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THE LEGAL STATUS OF PERSONS ADMITTED FOR FAMILY REUNION

A Comparative Study of Law and Practice in some European States

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1. INTRODUCTION

Problem Description

Family reunification is one of the major sources of immigration in most European states. In recent years the political debate in many states has focussed on asylum seekers, migrant workers, or migrants with common origin and language within the immigration country. Family members of these and other categories of migrants make up a large share of the total immigration in Europe, as in other continents.

Most immigrants admitted for family reunification have the relative advantage over other immigrants of having close links with a person who is already established in the host country. Such links may assist their integration into that country.

The residence status and other rights granted to the admitted family members are important elements that will assist the integration of the new migrants in the host society.

This study does not examine admission policy with regard to family members. It focuses on the status granted to family members once they have been admitted. To what extent do European states provide for a special status for family members? Which rights are included in that status? Does that status vary with the immigration status of the principal? To what extent is the family member's status dependent on the principal? How many family migrants have this status in practice? Are there indications that the legal status of family members has assisted or impeded their participation in the society of the host country?

This study describes, analyses and compares the relevant national immigration rules and practices. It also includes a brief description of the main European provisions on the rights of admitted family members, i.e., the relevant provisions in Council of Europe Conventions and EC law, both with regard to the family members of EU citizens and nationals of non-EU states, where relevant provisions are included in Agreements concluded by the EC. The study does not cover the implementation of EC law in EU Member States, nor the details of the case law of the European Convention of Human Rights in Strasbourg (ECHR), since that has been dealt with in another study recently.[1]

Research questions

The main research questions as to the national law and practice are:

(1) Does the national immigration legislation provide a special residence status for admitted family members and, if not, what status is granted to family members?
(2) What are the main elements of that immigration status?
    (a) does the status vary if the principal (sponsor) is a national of the country, a long-resident or a temporarily admitted national of a non-EU state?
    (b) do the rights of children differ from those of spouses?
(3) Does divorce or death of the principal (sponsor) alter the residence rights of the admitted family members?
(4) Are there any special restrictions on deportation or expulsion of family members?
(5) Is access of the admitted family members to the labour market restricted or free?

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[1] Groenendijk, Guild and Dogan 1998.

(6) Are there special rules on the social rights of admitted family members?
   (a) do they have the same rights as nationals of the host country generally?
   (b) if not, from which branches of social security or social assistance are family members excluded?
(7) To what extent are political rights, especially the right to vote and be elected in local, regional or national representative bodies granted to admitted family members?
(8) Are data on the number of admitted family members available and have elements of their status been subject of public or political debate in recent years?
(9) What has been the relevance of European conventions for the status of admitted family members?

Methodology

We sent a questionnaire to experts in the ten Council of Europe Member States included in this research. We asked the experts to send us the relevant provisions of the national immigration law and implementing decrees, published instructions or ministerial circulars and information on practice in the available literature. For each country we tried to contact one expert working with the central government, one practising immigration lawyer and one academic expert. Most of the experts we had addressed completed and returned our questionnaire. We also analysed the literature on the immigration law of those countries to the extent that it was available to us.

Moreover, with respect to some Member States we conducted interviews with officials of the competent ministry, officials of the immigration service, immigration lawyers, immigrant organisations and academic experts. The interviews were conducted either personally or by telephone.

The names of those who assisted us in preparing this report are mentioned in the Annex. We are most grateful to them for the time they spent answering our questions and for sharing their expertise with us. The authors only are responsible for the content of the report.

Terminology

In this report we use the term *foreigner* to indicate persons who are not nationals (citizens) of the state where they are living. *Nationality* and *citizenship* are used alternately to indicate the legal relation between a person or a state as defined by the legislation of that state, irrespective of the ethnic origin of the person. Persons who have that legal relationship with their state of residence are *nationals* or *citizens*.

The concept of 'family member' in this study is not restricted to spouses and children. If other close relatives (partners, parents, brothers or sisters) are admitted for family reunification, available data on their status and possible major differences with the status of the members of the 'core' family is included. The concept of family reunification for the purposes of this study includes persons who were not yet family members at the time when the sponsor who wants to bring them into the host country first entered that country.

The words establishment permit, settlement permit or permanent residence permit are used alternately in this report to indicate the status of long-term migrants. The words sponsor or principal are used alternately to indicate the person resident in the country of immigration with whom the family members seek reunification.

2. RELEVANT EUROPEAN INSTRUMENTS

2.1 European Convention on Human Rights (ECHR)

Article 8

Article 8(1) of the European Convention on Human Rights requires Member States to respect family life, subject to certain derogations set out in Article 8(2). There are no rules in the Convention or its Protocols on the status of family members, but it is clear from the case law of the European Commission of Human Rights and the European Court of Human Rights that Article 8 affects one important aspect of status, the issue of expulsion.[2]

The Court and Commission of Human Rights have applied a broad interpretation of the notion of 'family life'. It can include a parent's relationship with a child even after the child's parents have divorced or were never married, and can even be invoked by a parent who does not have custody. It also covers an adult's relationship with adult parents or siblings.

If a person has family life within a Contracting Party to the Convention, expulsion from that state obviously interferes with a person's family life for the purposes of Article 8(1). However, that does not mean that all such expulsions breach Article 8. It is possible for a state to defend its actions on the grounds set out in Article 8(2), particularly the 'economic well-being of the state' or public order and national security. Most expulsion cases which have reached the Strasbourg Court have concerned the latter defence.

The Strasbourg organs require contracting States to apply a balancing test in cases where expulsion threatens the continuation of family life.[3] On the one hand, how strong are the family links within the host state and how hard would it be to maintain them in another state? On the other hand, how severely does the expellee threaten public order in the host state, as determined by the severity and frequency of his or her crimes and the propensity to re-offend? The balancing test takes into account the length of time in the host state, the ability to live in the state of origin, the language skills of the expellee, his or her links with the state of origin, and whether he or she has passed up an opportunity to acquire citizenship of the host state. Illegal immigrants can also claim that an expulsion would threaten their family life under Article 8, but their illegal status is a factor to be counted against them.[4]

There has only been one Court judgement to date concerning an expulsion carried out on economic grounds.[5] In that case, the host state's right to protect its job market for its own nationals (and EC nationals) was outweighed by the unemployed father's right to maintain a relationship with his child.

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2 See in more detail Groenendijk, Guild and Dogan (1998).

3 This report refers to the key relevant cases. For a full discussion of the cases, see Groenendijk, Guild and Dogan (*ibid*).

4 *Dahlia v. France,* 24 February 1998, Reports of Judgments and Decisions 1998-I, No. 62.

5 *Berrehab v. Netherlands* A 138 (1988).

While the Human Rights Court cannot rule on broader issues of status of family members, such as the type of residence permit received and the extent of access to employment or benefits, the Article 8 cases have an indirect effect on such matters. Since Council of Europe Member States' ability to expel persons with family on their territory has been restricted, a larger number of such persons will remain for a longer period and acquire more comprehensive forms of status.

Article 14 and Protocol 1, Article 1

The First Protocol to the Convention, which was in force in November 1999 in 38 Council of Europe states,[6] also protects migrants' access to social security benefits. The Court of Human Rights has ruled that Article 1 of the First Protocol, the right to property, includes the right of access to a contributory social security benefit. The right must be taken in conjunction with Article 14 of the Convention, which requires equal treatment on a number of grounds as regards all the rights set out in the Convention and its Protocols (for states which have ratified the latter). As a result, States must grant equal treatment on the basis of nationality to contributory social security benefits.[7] This ruling must logically extend to family members of foreigners, so that if they are claiming in their own name they must receive equal treatment with nationals claiming in their own name; and if they are claiming as family members, they must receive equal treatment with family members of nationals. Refusal of the benefits on the sole ground of nationality of the lawfully resident migrant can only be justified on 'very weighty grounds'.

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[6] All except Andorra, Georgia (which signed the Protocol in 1999) and Switzerland (which signed it in 1976).

[7] *Gaygususz v. Austria* [1997] 23 EHRR 364.

2.2 European Social Charter

The 1961 European Social Charter was in force in 24 Council of Europe states by December 1999.[8] A 1988 Protocol setting out additional substantive rights was in force in nine Council of Europe States by the same date.[9] In 1996, the Council of Europe agreed a revised Social Charter including amended versions of the previously-agreed rights, some new rights, and new enforcement procedures. The revised Charter was only in force in four Council of Europe Member States by December 1999.[10] The importance of the Social Charter is growing due to its ratification by non-EU states, especially in recent years.

The European Community rules on free movement exceed most of the rights granted to migrant workers and their families by the Charter. Hence, in practice the Charter is relevant mostly for migrants from the seven non-EEA states that have ratified the Charter. The Charter now has been ratified by Turkey, Poland, Hungary, the Czech Republic, Slovakia, Cyprus and Malta.

The 1961 Charter contains a provision on the right of family reunion in Article 19. This clause states: 'with a view to ensuring the effective exercise of the right of migrant workers and their families to protection and assistance on the territory of any other Contracting Party, the Contracting Parties undertake:' and lists ten specific rights. Article 19(6) specifies that Contracting Parties must 'facilitate as far as possible the family reunion of a foreign worker authorised to establish himself on the territory'. The appendix to the Charter defines 'family' as 'at least his wife and dependent children under the age of 21 years'. The Committee of Experts which supervises the application of the Charter has criticised several States which have long waiting periods for family reunion or which set a lower age than 21 for reunion of children.[11]

Article 19(2) of the Charter also refers to the family members of foreign workers. It requires contracting states to adopt measures 'to facilitate the departure, journey and reception of such workers and their families' and to provide 'appropriate services for health, medical attention and good hygienic conditions during the journey'. It is not clear whether the other paragraphs of Article 19 extend to family members of migrant workers; the opening words of Article 19 refer to 'migrant workers and their families', the specific provisions of Article 19(1), (3) to (5) and (7) to (10) refer only to 'workers', as does Article 18.

As for the other rights set out in the convention, Article 1 of the Appendix to the Social Charter states that most of the rights (Articles 1-17) only extend to nationals of other Contracting Parties, and (in accordance with Article 2) to Geneva Convention refugees.

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8 The fifteen EU Member States plus Cyprus, the Czech Republic, Hungary, Iceland, Malta, Norway, Poland, Slovakia and Turkey. Also, 7 Member States had signed the Charter: Latvia, Liechtenstein, Croatia, Slovenia, Switzerland, Ukraine and FYROM.

9 The Czech Republic, Denmark, Finland, Greece, Italy, the Netherlands, Norway, Slovakia and Sweden. Another 13 states have signed the Protocol. Note that the 1996 revised Social Charter includes the substantive rights in the 1988 Protocol, so a state that has ratified the 1996 revised Charter but not the Protocol might nonetheless be bound by the provisions of the Protocol *de facto*.

10 France, Italy, Romania and Slovenia. Another 17 states have signed the revised Charter.

11 See Cholewinski, 1997, 335-336.

This exclusion is also implied by the wording of Articles 18 and 19, with their reference to 'any other Contracting Party'. Extending the rights in Articles 1-17 to nationals of Contracting Parties benefits family members in several ways. In particular, Article 7 protects children and young persons in employment; Articles 9 and 10 govern the rights to vocational training and guidance; Article 14 sets out a right to social services; Article 16 establishes the right of the family to social, legal and economic protection; and Article 17 requires Contracting Parties to ensure the right of mothers and children to social and economic protection.

Also, two other Articles of the 1961 Charter set out specific rights for migrants which must also logically apply to the family members of such migrants. Article 12(4) requires Contracting Parties to agree bilateral or multilateral treaties or ensure by other means that persons are entitled to equal treatment in social security, along with retention and accumulation of social security benefits. Article 13(4) requires Contracting Parties to extend the European Convention on Social and Medical Assistance to the nationals of other Contracting Parties. The effect of this extension is explained in detail in section 2.5 of this Report.

The 1988 Protocol sets out four additional social rights, none of which relate specifically to migrants. The Appendix to the Protocol states that such rights are only extended to nationals of the Contracting Parties, Geneva Convention refugees, and stateless persons.

The revised version of the Social Charter, signed in 1996, adds eight additional rights.[12] None are specifically relevant to migrants. But Articles 27 and 30 are relevant to family members. The former Article requires the parties to take a number of specific measures to enable workers with family responsibilities to reconcile work and family life. The latter Article requires parties to protect against poverty and social exclusion, especially that of families.

In addition, the revised Charter has altered Article 19 of the original Charter, first by added two new rights (both of particular interest to family members) and secondly by changing the definition of 'family members' in Article 19(6) by means of a change to the Appendix. The two new rights are set out in Article 19(11) (teaching the host state language to migrant workers and their families) and Article 19(12) (teaching the home state language to children of the migrant worker). As for Article 19(6), the revised Charter defines 'family members' instead as 'unmarried children, as long as the latter are considered to be minors by the receiving state and are dependent on the migrant worker', and covers reunion with a 'spouse', rather than a 'wife'.

It should be emphasised that the Charter does not require its Contracting Parties to be bound by all the Charter's provisions. Article 20(1)(c) of the 1961 Charter requires them to accept at least 10 Articles or 45 numbered paragraphs from the 19 Articles set out in the convention. However, Article 20(1)(b) specifies that they must accept at least five of Articles 1, 5, 6, 12, 13, 16 and 19. Similarly, the 1988 Protocol requires its parties to be bound by only one Article of that Protocol.[13] The revised Social Charter requires its parties to be bound by at least sixteen of the thirty-one rights set out therein, or sixty-three

[12] The personal scope of the revised Charter is the same as that of the 1988 Protocol.
[13] Art. 5(1)(b), 1988 Protocol.

numbered paragraphs.[14] This must include at least six of Articles 1, 5, 6, 7, 12, 13, 16, 19 and 20.[15] However, states which ratify the revised Social Charter must remain bound by all the corresponding provisions of the 1961 Social Charter and the 1988 Protocol which they have already ratified.[16]

[14] Art. A(1)(c).
[15] Art. A(1)(b).
[16] Art. B.

2.3 European Convention on the Legal Status of Migrant Workers

The 1977 European Convention on the Legal Status of Migrant Workers was in force in eight Council of Europe member States in December 1999.[17] Article 12 of the Convention provides:

1. The spouse of a migrant worker who is lawfully employed on the territory of a Contracting Party and the unmarried children thereof, as long as they are considered to be minors by the relevant law of the receiving state, are authorised on conditions analogous which this Convention prescribes for the admission of migrant workers and according to the admission procedure prescribed by such law or by international agreements, to join the migrant worker in the territory of a Contracting Party, provided that the latter has available for the family housing considered as normal for national workers in the region where the migrant worker is employed. Any Contracting Party may make the giving of authorisation conditional upon a waiting period which shall not exceed twelve months.
2. Furthermore by a declaration sent to the General Secretary of the Council of Europe, and which will enter into force one month after having been received, any state can at any moment subject family reunion which is the subject of (1) above, to the condition that the migrant worker has regular and sufficient resources so as to support his family.

Article 12(2) allows the Contracting Parties to insist upon a sufficient resources requirement for the application of paragraph (1). Article 12(3) allows the Contracting Parties to derogate from paragraph 1 for one or more parts of its territory, subject to certain procedural requirements. The derogation cannot affect requests for family reunion that have already been submitted.

It is not clear how much of the rest of the Convention applies to the family members of migrant workers.[18] As seen above, Article 12(1) requires a Contracting Party to authorise family reunion 'on conditions analogous which this Convention prescribes for the admission of migrant workers', suggesting that some or all of the Convention's rules also apply to family members of migrant workers.

In any event, several provisions of the Convention specifically refer to family members. Article 9(3) states explicitly that Article 9 applies to family members admitted pursuant to Article 12. This gives important protection to family members, since Article 9 governs the right of residence in a Contracting Party, in particular the issue, renewal and withdrawal of residence permits. Each sub-section of Article 10, on reception of migrant workers, also expressly applies to their family members. Article 14(1) and 14(2) expressly extend rights to education and language training to family members as well as the migrant worker, and Article 14(3) refers to equal treatment for scholarships of migrant workers' children. Article 15 requires Contracting states to arrange teaching of the migrant worker's mother tongue to his or her children in the host state. Article 18(1) requires Contracting Parties to grant equal treatment in social security to migrant workers and their family members, subject to national legislation or bilateral or multilateral treaties, while Article 18(2)

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[17] France, Italy, the Netherlands, Norway, Portugal, Spain, Sweden and Turkey. It has also been signed by four other members. On this Convention, see generally Guild 1999.

[18] See Guild (*ibid.*), 11-12.

requires Contracting Parties to secure acquired rights via means of such treaties. Finally, Article 19 requires Contracting Parties to extend the European Convention on Social and Medical Assistance to migrant workers and their family members from the other Contracting Parties.[19]

[19] On this Convention, see further Section 2.5 below.

2.4 European Convention on Establishment

This Convention, which governs the entry and residence of the nationals of its Contracting Parties in the territory of other Contracting Parties, was in force in twelve Council of Europe Member States in December 1999.[20] There are no specific rules concerning the status of family members in the Convention, but there is nothing to preclude its application to nationals of its Contracting Parties who have entered another Contracting Party on family reunion grounds.

Article 3 sets out protection against expulsion. Article 3(1) prohibits expulsion of lawful residents except in cases of national security, *ordre public* or morality. Article 3(3) limits further the grounds for expulsion after ten years of lawful residence: it is only permitted in cases of national security and 'particularly serious' *ordre public* or morality grounds. Article 3(2) provides procedural protection for nationals of a Contracting Party who have lawfully resided for over two years in another Contracting Party.

Articles 10-17 set out rules on access to employment. Article 10 requires Contracting Parties to authorise nationals of the other parties to engage in any gainful footing on an equal basis with its own nationals, whether as an employee or on a self-employed basis. However, this does not apply if the Contracting Party 'has cogent economic or social reasons for withholding the authorisation'. Article 11 sets out a limited 'standstill', protecting persons who have already taken up employment or self-employment in a host Contracting Party from the effect of any new restrictions imposed by that Contracting Party. Article 12(1) exempts nationals of a Contracting Party from any restrictions which might have been imposed by a host state pursuant to Article 10, if they have been lawfully occupied in that state for five years, lawfully resident for ten years, or admitted as a permanent resident. However, Contracting Parties may choose to apply only one or two of the prior criteria, or pursuant to Article 12(2), may extend the five-year period of prior employment or self-employment to ten years. Article 13 is an exception for public functions or occupations 'connected with national security or defence', and Article 14 sets out procedural rules concerning the exclusion of other professions from the scope of the Convention. Finally, Article 20 concerns access to education. It requires Contracting Parties to admit school-age nationals of another Contracting Party to primary, secondary, technical and vocational training on an equal basis.

[20] Belgium, Denmark, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden, Turkey and the United Kingdom. Three other members have signed the Convention.

2.5 European Convention on Social and Medical Assistance

This Convention, which governs the status of the nationals of its Contracting Parties who need social or medical assistance in the territory of other Contracting Parties, was in force in 17 Council of Europe Member States in December 1999.[21] There are no specific rules concerning the status of family members in the Convention, but there is nothing to preclude its application to nationals of its Contracting Parties who have entered another Contracting Party on family reunion grounds.

Article 6(a) prevents a Contracting Party from repatriating a lawfully resident national of another Contracting Party if that person is in need of social or medical assistance. Article 7(a) allows exceptions to that rule if the person has been resident for less than five years (or ten years if he or she entered after the age of 55), he or she is fit enough to be transported, and he or she has 'no close ties' in the country of residence. This would appear to preclude deportation if a person has family members in the country of residence, but Article 7(c) states that repatriation shall include facilities offered to spouses and children.

The scope of the Convention has been extended by Article 13(4) of the European Social Charter.[22] Article 13(1) to (3) of the Charter require Contracting Parties to the Charter to ensure that persons without adequate resources should receive adequate assistance and health care; that such recipients should not face a diminution of political or social rights; and that Contracting Parties should provide public or private services to prevent, remove or alleviate want. Article 13(4) then requires Contracting Parties to the Convention on Social and Medical Assistance to extend this protection to nationals of all contracting states of the Social Charter. The Appendix further provides that Contracting Parties to the Social Charter which are not parties to the Convention on Social and Medical Assistance may ratify Article 13(4) 'if they grant to nationals of other Contracting Parties a treatment which is in conformity with the provisions of the said Convention'. The former provision only appears to govern the grant of assistance, and so does not appear to require Contracting Parties to the Social and Medical Assistance Convention to extend *residence protection* to nationals of all states which have ratified the Social Charter. However, the latter provision does appear to require all parties to the Social Charter to extend residence protection to nationals of all states which have ratified the Convention on Social and Medical Assistance. As pointed out in Section 2.2, Contracting Parties to the Social Charter are not obliged to ratify every provision of the Charter. However, the Committee of Independent Experts recently has held that "the scope of reference [in Article 13(4)] to the 1953 Convention is, therefore, as follows: if a Contracting Party to the Charter repatriates nationals of other Contracting Parties who are lawfully within its territory without residing there on the ground that they are in need of assistance, it must be respect the provisions of the 1953 Convention on repatriation which can be applied to them, i.e. Articles 7b and c, 8, 9 and 10".[23]

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[21] Belgium, Denmark, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, Malta, the Netherlands, Norway, Portugal, Spain, Sweden, Turkey and the United Kingdom. Estonia has signed the Convention.

[22] The revised Social Charter has not altered Art. 13 of the Charter or the related provisions of the Appendix.

[23] European Social Charter, Committee of Independent Experts, Conclusions XIV-1, vol. 1, Strasbourg 1988, par. 61.

2.6 European Union and European Community law[24]

EC and EEA nationals

EC rules concerning the free movement of nationals of EC Member States are very extensive. The rules also cover nationals of three EFTA states (Norway, Iceland and Liechtenstein) in the European Economic Area (EEA).[25] Similar rules have been agreed between the EC and its Member States and Switzerland in a treaty signed in 1999, although this treaty has yet to be ratified.[26] However, none of these rules cover EC nationals in their 'own' Member State who wish to exercise family reunion with nationals of third countries.[27]

The core Community provision on EC and EEA nationals is Regulation 1612/68, concerning EC national workers who move to other Member States, which implements the right to free movement of workers in Article 39 (ex-48) of the EC Treaty in more detail.[28] Article 10(1) of this Regulation allows a worker's 'spouse and their descendants who are under the age of 21 years or are dependants' and 'dependent relatives in the ascending line of the worker and his spouse' to 'install themselves' with a worker who is 'employed on the territory of another Member State'. The nationality of the family members is irrelevant. Article 10(2) obliges Member States to 'facilitate the admission of' other members of the family if 'dependent on the worker ... or living under his [or her] roof' in the worker's home country.

Article 11 of the Regulation allows the spouse and children under 21 or dependants of a worker or a self-employed person to take up any activity as an employed person anywhere in the host state, regardless of their nationality. Article 12 provides that children of a Member State national who 'is or has been employed' in another Member State 'shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory'. A further Directive from 1977 governs education rights of the children of EC national workers.[29]

Title I of the Regulation (eligibility for employment) and Title II (equal treatment) do not expressly refer to workers' families. However, the Court of Justice has ruled that the ban on limitations on numbers of foreign workers in Article 3 also applies to third-country national family members of EC national workers, as does the right to equal treatment in 'social advantages' provided for in Article 7(2).[30] It can be argued in light of the Court's continued stress on the integration of the migrant worker and his family into the host state that all provisions of the Regulation apply *mutatis mutandis* to family members of workers.

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24 This sub-section draws upon the text of the explanatory memorandum to the proposal by ILPA and MPG for an EC directive on family reunion (forthcoming, MPG/ILPA).

25 OJ 1994 L 1/1.

26 COM (1999) 229, 4 May 1999.

27 Joined Cases 35 and 36/82, *Morson and Jhanjan*, [1982] ECR 3723.

28 OJ 1968, L 257/2.

29 Directive 77/486 (OJ 1977, L 199/32).

30 Case 131/85, *Gul*, [1986] ECR 1573 (Art. 3), and case law since Case 32/75, *Christini*, [1975] ECR 1085 (Art. 7(2)).

Directive 68/360 accompanies Regulation 1612/68, and sets out rules on the immigration status of workers and their family members, in particular the recognition of their right of residence. The rights of workers and their family members after employment are set out in Regulation 1251/70, which allows family members to stay upon a worker's death, disability or retirement under certain conditions.[31]

The rules applying to family members of other categories of EC nationals are relatively similar. Directive 73/148 provides rights for self-employed persons and providers and recipients of services, implementing Articles 43 and 49 (ex-52 and 59) EC in more detail.[32] Articles 1(1)(c) and (d) and 1(2) of the Directive are essentially the same as Article 10 of Regulation 1612/68, with the minor distinction that an independent descendant under 21 other than a child could join a worker under the Regulation, but not a self-employed person or service provider or recipient under the Directive. The Directive also contains provisions very similar to Directive 68/360. There is no provision equivalent to Article 11 of the Regulation on family members' employment rights, but since Article 11 of the Regulation also expressly applies to family members of the self-employed, such a provision would be unnecessary. There is no express provision on education rights for children or for other social advantages for the self-employed or their family members. However, the case law of the Court of Justice has made it clear that Article 43 (ex-52) EC nevertheless gives self-employed persons the right to claim social advantages for their families, including education rights for children.[33] Directive 75/34 gives the self-employed and their family members the right to remain after self-employment under similar conditions to Regulation 1251/70.[34]

Directive 90/364 on 'self-sufficient' persons not falling under other EC rules, and Directive 90/365 on the rights of pensioners to move to other Member States after retirement, both allow spouses and dependent relatives in the ascending and descending line to join the principal.[35] This differs from the rules on workers and the self-employed slightly, because there is no obligation to facilitate the admission of certain other family members, and independent descendants (whether or not they are children) cannot join the primary right-holders. However, the spouse and dependent children are entitled to obtain employment or self-employment anywhere in the Member State. This differs slightly from the rights of family members of the employed and self-employed under Article 11 of Regulation 1612/68; their spouses and children who are under 21 *or* dependent can seek work, but not self-employment. Finally, under Directive 93/96 on rights of students, only the spouse and dependent children can join the student, although they can take up employment or self-employment in the Member State.[36]

In mid-1998, the Commission proposed amendments to Regulation 1612/68 and Directive 68/360.[37] The proposed amendment to the Regulation suggests three changes relevant to family members. Article 10 would be amended to:

- allow persons to move with a worker under Article 10(1) if they are considered equivalent to a spouse under the host state's law;

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31 OJ 1970, L 142/24.
32 OJ 1973, L 172/14.
33 Case C-185/96, *Commission v. Greece*, [1998] ECR I-6601; Case C-337/97, *Meussen*, judgment of 8 June 1999, not yet reported.
34 OJ 1975, L 14/10.
35 OJ 1990, L 180/26 and OJ 1990, L 180/28.
36 OJ 1993, L 317/59.
37 COM (1998) 394, 22 July 1998.

- allow descendant and ascendant relatives to join the worker under Article 10(1) whether or not they are dependants;
- allow other family members dependent upon the worker or living in his or her house to join the worker automatically under a new Article 10(1)(c), if such prior connections had already been formed within a Member State;[38]
- abolish the current Article 10(3), the accommodation requirement applied to initial entry of family members;
- insert a new Article 10(3), allowing all family members to claim social and other advantages in their own name;[39] and
- allow family members to stay after dissolution of a marriage, after three years of residence (new Article 10(4)).

Article 11 would be amended to:
- extend the scope of the Article to all family members, not just spouses and children under 21 or dependent;
- allow family members to take up any *self-employment*, as well as employment, in the host state;
- allow family members to retain these rights upon dissolution of a marriage after five years; and
- provide explicitly that family members' take-up of employment or self-employment must be on the same basis as nationals of the host state.[40]

Amendments to Article 12 would extend educational rights under that Article to all family members of a worker, not just his or her children.

In addition to the rights described above, Community social security legislation also grants rights to the family members of EC nationals who take up work, self-employment or studies in another Member State.[41]

Turkish nationals

In addition to the rules on family members of EC, EEA and Swiss nationals, the Ankara Agreement, which governs relations between Turkey and the EC and its Member States, contains rules on the treatment of family members.[42] The Ankara Agreement does not yet oblige the parties to secure free movement of workers or the self-employed, but the Decisions of the Association Council set up by that agreement are in force and grant certain rights. Article 7(1) of Association Council Decision 1/80 leaves Member States discretion as to whether to admit family members to join a worker. However, once the

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38 Art. 10(2) would still require Member States to 'facilitate' admission of such persons where the connections had been formed in a third country.

39 This would be wider than the right of family members to claim equality in social advantages upheld since *Christini*, since the right would not be based upon dependence upon the worker.

40 This would implement the ruling in *Gul* (note 13 above) as regards employment.

41 Reg 1408/71 (OJ 1971, L 149/2), as consolidated by Reg. 118/97 (OJ 1997, L 28/1); see Reg. 307/1999 extending the Regulation to students (OJ 1999, L 38/1).

42 OJ 1964, L 217. On the relevance of the Association-rules for Turkish citizens resident in the EU see N. Rogers, A Practitioners' Guide to the EC-Turkey Association Agreement, London 1999, Kluwer Law International, R. Gutmann, Die Assoziationsfreizügigkeit türkischen Staatsangehöriger, 2nd edition, Baden-Baden 1999, H. Gacon, L'Association entre la Communauté Européenne et la Turquie, in: Dictionnaire Permanent Droit des Etrangers, Paris and H. Staples, De Associatieovereenkomst EEG-Turkije, Migrantenrecht 1999.

family members have been admitted to a Member State they have, according to Article 7(1) of the Decision, the right to stay in its territory and take up work (subject to EC nationals' priority) after three years and take up any work (with EC nationals' priority dropped) after five years.[43] Article 7(2) of the Decision gives children of Turkish workers who have been employed for at least three years in the host state the right to take up any employment, with a corresponding right of residence.[44] Association Council Decision 3/80 confers the right to equal treatment in social security on Turkish workers and their family members.[45]

Morocco, Algeria, Tunisia

Treaties with Morocco, Algeria and Tunisia give family members of Maghreb workers in the EC (if they are living with the worker) the right to equal treatment in social security.[46] The EC Court of Justice has held that the concept of "family members" in these treaties includes the parents of the worker and his spouse who live with him in the host Member State.[47] These treaties also confer the right to non-discrimination in working conditions. The Court has ruled that this right does include a right to reside as long as a Maghreb worker has a work contract, but does preclude Member States from terminating a worker's residence before the end of a work permit, except on public order grounds.[48]

Central Europe

The European Agreements concluded with ten states of Central and Eastern Europe give family members of workers (if admitted) the right to work in the host state.[49] In late 1999, the Commission proposed that the Community agree to draft Decisions of the Association Council set up by each agreement. These Decisions would grant equal treatment in social security to nationals of the applicant states, and would also establish rules on accrual and transfer of benefits.[50]

Other rules

In 1993, the Immigration Ministers of the EU agreed a Resolution on family reunion for nationals of third countries.[51] However, this Resolution is non-binding and cannot be relied on in national courts. It only applies to persons who are resident with 'an expectation of permanent or long-term residence', but does not define this concept. It does not cover persons admitted for a fixed term, asylum applicants or recognised refugees, or third-country national family members of nationals of the host Member State (i.e., an Indian citizen joining a British citizen in Britain).

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43 Case C-351/97, *Kadiman*, [1997] ECR I-2133; see Advocate-General's Opinions of 3 June 1999 in Case C-329/97, *Ergat*, and 18 November 1999 in Case C-65/98, *Eyüp*, not yet reported.

44 Case C-355/93, *Eroglu*, [1994] ECR I-5113; Case C-210/97, *Akman*, [1998] ECR I-7519.

45 Case C-262/96, *Sürül*, judgment of 4 May 1999, not yet reported.

46 OJ 1978, L 263, 264 and 265; new treaty with Tunisia in OJ 1998, L 97; case law beginning with Case C-18/90, *Kziber*, [1991] ECR I-199.

47 Case C-178/98, *Mesbah,* judgement of 11 November 1999, not yet reported.

48 Case C-416/96, *El-Yassini*, [1999] ECR I-[425].

49 OJ 1993, L 347 (Poland); OJ 1993, L 348 (Hungary); OJ 1994, L 357 (Romania); OJ 1994, L 358 (Bulgaria); OJ 1994, L 359 (Czech Republic); OJ 1994, L 360 (Slovak Republic); OJ 1998, L 26 (Latvia); OJ 1998, L 51 (Lithuania); OJ 1998, L 68 (Estonia); and OJ 1999, L 51 (Slovenia).

50 COM (1999) 657 to 684.

51 Unpublished in the OJ; see Guild and Niessen, 1996.

The Resolution accepts that the spouse and children of the resident should 'normally' be admitted (point 2). Children must be dependent, unmarried and between the ages of 16 to 18 to enter (point 8). Other family members can only be admitted for 'compelling reasons' (point 10). Independent residence status 'may' be granted after an indefinite period and the right to work may be granted 'if appropriate' (point 12). A number of other conditions for possible refusal of entry or expulsion are set out, and there is no reference to the right to education, social advantages or other aspect of equal treatment in the host state.[52]

Subsequent EU Council resolutions also made reference to family members. The 1994 resolution on workers stated that Member States 'reserve the right' to admit spouses and dependent children of third-country national workers.[53] Presumably the 1994 resolution only refers to situations falling outside the scope of the 1993 Resolution (i.e., where workers do not yet have a right of long-term or permanent residence). There is no reference to the status of family members after admission. The 1994 resolution on the self-employed states that spouses and children (between the ages of 16 and 18) of the self-employed can join self-employed persons in accordance with the rules in the 1993 resolution on family members.[54] Again, this presumably applies only to persons who do not yet have a right of long-term or permanent residence. Finally, the 1994 resolution on students leaves it to each Member State whether to admit family members or allow a student's spouse to take up work.[55]

A later resolution in 1996 on the rights of Long-Term Resident (LTR) third-country nationals does not address family reunion in any detail. The 1996 resolution does not make clear how it relates to the 1993 resolution, but does state that family members of a long-term resident should be entitled to free movement within a single Member State and equal treatment in limited areas, along with the long-term resident.[56]

In 1997, the Commission proposed a Convention on Migration containing family reunion rules.[57] Family members joining an EC national in his or her 'own' state would have the same substantial rights as those joining EC nationals who had moved to another Member State. However, other categories of persons would still be in a weak position. There would be an obligation upon Member States under the Convention to admit spouses and unmarried children below the age of majority, but the obligations to show 'suitable' accommodation and means of support would remain. Most principal right holders could not request family reunion until they had resided for 'at least' a year with the right to reside for another year, and no maximum waiting period is provided for. Students could not apply for reunion until they had been present for two years with a further year of legal residence. Family members would not be allowed to take up work for at least six months after entry, except in emergencies, and there is no maximum limit placed on the waiting period before they can work. They could *request* separate status upon the death, divorce or separation from the principal right holder, but (unlike family members of EC nationals in another Member) they would have no *right* to such status upon death or separation. The Convention did not make clear whether family members could obtain the status of 'Long Term Resident' under the Convention.

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52 See critique in Guild and Niessen, *ibid*.
53 Point A(v) of resolution (OJ 1996, C 274/3).
54 Point C(9) of resolution (OJ 1996, C 274/7).
55 Point C(5) of resolution (OJ 1996, C 274/10).
56 Point V of resolution (OJ 1996, C 80/2).
57 COM (97) 387, 30 Jul. 1997, Arts. 24-31.

From May 1, 1999, when the Amsterdam Treaty entered into force, the EC has the power to adopt family reunion rules under article 63(3)(a) of the EC Treaty. On December 1, 1999, the EC Commission proposed a Directive on family reunion which replaces the proposed text of the 1997 Convention.[58]

If adopted, this proposal would govern the status of third-country nationals who join:

a) EU citizens who have not exercised their right to free movement;
b) Refugees (except asylum-seekers), no matter how long they have been resident; or
c) third-country nationals who are lawfully resident in a Member State for more than one year.[59]

Family members of EU citizens who have not exercised their right to free movement would have to be treated exactly the same as family members of EU citizens who had.[60] The proposal covers not just spouses and minor children, but unmarried partners (depending upon the law of the host state), dependent relatives with no other family support in the state of origin and dependent older children.[61] It entitles all family members to access to education on the same basis as EU citizens, and spouses and minor children to vocational training and employment on the same basis as EU citizens.[62] Spouses and children passing the age of majority have the right to autonomous status after four years if family links still exist, while other family members may be granted such status at a Member State's discretion.[63] Between one and four years, family members who become widowed, divorced or separated, they may apply for an autonomous permit, which must be accepted in 'particularly difficult situations'.[64]

The status of family members may also be affected by a separate proposal on the status of long-term residents of the European Union. The Commission is due to make such a proposal within two years of the entry into force of the Amsterdam Treaty (so by May 1, 2001).[65]

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58 COM (1999) 638.
59 Art. 3(1) and 3(2) of proposal.
60 Art. 4 of proposal.
61 Art. 5 of proposal.
62 Art. 12 of proposal.
63 Art. 13(1) and (2) of proposal.
64 Art. 13(3) of proposal.
65 See Council and Commission Action Plan on implementing the Area of Freedom, Security and Justice (OJ 1999, C 19/1).

3. LAW AND PRACTICE IN THREE COUNTRIES

3.1 Germany

Data on admission

More than 7.3 million foreigners live in Germany, i.e. 9 percent of the German population. Exact data on the number of immigrants admitted for family reunion are not available. In 1996-1998, between 55,000 and 65,000 foreigners were granted visa for family reunion each year. The actual number of non-EU citizens admitted for family reunion is estimated to be considerably higher, probably between 150,000-200,000 immigrants per year.[66]
Half of the visa granted for family reunion in 1998 were granted to foreign wives joining their foreign or German husband in Germany, one quarter were foreign husbands seeking to join their wives and one quarter were children under 18 years. In 1998 one third of the visa were granted to foreign spouses seeking to join a German national in Germany and one third were Turkish citizens.[67]

The cornerstone of German immigration law is the German Aliens Act (*Ausländergesetz*), which entered into force in 1991.[68] It was amended on 15 July 1999. The Aliens Act is a federal law, which is implemented by the administrative authorities of the sixteen *Länder*.

Residence status of family members

Foreign family members who wish to reside in Germany must hold a residence permission (*Aufenthaltsgenehmigung*).[69] Usually this will take the form of a temporary residence permit (*befristete Aufenthaltserlaubnis*), valid for one year and to be renewed each year.[70] At each renewal all the requirements for admission still have to be met. The temporary residence permit of a foreign family member of a German citizen usually will be granted for a period of time of three years.[71]

A family member will obtain a residence permit for temporary purpose (*Aufenthaltsbewilligung*) for a maximum period of two years at the most if the principal has a specific task or activities to perform in Germany, which is limited in time, e.g. studies.[72] This permit will only be extended as long as the principal holds the permit and the conjugal community continues.

If there are humanitarian grounds and the foreigner does not fulfil the conditions for another residence status, a residence permit on humanitarian grounds (*Aufenthaltsbefugnis*) may be issued for up to two years, to be renewed for two years at the most.[73] The spouse

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66 Lederer 1997, p. 211-219.
67 Beauftragte der Bundesregierung für Ausländerfrage, Migrationsbericht 1999, Berlin 1999, p. 20.
68 Act of 9 July 1990, Bundesgesetzblatt I, p. 1354 as amended on 15 July 1999 BGBL I, p. 1618 (hereafter: AG).
69 Art. 3(1) Ausländergesetz. See generally Art. 5 AG.
70 Art. 17-27 AG.
71 Art. 23(2) AG.
72 Art. 28 and next AG.
73 Art. 30 and next AG. See particularly Art. 30(2.1/2) AG.

and minor or unmarried children of the holder of a residence permit on humanitarian grounds will be granted the same residence permit.

The German Aliens Act institutes two different types of permanent residence statuses: the unrestricted residence permit (*unbefristete Aufenthaltserlaubnis*) and the establishment permit (*Aufenthaltsberechtigung*).

A spouse or other family member is entitled to an unrestricted residence permit after five years residence on the basis of a temporary residence permit, if (s)he has sufficient command of the German language to make him/herself understood, satisfies housing requirements, has sufficient income and is not liable to expulsion. If one spouse has sufficient income to support the family, the other spouse is not required to have sufficient income.[74] Spouses of German nationals may be granted an unrestricted residence permit after three years residence, if they have sufficient command of the German language and there are no public order objections.[75]

Children admitted for family reunification are entitled to an unrestricted residence permit, if they have been in possession of a temporary residence permit for eight years by the time they reach the age of 16 years. They do not have to fulfil the other requirements. However, if the residence requirement is only met after the age of 18 years, the child will have to meet the language and income requirements. The unrestricted residence permit may only be refused if there is personal ground for expulsion, the child has committed certain crimes during the past three years, or if the child cannot support himself or herself without social security benefit, unless he or she is in education.

If the child is given a suspended sentence instead of an unconditional sentence the restricted residence permit will be extended for a limited time until the probationary period has ended. The foreign national does not have to satisfy the sufficient income conditions if he cannot satisfy them because of a physical or mental disease or disability.[76]

The establishment permit offers better protection against expulsion than an unrestricted residence permit. A foreigner is entitled to this permit if (s)he fulfils the requirements for an unrestricted residence permit plus some additional conditions with respect to employment record and no relevant criminal record during the last three years.[77] The residence requirement may be reduced to five years for spouses of German citizens and spouses of foreigners holding an establishment permit.[78]

Relevance of nationality of principal

As mentioned above, the foreign family members of a German citizen will usually be granted a temporary residence permit for a three-year period, whereas the family member of a foreign national in possession of a residence permit or an establishment permit will be granted a temporary residence permit for up to one year.[79] Foreign spouses of German

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[74] Art. 24(1) AG.
[75] Art. 25(3) AG.
[76] Art. 26(4) AG.
[77] Art. 27(2) AG.
[78] Art. 27(3) AG.
[79] Art. 23(2) AG.

citizens can also acquire an unrestricted residence permit and an establishment permit more easily than spouses of foreign nationals and have more protection against expulsion.

Divorce or death of principal

In case of marriage breakdown the residence permits of the admitted spouse will not be extended if the spouses have lived together lawfully for less than four years in Germany, unless the expulsion of the foreign spouse would produce an exceptional hardship.[80] Usually there will be a case of exceptional hardship when the spouse has been maltreated during the marriage or the foreign relatives will face serious problems when returning to the country of origin. The duration of the conjugal community in Germany will therefore be taken into consideration.[81] The employment rights are linked to the residence permit. Hence, the right to work will be lost if the residence permit is no longer valid.

Death of the principal will not affect the residence rights of the foreign spouse. The temporary residence permit will be extended.[82]

Restrictions on deportation or expulsion

Deportation of foreign family members is possible if they have overstayed their leave to remain or if their stay in Germany constitutes a threat to public order. This will apply when the foreign national has committed certain criminal offences, e.g. drugs trafficking. However, when considering expulsion the public authorities will take into account the length of residence in Germany, the strength of connections with Germany and the effect on family members.[83]

A relative protection against expulsion is granted to foreigners in possession of an establishment permit, children of immigrants born in Germany or under 18 years at entry and in possession of an unrestricted residence permit, family members of those two categories and family members of German citizens.[84] In case of conviction for a serious criminal offence, expulsion is no longer mandatory but at the discretion of the authorities.[85] The rule that expulsion of these protected foreigners has to be justified by weighty reasons of public security or public order often is of no avail.

Access to labour market

Spouses and children of a principal holding a temporary residence permit or of an asylum seeker whose residence is tolerated (*Duldung*) are not allowed to work during the first year. This waiting period is extended four years for family members of a principal with a residence permit for temporary purpose.[86]

If the principal is in possession of an unrestricted residence permit or an establishment permit, there is no waiting period, but the family member has to apply for a labour permit

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80 Art. 19(1) (1) and (2) AG. Art. 25(2) gives a right to an unrestricted residence permit in these cases after five years under certain conditions.

81 Art. 19 AG.

82 Art. 19 (1.3) AG.

83 Art. 45-47 AG.

84 Art. 48 AG.

85 Art. 47(3) AG.

86 Art. 3 Arbeitsgenehmigungsverordnung

(*Arbeitserlaubnis*). That permit may be refused on labour market grounds, e.g. there are German or EU-citizens or other privileged foreign residents available for the job. Currently, it is possible to exclude foreign nationals, who need a work permit, from all employment in certain regions.

The admitted family members of a German citizen will be granted a special work permit, granting free access to all employment (*Arbeitsberechtigung*).[87] This special permit will be granted after four years of residence to the spouse of a foreign principal who is in possession of this permit him/herself, to children of migrants who have successfully finished their education or have participated in a year of professional training, and to other foreigners after six years of residence or five years of employment.[88]

Once the family member has obtained an unrestricted residence permit or an establishment permit him/herself, (s)he has free access to the labour market and does not need a labour permit anymore.[89]

Social rights

Generally, foreigners in possession of a residence permission will have access to social security benefits on the same conditions as German citizens. However, the loss of a social security benefit may affect the residence status of a foreigner: refusal to extend the residence permit.[90] The legislation of certain federal states does exclude foreign residents with a residence permit for a temporary purpose from special child benefits provided for in the legislation of that state. The Court of Justice in 1999 has held the non-discrimination-clause in Article 3 of Association Council EEG-Turkey nr. 3/80, which forbids this exclusion with respect to Turkish citizens having any kind of residence permission.[91]

Political rights

The right to vote and to be elected in public representative bodies is restricted to German citizens. The Constitutional Court accepted the right to vote with respect to municipal elections and for the European Parliament for resident citizens of the European Union. The Federal Parliament has implemented the privileges for EU citizens by changing the Constitution. The states (*Länder*) have changed their legislation accordingly.
Foreign nationals can become a member of a political party, but are not allowed to take part in nominations of candidates for elections.[92] However, foreign workers have the right to vote and to stand for elections for the Workers Councils

Germany is not a party to the *European Convention on the Participation of Foreigners in Public Life at Local Level*. In Article 6 of that Convention the state party undertakes to grant every foreigner, irrespective of his nationality, after five years of lawful residence the right to vote and to stand for election, provided that he fulfils the same requirements as applied to nationals.

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87 Art. 2 (1) (1) ArGV
88 Art. 2(2) and (3) ArGV and Art. 286 Sozialgesetzbuch III.
89 Art. 284 (1.2) SGB III.
90 Art. 12(2) AG.
91 Case C-262/96, Sürül, judgement of 4 May 1999, not yet reported.
92 Erpenbeck, p. 139/140

Public or political debate

The case of the 14 year old boy of Turkish nationality, born and raised in Germany, who was suspected of having committed more than 60 crimes and was expelled to Turkey after prior expulsion of his Turkish parents for lack of parental care, drew a lot of attention in the press in 1998 and 1999. The case, commonly referred to as the "Mehmet-case", focussed a larger debate on the justification of expulsion of immigrants with long legal residence in Germany.[93]

In 1999 the public and political debate on changing the German nationality legislation, promised by the SPD-Grüne government resulted in the adoption of an Act that among others grants German nationality at birth to children born in Germany if one of the parents has eight years of lawful residence in Germany. In case of dual citizenship the person has to choose for one of those between the age of 18 and 23 years.[94] The Act entered into force on 1 January 2000. If this Act had been in force when the boy nick-named "Mehmet" was born in Munich, he would probably have acquired German nationality and hence full protection against expulsion at birth.

Relevance of European conventions

The judgements of the European Court of Human Rights on Article 8 ECHR are referred to by the German courts, but generally the national courts hold that the level of protection under the ECHR is not higher than the protection granted by to the German constitutional law.

The ratification by Turkey of the European Convention on Establishment in 1990 – Germany was a party to the Convention since 1965 – lead to a better protection against expulsion of Turkish citizens in Germany. The actual scope of this protection is still unclear.[95] More clarity may result from the judgement in a case on the interpretation of Article 14 of Decision 1/80 of the EEC-Turkey Association Council presently pending before the EC Court of Justice.[96] An indication of the relevance of the EEC-Turkey Association rules for Turkish family members in Germany is provided by the instructions on the application of Council Decision 1/80 published by the German Ministry of Interior in 1998.[97]

Germany is a party to the European Convention on Social and Medical Assistance since 1956 and to the European Social Charter since 1965. The European Convention on the Legal Status of Migrant Workers has been signed in 1977, but not yet been ratified by Germany.

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93 See R. Gutmann, der Fall "Mehmet" – vom schwierigen Umgang mit der zweiten Ausländergeneration, NVWZ 1999, p. 43f and W. Krach, Pädagogischer Wahnsinn, Der Spiegel of 23.11.1998, p. 28f.

94 Art. 4(3) and Art. 29 Staatsangehörigkeitsgesetz as amended by the Act of 15 July 1999, BGBL I, p. 1618.

95 See the caselaw referred to in Groenendijk, Guild and Dogan 1998, p.46.

96 Case C-340/97, Nazli, OJ C357/19 of 22.11.1997, opinion of AG Mischo of 8 July 1999.

97 Algemeine Anwendungshinweise des Bundesministerium des Innern zum Beschluß Nr. 1/80 des Assoziationrats EWG/Türkei, Bonn, 1 October 1998.

3.2 Netherlands

Data on admission

In 1998 approximately 670.000 foreigners, persons without Dutch nationality, were registered as residents in the Netherlands, i.e. 4.5% of the total population. Nationals of the other EU Member States accounted for one quarter of the foreign population and are not discussed further in this section, because their legal status is primarily regulated by Community law (see Section 2.6). The number of persons admitted for family reunification is unknown. However, the number of visas for long term residence (machtiging tot voorlopig verblijf) granted for family reunification or family formation is known: in the years 1996-1998 it varied between 12,000 and 13,000 per year, making up half of all long term visas.[98] The number of foreign family members admitted will be higher, because not all foreigners are obliged to apply for a long term visa and not all foreigners who are under the obligation, actually apply before entry.

Research data from the late 1980s indicate that more than half of the foreign family members were admitted to join Dutch nationals, 85% of whom were Dutch by birth and 15% by naturalisation. In the majority of the cases a female spouse is coming to join her husband; in one quarter a male partner is coming to join a female partner; and in the remaining cases an unaccompanied child is joining one of his or her parents living in the Netherlands.[99]

Residence status of family members

The present conditions for family reunification vary slightly depending on whether the principal is a Dutch national or a foreigner, on the residence status of the foreigner and on whether the partners are married or not. The 1999 Bill for a new Foreigners Act (*Vreemdelingenwet 2000*) proposes abolishing most of the remaining differences with regard to the means test. All principals will have to earn the full amount equal to the standard Social Assistance benefits before family reunion is approved.

The rules on family reunification are not codified in the Foreigners Act, but are found in the policy rules contained in a special chapter of the Foreigners Circular (*Vreemdelingencirculaire*), which contains the instructions to the Immigration and Nationality Service and the local foreigners police.[100]

Once admitted all family members over 12 years of age, irrespective of the nationality or the residence status of the principal, are granted the same residence status: a normal residence permit valid for one year. The permit explicitly is restricted to "residence with the principal and employment". It has to be renewed each year.[101] At each application for renewal the aliens police will check whether the family members are still living together. In theory the renewal may be refused when the income and housing conditions are no longer met. In practice the renewal is only refused in case of disruption of the family ties (divorce, separation, death) or criminal offence.

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98 Immigratie- en Naturalitsatiedienst, Keten in kaart, Den Haag 1999, p. 39.
99 Naborn, 1992, p. 7.
100 Foreigners Circular chapter B-1.
101 Art. 11 Foreigners Act and Foreigners Circular B-1.

After five years of lawful residence the admitted spouse or unmarried partner upon application will be granted an establishment permit, provided the family income is sufficient and stable and there is no serious criminal record.[102] After ten years of residence the means test does not apply anymore. Children will be granted an establishment permit without a means test after five years of lawful residence, once they are 18 years old.[103]

The establishment permit is valid permanently and can only be withdrawn in case the person has provided incorrect information or has been convicted to a long prison sentence.[104] Children under the age of 18 years living with a parent may not be expelled. Foreigners born in the Netherlands or admitted before they were 10 years old may not be expelled after 15 years of residence. After 10 years of residence, they can only be expelled in case of a conviction for large scale drugs trafficking.[105]

Until 1994 spouses and children under 18 years, who were admitted for family reunification with a Dutch national or with a foreigner holding an establishment permit or refugee status, were automatically granted a statutory right to remain permanently in the Netherlands after they had lived in the country for one year on the basis of a residence permit. As long as the family relation was intact, the authorities were unable to end the legal residence of these family members. These rules were abolished in 1994. Family members now have to apply for renewal of their residence permit until they have received an establishment permit. However, family members admitted before 1994 continue to hold their strong statutory residence right.[106] In 1996, over 10% of the registered foreigners held that statutory residence right.[107]

Relevance of nationality of principal

As seen above, family members joining Dutch nationals after admission have the same residence status as those joining foreign nationals (other than nationals of other EU Member States). The few remaining privileges of Dutch nationals with respect to the admission of their family will be abolished according to the Bill of the new Foreigners Act.

Divorce or death of principal

In case of divorce or death of the principal or in case the spouse admitted for family reunion leaves the marital home due to violence or other circumstances, the residence permit of the spouse admitted for family reunification may be withdrawn or its extension refused. The official policy rule is that if the spouses have lived together for three years in the Netherlands, he or she will be required to find employment within a year, unless he or she has to take care of young children. In case the three years requirement is not met or no job found, the spouse may be expelled, except where expulsion would produce exceptional hardship.[108] Turkish citizens who have worked for at least a year have a privileged

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102 Art. 13 Foreigners Act and Foreigners Circular under A-4/7.7.2.
103 Foreigners circular B-2/3.
104 Art. 14 Foreigners Act and Foreigners Circular chapter A-4/4.3.2.2.
105 Foreigners Circular chapter A-4/4.3.2.2(b) and (c).
106 Art. 10(2) Foreigners Act, the now deleted Art. 47 Foreigners Decree and Art. III of Royal Decree of 6.1.1994 amending the Foreigners Decree, Staatsblad 1994, no. 4.
107 Groenendijk, Guild and Dogan 1998, p.50.
108 Foreigners Circular B-1/2.

position, because they may have an extended residence right under Association Council Decision 1/80 (see Section 2.6 of this report).[109]

In practice predominantly male spouses are expelled under these rules. From recent research it appears that 80% of the appeals of female spouses in such cases are successful. The spouse after administrative review or appeal receives a new residence permit. Among spouses with less than three years of residence the rate of success is somewhat lower (72%) than among those resident for more than three years (89%).[110] Earlier research revealed similar success rates for women, but less chances for success for men who divorce or leave their partner.[111]

In autumn 1999 the application of this policy rule became the subject of public and parliamentary discussion after a Polish widow was threatened with expulsion because her Dutch husband had died less than two years after she had been admitted.

Children who have been admitted before the age of 18 years and have lived with their parents for at least one year are not threatened with expulsion on the ground that they have left the parental home or do not have employment or sufficient income. They may only be expelled on very limited public order or national security grounds.[112]

Access to labour market

Generally, admitted family members, once they have received a residence permit, have the same access to the labour market as the principal. Since Dutch nationals and all foreigners holding an establishment permit, a refugee status, admitted on humanitarian grounds or having a temporary residence permit allowing employment for three consecutive years, are exempted from the obligation to have a labour permit, their family members after admission have free access to the labour market.[113] On their residence document it will be stated explicitly that they may work without the labour permit. Family members of a foreigner who is employed with a labour permit (e.g. a migrant worker during his or her first three years) or family members of foreigners admitted for another temporary purpose (e.g. students) have to apply for a labour permit. That permit may be refused if other workers for that job are available in the Netherlands or the EU. Recently an exception was made for the family members of employees of international companies. These family members are required to have a labour permit, but the permit will be granted without a labour market check.[114] A labour permit is only valid for a certain type of work with a specified employer.

If the residence permit of a family member exempted from the labour permit legislation is withdrawn and the person is allowed to stay in the Netherlands pending the appeal against the withdrawal, he or she will continue to have free access to the labour market pending the proceedings about the residence status.[115]

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109 Foreigners Circular B-1/2.5.2.
110 Van Blokland, Jansen and Vegter, 1999, p. 37.
111 Van Blokland and de Vries, 1992.
112 Foreigners Circular B-2/3.3.2.
113 Art. 3 and Art. 4 Employment of Foreigners Act of 21.12.1994, Staatsblad 1994, no. 959 and Art. 2 Employment of Foreigners Decree.
114 Rules implementing the Employment of Foreigners Act, par. 21.
115 Art. 1b Employment of Foreigners Decree.

As for self-employment, there are no special requirements for foreigners, apart from the general requirements applying both to Dutch and non-Dutch self employed persons.

Social rights

Admitted family members are on the same basis as all other residents covered by the national social insurance schemes, such as child benefits, old age pension and widow pensions. In some cases the amount of the benefits increases with the length of the residence. When employed, they are under the same conditions as Dutch nationals covered by the social security legislation protecting employers (unemployment or invalidity). They may also be covered as a family member of a worker under the health costs insurance legislation. Receiving benefits under these social security laws does not have negative effects for their residence status.

Family members awaiting the decision on their application for a residence permit are excluded from receiving benefits under the Social Assistance Act (Algemene Bijstandswet) since 1998. In exceptional cases they may receive reduced benefits under a special scheme. After admission, the family members have equal rights under the Social Assistance Act. However, the principal will have signed a declaration making him or her responsible for all costs incurred by public bodies with respect to the admitted family members during their first five years. Moreover, receiving social assistance may be a ground for withdrawal of the residence permit. With respect to children of migrants admitted before the age of 18 years, lack of means or receiving social assistance may not be used as a ground for withdrawal or non-renewal of the residence permit.[116] Once a family member has obtained an establishment permit, he or she is no longer liable to expulsion on the grounds of lack of means or receiving social assistance.[117]

With respect to the entitlement to student grants and scholarships a one-year residence requirement applies for foreign students from non-EU-countries. This requirement does not apply if the student is under 21 years and one of the parents has more than one year residence in the Netherlands.

Political rights

Foreigners lawfully residing for five years in the Netherlands, irrespective of their nationality, have the right to vote and stand for election in the municipal elections.[118] This right was introduced in 1985 on the basis of a clause inserted in the Dutch Constitution at its 1983 revision, allowing for the participation of non-Dutch residents in municipal elections only. One of the reasons for introducing that clause was the discussion in the EC about extending voting rights to EC citizens. Actually in 1996 to right to participate in municipal elections was extended to all resident EU citizens.[119]

An amendment of the Electoral Act in 1997 slightly raised the conditions for participation for non-EU-residents: previously lawful residence at the time of the call for elections was sufficient; now uninterrupted lawful residence during the full five years is required.

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116 Foreigners Circular B-2/3.2.2.
117 Art. 14 Foreigners Act.
118 Art. B3 Electoral Act (Kieswet).
119 Act of 3.7.1996 implementing Directive 94/80/EC, Staatsblad 1996, no. 392.

There are no special statutory restrictions for foreigners exercising other political rights, such as the freedom of speech and assembly, the membership of political parties or the voting rights for workers councils.

The Netherlands have ratified the Convention on the Participation of Foreigners in Public Life at Local Level.

Public or political debate

The issue of admission of family members has been the subject of recurrent political debate in the Netherlands over the past 20 years. Gradually the conditions for family reunification, especially the means test, have tended to become stricter over time. The required level and stability of the income of the principal who wants his or her family members to join him or her in the Netherlands has been increased. Admission for family reunification without a means test, which had been granted to certain categories of settled foreigners during the 1980s, disappeared altogether during the 1990s. Repeatedly both in parliament and in court the question was raised whether the proposed new stricter rules were in conformity with Article 8 ECHR. Each time both the Minister of Justice and the courts have taken the position that this minimum rule has not (yet) been violated.

In recent years the expulsion of non-Dutch parents of minor Dutch who are forced to follow them abroad and the threat of women admitted for family reunion after divorce or death of their husband was subject of political and public debate. The debate focussed on the position of women in cases of domestic violence. Since the recent case of the Polish widow mentioned above, amendment of the relevant rules is under decision.
In the debate on the Bill for a new Foreigners Act it has been suggested that admitted family members should be entitled to a residence permit valid for two or three years rather than for one year only. The extension of the possibilities for the administration to end the legal residence of admitted foreigners, proposed in the Bill has been criticised both by NGOs and in the press.

Relevance of European conventions

After the judgement of the European Court of Human Rights in the case *Berrehab v the Netherlands* the Strasbourg case law on Article 8 ECHR has been closely followed by the national courts and the legal press. It did not stop the policy on admission for family reunification from becoming more restrictive. On the other hand it stimulated efforts to reinforce the protection against expulsion of admitted family members.[120]

The Foreigners Circular at several places explicitly states that Article 8 ECHR restricts the power to refuse the renewal of the residence permit of admitted family members.[121]
In December 1999 the official Advisory Commission on Foreigners advised the Under-Minister for Justice that the practice of requiring family members, who apply for renewal of their residence permit after the permit has expired, to return to their country of origin to apply for a long term visa, in other words, treat such applications as a request for first admission, was contrary to Article 8 ECHR.[122]

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[120] Groenendijk, Guild and Dogan 1998, p. 54 and A. Kuijer and J.D.M. Steenbergen, Nederlands Vreemdelingenrecht, 4th ed., 1999 Utrecht (NCB), p. 74 and 146.
[121] E.g. Foreigners Circular B1/2.5.1 and 11.2.
[122] Advice of 28 December 1999.

The Netherlands have ratified all five Conventions discussed in chapter 2 of this report.

The parliamentary debate on the ratification of the European Convention on the Legal Status of Migrant Workers in 1983 stimulated the extension of certain rights to migrants. For instance, it affected rules on: granting a new labour permit to a worker wanting to work with another employer after the first year; access to university; equal treatment in labour law; and the entitlement to student grants. Most of these changes were not restricted to nationals of State Parties, but extended to all workers irrespective of their nationality and, in some cases, to undocumented workers as well.

The European Convention on Establishment prompted the introduction in the 1965 Foreigners Act of the establishment permit and the rule granting suspensive effect on requests for administrative reviews of decision to terminate legal residence.[123] The five and ten year periods in Article 13 of the Foreigners Act may be related to similar periods mentioned in the Convention. It has also enhanced the role of the Advisory Commission on Foreigners in immigration appeals. After the general rule on suspensive effect of immigration appeals was revoked in 1994, due to the implementation of Article 2 of the Convention, appeals from Turkish nationals with two years of lawful residence in the Netherlands still have suspensive effect.[124]

Recently Dutch courts have held that the exclusion from social assistance of family members, whose stay in the Netherlands is tolerated pending the (final) decision on their application for family reunion, cannot be applied to Turkish citizens due the obligations of the Netherlands under Article 1 of the European Convention on Social and Medical Assistance.[125]

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[123] Swart 1978, p. 121 and p. 353.
[124] Art. 103 Foreigners Decree and Foreigners Circular B5/1.4..
[125] Pres. Rb. Den Haag 7 October 1998, Rechtspraak Vreemdelingenrecht 1998, 82.

3.3 United Kingdom

Data on admission

According to data produced by Eurostat, in 1994 the total UK population was 54,5 million of which an estimated 2 million were foreigners (4%). EU citizens accounted for more than 880,000, of which more than half were Irish nationals. Of the remainder, 220,000 were nationals of countries in the African continent, 511,000 were nationals of Asian countries (170,000 Indian nationals, 84,000 Pakistan nationals) and 87,000 US citizens. Between 1988 and 1998 over 565,000 foreigners acquired a right of permanent residence in the UK.[126] As this right is automatically lost after a period of absence,[127] it is unknown how many of these foreigners still retain the right.

Over the period 1996 to 1998 the following numbers of persons were admitted to the UK as family members of persons settled in the UK:[128]

Admission to the UK for a limited period as Family Members 1996-1998[129]

Year	Husbands	Wives	Children	Total
1998	11,910	17,070	2,260	31,240
1997	9,600	14,120	1,890	25,610
1996	6,460	12,230	1,970	20,660

Over the same period the following numbers of family members got an independent residence right based on the fact of their relationship with their UK resident sponsor:[130]

Settlement in the UK as Family Members 1996-1998

Year	Husbands	Wives	Children	Parents & grandparent	Others	Total
1998	13,630	22,290	12,280	1,330	3,510	53,040
1997	11,260	20,400	11,520	1,190	1,870	46,240
1996	12,450	21,520	10,740	1,610	2,230	48,550

Public or political debate

The admission of family members has been the subject of substantial debate in the UK over the past 15 years. Indeed, it was UK law and policy in this field that led to one of the first judgements of the European Court of Human Rights on foreign family members in 1985.[131] Their treatment after admission has also given rise to discussion and the immigration rules relating to this treatment have been amended on numerous occasions over the same period.

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126 Control of Immigration: Statistics United Kingdom 1998, Cm 4431 Home Office 1999.

127 In excess of two years.

128 This includes both British citizens who are sponsors and foreigners who have indefinite leave to remain.

129 The statistics in these two tables is taken from Control of Immigration, Statistics United Kingdom First Half 1999, Cm 4431.

130 This status is acquired on arrival for some categories of family members and after a delay on one year for others (see below).

131 *Abdulaziz, Cabales & Balkandali v UK* [1985] EHRR 471.

Public discussion on foreign family members has focussed more on the conditions for admission than the conditions following admission. The abolition of the notorious "primary purpose" rule as a test for genuineness of marriages in the UK was heralded as an important step forward and sparked much public debate. In 1996 the rule was described as having "generated more anger and anguish than perhaps any other of the Immigration Rules…".[132] The rule was abolished after the change of Government in the UK in May 1997. The new elected Labour Government (coming to power for the first time after 20 years of Conservative Party rule) had made a manifesto commitment to withdrawal of the provision if elected and did so on 4 June 1997, little over a month after winning the elections. The UK authorities extended the policy on marriage breakdown and bereavement as a result of some public discussion. Similarly the extension of immigration benefits to unmarried partners resulted from public discussion and campaigning in particular by gay groups.

Residence status of family members

The classification of foreign family members in the UK divides neatly into two groups which form the vast majority of cases:

1. Those whose principal is either a British citizen or a person who has a permanent residence status in the UK (known as indefinite leave to remain).[133] We will refer to these persons as family members of a settled principal;
2. Those whose principal is a foreigner[134] who does yet have this status. Persons in this category (leaving aside students who are not the object of this study) are primarily either persons who have been given humanitarian status in the UK though refused recognition as refugees[135] or persons who have been admitted for work or self employment related activities and are in the process of acquiring the number of years residence required to achieve indefinite leave to remain (ILR).[136] We will refer to these persons as family members of a temporary principal.

The principal difference in treatment of family members after admission between the two groups relates to the security of their residence and their access to social assistance and security benefits. The Immigration Rules, HC 395 build in a discretion at almost every level so that the relevant immigration statuses 'may' be granted. In practice they are normally granted and there are only rare exceptions.

The family members of a settled principal may get one of two types of immigration status on admission: spouses[137] and children accompanying one parent are given limited leave to enter the UK for up to one year.[138] At the end of that year, subject to a means and

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132 Macdonald and Blake, 1995, p 343.

133 This permanent residence status does not need to be renewed. Once acquired it can only be lost if acquired by fraud, if the person abandons the UK as his or her home (the test is usually an absence of two years or more without returning with an intention to settle) or by reason of deportation.

134 For these purposes a 'foreigner' is used to include Commonwealth citizens unless otherwise stated.

135 Persons recognised as refugees are given indefinite leave to remain in the UK immediately on recognition.

136 For those in work or self employment related categories or with exceptional leave to remain the period is normally four years until their are eligible for ILR. However, some in the first group will never qualify for reason of policy in the immigration rules.

137 A concession has recently been re-introduced permitting unmarried partners where there is an impediment to marriage and the relationship has been in existence for two years or more to be admitted in the same way as married spouses.

138 Paras 282 and 301 HC 395 as amended (the Immigration Rules).

accommodation test,[139] and in respect of spouses evidence that there is still an intention to live together permanently as husband and wife, the time limit is lifted and the foreign family members are given ILR. The time limit is lifted only on application which is assessed by the UK authorities as regards compliance with the rules.

Children who arrive to join a sole parent or both parents who are already settled in the UK and parents joining children settled in the UK are given ILR on admission which again from the date of grant is personal to the individual and cannot be lost because of the behaviour of the principal.[140] Other family members who may be admitted are treated in the same way as parents.

Normally family members are limited to spouses and children though there are a number of concessions which permit the admission of parents. They become eligible for ILR together with the principal notwithstanding that the family members may have been resident only a short period of time or that the children have become adults while resident in the UK.[141]

Relevance of nationality of principal

There is no difference in access to ILR status for family members depending on whether the principal is a British citizen or a foreign national so long as the foreign national has ILR. Where the principal does not have ILR then differences occur. Also, nationals of other EU countries have less advantageous access to ILR for their family members than British citizens or foreigners with ILR.[142]

Divorce or death of principal

In respect of the foreign family members of temporary principals, all family members who are admitted are limited to the length of residence of the principal. On the other hand, once ILR status is granted, it is then held by the family member in a personal capacity and he or she can only be deprived of it on an individual basis irrespective of the state of the family, whereabouts of the principal etc.

As regards the foreign family members of settled principals, those who obtain ILR either at admission or afterwards are unaffected as regards their immigration status by subsequent marriage breakdown or death of their settled principal.[143] Spouses[144] during their probationary year are vulnerable to an adverse decision on their ILR application if there has been a marriage breakdown or death of their principal. This extends also to children who accompanied such a spouse. However, concessionary treatment is given to spouses and children where the marriage breakdown is the result of domestic violence and also to widows.[145]

In respect of temporary principals the law and policy as less clear. Where the foreign family members are related to a temporary principal whose status is based on humanitarian

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139 For a review of the recent case law on this question see Wray & Quayum, 1999, 133-135.
140 Paras 299 and 318 HC 395 as amended.
141 Macdonald and Blake, 1995, 315- 367.
142 For details, see the Opinion of 30 Sept 1999 of the Advocate-General in Case C-356/98 *Kaba*, pending before the European Court of Justice.
143 Vincenzi & Marrington, 1992, 87-100.
144 Which includes persons under the unmarried partner concession.
145 Immigration Service Instructions, www.opengov.uk

grounds, neither marriage breakdown nor death seem in practice to give rise to the refusal of extensions of leave to remain for the family members. However, if the temporary principal's status is on the basis of economic migration, then the family members are likely to be refused extensions of leave to remain in the UK and ultimately deported if they do not leave voluntarily.

In no case does either death or marriage breakdown have consequences for the right to work or engage in economic activities of the family members.

Restrictions on deportation or expulsion

Foreign family members of a settled or temporary principal can be deported on grounds that they have overstayed their leave to remain, breached the conditions of their leave to remain (this includes having access to social security or assistance when such access is prohibited) on the ground that their deportation is conducive to the public good (usually for reasons of criminal offences) where they are recommended for deportation by a criminal court following sentence for a crime, and on the grounds of national security including the interests of the state.[146]

Further, where the principal family member is to be deported, it is the UK Government's policy formally to deport the family members irrespective of whether those family members have already obtained ILR. However, this power[147] must be exercised in eight weeks of the departure of the principal.[148] The power also ceases to have effect if the person ceases to be a family member of a person to be deported or if the deportation decision against the principal is withdrawn or nullified. There is also provision for family members whose status is still dependent on that of their principal to be the object of deportation action as the result of being family members of a person who is subject to such deportation action.[149]

A number of concessionary policies have been put into practice by the UK authorities regarding deportation of family members. Most recently a concession as regards families who have lived in the UK for seven years and have children has been put into place. Where there is a child or children of the family who have spent seven or more years in the UK normally deportation will not be considered appropriate.[150] This does not directly relate to this study as these are not family members either of settled or temporary principals, though in theory at least the concession may be of value to the latter if they do not acquire ILR otherwise. Further non-British citizen children born in the UK and who have lived there for 10 years may not be deported.

Access to labour market

The right to work always follows the determination of the right to reside in UK law. The foreign family members admitted as such of settled principals are immediately entitled to take employment. There are no restrictions of an immigration kind, though normal

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146 Chatwin, 1999, 297-319.
147 S. 3 (5) (c) Immigration Act 1971.
148 S. 5 (3) Immigration Act 1971.
149 Para 365 et seq HC 395 (as amended).
150 Immigration Service Instructions, www.opengov.uk; see also *Akinola* (21218) IAT Decision 23.6.99 unreported.

professional rules on recognition of qualifications apply. Children are subject to the same (rather complex) restrictions of employment as regards age levels as any other child in the UK.

The foreign family members admitted as such of temporary principals are also immediately entitled to work. In this area there is no difference in treatment. However, both categories can run into discrimination in practice as employers prefer for reasons of certainty to employ persons who already have ILR and therefore their future in the UK is certain and unlimited.

Social rights

As regards access to social security and assistance this is complicated indeed. The first aspect is that relating to immigration status. As regards permanent principals, their family members are admitted on the basis of evidence that the principal will be able to support and accommodate them without recourse to public funds. Therefore if the family does have recourse to public funds, and if the family members have only a limited leave to remain in the UK and therefore must apply for ILR, the fact of reliance on social security or assistance over the qualifying period (of one year normally) can be a reason for refusing ILR.[151]

From the perspective of social security law it is more complicated. Some family members will have no access to benefits, others may do. As a result of a recent change of law where the sponsor is required to sign an undertaking to support and accommodate family members those family members even if they are given the immigration status of ILR on arrival are still excluded from access to social security benefits.[152] How this will be interpreted by the courts is uncertain.

In respect of temporary principals, family members are admitted subject to the ability of the principal to support and accommodate them. Failure to do so may result in the refusal of an extension of the leave to remain of the principal and the family members. This is tempered in respect of those who hold the status as a result of humanitarian considerations. Here while admission of family members is normally subject to a support and accommodation requirement (though regularly waived particularly on the basis of nationality) failure to comply after admission is very rarely the subject of a negative action by the state. Once the family members obtain ILR then they are free to claim state benefits of all kinds.

Political rights

British citizens and Commonwealth or Irish citizens resident in the UK are permitted to vote at all elections in the UK. Therefore if family members come within these categories they are entitled to vote. Under Community law other voting rights are extended to citizens of the Union.[153] The United Kingdom has signed the Convention on the Participation of Foreigners in Public Life at Local Level in 1992, but has not yet ratified the Convention.

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151 Remedios, 1998, 19-22.
152 S. 115(9) Immigration and Asylum Act 1999.
153 Macdonald and Blake 1995, 115-147.

Relevance of European conventions

The Human Rights Act 1998 will come into force on 2 October 2000 and incorporates the rights contained in the European Convention on Human Rights into UK domestic law. The consequences for UK immigration law are expected to be important and far reaching. Already there are indications from the UK courts that the "margin of appreciation" - doctrine of the Strasbourg court will be adjusted to the fact that its need in order to provide room for manoeuvre in a diverse Europe is not applicable within one state.[154] It is expected that there will be a substantial adjustment period in the field of family rights resulting from this change in the law. As regards the European Social Charter, this is rarely relied upon as regards the rights of migrants in the UK. From time to time representatives will argue the need to interpret UK immigration rules in line with the Charter but this is unusual and no decisions of the courts have relied on this aspect though it is difficult to say whether or not judges have been influenced by the arguments. Reference is made in the published UK authorities guidelines to the European Convention on Establishment as regards a concession for persons who have remained lawfully in the UK for 10 years or more. This is the only known reference to this convention. In contrast, representatives not infrequently mention the European Convention on the Legal Status of Migrant Workers in argument before the UK immigration courts. However, its value is diminished as the UK is not yet a signatory.

[154] However, a recent decision of the Immigration Appeals Tribunal goes in the other direction. Here the first instance court had allowed an appeal as the Secretary of State had failed to take account of Art. 8 ECHR. The Tribunal on appeal reversed the decision *Nasim Khan* (L 20511) IAT 20.7.99 unreported.

4. THE LAW IN SEVEN OTHER COUNTRIES

4.1 France

Data on admission

Over the past three years approximately 10,000 persons have been admitted to France yearly on family reunion grounds. Foreigners with the nationality of the Maghreb countries (Morocco, Algeria and Tunisia) account for 60% of the admitted foreign family members.

The main rules of French immigration law were codified in the *Ordonnance* of 1945 (a special regime apples to Algerian and Tunisian nationals in accordance with bilateral agreements). The last time the Ordonnance act was amended in May 1998 (*Loi Chevènement*).

Residence status of family members

Family members will obtain a temporary residence permit (*carte de séjour*), valid for only one year and renewable, or a residence card (*carte de résident*), valid for 10 years and also renewable.

There are two principal regimes relevant to family members:

1. (a) Family members of foreigners with temporary residence get a temporary residence permit called "vie privée et familiale" (except Algerian and Tunisian nationals, whose permit has another name), valid for one year, provided that they were admitted to France for this purpose.
   (b) Family members of a foreigner with long-residence status will be granted a residence card, if they have entered legally.[155] Family members may also be granted the card if their stay or entry is irregular.[156]

2. Family members of French nationals:
   (a) spouses who entered France regularly, if they have been married for less than one year are entitled to a residence permit for one year; [157]
   (b) spouses who reside in France regularly and who have been married more than one year are entitled to a residence card (ten year permit);[158]
   (c) spouses who entered France irregularly, even if they have been married for more than one year, may be granted a one year residence permit only at the discretion of the authorities (unless they obtained a residence permit in some other category);
   (d) unmarried partners of the opposite sex who have lived together for five years and have at least one child together may apply for a residence card but its issue is discretionary to the authorities;[159]
   (e) parents of French nationals who are legally resident in France are entitled to a residence card;[160]

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[155] Art. 15(5) Ordonnance relative aux conditions d'entrée et du séjour en France des étrangers of 2.11.1945, as amended by Act of 11.5.1998 (hereafter: Ord.).
[156] Art. 12bis(7) Ord.
[157] Art. 12bis(4) Ord.
[158] Art. 15(1) Ord.
[159] Circular of 12.05.98

(f) parents of French nationals who have entered and resided in France irregularly are entitled to a temporary residence permit (the minute the parents get their temporary permit they come within category (e) and may apply immediately for a residence card)[161]

All foreign nationals who have resided in France under temporary residence permits relating to family reunification may apply at the discretion of the authorities for a residence card after 3 years.[162] After five years they are entitled to a residence permit.[163]

According to the law relating to formally registered relationships of unmarried partners (la Loi PACS) which came into force on 15 November 1999 and its implementing secondary legislation, a partner may apply for a residence permit to remain in France with his or her partner after three years of cohabitation if one partner is French and after five years if the partner is a foreigner with residence in France otherwise than as a student.[164]

Children of French nationals are entitled to a residence card, although they will usually be French citizens in any event.[165]

In practice, children will not be issued with a residence card or a temporary sojourn card until they turn 18, unless they begin paid work between the ages of 16 and 18.[166]

Relevance of nationality of principal

As noted above, family members of French nationals who are married for more than one year are entitled to a residence card immediately, unlike family members of temporary residents.

Divorce or death of principal

In case of separation or death of the principal, within a year of the issue of the first permit, a temporary sojourn card may be refused. The relevant conditions are set out in a decree of the Conseil d'Etat.[167]

Restrictions on deportation or expulsion

The Minister of Interior may order the expulsion of a foreigner on the ground that he or she represents a serious threat to public order.[168] Also the foreigner may be expelled if he has been convicted for forging or establishing an immigration or resident entitlement under a false name.[169]

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160 Art. 15-3 Ord.
161 Art. 12-6 Ord.
162 Art. 14 Ord.
163 Art. 15 Ord.
164 Loi 15.11.99, Art. 12 Ord. and Circulaire 10.12.99
165 Art. 15(2) Ord.
166 Art. 9 Ord.
167 Art. 29 (IV and V) Ord.
168 Art. 22(I,7) Ord.
169 Art. 22(I,5) Ord.

Expulsion may not be ordered on a number of grounds. Among those grounds, the following are specifically concerned with family members or largely of relevance to them:

a) the foreigner is younger than 18;
b) the foreigner has lived in France since the age of 10;
c) the foreigner has lived in France for at least fifteen years, at least ten of them regularly in France (excluding periods when the foreigner held a student residence card);
d) the foreigner has been married to a French citizen for at least one year; and
e) the foreigner is the parent of a French child residing in France and has custody over or supports that child.[170]

Access to labour market

The residence card grants access to all employment and independent professional activities.[171] Immigrants in possession of a temporary residence permit mentioning 'vie privée et familial' are entitled to work or take up other economic activities.[172]

Social rights

Foreign family members who have been admitted to France automatically have access to social security. Equal treatment in social security benefits is not restricted to foreigners with a residence card, but is also extended to those with temporary residence permits as well.[173]

Political rights

Voting in national elections is reserved to French citizens. Voting in local and European Parliament elections is reserved to nationals of EU Member States.
France is not a party to the Convention on the Participation of Foreigners in Public Life at Local Level.

Relevance of European Conventions

The *Loi Chevènement* of April 1998 extended the right to a temporary residence permit to certain categories of foreigners protected by Article 8 ECHR, but unable to acquire a residence permit under the previous text of the *Ordonnance* of 1945.
France has ratified all the European conventions discussed in chapter 2, except for the Convention on Establishment, which has been signed in 1977, but has not yet been ratified.

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170 Art. 25 Ord.
171 Art. 17 Ord.
172 Art. 12bis and Art. 30bis Ord.
173 Groenendijk, Guild and Dogan 1998, p. 32.

4.2 Hungary

Residence status of family members

The 1993 Hungarian Foreigners Act contains rules on three kinds of residence permits: a temporary residence permit valid for up to one year, an extended residence permit for a stay of more than one year, and an immigration permit granting an unrestricted residence right.[174] An immigration permit may be granted to foreigners with three year of lawful residence. The issue of an immigration permit is in the discretion of the authorities. Foreigners many live for many years In Hungary on the basis of a temporary permit.

Foreign spouses and children (along with dependent parents, dependent grandparents and dependent children over 18) on admission normally will be granted the same residence permit as the principle. Family members of a principal with a temporary permit will also get a temporary permit. Family members of nationals or foreigners, who have an immigration permit, may immediately obtain an immigration permit without a waiting period, if they enter Hungary in possession of an immigrants' visa.[175] A child of immigration permit holders who was born in Hungary will automatically obtain a that status.[176]

In 1996-1998 an average of 10,000 immigration permits were issued, two thirds of which to family members of settled immigrants.

Relevance of nationality of principal

Family members of nationals are treated on the same basis as family members of foreigners with an immigration permit. There are no statutory rules on the residence status of family members of Hungarian citizens.

Divorce or death of principal

Until 1999, the right to be resident in Hungary was not automatically affected by death, divorce or separation because family membership was not a legal entitlement. If an individual could continue to ensure the accommodation and subsistence requirements applicable to acquisition of a permit from other sources, residence permits would not be withdrawn and prolongation of the permits would not be rejected.[177] The same applied to a child reaching majority. The death of a parent would open child-care social services for a child, but an orphaned child would exceptionally be removed from the country.[178]

This situation has apparently been altered by 1999 amendments, which allow the authorities to withdraw an immigration permit if the circumstances of issue of the permit

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174 Art. 14 and Art. 17 of the Act on the Entry, Stay in Hungary and Immigration of Foreigners No. LXXXVI of 14.9.1993 (hereafter: FA).

175 Art. 17, s. 4-5 FA.

176 Art. 30A, section 1-2 of Government Decree No. 64/1994 implementing the 1993 Act (hereafter: FD).

177 Art. 17(3) and (5) FD.

178 Art. 4(2) and Art. 17(2) of the Act on Child Protection and Guardian Authority No. XXXI of 1995.

have significantly changed during the first five years of residence. After the withdrawal the person may be granted another (temporary) permit under the general rules.[179]

Restrictions on deportation or expulsion

Hungarian law makes no explicit reference to protecting family members in expulsion proceedings, but discretionary power which takes into account personal circumstances may be exercised.[180] According to a study of expulsion decisions, 'public order' was consistently given precedence over family members' connections in Hungary, even though the courts' or authorities' attention was consistently drawn to such family status.[181] Therefore it appears that family status in expulsion cases is a marginalised issue in practice.

Access to labour market

Immigration permit holders and their family members have access to the labour market freely, without the obligation to have a work permit. Foreigners who hold a temporary residence permit, and their family members do not have access to the labour market, unless they have obtained a labour permits (issued and renewable annually under the same conditions). The dependent spouse or child of a residence permit holder, who has lived at least eight years in Hungary, will obtain a work permit automatically if the family has lived together in Hungary for at least five years.[182]

For independent economic activities a special individual enterprise card is required. This card is issued depending on the immigration status and irrespective of the family relationship.[183]

Social rights

Access to social security depends on the legal status of the principal. If the principal is insured by social insurance, the dependent family members automatically have equal treatment. Persons holding an immigration permit are entitled to equal treatment with Hungarian nationals which includes defined assistance (locally funded social and family allowances and centrally funded family care).[184]

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179 New Art. 22A inserted in the Foreigners Act by Act No. LXXV of 1999.

180 Artt. 23 and 31 FA.

181 Only in four out of a total of 33 judgements in expulsion cases published in 1993-1999 it appeared from the judgement that the court had explicitly taken into consideration the effect of an expulsion on family members living in Hungary, while in half of the cases family members were apparently living with the person threatened with expulsion, letter of J. Toth of 9.8.1999.

182 Art. 7(2) and 7(3) of the Act on Employment and Allowances for Unemployed Workers (No. IV of 1991); Groenendijk, Guild and Dogan 1998, p. 78.

183 Art. 3(1) and (2) of the Act on Individual Enterprise No. V of 1990.

184 Art. 3 of the Act on Social Allowances and Contributions; Art. 2 of the Act on Family care and Art. 4(1) of the Act on Child Protection and Guardian Authority.

Political rights

Foreigners having an immigration permit may vote in local elections and referenda provided that they are present on the day of the vote.[185] Hungary has not signed the Convention on the Participation of Foreigners in Public Life at Local Level.

Relevance of European conventions

Reference to the European Convention on Human Rights in national case law is gradually growing. However, a study of 5600 published cases from 1993 to June 1999 do not contain any references to Article 8 ECHR in connection with foreigners. The UN Convention on the Rights of the Child is more relevant. In at least 12 cases, this Convention was invoked to justify the best interest of the child (location of the minor, separation of the couple, contact with parents abroad).

The European Social Charter so far had little relevance to migration law in Hungary. When ratifying the Charter in July 1999 Hungary opted against applying Articles 18 and 19. Hungary has not signed the other three European conventions discussed in chapter 2.

[185] Art. 70 Constitution of the Hungarian Republic.

4.3 Latvia

Data on admission

The figures below give a specification of the various categories of family members that have been issued with residence permits in 1997 and 1998.[186]

	1997	1998
Temporarily admitted		
- spouses of Latvian citizens	458	366
- spouses of the non-citizens[187] and other long-resident foreigners	446	389
- children of Latvian citizens	48	36
- children of the non-citizens/foreigners	108	58
Permanent residence permit		
- spouses of Latvian citizens	141	418
- spouses of the non-citizens	4	27
- children of Latvian citizens	9	32
- children of the non-citizens	5	98

Residence status of family members

Spouses initially receive a temporary residence permit for one year,[188] with two exceptions. First, if the principal has residence status for a longer period, spouses and children will be admitted for the length of time of the residence permit of the principal. Second, if the principal is a 'repatriate' who is returning to Latvia with Latvian citizenship or who has a Latvian parent or grandparent, his or her spouse will receive a permanent residence permit.

Minor or dependent children of a Latvian citizen or a permanently resident foreigner are granted a permanent residence permit.[189] If they are not children of the principal, but of a foreign national without a permanent residence permit, they receive only a temporary residence permit.[190] If they are children of a repatriate and his or her spouse they are entitled to be admitted with a permanent residence permit.

Spouses and children of temporary residents can only be admitted for the length of time of the residence permit of the principal.[191] Spouses of long-resident foreigners, 'non-citizens' or citizens can extend their initial one-year status for a further four years upon their first request, and indefinitely upon their third request.

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186 These statistics were supplied by the Citizenship and Migration Affairs Board of the Republic of Latvia.

187 'Non-citizens' are persons who were nationals of the USSR but who now are stateless, according to the law 'On the Status of those Former USSR Citizens who do not have the Citizenship of Latvia or that of Any Other State, of 12.4.1995.

188 Art.s 17, 25(1), 26 and 27 of the Law on the Entry and Residence of Aliens and Stateless Persons in the Republic of Latvia of 9 June 1992, as amended lastly on 15 October 1998 (hereafter: LER).

189 Art.s 17(1/2) and 23(1) LER.

190 Art. 28(1) LER.

191 Art. 27 LER.

It is assumed that a citizen's parents are either citizens or permanent residents. Dependent parents of a repatriate are entitled to be admitted into Latvia, and may receive permanent status.[192] A 'non-citizen' has the right to bring in his or her dependent parents from a foreign country in accordance with legal procedures, but the relevant procedures have not yet been adopted.[193]

Relevance of nationality of principal

As described above, family members of 'repatriates' have access to a permanent residence permit. This distinction is based not on nationality *per se*, but on the present or former nationality or the ethnic descent of non-residents.

Divorce or death of principal

If the marriage of a foreign spouse with a Latvian citizen is dissolved within five years of holding the temporary residence permit issued because of the marriage, the residence permit of the temporarily admitted spouse will be annulled, except where the child is a Latvian citizen.[194] In such cases the ex-spouse receives a permanent residence permit, if he or she has been granted custody of that child. Spouses also lose their residence permit if their marriage to a permanent resident is dissolved after five years, or if their marriage to a temporary resident is dissolved.[195] But if a spouse has acquired a permanent residence permit, then dissolution of the marriage does not affect his or her status.

An ex-spouse might request a residence permit on other grounds, but Latvian law is only beginning to recognise 'long-standing ties with the country of residence'. In any event, ties which have lasted less than five years will not likely be considered 'long-standing'. The legal position where a marriage between a temporary resident and a permanent resident dissolves is unclear.

Where a Latvian citizen or 'non-citizen' married to a foreigner or a stateless person dies, and there are no children, a temporary residence permit shall not be extended, except where the spouse inherits property in Latvia in accordance with national law. If there is a child, the non-citizen parent is entitled to receive a permanent residence permit.[196] However, where a permanent resident married to a temporary resident dies, there is no protection either for the spouse or child of the principal.

Restrictions on deportation or expulsion

If a deportation order has been issued on specified grounds, family members shall depart together with that person, unless the family members are Latvian citizens or 'non-citizens' as defined above.[197] The Latvian legislation, authorities and courts do not generally take account of the case law of international organs when considering the deportation of family members.

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192 Art.s 3 and 13 of the Repatriation Law.
193 Art.s 17(1) and (2) LER.
194 Art. 25 LER.
195 Art. 26 LER.
196 Art. 28 LER.
197 Art. 39 LER.

Access to labour market

Employers and employees can conclude contracts without restriction if an employee is a citizen or permanent resident. Temporary residents must have a permit that allows them to work in order to do so.[198] Admitted spouses of citizens and long-resident foreigners receive a free work permit for the period of their residence permit, which is extended in accordance with the renewal of their residence permit.[199] Employment in the public service is open to Latvian citizens only.

Social rights

Citizens and non-citizens are both covered by social security, except for persons who have received only temporary residence permits.[200] All persons covered by social security have access to child-birth grants, child-care benefits, state family benefits and local authority social assistance benefits, regardless of their period of residence in Latvia.[201] However, to receive other state social security benefits, an insured person must have resided in Latvia both for the last 12 months consecutively, and for a total period of at least 60 months.[202] Latvian social security law is based on individual rights, not family ties.

Political rights

Only Latvian citizens may vote or run for elected office.[203] Latvia is not a party to the Convention on the Participation of Foreigners in Public Life at Local Level.

Public or political debate

The main issue has been whether parents or other dependent family members besides spouses or children should be admitted. Parents will now be admitted if dependent, but other family members will not be.

Relevance of European conventions

Latvia ratified the ECHR in June 1997. On the territory of Latvia it has the force of law. The Convention has priority over national legislation, and equal priority with the constitution. The Latvian administration must take into account international obligations when applying legislation, but its practice on this point has been criticised. More attention is paid when drafting or amending legislation.
Latvia has signed (May 1997) but not ratified the European Social Charter. Neither has it ratified the other three European conventions discussed in chapter 2.

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198 Art. 19 Latvian Labour Code.
199 Art. 29 of Regulation No. 54 of the Council of Ministers of 17.2.1998.
200 Art. 5(1) of the Law on Social Assistance of 20.11.1997.
201 Art. 5(3) and 5(4) Law on Social Assistance.
202 Art. 5(2) Law on Social Assistance.
203 Art.s 8 and 9 of the Latvian Constitution.

4.4 Norway

Data on admission

Family reunification has been in important source of immigration to Norway in recent years. From 1996 till 1998 yearly approximately 6,500 residence permits have been issued to immigrants on family reunification grounds. Half these permits were issued to family members of Norwegian citizens, 30% to family member of long-term resident foreigners and 20% to temporarily admitted foreigners.[204]

Residence status of family members

The spouse joining a Norwegian national or a foreigner who holds a settlement permit has on application the right to be granted a time-limited residence and work permit.[205] However, where the principal has only a residence permit without the right to work, a spouse does not have a right to a residence permit. In such cases, leave to reside is discretionary.[206] The same rules apply to parents who are admitted to live with an adult child.

A child has the *right* to a residence permit if:
- at least one parent was a Norwegian national at the time of his or her birth;[207]
- he or she is under the age of 18 and both parents have been or will shortly be granted lawful residence in Norway;[208]
- he or she is the child of a foreign spouse who has the right to enter for family reunion;[209] or
- he or she is a dependant child under 21, without a spouse or cohabitant, of any foreign national who is lawfully resident and a national of any country which is a party to the 1961 European Social Charter;[210]
- if he or she is an adopted child.[211]

Unmarried partners are eligible for admission.[212] With regard to their residence status the rules on spouses are applicable to admitted partners.

The initial permit is usually issued for one year, with one-year periods for renewal.[213] A proposal to renew permits for two years was under discussion in 1999. The conditions associated with renewing a permit are generally the same as when applying for a permit for the first time.

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204 Figures of the Ministry of Justice, Immigration Department.
205 Art. 9 Immigration Act of 24 July 1988 No. 64 (hereafter: IA); Art. 22 first paragraph and 23 (1) (a) Immigration Regulations (hereafter: IR).
206 Art. 9 IA; Art. 22 (3) and Art. 23 (1) (a) IR.
207 Art. 3 IR and Art. 18 IR.
208 Art. 23 (1) (c) IR.
209 Art. 23(1) (e) IR.
210 Art. 23 (1) (f) IR.
211 Art. 23(1) (d) IR
212 Art. 22(1) and Art. 23(1)(b) IR.
213 Art. 11 (2) IA; Art. 15 and 38 (1) IR.

Foreigners who have resided for three continuous years with a residence permit are entitled to a settlement permit unless there are grounds for expulsion.[214] This means that family members gain after three years the right to such a permit independently of their status as family members.

A child born in Norway to resident parents is granted a settlement permit if the parents apply within one year of the birth for a settlement permit and themselves satisfy the conditions for a settlement permit. Any adopted child of Norwegian or Nordic parents or of parents with a settlement permit will be granted a settlement permit where application is made within one year after entry.[215]

Relevance of nationality of principal

There is no distinction as regards spouses. Children of Norwegian nationals have the right to renewal of their residence permit without any conditions. Other children, and all spouses, must still meet the conditions imposed for initial entry.[216]

Divorce or death of principal

If a permit has been issued because of a marriage or cohabitation, it is a condition that the marriage or cohabitation still exists and the parties still live together. If the relationship ends within three years, the right to stay is lost. An exception may be made where there are strong reasonable grounds so indicate, including armed service or studies abroad of the principal or of the family members.[217] Otherwise, the permit is renewed in conformity with the permit held by the principle.
A foreigner whose marriage or cohabitation ceases within the first three years who has a child under the age of 18 in Norway is to be granted a new first-issue residence permit if the relevant conditions are met.[218] In other cases a woman may be granted a permit if she will have unreasonable difficulties in her country of origin due to the breakdown of the marriage, or if she or the children have been ill-treated while the partners were living together. [219]
Breakdown of the relationship is no longer relevant when the foreign family member has been granted a settlement permit after three years of legal residence in Norway.

The death of the principal within the first three years implies that the conditions for family reunion are no longer fulfilled. Hence, the residence and work permits are not renewed. A permit may nevertheless be granted if there are strong humanitarian considerations.

Restrictions on deportation or expulsion

A settlement permit confers extended protection against deportation and expulsion: a foreigner who holds such a permit may only be expelled on the ground that he has committed a serious crime.[220] Expulsion may not be ordered if, when considering the

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214 Art. 12 (1) IA; Art. 43 (1) IR.
215 Art. 43 (5) IR.
216 Art. 36 IR.
217 Art. 37 (3) IR.
218 Art. 37(3) IR.
219 Art. 21(3) and Art. 37 (6).
220 Art. 12 (2) IA; Art. 46 IR.

seriousness of the crime and the connection with Norway, it would be a disproportionately severe reaction against the foreigner or his or her family.[221] In addition, there are also unpublished instructions of the Ministry of Justice which state that when expulsion is considered, there should be special consideration of the foreigner's children resident in Norway. Furthermore, if a foreign child was born in Norway, and has been resident in Norway without interruption, he or she may not be expelled.[222]

Access to labour market

A settlement permit confers an entitlement to take up work or operate a business throughout Norway.[223] Prior to that date, the normal rule is that a foreigner must have a work permit before working or operating a business in Norway, and must receive that permit before entering.[224] Some family members are allowed to apply for a permit while already present, but must await the issue of the permit before beginning work.[225]

Family members of a Norwegian or Nordic national, or a foreigner with a settlement permit or a permit that may constitute the basis for such a permit, have the right to a work permit on application.[226] The family members of persons other than the aforementioned may be given a work permit.[227] Children will only be granted a work permit if they are at least 15 years.[228]

Work permits issued on the basis of family reunion are not limited to a specific job or place of work. However, certain public offices are reserved for Norwegian citizens.[229]

Social rights

Social assistance is granted equally to Norwegian nationals and legal foreign residents. Social security is also granted on the same basis, although since access to some benefits depends on a period of membership in the national security system or a waiting period, some foreigners will not be able to acquire some benefits or only partial benefits, except where bilateral social security treaties have been agreed. Disability benefits can only be granted where the disability did not occur until three years after entry to Norway.
Reliance on social assistance may be a ground to refuse renewal of a residence permit if the permit requires the principal to bear the cost of living of the family members.

Voting rights

Foreign nationals with three years of uninterrupted residence may vote in local elections. Nationals of the Nordic countries may vote after registration as a resident in Norway. Participation in national elections is restricted to Norwegian nationals.
Norway has ratified the Convention on the Participation of Foreigners in Public Life at Local Level.

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221 Art. 29 IA; Art. 30 (2) IA.
222 Art. 30 (1) IA.
223 Art. 12 (2) IA; Art. 46 IR.
224 Art. 6 IR; Art. 6 (1) IA.
225 Art. 6 (4) IA; Art. 10 (1) IR.
226 Art. 8 and 9 (1) IA; Art. 22 (1) and 23 IR.
227 Art. 22 (3) IR.
228 Art. 2 (3) IR and Art. 22 (4) IR.
229 Art. 9 (2) IA.

Public or political debate

Deportation of foreigners with long lawful residence in Norway (in case of conviction for serious drugs offences even after 10 years) and of the families of asylum seekers on the ground that they had stayed in a save third country before entering Norway more than five years ago, has caused debate in newspapers and in legal periodicals.

Relevance of European Conventions

Norway has ratified all five Council of Europe conventions discussed in chapter 2. However, Norwegian immigration law and policy have only marginally been influenced by these conventions, e.g. the effect of the Social Charter on the admission of children (mentioned above). Norway introduced rights for lawfully resident foreign nationals at an early stage before it became a party to these instruments.

4.5 Spain

Data on admission

In 1998 13,187 permits were issued for family reunion (15,061 in 1997). More than half of those permits were issued to Moroccan citizens. In 1996 the total number of registered foreign residents was 540,000, just over one percent of the total population of Spain. Almost 60% of the foreign residents were nationals of EU/EEA countries or family members of Spanish citizens.

Residence status of family members

The right to family reunion is codified in Article 54 of the Royal Decree 155/1996 based on the 1985 Act on the rights and duties of aliens.[230] In Spain, admitted family members are entitled to the same residence status as the principal.[231]

In Spain initial residence permits are issued for one year, renewable for two more years. Ordinary permits are issued for a maximum of three years. Ordinary permits can be requested once the initial permit can no longer be extended. [232] Permanent permits (*permiso de residencia permanente*) are issued to foreigners who have resided legally for six years. The permit grants an unrestricted residence right and is valid for an indefinite period of time. The document has to be renewed every five years. [233]

The spouse of a temporarily admitted foreigner receives a residence permit on the basis of family reunion (initial or ordinary permit, depending on which permit the principal holds), and the spouse of a principal holding a permanent residence permit receives a permanent residence permit as well. Status for the spouses of foreigners is subject to the conditions that the spouses are not separated *de jure* or *de facto*, they are not polygamous, and there is no marriage of convenience.[234]

In the Royal Decree implementing the Community rules on free movement are extended to the family members of Spanish nationals. Family members of Spanish and EU/EEA nationals will be granted a permanent residence permit, if they are not separated in law.[235]

Relevance of nationality of principal

Spouses of Spanish and EU/EEA nationals have immediate access to the permanent status, unlike family members of a foreigner in possession of an initial permit or an ordinary permit.

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230 Act no. 7/1985 of 1 July 1985
231 Art. 54(4) of Royal Decree 155/1996.
232 Art. 49 RD 155/1996.
233 Art. 52(1) and Art. 79 RD 155/1996.
234 Art. 54(2a/3) RD 155/1996.
235 Art. 2(1a) of Royal Decree 766/1992.

Divorce or death of principal

In case of divorce or factual separation the spouse may lose his or her residence rights, unless the spouse holds a work permit or can prove that the spouses have lived together for at least two years in Spain. In those cases she is entitled to an independent residence permit. The spouse who has resided less than two years with the principal may be granted an independent residence permit, if family reasons justify it.[236] Children are entitled to such a permit when they reach the age of majority.[237]

The spouse and children are entitled to an independent residence permit if the principal has died, while lawfully resident, irrespective of the type of residence permit held by the principle.[238] The same rule applies to family members of Spanish nationals. [239]

Restrictions on deportation or expulsion

There are special rules on deportation of family members after two years of legal residence. Such persons cannot be deported if the principal has a permanent residence permit, was formerly Spanish, was born in Spain and resided there for five years, or has a pension form an occupational illness or accident.[240] These rules restrict the ground upon which deportation can be ordered.

Access to labour market

Family members of foreigners have access to employment without a waiting period. However, they have to apply for a labour permit. Such a permit may be refused on labour market grounds. Family members born in Spain, spouses and children of a foreigner holding a ordinary or permanent permit will receive a labour permit irrespective of the labour market situation.[241]
Family members of a Spanish national have the same rights of access to employment as nationals, except for the 'public employment' restrictions allowed by Article 39(4) (ex-48(4)) of the EC Treaty. This privileged treatment is not extended to ascendants of the spouses.[242]

Social rights

Legal immigrants are entitled for the same social rights and protections as Spanish citizens. Ascendants of resident foreigners are not entitled to social security benefits, where the statutory coverage is restricted to workers, their spouse and children.

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236 Art. 54(5) and Art. 60(2c) RD 155/1996.
237 Art. 54(7) RD 155/1996.
238 Art. 54(5c) RD 155/1996 and Art. 8(5) RD 766/1992.
239 Art. 8(3) RD 776/1992.
240 Art. 99(4) RD 155/1996.
241 Art. 77a RD 155/1996.
242 Art. 4(2) RD 766/1992.

Political rights

Nationals of EU countries have voting rights in municipal and European Parliament elections. Third country nationals are excluded from voting rights at the national level, as well as at the local level, unless granted by treaty or law on the basis of reciprocity.
Spain is not a party to the Convention on the Participation of Foreigners in Public Life at Local Level.

Public or political debate

There is a lively public debate on family reunion, between the government, local authorities and non-governmental organisations. A new Immigration Act was adopted in January 2000.[243] It will enter into force in February 2000. The admission of family members is regulated in Articles 16 and 17 of the new Act.

Relevance of European Conventions

Spain has ratified the European Social Charter, the Convention on the Legal Status of Migrant Workers and the Convention on Social and Medical Assistance. It has not ratified or signed the European Convention on Establishment yet.

Spanish judges are reluctant to apply the ECHR in immigration cases. They often refer to Article 8 ECHR. However, there is not a single judgement of the Spanish Supreme Court, in which Article 8 ECHR is used as ground for not applying a national rule concerning family reunion.

[243] Constitutional Law N° 4 of 11 January 2000 on the rights and freedoms of aliens in Spain and their social integration. For an analysis of the debate on family reunification, see Casey, p. 115.

4.6 Sweden

Data on admission

In 1997 almost 19,000 persons and in 1998 almost 22,000 persons were granted a residence permit for family reunion in Sweden. In both years the family migrants made up more than half of all the residence permits issued: 52% in 1997 and 55% in 1998.[244]

Residence status of family members

Foreigners admitted on family reunion grounds will be granted a time-limited residence permit (*Uppehållstillstånd*) or a permanent residence permit (*Permanent Uppehållstillstånd*).[245] A permanent residence permit may be granted either prior to entry of after one or more years of lawful residence in Sweden.

Spouses, children and parents of Swedish citizens or foreigners who hold a permanent residence permit will be given a permanent residence permit on admission.[246] Other family members are usually granted a time-limited residence permit, valid for one year but renewable.[247] Cohabitees are treated in the same way as spouses. After two years, a permanent residence permit is granted if the spouses or cohabitants are still married or living together.[248] This system is called the delayed immigration decision.

Parents of a resident foreigner may be admitted in Sweden under the clause on "close relatives". Factors to be taken into account: are the length of the period the parent and the principal have been living in the same household before the principal left for Sweden, length of the separation, the dependency of the parent making it difficult to live apart .[249]

Relevance of nationality of principal

The nationality of the principle does not matter as regards spouses or children, where the foreigner holds a permanent residence permit. The family members of a temporarily admitted foreigner will be granted a time-limited residence permit only.

Children under the age of 16 and unmarried do not need a residence permit if the parent in whose custody they reside is a national of Denmark, Sweden, Finland, Iceland or Norway, or is settled in Sweden with a valid residence permit. Spouses holding the nationality of one of the four Nordic countries are also exempted from the requirement to have a residence permit. However, this status they acquire independently, simply by virtue of holding the nationality of those states; it is not connected to the nationality of their spouse.[250]

A person who has had a residence permit for more than one year and who is married to a Swedish citizen or to a foreigner who does not require a work permit, may apply for a

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244 Information of the Swedish Immigration Board (SIB) and the Ministry for Foreign Affairs.
245 Ch. 2, Art. 1 of the Foreigners Act (1989:529) as amended in October 1997 (hereafter: FA).
246 Campbell/Fischer SWE III-7.
247 Information SIB.
248 Groenendijk, Guild and Dogan 1998, p. 90.
249 Engstrom, p. 172-173.
250 Ch.1, Art. 4(1) FA.

permanent residence permit, which grants permission to stay in Sweden for an unlimited period.[251] In this respect there is no distinction between family members of Swedish citizens and family members of long-term resident third-country nationals.

Divorce or death of principal

Where a temporary residence permit is issued, renewal requires the continued existence of the marriage or relationship. The spouse or cohabitee must leave if the relationship ends during the first two years, due to death, divorce or breakdown of the relationship. However, there are exceptions if an applicant has been subjected to abuse during the marriage or relationship or if there are joint children of the marriage or relationship. In such cases, an applicant can get a permanent residence permit on humanitarian grounds. A permanent residence permit can also be granted in case of early divorce or relationship collapse if there is a strong connection to Sweden through working life. [252]

Once the family member has been granted a permanent residence permit, death, divorce or the relationship breakdown does not affect his or her residence and employment rights.

Restrictions on deportation or expulsion

When considering possible expulsion, a court must pay due regard to a foreigner's links to Swedish society, particularly the family circumstances and the length of time a foreigner has resided in Sweden. If the foreigner has lawfully resided in Sweden for more than four years, the residence permit may only be revoked in exceptional circumstances. [253] In particular, if a person has parents and siblings in Sweden and no close relatives in the country of origin, or is married or cohabiting with a Swedish national or a person who has a residence permit, this strongly argues against revocation of a residence permit.[254]

A foreigner cannot be expelled if he or she came to Sweden before the age of 15 and had been residing in Sweden for five years before the time of the proceedings.[255]

Access to labour market

Work permits are not necessary once a person has a permanent residence permit, or is married to a Swedish national, or is under 16, if his or her custodian has a residence permit.[256]

Other foreigners from non-EEA countries should apply for a work permit before entry into Sweden, but can apply afterwards if they have entered to reunite with a family member. In case of delayed immigration decision a work permit is usually granted with the temporary residence permit.
If a time-limited work- and residence permit has been granted for employment the foreign workers' spouse may also be granted a work permit for the same period.

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251 Engstrom, p. 173.
252 Information Ministry for Foreign Affairs; Melander, p. 1318/1319.
253 Ch. 4, Art. 9 and Art. 10(2)-(4) FA; Groenendijk, Guild and Dogan 1998, p. 91.
254 Prop. 1997:98:36 s 19.
255 Ch. 4, Art. 10 FA.
256 Engstrom, p. 173/174; Groenendijk, Guild and Dogan, p. 90.

Social rights

Any foreigner with a permanent or temporary residence permit is entitled to the same social welfare safeguards as Swedish residents regarding health care, medical treatment and social allowance.[257] However, a person who enters the country without a residence permit and is then permitted to remain there pending consideration of an application for a permit, will have the benefits status of an asylum-seeker.[258]

Political rights

All foreigners older than 18 who have resided in Sweden for more than three years have the right to vote and to be elected in local and regional elections. There is no waiting period for nationals of EU Member States, Norway and Iceland.
Sweden has ratified the Convention on the Participation of Foreigners in Public Life at Local Level.

Relevance of European Conventions

Sweden has ratified all five Council of Europe conventions discussed in chapter 2. However, none of these conventions is considered to have had an impact on legislation or case law, because the view is that Sweden already complied with the conventions.

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[257] SIB information.
[258] Information of the Ministry for Foreign Affairs; Melander, p. 1328.

4.7 Switzerland

Data on admission

Figures on the number of family members and the total number of foreigners admitted in 1996-1998 are given below.[259]

	total number	of which			
	of admitted foreigners	reunion with foreign residents	spouses of Swiss nationals	total	%
1996	79,708	25,275	11,162	36,437	45,7
1997	72,769	22,412	11,047	33,469	46
1998	74,949	22,343	11,123	33,466	44,6

Residence status of family members

The foreign spouse of a Swiss national and the foreign spouse of a resident foreigner who holds a temporary residence permit (*Aufenthaltsbewilligung*)[260] or an establishment permit (*Niederlassungsbewilligung*)[261] will be granted a temporary residence permit for one year, with extensions of one year.[262] Spouses have the right of entry if the principal is a Swiss citizen or holds an establishment permit. If the principal holds only a temporary residence permit, the issue of a permit to the spouse is discretionary.[263] After a stay of five years the temporary residence permit will be extended for a two year period.
Foreign spouses of foreigners who are only resident in Switzerland for short periods, such as for study, work placement, or health visits, will not receive family reunion permits.[264]

The minor children of a foreign spouse will be granted the same residence permit as the foreign parent. However, children joining a resident foreigner in Switzerland who holds an establishment permit will be granted an establishment permit immediately after admission, while the admitted foreign spouse will be granted a temporary residence permit. These children are entitled to be mentioned in the establishment permit of their parent, providing they live together.[265]

Parents or other family members of Swiss nationals or establishment permit holders may be admitted for exceptional situations, if the parents depend on the family members residing in Switzerland. They are granted a temporary residence permit for one year.

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259 Bundesamt für Statistik, Migration und ausländische Bevölkerung in der Schweiz 1997, Neuchâtel 1998.
260 Art. 38 and 39 Aliens Ordonnance (BVO) (Verordnung über die Begrenzung der Zahl der Ausländer vom 6.10.1986).
261 Art. 17(2) Aliens Act.
262 Art. 5 and 7(1) Aliens Act (ANAG) (Bundesgesetz über Aufenthalt und Niederlassung der Ausländer of 26.3.1931).
263 Lawyers' Guide, 7; Kalin/Rieder, p. 14.
264 Art. 18 Aliens Act; Art. 16-24 and 38(2) Aliens Ordonnance. See also, public and political debate of this section.
265 Art. 17(2) Aliens Act.

Establishment permits are granted for an unlimited period and are unconditional.[266] However, the card itself has to be renewed each three year. As a rule, the establishment permit is granted after a regular and uninterrupted stay of ten years, but there is no absolute right to such a permit.[267] In exceptional situations an establishment permit will be granted to a migrant directly, if he or she is highly skilled. In such cases, the migrant's spouse will receive an establishment permit as well.[268] Spouses of Swiss citizens are entitled to an establishment permit after an uninterrupted stay of five years in Switzerland. In this respect it is required the spouses are married, However, the spouses do not have to live together.[269] Spouses of establishment permit holders can obtain this status after the same period, provided that they are married and have not separated.[270] Switzerland has also signed treaties with a number of states agreeing to grant an establishment permit after five years of residence.[271]

Relevance of nationality of principal

As seen above, there is a distinction between the family members of Swiss nationals and those of permanent residents, as regards easier access to a permanent residence permit. However, there are considerable distinctions between Swiss nationals and temporary residents.

Divorce or death of principal

Foreign spouses of Swiss citizens will lose their residence rights if they divorce within five years of admission. The permit will not be renewed after the divorce, but it will be retained during separation.[272] Foreign spouses of permanent residents will, however, lose their residence status upon mere separation within that five-year period.[273] However, since any children of such a marriage will still hold an establishment permit, the mother can appeal against expulsion in order to protect her family life under Article 8 ECHR.[274] If both spouses are temporary residents, then the non-working spouse loses his or her temporary residence permit. But if the spouse is employed, he or she will retain residence status.

The same applies if the principal dies within five years.[275] Factors in deciding whether to issue an independent permit to a spouse in such circumstances are the length of time in the country, any employment, children holding an establishment permit and ties with the country.

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266 Art. 6(1) Aliens Act.
267 Art. 11(5) Aliens Regulation (ANAV) (Vollziehungsverordnung of 1.3.1949).
268 Art. 17(2) Aliens Act; Art. 10(1) Aliens Regulation.
269 Art. 7(1) Aliens Act; BGE 122 II 145 E.3 (caselaw).
270 Art. 17(2) Aliens Act.
271 Kälin/Rieder, p. 15; Lawyer's Guide, 8; Campbell/Fischer, SWI-IV-1; Raess/Raess. 3/2.3.2.2.1 and 3/3.1.2.
272 Art. 7 Aliens Act; BGE 118 Ib 150f.E.3c (case law).
273 Art. 17(2) Aliens Act.
274 Spescha, p. 181.
275 Spescha, p. 162, 165-166.

Restrictions on deportation or expulsion

There are three kinds of expulsion. First of all a foreigner may be expelled as a preventive measure if he or she endangers the internal and external security of the state[276]. However, expulsion on this ground occurs seldom. Secondly, the Swiss law permits administrative expulsion. [277] The authorities may order the expulsion of a foreigner on the grounds of a conviction for a crime or an offence, for failure to adjust the established order or for breach of public order due to mental illness. Thirdly, the Swiss Penal Code empowers the court to make an expulsion order as part of the sentence of a foreigner convicted and sentenced to prison (judicial expulsion).[278] However, the second and third types of expulsion can be limited on grounds of possible disadvantage to family members and ties with Swiss society.[279]

Access to labour market

The general rule is that foreign family members do not have access to employment immediately. Only principals have access to employment, and their family members have to wait for a work permit (*Arbeitsbewilligung*) issued by the cantonal authorities. For family members, there is no minimum waiting period before such permission can be granted.[280]

Foreign relatives of establishment permit holders are entitled to obtain a work permit. Family members of Swiss citizens are not entitled to be granted a work permit. However, they are exempted from quotas (*Kontingentierung*) and from the priority of domestic over foreign workers.[281] Temporary residents may be subject to this.[282] Holders of establishment permits no longer need prior approval to take up any employed or self-employed activity.[283]

Social rights

When family members take up employment or self-employment, they have immediate access to various disability, unemployment and pension benefits. Foreigners in Switzerland for over three months are obliged to take out medical insurance.

Political rights

Only Swiss citizens can vote, but some cantons have granted local voting rights to long-resident and permanently resident migrants.[284] In recent years there have been proposals in many other cantons to extend local voting rights to migrants, but these proposals have been consistently defeated in referenda.[285]

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276 Art. 70 of the Swiss Constitution.
277 Art. 10 (1) (a-c) Aliens Act.
278 Art. 55 of the Penal Code.
279 Campbell-Fischer, SWI-V-2; Raess/Raess 5/3.3.1.
280 Art. 9(2) Aliens Regulation.
281 Art. 3(1)(c) Aliens Ordonnance.
282 Campbell-Fischer, SWI-I-4.
283 Kälin/Rieder, 7/27; Lawyer's Guide, 8; Campbell/Fischer, SWI-IV-1.
284 Raess/Raess, ch. C 3; polit. and social participation, p. 66.
285 Polit. and social participation, p. 162/163.

Switzerland is not a party to the Convention on the Participation of Foreigners in Public Life at Local Level.

Public or political debate

There is a debate about whether to grant an independent temporary residence permit to spouses, with women's' rights groups supporting the change but opponents fearing an increase in marriages of convenience.[286] Also, the increasing number of children who only speak a foreign language at school is the subject of debate.[287]

Swiss immigration legislation will shortly be revised, largely to take account of the Agreement on Free Movement of Persons recently agreed with the European Community.[288] This legislation is currently being drafted. The intention of future legislation is that family members of temporary migrants (both *Aufenthalter* and *Kurzaufenthalter*) may be admitted without any restrictions, but that family reunion must take place within five years after the conditions for family reunion are satisfied.

Relevance of European Conventions

The European Convention on Human Rights is considered to have an impact on case law. Swiss judges often refer to Article 8 ECHR.[289]

Switzerland has signed the European Social Charter in 1976. It has not yet ratified the Charter. The three other Council of Europe conventions, discussed in chapter 2, have not been signed.

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286 SPK-NR (95.088), Antwort des Bundesrates vom 2. Juni 1997; Spescha, p. 193/194.
287 Spescha, p. 153.
288 Section 2.6 above.
289 E.g. BGE 122 II f. or 122 II 385, 124 II 361.

5. CONCLUSIONS AND RECOMMENDATIONS

Principles

This research starts from the position that the movement of migrants could usually more accurately be described as the movement of *families*. National legislation governing family movement should therefore be governed by the twin principles that should govern all migration law: equality and security. In the family context, equality means two things. First, it means equal treatment of migrant families compared with national families as far as possible. Equality in this sense will contribute toward equal treatment of racial, ethnic, religious and cultural minorities, because migrants often constitute a large proportion of the persons in these groups. Second, it requires equal treatment of men and women, in accordance with the fundamental right to sexual equality enshrined in international human rights law. The principle of security has great parallel importance, because 'secure residence status is a necessary element of any policy aiming at integration of immigrants in the host society'.[290]

These twin principles have specific implications for the status of persons admitted for family reunion. Unequal treatment as regards employment and social rights will lead to different treatment of minorities and social exclusion. If a spouse (or, in several states, a cohabitee) has less *de jure* access to the labour market because of national law, that law has established inequality between spouses, in breach of the principle of the right to sexual equality. The principles also apply where a marriage (or, where relevant, a cohabitation) ends due to death or divorce or is affected by separation. Unless the family member has acquired independent rights to stay, he or she may have to leave the state in question. Though such a rule arguably could be justified by other interests, it also infringes on the principle of sexual equality. Furthermore, where there are children of a relationship or a lengthy stay in the host state, expulsion in such cases may breach the protection of private and family life pursuant to Article 8 ECHR. Finally, such rules may lead to the unjust treatment of persons subjected to domestic violence, facing them with a difficult choice between staying in a violent relationship or leaving the host state and their job, family and friends there.

Size of population

It is clear that relative to the size of each country, family members make up a substantial proportion of migrants. Data from two states in this study (Sweden and Switzerland) indicate that family members are 40-50% of entrants. Other research presented similar or even higher percentages for Australia, Canada, France, the UK and the USA.[291]

Public debate

There has been public debate about family members in several states, but such debate has apparently focussed on certain specific details of national law and policy, rather than general issues of relevance to all countries. So the UK debate has focussed upon the former 'primary purpose' rule, the Dutch debate has focussed on means tests, and the Latvian

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[290] Groenendijk Guild and Dogan, 1998.
[291] Lederer 1997, p. 222.

debate has focussed on admission of parents. In Switzerland, and recently in the Netherlands, the debate has focussed on an issue of broader relevance: treatment of family members upon divorce or death of a spouse. In Germany and Norway expulsion of members of a family with long legal residence in the country is under discussion. It should be noted that strictly speaking only the latter two debates concern status, not admission.

Residence status of family members

A family member receives the identical status to that of the principal he or she is joining, unless of course that principal is a citizen of the host state. However, the detailed implementation of this principle differs widely. In the United Kingdom, spouses joining long-term residents get independent leave to remain status after one year of residence, while children get such status upon entry. Persons joining UK citizens or persons who already have independent leave to remain have a better status, because family members joining temporary residents are limited to temporary status. In the Netherlands, family members receive a one-year renewable permit until they obtain an establishment permit after five years (subject to a means test for spouses). In Spain, family members receive an initial one-year permit, renewable annually for three years, then a three-year permit, before obtaining a long-term permit after six years. However, a person joining a citizen of Spain or another EC Member State receives a permanent residence permit immediately. In France, family members receive a long-term residents' card after one year of marriage or a temporary card if they are joining a temporary resident. In Germany, the family member receives similar status to the primary right-holder. Persons joining German nationals are always entitled to a long-term residence permit, while persons joining non-Germans are not necessarily so entitled; moreover, persons joining German nationals receive the permit for a three year period, while persons joining non-Germans receive it for one year. Family members of other persons receive a long-term permit if the principal has one. Children receive long-term permits if they were born in Germany, or if the mother of the child holds a long-term permit.

In Sweden, family members receive a one-year permit linked to the principal's permit. They may receive a permanent permit immediately in some cases, but not if the principal is a temporary resident. In Switzerland, residents can obtain an establishment permit after ten years of residence, and prior to that a residence permit renewable annually for five years then renewable every two years. However, family members of establishment permit holders can obtain permanent status after only five years. In Hungary, spouses, children and parents of citizens and permanent residents receive a permanent residence permit. In Norway, a family member is entitled to a time-limited residence permit if the primary right-holder is a Norwegian national or has a long-term permit. Children get such status if one parent was a Nordic national at birth, if they are under 18 with one parent lawfully resident, if they are the child of a foreign spouse who has the right to enter, or if they are over 18 but within the scope of the European Social Charter. In Latvia, spouses and children get a one-year temporary permit unless the principal is a 'repatriate' or has a longer right of residence.

Under EC law, family members of migrants from EEA countries receive a residence status equal to that of the primary right-holder.

Divorce or death of principal

States all provide for an essentially transitional period during which family members' status is dependent on the primary right-holder. After that period, family members acquire rights in their own name, but before that point, they can be expelled upon separation, divorce or death of the right-holder. Usually, however, there are restrictions upon the ability of the state to effect an expulsion during the transitional period.

There are variations between states concerning the length of the transitional period. Germany provides for five years, with eight years in some circumstances. In the UK, family members obtain independent status after a probationary year, but are protected during that first year if they are widowed or suffer domestic violence. In the Netherlands, ex-spouses can only remain during the transitional period (three years) in exceptional circumstances. After that point, they may remain if they find a job within a year or are caring for young children. However, children have a more entrenched right to stay after one year's residence once they are 18 years. After five years, they may obtain an independent establishment permit. In France, the transitional period is one year and family members can obtain protection if necessary during that year. Sweden provides for a two-year transitional period, but similar to the Netherlands, allows persons with children or a job to stay. Norway has a three-year wait for a permit, excepting cases involving children or violence. Hungary imposed a five-year residence period in 1999. Switzerland also has a five-year period, with distinctions between family members of Swiss nationals (who can stay on separation) and family members of foreigners (who must leave upon separation). Latvia has a five-year period, excepting persons who can acquire permanent status earlier or who have children. In Spain, spouses have a two-year waiting period, unless family reasons justify it, or the principal has died while a legal resident. Children have an independent status when they reach the age of majority.

From empirical research in the Netherlands it appears that the rules on the transitional period are enforced strictly on male ex-spouses, while most of the female ex-spouses/partners are allowed to remain in the end.

European Community law protects family members of nationals of the EU states, Norway, Iceland and Liechtenstein against separation, although EC free movement law only applies if the principals have moved to another Member State. Equivalent rules for Swiss nationals are part of the EC-Switzerland Agreement signed in 1999. EC law also grants extensive protection upon death or illness of the primary right-holder. However, it apparently does not grant protection upon divorce, no matter how long the family members have been resident, and family members can only claim independent rights under EC law if they are themselves nationals of the EU states, Norway, Iceland and Liechtenstein. Proposals to extend independent rights on divorce to third-country national family members of migrant EC nationals are pending, but the Council of the EU had not seemed interested in considering them by late 1999. The December 1999 proposal of the European Commission for a Directive on family reunification would require Member States to extend the rules applying to family members of EU nationals who have migrated, to family members of all EU nationals, including their own citizens who did not move. Some EU states (e.g. Belgium and Spain) adopted such a rule in their national legislation already years ago.

As for the family members of other third-country nationals, under EC law the family members of Turkish workers can gain independent rights after separate employment of

over a year with the same employer. The December 1999 proposal would allow the family members of all third-country nationals an autonomous right to reside after four years' residence, and a potential right to reside between one and four years of residence in 'particularly difficult situations'.

It should be recalled that the right to family and private life in Article 8 ECHR, as interpreted by the European Court of Human Rights, protects against expulsion after divorce where there is other established family or private life in a state. Presumably Article 8 also applies upon death or illness of, or separation from, the principal right-holder if a person has other family or private life.

Restrictions on deportation or expulsion

In most states, there is some form of protection against expulsion based on family status. However, the details differ substantially. In the UK, there is additional protection for children born and resident over ten years, and for families with children resident for over seven years. In France, there is full protection for children under 18, and extra protection for persons who have resided there since the age of 10, for over 15 years, who are married to a French citizen, or who are the parent of a French child. In Sweden, expulsion is conditional upon consideration of existing links and length of residence, and cannot take place after five years' residence or if a person entered before the age of 15. In Norway, persons with a settlement permit cannot be deported until after consideration of their children, and there can be no expulsion where a child was born in Norway. In the Netherlands, children who entered before 18 and lived with their parents for at least a year can only be expelled on limited grounds. If they were born in the Netherlands or admitted before the age of 10 years, there can be no expulsion after 15 years of residence. In Switzerland, expulsion is limited on family grounds. In Spain, persons cannot be deported if the principal has a permanent residence permit, was formerly Spanish, was born in Spain and lived there five years, or has an occupational pension. Hungary and Latvia reportedly impose no such limitations in practice.

Under EC law, family members of EC nationals who have moved to another Member State receive the same detailed substantive procedural and substantive protection against expulsion or refusal of entry as principals. The same rules apply to family members of migrants from Norway, Iceland, Liechtenstein and (soon) Switzerland. They also apply to Turkish nationals and their family members,[292] and nationals of North African states have similar protection as long as they have work permits.

Access to labour market

The states covered by this survey grant family members access to the labour market. In some cases such access is granted immediately to all (France, Netherlands, UK). In several others, it is granted to the family members of long-term residents, while the family members of short-term residents do not have an absolute right to it (Germany, Hungary, Latvia, Norway, Sweden, Switzerland). In several of these states, family members of citizens also have immediate access to the labour market (Latvia, Norway, Sweden, Switzerland). In Spain, there is no right of access, but only the possibility of requesting it.

[292] See European Court of Justice 11. 3. 2000. Case C-340/97, *Nazli*, not yet reported.

Priority for national workers and EC nationals is applied if the family member has only the 'initial' residence permit (first three years of residence).

EC law grants immediate equal access to employment all family members of migrant EC nationals. The same rules apply to Norway, Iceland, Liechtenstein, and soon Switzerland. Family members of workers from Central Europe may work if admitted, and family members of Turkish workers can look for work after three years' residence with EC nationals' priority lifted after five years. The December 1999 proposal for a Directive on family reunification would require Member States to extend the rules applying to family members of EU nationals who have moved to the family members of EU nationals who have not moved. In addition, identical rights would apply to the family members of any third-country national covered by the directive (persons resident for less than a year would fall outside its scope).

Social rights

In principle, all legal residents of states, including their family members, have equal access to social rights. In some cases, such access is reportedly uncomplicated (France, Hungary, Netherlands, Sweden, Switzerland). In other cases, it is subject to obtaining long-term residence status (UK) or waiting periods (Norway, Latvia). EC law guarantees equal treatment for most categories of nationals of EC states, Norway, Iceland and Liechtenstein, along with Turkish and North African workers. Equal treatment for Swiss nationals and nationals of ten applicant states may be agreed soon, but the European Commission's proposals for equal treatment of all third-country nationals are blocked at present. The December 1999 proposal for an EC Directive on family reunification would grant equal rights to education for all family members, and equal treatment in vocational training for spouses and children.

It should be recalled that equal treatment in social rights is required by the ECHR, as interpreted by the European Court of Human Rights.[293]

Political Rights

In six of the ten states included in this study, certain categories of non-national residents have political rights in local elections, usually after a certain period of residence (Sweden, Hungary, Netherlands, Norway, Spain, partly Switzerland). In one state, voting rights extend to national elections, but the rights are limited to citizens of only certain foreign states (United Kingdom). Some states do not provide for voting rights for non-citizens (Latvia, partly Switzerland) or provide them only for citizens of other EU Member States (France, Germany). EU countries are required by Community law to allow citizens of other EU states to vote in local elections. It does not appear that family status is relevant to the existence or exercise of political rights.

The Convention on the Participation of Foreigners in Public Life at Local Level adopted within the Council of Europe in 1992, entered into force in 1997. Five Member States (Denmark, Italy, Netherlands, Norway, Sweden) ratified and three other States (Cyprus, Finland, UK) signed this convention that provides for voting rights in municipal elections after five years of residence for foreigners, irrespective of their nationality.

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[293] *Gaygusuz v. Austria* [1997] 23 EHRR 364.

Relevance of European conventions

In some Member States, the ECHR has had a considerable impact on case law (UK, Netherlands, France). However, it has had less impact on case law in several others (Sweden, Hungary, Latvia, Germany). The other Council of Europe Conventions have little impact, except to the extent that they influence legislation and policy (UK, Netherlands, Latvia). It should be recalled that even where the Conventions are not mentioned in case law or legislation, they still create a binding 'floor' of rights which the signatory states cannot fall below; so in their absence, the status of family members might be weaker.

Common Problems and Solutions

There are five issues which are central to the status of family members after admission in most or all states.

a) Nature of the initial residence permit

In most cases this differs depending on three factors: whether the principal is a national of the host state (or another EU Member State, in Member States of the EU plus Norway, Iceland and Liechtenstein); whether the principal (if a non-national) has temporary or long-term residence status; and whether the family member is a spouse or child. There is a strong tendency to grant a more durable residence permit to family members of nationals compared to non-nationals and to family members of long-term residents compared to short-term residents. As for children, there is a marked tendency to give them different residence status depending on certain factors (such as birth in the country or entry before a certain age).

b) Length of the transitional period before independent rights

This period lasts between one year and six years (sometimes eight) in the countries examined, while EC law never provides for such independent rights upon divorce (unless the family member is an EC national exercising EC law rights). However, in most states there is protection against expulsion during this period in limited circumstances, usually if the family member has children in the host state or if the family was dissolved due to domestic violence. The economic status of the family member is relevant in some states. In most cases, separation is treated as equal to divorce.

c) Ability to expel the family member

On this point, reflecting the jurisprudence of the European Court of Human Rights, the countries studied protect against expulsion on the grounds of established family life, although this protection takes different detailed forms. There is no explicit reference in the national laws studied to protection on the grounds of established private life, although this is equally protected by Article 8 ECHR.

d) Access to the labour market

Here there are divergences between the countries studied, with some granting immediate access to the labour market, and some granting easier access to family members of citizens or long-term residents. It is clear that family members have easier labour market access than most economic migrants.

e) Access to social rights

All countries studied allows such access for family members, but this can sometimes depend on waiting periods, means tests or the acquisition of long-term residence status.

Policy and legislative options

The following options are recommended to give effect to the twin principles of equality and security discussed above, and to give effective protection to rights guaranteed by the ECHR.

A. For governments:

a) ensure **greater equality and security** by treating the family members of long-term residents the same as family members of their citizens as regards residence status, transitional periods, protection against expulsion, social rights and access to employment;

b) ensure greater **protection for children** by applying specific provisions further protecting their residence rights taking into account their commitments under the UN Convention on the Rights of the Child;

c) apply a **short transitional period** before family members can obtain full independent status, and provide for protection during this period on humanitarian grounds;

d) ensure that specific rules **protecting against expulsion** are applied by the authorities and enforced by the courts, to give effect to the protection of private and family life under Article 8 ECHR;

e) grant full **access to the labour market** to at least family members of long-term residents;

f) grant **equal social rights** in accordance with the ECHR; and

g) ratify the **European Social Charter**, the **European Convention on Establishment, European Convention on the Legal Status of Migrant Workers and the European Convention on the Participation of Foreigners in Public Life at Local Level**.

B. For the Council of Europe:

a) the Committee of Ministers issues a **Recommendation on the legal status of persons admitted for family reunification**, addressing at least the following elements:
- the residence status of persons admitted for family reunification, including equality between persons joining nationals and persons joining long-term residents and the particular status of children;
- the transitional period before persons admitted for family reunification obtain full independent rights, including humanitarian protection during this period;
- effective protection against expulsion of persons admitted for family reunification;
- equal access to the labour market of persons admitted for family reunification;
- the equal social (including educational) rights of persons admitted for family reunification; and
- the right to vote in municipal elections for foreigners lawfully resident in the country for five years

b) examine states' **compliance with the rulings** of the European Court of Human Rights relevant to the status of persons admitted for family reunification; and

c) draw up **Protocols** to the **European Convention on Establishment**, the **European Social Charter** and the **European Convention on the Legal Status of Migrant Workers**, extending those Conventions to all persons lawfully in the country, or to persons lawfully resident in the country for a certain number of years, or to persons admitted for the purpose of family reunion irrespective of their nationality, not just nationals of the other Contracting Parties.

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- R. Harding, The Home Office, London
- The Immigration Team, Kingsley Napley, solicitors, London[294]
- G. Mehmet, solicitor, Penningtons, London
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