiate E.P.'s personal conduct. He was nonetheless required to adopt, with a certain degree of urgency, a decision that would be binding on the Member States concerned on the basis of relatively restricted information. Nationals of third States wishing to stay in the Union for short periods are not in fact well known to the national authorities, all the more so when their stay is exempt from a visa. To require those authorities to base their decision on a systematic and precise assessment of the personal conduct of the individual concerned, and to require them to demonstrate the existence of a genuine, present and sufficiently serious threat to a fundamental interest of society might well amount to presenting them with a challenge that would be impossible to surmount, no longer allowing them to adopt negative decisions and, ultimately, jeopardising the security of the area without internal borders within which those persons are allowed to move. [25]

29. In those particular circumstances, it is therefore necessary to recognise that the national authorities have a wide discretion, comparable with that which the Court recognised them as having in its judgment in *Koushkaki* [26] in relation to the Visa Code. In that judgment, the Court held that 'the assessment of the individual position of a visa applicant, with a view to determining whether there is a ground for refusal of his application, entails complex evaluations based, inter alia, on the personality of that applicant, his integration in the country where he resides, the political, social and economic situation of that country and *the potential threat posed by the entry of that applicant to public policy …*'. [27] The Court went on to explain that 'such complex evaluations involve predicting the foreseeable conduct of that applicant and must be based on, inter alia, an extensive knowledge of his country of residence and on the analysis of various documents'. [28] It also emphasised that 'the examination carried out by the competent authorities of a Member State to whom a visa application has been submitted must be all the more scrupulous since any issue of a uniform visa allows the applicant to enter the territory of the Member States within the limits fixed by the [SBC]'. [29] The Court thus recognised that the competent authorities have a 'wide discretion which relates to the conditions for the application of Articles 32(1) and 35(6) of that code and also to the assessment of the relevant facts in order to determine whether the grounds set out in those provisions preclude the issue of the visa applied for'. [30] Article 32(1)(a)(vi) of the Visa Code lays down the condition relating to the absence of a threat to public policy. In all logic, the Court should also recognise the complexity of the assessments that have to be made in respect of the conditions of legal entry and stay set out in Article 6 of the SBC and therefore recognise that the national authorities have a wide discretion that cannot thus be reduced to the requirement of a genuine, present and sufficiently serious threat affecting a fundamental interest of society.

25 See recital 2 of the SBC.

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

27 Judgment of 19 December 2013, *Koushkaki* (C-84/12, EU:C:2013:862, paragraph 56). Emphasis added.

28 Judgment of 19 December 2013, *Koushkaki* (C-84/12, EU:C:2013:862, paragraph 57).

29 Judgment of 19 December 2013, *Koushkaki* (C-84/12, EU:C:2013:862, paragraph 59).

30 Judgment of 19 December 2013, *Koushkaki* (C-84/12, EU:C:2013:862, paragraph 60).

30. I would add that the Court expanded on the solution which it reached in its judgment in *Koushkaki*[31] in its judgment in *Fahimian*,[32] which concerned the entry conditions of nationals of third States for the purpose of study and, more specifically, a provision having similar wording to that of Article 6(1)(e) of the SBC.[33] In that judgment, the Court was required to determine whether a Member State could refuse entry to an Iranian national who was applying for a visa for the purpose of study in Germany for reasons connected with public security without necessarily basing its decision on the personal conduct of the individual concerned and the actual genuine, present and sufficiently serious threat to a fundamental interest to society which that conduct was supposed to constitute. The Court accepted that that could be the case, for two essential reasons: first of all, because one of the recitals of Directive 2004/114 envisaged that the threat might be only potential;[34] and, next, because the assessment of the individual situation of an applicant for a visa involved complex evaluations on the part of the authorities and because the national authorities must be recognised as having a wide discretion when assessing the relevant facts.[35]

31. Apart from those precedents, which the Court might find helpful, the entry condition defined in Article 6(1)(e) of the SBC should be interpreted consistently with the other entry conditions. In that regard, I note that Article 6(1)(d) of the SBC provides that the national of a third State wishing to enter the territory of the Union must not be a person for whom an alert has been issued in the SIS for the purposes of refusing entry. The criteria for such an alert are defined in Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second-generation Schengen Information System (SIS II).[36] Article 24(1) of that regulation states, first of all, that the alert must be based on an 'individual assessment'. In addition, an alert is entered in the SIS where the decision is based on a threat to public policy which the presence of a national of a third State on the territory of a Member State may pose. Regulation No 1987/2006 provides that that may be the case where that national has been convicted and sentenced to a penalty of more than 1 year's imprisonment or where 'there are serious grounds for believing that he has committed a serious criminal offence or [where] there are clear indications of an intention to commit such an offence in the territory of a Member State'.[37] Here, the EU legislature clearly accepted that the mere suspicion that an offence has been committed or will be committed can serve as the basis for the existence of a threat to public policy and did not make the requirement of a genuine, present and sufficiently serious threat affecting a fundamental interest of society conditional on the existence of such a threat. To my mind, the acceptance of a 'threat to public policy', in the context of the SBC, should have the same meaning whether it relates to the entry condition referred to in Article 6(1)(d) of the SBC or to the entry condition laid down in Article 6(1)(e) of the SBC.

32. If, as I believe, the requirement arising under Article 27 of Directive 2004/38 should not be systematically transposed to all acts of secondary law containing a provision allowing reasons based on public policy to be invoked, and that the concept of a 'threat to public policy' must be interpreted by reference to the normative environment surrounding it, the factors which I have just listed argue in favour of the national authorities being recognised as having a wide discretion when they adopt a decision finding that the entry condition relating to the absence of a threat to public order is not or is no longer satisfied.

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

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

33 Namely, Article 6(1)(d) of 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).

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

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

36 OJ 2006 L 381, p. 4.

37 Article 24(2)(b) of Regulation No 1987/2006.

33. It remains to ascertain, however, that that conclusion is not, or cannot be, called into question in the light of the Court's case-law that gives rise to the referring court's doubts.

C. The requirement of a present, genuine and sufficiently serious threat affecting a fundamental interest of society where there is a suspicion of an offence or a criminal conviction in the Court's case-law

1. Presentation of the Court's case-law

34. It was in its judgment in *Bouchereau*[38] that the Court held, for the first time, that the existence of a criminal conviction could be relevant, for the implementation of a restriction on the free movement of nationals of the Member States on grounds of public policy, only in so far as the circumstances which had given rise to that conviction were evidence of 'personal conduct constituting a present threat to the requirements of public policy'.[39] It then added 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,[40] which it was for the national courts to verify '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'.[41] Before that, the Court had observed that the directive which it had been requested to interpret, which was intended to coordinate national rules on the control of aliens, sought to protect the nationals of the Member States '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'.[42]

35. The requirement that a decision derogating from a fundamental freedom be based on the personal conduct of the individual concerned that constitutes a genuine, present and sufficiently serious threat affecting a fundamental interest of society was therefore initially developed in the context of the free movement of persons, then repeated,[43] before being codified, as is well known, in Directive 2004/38.[44]

36. That being so, the Court has on several occasions extended the scope of that requirement to areas less directly connected, or not at all connected, with the free movement of citizens of the Union.

37. Thus, in its judgment in *Commission* v *Spain*,[45] the Court held that a Member State failed to fulfil its obligation under the same directive as that interpreted in the judgment in *Bouchereau*[46] since it refused entry to the territory of the Union to a national of a third State who was the spouse of a citizen of the Union on the sole ground that that national had been the subject of an alert in the SIS. After pointing out that the public policy exception was a derogation from the fundamental principle of freedom of movement for persons and had to be interpreted strictly, and could not be determined unilaterally by the Member States,[47] the Court held 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

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

39 Judgment of 27 October 1977, *Bouchereau* (30/77, EU:C:1977:172, paragraph 28). Such a requirement had already been established in the judgment of 28 October 1975, *Rutili* (36/75, EU:C:1975:137) with regard to a decision restricting the freedom of movement in France of an Italian national because of his political and trade union activities (see, in particular, paragraph 28 of that judgment).

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

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

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

43 Among abundant case-law, see judgments of 29 April 2004, *Orfanopoulos and Oliveri* (C-482/01 and C-493/01, EU:C:2004:262, paragraph 66).

44 See, more specifically, Article 27(2) of Directive 2004/38.

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

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

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

threat to the requirements of public policy affecting one of the fundamental interests of society'.[48] The Court also drew a link in that judgment between the strict interpretation of 'public policy' and protection of the right of the citizen of the Union to respect for his family life.[49] In those circumstances, a national of a third State who is the spouse of a citizen of the Union can be refused entry to the Union only if the alert in the SIS is corroborated by information on which it may be established that the presence of that national of a third State constitutes a genuine, present and sufficiently serious threat affecting a fundamental interest of society.[50]

38. In its judgment in *Zh. and O.*,[51] the Court held, moreover, with respect to Article 7(4) of Directive 2008/115, which provides that Member States may shorten the period for voluntary departure when the person concerned poses a danger to public policy, that the latter concept must be assessed on a case-by-case basis, in order to ascertain whether personal conduct of the national of a third State concerned poses a genuine and present risk to public policy.[52] The Court precluded any practice based on general considerations or any assumption, and held that the fact that such a 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'.[53] Nonetheless, a Member State may find that there is a risk to public policy in the event of a criminal conviction where that conviction, 'taken *together with other circumstances* relating to the situation of the person concerned, justifies such a finding'.[54] Likewise, the mere suspicion that such a national has committed an offence may, 'together with other factors relating to the case in question',[55] be used as a basis for a finding that he poses a risk to public policy, still within the meaning of the provision concerned. In doing so, the Court observed that the Member States essentially retain the freedom to determine the requirements of the concept of 'public policy' in accordance with their national needs.[56] In that context, the application of the solution resulting from the judgment in *Bouchereau*[57] does not appear to be justified by the derogation from freedom of movement for citizens of the Union nor by their right to family reunification union, but by the fact that Directive 2008/115 established a derogation from an obligation — the obligation to lay down an appropriate period for voluntary departure — conceived with the aim of ensuring respect for the fundamental rights of nationals of third States when they are removed from the Union.[58]

39. Then, in its judgment in *N.*,[59] the Court referred to what has become an established principle in its case-law on the concept of 'public policy', which 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 a fundamental interest of society,[60] and then applied that case-law in the context of the interpretation of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection.[61] Thus, a Member State is justified in placing or keeping an applicant for

48 Judgment of 31 January 2006, *Commission* v *Spain* (C-503/03, EU:C:2006:74, paragraph 46). Emphasis added.

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

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

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

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

53 Judgment of 11 June 2015, *Zh. and O.* (C-554/13, EU:C:2015:377, paragraph 50). Emphasis added.

54 Judgment of 11 June 2015, *Zh. and O.* (C-554/13, EU:C:2015:377, paragraph 51). Emphasis added.

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

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

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

58 See judgment of 11 June 2015, *Zh. and O.* (C-554/13, EU:C:2015:377, paragraph 48). The Court reiterated its position vis-à-vis the concept of 'public policy' in Directive 2008/115 in its judgment of 16 January 2018, *E* (C-240/17, EU:C:2018:8, paragraphs 48 and 49).

59 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.

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

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

international protection in detention for public policy reasons 'if the applicant's individual conduct represents a genuine, present and sufficiently serious threat affecting a fundamental interest of society'.[62] In that case, it was because of the exceptional nature of detention, used only as a last resort,[63] that the Court intended to circumscribe the power of the national authorities.[64]

40. When requested, in the judgment in *T.*,[65] to interpret the public policy ground in the context of Directive 2004/83/EC,[66] the Court, after observing that that directive did not define public policy, referred to the interpretation of that concept which it had already provided in the context of Directive 2004/38. Although those two directives pursue different objectives, the Court held that the case-law developed in connection with the latter directive was relevant in the present case, since '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'. The Court then held that a national authority could not rely, in order to deprive a refugee of his residence permit for reasons related to public policy, on the sole ground of his support for a terrorist organisation, since in such a case that authority did not carry out an 'individual assessment of the specific facts'.[67]

2. The specific aspects of the present case that preclude the transposition of the solution resulting from the judgment in Bouchereau

41. As regards the present reference for a preliminary ruling, I am of the view that, apart from the factors developed in points 23 to 32 of this Opinion, the specific aspects of the present case argue against transposing, *ad infinitum*, the solution resulting from the judgment in *Bouchereau*[68] and against requiring the national authorities to base their decision finding that a national of a third State no longer fulfils the conditions for a legal stay, for reasons related to public policy, on an assessment of the personal conduct of that national as necessarily constituting a genuine, present and sufficiently serious threat affecting a fundamental interest of society.

42. E.P. is not a citizen of the Union. His entry into, and then his stay in, the Union have no connection with another citizen of the Union or a situation of family reunification with a national of a third State who is a long-standing resident on the territory of the Union. The decision at issue in the main proceedings, in that it finds that the stay has ceased to be legal, does not constitute a breach of a fundamental right of such intensity that it would trigger the application of the solution resulting from the judgment in *Bouchereau*,[69] as was the case, for example, in the judgment in *N.*,[70] since the immediate legal consequence of that finding is the early end of the stay which was in any event initially of short duration. The authorities' finding was indeed accompanied by the imposition of a return, but that return was required to be implemented within a period of 28 days, when Directive 2008/115 lays down a reasonable period of a maximum of 30 days.[71] That factor distinguishes E.P.'s situation from the situation in the case of *Zh. and O.*[72]

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

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

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

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

66 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).

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

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

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

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

71 See Article 7(1) of Directive 2008/115.

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

43. Last, the logic underlying the decision in *Bouchereau*[73] and its subsequent developments in connection with the free movement of persons is also alien to the considerations that govern the SBC, the CISA or the Visa Code. The higher the degree of consolidation that appears to have been achieved (where the citizen of the Union or the national of the third State has been integrated in the host Member State, where a family life has development), the greater the protection against removal must be and the higher the level of requirement demanded of the national authorities will be.[74] A national of a third State in a situation of a short stay on the territory of the Union cannot claim to rely on comparable circumstances.

44. Without requiring the national authorities to base their decision refusing entry or declaring a stay illegal on the personal conduct of the national of the third State concerned as constituting a genuine, present and sufficiently serious threat affecting a fundamental interest of society and while recognising that they have a wide discretion, that discretion is nonetheless restricted by minimum guarantees.

3. The restriction of the Member States' wide discretion

45. First of all, under Article 14(2) of the SBC the Member States are required to refuse entry, where the conditions laid down in Article 6 of the SBC are not satisfied, 'by a substantiated decision stating the precise reasons for the refusal'. In view of the parallel that exists between the conditions of entry and the conditions of legal short stay, that provision applies by analogy to decisions declaring the short stay illegal.

46. Next — and, perhaps, above all — the whole of the SBC clearly, as I observed above, bears the seal of fundamental rights and the principle of proportionality.[75] As the Commission illustrates, the principle of proportionality will not be deemed to be complied with if the mere suspicion on which the national authorities rely in order to declare the end of the legal stay was, for example, the suspicion of a breach of the highway code. The review of compliance with the principle of proportionality is ultimately a matter for the national court. I shall therefore merely observe that the conditions in which the suspicion arises should not be taken into account. In E.P.'s case, in all likelihood, the suspicion relates to an offence discovered while it was being committed. The suspicion is therefore an enhanced suspicion, which removes at the outset the spectre of arbitrary arrest and charge.

47. In those circumstances, I am of the view that Article 6(1)(e) of the SBC, read with Article 20 of the CISA, must be interpreted as meaning that, in order to find that the stay of a national of a third State is illegal, the national authorities, which have a wide discretion, are not required to base their decision on the personal conduct of that national that must constitute a genuine, present and sufficiently serious threat affecting a fundamental interest of society. That provision must also be interpreted as meaning that, in principle, a threat to public policy may result from the mere existence of a strong suspicion that the national of a third State concerned has committed an offence. In the exercise of their wide discretion, however, those authorities are required to base their decision on specific facts and to observe the principle of proportionality.

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

74 Which is also justified by the question of the availability of the information, which is closely linked to the duration of the legal situation in question.

75 See, in particular, Articles 4 and 7 of the SBC.

IV. Conclusion

48. For all of the foregoing considerations, I suggest that the Court answer the questions submitted by the Raad van State (Council of State, Netherlands) as follows:

(1) Article 6(1)(e) of Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (the Schengen Borders Code), read with Article 20 of the Convention implementing the Schengen Agreement, of 14 June 1985, between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed in Schengen on 19 June 1990, must be interpreted as meaning that, in order to find that the stay of a national of a third State is illegal, the national authorities, which have a wide discretion, are not required to base their decision on the personal conduct of that national that must constitute a genuine, present and sufficiently serious threat affecting a fundamental interest of society.

(2) Article 6(1)(e) of Regulation (EU) 2016/399, read with Article 20 of the Convention implementing the Schengen Agreement, must be interpreted as meaning that, in principle, a threat to public policy may result from the mere existence of a strong suspicion that the national of a third State concerned has committed an offence. In the exercise of their wide discretion, however, those authorities are required to base their decision on specific facts and to observe the principle of proportionality.