Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 12 February 2015 [1]

Case C-554/13

Z. Zh. and O.
v
Staatssecretaris van Veiligheid en Justitie

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

(Area of freedom, security and justice — Directive 2008/115/EC — Common standards and procedures in Member States for returning illegally staying third-country nationals — Article 7(4) — Decision refusing to grant a period for voluntary departure — Risk to public policy)

1. Directive 2008/115/EC [2] lays down common standards and procedures to be applied by Member States for returning illegally staying third-country nationals from the European Union to, for example, their country of origin. Upon issuing a return decision under that directive, the Member State in question must allow the person concerned an appropriate period (of between 7 and 30 days) for voluntary departure. However, Member States are entitled to derogate from that rule under Article 7(4) by refraining from granting such a period (or by granting a period of less than seven days) on certain grounds, including that the person concerned poses a risk to public policy. [3]

2. In this request for a preliminary ruling the Raad van State (Council of State) (Netherlands) seeks guidance from the Court as to the meaning of Article 7(4) of the Returns Directive, in particular regarding the meaning of the words 'poses a risk to public policy'.

European Union law

The Schengen acquis

3. The Schengen area is founded upon the Schengen Agreement of 1985, [4] by which the States signatory agreed to abolish all internal borders and to establish a single external frontier. Within the Schengen area, common rules and procedures are applied in relation to, inter alia, border controls. Article 1 of the Implementing Convention [5] defines an 'alien' as any person other than a national of a

1 — Original language: English.

2 — 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 ('the Returns Directive') (OJ 2008 L 348, p. 98).

3 — See points 13 and 33 below.

4 — Agreement 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 (OJ 2000 L 239, p. 13).

5 — 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 (OJ 2000 L 239, p. 19) ('the Implementing Convention').

Member State.[6] Article 4(1) states that passengers on internal flights who transfer on to flights bound for third States will be subject to a departure check at the airport from which their external flight departs. Article 5(1) provides that where the person in question meets certain conditions, such as possessing valid documents authorising him to cross the border (Article 5(1)(a)) or that he is not considered to be a threat to public policy, national security or the international relations of the Contracting Parties (Article 5(1)(e)), he may be granted entry for periods not exceeding three months into the territories of the Contracting Parties. However, the Contracting Parties must in principle refuse entry to a person who does not meet the conditions listed in Article 5(1).[7] Cross-border movement at external borders is subject to checks carried out by the competent national authorities in accordance with the uniform principles listed in Article 6(2).[8] These include not only verification of travel documents and other conditions governing entry, residence and work and exit but also checks to detect and prevent threats to national security and public policy of the Contracting Parties.[9]

4. The Schengen Information System ('the SIS') was established under Article 92 of the Implementing Convention. It allows the Member States to obtain information relating to 'alerts' on persons and property for, inter alia, border checks. The purpose of the SIS includes maintaining public policy and public security, including national security.[10] Where a person is refused entry to the Schengen area, the relevant data is entered into the SIS on the basis of a national alert triggered by decisions taken by the competent administrative authorities or courts pursuant to national rules.[11] Such decisions may be based upon a threat to public policy, public security or national security posed by the presence of that person within the national territory concerned.[12] That situation may arise in particular where the person in question has been convicted of an offence carrying a penalty involving a deprivation of liberty of at least one year,[13] or there are strong grounds for believing that he has committed serious criminal offences or there is clear evidence of an intention to commit such offences within the Schengen area.

5. The Regulation establishing the Schengen Borders Code[14] defines 'persons for whom an alert has been issued for the purposes of refusing entry' as 'any third-country national for whom an alert has been issued in the [SIS] in accordance with and for the purposes laid down in Article 96 of the Implementing Convention'.[15] Article 2(5) defines persons enjoying the right to free movement within the EU as being EU citizens within the meaning of Article 20(1) TFEU and third-country nationals who are members of the family of an EU citizen exercising his (or her) right to free movement to whom Directive 2004/38/EC[16] applies.

6 — In what follows I shall use the term 'third-country national' as a synonym for 'alien' because the word 'alien' is not used in any of the legislation that is considered here.

7 — Article 5(2).

8 — Article 6(1).

9 — Article 6(2).

10 — Article 93.

11 — Article 96(1).

12 — Article 96(2).

13 — Article 96(2)(a) and (b).

14 — Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2006 L 105, p. 1), recently revised by Regulation (EU) No 1051/2013 of the European Parliament and of the Council of 22 October 2013 (OJ 2013 L 295, p. 1). Although the Netherlands Government has referred to subsequent amendments in its written observations, I have not set them out here because they are not relevant since they entered into force after the material time in the main proceedings.

15 — Article 2(7).

16 — 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 and 93/96/EEC (OJ 2004 L 158, p. 77) ('the Citizenship Directive').

The Returns Directive

6. The common standards and procedures introduced by the Returns Directive must be applied in accordance with, inter alia, fundamental rights as general principles of EU law.[17]

7. The Returns Directive traces its origins to two European Councils. The first, in Tampere on 15 and 16 October 1999, established a coherent approach in immigration and asylum.[18] The second, the Brussels European Council of 4 and 5 November 2004, called for the establishment of an effective removal and repatriation policy, based on common standards, for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity.[19] An overarching aim of the directive is to establish the clear, transparent and fair rules required to provide for an effective return policy as a necessary element of a well-managed migration policy.[20] Thus, the Returns Directive establishes rules applicable to all third-country nationals who do not or who no longer fulfil the conditions for entry, stay or residence in a Member State.[21] The expulsion of an illegally staying third-country national from a Member State's territory should be carried out through a fair and transparent procedure. According to general principles of EU law, decisions taken under the Returns Directive should be adopted on a case-by-case basis and founded on objective criteria, implying that consideration should go beyond the mere fact of an illegal stay.[22] It is however legitimate for Member States to return illegally staying third-country nationals, provided that fair and efficient asylum systems are in place which fully respect the principle of non-refoulement.[23] Where there are no reasons to believe that voluntary return would undermine the purpose of a return procedure, voluntary return should be preferred over forced return and a period for voluntary departure should be granted. An extension of the period for voluntary departure should be provided when considered necessary because of the specific circumstances of an individual case.[24] Furthermore, the situation of third-country nationals who are staying illegally but who cannot yet be removed should be addressed. The effects of national return measures are, moreover, given an EU dimension by establishing an entry ban prohibiting entry into and stay within the territory of all the Member States.[25] Member States should have rapid access to information on entry bans issued by other Member States in accordance with the SIS II Regulation.[26]

8. The Returns Directive applies to third-country nationals staying illegally within the territory of a Member State.[27] It does not apply to persons enjoying the EU right of free movement as defined in Article 2(5) of the Schengen Borders Code.[28]

9. The following definitions in Article 3 are relevant:

'1. "third-country national" means any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty and who is not a person enjoying the [EU] right of free movement, as defined in Article 2(5) of the Schengen Borders Code;

17 — Article 1 and recital 24.
18 — Recital 1.
19 — Recital 2.
20 — Recital 4.
21 — Recital 5.
22 — Recital 6.
23 — Recital 8.
24 — Recital 10.
25 — Recital 14.
26 — Recital 18. In that recital the legislator refers to the subsequent amendment to the Schengen Borders Code (see footnote 14 above).
27 — Article 2(1).
28 — Article 2(3): see point 5 above. Member States may decide not to apply the Returns Directive to the categories of third-country national listed in Article 2(2).

2. “illegal stay” means the presence on the territory of a Member State of a third-country national who does not fulfil, or no longer fulfils the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State;

3. “return” means the process of a third-country national going back — whether in voluntary compliance with an obligation to return, or enforced — to:

— his or her country of origin, or

— a country of transit in accordance with [EU] or bilateral readmission agreements or other arrangements, or

— another third country, to which the third-country national concerned voluntarily decides to return and in which he or she will be accepted;

4. “return decision” means an administrative or judicial decision or act, stating or declaring the stay of a third-country national to be illegal and imposing or stating an obligation to return;

…

6. “entry ban” means an administrative or judicial decision or act prohibiting entry into and stay on the territory of the Member States for a specified period, accompanying a return decision;

…

8. “voluntary departure” means compliance with the obligation to return within the time-limit fixed for that purpose in the return decision;

…’

10. The Member States retain the right to adopt more favourable provisions subject to such measures being compatible with the Directive.[29]

11. Under Article 5, when implementing the Returns Directive the Member States must take account of certain factors relating to the third-country national concerned including his family life, his state of health and respect for the principle of non-refoulement.

12. Article 6(1) requires Member States to issue a return decision to any third-country national staying illegally within their territory.[30]

13. Article 7 states:

‘1. A return decision shall provide for an appropriate period for voluntary departure of between seven and thirty days, without prejudice to the exceptions referred to in paragraphs 2 and 4. Member States may provide in their national legislation that such a period shall be granted only following an application by the third-country national concerned. In such a case, Member States shall inform the third-country nationals concerned of the possibility of submitting such an application.

The time period provided for in the first subparagraph shall not exclude the possibility for the third-country nationals concerned to leave earlier.

29 — Article 4.

30 — That obligation is without prejudice to the exceptions listed in Article 6(2) to (5).

2. Member States shall, where necessary, extend the period for voluntary departure by an appropriate period, taking into account the specific circumstances of the individual case, such as the length of stay, the existence of children attending school and the existence of other family and social links.

3. Certain obligations aimed at avoiding the risk of absconding, such as regular reporting to the authorities, deposit of an adequate financial guarantee, submission of documents or the obligation to stay at a certain place may be imposed for the duration of the period for voluntary departure.

4. If there is a risk of absconding, or if an application for a legal stay has been dismissed as manifestly unfounded or fraudulent, or if the person concerned poses a risk to public policy, public security or national security, Member States may refrain from granting a period for voluntary departure, or may grant a period shorter than seven days.'

14. Article 8(1) provides that Member States must take all necessary measures to enforce a return decision if, inter alia, no period for voluntary departure has been granted in accordance with Article 7(4).

15. Pursuant to Article 11, return decisions must be accompanied by an entry ban if no period for voluntary departure has been granted or if the obligation to return has not been complied with.[31] The length of the entry ban must be determined with due regard to all relevant circumstances of the individual case and shall not in principle exceed five years. It may however exceed five years if the third-country national represents a serious threat to public policy, public security or national security.[32] Member States have a degree of discretion in so far as they may refrain from issuing, withdraw or suspend an entry ban in individual cases for humanitarian reasons and they may withdraw or suspend an entry ban in individual cases or certain categories of cases for other reasons.

16. Article 14 provides that the Member States must ensure that certain principles are taken into account during the period for voluntary departure of the third-country national. Those principles include maintaining family unity with family members present in the territory of the Member State in question; providing emergency health care and essential treatment of illnesses; granting minors access to the basic education system subject to the length of their stay; and taking the special needs of vulnerable persons into account.

National rules

17. The Vreemdelingenwet 2000 (Law on Foreign Nationals) ('the Vw 2000') provides that a third-country national who is not (or is no longer) legally resident in the Netherlands has a period of 28 days in which to depart voluntarily from the territory.[33] The Staatssecretaris ('Secretary of State')[34] may shorten the period for departure or he may decide that the individual in question must leave the Netherlands immediately where, inter alia, he poses a risk to public policy, public security or national security.

31 — Article 11(1).

32 — Article 11(2).

33 — Article 61(1) read together with Article 62(2).

34 — According to the order for reference a decision to reduce the period for departure is taken by the Staatssecretaris. However, I understand from the written observations of the Netherlands Government that the relevant provisions of the Vw 2000 refer to the Minister in this respect.

18. With effect from 9 February 2012 the Vreemdelingencirculaire 2000 (Circular on Foreign Nationals) ('the Circular of 9 February 2012') stated that the departure period under Article 62(2) of the Vw 2000 might be shortened or not applied at all if the third-country national posed a danger (*gevaar*) to public policy, public security or national security. According to the Circular of 9 February 2012, any suspicion or conviction in respect of a criminal offence under national law is deemed to constitute a risk to public policy. A suspicion must be capable of being confirmed by the chief of police. [35]

Facts, procedure and questions referred

19. On 8 June 2011 Mr Zh. arrived at Schiphol Airport on a flight from Greece, his final destination being Canada. He was arrested while in transit in the Netherlands as he was travelling with a false travel document. On 21 June 2011 he was convicted of being in possession of a travel document which he knew to be false and he was given a custodial sentence of two months pursuant to the Netherlands Criminal Code. On 4 August 2011 the Secretary of State ordered Mr Zh. to leave the European Union immediately (that is, without a period for voluntary departure as provided in Article 62(1) read together with Article 62(2) Vw 2000). Following the end of his prison term Mr Zh. was detained prior to being returned to China. On 2 September 2011 the Secretary of State upheld the return decision in Mr Zh.'s case.

20. On 8 November 2011 the Rechtbank upheld the decision of the Secretary of State. Mr Zh. has appealed against that ruling to the referring court. On 14 December 2011, the custodial sentence imposed on Mr Zh. was lifted on the ground that he had, in the meantime, been deported from the Netherlands.

21. On 16 January 2011 Mr O., also a third-country national, entered the Netherlands on a 21-day short-stay visa. On 23 November 2011, he was arrested and detained on suspicion of domestic abuse of a woman. On 24 November 2011 he was placed in custody prior to expulsion and ordered to leave the European Union with immediate effect. On 17 January 2012 the Secretary of State upheld the decision of 24 November 2011 on the grounds that Mr O. had been arrested on suspicion of having committed a criminal offence; he therefore constituted a risk to public policy and was not entitled to a period allowing him to depart voluntarily from the Netherlands. On 1 February 2012 the Rechtbank allowed Mr O.'s appeal and set aside the Secretary of State's decision. The Secretary of State challenged that ruling on appeal before the referring court. On 23 February 2012 the custody order on Mr O. was lifted as he had, in the meantime, been deported.

22. The referring court considers that the words 'a risk to public policy' in Article 7(4) embody an autonomous concept of EU law and that evaluating their meaning requires an examination as to whether any guidance may be found in the interpretation of public-policy concepts in other EU acts, such as Article 27(1) of the Citizenship Directive, Article 6(1) of Council Directive 2003/109/EC [36] and Article 6(1) or (2) of Council Directive 2003/86/EC ('the three directives'). [37] However, given the material differences between those directives and the Returns Directive with regard to their objectives, context and the wording, the referring court considers that, in seeking to interpret the concept of public policy in the Returns Directive, it cannot simply apply the concepts in the three directives by analogy. Furthermore, in the scheme of the Returns Directive, refraining from granting a period for voluntary departure is the least restrictive measure. Thus, it may be that a 'risk to public policy', as

35 — The Circular also states that the acceptance of 'a compromise' in respect of an offence is deemed to constitute a risk to public policy. I understand 'a compromise', '*een schikking*' or '*een transactie*' in the Dutch text to be in the nature of an agreement to settle the matter, in the context of a criminal prosecution, outside the court system.

36 — Of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ 2004 L 16, p. 44) ('the Long-Term Residents' Directive').

37 — Of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12) ('the Family Reunification Directive').

used in Article 7(4) of the Returns Directive, should be interpreted more broadly than the term 'grounds of public policy' in the three directives, so that a third-country national may more easily come within the scope of the term in the Returns Directive. If so, mere suspicion of having committed a criminal offence may be sufficient.

23. Against that background the Raad van State seeks guidance on the following questions referred to the Court for a preliminary ruling:

'(1) Does a third-country national who is staying illegally within the territory of a Member State pose a risk to public policy, within the meaning of Article 7(4) of [the Returns Directive], merely because he is suspected of having committed a criminal offence under national law, or is it necessary that he should have been convicted in a criminal court for the commission of that offence and, in the latter case, must that conviction have become final and absolute?

(2) In the assessment as to whether a third-country national who is staying illegally within the territory of a Member State poses a risk to public policy within the meaning of Article 7(4) of the Returns Directive, do other facts and circumstances of the case, in addition to a suspicion or a conviction, also play a role, such as the severity or type of criminal offence under national law, the time that has elapsed and the intention of the person concerned?

(3) Do the facts and circumstances of the case which are relevant to the assessment referred to in Question 2 also have a role to play in the option provided for in Article 7(4) of the Returns Directive, in a case where the person concerned poses a risk to public policy within the meaning of that provision, of being able to choose between, on the one hand, refraining from granting a period for voluntary departure and, on the other hand, granting a period for voluntary departure which is shorter than seven days?'

24. Written observations were submitted on behalf of Mr Zh., Belgium, the Czech Republic, France, Greece, the Netherlands, Poland and the European Commission. Mr Zh., Belgium, the Netherlands, Poland and the Commission made oral submissions at the hearing on 15 October 2014.

Preliminary observations

25. It is common ground that both Mr Zh. and Mr O. fall within the scope of the Returns Directive as illegally staying third-country nationals for the purposes of Article 3(1) and (2). Under Article 7(1) of that directive, the general rule is that such persons have a right to a period of between 7 and 30 days to return voluntarily to their country of origin. That right may be curtailed only where one of the exceptions listed in Article 7(4) applies, such as the derogation based on a risk to public policy.

26. As both Mr Zh. and Mr O. have since been deported from the Netherlands, the significance of the current proceedings for each of them is that, if the referring court considers that the decisions refusing a period of voluntary departure were unlawful, they may be able to launch actions for damages against the Netherlands authorities for unlawful detention. In Mr Zh.'s case, the possible claim might cover the period between the end of his prison term for travelling with a false document and the date of his expulsion. In relation to Mr O. the possible claim might cover the period he spent in detention before his expulsion. [38]

38 — It appears that Mr Zh. has already instituted such proceedings; Mr O. may yet decide to do so.

Question 1

27. By Question 1 the referring court seeks to ascertain the meaning of the words 'poses a risk to public policy' in Article 7(4) of the Returns Directive. It asks whether a third-country national who is staying illegally within the territory of a Member State poses such a risk where he is merely suspected of having committed a criminal offence under the national law of that Member State, or whether it is necessary that he should have been convicted of having committed an offence and, if so, whether that conviction has to have become final and absolute (that is, no further appeal procedure is available).

28. The concept and meaning of a 'public policy exception' to freedoms guaranteed by EU law is not new. It first arose years ago in cases concerning the free movement of workers.[39] More recently it has impinged on the free movement of EU citizens.[40] Article 45(3) TFEU allows Member States to restrict freedom of movement for workers on grounds of public policy, public security or public health. The French text of Article 45(3) TFEU refers to '*des raisons d'ordre public*'. The English version, however, uses the term 'public policy'.[41] In contrast, the term '*ordre public*' in the French text of the European Convention of Human Rights[42] is translated in the English version as 'public order'.[43]

29. The term 'public order' is not synonymous with 'public policy'.

30. Public order broadly covers crimes or acts that interfere with the operations of society, such as in *Oteiza Olazabal*.[44] In 1988 Mr Olazabal, a Spanish national of Basque origin residing in France, was sentenced to 18 months imprisonment and a four year ban on residence for conspiracy to disturb public order (*ordre public*) by intimidation or terror. In 1996 he decided that he wished to move from the Île de France region (near Paris) to the Pyrénées-Atlantiques bordering Spain. The French police had information that he continued to maintain relations with ETA. The French authorities therefore sought to restrict his movement within France by prohibiting him from residing in 31 *départements* with a view to ensuring that he was not near the Spanish frontier. The Court considered that the action of the French authorities was within the scope of the exception to free movement of workers under what was then Article 48(3) of the Treaty (now Article 45(3) TFEU) on the grounds of public policy (*ordre public*).

31. Public policy is a broader concept than public order in so far as it is understood as encompassing both acts contrary to public order (such as in *Oteiza Olazabal*) and acts that are considered to be against the policy of the law. Thus, in *Van Duyn*[45] the UK authorities lawfully refused Ms Van Duyn's request for a work permit in order to enable her to take up a position with the Church of Scientology, on the grounds that to do so would be contrary to public policy or what the Court described, using (yet) other words, as being 'the public good'.[46]

39 — Judgments in *Van Duyn*, 41/74, EU:C:1974:133, paragraph 18; *Rutili*, 36/75, EU:C:1975:137, paragraph 26 et seq.; and *Bouchereau*, 30/77, EU:C:1977:172, paragraph 33 et seq.

40 — See, for example the Opinion of Advocate General Bot in *Tsakouridis*, C-145/09, EU:C:2010:322, point 60.

41 — This linguistic variation persists in a number of acts of secondary legislation, including those expressly mentioned by the referring court (see point 22 above).

42 — Signed at Rome on 4 November 1950.

43 — See Article 6(1) providing that the press may be excluded from all or part of a trial in the interests of public order without jeopardising the right to a fair trial; Article 9(2), providing that freedom to show one's religion is subject to limitations in the interests of public order; and Article 1(2) of Protocol No 7, providing that certain procedural safeguards for aliens (third-country nationals) concerning expulsion will not apply where expulsion is necessary in the interests of public order.

44 — Judgment in C-100/01, EU:C:2002:712.

45 — Judgment in *Van Duyn*, EU:C:1974:133.

46 — Judgment in *Van Duyn*, EU:C:1974:133, paragraph 18; see also judgment in *Shingara and Radiom*, C-65/95 and C-111/95, EU:C:1997:300, paragraphs 13 and 27.

32. The concept of 'public order' is very much present in the sphere of immigration law, as in Article 7(4) of the Returns Directive. All linguistic versions of that directive apart from the English use a term that equates to '*ordre public*' rather than to '*public policy*'.[47] The term 'public policy' was not in the original Commission proposal in English but was inserted at a relatively late stage in the evolution of the English text when it was being negotiated in Council.[48] Regrettably, no recital was inserted with a view to assisting interpretation of that provision by explaining its purpose.

33. It is evident, from looking at both the EU legislation and the case-law of the Court, that the term 'public policy' is here used as an equivalent for the French term '*ordre public*'. It should also be borne in mind that EU law uses terminology which is peculiar to it and that legal concepts do not necessarily have the same meaning in EU law and in the law of the various Member States.[49] To keep matters clear for the reader in the present context of my examination of the Returns Directive, where I am citing texts which refer in English to 'public policy', I shall replace this by [public order].

34. The Court has stated that while Member States essentially retain the freedom to determine the requirements of, inter alia, [public order] in accordance with their national needs, which can vary from one Member State to another and from one era to another, particularly as justification for a derogation from the fundamental principle of free movement of persons, those requirements must nevertheless be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the institutions of the European Union.[50]

35. Thus, there is no exhaustive definition of the concept of [public order]. It is not only difficult but it may be artificial to attempt a definition, particularly as it is acknowledged that Member States enjoy wide discretion as to the circumstances justifying recourse to a [public order] exception.[51]

36. It seems to me that there is nothing in the wording of the Returns Directive indicating that [public order] should be interpreted narrowly so as to exclude acts contrary to the policy of the law in the specific sphere of immigration law. The case-law suggests that [public order], when used to justify a derogation, has certain features, in as much as it presupposes 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 order] affecting one of the fundamental interests of society.[52]

37. For the purposes of Article 7(4) of the Returns Directive the question is whether the person concerned poses a *risk* to [public order].

47 — There were 22 official languages at the time that the Returns Directive was adopted.

48 — See Article 6a (which subsequently became Article 7 of the Returns Directive) of Council document 7774/08 of 25 March 2008, 2005/0167 (COD).

49 — Judgment in *Cilfit and Others*, 283/81, EU:C:1982:335, paragraph 19.

50 — Judgment in *I*, C-348/09, EU:C:2012:300, paragraph 23 and the case-law cited.

51 — Opinion of Advocate General Bot in *Tsakouridis*, EU:C:2010:322, point 68.

52 — Judgment in *Bouchereau*, EU:C:1977:172, paragraph 35. In his Opinion in *Bouchereau*, at pages 2024 to 2026, EU:C:1977:141, Advocate General Warner drew a distinction between the terms 'public policy' ('*ordre public*' in what was then Community law) and the common law notion of 'public order'. He explained that [public order] is a concept known in both the civil and common law systems. In particular, it is known in the sphere of immigration and asylum. He states that it corresponds in English to the notion of 'the public good'. The Court has held that the concept of [public order] includes, inter alia, preventing violence in large urban centres (judgment in *Bonsignore*, 67/74, EU:C:1975:34); preventing the sale of stolen cars (judgment in *Boscher*, C-239/90, EU:C:1991:180); protection of the right to mint coinage (judgment in *Thompson and Others*, 7/78, EU:C:1978:209); respect for human dignity (judgment in *Omega*, C-36/02, EU:C:2004:614); and the justification of measures derogating from the right of free movement of a Member State's own nationals (judgment in *Aladzhov*, C-434/10, EU:C:2011:750).

38. The different language versions of Article 7(4) are not couched in identical terms. The French text, for example, differs from the English version in that it distinguishes between the words '*risque*' and '*danger*'. In the opening words of Article 7(4), the first ground of derogation (that the person concerned may abscond), the French text refers to a '*risque de fuite*'. Subsequently, in relation to the [public order] exception, it uses the phrase '*si la personne concernée constitue un danger pour l'ordre public*'.

39. The English text refers in both instances to 'a risk'. The words 'danger' or 'threat' are not necessarily synonyms for the word 'risk'. It would be more natural in English to refer to 'a risk of absconding' and a 'threat to [public order]' (meaning that [public order] may be endangered by a future act) rather than that the person concerned constitutes a risk to [public order].[53] That is because the word 'risk' in English is ambiguous. It can mean that there is a chance that adverse consequences might follow from the actions of the person concerned. It can also be understood as meaning that such a person constitutes a danger or a threat to [public order] (thus connoting exposure to danger). Here I note that, Article 7(3) provides that where measures such as reporting restrictions, can be applied to avoid the *risk* of absconding, the preference should still be for a period for voluntary departure.

40. Of the 22 EU languages used at the time that the Returns Directive was adopted, 11 follow the French model and distinguish between the *risk* of absconding and a *danger* (or threat) to [public order].[54] Eleven follow the English version and use the same word to describe the risk of absconding and a risk to [public order].[55]

41. It is settled case-law that where there is a divergence between the various language versions of an EU legislative text, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part.[56]

42. It seems to me that the word 'risk' in Article 7(3) and in the first ground of the derogation in Article 7(4) is used differently to its use in the [public order] derogation. In the latter context, it refers to the possibility that the person concerned poses a future threat to [public order], by reason of his past conduct (for example commission of a criminal offence).

43. In order to ensure that the Returns Directive is interpreted in conformity with its aims it is thus necessary, before reliance can be placed on the Article 7(4) derogation, to establish that there is a threat to [public order]. Member States must show why the [public order] interests that they seek to protect are likely to be endangered by the person in question. Thus, the words 'poses a risk to [public order]' should be understood as meaning 'constitutes a danger or threat to [public order]'.[57] In that respect the French text and the language versions that follow it are clearer than the English text.

44. There must be a real and sufficient danger to [public order] for the Member State to have recourse to the derogation. In other words, it is not sufficient for the person concerned to have acted against [public order]. That reading is reinforced by recital 6 which states, in relation to decisions taken under the directive, that consideration should go beyond the mere fact of an illegal stay. That indicates that the competent authorities should engage in a process of assessment in the individual case, rather than relying solely on the fact that the person is staying illegally as the basis for decisions under the directive.

53 — See Article 11(2) of the Returns Directive, where the word 'threat' is used.

54 — The Czech, Dutch, French, Hungarian, Italian, Latvian, Lithuanian, Polish, Romanian, Slovenian and Swedish texts.

55 — The Bulgarian, Danish, English, Estonian, German, Greek, Finnish, Maltese, Portuguese, Slovakian and Spanish texts.

56 — Judgment in *Endendijk*, C-187/07, EU:C:2008:197, paragraphs 22 to 24 and case-law cited; see more recently the Opinion of Advocate General Bot in *Bero and Bouzalmate*, C-473 and C-514/13, EU:C:2014:295, point 75.

57 — The words 'risk', 'danger' and 'threat' are therefore mentioned in the English text of this Opinion.

45. Where the concept of [public order] is used to justify derogation from a right conferred by EU law it must be interpreted strictly. [58]

46. In that respect the scope of the derogation in Article 7(4) also cannot be determined unilaterally by each Member State without being subject to control by the EU institutions. [59] I therefore disagree with the Netherlands and Polish Governments, who argue that the question as to whether there is a risk to [public order] is solely a matter for national law.

47. It is true that the Member States' respective cultural, social and legal values are factors to be taken into account in any determination of [public order]. Nevertheless, were the concept not subject to oversight at EU level, those chimera type attributes would mean that the Member States would be able to apply [public order] in a manner that denied the effectiveness of rights guaranteed by EU law. Thus, the onus is on the Member State relying upon the derogation to show why there is a threat to [public order] in any particular case and to put forward grounds justifying recourse to the derogation in Article 7(4).

48. The referring court asks whether guidance as to the meaning of the concept of [public order] in Article 7(4) of the Returns Directive may be derived from other EU acts, in particular the Citizenship Directive, the Long-Term Residents' Directive and the Family Reunification Directive. I understand it thereby to be enquiring essentially whether the rules for evaluating the [public order] exception under any of those three directives should apply by analogy to the assessment conducted under Article 7(4) of the Returns Directive.

49. The parties that have submitted observations all agree that the three directives should not be applied by analogy to interpret Article 7(4) of the Returns Directive. I also agree with that view as far as a textual comparison of the directives is concerned. Each of the three directives differs from the Returns Directive as regards its wording, scope and aims. The term [public order] is not defined in any of those texts. Each directive does, however, set out certain factors to be taken into account where the [public order] exception is raised.

50. Article 27(1) of the Citizenship Directive provides that Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of [public order], public security or public health. Such measures must comply with the principle of proportionality and must be based exclusively on the personal conduct of the individual concerned (Article 27(2)). Previous criminal convictions do not in themselves constitute grounds for taking such measures. The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. [60] In that context Article 28 [61] of that directive makes specific provision conferring protection against expulsion decisions on grounds including, inter alia, [public order]; the length of residence is a factor in determining the level of protection against such decisions.

51. The aim of the Long-Term Residents' Directive is to integrate third-country nationals who are long-term residents legally residing continuously within the territory of a Member State (for 5 years) with a view to promoting a fundamental objective of the Treaties, namely economic and social cohesion. [62] Pursuant to Article 6(1) of the Long-Term Residents' Directive, Member States may refuse

58 — See, for example the case-law cited in footnote 39 above, and see judgment in *Bero and Bouzalmate*, C-473/13 and C-514/13, EU:C:2014:2095, paragraph 25.

59 — See point 34 and footnote 50 above.

60 — See further judgment in *Tsakouridis*, C-145/09, EU:C:2010:708, paragraph 25.

61 — Article 28(1) provides that before taking an expulsion decision on, inter alia, [public order] grounds the host Member State must take account of considerations including the length of time that the individual concerned has resided within its territory, social and cultural integration in that Member State and the extent of their links with their country of origin. Where the person concerned enjoys a right of permanent residence an expulsion decision may not be made under Article 28(2) except on, inter alia, serious grounds of [public order].

62 — Recital 4 in the preamble to the Long-Term Residents' Directive and Articles 1, 3 and 4 of that act.

to grant long-term resident status on grounds of [public order] or public security. When taking the relevant decision, the Member State in question must consider the severity or type of offence against [public order] or public security, or the danger that emanates from the person concerned,[63] while also having proper regard to the duration of residence and to the existence of links with the country of residence.[64]

52. The Family Reunification Directive takes into account the need for harmonisation of national legislation and the conditions for admission and residence of third-country nationals. It applies where there is an application for the family members of a 'sponsor' (a third-country national residing in a Member State on the basis of a residence permit valid for at least one year and having reasonable prospects of obtaining the right of permanent residence) to join him for the purpose of family reunification. Article 6(1) allows Member States to reject such an application on grounds of, inter alia, [public order].[65] When taking the relevant decision, the Member State must consider matters including the severity or type of offence against [public order] or the dangers emanating from the person concerned.[66]

53. A significant difference between the legal regime in the Returns Directive and the three directives mentioned by the referring court is that there is no need in the former to balance the implications for a person who is integrated into the society of the Member State in question against the desirability of withdrawing the right to voluntary departure.[67] Under the Returns Directive the national authorities are confronted by a more practical issue. What period of time is required in order to allow the person concerned to depart in a humane and dignified manner that respects his fundamental rights? A third-country national who is within the scope of the Returns Directive is not a person who resides or has any degree of integration in the society of the Member State in question. It is therefore logical that there is no need to balance factors pertaining to his links with that Member State against the consequences of a decision refusing him a right to voluntary departure.

54. Given the differences in wording, scope, aims and the context of the acts, it seems to me that none of the three directives (the Citizenship Directive, the Long-Term Residents' Directive or the Family Reunification Directive) can apply by analogy in interpreting the meaning of [public order] in Article 7(4) of the Returns Directive.

55. All of the Member States making observations to the Court submit that the consequences for the persons concerned of derogating from the general rule under the three directives are more severe than the consequences for an illegally staying third-country national of a decision refusing voluntary departure under the Returns Directive. They argue that different levels of protection apply under the three directives; the highest being that afforded to EU citizens whose normal rights contrast sharply with those of illegally staying third-country nationals under the Returns Directive. Therefore the

63 — The second subparagraph of Article 6(1); and see further the conditions in Article 12(3) of the Long-Term Residents' Directive.

64 — Member States may treat a previous conviction for committing a crime as sufficient ground for considering that the person concerned presents a threat to, inter alia, [public order]. They may take an expulsion decision where such a person constitutes an actual and sufficiently serious threat (Article 12(1)). Before taking an expulsion decision Member States must take account of the factors listed in Article 12(3), including the duration of residence, age, the consequences for the person and his family, links with the country of residence or absence of links with the country of origin.

65 — Articles 1, 2(c) and 3 of the Family Reunification Directive. The directive aims in particular, to ensure fair treatment of third-country nationals residing lawfully within the European Union and takes into account that the objective of a more vigorous integration policy is to grant such persons rights and obligations comparable to those of EU citizens.

66 — The notion of [public order] includes a conviction for committing a serious crime, where the third-country national in question belongs to an association that supports terrorism, supports such an association or has extremist aspirations. See recital 14 in the preamble to the Family Reunification Directive, and the second subparagraph of Article 6(2) concerning withdrawal or refusal to renew a residence permit and see further Article 17.

67 — See points 50 to 52 above.

derogation on grounds of [public order] under the Citizenship Directive should be interpreted more narrowly than that in the Returns Directive; and the concept of 'risk' or 'danger' to [public order] under the latter should be interpreted less strictly than the notion of 'grounds of [public order]' in each of the three directives. The referring court takes the same approach.

56. I do not share that view.

57. No useful purpose is served by comparing Article 7(4) of the Returns Directive to provisions in any of the three directives containing a [public order] exception. Just as those directives do not apply by analogy, so whether the threshold for triggering the application of the [public order] derogation in the Returns Directive is higher or lower is both unascertainable and irrelevant. The Returns Directive differs from those three directives in fundamental respects. It must therefore be interpreted by reference to its wording, purpose, scheme and context in order to establish the meaning of the derogation in Article 7(4). [68]

58. Moreover, the Member States' argument that the derogation in the Returns Directive should be interpreted less strictly than derogations in any of the three directives has unfortunate connotations. It suggests that individuals may be ranked in a hierarchy of protection, where EU citizens are at the top and illegally staying third-country nationals are at the bottom. It implies that those at the bottom fall more readily within the scope of a provision derogating from rights afforded to them under EU law simply because they are of a lower status in the hierarchy.

59. I cannot accept such an approach. True, the position of EU citizens and illegally staying third-country nationals cannot be assimilated and they are governed by different rules. However, it does not follow from the fact of difference that less rigorous or scrupulous attention should be paid to assessing whether a derogation from a right conferred by EU law is triggered. A derogation provision, such as Article 7(4) of the Returns Directive, is not to be construed in a lax instead of a strict manner because it concerns individuals who do not have residence rights within the European Union. Furthermore, third-country nationals (including those whose presence in the European Union is illegal) are within the scope of the Charter. [69] The fundamental rights guaranteed by EU law that do apply to third-country nationals should be observed with equal rigour to those applying to EU citizens.

60. Thus, when examining whether a third-country national constitutes a risk to [public order] Member States should base their assessment on the individual position of the person concerned rather than on general considerations. [70] The Court so held in *Royer* [71] in relation to the wording of Article 3(1) of Council Directive 64/221/EEC [72] which stated: 'Measures taken on grounds of [public order] or of public security shall be based exclusively on the personal conduct of the individual concerned.' In my view that approach applies equally in relation to the Returns Directive. The scheme of Article 7 expressly takes into account that individual circumstances are relevant to the assessment process. [73] Thus, the same methodology should be applied to decisions taken under Article 7(4). Such decisions should be adopted on a case-by-case basis according to objective criteria.

68 — Judgment in *Brouwer*, C-355/11, EU:C:2012:353, paragraph 36 and the case-law cited.

69 — The Charter of Fundamental Rights of the European Union (OJ 2010 C 83, p. 389). Self-evidently, third country nationals do not enjoy the specific rights contained in Title V of that Charter, known as 'Citizens' rights', such as the right to stand as a candidate at elections to the European Parliament.

70 — Judgment in *Royer*, 48/75, EU:C:1976:57, paragraph 46.

71 — Cited in footnote 70 above.

72 — Of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (OJ, English Special Edition 1963-64(I), p. 117-119).

73 — See Article 7(2).

61. The rules of criminal law are all [public order] rules in the sense that they are imperative rules. An infringement of those rules therefore causes a disturbance to Member States' [public order]. The magnitude of that disturbance will be lesser or greater depending on the nature of the act committed. The severity of the penalty laid down by the national legislature to sanction the prohibited conduct will normally reflect the perceived impact of the disturbance on [public order].[74]

62. A breach of a Member State's criminal law therefore equates to an act contrary to [public order]. However, it does not necessarily follow that any breach of the criminal law, however minor, constitutes a (future) threat to [public order] within the meaning of Article 7(4). The national authorities must carry out their appraisal from the perspective of the interests inherent in protecting the requirements of [public order]. That is not necessarily the same thing as the appraisal that formed the basis of the criminal conviction.[75]

63. Recital 6 of the Returns Directive explains that decisions should be made on a case-by-case basis and that consideration should go beyond the mere fact of an illegal stay.[76] Thus, in circumstances like those of Mr Zh. it is not sufficient for the national authorities to base their decision withdrawing the right to voluntary departure solely on the fact that the person concerned has a conviction for travelling with a false travel document contrary to Article 5 of the Schengen Borders Code and is an illegally staying third-country national within the meaning of Article 3(2) of the Returns Directive. A significant number of third-country nationals in flight presenting at EU borders are likely to be travelling with false papers. People often seek to hide their identity when fleeing their country of origin in order to protect themselves. They may not necessarily be protected by submitting a claim for asylum if they do not seek such protection in the European Union.[77] The national authorities must assess what [public order] interests require protection and in what respect the individual concerned constitutes a danger to [public order]. In other words, there should be no automatic decisions depriving an individual of a right to voluntary departure simply because he is convicted of travelling with a false document and could therefore be an illegally staying third-country national.[78]

64. That said, in my view a conviction does not have to become final and absolute with no further appeal in order to bring the person concerned within the scope of Article 7(4) of the Returns Directive.

65. Such a position would be inconsistent with the general observations outlined above; and there is no basis in the wording of the directive to support such a view. Furthermore, it would be contrary to the purpose of laying down a specific time-limit for voluntary departure. If account had to be taken of a final appeal the 30-day period (and certainly periods closer to the 7 days in Article 7(1)) would be overrun in many cases by dint of the length of legal proceedings. It would also undermine the derogation in Article 7(4): a speedy return in less than seven days would be impossible in any case where the person concerned launched appeal proceedings.

74 — See Opinion of Advocate General Bot in *I*, C-348/09, EU:C:2012:123, points 36 and 37.

75 — See, by analogy, judgment in *Bouchereau*, EU:C:1977:172, paragraph 27.

76 — See points 44 and 60 above.

77 — At the hearing the Netherlands Government explained that whilst asylum claims are being assessed proceedings are not taken against the individual concerned in respect of an illegal stay. See further judgment in *Arslan*, C-534/11, EU:C:2013:343, paragraph 49.

78 — Pursuant to the Returns Directive, Member States must return illegally staying third-country nationals respecting their fundamental rights in accordance with Article 1. Where a period of voluntary departure has been granted but the return decision has not been complied with, Member States must take steps to enforce the decision under Article 8(1).

66. Moreover, as Belgium, France, and the Netherlands correctly submit, that position would be incompatible with the Schengen *acquis* in so far as the purpose of the SIS system [79] (allowing Member States to obtain information relating to alerts on persons for border checks) includes maintaining, inter alia, [public order]. [80] Thus, a person who is subject to an immediate return decision is also subject to an entry ban under Article 11(1) of the Returns Directive, the relevant data being entered into the SIS system. Such decisions may be based upon a threat to [public order] which arises where the person concerned has been convicted of an offence carrying a penalty of imprisonment of at least one year. [81] There is no requirement under the Implementing Convention that that conviction must have become final and absolute. Where the conviction also forms the basis for refusing to grant a period for voluntary departure on [public order] grounds under Article 7(4), it would be inconsistent with the requirements of Article 96(2) of the Implementing Convention to add a further requirement that the conviction must be one from which there is no appeal. I therefore consider the better view to be to construe Article 7(4) without adding such a requirement. That has the advantage of ensuring consistent interpretation with the overall legislative scheme which includes the Schengen *acquis*.

67. Is suspicion that the person concerned has committed a criminal offence sufficient to trigger Article 7(4)?

68. Given that decisions must be adopted on a case-by-case basis taking account of objective criteria (recital 6 in the preamble to the Returns Directive) and that Member States should make their decisions on the basis of the individual person concerned rather than general considerations, there cannot in my view be a general rule that only convictions for criminal offences are sufficient. Thus, in principle suspicion of having committed a criminal offence could be enough to invoke the Article 7(4) derogation.

69. The national authorities must nevertheless assess which [public order] interests require protection and in what respect the individual concerned constitutes a danger to [public order] in the case both of a conviction and of a suspicion that a criminal offence has been committed. In other words, there should not be an automatic decision depriving an individual of his right to voluntary departure simply because he is either convicted of an offence or suspected of having committed one.

70. I conclude that in order to trigger the derogation to the general rule in Article 7(1) of the Returns Directive that illegally staying third-country nationals should be granted a period of 7 to 30 days for voluntary departure, the 'risk' or threat to [public order] within the meaning of Article 7(4) must be identifiable by the Member State concerned. The scope of that derogation is a matter of EU law. General guidance as to the meaning of the term [public order] may be derived from the Court's case-law elsewhere on that concept taking account of the wording, aims, scheme and context of the Returns Directive. In establishing whether an illegally staying third-country national poses a threat to [public order] within the meaning of Article 7(4) of the Returns Directive, the competent national authorities must make a case-by-case assessment in each instance in order to determine the [public order] interest that they seek to protect. The onus is on those authorities to put forward grounds justifying recourse to Article 7(4). In that respect they must demonstrate that the person concerned: (i) has acted contrary to [public order] and (ii) poses a threat to [public order]. In appropriate circumstances, a reasonable suspicion that the person concerned has committed a criminal offence is sufficient to invoke the [public order] exception in Article 7(4). Where there has been a conviction, this does not need to have become final and absolute.

79 — See points 3 and 4 above.

80 — There is an express reference to the Schengen Borders Code in Article 3(2) of the Returns Directive and to the SIS system in recital 18 of the preamble as well as a more general reference to the Schengen system in recital 14. Those references indicate that the Schengen *acquis* form part of the legislative context relevant to the interpretation of the Returns Directive.

81 — See point 4 above.

Question 2

71. By Question 2 the referring court asks whether other facts and circumstances apart from suspicion or conviction of having committed a criminal offence (such as the type of offence; the gravity with which it is regarded under national rules; the time elapsed since the offence was committed and the intention of the person concerned) should be taken into account in assessing whether the derogation in Article 7(4) applies and, if so what factors are relevant.

72. I share the view of all the parties submitting observations to the Court that other factors should be taken into account.

73. The question is, what are those factors?

74. I do not think that it is possible to list all relevant factors exhaustively in the abstract. Where a person is convicted of having committed a criminal offence, in addition to the points identified by the referring court it seems to me that at least the following are also relevant: the severity of the penalty imposed; and the degree of involvement of the person concerned in committing that offence (whether he was the instigator, the principal or played a minor role).

75. I disagree with the Commission in so far as it considers that what matters is whether the person concerned might not voluntarily comply with his obligation to return.[82] The language of the Returns Directive is not restricted in that way. Furthermore, to the extent that the Commission's position envisages circumstances where the third-country national is likely to abscond, that situation is addressed by the first ground in Article 7(4) of the Returns Directive (as defined in Article 3(7)).

76. The referring court also asks whether the intention of the person concerned can be a relevant factor. It seems to me that in principle it must be, since whether the person concerned is likely to reoffend or to commit a more serious offence is clearly a relevant factor. It may be that the question of intention is raised expressly here because Mr Zh. did not intend to stay in the Netherlands — he was stopped by the Dutch authorities in transit to Canada. The fact that he did not intend to stay in the Netherlands is irrelevant to whether he stayed illegally for the purposes of the Returns Directive.[83] However, his intention is relevant to the appraisal of whether the criminal offence he committed of travelling with a false document constitutes a disturbance to [public order] and whether he is a threat to [public order] in the Netherlands. The weight attached to Mr Zh.'s intentions is a matter for the national authorities, subject to review by the national court. As with the other factors (listed in points 71 and 74 above) the individual's intentions cannot be determinative. Indeed, in that respect it seems to me that, in relation to a person travelling with a false document who has no intention of staying in the country concerned, the degree of the disturbance and the nature of the threat to the [public order] is appreciably less clear than it is in the case of a person convicted of knowingly supplying false papers to gangs involved in people trafficking. The latter is a more serious offence that has clear implications for [public order].

77. Those factors are equally relevant in relation to suspicion of having committed a criminal offence. It is also important to take account of the basis for that suspicion. Thus, for example, the situation of a person arrested for having committed a violent assault whose trial is abandoned because the victim (the sole witness) refuses to give evidence would be different from that of an individual who is accused of having committed petty theft which has not been investigated by the police, but who is

82 — I understand that the Commission may have been referring to circumstances where the third-country national does not necessarily abscond but refuses to leave without a removal decision being issued under Article 8.

83 — See points 9 and 25 above.

none the less drawn to the attention of the immigration authorities. In the first situation there were sufficient grounds for the State to commence a prosecution which implies that there is a [public order] interest. The second scenario is of a mere allegation which of itself does not necessarily show a [public order] interest.

78. The referring court explains that since the Circular of 9 February 2012 the policy in the Netherlands is that any suspicion or conviction for a crime under national law constitutes a risk to [public order] for the purposes of a return decision. [84] That circular postdates the facts at issue in the main proceedings. However, at the hearing the Netherlands Government confirmed that the content of the previous circular in place at the material time was more or less the same as that of the Circular of 9 February 2012. The Netherlands Government stated that although the circular was not legally binding, the standard practice was for the national authorities to assume that a threat to [public order] existed in cases like those of Mr Zh. and Mr O. and to refuse to grant a period for voluntary departure because the person concerned had a criminal conviction or was suspected of having committed a crime. The third-country national would then be informed and given an opportunity to indicate whether his individual personal circumstances were such that he should none the less be granted a period of voluntary departure (automatically 28 days) on the grounds that such a period was necessary for reasons relating to, for example, health or family life (see Article 5 of the Returns Directive).

79. Although the Netherlands' system is not in issue in the current proceedings (this is not an infringement action), I observe for the sake of good order that such a policy seems to me to be incompatible with the Returns Directive for the following reasons. First, the scheme of Article 7 is that it confers a right to voluntary departure (Article 7(1)) and permits derogation from that right only in particular circumstances (Article 7(4)). Second, the wording of the directive expressly indicates that a case-by-case assessment (rather than the application of general rules, such as whether there is any suspicion or conviction of a criminal offence) is required to trigger the [public order] derogation in Article 7(4). [85] Third, the Netherlands system as explained by the referring court is characterised by a *presumption* against voluntary departure where the person concerned is convicted or suspected of having committed a criminal offence. There is nothing in the wording of the Returns Directive supporting the notion of such a presumption.

80. Furthermore, the Returns Directive establishes common standards and procedures (recital 2 and Article 1) which must be applied by each Member State for returning illegally staying third-country nationals. The Member States may therefore only depart from those standards and procedures where they wish to apply more favourable provisions in accordance with Article 4. The directive does not allow Member States to apply stricter standards in the sphere that it governs. [86]

81. It follows, in the light of these comments, that the national authorities must show over and beyond the fact that Mr Zh. was convicted of travelling with a false document why they are justified in relying upon Article 7(4). In what respect does his action constitute a disturbance to [public order] and why is he considered to pose a threat? Mr O., on the other hand, is suspected of having committed an act of domestic violence — also a criminal offence. In his case the national authorities must demonstrate in what respect he has acted contrary to [public order]. They must show a firm basis for the suspicion, which must be distinguished from a mere allegation. In so doing they need to establish the [public order] nature of the offence: for example, whether there is a concern that he will commit further similar offences.

84 — See point 18 and footnote 35. The matter of a 'compromise' does not arise in the main proceedings.

85 — See recital 6 in the preamble to the Returns Directive. See further judgment in *Royer*, EU:C:1976:57, paragraph 46.

86 — Judgment in *El Dridi*, C-61/11 PPU, EU:C:2011:268, paragraphs 31 to 33.

82. In conclusion, when assessing whether there is a threat to [public order] for the purposes of Article 7(4) of the Returns Directive, decisions should not be taken solely on the basis that the third-country national concerned is suspected or has been convicted of committing a criminal offence. Other factors, such as the severity or type of criminal offence under national law, the time that has elapsed since the offence was committed, the intention of the person concerned and the degree of involvement in carrying out the offence are relevant to any assessment. Where the basis for invoking the derogation in Article 7(4) is suspicion of having committed an offence, the grounds on which that suspicion is based are relevant to the appraisal. Any assessment must be made on a case-by-case basis.

Question 3

83. Where the third-country national concerned is considered to pose a threat to [public order] for the purposes of Article 7(4), the referring court seeks guidance as to whether the factors taken into account in assessing that threat are also relevant in determining whether that person should be granted a period shorter than seven days to depart voluntarily or no period at all.

84. The Netherlands submits that in such circumstances the Returns Directive allows Member States to decide between two alternative situations: (i) to grant a period shorter than seven days or (ii) to refuse to grant any period of time for voluntary departure. Thus, Member States are not obliged to apply a rule that covers both immediate expulsion and departure within a timescale of one to six days. The Netherlands does not apply such a scale: it does not grant any period for voluntary departure where Article 7(4) applies. The Netherlands Government explains that it considers that its approach avoids uncertainty because it is clear that no period for voluntary departure will be granted. It thus reduces burdens on the executive and judicial authorities who are not obliged to assess whether a period shorter than seven days would be appropriate in any particular case. As an exception, where the third-country national's circumstances are such that the conditions in Article 5 of the Returns Directive apply (on the grounds of family life or the state of health of the person concerned), a fixed longer period (28 days) can be and is granted.

85. All Member States making observations regarding Question 3 submit that the assessment as to whether the individual in question should be expelled immediately or granted one to six days for voluntary departure is within the discretion of the Member State concerned; and that the factors relevant in the appraisal of whether the [public order] interest is endangered are equally relevant in determining whether to grant less than seven days for making a voluntary departure or to expel immediately.

86. It seems to me that the aims of Article 7(4) include enabling Member States to return speedily certain illegally staying third-country nationals where the [public order] interest so requires. There is therefore a correlation between the threat to the [public order] interest and the need to effect a speedy return. Thus, the short answer to Question 3 is 'yes': the factors relevant to the assessment of whether there is a threat to [public order] are also relevant in determining whether a period of less than seven days should be granted in any particular case.

87. However, as regards the implicit question concerning the meaning of the words '… Member States may refrain from granting a period for voluntary departure, or may grant a period shorter than seven days' in Article 7(4), I disagree with the position of the Netherlands Government. I consider that an interpretation of Article 7(4) that would allow a Member State automatically to effect immediate expulsion if the [public order] derogation applies is incompatible with the Returns Directive.

88. An interpretation that is consistent with the aims and the scheme of the Returns Directive requires, rather, that a case-by-case assessment should be made in each instance as to whether immediate expulsion is appropriate or whether one to six days should be allowed for voluntary departure. [87]

89. The wording of the Returns Directive supports that more nuanced approach. Decisions taken under the directive should be adopted on a case-by-case basis by reference to objective criteria. [88] Voluntary return should be preferred over forced return and a period for voluntary departure should be granted. [89]

90. Moreover, under the Returns Directive an entry ban must in principle be issued if no period for voluntary return is given. [90] Issuing an entry ban has important consequences for the third-country national concerned. It indicates that the threat to the [public order] interest that he represents is significant and it sets the Schengen alert system in the SIS in motion. [91] It also means that the safeguards pending return laid down in Article 14 of the directive, including maintaining unity with family members present in the Member State concerned and emergency health care and essential treatment of illness, are jeopardised.

91. It is settled case-law that, when adopting measures to implement EU legislation, Member States must exercise their discretion in compliance with the general principles of EU law including the principle of proportionality. [92] In the context of the Returns Directive, that principle requires that when restricting the right to voluntary departure the least restrictive measure should be taken according to the circumstances of the case.

92. The Returns Directive provides that where a third-country national falls within Article 7(4) the Member State concerned may choose to grant a period of less than 7 days for voluntary departure as an exception to Article 7(1) (which provides for a period of voluntary departure of between 7 and 30 days) and, where appropriate, to grant no period for voluntary departure at all. I disagree with the referring court's observation that refraining from granting a period for voluntary departure is the least restrictive measure. On the contrary: where a Member State applies a policy of refraining from granting such a period in every case, it does not apply the least restrictive measure. Since all cases are subject to the same general rule, there is no process of individual assessment. That position does not seem to me be in accordance with the principle of proportionality.

93. I add that I do not accept the Netherlands' argument that its position avoids placing burdens on the executive and judicial bodies. Seeking to minimise administrative inconvenience is not a valid reason for avoiding assessing cases in accordance with the more nuanced system required under the directive. [93]

87 — The minimum normal period for voluntary departure under Article 7(1) is seven days.

88 — See recital 6 in the preamble to the Returns Directive and points 44, 60 and 63 above.

89 — See recital 10 in the preamble to the Returns Directive. See further judgment in *El Dridi*, EU:C:2011:268, paragraphs 36 and 37.

90 — Article 11(1)(a) of the Returns Directive. At the hearing the Netherlands Government explained that an entry ban is not automatically applied where no period of voluntary departure is given. That position seems to be inconsistent with the wording of Article 11(1)(a) which is mandatory. It is true that Article 4(3) preserves the right of Member States to apply more favourable measures provided that they are compatible with the directive. However, the Netherlands policy relating to entry bans does not appear to be consistent with the directive in so far as the aim is to ensure that return decisions and entry bans have an EU-wide dimension, prohibiting stay in the territory of all Member States (see Article 11(1)(a) read in the light of recital 14).

91 — See point 4 above.

92 — Judgment in *Cypra*, C-402/13, EU:C:2014:2333, paragraph 26 and the case-law cited. See also recital 6 in the preamble to the Returns Directive and the reference to decisions taken under the directive being in accordance with the general principles of EU law which include the principle of proportionality. See further judgment in *El Dridi*, EU:C:2011:268, paragraph 41.

93 — According to the Court's settled case-law a Member State may not plead practical or administrative difficulties in order to justify a failure to comply with its obligations to implement a directive. See by way of analogy judgment in *Commission* v *Portugal*, C-277/13, EU:C:2014:2208, paragraph 59 and the case-law cited.

94. I conclude that where a third-country national poses a threat to [public order] within the meaning of Article 7(4) of the Returns Directive, Member States must comply with the general principles of EU law, including the principle of proportionality. When determining whether the person concerned should be granted less than seven days for voluntary departure or be expelled immediately, the competent national authorities may take into account the factors considered in the assessment of whether the person concerned poses such a threat to [public order]. In determining whether to grant a reduced period for voluntary departure under Article 7(4) it is incompatible with that directive automatically to decide to grant no period for voluntary departure in every case, even if a period of between one and six days for voluntary departure might be appropriate in the circumstances of an individual case.

Conclusion

95. In the light of the foregoing considerations I propose that the Court should answer the questions referred by the Raad van State (Netherlands) as follows:

— In order to trigger the derogation to the general rule in Article 7(1) 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, that illegally staying third-country nationals should be granted a period of 7 to 30 days for voluntary departure, the 'risk' or threat to [public order] within the meaning of the derogation in Article 7(4) must be identifiable by the Member State concerned. The scope of that derogation is a matter of EU law. General guidance as to the meaning of the term [public order] may be derived from the Court's case-law elsewhere on that concept taking account of the wording, aims, scheme and context of the Directive 2008/115. In establishing whether an illegally staying third-country national poses a threat to [public order] within the meaning of Article 7(4) of the Directive 2008/115, the competent national authorities must make a case-by-case assessment in each instance in order to determine the [public order] interest that they seek to protect. The onus is on those authorities to put forward grounds justifying recourse to Article 7(4). In that respect they must demonstrate that the person concerned: (i) has acted contrary to [public order] and (ii) poses a threat to [public order]. In appropriate circumstances, a reasonable suspicion that the person concerned has committed a criminal offence is sufficient to invoke the [public order] exception in Article 7(4). Where there has been a conviction, this does not need to have become final and absolute.

— When assessing whether there is a threat to [public order] for the purposes of Article 7(4) of Directive 2008/115 decisions should not be taken solely on the basis that the third-country national concerned is suspected or has been convicted of committing a criminal offence. Other factors, such as the severity or type of criminal offence under national law, the time that has elapsed since the offence was committed, the intention of the person concerned and the degree of involvement in carrying out the offence are relevant to any appraisal. Where the basis for invoking the derogation in Article 7(4) of Directive 2008/115 is suspicion of having committed an offence, the grounds on which that suspicion is based are relevant to the appraisal.

— Where a third-country national poses a threat to [public order] within the meaning of Article 7(4) of Directive 2008/115 Member States must comply with the general principles of EU law, including the principle of proportionality. When determining whether the person concerned should be granted less than seven days for voluntary departure or whether he should be expelled immediately, the competent national authorities may take into account the factors considered in the assessment of whether the person concerned poses a threat to [public order]. In determining whether to grant a reduced period for voluntary departure under Article 7(4), it is incompatible with that directive automatically to decide to grant no period for voluntary departure in every case, even if a period of between one and six days for voluntary departure might be appropriate in the circumstances of an individual case.