



SECURITY OF RESIDENCE OF LONG-TERM MIGRANTS

**A comparative study of law and practice
in European countries**

Kees Groenendijk, Elspeth Guild and Halil Dogan

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Note: This document expresses the personal views of the consultants and not necessarily the official view of the Council of Europe or its member States.

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1. INTRODUCTION

Problem description

In 1994 over 20 million aliens, persons not being citizens of their country of residence, were living in Council of Europe member states; 18.7 million of them were living in the seventeen countries of the European Economic Area (EEA) and Switzerland. The large majority of those immigrants were already resident in those countries for more than ten years. The total number of acquisitions of citizenship (nationality) by alien residents of the EEA-countries plus Switzerland in 1994 was 350,000, hence less than 2% of the alien population.¹

The social integration of immigrants is one of the major issues in many countries in Europe. It is also an issue on the agenda of several European institutions. Our central hypothesis is that security of residence of migrants is one of the essential conditions for their integration in the host society. It is neither the sole condition nor a sufficient condition for integration.² However, security of residence provides the immigrant with a firm base for orientation towards settlement and integration in the new society. For the native population security of residence is a clear signal that public authorities have accepted the indefinite residence of the newcomers, that they are going to stay, will probably one day acquire full citizenship and that unequal treatment can no longer be justified on the basis of their provisional status in society. Hence, the importance of secure residence rights as a step towards full citizenship and social integration can hardly be overestimated.

Many Council of Europe member states have dealt with the issue of a secure residence status of immigrants who have lawfully resided on their territory for many years without acquiring the citizenship (nationality) and the related full residence rights inherent in that status. The focus group of our study are immigrants who have legally resided for many years but have not (yet) acquired the citizenship of the state of residence, either because they are unable to fulfil the conditions, or they are unwilling to apply for naturalisation because of the consequences (e.g. loss of the citizenship of their country of origin).

In a paper on the legal status of long-term migrants in Europe one of us distinguished four models of treatment: citizenship, quasi-citizenship, privileged treatment and denizen status.³ It was observed that those models differ in the extent residence rights and other rights in social and public life are granted to immigrants. This study does not deal with that second group of rights. It focuses on the residence rights. Our aim is to make a comparative study of law and practice on the residence status of long-term migrants in a number of European states having different approaches on this issue. Moreover, we will survey the provisions in European instruments on this specific issue and analyse the relevant case law of the European Court of Human Rights and the Court of Justice of the European Community.

Research questions

¹ Eurostat 1997, pp. 17 and 41.

² Bauböck 1994.

³ Groenendijk 1996.

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

- (1) does the national legislation provide a special secure residence status for long-term migrants?
- (2) does the national legislation provide for a restriction of the grounds for expulsion after prolonged lawful residence?
- (3) is security of residence provided to certain special categories, e.g. family members of citizens, second generation migrants or ex-nationals?
- (4) does the national legislation provide for simplified or automatic acquisition of citizenship (nationality), and hence full residence rights, for certain categories of immigrants?
- (5) what has been the relevance of the European Convention on Human Rights, other European instruments and the case law of the ECHR and the ECJ for the residence status of those migrants?

In addition, we want to know how the relevant national rules are applied in practice. Here our main questions are:

- * in how many cases have aliens been expelled after prolonged legal residence and on what grounds?
- * which particular categories of long-term migrants have been threatened with expulsion and have these cases drawn public attention?
- * what issues have been discussed in the national courts or in public debate with respect to this issue?

Methodology

We sent a questionnaire to experts in each of the 18 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. For most countries two or more 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 five member states we conducted interviews with officials of the competent ministry, officials of the aliens police in one or two major cities, immigration lawyers, immigrant organisations and academic experts. Our aim was to conduct 5-10 interviews in each state included in this part of the study. We have conducted a total of 36 interviews either personally or by telephone. Finally, we sent a short questionnaire to chief officers of the local or regional aliens police in nine cities in a sixth member state in order to get some information on the expulsion practice in that state.

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 word *alien* 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 word *expulsion* is used for a decision by a public authority, either administrative or judicial ordering an alien who has been lawfully resident to leave the country. This order might or might not include a ban on return.

In order to avoid the word deportation (a technical legal term in the immigration law of many states) we speak about the *forced departure* of an alien where the authorities implementing an expulsion order have used physical or other pressure to make the alien depart from the country of his or her former residence.

2. RELEVANT EUROPEAN INSTRUMENTS

2.1 European Convention on Human Rights: State duties under Article 8 ECHR and long resident third country nationals

As of 1997 the European Convention on Human Rights (ECHR) has been ratified by all Council of Europe member states except Russia. The Convention provides protection to long resident third country nationals against expulsion where it can be established to the satisfaction of national authorities, courts and all decision-makers ultimately subject to the control of the European Court of Human Rights that expulsion would be contrary to the rights protected by Article 8 of the Convention.

According to the practice of the European Court of Human Rights (ECtHR), it considers each case in respect of which a petition has been declared admissible on its merits and facts. Accordingly, it does not explicitly, like the European Court of Justice, provide national tribunals and administrations with guidelines on the interpretation of the provision in question. Rather it assesses the application of the right guaranteed by the Convention against the action taken by the authorities of the member state and concludes on the basis of the facts whether or not there has been a violation of the Convention right. The starting point is the wording of Article 8:

*Article 8: (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
(2) There shall be no interference by a public authority with the exercise of this right except as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

Article 8: Right to respect for private and family life

Article 8 ECHR requires states to refrain from interfering with the exercise of private and family life unless the interference can be justified on one of the grounds contained in the Article itself. The determination of Article 8 questions requires a number of steps. First does the matter involve private life or family life? The Court has yet to decide that an immigration related matter calls into question an issue exclusively of private life. However, it has found relevant to expulsion cases whether private life has been established⁴. If the

⁴ "In addition Mr C established real social ties in Belgium. He lived there from the age of eleven, went to school there, underwent vocational training there and worked there for a number of years. He accordingly also established a private life there within the meaning of Article 8, which encompasses the right for an individual to form and develop relationships with other human beings, including relationships of a professional or business nature. It follows that the applicants deportation amounted to interference with his right to respect for his private and family life." *C v Belgium* (35/1995/541/627) Judgment 7.8.96.

issue in question is a person's family life, that family life must be established. Assuming family life is established then the action of the state must interfere with this if a violation is to be found.

If the state's action does so interfere with it then the action will need to be in accordance with the law and the Court or Commission will examine the relevant law to satisfy itself of this if it is in dispute. Where the act was lawful under the relevant legislation of the state, then it must be established that the interference was in pursuit of a legitimate aim. If this is fulfilled then there is one final hurdle, whether notwithstanding the above, the interference was necessary in a democratic society.

In migration matters, Article 8 raises two distinct questions which have elicited somewhat different answers from the Commission and the Court:

- (i) first, under what circumstances must a state refrain from taking an expulsion decision on the grounds that it would interfere with private or family life;
- (ii) secondly, under what circumstances must a state take action for example by the issue of a visa to a family member abroad to enable family life to be enjoyed?

In some cases the two questions overlap, for instance where expulsion has already taken place, but these, by and large can be categorised with group (i). Only decisions involving this first category are relevant to this study and will be considered here.

Family life

Critical to the question of the lawfulness of expulsion is, then, the character of family life. Before expulsion will be contrary to Article 8 the foreign national must have a real link with the state. In one of the first important judgements on the expulsion of aliens and Article 8 the Court gave a wide, purposive meaning to family life. Family life does not just include situations where family members live under the same roof.

In 1988, the Court reached this decision which may be considered critical to the development of its approach to the compatibility of expulsion with respect for family life⁵. In the *Berrehab* case the Dutch authorities expelled a Moroccan national who had been married to but subsequently divorced from his Dutch wife and with whom he had a young child. On the evidence of both a legal and actual relationship between the father and the child the Court found that family life existed. It held that cohabitation was not the *sine qua non* of family life between a parent and minor child, and indeed such family life could exist without cohabitation.

The Court did not accept the state's argument that family life could be enjoyed by short-stay visas for the father to visit the child on occasion. The Court accepted the state's argument that expulsion was in pursuit of a legitimate aim - the economic well-being of the country - but did not accept that it was necessary in a democratic society. The consequential breaking of the ties between father and daughter was so severe as to make expulsion disproportionate. This is important to understanding the meaning of Article 8 in

⁵ *Berrehab v Netherlands* 21.6.88; Series A no 138.

cases of long residence. A long resident alien will normally be adult. His or her family life with other relatives in the country of residence may still form the basis of a duty on the State under Article 8 even where the young person no longer lives with his or her immediate family.

This approach is supported in two recent decisions of the Court⁶. In both cases the national government argued that as the alien was both an adult and independent from his family, there was no family life. The Court stated "[Mr Boujlifa] arrived in France in 1967 at the age of five and has lived there since then, except while he was imprisoned in Switzerland. He received his schooling there (partly in prison), and his parents and his eight brothers and sisters - with whom he seems to have remained in touch - live there... Consequently, the Court is in no doubt that the measure complained of amounts to interference with the applicants right to respect for his private and family life." In the second case the Court stated "[Mr Boujaïdi] arrived in France in 1974 at the age of seven and lived there until 26 August 1993. He received most of his schooling there and worked for several years. In addition his parents, his three sisters and his brother - with whom it was not contested that he had remained in contact - live there... Consequently, the Court is in no doubt that enforcement of the exclusion order amounted to interference with the applicants right to respect for his private and family life."

Balancing family life and expulsion on grounds of criminality

Between January 1991 and March 1992 three cases came before the Court relating to the proposed expulsion of men who had been long resident or indeed lived all their lives in the host state. The Court's decisions in respect of these men form the benchmark of Article 8 in respect of expulsion and long residence. The first case against France settled at the last minute resulting in the decision to strike out the application since the French government permitted the applicant to remain in France⁷, the second against Belgium came before the Court on its substance⁸. The third case, coming slightly later was again against France and was considered in substance⁹. All three cases had similar facts: an alien man who had spent a substantial part if not all of his life in the particular state accumulated an increasingly impressive list of criminal convictions. In each case the man's family including parents and siblings, and in the last case wife as well, were resident in the state. In all three cases the man had grown up and undertaken his schooling in the state.

In all three cases, at some point after yet another criminal conviction, the state decided to deport the man to the country of his nationality on grounds of public order. In all three cases the man appealed and ultimately petitioned the Court on the basis of the state's interference with his right to private and family life.

⁶ *Boujlifa v France* (122/1996/741/440) Judgment 21.10.97 and *El Boujaïdi v France* (123/1996/742/941) Judgment 26.9.97.

⁷ *Djeroud v France* 34/1990/225/28 Judgment 23.1.91.

⁸ *Moustaquim v Belgium* 18.2.91; Series A no 193.

⁹ *Beldjoudi v France* 26.3.92; Series A no 234.

The first of these cases to be the subject of a substantive decision of the Court was that of Mr Moustaquim. He had been born in 1963 in Casablanca. He had arrived in Belgium in 1965 with his mother. His brothers and sisters also lived in Belgium. While he was still a minor, the Juvenile Court had dealt with 147 charges against him and among other punishments had ordered him detained on three occasions. The state considered that even if Mr Moustaquim had family life, which it doubted, the interference with that family life was justified by the legitimate aim of the prevention of disorder and was necessary in a democratic society.

Both the Commission and the Court found in favour of family life and that Mr Moustaquim's expulsion was not necessary in a democratic society. The Court considered the relatively minor nature of the crimes, which though numerous had mainly occurred while he was a minor was not sufficient to justify expulsion. It then stated "Mr Moustaquim himself was less than two years old when he arrived in Belgium. From that time on he had lived there for about 20 years with his family or not far away from them. He had returned to Morocco only twice on holidays. He had received all his schooling in French". The Court held "His family life was thus seriously disrupted by the measure taken against him"¹⁰. It is worth noting that in this judgement two judges dissented.

The next step in the development of this case law of the Court is the matter of Mr Beldjoudi. While the facts were not dissimilar to those of Mr Moustaquim, a history of crime of increasing severity was evidenced as well as the fact that Mr Beldjoudi was an adult born in 1950. However, on the other side of the coin, Mr Beldjoudi had been born in France at a time when he and his family had been French citizens. The subsequent independence of their state of origin (Algeria) resulted in them losing this status. He was also married to a French citizen. The Court held that expulsion of Mr Beldjoudi was not proportionate to the legitimate aim pursued and therefore violated Article 8.¹¹

Again, the same two judges dissented as in the case of Mr Moustaquim. However, two judges were moved to give separate and concurring opinions. Both of them were of the view that the expulsion of Mr Beldjoudi was an interference with his private life. In an unusually passionate passage, Judge Martens stated:

"In my opinion, mere nationality does not constitute an objective and reasonable justification for the existence of a difference as regards the admissibility of expelling someone from what, in both cases [Moustaquim and Beldjoudi], may be called his 'own country'... I believe that an increasing number of member states of the Council of Europe accept the principle that such integrated aliens, should be no more liable to expulsion than nationals¹², an exception being justified, if at all, only in very exceptional circumstances¹³."

¹⁰ *Moustaquim v Belgium*, supra, para 45 and 26.

¹¹ *Beldjoudi v France*, supra.

¹² This principle has already been accepted in the context of the International Covenant on Civil and Political Rights: under Article 12(4) of the Covenant no one shall be arbitrarily deprived of the right to enter his own country; but also - as appears from the drafting history of the words his own country - of all integrated aliens (such as second generation immigrants); see M Nowak, *de Europese Kommentar Art 12 rdn. 45 - 51*; Van Dijk & Van Hoof *De Europese Conventie* 2nd Edition p 551; Velu-Ergec, *La Convention Eur. DH*, s 372 (p. 322) [footnote of opinion].

In another case around the same issue, the Commission considered the offences committed by young man of 25 against his family history and stated: "Although [Mr Lamguindaz] is legally an alien, his family and social ties are... in the United Kingdom and his nationality status does not reflect his actual position in human terms. In these circumstances the Commission finds that the expulsion constitutes such hardship that only in exceptional circumstances could it be justified as proportionate to the aim pursued under Article 8(2)"¹⁴.

Here again one of the members of the Commission, Mr Schermers, was moved to write a partly concurring, partly dissenting opinion stressing first that he considered the better basis of the decision to be the state's interference with the applicant's private life. He went on to add:

"I fully agree with the Court that there is well-established international law granting states full control over entry of aliens ... For any society individuals like the present applicant are a burden. Even independent of human rights considerations, I doubt whether modern international law permits a state which has educated children of admitted aliens to expel these children when they become a burden. Shifting this burden to the state of origin of the parent is no longer clearly acceptable under modern international law. It is at least subject to doubt whether a host country has the right to return those immigrants who prove to be unsatisfactory"¹⁵.

In 1995 again the Court found that the compassionate circumstances of the case of a long resident alien were such as to render expulsion disproportionate. In this case a deaf and dumb young Algerian man who was also effectively illiterate was convicted of a serious offence (rape) for which he was sentenced to five years imprisonment. He had been born and spent the first five years of his life in Algeria then with his family moved to France where he had lived thereafter. He had no real ties with Algeria. In recognition of the compassionate circumstances the French court had suspended two of the five year sentence. On balancing the applicant's circumstances with the maintenance of public order, the Court found that it would not be proportionate to the legitimate aim pursued to permit his expulsion¹⁶.

Recently, in some cases where the applicant had not arrived in the state at a very young age, the Court has allowed states a somewhat wider margin as regards expulsion in the pursuit of a legitimate aim. In one case a Moroccan national had moved with his family to Belgium at 11 years of age in 1966. His father had at some time returned and died in Morocco. The man married a Moroccan woman who came to Belgium but they were subsequently divorced and she returned to Morocco. He was convicted of a serious drug importation crime and imprisonment for five years. When released the Belgian authorities sought to expel him. The Court held that in view of the seriousness of the crime, namely

¹³ Concurring Opinion of Judge Martens, *Beldjoudi v France*, supra.

¹⁴ *Lamguindaz v UK* 28.6.93; Series A no 258-C, paras 45-46.

¹⁵ *Lamquindaz v UK*, supra, Opinion of Mr Schermers.

¹⁶ *Nasri v France* Judgment 13.7.95.

illegal drugs supply, his expulsion was not disproportionate to the legitimate aim pursued by the state¹⁷. Another recent case points in the same direction¹⁸.

Three important decisions relating to expulsion of long resident aliens have been handed down in 1997. The first relates to a man who arrived in France, the host state, at the age of two for the purpose of family reunification. His mother, step father, four brothers and sisters and five step brothers and sisters lived in France as well. The family was, according to the record close. All of his siblings held French citizenship with one exception. He was married to and had a child by a French national however his marriage and the birth of his child occurred after he had been expelled for the first time and returned unlawfully. It was accepted that in view of the situation in Algeria, his wife and child could not follow him there. He was deported in 1990 when he was 20 years of age. The reason for expulsion was conviction of a serious criminal offence - rape with violence and theft in 1988. He was sentenced to five years imprisonment. The Court spelled out its duty to determine whether the expulsion in issue struck a fair balance between the relevant interests, namely the applicant's right to respect for his private and family life and the prevention of disorder or crime on the other. In view of the severity of the crime, the Court held that the decision to deport the man was not disproportionate to the legitimate aims pursued¹⁹. In a dissenting opinion, Judge Palm disagreed with the Courts finding on the grounds that: "I find it difficult in principle to accept that a country can be justified under the Convention in expelling a second-generation immigrant to his country of origin because of his behaviour when almost all his ties are with his new homeland. In my view there must be much stronger reasons than those advanced in the present case to justify such an action. As a rule, second-generation immigrants ought to be treated in the same way as nationals. Only in exceptional circumstances should expulsion of these non-nationals be accepted." The Judge reconsidered the balance of factors in favour of family and private life and did not consider that the necessary exceptional character of the offence justified the interference.

Mr El Boujadi also petitioned the Strasbourg Court in relation to a decision to expel him from France. He was born in Morocco in 1967. He went for family reunification to France in 1974 and lived there until expelled in 1993. He went to school in France and worked there for several years. In addition to his parents and siblings, (which in contrast to other cases the Court rejected as constituting family life as the man was, at the relevant time, 30 years old) he had a French national wife and child. He was convicted of trafficking in heroin and sentenced to 30 months imprisonment. He was subsequently convicted of robbery. Again in seeking a fair balance between the relevant interests, namely the applicants right to respect for his private and family life and the prevention of disorder and crime on the other the Court found that there was no violation of Article 8. Again one judge dissented (Judge Foighel). He shared the opinion of Judge Martens in the earlier case²⁰ that integrated aliens should in principle be treated in the same way as nationals as regards expulsion.

¹⁷ *C v Belgium* (35/1995/541/627) Judgment 7.8.96.

¹⁸ *Boughanemi v France* (16/1995/522/608) Judgment 24.4.96.

¹⁹ *Bouchelkia v France* (112/1995/618/708) Judgment 29.1.97.

²⁰ *Boughanemi v France* Judgment 24.4.96.

The following arguments have been made in the dissenting and concurring opinions:

1. Nationality is not a condition for the exercise of the rights of the Convention.
2. In respect of integrated aliens, the punishment appropriate for own nationals is sufficient. Any more severe punishment for integrated aliens than own nationals is not justified. Such punishment includes in particular expulsion which means for many such persons a permanent break with their family and home.
3. The costs to the country of origin are not proportionate as the alien has been raised and lived the majority of his life in the host country only to be returned to the state of origin when problems developed in the host country manifest.
4. Legal certainty is needed as regards expulsion of integrated aliens. At the moment, Article 8 as interpreted by the Court is resulting in inconsistent judgements where similar facts are giving rise to different results. As stated in a joint dissenting opinion, "the present judgement does not provide the national authorities and the possible victims of future expulsions with the certainty and clarity to which they are entitled."²¹

In summary, neither the Commission nor the Court will countenance the expulsion of long resident aliens except in exceptional circumstances. Further an increasingly artificial consideration of family ties in order to constitute family life so that integrated aliens may enjoy Article 8 protection from expulsion is resulting in a lack of legal certainty.

Conclusions

A review of the jurisprudence of the Commission and the Court on the obligations of states towards aliens reveals an important differentiation between what is owed to 'integrated aliens' and what is owed to aliens seeking to enter or remain in a state after only a short period of time.

Where an alien has resided for a substantial period of time in a state and has family and social ties with the state both the Court and the Commission have taken far reaching decisions protecting the alien's right of residence against any interference by the state even in the face of serious criminal convictions.

²¹ "The Court has been divided on the issue of the deportation of 'second generation' immigrants for quite some time. The 'reality of life' becomes rather problematical when the application of the proportionality test leads to different outcomes in cases in which the factors to be weighed would not seem to differ in any essential respect. It would therefore seem to be highly desirable that the Court should abandon its casuistic approach to the matter and take a clear position on the question whether and to what extent so-called 'second generation' immigrants constitute a special category for whose deportation very serious reasons have to be advanced to make it justifiable under the second paragraph of Article 8. Failing that, the Court should at the very least, in each separate case involving a 'second generation' immigrant, indicate in an explicit and well reasoned way in what respects it is to be distinguished from other cases involving a 'second generation' immigrant in which the Court has reached a different conclusion as to the proportionality of the measure. **In our opinion, and to our regret, the present judgment does not provide the national authorities and the possible victims of future deportations with the certainty and clarity to which they are entitled**" (emphasis provided), Joint Dissenting Opinion of Judges Baka and Van Dijk, *Boujlifa v France* (122/1996/41/940) Judgment 21.10.97.

Because of the way in which the Article 8 protection appears in the Convention, a balance must be struck between the legitimate interest of the state to maintain order and the family life of the alien. The factors which the Court has considered of particular importance are:

In favour of the state:

1. the nature of the offence committed;
2. the length of the sentence imposed;
3. the number of offences committed;
4. the criminal history of the alien.

In favour of the alien:

1. place of birth (whether the member state or elsewhere);
2. age at entry into the state;
3. length of residence in the state;
4. existence of family in the state (balanced against family members in the country of nationality²²);
5. language - does the alien speak the language of his or her country of nationality?
6. social ties - does the alien mix exclusively with people from his or her state of nationality in the host state?

It appears that increasingly the Commission and the Court are unwilling to permit differential treatment between long resident aliens and nationals of the state. Some indications suggest that the definition of 'national' of a state itself may be under consideration in the direction of including such 'integrated aliens'. However, the legal basis for this protection is too narrow. The need to demonstrate interference with family life in order to enjoy protection is constituting an obstacle to the equal treatment of integrated aliens. Even at the Court itself there are indications that the judges are not satisfied with the narrow approach which Article 8 ECHR forces them to determine the proportionality of expulsion in the light of all the circumstances.

This problem has been most eloquently stated in 1995 by Judge Pettiti: "The European Court now has pending before it several cases concerning the expulsion of aliens who have been convicted of offences and who are habitual re-offenders. The European Convention excluded from its substantive law the expulsion of aliens by states (except collective expulsions). However, the Court, invoking Article 8 and, in circumstances of exceptional gravity, Article 3, may examine individual cases without overstepping the limits of what is laid down in Article 8 concerning the notion of private life. But this line of decisions does not provide a solution to the general problem, which is a matter for the member states of the Council of Europe, if they have the will to harmonise their policies in this field and co-operate, so as to take account of immigration and differences in the rules adopted with

²² Here a wide definition of family members is applicable, in respect of adult aliens this includes siblings and others; of particular relevance is whether the individual has a spouse who is a national of the host state and most important is whether there are children nationals of the host state to the marriage.

regard to integration and family reunion by certain states with a view to strengthening the protection of families ...²³

²³ *Nasri v France* Judgment 13.7.95.

2.2 European Convention on Establishment

The Convention was signed in Paris in 1955. Its aim is to grant migrants from one State Party to the Convention, living in another State Party, equal treatment with the nationals of that State in a range of areas, to liberalise access to employment and other "gainful occupations" and grant migrants who have lived in the country for several years, security of residence and protection against sudden forced departure from that country.²⁴ This last aim is especially relevant for our study. It is clearly apparent in Article 3 of the Convention:

Article 3

1. Nationals of any Contracting Party lawfully residing in the territory of another Party may be expelled only if they endanger national security or offend against *ordre public* or morality.
2. Except where imperative considerations of national security otherwise require, a national of any Contracting Party who has been so lawfully residing for more than two years in the territory of any other Party shall not be expelled without first being allowed to submit reasons against his expulsion and to appeal to, and be represented for the purpose before, a competent authority or a person or persons specially designated by the competent authority.
3. Nationals of any Contracting Party who have been lawfully residing for more than ten years in the territory of any other Party may only be expelled for reasons of national security or if the other reasons mentioned in paragraph 1 of this Article are of a particular serious nature.

Article 12 of the Convention provides that migrants from one State Party having lawfully resided in another State Party are entitled to engage in any gainful occupation on an equal footing with the nationals of that Party, if they comply with one of the three following conditions: after they have lawfully worked for five years in that country, after ten years of uninterrupted lawful residence, or once they have been admitted for permanent residence. The State Parties have to accept at least one of those three conditions.

The Convention entered into force in 1965. The practical effect of the Convention was limited by the establishment of the European Economic Community in 1957 and with the gradual extension of the membership of the EC. However, six Council of Europe member states ratified the European Convention on Establishment and by doing so, acquired a higher level of protection for their nationals working or living in other State Parties, in the period *before* they entered the EC. Thus, Denmark, Greece and Norway ratified the Convention in 1965, Ireland in 1966, the UK in 1969 and Sweden in 1971, (long) before they became EC member states. At the end of 1997 twelve Council of Europe member states were Parties to the Convention on Establishment.²⁵

²⁴ For the history of the drafting see Commentary on the European Convention on Establishment, adopted by the Standing Committee, Council of Europe, Strasbourg 1980, L. Rigaux, *La Convention européenne d'Etablissement*, *Revue Générale de Droit International Public* 1957, p. 5-50, J. van Essen, *La Convention européenne d'Etablissement*, *Nederlands Tijdschrift voor Internationaal Recht* 1956, p. 135-155; A.H.J. Swart, *The Legal Status of Aliens: Clauses in Council of Europe Instruments Relating to the Rights of Aliens*, *Netherlands Yearbook of International Law* (Vol. XI) 1980, p. 3-64; K. Oellers-Frahm, *The Contribution of the Council of Europe to the Legal Position of Aliens*, in Frowein and Stein 1987, p. 1747 ff.

²⁵ Belgium, Denmark, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Norway,

Turkey ratified the Convention in 1990. After the establishment of the European Economic Area, the principle value of the convention is that it reinforces the status of over 2.5 million Turkish citizens living in Western European states which are Party to the Convention.

For the new member states in Central and Eastern Europe ratification of this Convention is an opportunity to reinforce the position of their nationals living and working in the other State Parties. For some States this would be relevant pending the negotiations on EU membership and accession to the EU. For other new Council of Europe member states which are unlikely, in the medium term or indeed at all, to accede to the EU the Convention offers an important avenue for protection of their nationals resident elsewhere in Europe. Moreover ratification might offer an opportunity to adjust to the practice of granting equal treatment with nationals to foreign residents in certain areas and thus be better prepared for the same requirement on a large scale which is a central element of EC law. The same reasoning applies to the 1977 European Convention on the Legal Status of Migrant Workers.²⁶ Both Conventions grant more rights to migrant workers than the Europe Agreements concluded between the CEEC and the EU. Since the 1977 Convention does not provide special rights for migrants with long residence in a country the citizenship of which they have not yet acquired, that convention is not dealt with in this study.

In the next chapters we will see to what extent the European Convention on Establishment has influenced the national legislation and the practice with regard to long term migrants in some of the State Parties.

Sweden, Turkey and the UK.

²⁶ This Convention was adopted in Strasbourg on 24.11.1977. It entered into force in 1983 and was ratified by eight member states by the end of 1997.

2.3 EU and Community law on expulsion and long-term residents

The 15 member states of the European Union, with the addition of three EFTA states, Norway, Liechtenstein and Iceland, have limited the power to expel nationals of any of the other contracting states and their family members through the provisions of the EC Treaty, subsidiary legislation and the EEA Agreement. The protection extended to nationals of other member states was initially limited to those persons who were exercising economic activities within the territory of another member state²⁷ but has been extended to the economically inactive.²⁸

Personal scope of the protection against expulsion

The above does not mean that all nationals of the member states, parties to the EC and EEA Treaties, are necessarily protected against expulsion in accordance with the Community law rules below. The first requirement is that the person must come within the personal scope of Community law for free movement purposes. If he or she does not, then no Community protection is available. To come within the scope, the person must be able to establish:

1. he or she is a work seeker, who within a reasonable period of time has a genuine chance of obtaining employment in the host state²⁹;
2. he or she is a worker or former worker now retired³⁰;
3. he or she is self employed³¹;
4. he or she is providing or receiving services in the host member state³²;
5. he or she is a student and has made a declaration of self sufficiency³³;
6. he or she is a pensioner with sufficient resources so as not to become a burden on the social assistance system of the host state³⁴;
7. he or she is economically inactive, does not come within any of the other categories but has sufficient resources not to become a burden on the social assistance or security system of the host state³⁵;
8. family members of any nationality of a Community national coming within the above categories³⁶.

The main group of persons excluded are those who do not have sufficient resources to support themselves. Notwithstanding the introduction in 1991 of the concept of citizenship of the Union³⁷ among the rights attached to which is that to reside in the member states, it

²⁷ Articles 48-59 EC.

²⁸ Directives 93/96, 90/365 and 90/364.

²⁹ *Antonissen* [1991] ECR I-745.

³⁰ Article 48 EC and Regulation 1612/68 in conjunction with Directive 68/360.

³¹ Article 52 EC and Directive 73/148.

³² Article 59 EC and Directive 73/148.

³³ Directive 93/96.

³⁴ Directive 90/365.

³⁵ Directive 90/364.

³⁶ Article 10 Regulation 1612/68 as regards workers, Article 1 Directive 73/148 as regards the self-employed and service providers and recipients; Article 1 of each of the three Directives.

³⁷ Article 8A EC.

remains unclear to what extent nationals of the member states who are reliant on social assistance in a host state remain protected by the Treaty against expulsion.

Nature of the protection

In Community law, expulsion of a national (coming within the personal scope of EC law) of one member state from the territory of a host member state is only permitted if he or she constitutes a threat to public policy, public security or public health.³⁸ The protection afforded against expulsion is not qualified by any requirement of long residence. It applies as soon as the individual is seeking to enter or is already on the territory of another member state and exercising a right recognised by the EC Treaty and its subsidiary legislation.

The main measure adopted to give effect to protection against expulsion is Directive 64/221, adopted in 1964. It covers all persons who may rely on a Community right of free movement.³⁹ It seeks to protect nationals of the member states and their family members from any exercise of state power resulting from the exception relating to limitations justified on grounds of public policy, public security or public health contained in Article 48(3) EC.

There are specific limitations on the way in which the power can be exercised. Specifically it cannot be invoked to service economic ends.⁴⁰ Measures taken on the permitted grounds must be based exclusively on the personal conduct of the individual concerned.⁴¹ Previous criminal convictions do not in themselves constitute grounds for expulsion.⁴² Expiry of an identity card or passport cannot justify expulsion.⁴³ Only diseases in the Annex can constitute a public health ground for expulsion.⁴⁴

Community law will not countenance the expulsion of a migrant citizen of the Union if the expulsion decision was taken as a deterrent measure directed at other foreigners, in other words if it is based on general preventative grounds.⁴⁵ Further, criminal activity in itself is not sufficient to justify expulsion even where the alien has only just recently arrived on the territory of a member state. For an expulsion decision on the basis of public policy to be in conformity with Community law there must be evidence that the personal conduct of the individual constitutes a present threat. This implies that there is a propensity to act in the same way in the future. Only rarely will past conduct on its own be sufficient to justify an expulsion measure.⁴⁶

Restrictions cannot be imposed on the right of a national of a member state to enter the territory of another member state, to stay there and to move within it⁴⁷ unless his or her

³⁸ Article 48(3) EC and repeated for the other residence rights.

³⁹ *Royer* [1976] ECR 497.

⁴⁰ Article 2(2) Directive 64/221.

⁴¹ In other words, general preventive grounds are not permissible; Article 3(1) Directive 64/221.

⁴² Article 3(2) Directive 63/221.

⁴³ Article 3(3) Directive 64/221.

⁴⁴ Article 4 Directive 64/221.

⁴⁵ *Bonsignore* [1975] ECR 297.

⁴⁶ *Bouchereau* [1977] ECR 1999.

⁴⁷ Subject of course to the person remaining within the person scope of Community law for the

presence or conduct constitutes a genuine and sufficiently serious threat to public policy or public health.⁴⁸ According to the interpretation of this limitation by the European Court of Justice

*"these limitations are a specific manifestation of the more general principle, enshrined in Articles 8, 9, 10 and 11 of the European Convention on Human Rights^{1/4} and in Article 2 of Protocol 4 of the same convention, which provide in identical terms, that no restrictions in the interests of national security or public safety shall be placed on the rights secured by the above quoted Articles other than such as are necessary for the protection of those interests in a democratic society."*⁴⁹

Further, Community law sets out in some detail the procedural requirements and appeal rights which must accompany any attempt to expel a person entitled to the protection of the EC Treaty.⁵⁰

Limitations on the right

The rules on expulsion are uniform. No greater protection is afforded to citizens of the Union depending on the period of time they have been resident on the territory of a host member state. To this extent in particular, the Community rules are inadequate as they do not recognise the special position of long resident aliens. The European Court of Justice has acknowledged the importance of the European Convention on Human Rights in particular in the application of Community law. To this extent the jurisprudence of the European Court of Human Rights on Article 8 ECHR may be transposable into Community law. However, as has already been explained, that convention also fails explicitly to accommodate the special position of long resident aliens. Accordingly, while some useful guidance may be derived from Community law on expulsion as regards proportionality, for instance where a question of criminal behaviour is involved, it does not yet explicitly recognise any additional protection on the basis of long residence.

purposes of free movement.

⁴⁸ Article 2 Directive 64/221.

⁴⁹ *Rutili* [1975] ECR 1219.

⁵⁰ Articles 8 & 9 Directive 64/221.

2.4 EU and Community law on secure residence of third country nationals

The general competence of the European Community in respect of free movement over nationals of countries which are not member states of the EC Treaty or EEA Treaty has been the subject of substantial discussion. The situation has now been clarified in the Amsterdam Treaty.⁵¹

The residence status of third country nationals has been dealt with in the intergovernmental co-operation on the EU member states in Justice and Home Affairs (the so-called Third Pillar) in 1996, when the EU Council of Ministers adopted a Resolution on the status of third country nationals residing on a long-term basis in the territory of the member states.⁵² The Resolution, which creates no legal obligations for the EU member states, defines which persons should be recognised as long-term residents and that these persons should receive an unlimited residence authorisation or a residence authorisation for at least ten years (Article III). It also provides for the cancellation or non-renewal on three grounds (public policy, long absence and definite departure, or the authorisation has been obtained by fraud). Expulsion for reasons of public policy should be "based on the personal behaviour of the long-term resident involving a sufficiently serious threat to public policy, or to national security". Due account should be taken of the length of the period of legal residence.⁵³

EEA and the EEC-Turkey Association Agreement

However, in the context of reciprocal agreements with third countries on two occasions Community law has been extended to cover the expulsion of third country nationals.

In the European Economic Area Agreement, currently between the Community and Iceland, Liechtenstein and Norway, nationals of those countries (who are of course third country nationals for the purposes of Community law) have been given the same right to protection against expulsion as Community nationals exercising a free movement right. This extension of Community law by way of a third country agreement has proved non-contentious.

In 1963 the Community entered into an association agreement with Turkey⁵⁴ which was extended by an Additional Protocol in 1970. Under that Agreement and Protocol, provision was made for an Association Council with power to adopt decisions regulating the implementation of the Agreement. Among the areas covered by the Agreement is free

⁵¹ Article 63(3) of the new Title IV on free movement of persons, asylum and immigration, inserted in the EC Treaty by the Treaty of Amsterdam, provides that the Council will adopt: "Measures on immigration policy within the following areas: (a) conditions of entry and residence, and standards on procedures for the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunion; ...".

⁵² Council Resolution of 4.3.1996, O.J. C80/2 of 18.3.1996; see Annex I to this report.

⁵³ Article IV.

⁵⁴ Confirmed by Council Decision 64/732 OJ C 113/1 1973.

movement of workers. Association Council Decision 1/80, currently in force, extends various rights of continued access to the labour market and residence to Turkish workers lawfully within the territory of the member states. Most importantly, after one years lawful employment a Turkish worker is entitled to a renewal of his or her work and residence permits in order to continue to work for the same employer. After three years a Turkish worker is entitled to change employment within the same occupation and after four years he or she is entitled to free access to the labour market. Rights are also accorded to family members.

Article 14(1) of the Decision permits the application of limitations on the exercise of the rights contained in the Decision only on the grounds of public policy, public security or public health⁵⁵. The Court of Justice has yet to consider the scope and meaning of this provision though a reference has been made to it on this point by a court in Germany⁵⁶. However, as regards other provisions of Decision 1/80 the Court has held that they are capable of direct effect which means that the provisions can be relied upon directly by an individual against a state in order to support his or her claim to their benefit⁵⁷. From the recent decisions of the Court there appears to be a strong trend that the Court interprets the provisions of the Decision in accordance with the relevant similarly worded provision of Community law⁵⁸. It may, accordingly, be possible cautiously to suggest that a uniform meaning applies also to the concept of "public policy, public security and public health" and that the provision in Decision 1/80 has the same content as Article 48(3) EC.

⁵⁵ "The provisions of this section shall be applied subject to limitations justified on grounds of public policy, public security or public health".

⁵⁶ In the *Nazli* case, C-340/97.

⁵⁷ *Sevince* [1990] ECR I-3461; *Kus* [1992] ECR I-6781.

⁵⁸ See in particular the Court's uniform definition of a worker as regards Turkish workers and Community workers *Günaydin* decision of 30.9.1997; and *Ertanir* decision of 30.9.1997.

3. LAW AND PRACTICE IN SIX COUNTRIES

3.1 Belgium

Foreign population

The total population of Belgium in 1994 was 10,1 million. More than 920,000 registered aliens (9%) were living in the country. The majority (60%) originates from EU member states (mainly Italy and the neighbouring countries France and the Netherlands). Among the non-EU citizens, Moroccans (145,000) and Turks (88,000) are by far the largest immigrants groups.

Security of residence

The Belgian Aliens Act of 1980⁵⁹ established a special secure status for aliens with long legal residence or close ties with persons residing in Belgium: the establishment permit (*vestigingsvergunning, permit d'établissement*).⁶⁰ A statutory right to this permit is granted to aliens with five years of continuous lawful residence in Belgium. Periods of unstable residence, e.g. awaiting the decision on an asylum request, or with a residence permit for study do not count towards the five years.⁶¹ If an alien meets the above requirements, a permit can be refused solely on public order grounds, not on grounds of insufficient income.⁶² Only criminal convictions for serious crimes or repeated convictions are a sufficient ground for refusal of the permit.⁶³

Certain categories of aliens are entitled to a establishment permit without the five year waiting period:

- EU-citizens using their free movement rights under Community law and non-Belgian spouses and children of Belgian citizens⁶⁴;
- the spouses and children (under 18 years or cared for by the parents) of aliens having an establishment permit;
- aliens who fulfil the conditions for acquisition of Belgian nationality.⁶⁵

An application for an establishment permit must be made to the municipal authorities who transmit the application to the Minister of the Interior. If the Minister does not refuse the request within five months, it is deemed to be allowed. The permit grants an unlimited right to reside in Belgium. However, the document issued by the municipal authorities is

⁵⁹ Wet betreffende de toegang tot het grondgebied, het verblijf de vestiging en de verwijdering van vreemdelingen of 15.12.1980, see Foblets 1997.

⁶⁰ An establishment permit grants permanent residence. It has no relation to the right of establishment under Article 52 EC Treaty.

⁶¹ Denys 1995, p. 75; Lindemann 1985, p. 9.

⁶² Article 15(4) of the Aliens Act.

⁶³ Taverne et al. 1985, p. 33.

⁶⁴ Articles 40 ff of the 1980 Act. After two periods of three months on the basis of a provisional residence permit, EU-citizens are entitled to establishment permit, Article 45 of Royal Decree of 8.10.1981. Students from EU-countries are not entitled to an establishment permit.

⁶⁵ Article 15(1) of the Act.

valid for five years only. Upon request it is automatically renewable for another five years. Extension of the validity of the document to ten years is under discussion. Once an alien has received an establishment permit, the person is registered by the municipal authorities in the general population register and his or her data are removed from the aliens register.⁶⁶

Aliens with an establishment permit are exempted from the requirement to have a labour permit for employment. However, for self-employment a special permit is still required. An alien in possession of an establishment permit has equal rights with Belgium citizens in a range of areas (social security, private law and the freedom of expression and of association). Moreover, these aliens enjoy relatively strong protection against expulsion (see below). They are excluded from the restrictions on the residence of immigrants in certain municipalities which can be applied by Royal Decree on the basis of exceptional powers in the Aliens Act⁶⁷.

Establishment permit in practice

Statistical data on the number of establishment permits issued or the percentage of the alien population holding such permit are not available.

However, considering the fact that 60% of all aliens in Belgium are EU-citizens and that the majority of the other aliens probably will have lived more than five years in the country, it is likely that over three quarters of all aliens in Belgium hold an establishment permit.

The number of refusals of establishment permits is not recorded. Practising lawyers told us that the number of refusals on public order grounds is small. Most refusals occur in cases of family members unable to comply with the rules on family reunification, which have become more strict during the last years, and hence are refused both admission and the establishment permit⁶⁸. Several lawyers told us that sometimes family members admitted long ago do not apply for an establishment permit and hence have a less secure residence status than they are entitled to under the Belgium legislation.

In the eighties and early nineties some municipalities in the Brussels region refused to issue establishment permits to aliens in order to avoid the risk of extra costs of public assistance on the local budget and to dissuade aliens from moving to the municipality. This unlawful practice was successfully tackled by the central government and the courts. This source of refusal of establishment permits has disappeared.

Losing the establishment permit: absence, expulsion and the protection against expulsion

An establishment permit loses its validity in two circumstances only: the holder is absent from Belgium for longer than one year or in the event of expulsion. An alien may apply for

⁶⁶ Articles 16-18 of the Act and Article 30 Royal Decree of 8.10.1981.

⁶⁷ Article 18bis.

⁶⁸ Wauthier 1996.

an extension of the validity of the permit before leaving Belgium, if (s)he foresees a return after the expiry date of the permit.⁶⁹

Expulsion (*uitzetting, expulsion*) of aliens in possession of an establishment permit is only allowed on the ground that the alien has caused serious offence against public order or national security of the country. The decision may be taken by the Minister of the Interior only. The decision has to be taken in the form of a Royal Decree and the Advisory Committee on Aliens has to be consulted. The committee is composed of a judge, a practising lawyer and a representative of an NGO acting for immigrants. The alien has the right to appear with a lawyer before the committee. The Minister is not obliged to follow the advice of the committee. An appeal against an expulsion decree may be filed with the State Council. This appeal does not automatically suspend the expulsion. The expulsion decision automatically imposes a ten year prohibition on entry to Belgium, unless it is suspended or withdrawn.⁷⁰

The bill for the 1980 Act initially proposed to restrict expulsion to national security cases only. During the parliamentary debate the government expanded the relevant provision by including the broader notion of "public order". However, it was explicitly stipulated in the Act that only the personal behaviour of the alien could be a ground for expulsion. Thus the similar restriction in Community law on the freedom of movement, protecting EU citizens, has been extended to all established aliens in Belgium. Lawful exercise of the freedom of expression or the freedom of association can never be a ground for expulsion. Where expulsion is founded on the political activities of an alien the expulsion decree has to be debated in the Council of Ministers.⁷¹ This was a considerable change, since under the previous legislation expulsion on grounds of undesirable political activities had quite often resulted in expulsion.⁷²

The Act enumerates six categories of aliens which can only be expelled in case of serious offence against public order or national security (*"d'atteinte grave à l'ordre public ou à la sécurité nationale"*). This protection is guaranteed *inter alia* to aliens with ten years of continuous lawful residence, spouses of Belgian citizens, and to aliens who have become permanently disabled by occupational accidents.⁷³ In practice most of these aliens will be entitled to an establishment permit and hence get little extra protection above the level granted by the general rules on expulsion and the restrictive interpretation of those rules by the courts. According to the lawyers we interviewed this provision is rarely used in practice.

Under the present Belgian law there are no aliens who have absolute protection against expulsion.

⁶⁹ Article 19 of the Act.

⁷⁰ Article 26 of the Act.

⁷¹ Article 20(2) and (3).

⁷² De Moffarts 1996, p. 40; Lindemann 1985, p. 12.

⁷³ Article 21.

Practice in expulsion cases

Since 1980 the statutory provisions on expulsion have been changed in respect of minor points only. However, expulsion practice has radically changed. In October 1990, a year after the European Commission on Human Rights held that Belgium by the expulsion of a young Moroccan, Mr. Moustaquim, had violated Article 8 ECHR, the competent minister issued a short internal instruction to the head of the Belgian immigration service, restricting the circumstances in which expulsion could be contemplated. The instruction contained three basic rules. First aliens born in Belgium and EC-citizens having an establishment permit could only be expelled on grounds related to national security. Aliens with ten years legal residence or refugees with convention status could only be expelled after having been convicted to a prison sentence of five years or more. Aliens with an establishment permit having under ten years of legal residence in Belgium could only be expelled after a prison sentence of three years or more.⁷⁴ Another ministerial instruction of 1995 elaborates these rules taking into account the recent case law of the ECtHR in Strasbourg. It focuses on two categories where expulsion presents special problems: the second generation and heads of families, where the other family members are unable to follow the person to be expelled. On the one hand this rather long instruction extends the protection of aliens born in Belgium to aliens who were under 7 years of age when they entered Belgium and do not have real ties with their country of origin. On the other hand, the instruction allows for expulsion of both categories if the alien is considered extremely dangerous and where there is a high risk of recidivism.⁷⁵ The two instructions have not been published in the Official Journal. Nevertheless, they have radically influenced both the practice and the case law in expulsion cases. The number of expulsion orders was reduced from approximately 100 per year in the mid eighties⁷⁶ to five and ten annually in recent years.

Number of expulsion orders in Belgium 1989-1996

1989	63	1993	21
1990	70	1994	22
1991	7	1995	5
1992	73	1996	10

Source: Ministry of the Interior, Brussels

From March 1995 to January 1997, the French language chamber of the Advisory Commission on Aliens that handles the cases of expulsion proposals concerning aliens in criminal detention, heard a total of 26 expulsion cases. In 8 cases the Commission considered the expulsion not justified. In three cases the proposal was deemed premature considering the remaining length of the prison sentence. During those two years only in 15 cases did the Commission hold the expulsion to be justified.⁷⁷ The Minister of the Interior

⁷⁴ Instruction of Minister Wathelet of 8.10.1990, reprinted in *Tijdschrift voor Vreemdelingenrecht* 1992, nos 60-61, p. 91. The earlier instructions of 1982 are described by De Ceuster 1982.

⁷⁵ Instructions of 17.2.95; for an extensive analysis see De Schutter 1997.

⁷⁶ Reply of the Minister of Justice of 7.10.1986, *Vragen en Antwoorden* no. 209: 64 expulsion orders were made in 1983, 91 in 1984 and 101 in 1985.

⁷⁷ A.Dessart, Vice-President of the Advisory Commission on Aliens, *La Commission*

tends to follow the opinion of the Commission. In some cases where the Commission has held the expulsion to be justified, the minister may, on the basis of current information at the time the prison sentence is completed, choose to abstain from making the expulsion order. The above figures indicate that the total number of aliens with an establishment permit who are expelled, has become extremely small. The majority of the expulsion cases are in respect of persons convicted of a long series of crimes related with drug trafficking, murder or serious sexual crimes (incest). Expulsion on national security grounds is extremely rare. It only occurs after the alien is convicted of a crime. Several respondents mentioned the case of members of the Algerian GIA-movement convicted for terrorist activities. None of the persons we interviewed, remembered a case of expulsion solely on the ground of political activities during the last ten years.

Most of the limited number of expulsion decrees are actually implemented, since the aliens concerned are in prison serving criminal sentences at the time the decree is made. It is enforced immediately on the expiry of their sentence.

However, in some cases the expulsion order is suspended in order to grant the alien an opportunity to demonstrate rehabilitation. The 1995 ministerial instructions mention this alternative with regard to second generation immigrants having no ties with their country of nationality. There is also a practice of granting a "last chance" in cases where the prospects of rehabilitation are good. Here the expulsion decree is made on the explicit condition that the decree lapses if the alien does not commit an offence within the period set out in the decree.⁷⁸ A similar exception is sometimes made when the person considered for expulsion is married to an alien who holds an establishment permit, in which case the immigration authorities may grant a simple residence permit valid for one year only. A formal warning by the authorities is also used as an alternative to expulsion.⁷⁹

Several sources mentioned the perverse effect of expulsion of aliens all whose family members, often Belgian nationals, live in Belgium. The absence of a feasible alternative place to live, enhances the likelihood that those aliens after expulsion sooner or later will return and stay illegally in the country. The lack of residence status will hinder their social integration and increase the possibility of renewed criminal activities. Examples of expulsion of EU citizens producing this perverse effect were mentioned.⁸⁰

Long absence or administrative removal

Several respondents told us that the number of aliens with long legal residence who have problems with the authorities regarding the loss of their residence rights because of long

consultative des étrangers: fonctionnement, dysfonctionnements, incidence sur l'exécution de la peine, lecture at Louvain-la-Neuve 21.3.1997. For the earlier practice of the Committee see Ellouze 1990.

⁷⁸ Minister of Interior in reply to parliamentary question of 24.6.1996, Vragen en Antwoorden 1995-1996, no. 336, p. 6189.

⁷⁹ In the case that resulted in ECHR 7.8.1996, *C v. Belgium*, ECHR Reports 1996-II/12, p. 915, the Immigration Office initially advised the Minister to give Mr C a warning instead of an expulsion.

⁸⁰ De Schutter 1997 and interview with Mr Bienfait on 16.12.1997.

absence from Belgium, the omission to report a change of address with the local authorities or to apply for a renewal of their residence document in time, is far greater than the number of aliens threatened by expulsion on public order grounds.

When the local authorities note that an alien is no longer living at his registered address, his name may be removed from the population register. On subsequent contact, the authorities may take the position that the alien has lost his or her residence rights because of prolonged absence and hence should apply for an immigration visa from abroad. In order to avoid this dead end street, the alien has to prove that he or she has not been absent from Belgium for more than a year. Similar problems occur if the application for a new document proving the establishment right, is filed after the administrative removal from the register. Timely applications for renewal of documents proving the establishment permit apparently do not cause administrative problems. A decree of 1995 granted a right to return to Belgium, even after a stay of more than one year abroad, depending on the length of the previous residence in Belgium.⁸¹ In 1996 two long and detailed ministerial instructions to the local authorities on how to deal with such cases were published.⁸² These new rules have considerably reduced the extent of this problem in practice.

Influence of European instruments

Belgium ratified the European Convention on Establishment in 1962. The involvement of the Advisory Commission on Aliens and the ten year period in Article 21(1) of the Aliens Act both can be taken as implementation of Article 3 of that Convention.⁸³

The judgement of the European Court of Human Rights in the case *Moustaquim v. Belgium* understandably received wide attention in Belgian practice and legal literature. The State Council has integrated the judgements of the Court in Strasbourg on the protection granted by Article 8 ECHR in expulsion cases in its case law. The two ministerial instructions of 1990 and 1995 explicitly refer to the need to take into account the fact that the right to family life, close family ties in Belgium or the absence of real ties with the country of nationality, effectively restrict the possibilities for expulsion of aliens with long legal residence.⁸⁴

Some of the restrictions on the expulsion of EU-citizens provided for in Community law have been explicitly integrated in the Belgian Aliens Act and extended to third country nationals holding an establishment permit. The statutory protection coupled with the very restricted expulsion practice of the Belgian authorities obviates the need to distinguish between EU-citizens and nationals of other countries. For the same reason the provision on public order in Decision 1/80 of the Association Council EEC-Turkey appears to have

⁸¹ Royal Decree of 6.8.1995, Belgisch Staatsblad of 2.9.1995.

⁸² Circular letters of the Minister of Interior of 5.2.1996 and 24.7.1996, Belgisch Staatsblad 21.2.1996 and 10.8.1996.

⁸³ Denys 1997, p. 8. Likewise, the special protection against expulsion of disabled migrant workers in Article 21 of the Act is an implementation of Article 8 of the ILO Convention on Migrant Workers (no. 97) of 1949.

⁸⁴ Martens 1991; Carlier 1993; Parmentier 1993; Van de Putte 1994; Denys and Van Ex 1995; Foblets 1995; De Moffarts 1996; De Schutter 1997.

played no role in the expulsion practice so far. Established Turkish workers receive the same protection as EU-citizens on the basis of the general rules. The justification for the remaining differences in treatment between EU-citizens and established third country nationals as regards expulsion, mentioned in the recent ECtHR judgement in another expulsion case against Belgium, are disputed in the legal literature.⁸⁵

NGO activities

After the decision of the European Commission on Human Rights in the *Moustaquim* case several human rights organisations and other NGOs started to campaign against the expulsion of second generation immigrants. The Committee against Exile (*Comité contre le bannissement/Komitee tegen de verbanning*) was established in February 1990. This committee monitored the implementation of the ministerial instruction of October 1990 with special attention to the retroactive application of the new rules in cases of aliens expelled before 1990 under the old rules. The Green Party (*Agalev-Ecolo*) introduced a bill in Parliament aiming at integration the ministerial rules in the Aliens Act. This initiative was unsuccessful.⁸⁶ Subsequently the limited use of expulsion in practice has taken away much of the impetus for further action and the issue has disappeared from the political agenda.

Simple acquisition of Belgian nationality

Persons born in Belgium to non-Belgian parents may acquire Belgian citizenship in a simple procedure and with little or no costs involved. The alien who has continuously lived in Belgium from birth can declare his or her wish to be a Belgian national with the authorities before the age of 30 years. Another simple procedure is available for second generation immigrants having long but interrupted residence in Belgium.⁸⁷ Belgian nationality is acquired from the date of registration which takes effect in some cases if the public prosecutor does not make objections to the declaration within two months and in other cases after the civil court has made its decision on the option for the Belgian nationality. A similar simple procedure is also available for aliens married to Belgian nationals.⁸⁸ In the years 1990-1995 more than 13,000 spouses acquired Belgian nationality under the latter provisions and 33,000 second generation immigrants became Belgian nationals under the simple procedure.⁸⁹ The third generation acquires Belgian nationality at birth.⁹⁰

⁸⁵ De Schutter 1997, p. 183.

⁸⁶ Terecht?, January-March 1993.

⁸⁷ Articles 12bis, 13 and 14 of the 1984 Code of the Belgian Nationality, see Foblets 1997.

⁸⁸ Under the conditions stipulated in Article 16 of the Code; for the practice see Renault 1994, p. 261.

⁸⁹ Parliamentary questions of 23.7.1996, Vragen en Antwoorden 1995/96, p. 66610.

⁹⁰ Article 11 of the Code of Belgian Nationality.

3.2 France

Foreign population

France is one of the few European countries where the government during most of this century considered the country to be one of immigration. This view was reflected both in a liberal immigration policy concerning migrant workers, refugees and their family members, and in nationality legislation which grants nationality on the basis of birth or prolonged residence in the country. In 1994 3.6 million aliens were living in France, i.e. 6.3% of the total population. EU citizens, mainly from Portugal, Spain and Italy, account for more than one third of the alien population. Aliens with the nationality of the Maghreb countries (Algeria, Morocco and Tunisia) make up 60% of the immigrants from outside the EU.

Carte de résident (carte de dix ans)

The central rules of French immigration law are still to be found in the *Ordonnance* of 1945. Since 1974 this act has been changed twenty times.⁹¹ In 1984 a new residence document was introduced: the "*carte de résident*". This new card is valid for ten years and renewable every ten years.⁹² Hence it is commonly called the "*carte de dix ans*".

This residence document may be issued to an alien with three years of lawful residence in France and sufficient income.⁹³ Certain categories of aliens have a statutory right to this card:

- on the basis of a special relationship with a French citizen (being the spouse of a French citizen for more than a year, or the mother, father or child of a French citizen),
- after admission for family reunification with an alien having such a residence card,
- refugees with convention status, their family members and recognised stateless aliens with three years residence,
- after five years lawful residence with a special residence permit for family life or granting territorial asylum,⁹⁴
- after five years lawful residence with a special residence permit for family life of granting territorial asylum after ten years lawful residence in the country.⁹⁵

Further requirements are: lawful residence on the basis of a visa or a temporary residence permit and not representing a threat to the public order, including not living in polygamy.

⁹¹ Weil 1997, p. 46.

⁹² Articles 14-18 of the *Ordonnance* of 1945 introduced by the Act of 17.7.1984, *Journal Officiel* 19.7.1984, see Debouy 1988, p. 132; Guimezames 1990, p. 85 Weil 1991, p. 176-185; Zimmermann 1997.

⁹³ Article 14.

⁹⁴ This category was added to Article 15 by the *Loi Chevènement* adopted by the *Assemblée Nationale* on 9.4.1998.

⁹⁵ Those categories and the other, quantitatively less important ones are specified in Article 15.

Aliens born in France, who may opt for France nationality, but have not (yet) done so, are entitled to the residence card on the sole condition that they have lived in France during the last five years. The other requirements set out above do not apply in these cases.⁹⁶ This provision protects the residence rights of the second generation where they have not yet decided to opt for French nationality.

Between 1986 and 1996 successive governments have introduced new conditions restricting the categories of aliens entitled to this residence status. Thus, the requirements of lawful residence and absence of threat to public order were introduced in 1986. The first requirement was abolished in 1989 and reintroduced again in 1993 by the *Loi Pasqua*.⁹⁷ In 1997 the Jospin government proposed to change the *Ordonnance* of 1945 again. One of the aims of the recent bill is to make it easier to obtain a residence card by deleting some of the requirements introduced by previous governments and to facilitate the renewal of these cards. The bill turned into the “*Loi Chevènement*”⁹⁸ after adoption by the *Assemblée Nationale* in April 1998.

Algerian nationals receive, on the basis of bilateral agreements, an Algerian residence certificate. The requirements for this certificate are similar but not identical to those for the residence card.⁹⁹ This certificate is valid for ten years and entails the same rights as the residence card. The extensive documentation to be provided by an alien with the application for a residence card is specified in a decree.¹⁰⁰

The residence card grants access to all employment and independent professional activities.¹⁰¹ The card also guarantees equal treatment with French nationals with regard to certain non-contributory benefits (e.g. compensation for victims of crime). Equal treatment in social security benefits is not restricted to aliens having a residence card, but is normally granted to aliens with temporary residence permits as well. The card further relieves the alien of the need to apply each year to the immigration authorities for an extension of the permit. Moreover, the ten-year validity of the card makes it easier for the alien to make long visits abroad. However, the card does not provide special protection against expulsion.

The validity of the card may end in three ways: expiry, non-renewal, and withdrawal. The card automatically expires if the alien lives outside France for more than three years.¹⁰² Renewal can only be refused on the ground of such long absence or of polygamy.¹⁰³ The card may be withdrawn where it has been obtained by fraud or the alien is deemed to

⁹⁶ Last sentence of Article 15.

⁹⁷ Act of 24.8.1993, *Journal Officiel* of 29.8.1993; see Costa-Lascoux 1994, p. 26 and Gacon-Estrada and Rodier 1996, p. 311.

⁹⁸ *Loi* no. 98-349 of 11.5.1998, *Journal Officiel* no. 109 of 12.5.1998.

⁹⁹ Article 7bis of the current version of the Agreement between France and Algeria of 27.12.1968, *Journal Officiel* of 22.3.1969.

¹⁰⁰ Article 11 of the Decree of 30.6.1994 as amended in 1994, *Journal Officiel* of 4.9.1994, see GISTI 1994, p. 49.

¹⁰¹ Article 17 of the 1945 *Ordonnance*.

¹⁰² Article 18.

¹⁰³ Article 16.

represent a threat to public order. Employment of aliens without the required labour permit and polygamy are explicitly mentioned as examples of such threat.¹⁰⁴ An expulsion decision implies the withdrawal of the card.

Practice

According to data of the Ministry of the Interior at the end of 1992 the vast majority of aliens held either the residence card (46%), the equivalent residence document for Algerian citizens (17%) or the residence document for EU-nationals (30%) valid either for five or ten years. Only 7% of the 3,5 million aliens held temporary residence permits or documents granting provisional residence rights pending administrative procedures. In certain regions the percentage of aliens with temporary or provisional residence documents was higher: Paris and Val-de-Marne 14%. But the large regional discrepancies in the percentage of alien residents having a privileged residence status, prevalent before the introduction of the ten-year card have disappeared.¹⁰⁵

Most residence cards are issued to spouses of French citizens, to spouses and children of aliens holding a residence card, and to refugees and their family members soon after admission. Stateless persons and immigrant workers receiving a disability pension accounted for limited numbers only.¹⁰⁶

Few aliens are granted a residence card after three years only, because at that moment it is in the discretion of the administration to grant or refuse the card. Most aliens are granted the card either as of right rather soon after their admission or after ten years residence on the basis of a temporary permit. However, the latter category has been considerably reduced by an amendment of the law in 1993 excluding students from entitlement to the card on the basis of ten years residence.

Procedural guarantees in cases of refusal to issue or renew a residence card were introduced in 1989. Under this procedure decisions could only be made after a special commission (*Commission de séjour*), to be established in each regional administration (*départements*), had been consulted. The administration was bound to act in conformity with the opinion of that commission composed of three judges.¹⁰⁷ Three years later a quarter of the regional administrations had not established a commission as required by the law.¹⁰⁸ In 1993 the competence of the commissions was restricted. Its opinions became advisory only. In 1997 the commissions were abolished altogether. However, in April 1998 they were reintroduced by the *Loi Chevènement*.

¹⁰⁴Article 22(7), Article 15 bis and Article 15 ter of the 1945 *Ordonnance*.

¹⁰⁵The percentage of aliens holding the old privileged residence document card varied between the regions: from 25% of the registered aliens in Paris, to 90% in Northern France (*département du Nord*), see Weil 1991, p. 178.

¹⁰⁶Lebon 1996, p. 15 and 87; OMI 1993, p. 42-45.

¹⁰⁷Article 18bis introduced by the Act of 2.8.1989, *Journal Officiel* of 8.8.1989 (*Loi Joxe*).

¹⁰⁸See Instructions of the Minister of the Interior of 8.2.1994, reprinted in GISTI 1994, pp. 59 and 64.

Four lawyers we interviewed told us about recurrent experiences with problems regarding the renewal of residence cards. Refusals are usually based either on a simple criminal conviction, or on divorce or an application for public assistance during the last ten years (the latter two are categorised as fraud) or on the alien being unable to produce tax returns for three consecutive years (taken as proof of long absence from France). Practice on this issue appears to vary considerably between the *départements*. At some *préfectures* an alien who applies for renewal a few weeks after the expiry of the ten year period, is told that his or her stay has become illegal and that (s)he has to return to the country of origin and apply for a new entry visa. On the contrary other *départements* routinely advise aliens by letter of the imminent expiry of their residence card and the need to apply for renewal.¹⁰⁹ Most respondents considered such problems more serious and widespread than the threat of expulsion. Some lawyers told us about cases where the entry of the alien's name on the Schengen Information System by another Schengen country, on the basis of acts committed many years ago, resulted in the refusal to renew the alien's residence card.

Expulsion and protection against expulsion: the law

The residence right provided by the residence card automatically ends with the decision of the administrative authorities to expel the person (administrative expulsion) or with the ban on continued presence on French territory ordered by a court (judicial expulsion).

The Minister of the Interior may order the expulsion of an alien on the ground that he represents a serious threat to public order (*une menace grave pour l'ordre public*).¹¹⁰ Certain categories of aliens enjoy either relative or absolute protection against expulsion. The main categories of "protected" aliens are generally the same as those entitled to a residence card. They are specified in Article 25 of the *Ordonnance* of 1945:

- aliens with 15 years habitual residence or 10 years lawful residence in France, unless they have been holding the status of a student throughout that period;
- aliens resident in France since the age of ten;
- spouses of French citizens and parents of French minors.

A lawfully resident alien may not be expelled on grounds of a prison sentence of less than one year. However, for certain crimes (relating to drugs, labour relations or illegally offering collective housing) any prison sentence may be a ground for expulsion.

The protection offered by Article 25 is relative. It can be withdrawn where the alien on conviction receives a prison sentence of five years or more and in the case of overriding necessity in the interests of national or public security (*une nécessité impérieuse pour la sûreté de l'Etat ou la sécurité publique*).¹¹¹ The first exception does not apply to second generation immigrants who, on entry, were ten years or younger.

¹⁰⁹Weil 1997, p. 93.

¹¹⁰Article 23 of the 1945 *Ordonnance*; see Dictionnaire Permanent Droit des Etrangers, under "Expulsion" and Gacon-Estrada and Rodier 1996.

¹¹¹ Article 25(4) and Article 26(b).

In January 1997 the Minister of the Interior delegated the competence to make expulsion orders regarding aliens not covered by Article 25 to the head of the regional administrations (*Préfet*).¹¹² He also issued detailed instructions on the use of this new competence.¹¹³

The alien has to be informed in writing by the administration of its intention to make an expulsion order. The alien has the right to appear before a commission (*Commission d'expulsion*) composed of three judges. Such commissions have been established in each *département*. The commission gives an opinion on the expulsion. Since 1993 the administrative authorities are no longer bound to follow the advice of the commission. Moreover, the Minister of the Interior can order expulsion without referring the case to the commission in cases of absolute urgency (*en cas d'urgence absolue*).¹¹⁴ Hence, both the material and the procedural guarantees can be circumvented in certain cases. Only aliens under 18 years are granted absolute protection against expulsion.¹¹⁵

Judicial expulsion may be ordered by a criminal court as part of the sentence following a criminal conviction.¹¹⁶ This judicial expulsion also ends the validity of a residence card held by the person convicted. A court may hand down a ban on continued presence on the French territory (*interdiction du territoire*) in the event of conviction for offences in the immigration legislation¹¹⁷ or for certain crimes specified in the Criminal Code: manslaughter, drug trafficking, terrorism and violation of State security.¹¹⁸

Some categories of resident aliens in theory enjoy protection against this judicial expulsion. The categories are similar to but not identical with the ones protected against administrative expulsion. However, in 1993 this protection was diminished, while the number of crimes for which expulsion may be ordered was extended. The courts may now order the expulsion of those privileged resident aliens as well. Again, only aliens under 18 years enjoy absolute protection against expulsion.¹¹⁹

Expulsion practice

The actual number of expulsion orders made by the administration in the last three years was little over a thousand per year: 1,153 in 1994, 1,026 in 1995 and 1,166 in 1996.¹²⁰ These numbers include aliens in possession of a residence card or a temporary residence permit and aliens without residence documents. About half of the expulsion decisions are made against nationals of Algeria and Morocco. In the last two years approximately 150

¹¹²Décret of 13.1.1997, *Journal Officiel* of 16.1.1997.

¹¹³Circulaire of 16.1.1997

¹¹⁴Article 26(a).

¹¹⁵Article 25 and Article 26. However, the administration may order the expulsion of that child's parents.

¹¹⁶See Dictionnaire Permanent Droit des Etrangers, under "*Interdiction du territoire*" and Gacon-Estrada and Rodier 1996, p. 317ff.

¹¹⁷Article 21 of the *Ordonnance* of 1945.

¹¹⁸Articles 130-30, 213-2, 414-6, 422-4, 431-19, 442-12, 222-48 of the *Code pénal*.

¹¹⁹310-10 of *Code pénal*; Costa-Lascoux 1994, p. 33.

¹²⁰Data provided by the Ministry of Interior.

orders concerned the expulsion of EU citizens, mainly nationals of Southern member states. Drug-related crimes accounted for just under half of all expulsion decisions. This also applies to the 400 cases per year where the protection of Article 25 was withdrawn and expulsion was ordered on the ground of "*nécessité impérieuse*". That exceptional clause was also used in cases of murder, violence and robbery. We have seen a limited number of notices of intention to make an expulsion order, all concerning aliens covered by Article 25. Half of the aliens concerned actually held valid residence cards or their cards had expired during the prison sentence they were serving.¹²¹

The two other exceptional clauses that allow the administrative authorities to decide on expulsion without reference to the *Commission d'expulsion*, are used less frequently. The exception of "*urgence absolue*" has been used in recent years in 10 to 20 cases per year. The combination of the two exceptions was used in nine cases in 1995 and in 45 cases in 1996. Several respondents told us that the combined exceptions are used mainly in cases of aliens who have served very long prison sentences, when the administration wants to avoid a release pending proceedings before the Commission.¹²² Moreover, this procedure is used in a few cases (less than ten per year) of terrorist activities (ETA and GIA), incitement to violence against the French republic or actions against national security. In 1991 the exception for urgent cases was used in respect of nationals of certain countries considered to be a security risk in the light of the involvement of France in the Gulf War.

Both in 1995 and in 1996 less than 15% of the expulsion decisions were made in cases where the *Commission d'expulsion* had advised against the expulsion and in less than 5% the decision was made without the advice of the commission being requested. The role of the Commission is illustrated by the following data on the activities of the *Commission d'expulsion* in Paris and the decisions made by the *Préfet* and the Minister of the Interior. In 1996 the Paris aliens police was involved in almost 30% of all expulsion decisions in France.

From these data it appears that the Commission hardly ever advises against expulsion in cases of aliens not covered by Article 25. We were told that in the large majority of those cases the alien at the relevant time will still be serving a prison sentence and is hardly ever assisted by a lawyer before the commission. However, when the administration intends to use the exceptional clauses of Article 26 and withdraw the statutory protection, the commission is more critical: in half of these cases the Commission advised against expulsion. The Minister complies with the large majority of those opinions. In most of these cases the alien is not in detention and is represented by a lawyer before the Commission.¹²³ The administration knows that it will not be easy to defend expulsion in these cases before the administrative courts. In 1997 the Paris aliens police in 24 cases

¹²¹CIMARD, an NGO active in migration policy, in 1996 produced a review of 100 cases where expulsion orders were made between 1988 and 1995 against aliens born or long resident in France ("*Histoires d'expulsés*"). In most cases the order was made notwithstanding that the person was covered by the relative protection of Article 25.

¹²²However, this exceptional power is also used in respect of aliens who have been released after having served their prison sentence, Aubrée 1997.

¹²³For a critical view of the functioning of the Commission and the use of the exceptions of Article 26, see Aubrée 1997.

decided not to order expulsion but issued a written warning, that in the event of a further criminal offence expulsion would be ordered; 29 such warning were issued in 1996.¹²⁴

Opinions of Expulsion Commission and decisions by immigration authorities in Paris 1996/1997

	Aliens <u>not</u> covered by Article 25				Aliens covered by Article 25, admin. uses exceptions of Art. 26			Total			
	Favor	Unfav	Préfet	Min	Favor	Unfav	Min	Favor	Unfav	Préfet	Min
1996	299	8	-	281	36	37	42	335	45	-	323
1997*	240	16	213	16	32	38	27	272	54	213	43

Favor/Unfav = opinion of the commission in favor of/against expulsion

* The figures on 2.12.1997

Source: Administration des étrangers, Paris

From the case law concerning the concept *menace grave pour l'ordre public*¹²⁵ and from the experiences of our respondents, it appears that expulsion decisions generally are based only on behaviour of the individual alien which has resulted in a prison sentence. General preventive considerations should not be taken into account. Respondents, however, told us that some expulsion orders clearly are made with the aim to set an example for other resident aliens. The administration evaluates not only the actual threat, but the potential threat (*risque future*) as well. We were repeatedly told that with regard to aliens with long residence in France a long series of relatively short prison sentences more often result in expulsion than one conviction to a very long prison sentence for a "*crime passionnel*".

Several respondents told us that a third of the expulsion decisions are not implemented.¹²⁶ In many cases where expulsion is hard to carry out, alternative measures are used: a written warning, suspension of the expulsion order or the imposition of a restricted residence order.¹²⁷ The latter alternative means that the expulsion order remains in force and the alien is obliged to live in a certain area until the order is lifted at the end of the probationary period. During that period the person is not entitled to social security benefits.

Since an expulsion order can be made against aliens with or without residence rights in France, only part of the above figures relate to aliens holding a residence card or equivalent document. Hence in practice the number of people holding a residence card who are actually expelled from France is limited. Considering the total number of aliens holding a residence card or its equivalent for Algerian nationals (2.2 million) the number of aliens actually threatened with expulsion is extremely small.

¹²⁴Both in 1996 and in 1997 one fifth of the cases submitted to the Commission had not yet been decided by the administration.

¹²⁵See Dictionnaire Permanent Droit des Etrangers, Expulsion, no. 23.

¹²⁶Weil 1997, p. 99 mentions that 62% of all administrative expulsions orders are actually implemented and 33% to 57% of the judicial expulsion measures.

¹²⁷In 1996 the Minister of the Interior issued 229 written warnings and imposed a restricted residence order in another 150 cases.

A larger numbers of aliens with secure residence rights may be affected by the judicial expulsion, if only because the number of *interdiction judiciaire du territoire* is much higher: 10,500 in 1996.¹²⁸ However, 80% of those measures concerned aliens without residence documents. The remaining 20% are aliens with any type of residence permit in France. Often expulsion decrees are made in cases of aliens already under a judicial expulsion measure. By this double check the administration ensures that, after the court has lift its residence prohibition, the administration still can prevent further legal residence.

Influence of European instruments

France signed the European Convention on Establishment in 1995, but has not yet ratified that convention.

In 1991 the French State Council (*Conseil d'Etat*) integrated the jurisprudence of the European Court of Human Rights on Article 8 ECHR with regard to the protection against expulsion of aliens with very long residence and close families ties in the country of residence into French case law.¹²⁹

The Minister of the Interior has repeatedly (in 1991, 1994, 1996 and 1997) issued circular letters to the administrative authorities explaining the case law of the Court in Strasbourg and inviting the authorities to keep that case law in mind when deciding on expulsion.¹³⁰ The 1997 instruction at three points explicitly refers to that case law. Apparently the local immigration authorities are still predominantly oriented towards the national legislation and find it difficult to integrate the Strasbourg case law in their practice. Half of the statements of the intention to make an expulsion order we saw, concerned aliens, born in France or living there ever since their early youth, but contained no information on ties with the country of nationality of the alien. From these statements it was clear that the local authorities considered the absence of integration in French society far more relevant to their decision on expulsion than the presence or absence of ties with the country of nationality.

The *Loi Chevènement* of April 1998 extended the right to a temporary residence permit to certain categories of aliens protected by Article 8 ECHR, but unable to acquire a residence permit under the previous text of the *Ordonnance* of 1945.

Our question why so far most of the relevant judgments by the Court in Strasbourg on Article 8 ECHR originated from complaints against France, provoked the following answers: the administration circumvents the statutory protection against expulsion by a broad interpretation of the exceptional powers granted by the law, the rigorous attitude of the immigration authorities in certain regions, the high number of judicial expulsion

¹²⁸Weil 1997, p. 98. Liger 1996, citing S. Philibert, J.O. of 10.4.1996, Vol I, p. 149, mentions a total of almost 8,000 judicial expulsions for 1995.

¹²⁹*Conseil d'Etat* 18.1.1991 (Beldjoudi) and 19.4.1991 (Belgacem); see also Corouge 1997 and Vandendriessche 1997.

¹³⁰*Circulaires* of 25.10.1991, 8.2.1994, 5.4.1996 *Bulletin Officiel*, 2nd trim. 1996, p. 12-21) and 16.1.1997.

measures, the absence of suspensive effect of administrative appeals against expulsion decisions and the activities of NGOs supporting test cases for aliens in Strasbourg.

The general rules on expulsion are also applied to EU-citizens and to Turkish workers and their family members. Privileged treatment of those aliens is provided for neither in the *Ordonnance* nor the Decree on the implementation of Community law in French immigration legislation.¹³¹ Article 24 of the *Ordonnance* of 2 November 1945 complies with the provisions of the community law as embodied in Directive 64/221 on public order, health and public security of 25 February 1964. The provisions on expulsion are applicable to all aliens resident in France, European Union nationals as well as third country nationals. There are special rules on the expulsion of nationals of six former French colonies in Africa based on bilateral agreements with those countries.¹³²

NGO activities

The residence card was introduced in 1984 after an intense campaign begun in early 1983 by CIMADE, GISTI and many other immigrant, lawyers and human rights organisations calling for "*la carte unique de 10 ans*".

Around 1990 similar organisations began a campaign against double punishment ("*la double peine*"), the application of both a prison sentence and expulsion in respect of the same criminal conviction. In 1991 a well-known Moroccan author (Diouri), who resided in France since 1974 as a refugee and hence held a residence card, was expelled on the basis of the rules on absolute urgency, on the ground that the publication of his book on King Hassan II could strain the relations between France and Morocco. After extensive media coverage and NGO-activities the expulsion decision was quashed on appeal by an administrative tribunal and the author was allowed to return to France. The NGO campaign in 1991 also involved a hunger strike and a Committee against the Expulsion of Sick People acting against the intended expulsion of a 27-year old Moroccan man, infected with Aids, who had lived in France since the age of 7 years.¹³³ Shortly after this campaign the statutory power to expel resident aliens was restricted.¹³⁴ This restriction, however, was repealed by the *Loi Pasqua* of 1993, described by the GISTI as a "*retour de la double peine*".¹³⁵ That organisation continued to oppose the extension of the judicial expulsion and complained that the bill introduced by Minister *Chevènement* in 1997 maintained the double sanction for resident aliens.¹³⁶

Simple acquisition of French nationality

¹³¹ *Décret* of 11.3.1994 and the *Circulaire* of 7.6.1994. Both documents are reprinted in GISTI 1995; see also Dictionnaire Permanent Droit des Etrangers, under Expulsion, no. 46.

¹³² *Circulaire* of 16.1.1997, under I(8) on p. 7. For example the expulsion of nationals of Central African Republic, Gabon and Togo may only be ordered by the Prime Minister. The conventions signed with these three countries have been subject to revision and have been modified in this regard.

¹³³ *Le Monde* 11.12.1991 and Migration News Sheet January 1992, p. 3.

¹³⁴ A change of the *Ordonnance* of 1945 by an Act of 31.12.1991.

¹³⁵ GISTI 1993, p. 43/44.

¹³⁶ GISTI 1997, p. 9.

French nationality legislation has for decades provided that second generation immigrants born in France and having lived in France ever since their birth, automatically become French nationals at the age of majority. In 1993 a conservative government initiated a change of the law providing for the acquisition of French nationality by expression of wish ("*manifestation de volonté*") for persons born in France to non-French parents. These aliens acquire French nationality by simple declaration made between the ages of 16 and 21. The two requirements were: to have lived in France during the five years preceding the declaration and to have no conviction resulting in a prison sentence of more than six months for a serious criminal offence committed after the age of 18 years. Only the third generation acquires French nationality automatically by birth from alien parents. In autumn 1997 the socialist coalition government proposed to amend the nationality legislation, basically returning to the old system: a person born in France to non-French parents automatically acquires French nationality at 18 years, if at that time he has lived in France for at least five years after the age of 11 years. He may also opt for French nationality by way of declaration as soon as he is 16 years old. These proposals have been enacted in March 1998.¹³⁷ In 1996 CIMADE published a report on the negative effects of successive changes in the immigration law and practice on young immigrants with long residence in France.¹³⁸

¹³⁷Amendments to Article 21 (7) and Article 21 (11) of the Code civil, introduced by the Act no. 98-170 of 16.3.1998, *Journal Officiel* of 17.3.1998, p. 3935.

¹³⁸CIMADE 1996.

3.3 Germany

Foreign population

At the end of 1996 the total number of alien residents in Germany was 7.3 million, i.e. 8.9% of the total population. Turkish nationals (2 million) are by far the largest group (28% of the alien population). EU-citizens, primarily from Italy, Greece, Austria, Spain and Portugal, make up 25% and the citizens of the states of the former Yugoslavia are 10% of the registered aliens. More than 49% of all aliens, half of the Turkish nationals and 60% of the Italian and Greek nationals have already been living in Germany more than 15 years. One fifth of the aliens were born in Germany.¹³⁹

Secure residence status

The main body of German immigration legislation was codified in the new Aliens Act which entered into force in 1991.¹⁴⁰ The Aliens Act is a federal law which is implemented by the administrative authorities of the sixteen *Länder*. Within the limits set by the federal legislation and under control of the federal Minister of the Interior, the *Länder* may have their own rules on certain issues. Thus, the practice with respect to family reunification or expulsion may differ between the *Länder*. In 1997 a draft of the general instructions on the implementation of the Aliens Act (*Allgemeine Verwaltungsvorschriften zum Ausländergesetz - AuslG-VV*) were sent by the Federal Minister of the Interior to the authorities of the *Länder* for comments.

The Aliens Act institutes five different types of temporary residence status¹⁴¹ and two permanent residence statuses: the unrestricted residence permit (*unbefristete Aufenthaltserlaubnis*) and the establishment permit (*Aufenthaltsberechtigung*). The new Act by a codification of the administrative practice and the case law, developed under the previous Aliens Act of 1965, considerably restricted the discretion of the administration. Under the old legislation the administration could issue either one of the two secure residence statuses, but it was not obliged to do so by law. Under the current legislation an alien fulfilling the statutory conditions has a right to obtain the secure status.¹⁴²

An alien is entitled to an unrestricted residence permit after five years residence on the basis of a temporary permit, if (s)he possesses a work permit or a permit for self-employment, has sufficient income and accommodation for the family, has sufficient command of the German language to make him/ herself understood, and there are no

¹³⁹Ausländerbeauftragte 1997, p. 17 and Annex: Tables 2 and 7; Lederer 1997, p. 84.

¹⁴⁰Ausländergesetz of 9.7.1990, Bundesgesetzblatt I, p. 1354.

¹⁴¹See Article 5 Aliens Act: *befristete Aufenthaltserlaubnis* (Article 15 ff.), *Aufenthaltsbewilligung* (Article 28), *Aufenthaltsbefugnis* (Article 30), *Aufenthalts gestattung* (Article 55 Asylum Procedure Act) and *Duldung* (Article 55 Aliens Act).

¹⁴²Huber 1991, p. 111. For example, in the draft general instructions it is stated that as soon as the conditions for an unrestricted residence permit are met by the alien, the temporary residence permit should be replaced by a permit without restrictions (par. 24.0.4.1 AuslG-VV).

public order objections that could justify expulsion. If one spouse has sufficient income to support the family, the other spouse is not required to have a work permit.¹⁴³ Spouses of German nationals are entitled to an unrestricted residence permit after three years residence, if they speak some German and there are no public order objections.¹⁴⁴ It is not required that the alien reads or writes German. The person should be able to make him(her)self understood in daily life in Germany.¹⁴⁵ Children admitted for family reunification are entitled to an unrestricted residence permit, if they have been in Germany for eight years by the time they reach the age of 16 years. If the eight-year residence requirement is only met when they turn 18, they then have to meet the language and income requirements as well. The limited grounds for refusal of an unrestricted residence permit to these second-generation immigrants are enumerated in the law.¹⁴⁶

The establishment permit (*Aufenthaltsberechtigung*) and the unrestricted residence permit both grant a residence right that is not restricted with respect to the aim or length of residence. The establishment permit offers better protection against expulsion than an unrestricted residence permit. An alien is entitled to this permit if (s)he fulfils the requirements for an unrestricted residence permit plus the following four criteria:

- eight years of residence on the basis of a temporary residence permit or three years on the basis of an unrestricted one,
- sufficient income,
- payment of at least 60 months worth of social security contributions,
- no prison sentence of more than six months during the last three years.

Some of these conditions are not required or lowered with regard to certain privileged groups: former German citizens, spouses of German citizens, refugees and spouses of aliens holding an establishment permit.¹⁴⁷ The requirement of social security contributions has been deleted for second generation immigrants in secondary or professional education, as part of the amendments to the Aliens Act in 1997.¹⁴⁸

Practice

The Central Aliens Registry (*Ausländerzentralregister*) in 1996 published data on the residence documents of 5 million of the 7.3 million aliens. Among the others are probably a large group of children not having separate documents, but generally having a residence status with a similar level of security as their parents. Just over half of all aliens holds one of the two more secure residence documents: 17% of all aliens holds an establishment permit and 36% is in possession of an unrestricted residence permit. One quarter holds a temporary residence permit (24%) The remaining quarter (e.g. foreign students, temporary

¹⁴³Article 24 Aliens Act.

¹⁴⁴Article 25 Aliens Act.

¹⁴⁵Par. 24.1.4 (draft) AuslG-VV.

¹⁴⁶Article 26 Aliens Act.

¹⁴⁷Article 27 Aliens Act.

¹⁴⁸Gesetz zur Änderung straf-, ausländer- und asylrechtlicher Vorschriften 29.10.1996, that entered into force on 1.11.1997.

workers, asylum seekers, displaced persons granted temporary protection) have a less secure residence status.

Residence status of the alien population of Germany on 31.12.1996¹⁴⁹

Establishment permit (<i>Aufenthaltsberechtigung</i>)	866,769	17%
Residence permit (<i>Aufenthaltserlaubnis</i>)		
unrestricted (<i>unbefristet</i>)	1,827,715	36%
temporary (<i>befristet</i>)	1,235,697	24%
<i>Aufenthaltsbewilligung</i>	198,882	4%
<i>Aufenthaltsbefugnis</i>	249,226	5%
<i>Aufenthalts gestattet</i>	351,083	7%
<i>Duldung</i>	<u>337,539</u>	<u>7%</u>
Total	5,066,911	100%

Among Turkish nationals the percentage having an establishment permit is (25%) clearly above the average. The relatively small number of the aliens holding an establishment permit is surprising, considering that, on the one hand, 54% of the total alien population has been living more than eight years and 40% already more than 15 years in Germany, whilst, on the other hand, the number of naturalisations has been relatively low.¹⁵⁰ The percentages of aliens holding an establishment permit vary considerably between the *Länder* from 7% in Saarland to 21% in Bremen.¹⁵¹

Aliens have to file an application for an establishment permit. They may be unaware of the advantages of this residence status or their entitlement to this status. In a large survey conducted in 1995 about one third of the aliens in possession of an unrestricted residence permit said that they had not applied for the establishment permit, they were entitled to, because they were unaware of the possibility of acquiring this more secure residence status.¹⁵²

Expulsion

According to the Aliens Act, both residence permits and establishment permits may lose their validity on the basis of a decision of the administration if the permit was obtained on the basis of incorrect information or when the alien has lost his or her passport or nationality. The permits lapse when the alien has left Germany permanently or is absent for more than six months without the prior authorisation of the aliens police or as the automatic consequence of an expulsion order made against the alien.¹⁵³

¹⁴⁹Ausländerbeauftragte 1997, Annex table 8; Lederer 1997, p. 88-93.

¹⁵⁰Lederer 1997, p. 80 and 84.

¹⁵¹Bundesverwaltungsamt, Statistische Informationen aus dem Ausländerzentralregister zur ausländischen Bevölkerung in der BRD, Köln, January 1997.

¹⁵²Mehrländer a.o. 1996, p. 383.

¹⁵³Articles 43 and 44 Aliens Act.

The Aliens Act distinguishes between grounds that may give rise to expulsion, grounds that generally will lead to an expulsion order and situations where an expulsion order has to be made.

The authorities may make an expulsion order (*Kann-Ausweisung*) if the presence of the alien is a threat to public order, national security or other serious interests of the state. A range of examples are listed in the Act: e.g. incitement to violence, prostitution, use of drugs, repeated criminal acts, homelessness, dependency on public assistance. It is left to the discretion of the authorities to balance the interests of the persons concerned and the public interest.¹⁵⁴

An expulsion order has to be made, save for exceptional cases (*Regel-Ausweisung*), in the case of a prison sentence that is not suspended, drug trafficking, or participation in a banned demonstration that resulted in violence against persons or goods.¹⁵⁵ This last ground has been added by an amendment of the Act adopted in 1997 in reaction to the repeated violent actions of Kurdish organisations in Germany.¹⁵⁶

These amendments also widened the grounds where the law obliges the authorities to make an expulsion order (*Ist-Ausweisung*). Under the new provisions expulsion has to be ordered in the case of a prison sentence of three years (previously: five years) or a prison sentence of two years in the case of a conviction under the drugs legislation, serious breach of the peace or participation in a banned demonstration.¹⁵⁷

The expulsion order (*Ausweisung*) implies both the loss of residence rights, the obligation to leave and a ban on return to the country. The authorities in making an expulsion order are under a statutory duty to take into account the length of lawful residence of the alien, his or her personal and economic ties with Germany and the consequences of expulsion for family members who are living with the alien in Germany.¹⁵⁸

Certain resident aliens enjoy relatively high protection against expulsion. This protection is granted to: first generation immigrants in possession of an establishment permit, second generation immigrants, born 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. With respect to these privileged aliens the statutory obligation to make an expulsion order is changed into the category where the administration is allowed to make exceptions to the rule. Decision-making in cases where generally an expulsion order should be made (*Regel-Ausweisung*), with respect to the protected aliens is left to the discretion of the authorities. With regard to children under 18 years and immigrants who have grown up in Germany and possess one of the two secure residence statuses, there is no statutory obligation to make an expulsion order. Moreover, the discretion of the authorities is limited by the statutory rule that expulsion of protected aliens can only be

¹⁵⁴Article 45(1) and 46 Aliens Act.

¹⁵⁵Article 47(2) Aliens Act.

¹⁵⁶Amendments introduced by the Act of 29.10.1997 mentioned above; Huber 1996, p. 10.

¹⁵⁷Article 47(1) Aliens Act.

¹⁵⁸Article 45(2) Aliens Act.

justified by weighty reasons of public security or public order ("*schwerwiegenden Gründen der öffentlichen Sicherheit und Ordnung*").¹⁵⁹ The Aliens Act does not provide an absolute protection against expulsion for any category of aliens.¹⁶⁰

Expulsion practice

Due to the decentralised implementation of the Aliens Act there are no national statistics on the number of expulsions, and certainly no statistics as to the expulsion of aliens with long legal residence. The 1994 statistics on all cases of forced departure from Germany indicate that less than one quarter of all expulsion orders were actually implemented. Two thirds of the aliens actually forced to depart were asylum seekers whose application had been refused.¹⁶¹ Presumably most of the other deportees were illegal immigrants. A detailed description of the practice in expulsion cases in a large city amounts to a long tale of legal and practical barriers both to the making of an expulsion order and its actual implementation: protection granted by national legislation or international instruments, administrative and judicial remedies, integration of the resident or his/her family in German society, etc.¹⁶²

In order to get some impression of the current expulsion practice we wrote to officials responsible for the implementation of the Aliens Act in nine cities in six different *Länder* asking them about the number of aliens living for more than 15 years resident or born in Germany, who were actually expelled by their administration in 1995 or 1996. We received responses from officials in seven cities in five *Länder*. The alien population of those seven cities together amounts to 500,000 persons. In four cities no expulsion order had been made against any long-term aliens as defined in our questionnaire during those two years. In one city eight expulsion orders had been made. However, only half of these orders had actually been implemented. In the other cases the expulsion order was not yet effective due to administrative appeals, or because the alien was still serving his prison sentence and the public prosecutor had not agreed to the forced departure of the alien. The aliens administration in the city with the largest alien population (approximately 200,000 persons) responded that no statistical data were available with regard to the expulsion of the category of aliens we indicated. However, due to the protection granted by Article 48 Aliens Act that number would be very small ("*... ist von einer sehr geringen Anzahl von Ausweisungen auszugehen.*"). With regard to aliens living in the city with the second largest alien population in our small survey, an average of 300 expulsion orders were made in 1995 and 1996. It was estimated that certainly not more than a quarter of those orders were made in respect of aliens with long legal residence. The differences in expulsion practices between the cities apparently are due to clear differences in position on this issue between the governments of the *Länder*. Several *Länder* have instituted a hardship

¹⁵⁹Article 48, Article 47(3) and Article 45(2) Aliens Act.

¹⁶⁰Schumacher 1996, p. 243. However, there is statutory protection against forced departure to a country where there is the risk of persecution, torture or death penalty, Article 51(1) and Article 53.

¹⁶¹Holtschneider 1996, p. 72.

¹⁶²Holtschneider 1996, p. 63-67; see also Knösel 1991.

commission (*Härtefall-Kommission*) which advises how to handle "humanitarian" cases where the restrictive federal legislation leads to socially or politically unacceptable results.

No data on the actual implementation of those expulsion orders were available. Probably all in all between 50 and 100 expulsion orders were made in those seven cities with respect to long-term resident aliens and only part of those orders actually resulted in forced departure. One of the officers, we had addressed, in a long telephone interview, mentioned the extensive use of various remedies against expulsion by long-term residents. Moreover, she mentioned several alternative responses: postponing decision making to give the alien an opportunity for rehabilitation, issuing a formal written warning instead of an expulsion order, or making an expulsion order with a relatively short ban on return to Germany. The officers in the three cities that reported to have made expulsion orders against long-term resident aliens, stated that such orders were made primarily in cases of long prison sentences for drug trafficking. In the reply from one city cases of very serious violence (murder or rape) were also mentioned.

Influence of European instruments

Germany ratified the European Convention on Establishment in 1965. The ratification of the Convention by Turkey in 1990 resulted in a liberalisation of rules on the issue of unrestricted work permits and in an improvement in protection against expulsion for Turkish nationals living in Germany. The improvement was limited by the interpretation of the Convention in the case law of the *Bundesverwaltungsgericht* in 1993. However, it remained effective in practice, as long as the scope of the protection provided under the EEC-Turkey Association Agreement was still disputed.¹⁶³

The case law of the European Court of Human Rights on Article 8 ECHR is frequently referred to in judgements of German courts. It is discussed in the immigration law journals. According to our respondents there are few if any cases where the effect of the national legislation (*Ist-Ausweisung* or *Regel-Ausweisung*) was corrected by the national courts on the basis of the Strasbourg case law.¹⁶⁴ In most reported cases the national court considered the ties with Germany weaker than in the cases judged by the Court in Strasbourg.¹⁶⁵ The 1997 draft of the general instructions on the implementation of the Aliens Act explicitly refers to Article 8 ECHR and the need to comply with it in national practice.¹⁶⁶

The Federal Commissioner for Foreigners' Affairs (*Ausländerbeauftragte*) repeatedly advised the German government to grant an irrevocable right of residence to those persons who have particular close ties with the country. In her 1993 report the Commissioner in this respect referred to the Court's judgement in the *Moustaquim* case. In her 1995 report

¹⁶³See Informationsbrief Ausländerrecht (InfAuslR) 1991, p. 36, 223 and 339; InfAuslR 1992, p. 91 and 341; InfAuslR 1994, p. 13, 45 and 98; InfAuslR 1995, p. 99 and 313. For a recent more liberal interpretation of Article 3 European Convention on Establishment by the Bundesverwaltungsgericht see InfAuslR 1997, p. 8.

¹⁶⁴Also Schumacher 1996, p. 254.

¹⁶⁵E.g. Bundesverwaltungsgericht 28.1.1997, InfAuslR 1997, p. 296, at p. 301.

¹⁶⁶Par. 45.05.4-4.2 (draft) AuslG-VV.

she referred to the separate opinion of one of the members of the European Commission of Human Rights in another expulsion case.¹⁶⁷

Community law on free movement has been implemented by a special Act, explicitly restricting the scope of the general provisions on expulsion in the Aliens Act with respect to EU-citizens enjoying the right of free movement.¹⁶⁸ The limited extent of the implementation of the relevant case law of the European Court of Justice with regard to expulsion of EU-citizens by the administration has been subject to criticism.¹⁶⁹

German courts have given different interpretations to the meaning of Article 14 of Decision 1/80 of the EEC-Turkey Association Council regarding expulsion of Turkish citizens. Some courts have held that this provision grants Turkish workers and their family members the same protection as EU-citizens, other courts have opted for a more restrictive interpretation. The latter interpretation is followed in the draft of the separate general instructions on the implementation of Decision 1/80, which the Federal Minister of the Interior sent to his colleagues of the *Länder* for their comments in 1997.¹⁷⁰

Simple acquisition of German nationality

The German Nationality Act of 1913 is based on the principle that German nationality is acquired either by descent or by naturalisation. The normal residence requirement for naturalisation is ten years and the grant discretionary. Immigrants of German decent (*Aussiedler*) who have come from certain areas in Central and Eastern Europe after admission to Germany are entitled to be naturalised in a simple procedure. As opposed to most other applicants for naturalisation, they are not required to give up their previous nationality.¹⁷¹ However, the 1990 Aliens Act has been amended in 1993 in order to grant second- generation immigrants who have been raised and received most of their schooling in Germany, as well as immigrants with more than fifteen years of lawful residence in Germany a right to naturalisation. These new provisions, as opposed to the rules of the 1913 Nationality Act, allow for dual citizenship under certain circumstances.¹⁷² The number of naturalisations has increased from almost 45,000 in 1993 to over 86,000 in 1996 (excluding the naturalisations of *Aussiedler*). The number of naturalisations is still relatively low, as compared with other countries in Western Europe.¹⁷³ Naturalisation

¹⁶⁷ *Lamguindaz, v. UK*, 28.6.1993, application 16152/90; see *Ausländerbeauftragte* 1993, p. 84 and 1995, p. 58.

¹⁶⁸ Article 12 Aufenthaltsgesetz/EWG of 31.1.1980, *Bundesgesetzblatt I*, p. 116.

¹⁶⁹ Brinkmann 1996: 174-184 and *Ausländerbeauftragte* 1997, p. 94ff.

¹⁷⁰ *Allgemeine Anwendungshinweise des Bundesministeriums des Innern zum Beschluss Nr. 1/80 des Assoziationsrats EWG/Türkei*, draft of 26.9.1997 under point 5.2, where no reference is made to the judgment of the Bundesverwaltungsgericht of 11.6.1996, *InfAuslR* 1997, p. 8. The more liberal position of that court is shared by Zuleeg 1996 and *Ausländerbeauftragte* 1997, p. 96.

¹⁷¹ Groenendijk 1997.

¹⁷² Articles 85-91 Aliens Act, as amended in 1993.

¹⁷³ Lederer 1997, p. 77 ; Thränhardt 1995, p. 94ff.

practice varies considerably between the *Länder*, Bavaria apparently having the most restrictive practice and Berlin the most liberal one.¹⁷⁴

¹⁷⁴ Thränhardt 1995, p. 87ff.

3.4 The Netherlands

Foreign population

In 1994 approximately 780,000 persons without Dutch nationality were registered in the Netherlands, i.e. 5% of the total population (15.3 million). The two largest groups were the nationals of Turkey (203,000) and Morocco (165,000), together accounting for almost half of the alien population. Nationals of EU member states (195,000) accounted for a quarter of the alien population. Due to the large number of naturalisations in the three years after 1994 (in 1996 alone more than 80,000 alien residents acquired Dutch nationality), the total alien population decreased to 680,000 in 1997. At that time 85% of first generation immigrants from Turkey and 60% of those from Morocco had been living for 15 years or longer in the Netherlands. In contrast, half of the first generation immigrants from other countries outside the EU had lived in the Netherlands for less than five years.¹⁷⁵ In 1997 over 9% of the total population had been born outside the Netherlands.

Establishment permit and other secure residence status

The Aliens Act of 1965 introduced the principle that certain categories of aliens should have a secure residence right.¹⁷⁶ Aliens who have lawfully resided in the Netherlands for five consecutive years are entitled to an establishment permit (*vestigingsvergunning*), on two conditions: sufficient and stable income, and no serious offence against public order.¹⁷⁷ The income has to be at least equal to the standard amount of public assistance benefits. An employed person should have an employment contract for more than one year. The income requirement does not apply to aliens with ten years of residence.¹⁷⁸ Neither is it applied to children and spouses admitted for family reunification. On the basis of instructions of the Minister of Justice, published in the Aliens Circular, these children are entitled to an establishment permit once they are 18 years old and have lived in the country for five years.¹⁷⁹ Spouses are entitled to the permit after five years residence if the total income of the family meets the above standard.¹⁸⁰

The ministerial instructions specify that the permit is to be refused for reasons of public order only where the alien has been convicted and sentenced to two years in prison.¹⁸¹

The residence requirement does not apply for nationals of Belgium and Luxembourg. They are entitled to an establishment permit, if they have sufficient income and do not present an actual threat to public order.¹⁸²

¹⁷⁵Prins 1997, p. 9.

¹⁷⁶Swart 1978, p. 121.

¹⁷⁷Article 13 of the Act.

¹⁷⁸Article 13(4) of the Act.

¹⁷⁹Aliens Circular 1994, chapter B2, under 3.3.2. The text of the main chapters of the Aliens Circular are published as a paperback: Pocket Vreemdelingencirculaire, The Hague (SDU) 1997.

¹⁸⁰Aliens Circular 1994, chapter A4, under 7.7.2.

¹⁸¹Aliens Circular 1994, chapter A4 under 4.3.2.2.

¹⁸²This privileged status is granted by the Articles 55 and 56 of the 1960 Treaty on the Benelux

Since 1965 the statutory rules concerning establishment permits have been changed on minor points only. In 1985 the State Council introduced a more restrictive interpretation of the residence requirement: residence has to be lawful during the full five years. Before, periods of tolerated or illegal residence were accepted, if the alien held a residence permit at the time of application for an establishment permit.¹⁸³ Most relevant ministerial instructions have been in force for more than ten years.

The entitlement to an establishment permit does not depend on a timely application. The local aliens police are instructed to inform an alien of his or her right to this permit and how to obtain it, once the residence requirement has been met.¹⁸⁴ The State Council has held that the entitlement to an establishment permit lapses where the alien after being invited by the aliens police has failed to apply for it.¹⁸⁵

Refugees with Convention status receive a residence status identical to that of the establishment permit immediately on their admission in the country.¹⁸⁶

An establishment permit entitles the alien to permanent residence in the Netherlands. There are no time limits or other restrictions linked to this permit. The establishment permit grants access to employment without a work permit.¹⁸⁷ In the Netherlands there are no special requirements for self-employment by aliens. For aliens in possession of an establishment permit the conditions for admission of family members are more or less identical to the rules on family reunification with Dutch citizens. In social security and other areas equal treatment with Dutch nationals is not restricted to aliens having an establishment permit, but generally granted to aliens with a temporary residence permit as well. The right to vote and stand for election in municipal elections is granted to all aliens with five years lawful residence in the Netherlands.

Until 1994 the spouses and children under 18 years, admitted for family reunification with a Dutch national or with an alien holding an establishment permit, 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. However, this rule was abolished in January 1994. Family members admitted afterwards no longer receive that special secure status. They have to apply for renewal of their temporary residence permit each year, until they are entitled to an establishment permit under the rules described above. Family members admitted before 1994 continue to hold their permanent residence right.¹⁸⁸

Economic Union, implemented by Article 99(1) Aliens Decree.

¹⁸³Kuijjer and Steenbergen 1994, p. 67.

¹⁸⁴Aliens Circular 1994, chapter A4, under 7.6.1.

¹⁸⁵Raad van State 25.1.1993, Rechtspraak Vreemdelingenrecht 1993, no 32.

¹⁸⁶Article 15 Aliens Act.

¹⁸⁷Article 4(2)(a) Aliens Employment Act (Wet arbeid vreemdelingen), Act of 21.12.1994, Staatsblad 1994, no. 959.

¹⁸⁸Article 10(2) Aliens Act, the now deleted Article 47 Aliens Decree, and Article III of Royal Decree of 6.1.1994 amending the Aliens Decree, Staatsblad 1994, no. 4.

Establishment permit and other secure residence status in practice

According to information from the registration system of the aliens police at the end of 1996 two thirds of registered aliens had a secure residence status: either an establishment permit, refugee status, a statutory right to permanent residence as family members admitted before 1994, or the strong residence right under EC law. One fifth of all aliens had a temporary residence permit valid for one year only. Approximately 10% of registered aliens were awaiting a decision on their asylum request or application for another residence status. Children under twelve years do not have their own residence documents. Mostly they will have the same residence rights as their parents. Probably less than a quarter of these children (4% of the total alien population) will have a less secure status, on accounts of the fact that their parents hold a temporary residence permit only.

Residence status of registered aliens in the Netherlands on 31.12.1996

	abs.	%
Establishment permit	152,205	23
Refugee status	32,856	5
Family members with permanent residence right	75,996	11
EC-residence card	76,867	12
Temporary residence permit	135,606	20
Provisional residence permit (temporary asylum)	6,072	1
Children under 12 (no separate document) ¹⁸⁹	120,524	18
Asylum seekers without status (estimated ¹⁹⁰)	35,000	5
Other aliens awaiting decision on status (estim.)	<u>28,000</u>	<u>4</u>
Total	663,000	100

Survey data confirm this picture from the official registry. In a large survey of Turkish and Moroccan immigrants in 1994 it appeared that 70% of heads of families held an establishment permit and another 16% had a statutory right to permanent residence.¹⁹¹

The number of refusals of establishment permits appears to be very small. None of the lawyers we interviewed perceived this as a major problem. The District Court of Amsterdam, one of the five district courts handling administrative appeals in immigration matters, during the last four years (1994-1997) received twenty appeals concerning decisions to refuse an establishment permit, an average of five appeals per year. There is no time limit on the establishment permit. Hence, the issue of renewal does not arise.

¹⁸⁹Source; CBS, Central Office for Statistics; for data on age groups of aliens for 1996 Ph. Muus, Sopemi report on The Netherlands 1996, Utrecht (ERCOMER), p. 69.

¹⁹⁰The numbers of asylum seekers and other aliens awaiting a decision on their residence status have been estimated by police authorities on the basis of the Aliens Registration System (VAS).

¹⁹¹Data produced for this report by E.P. Martens of the University of Rotterdam; other results of his survey are described in Martens 1995.

Loss of an establishment permit: public order and long absence

An establishment permit is valid until it is withdrawn by the Minister of Justice. Withdrawal is possible on the following grounds only: the permit has been obtained on the basis of incorrect information, repeated offences against the immigration legislation, conviction for a serious crime or serious threat to national security. The permit has to be withdrawn once the alien has moved his or her residence outside the Netherlands. A stay abroad of more than nine months may be considered as a definite departure.¹⁹² Loss of income or employment, or dependence on public assistance are not grounds for withdrawal of the permit.

A decision to withdraw an establishment permit is subject to administrative review. The Minister of Justice has to ask the Advisory Commission on Aliens for its opinion on the request for review. A refusal to review the original decision can be appealed to the Aliens Chamber of the District Court.¹⁹³ Where the Minister of Justice intends to expel an alien pending the review, the alien may seek an interim injunction from the President of the District Court.

The possibility of withdrawal of an establishment permit for offences against the immigration legislation has for all practical purposes been ruled out by ministerial instructions. Withdrawal on national security grounds is extremely rare. The last published case, concerning a citizen of Iraq suspected of being active in the Palestinian organisation El Fatah, dates back to 1991.¹⁹⁴ In practice the remaining problems with residence rights for aliens with long residence in the Netherlands centre around the consequences of serious criminal behaviour and long absence from the country.

The practice of expulsion of resident aliens on public order grounds over many years has been the subject of public debate. The categorisation of expulsion of established aliens having served their prison term as a "double punishment" was already in use in the mid seventies.¹⁹⁵ The highest administrative court gradually restricted the discretion of the administration: only final convictions to prison sentences actually to be served were accepted as sufficient ground for withdrawal of a permit and the administration had to take into account the length of lawful residence. Political pressure resulted in 1979 in the statement in a government white paper on immigration policy that second generation immigrants would only be expelled after a conviction for a very serious crime threatening Dutch society. That rule was extended to all aliens with ten years lawful residence, two years later in a white paper on the governments' new Minorities Policy. That paper also introduced another rule: after two years of legal residence expulsion would only be possible after a prison sentence where more than six months must be served.¹⁹⁶

¹⁹² Article 14 Aliens Act and Aliens Circular chapter A-4 under 7.6.2.

¹⁹³ Article 31(2)(a) Aliens Act.

¹⁹⁴ The request for administrative review was granted by the Ministry of Justice, *Rechtspraak Vreemdelingenrecht* 1991, no. 57.

¹⁹⁵ Swart 1978, p. 214 and Swart 1984.

¹⁹⁶ Groenendijk 1987, p. 1342.

Empirical research revealed that in the eighties the actual number of withdrawals of establishment permits was limited: two or three cases a year for incorrect information and between 20 to 40 cases for criminal convictions. Three quarter of the latter cases were drug-related crimes or murder. More than one in four of the withdrawal decisions was repealed or annulled on review. In some cases aliens received a temporary residence permit allowing the administration to check on the persons future behaviour on the yearly application for renewal.¹⁹⁷

In February 1990 the Secretary of State for Justice issued an instruction with new rules on expulsion.¹⁹⁸ The instructions contain "a sliding scale" and special rules protecting certain groups. These rules are still in force. At the lower end of the scale it is provided that after three years of lawful residence an alien is only expelled on the basis of a prison sentence of which over 18 months must be served; after five years residence only on the basis of a prison sentence of which over 24 months must be served. At the upper end of the scale the rules are: after ten years residence expulsion is only permitted on the basis of a prison sentence of more than 60 months and solely in cases of serious violence or drug trafficking; after fifteen years only on the basis of a sentence of over 96 months. After twenty years residence an alien can no longer be expelled on public order grounds. This last rule also applies to second generation immigrants, born in the Netherlands or admitted for family reunification and having resided in the country for 15 years.¹⁹⁹

These rules (commonly called the "tariff") provide considerable security for resident aliens. Their application is closely monitored by the courts. The administration may decide to expel an alien not protected by these rules. But it is not obliged to do so. Recently a court reminded the administration that even in these cases Article 8 ECHR is applicable and hence, it has to weigh the interests of the alien and his family against the interests of the state.²⁰⁰

The 1990 instructions state that a decision to withdraw an establishment permit as a rule should include an order banning return to the Netherlands. That order may be given for an indefinite period. The alien may after five years (or ten years in cases of serious violence or drug trafficking) apply for withdrawal of the expulsion order.²⁰¹

As a result of these rules the number of withdrawals of establishment permits has been further reduced. The exact number of such decisions is not recorded. However, the Advisory Commission on Aliens which has to be consulted on requests for review of a withdrawal, during the last three years (1995-1997) received 65 requests and gave 61 opinions in such cases: hence little over twenty cases per year.²⁰² Half of the cases in

¹⁹⁷Groenendijk 1987, p. 1344ff; Groenendijk 1996, p. 354.

¹⁹⁸Circular of the Secretary of State for Justice of 20.2.1990, Staatscourant of 12.3.1990, no. 50.

¹⁹⁹Aliens Circular chapter A-4 under 4.3.2.2. For the application of these rules see Kuijer en Steenberg 1996, p. 213-222.

²⁰⁰District Court The Hague 27.3.1997, Vreemdelingenbulletin 1997, no. 13, p. 19.

²⁰¹Aliens Circular chapter A-5 under 6.4.

²⁰²Not all cases of withdrawal will reach the Commission. The alien may not ask for a review of the decision. However, most lawyers consulted considered that few aliens will immediately accept the loss of their establishment permit. Besides, the Ministry may decide to review its first decision without consulting the Commission. In those cases the aliens' residence rights

which the Commission gave an opinion concerned withdrawal of an establishment permit on the ground that the alien had moved his or her residence abroad. In five cases the withdrawal was based on incorrect information being provided by the alien and in 25 cases it was based on public order grounds (an average of eight cases per year). In 7 of these 25 cases the Commission advised the minister to revise the withdrawal of the establishment permit.

The Aliens Chamber of the District Court of Amsterdam in 1994-1997 dealt with just over ten appeals where an establishment permit had been withdrawn. The majority of those cases were disputes on whether the aliens had moved their residence outside the Netherlands or not. In three cases the permit was withdrawn on public order grounds. The six judgements in similar cases stored in the database covering the five Aliens Chambers all were made in respect of cases where prison sentences of five to ten years had been imposed and the alien convicted had resided in the Netherlands between 10 and 15 years. In half of these cases the courts annulled the expulsion order.

According to the lawyers we interviewed in the last few years expulsion cases concern either first generation immigrants with very long prison sentences mostly for drug trafficking, the sentence being too long for protection under the 1990 rules or second generation immigrants in "borderline" and marginal cases: immigrants who were under eight years at entry, but were never registered with the police by their relatives or who lost their residence right at the age of 18 years and forgot to apply for a new residence document, or did apply for an establishment permit but failed to pay the Dfl. 500,- administrative fee and hence their application was automatically rejected. Problems then arise when these young immigrants get caught by the police in relation to serious criminal offences.

Protection against expulsion

Under Dutch law at present four categories of aliens have an "absolute" residence right.²⁰³ First, family members who have a statutory right to remain permanently in the Netherlands. The administration has no power to end that residence right, as long as the spouses are living together in the Netherlands and, as regards the children, as long as they are under 18 years.

The second category is aliens who have resided in the Netherlands for twenty years or more. Second generation immigrants, who are born in the Netherlands or have been admitted for family reunification and resided in the country for 15 years, are the third category. Since the 1990 ministerial instruction these categories can no longer be expelled. Thus, a child born or having lived in the country since the age of three years cannot be expelled, even when at the age of 18, its statutory residence right ends.

are restored.

²⁰³Groenendijk 1996, p. 351 ff.

Finally, a special Act on the status of Moluccan immigrants and their descendants grants a right to equal treatment with Dutch nationals.²⁰⁴ These immigrants, who served in the Dutch colonial army in Indonesia, were admitted to the Netherlands in the early fifties. Because of their intention to return and establish an independent republic on the Moluccan Islands, most of these immigrants did not want to acquire Dutch nationality preferring to remain stateless after they had lost their Indonesian nationality. The large majority of this group over time has acquired Dutch nationality either by naturalisation or, with respect to descendants, by birth. Hence, the number of immigrants covered by this act is gradually diminishing.

NGO activities

The 1990 instructions restricting expulsion were prompted by three events: a long campaign by NGOs, the case law of the State Council and the decision of the European Commission of Human Rights in the *Moustaquim* case. As part of a long campaign against "double punishment", NGOs had invited MPs specialising in immigration issues to visit the large prison complex where a number of aliens were serving long prison sentences. The MPs spoke with the prisoners and their family members and received first hand experience of the consequences of the threat of expulsion for the families of the detainees who were living in the Netherlands. The pressure from these MPs, some recent decisions of the State Council allowing appeals in cases of aliens with more than ten years residence in the country²⁰⁵, and the *Moustaquim* decision of the European Commission of October 1989, all combined assisted to overcome objections against the restriction of the statutory power to expel aliens on the ground of long prison sentences. In the prison complex for many year a group of lawyers and volunteers had assisted detained prisoners threatened with expulsion and their families living in the Netherlands. Soon after the introduction of the new rules in 1990 this group was dissolved as there were no longer sufficient numbers of cases to justify its existence. The new rules had almost solved this problem.

Influence of European instruments

The Netherlands ratified the European Convention on Establishment in 1969. Visible effects are the introduction of the establishment permit, the role of the Advisory Commission on Aliens and the rule granting suspensive effect on request for administrative review made by nationals of the State Parties to that convention.²⁰⁶ The five and ten year periods in Article 13 Aliens Act may be indirectly related to similar periods mentioned in Article 12 of the convention. The Aliens Circular contains a short chapter on the convention.²⁰⁷

²⁰⁴Act on the Legal Status of Moluccans (Wet op de rechtspositie van Molukkers), of 9.9.1976, Staatsblad 1976, no. 672.

²⁰⁵Rechtspraak Vreemdelingenrecht 1988, no. 57 and 1989, nos. 52 and 54.

²⁰⁶Swart 1978, p. 121 and 353. Article 103 Aliens Decree for the rule on suspensive effect, that actually applies solely to Turkish nationals after two years lawful residence.

²⁰⁷Chapter B-5.

The case law of the European Court of Human Rights on Article 8 ECHR in expulsion cases and the decision of the European Commission in the *Moustaquim* case have undeniable contributed to the restriction of both the rules and the practice in expulsion cases. The Strasbourg case law has been closely followed by national courts and the legal press.²⁰⁸ It is frequently referred to in the Aliens Circular.²⁰⁹

In 1996 the Ministry of Justice stipulated in the Aliens Circular that the provision on public order in Article 14 of Decision 1/80 of the Association Council EEC-Turkey grants Turkish workers, covered by that Decision 1/80, the same protection against expulsion as provided to nationals of the EU member states under Community law.²¹⁰

Simple acquisition of Dutch nationality

First generation immigrants can acquire Dutch nationality only by naturalisation after five years residence. The second generation born in the Netherlands may acquire nationality by simple declaration to be made with the municipal authorities between the age of 18 and 23 years on the sole condition that the person has lived in the Netherlands since birth. The third generation receives Dutch nationality automatically at birth.²¹¹

²⁰⁸Swart 1990, Van Dijk 1994, Koens 1993, Steenbergen 1989 and 1990, Stokkenbroek 1996, p. 350-365 en Vrouwenraets 1997.

²⁰⁹E.g. in chapter B-1 under 4.5.1.

²¹⁰Aliens Circular Chapter B-4 under 9.1; Kuijter and Steenbergen 1996, p. 222.

²¹¹Article 8 (naturalization), Article 6 (option) and Article 3(3) (birth) of the Act on Netherlands nationality of 19.12.1984, Staatsblad 1984, no. 628.

3.5 Spain ²¹²

Foreign population

Spain, until the beginning of the process towards democracy in the mid 1970s, long had been a country of emigration. The return of Spanish workers from France, Germany and other European countries and the arrival of migrant workers attracted by the economic boom in Spain in the eighties turned it into a country of net immigration. In these years foreign migrant workers predominantly came from South and Central America and from Morocco, because of the cultural similarities, former colonial ties or visa free travel. In recent years migrant workers have come from other African countries, Central Europe and the Philippines as well. During a series of regularisation campaigns in 1986, 1989 and 1991 large numbers of illegal workers received work and residence permits. In 1993 a system of yearly quotas for the admission of migrant workers was introduced. The number of legally resident aliens increased from little over 50,000 in 1955 to 430,000 in 1994 and over 500,000 in 1996. In 1994 the alien population made up just over one percent of the total population of Spain (39 million persons). Half of the alien population are nationals of EU Member States, 22% are nationals of Latin American states, 14% Moroccan, and 11% Polish nationals.²¹³

Permanent residence and work permits

The development of an immigration policy in Spain during the first half of the eighties resulted in the adoption of the Act on the rights and duties of aliens in 1985.²¹⁴ The implementation of that Act with respect to immigrants, not being refugees, was dominated by the system of work permits established by the Aliens Decree of 1986.²¹⁵ This decree was replaced by a new aliens decree in 1996. Currently there are four different types of work permits: one for seasonal labour (permit A), one for employment up to one year (permit B), which may be renewed for two years, and permit C valid for a maximum of three years and for all employment. This permit is granted to aliens who have worked for three years. Finally, an alien who has held a permit C for three years is entitled to the fourth permit, the permanent labour permit valid for an indefinite period of time.²¹⁶

The 1996 Aliens Decree establishes for the first time a special residence status for long-term immigrants.²¹⁷ The decree provides for three different residence permits:²¹⁸ the initial residence permit valid for one year and renewable for a period of up to two years; the ordinary residence permit to be issued to aliens who have three years of continuous

²¹²We gratefully acknowledge the contribution of Ms. Henar Armas Omedes (Nijmegen) in the preparation of this section.

²¹³Ministerio de Trabajo 1997; Eurostat 1997; Cornelius 1994.

²¹⁴Act 7/1985 of 1 July 1985.

²¹⁵Royal Decree no. 1199 of 26 May 1986.

²¹⁶Article 39 of the 1986 Aliens Decree replaced by Article 75 of the Aliens Decree of 1996; Izquierdo Escribano 1992, p. 101; Groenendijk and Hampsink 1995, p. 66.

²¹⁷Royal Decree no. 155/1996 of 2.2.1996, BOE 23.2.1996, p. 6949, hereafter cited as Aliens Decree.

²¹⁸Article 49 Aliens Decree.

lawful residence in Spain; this permit is valid for three years; finally, the permanent residence permit (*permiso de residencia permanente*), which is issued to aliens after six years of continuous lawful residence. This residence requirement is reduced to five years for certain privileged categories.²¹⁹ Permanent residence permits are also issued to aliens admitted as refugees or stateless persons and to family members of an alien holding permanent residence permits who have been admitted for family reunification and their children born in Spain. Further, a permanent residence permit will be issued to second generation immigrants born in Spain who have been lawfully resident for three years preceding their 18th birthday. A similar exception is made for aliens of Spanish origin who have turned 18 years.²²⁰ Aliens who fulfil the statutory conditions have a right to permanent permits.

A permanent residence permit is valid for an indefinite period of time. The document has to be renewed every five years.²²¹ The decision on the application is made by the administrative authorities of the province (*Delegacion de Gobierno*). The local aliens police gives its opinion on the application and issues the document.

A permanent residence permit does not entitle an alien to a privileged position as regards access to employment, education or social security benefits. The permit does not free an alien from the obligation to have a work permit.²²² The idea is that the alien applies for both the permanent work permit and the permanent residence permit at the same time.

Residence permits in practice

In April 1996, when the new Aliens Decree came into force, more than 400,000 aliens were living in Spain on the basis of a residence permit under the previous rules. According to information from the Ministry of the Interior over 1,500 permanent residence permits were issued between April 1996 and July 1997.

In practice the residence permit and the work permit are closely linked. Practical obstacles to obtaining or renewing work permits appear to be considerable.²²³ When applying for renewal of a work permit the alien has to prove that (s)he still has an employment contract and, where (s)he is self-employed that social security contributions have been paid during periods covering at least three quarters of the period of validity of the last work permit. If the alien has not paid these contributions the work permit will not be renewed and his or her residence permit can be revoked or its renewal refused. When the alien is unemployed at the end of the period of a renewed work permit, the residence permit will be extended

²¹⁹Articles 52(1) and 79 Aliens Decree.

²²⁰Article 52(2) and 54 Aliens Decree. The latter provision covers the spouse, children, and the economically dependent parents of the alien.

²²¹Article 52(3) Aliens Decree; Alfonso Pérez 1997, p. 55 ff.

²²²The general obligation of aliens to have a work permit either for employment or for self-employment (Article 15 Aliens Act) is repeated in Article 71 Aliens Decree. Aliens holding a permanent resident permit are not mentioned among the categories exempted from this obligation in Article 16 Aliens Act.

²²³Cornelius 1994, p. 339.

for one year in order to allow the alien to look for another job.²²⁴ Under these rules aliens who had been lawfully resident for more than five years in Spain, have lost their residence permit because they had not paid the required social security contributions. In practice the initial residence permit often is not renewed for one year but for six months only. Moreover, the ordinary permit regularly is granted not for three years but for considerably shorter periods. If a residence permit is not renewed as from the expiry date of the previous permit, lawful residence has been interrupted. Hence the qualifying periods of lawful residence (six years) for entitlement to a permanent residence permit and (ten years) for naturalisation start to run all over again. For certain aliens it might be difficult to establish the six years uninterrupted legal residence required for the permanent residence permit.

Among practising lawyers there is not much experience yet with the implementation of rules on permanent residence permits. A lawyer running a trade union legal aid service for immigrants told us that, although the Aliens Decree does not explicitly require the alien applying for a permanent permit to have sufficient income, she expects that the aliens police in practice will check the income of applicants. If the income is deemed to be insufficient or if the alien is unemployed, the ordinary residence permit will be revoked or its renewal refused. The alien then would no longer qualify for a permanent residence permit. Since it is left to the administrative authorities of the provinces to decide on applications for a permanent residence permits, practice may vary between the provinces.

Expulsion and protection against expulsion

A permanent residence permit may lose its validity either as a result of a decision of the administrative authorities or automatically. The latter occurs if the holder renounces the permit, in case of war or emergency, or where the alien has been outside Spain for more than six months. The administration may revoke the permit if the alien no longer has sufficient income or accommodation, where there is change or loss of nationality, and where the reasons for issuing the permit are no longer present.²²⁵ All three grounds apply to permanent residence permits as well.

In Spain an expulsion order may be made by the administration or by a court. The administration may order the expulsion of an alien holding a residence permit on the ground of participation in activities against public order, internal or external security, or against interests of Spanish citizens or of Spain. Moreover, an expulsion order may be made if an alien has been illegally resident (i.e. after a temporary permit expired), has taken employment without a work permit, is begging or practising other illegal activities, has committed or has been convicted, either in Spain or abroad, of a crime and sentenced to a prison term of over one year, or where the alien provided incorrect information to the Ministry of the Interior.²²⁶ Whilst aliens holding other resident permits may be expelled on the latter grounds, holders of a permanent permit may only be expelled if they have committed these acts twice within one year.²²⁷

²²⁴Alfonso Pérez 1997, p. 180 ff.

²²⁵Article 60 Aliens Decree.

²²⁶Article 26 Aliens Act and Articles 98 and 99 Aliens Decree; Alfonso Pérez 1997.

²²⁷The same protection is granted to persons born in Spain and to aliens of Spanish origin,

The initiative to make an expulsion order lies with the local or regional police. They will prepare the file and send it to the regional authorities. An expulsion order is made by the administrative authorities at the provincial level. The alien is notified of commencement of the expulsion procedure.²²⁸ The alien has a right of appeal to an administrative court, but the appeal has no suspensive effect, unless a court issues an injunction. An expulsion order carries a ban on return to Spain for a period between three and five years.²²⁹

Judicial expulsion may be ordered by a criminal court where an alien is charged with a crime that is punishable with a prison sentence of up to three years.²³⁰ In practice an alien holding a residence permit who is suspected of having committed a serious offence, will often not be tried but deported on the basis of an expulsion order, if the competent judge consents to the expulsion. This practice was confirmed by an instruction from the General State Prosecutor of 1994 requesting that expulsion orders be made against all aliens charged with a serious offence. In December 1997 the Court of Appeal in Madrid held in the case of a Chinese national who was residing and working lawfully in Spain and was charged with illegal employment of several compatriots, that the decision of the investigating judge who upon the request of the police had authorised the expulsion, violated the principle of presumption of innocence and the right of the person to defend himself in court.²³¹

In 1996 a total of 4,837 expulsion orders were made against aliens who had held residence permits. It is highly unlikely that among them were aliens who currently held permanent residence permits, since those permits were only issued as of April 1996. Of the expulsion orders 30% were made against Moroccans, 30% against nationals of Latin American countries and 5% against nationals of other EU member states. Most expulsion orders were made on the ground that the residence permit had expired, the alien had breached public order or no longer had sufficient income. Only 7% of expulsion orders were based on convictions to prison sentences of more than one year, illegal labour or providing incorrect information with an application for a residence permit. Over 40% of the expulsion orders were made in four of the 49 Spanish provinces: Madrid, Malaga, Barcelona and Alicante.²³²

Influence of European instruments

Spain has not yet ratified the European Convention on Establishment. It ratified the European Social Charter in 1980 and the European Convention on the Legal Status of Migrant Workers in 1983. Both Conventions contain provisions reinforcing the legal status of migrant workers. The protection of both conventions is restricted to migrants who are

Article 99(3) Aliens Decree.

²²⁸Amico Anaya 1992.

²²⁹Article 36 Aliens Act.

²³⁰Article 21(2) Aliens Act; Alfonso Pérez 1997, p. 242.

²³¹Audiencia Provincial de Madrid 11.12.1997, El País 12.12.1997, Migration News Sheet January 1998, p. 3.

²³²Ministerio del Interior 1997, p. 147-162.

nationals of other State Parties to the Convention. Since most of the State Parties to both Conventions are EU/EEA states, the number of migrants in Spain who can rely on these two Conventions is limited.

The impact of the case law of the ECtHR with respect to the meaning of Article 8 ECHR in expulsion cases on the Spanish immigration law and practice apparently has so far been small.²³³

The rules of Community law on free movement of workers and other persons have been transposed into Spanish immigration law by a separate Royal Decree of 1986 that was amended in 1992.²³⁴ This decree provides special protection of EU citizens against expulsion by restricting the grounds for expulsion.

The drafters of the 1996 Aliens Decree took into account discussions on the draft-resolution on the status of third-country nationals residing in the EU member states which were going on in the EU's Third Pillar during 1995. That resolution was eventually adopted in March 1996.²³⁵

The EEC-Turkey Association Agreement appears to have little relevance for settled migrants in Spain so far. The number of Turkish citizens living in Spain is rather small: 340 at the end of 1996.²³⁶

Simplified acquisition of Spanish nationality

The general residence requirement for naturalisation is ten years of uninterrupted legal residence. A refusal to renew a residence permit makes the previous lawful residence irrelevant to the required ten year period. The ten year period is reduced to five years for refugees and to two years for nationals of Latin American countries, Portugal, The Philippines, Equatorial Guinea and for Sephardic Jews. The residence requirement is reduced to one year for aliens born in Spain or who have been married to Spanish citizens for more than a year.²³⁷

In 1996 a total of 8,432 aliens acquired Spanish nationality, mainly nationals of Latin American countries, Portugal and the Philippines. Moroccan nationals, many of them resident in Spain since the early 1970s, made up 8% of those naturalised.²³⁸

²³³Alfonso Pérez 1997, makes one reference to the Strasbourg case law on Article 8 EHCR at p. 246 footnote 5.

²³⁴Royal Decree no. 1099 of 26 May 1986 replaced by the Royal Decree 766/1992 of 26.6.1992; Alfonso Pérez 1997, p. 305.

²³⁵Information obtained from the Spanish Ministry of Interior.

²³⁶Ministerio del Interior 1997, p. 108.

²³⁷Article 22 of the Civil Code as amended by the Act 18/1990.

²³⁸Ministerio del Interior 1997, p. 166; Cornelius 1994, p. 357.

3.6 United Kingdom

Introduction

According to data produced by Eurostat, in 1994 the total UK population was 54,5 million of which an estimated 2 million were aliens (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 1986 and 1996 over 580,000 aliens acquired a right of permanent residence in the UK. As this right is automatically lost after a period of absence²³⁹ it is unknown how many of these aliens still retain the right.

The cornerstone of UK immigration law is the Immigration Act 1971.²⁴⁰ The entry into force of the Act²⁴¹ marked the end of a transition which had taken place over approximately ten years from the UK as a country where any Commonwealth citizen had a right to enter, reside and engage in economic activities indefinitely to a country where only nationals of the European Union member states could aspire to such a right.

The Act itself contains the principal provisions relating to expulsion which find specificity in the Immigration Rules (statutory instrument which must be laid before Parliament) HC 395 being those currently in force. These Rules are amended regularly and are supplemented by non-statutory concessions and practices.²⁴²

The key to permanent residence in the UK for an alien is a status known as "indefinite leave to enter or remain."²⁴³ This is the most important status²⁴⁴ giving aliens²⁴⁵ a right to live in the UK and engage in economic activities for as long as they wish. The number of persons acquiring this status has risen steadily over the past ten years notwithstanding changes to the Immigration Rules which increased the requirements for its acquisition. In 1986 47,820 persons were granted indefinite leave to enter or remain, in 1996 61,730 persons acquired it. According to the Government Statistical Service the reason for the increase in 1996 was "due to a rise in the number of asylum-related cases i.e. persons

²³⁹ In excess of two years.

²⁴⁰ The Act has been supplemented by a number of further Acts on the same subject but which are not of primary relevance to this study.

²⁴¹ On 1 January 1973.

²⁴² For a general overview of UK immigration law, see Macdonald and Blake 1996, Shutter 1997, Jackson 1996 and Supperstone and O'Dempsey 1996.

²⁴³ "To enter" when accorded at the border, "to remain" when accorded after entry into the country.

²⁴⁴ Important in the sense of numbers of persons affected and availability of the status to be acquired. A number of other statuses exist such as the right of abode, the right of readmission which also give rights to live and work in the UK but these affect only small numbers of persons or can no longer be acquired.

²⁴⁵ For these purposes includes Commonwealth citizens other than British citizens.

granted asylum four years earlier or exceptional leave to remain seven years earlier, together with their spouses and dependants.²⁴⁶

Indefinite leave to enter or remain

This status may only be acquired by aliens who require "leave to enter" the UK. This distinction, which appears odd, is necessary to understanding the UK system. There are some Commonwealth citizens who are not British citizens but who have the right of abode in the UK. This status is a quasi-nationality status in that once acquired, it cannot be lost otherwise than by renunciation of citizenship and the holder is not liable to expulsion.

An alien with indefinite leave to enter or remain in the UK cannot be subject to any conditions on that permission, for instance in respect of work or duration.²⁴⁷ However, the status is "lost" every time the person leaves the UK²⁴⁸ and must be re-established every time the person seeks to re-enter the UK.²⁴⁹ Normally this is a formality when the person has been abroad for a short period of time. However, if the person is not coming back to the UK with the intention of "settling" (i.e. remaining permanently there) on that occasion or if the person has been abroad for two years without returning to the UK the status is usually lost.²⁵⁰ According to some lawyers interviewed, loss of the status as a result of absence from the territory constitutes a substantial obstacle for aliens and a more important source of loss of rights than expulsion.

Indefinite leave to enter or remain can be acquired in three principal ways:²⁵¹

- by an individual in his or her own right on completion of four years of certain economic activities;²⁵²
- as a spouse or dependant of a British citizen or person with indefinite leave to enter or remain or in the process of acquiring it at the same time;
- as a Convention refugee or person not recognised as a Convention refugee but granted exceptional leave to remain.²⁵³

The detailed rules for categories 1 and 2 are set out in the Immigration Rules and include a sufficient resources test, category 3 is covered by administrative concession and discretion.

²⁴⁶ Control of Immigration: Statistics United Kingdom 1996, CM3737 Home Office 1997.

²⁴⁷ Section 3 Immigration Act 1971.

²⁴⁸ More precisely, the Common Travel Area which includes the UK and the Republic of Ireland.

²⁴⁹ Section 3(4) Immigration Act 1971.

²⁵⁰ Paragraph 18 Immigration Rules HC 395.

²⁵¹ A fourth category of particular interest to this study is the administrative concession to grant indefinite leave to remain to persons who have been lawfully resident on the territory for a period of ten years, or on a combination of lawful and irregular (or indeed exclusively irregular) residence for a period of 14 years.

²⁵² This further includes Commonwealth citizens with a UK born grandparent taking or seeking employment, British Overseas citizens with special vouchers, Commonwealth citizens or nationals of Pakistan ordinarily resident on 1.1.73 and thereafter.

²⁵³ This ground is related, albeit obliquely, to the protection required of the UK in accordance with Article 3 ECHR.

Once acquired the right is free standing, the individual holds the right as such independently of the ground on which it was granted.

Practice

In 1996 a total of 61,730 aliens acquired indefinite leave to remain in the UK. This figure includes spouses and children whose applications were dependent on the outcome of a principal application's request ("in-line" dependants). It also includes appeal outcomes. Of this number 47,370 decisions were made in respect of principal applicants.

Aliens granted/refused indefinite leave to remain (ILR) 1993 - 1996

	1993	1994	1995	1996
Number of ILR decisions ²⁵⁴	44,160	43,760	46,250	47,370
% of applications refused	7.3	6.9	7.4	5.3

Out of the total number of aliens, including "in-line" dependants and appeal outcomes, who were granted indefinite leave to remain in 1996²⁵⁵ the largest single category of applicants is "wives" at 21,520. The next largest group is "husbands" with 21,450 applicants followed by "children" numbering 10,740. A long way behind are persons acquiring indefinite leave to remain after four years exercise of an economic activity: 4,140. Persons given protection outside the Geneva Convention status of refugee who are eligible for indefinite leave to remain after seven years residence in that capacity appear next: 3,080. Recognised refugees eligible for the status after four years residence after recognition accounted for 1,090 grants. The final group which may be of interest is "other discretionary" at 2,840 grants. This group includes various compassionate cases but also persons who become eligible for the status on a discretionary basis after 10 years lawful residence or 14 years mixed lawful/irregular or completely irregular residence.

The largest regional group gaining indefinite leave to remain in 1996 was from the Indian sub-continent at 22% in comparison with the 1986 percentage from the same region of 30%. The next largest regional group is Africa at 21% comparing with the 1986 percentage of 9%. Thereafter, the categories "remainder of Asia", Americas and Europe (including EEA) in 1996 accounted for between 12-15% each; the figures for 1986 are slightly lower but consistent.

Therefore, the most important groups gaining a secure residence status in the UK in 1996 (and consistent for the preceding periods) are immediate family members of persons who have a residence right in the UK (be it indefinite leave to remain or citizenship) from countries of the New or Old Commonwealth. Out of 61,730 grants, spouses and dependants (including parents and grandparents) accounted for 48,550 in 1996. The comparable figures for 1986 are out of a total of 47,820 family members numbered 34,470.

²⁵⁴ This number excludes "in-line" dependents and the outcome of appeals.

²⁵⁵ 61,730.

In law there is no right to indefinite leave to remain for any category of applicant. Each case is considered on its merits in accordance with the relevant immigration rules but with a substantial degree of discretion retained by the authorities to grant or refuse the status. There is a right of appeal to a statutory tribunal in the event of refusal provided the procedural requirements have been fulfilled.

Expulsion and protection against expulsion

Once lawfully acquired,²⁵⁶ indefinite leave to enter or remain can be lost in one of four ways: absence from the territory; an administrative decision to make an expulsion order on the basis that the Secretary of State deems the person's expulsion conducive to the public good;²⁵⁷ having the misfortune of being a family member (as defined) of a person who is or has been ordered to be expelled;²⁵⁸ where a court recommends expulsion as part of a sentence for a criminal conviction²⁵⁹ and the Home Office chooses at its discretion to follow the recommendation.

There is no power to withdraw the status. There has been little amendment to the grounds on which expulsion of an alien with indefinite leave to remain can be ordered. Since the passing of the 1971 Act the only amendment to the provision on expulsion has been in respect of persons who have lived less than seven years in the UK and have limited permission to reside. Here the procedural guarantees were dramatically diminished by statute in 1988.²⁶⁰

Three categories are exempt from expulsion: British citizens, persons holding the right of abode,²⁶¹ and certain Commonwealth and Irish nationals whose residence in the UK dates from before 1973.

In all cases the decision to proceed to expel an alien is made by the Secretary of State through the officials of the Immigration and Nationality Directorate. Except in the case of a recommendation by a criminal court, the initiative is taken by the Secretary of State with the service of a decision to make an expulsion order. The notice must state the grounds on which the action is being taken. In respect of the category of aliens of interest to this study, a right of appeal lies against the decision to make an expulsion order.²⁶² The exercise of the appeal right means that all expulsion action is suspended pending the final outcome of the appeal. Such an appeal right was introduced in 1969. Exceptionally, where the decision is taken on political grounds and certified by the Secretary of State personally no right of appeal lies. This lack of a remedy was criticised by the European Court of Human Rights

²⁵⁶ If fraud is alleged to have been used in the acquisition of the status alternative procedures may apply.

²⁵⁷ Section 3(5)(b) Immigration Act 1971.

²⁵⁸ Section 3(5)(c) Immigration Act 1971 - this ground will be dealt with together with the preceding ground.

²⁵⁹ Section 6 Immigration Act 1971.

²⁶⁰ Section 5 Immigration Act 1988.

²⁶¹ Since 1.1.1983 this status cannot be acquired independently of citizenship.

²⁶² Section 15(1) & (2) Immigration Act 1971.

in 1996²⁶³ and a Bill is currently before Parliament to provide a right of appeal in these circumstances.

The majority of non-political cases where expulsion proceedings are commenced on the ground of the public good relate to aliens who have been convicted of criminal offences but the court has not recommended expulsion.²⁶⁴ Not every conviction can legitimately give rise to a decision to expel. There must be some public interest at stake in favour of the person's expulsion. The most common types of criminal convictions which give rise to a decision to expel the alien relate to import²⁶⁵ or supply of serious drugs²⁶⁶ or very serious offences against the person: murder or armed robbery. Sporadically, serious social security fraud seems to give rise to a decision.

The Immigration Rules set out the factors which must be taken into account. Factors to be taken into account include:

- age;
- length of residence in the UK;
- strength of connections with the UK;
- personal history, including character, conduct and employment record;
- the nature of the offence of which the person was convicted;
- previous criminal record;
- compassionate circumstances;
- any representations received on the person's behalf.

The consequence of expulsion²⁶⁷ is a permanent prohibition on re-entry to the UK unless the order is revoked.²⁶⁸ A person expelled from the UK may apply to have his or her expulsion order revoked. Normally at least three years should elapse before there is a likelihood of a successful application. Further, during that period the person is usually expected to have been outside the UK though there are exceptions. In order to avoid the consequences of an order, persons may be given the opportunity to leave voluntarily before the order is signed after which point no order will be signed. In no case of expulsion on the basis of the public good did an alien take advantage of such a possibility in 1996. There were 10 supervised departures in 1995, a procedure recommended for young and first time offenders, though it may also be used in respect of family members of a person being expelled.

The power of a criminal court to make a recommendation for expulsion²⁶⁹ does not have the effect of requiring the expulsion of the individual. The ultimate decision whether to

²⁶³ *Chahal* (70/1995/576/662) judgment of 15.11.1996.

²⁶⁴ Macdonald & Blake, *Immigration Law & Practice*, 3rd Edition, Butterworths, London 1995.

²⁶⁵ Anecdotaly, couriers of drugs seem to come within this category.

²⁶⁶ In UK criminal law usually those in Class 'A'; heroin and similar substances.

²⁶⁷ The signing of a deportation order.

²⁶⁸ Except where the ground was on the basis of being a family member of a person being deported and the individual ceases to be a family member or reaches majority; similarly if a person becomes a British citizen the deportation order ceases to have effect.

²⁶⁹ Section 15 Immigration Act 1971.

accept or reject the criminal court's recommendation rests with the Secretary of State. He is under a duty to take into account the factors set out above when deciding whether or not to accept such a recommendation. A recommendation for expulsion forms part of the sentence of the court and may therefore be the subject of appeal within the criminal court system. The Court of Appeal has laid down some guidelines on the exercise of the power:²⁷⁰

- is the person's continued presence in the UK to its detriment;
- minor offences do not merit expulsion recommendations;
- the effect on innocent third parties (such as family members);
- length of residence in the UK;²⁷¹
- compassionate circumstances.²⁷²

Recommendations should not be added to a sentence without argument and where the court is considering a recommendation it should invite the parties to make representations.

Although not a form of expulsion, the automatic loss of indefinite leave to enter or remain constitutes a substantial problem. Aliens who have acquired the status lose it automatically under this head in one of two ways: either they remain outside the country in excess of two years²⁷³ or on returning to the UK within that period fail to satisfy an immigration officer that they are seeking "settlement" i.e., they are returning to make the UK their home on that occasion. However, the Immigration Rules do state that where a person falls foul of either of these rules he or she may nonetheless be admitted with indefinite leave to enter if "he has lived here for most of his life."²⁷⁴

Practice

As regards the administrative power to make an expulsion order against aliens with a secure residence status, this is very sparingly used. In 1996 120 such decisions were made on the primary basis available²⁷⁵ for expulsion of such persons though this basis can also be used against short term aliens. Thereafter 20 decisions were withdrawn. 90 expulsions actually took place. According to lawyers, usually aliens exercise their right of appeal against the decision to make an expulsion order though occasionally they withdraw their appeals before determination, usually on the basis of family circumstances. They further indicate that there are some common characteristics of aliens subject to expulsion decisions and exercising their appeal rights: they tend to be men, between 25-40 with wives and children resident in the UK. It is less clear whether the family circumstances motivate the extra efforts to remain in the UK and therefore the class is self selecting, or whether this properly represents the category of aliens long resident in the UK and subject to expulsion decisions.

²⁷⁰ *R v Nazari* [1980] 3 All ER 880.

²⁷¹ *R v Sandhu* [1978] Crim LR 103 CA.

²⁷² *R v Walters* [1978] Crim LR 175 CA.

²⁷³ Paragraph 18(ii) Immigration Rules HC 395.

²⁷⁴ Paragraph 19 Immigration Rules HC 395.

²⁷⁵ Conducive to the public good - see above.

Expulsion Action: 1986-96 - On the Ground of Public Good

Year	Notice of expulsion	Decision not to expel	Departed voluntarily	Expulsion order enforced
1986	140	-	-	100
1987	70	-	-	70
1988	70	40	-	70
1989	110	20	20	70
1990	190	10	20	70
1991	270	100	40	90
1992	150	30	10	130
1993	110	10	-	140
1994	130	20	-	100
1995	90	20	-	70
1996	120	20	-	90

The power to make an expulsion order on the basis of national security appears to be used only infrequently. According to persons interviewed for this study the numbers annually rare reach double digits. However such decisions are often highly contentious.

In practice the power of criminal courts to make a recommendation is not widely used. From 1991 to the present courts annually make about 300-400 such recommendations. Such recommendations apply to all aliens, not only those with a secure residence status who will be the minority with whom the courts come in contact.²⁷⁶ In 1996 360 such recommendations were made against which ten appeals were successful and in another thirty cases the Secretary of State decided not to proceed. 270 orders were actually made in respect of which all persons were expelled. Aliens with a secure residence status are likely to form a very small part of this figure. In practice it is not clear that criminal courts regularly consider expulsion recommendations or indeed are aware of the nationality of the person and hence possibility of making a recommendation. However, where the courts are aware of their power and are contemplating its use the person must be notified seven days in advance of the hearing in order to have an opportunity to address the issue.

Further, where a court has recommended expulsion in respect of an alien the Immigration and Nationality Directorate undertakes a separate appreciation of the circumstances before deciding whether to proceed with an order. Even in cases of temporarily resident aliens where a recommendation is made following a criminal conviction an administrative decision to proceed does not necessarily follow. In general, the most common circumstances where a person is recommended for expulsion is on grounds of criminal activity involving prohibited drugs of a serious nature or serious offences against the person. The IND is likely to come to the same appreciation of the balance of the alien's interest in continued residence as against the public good as found by the courts.

²⁷⁶ Shoplifting and other minor offences against property are the most common.

Influence of European instruments

The UK ratified the European Convention on Establishment in 1969. The concession to grant aliens with 10 years lawful residence in the UK permanent residence comes from the convention. The UK grants aliens with indefinite leave to remain a higher level of protection against expulsion and free access to all economic activities after a shorter period of residence than required by the convention. Moreover, this strong legal status is granted to all aliens with indefinite leave to remain, irrespective of their nationality.

The UK is currently in the process of incorporating the European Convention on Human Rights. This will render the jurisprudence of the ECtHR directly relevant to national court and tribunal decisions. Further, as a result of the judgement of the Court of Human Rights in *Chahal* a right of appeal is being introduced for aliens threatened with expulsion on political grounds.

As regards the practice in the Immigration and Nationality Directorate, lawyers do not find that references to international instruments had to detailed replies other than in respect of European Community law. One complaint which arose on a number of occasions from lawyers was that a standard paragraph relating to arguments on the European Convention on Human Rights seems to be inserted into refusal letters from the IND without any indication how the assessment of, for instance, the right to family life against the protection of the community required under Article 8 ECHR was carried out. This is likely to change once the ECHR has been incorporated into domestic law as only a more detailed reasoning is likely to satisfy the courts.

NGO activities

A number of NGOs in the UK are specifically concerned with expulsion and the support of persons under threat of expulsion. Among these are the Joint Council for the Welfare of Immigrants (JCWI), an umbrella group of non-governmental organisations in the UK. The churches have also been outspoken in respect of some expulsion decisions against persons long resident, for instance Social & Pastoral Action, a group under the auspices of the Westminster Diocese has been active on behalf of such migrants. One guess is that at any given time there are likely to be three or four campaigns running against the expulsion of specific aliens. These vary greatly in character - some are organised by trade unions, other by community groups or churches. Some receive and indeed encourage wide press coverage and attention, others are very low key relying on the lack of publicity to influence the exercise of state discretion.

The area of greatest concern for NGOs in respect of expulsion does not tend to be the group of persons who have indefinite leave to remain but rather persons who have been resident for substantial periods of time without acquiring it - usually people in irregular positions. Often there is an element of asylum involved in the case - for instance, asylum applicants can wait many years (not infrequently in excess of five) for a decision on their application. During the waiting period links are developed with a community and the

applicant and his or her family become integrated. Expulsion in such circumstances tends to be repugnant to parts of the society at least.

Citizenship

The grant of citizenship by naturalisation in the UK is discretionary. It is always subject to a good character and normally a language test as well. It is only available to aliens who have indefinite leave to remain²⁷⁷ and is subject to a residence requirement. Aliens seeking citizenship in their own capacity must have completed five years residence in the UK (except for permitted absences). Where citizenship is sought on the basis of marriage to a British citizen the residence period is reduced to three years.

Children born in the UK to an alien²⁷⁸ with indefinite leave to remain acquire automatically British citizenship.²⁷⁹ For this reason there are very few persons in the UK who come within the category common in other European states of "second-generation" immigrants having an insecure residence status. Most children born in the UK to persons who intend to remain indefinitely automatically acquire citizenship at birth. Of course there are some children who are born in the UK to such parents before the parents acquire indefinite leave to remain and therefore the children are not born British citizens. In respect of such children, though, simplified rules on acquisition of citizenship apply.²⁸⁰ A simplified procedure also applies to children born abroad who move (usually with their families) to the UK on a permanent basis. Dual nationality is permissible. Therefore, by the time a young person born to alien parents either in the UK or abroad but arriving while a child in the UK, reaches 16 or older,²⁸¹ the chances are that he or she will be a citizen and therefore immune from expulsion.

²⁷⁷ Or a more secure status which does not restrict the period the person may remain in the UK.

²⁷⁸ In respect of a woman whether or not the child is legitimate, in respect of a man only children born in wedlock.

²⁷⁹ Section 1 British Nationality Act 1981.

²⁸⁰ Section 3 British Nationality Act 1981.

²⁸¹ The case law from the European Court of Human Rights on expulsion of foreign nationals and the right of family life (Article 8 ECHR) tends to indicate that young people (16 +), either born in the state or who have come to reside at an early age in the state are most likely to be the subject of expulsion proceedings following criminal convictions.

4. THE LAW IN TWELVE OTHER COUNTRIES

4.1 Austria

In 1996 approximately 728,000 aliens were living in Austria, i.e. 9% of the total population (8 million). The main groups are nationals of the former Yugoslavia (almost 50%), Turkey and EU member states. About 40% of the alien population is living in Vienna. It is estimated that in 1995 two thirds of the alien population had been living more than eight years in Austria and about 45% had been in Austria for over 15 years.²⁸²

Austrian immigration legislation has been revised repeatedly over the last decade: in 1990, 1993, 1995 and 1997.²⁸³ The 1997 Aliens Act provides for a comprehensive reform of the legislation on entry, residence and establishment of aliens. It entered into force on 1 January 1998.²⁸⁴ One of its aims is the integration of migrants already residing in Austria. This law provides stronger residence status for long-term migrants. It distinguishes two types of residence permits: one for temporary residence (*Aufenthaltserlaubnis*) and the other for establishment (*Niederlassungsbewilligung*).²⁸⁵

Aliens who intend to live in Austria for an indefinite period of time or take up employed or self-employed work may be granted an establishment permit where they prove they have sufficient accommodation and income.²⁸⁶ The success of an application for an establishment permit also depends on whether the yearly quota of new establishment permits has not yet been filled.²⁸⁷ A first establishment permit is valid for one year and can be renewed twice for two years.²⁸⁸ Once the person has continuously resided for five years in Austria, still has sufficient income and lawful employment and where the other conditions for issuing the first permit (e.g. no risk to public order) are still fulfilled, the person is entitled to a permanent establishment permit (*unbefristete Niederlassungsbewilligung*). Spouse and minor children of persons who hold permanent establishment permits are entitled to this status when they have lived for two years in Austria.²⁸⁹ Alien family members of Austria citizens also have a right to establishment permits. They are granted the same residence rights as third country family members of EU citizens.²⁹⁰ This permit is valid for an indefinite period of time.

The 1997 Aliens Act stipulates that language courses, vocational training and information programs shall be provided to aliens holding establishment permits in order to further their

²⁸²Hoflinger and Waldrauch 1997, p. 110.

²⁸³Gehmacher 1993; Pochieser 1996, p. 361; Rath-Kahrein 1997.

²⁸⁴Bundesgesetz über die Einreise, den Aufenthalt und die Niederlassung von Fremden (Fremdengesetz 1997), Bundesgesetzblatt 14.7.1997, I, p. 995, hereafter referred to as "FrG".

²⁸⁵Article 7 FrG.

²⁸⁶Article 10 and Article 12 (1) FrG.

²⁸⁷Article 19 FrG.

²⁸⁸Article 19 (6) and Article 23 (4) FrG.

²⁸⁹Article 24 FrG; see also Article 20(1) and 23(6).

²⁹⁰Article 49 FrG.

integration into the economic, social and cultural life of Austria and create equal chances with Austrian citizens in those areas.²⁹¹

According to a survey conducted in Vienna in 1995 some 40% of the alien population and 90% of the aliens who migrated to Austria between 1963 and 1983 held a permanent residence permit (*unbefristeter Aufenthaltstitel*) under the former Aliens Act.²⁹² Most of them will be entitled to a permanent establishment permit under the 1997 Act.²⁹³

Several provisions in the new legislation strengthen the residence status of long-term aliens. It was adopted after strong and persistent criticism on the implementation of the previous Act which came into force in 1993.²⁹⁴ Under the previous legislation a permanent residence permit could be withdrawn on any ground sufficient for refusal of a visa, such as insufficient income, inadequate housing, acts against public security, peace and order, including traffic offences.²⁹⁵ Thousands of aliens holding residence permits could not fulfil the requirements on adequate housing and were at risk of losing their status and being forced to leave the country.²⁹⁶

The problems around expulsion of long-term resident aliens under the previous legislation have been broadly covered in the media. They led to sustained efforts by NGOs, churches and semi-public organisations like the *Wiener Integrationsfonds* opposing expulsion and campaigning for a secure residence status especially for second and third generation immigrants.²⁹⁷

In several cases the Austrian Constitutional Court held that decisions by the authorities implementing the former legislation violated the right to family life.²⁹⁸ In a case in 1995 the Constitutional Court held it to be unconstitutional to treat aliens having long residence in the country as new immigrants when they apply for renewal of their residence permits. The case concerned an ex-Yugoslav family who had been residing in Austria for more than 20 years and whose children were born there. Their application for renewal of their residence permit was rejected on the grounds that they had exceeded their permitted stay by two months. The Court described such a policy as harassment, criticising the authorities for not taking into account the right to family unity. The Court argued that in such cases the right to family life contained in Article 8 ECHR carried more weight than the relatively minor violation of the immigration law. In several other cases where residence permits had been withdrawn on the grounds of lack of adequate housing or sufficient income, the Constitutional Court also held that the right to private and family life contained in Article 8

²⁹¹Article 51 FrG.

²⁹²Hoflinger and Waldrauch 1997: 99; 36% held a residence permit for two years and 15% a permit valid for one year. The same authors had estimated the percentage of aliens holding a permanent permit to be considerably smaller: Cinar, Hofinger and Waldrauch 1995, p. 33.

²⁹³Article 113(5) FrG.

²⁹⁴Regelung des Aufenthalts von Fremden in Österreich – Aufenthaltsgesetz, Bundesgesetz 1992/466, that came into force 1 July 1993.

²⁹⁵Article 10 (1) FrG 1993; Pochieser 1996, p. 361.

²⁹⁶Migration News Sheet September 1993; Pochieser 1996, p. 369.

²⁹⁷Wiener Integrationsfonds 1996; Migration News Sheet May 1997.

²⁹⁸Pochieser 1996, p. 370; Wiener Integrationsfonds 1996, p. 23-25.

ECHR should prevail and the alien be granted an extension of the residence permit. The Constitutional Court in these judgements apparently took into account the case law of the European Commission and the Court of Human Rights.²⁹⁹ Early in 1997 two complaints against Austria filed by long-term resident aliens who were threatened with expulsion were declared admissible by the European Commission on Human Rights.³⁰⁰

The drafters of the new Aliens Act took into account of both the national and Strasbourg case law on the right to family life.³⁰¹ The Act five times explicitly refers to Article 8 ECHR.³⁰²

The 1997 Act contains a system of facultative and obligatory grounds for expulsion, somewhat similar to the one in the German Aliens Act.³⁰³ The new legislation introduced a graded reinforcement of security of residence for aliens who have resided in Austria on the basis of an establishment permit for 5, 8 or 10 years. After five years of residence expulsion is no longer possible for lack of income or dependence on public assistance unless the person is not seriously trying to find employment. After eight years the sole ground for expulsion is that the alien has been convicted of a criminal offence and his or her further stay in Austria is considered a threat to public peace, order and security. After ten years the immigrant may only be expelled if (s)he has been convicted of a few specified serious crimes such as drug trafficking to a prison sentence of at least one year, or in case of recidivism before the first sentence is served and the second conviction results in a prison sentence of at least six months.³⁰⁴

Second and third generation immigrants enjoy absolute security of residence: the expulsion of aliens who grew up and lived half of their life in Austria and were resident in the country during the last three years is prohibited. Nor may a ban on residence be made against these aliens.³⁰⁵ The Aliens Act explicitly forbids the forced departure of an alien where the European Court of Human Rights or the European Commission in a provisional measure has recommended to suspend the deportation.³⁰⁶

Austrian nationality may be granted to an alien after 10 years continuous lawful residence in Austria. This period is reduced for spouses of Austrian citizens. Nationality has to be granted after 30 years of lawful residence. There is no simple acquisition of the Austrian nationality for second-generation immigrants. Minor children may share in the naturalisation of their parents.³⁰⁷

²⁹⁹Morscher 1997, p.144 fn 104; Wiener Integrationsfonds 1995, p. 23.

³⁰⁰*Ciftci v Austria* (Application 24375/94) and *Raguz v Austria* (Application 26300/95).

³⁰¹Rath-Kahrein 1997, p. 713.

³⁰²In Articles 8 (4), 34 (1), 36 (1), 36 (9) and 94(3).

³⁰³Articles 34 and 37 FrG.

³⁰⁴Article 35 FrG.

³⁰⁵Article 35(4) and Article 38 (2) FrG.

³⁰⁶Article 57(6) FrG.

³⁰⁷EURODOC 1997: 13-17.

4.2 Denmark

In 1994 about 190,000 aliens (3.6% of the total population) had registered residence in Denmark, of which 43,000 were EU-citizens. Turks at 35,000 were the largest single nationality.

The Danish Aliens Act³⁰⁸ provides for two types of special secure residence status: (1) the permanent residence permit with no limitation of validity and (2) the temporary residence permit which for certain privileged groups can be withdrawn or not extended on exceptional grounds only, and hence in practice entails almost the same rights as the permanent residence permit. Most long-term alien migrants will be issued with a permanent residence permit after five years of lawful residence.³⁰⁹ They will no longer need a work permit and be entitled to family reunification with their spouse and children under age.

A residence permit lapses when the alien is absent from Denmark for more than 12 month.³¹⁰ The permit may be withdrawn if the reasons for granting the permit no longer exist (e.g. divorce or unemployment). However, migrants admitted with a view to permanent residence, i.e. mostly close family members including spouses, cohabiting partners, minor children and aged parents, of Danish or aliens with permanent residence, are protected against withdrawal of their permit on this ground after three years of legal residence.³¹¹ A temporary or permanent residence permit which has been obtained by fraud can always be withdrawn.

In 1995 there were 198 withdrawals of residence permits of persons admitted on grounds other than asylum. This number covers both withdrawals because the permit was obtained by fraud and cases where the ground for issuing the residence permit no longer exists. This latter ground can no longer be used with respect to persons admitted for permanent residence three years after admission.

The expulsion of an alien can be ordered by a court (not by the administration) as part of a criminal sentence.³¹² The longer the period of stay in Denmark the better protection against expulsion. This principle and detailed rules deriving from it are explicitly stipulated in the Act. An alien who has lawfully lived in Denmark for more than the preceding 7 years may be expelled only if: it is deemed necessary for national security reasons, the alien has repeatedly committed serious criminal offences or after a prison sentence of six years or more, taking into account the nature and the seriousness of the crime. After four years of lawful residence expulsion is possible after a prison sentence of four years or after a sentence of at least one year if it is likely that the alien will commit further crimes in Denmark.³¹³

³⁰⁸Consolidated Act No. 562 of 30 June 1995 of the Ministry of the Interior.

³⁰⁹Section 11(2) Aliens Act.

³¹⁰Section 17 Aliens Act.

³¹¹Section 19(2) Aliens Act.

³¹²Section 49 Aliens Act.

³¹³Sections 22-26 Aliens Act and Hofmann 1985, p. 218.

In 1995 the total number of expulsion orders made by the courts was 281. From January 1996 till July 1997 a total of 507 expulsion orders were made. In 365 of those cases the order was actually implemented through the forcible departure of the alien. These numbers include all aliens irrespective of their residence status. Most of them had been in Denmark for a short time only. Expulsion orders in respect of aliens with long lawful residence are generally made in cases of homicide or drug related crimes.

In the preparation of the current Aliens Act explicit reference was made to the Articles 3 and 8 of the ECHR. The provisions on expulsion and security of residence were intended to be in conformity with the convention and the case law of the ECtHR. Decisions of the immigration authorities or the courts in expulsion cases with respect to long-term immigrants will generally be influenced by the convention, though explicit references to the case law of the ECtHR are rarely made in decisions or judgements.

The normal residence requirement for naturalisation (seven years) is reduced to four years for aliens married to Danish citizens for more than three years. Citizens of Finland, Norway and Sweden are entitled to Danish nationality after seven years residence in Denmark. Other aliens have no right to naturalisation. However, persons who have lived permanently in Denmark for five years before the age of 16, may opt for Danish citizenship. The declaration should be made before reaching the age of 23 years.³¹⁴

³¹⁴Hofmann, p. 220.

4.3 Estonia

Upon re-establishing its independence in 1991 Estonia reinstated the nationality law which had been in force at the time of the occupation by the USSR in 1940. All other successor states of the USSR, except Latvia, granted citizenship to the permanent residents at the time of independence or permitted those residents to opt for citizenship.³¹⁵ The result of the Estonian policy was that almost half a million people (30 per cent of the total population) became aliens in their country of residence. Most of them are Russian speaking immigrants who settled in Estonia during the Soviet occupation or have been born in Estonia. When the 1993 Aliens Act required these persons to apply for an alien's passport³¹⁶, residence permit and work permit, considerable numbers opted for Russian citizenship, primarily to avoid further statelessness. From a survey conducted in 1996 it appeared that at that time two thirds of Estonia's non-citizen residents were stateless and 28% held citizenship of the Russian Federation. Over 60% of residents without Estonian citizenship have lived in Estonia for 20 years or more.³¹⁷

The Estonian Aliens Act of 1993 provides for temporary and permanent residence permits. A permanent residence permit may be issued to aliens who have resided in Estonia on the basis of a temporary residence permit for at least three years within the last five years and who have accommodation and employment or other legal means for subsistence.³¹⁸ The Act enumerates seven grounds for obligatory refusal of a residence permit. The same grounds apply both to temporary and permanent residence permits.

A residence permit may be revoked on five grounds: submission of false information on the application, violation of the constitutional order or laws of Estonia, activities threatening the Estonian state and its security, a prison sentence of more than one year, or entering the military service of a foreign state.³¹⁹ Again the same grounds apply both for temporary and permanent residence permits. An alien who has lost his or her residence status has to leave the country. If the person does not comply, an expulsion order may be made.³²⁰ There is no statutory provision granting a right to a permanent residence permit to any category of aliens. Moreover, permanent residence permits provide no more protection against expulsion than the temporary permits, except that the latter may not be renewed when they expire. Aliens lawfully staying in the country have a right of appeal to a court against a decision to withdraw their residence permit or an expulsion order. However, the law does not provide for suspensive effect of such appeals.³²¹

³¹⁵Schlager 1997, p. 25; Brubacker 1992.

³¹⁶Article 8(3) of the Aliens Act of 8.7.1993.

³¹⁷IOM 1997, p. 4-15 and 34.

³¹⁸Article 12(3) of the 1993 Aliens Act. The Act has been amended in 1994, 1995 and (twice) in 1997. An official English translation of the Act has been published by the Estonian Translation and Legislative Support Centre in Tallinn, Estonian Legislation in Translation, No. 8 August 1997; see also Sanikidze 1996, p. 76 ff.

³¹⁹Article 14 Aliens Act.

³²⁰Article 16 Aliens Act.

³²¹Article 9(4) Aliens Act. In Article 20(3) aliens settled in Estonia in July 1990 are granted a similar generally worded right of appeal against the refusal of a residence or work permit. The Council of Europe Experts who in 1993 at the request of the President of Estonia

The 1993 Aliens Act provides that aliens who were resident in Estonia on 1 July 1990 and continued to live in the country, have to apply within two years for a residence and work permit. This period was later extended to three years. They are "guaranteed the issue of a residence and work permit if the legal status of the alien meets the requirements of this Act".³²² Since the general rules of the Act only provide that residence permits may be issued and further enumerate the grounds for refusal or revocation of residence permits, the meaning of this guarantee is unclear. Residence permits stamped in the old internal USSR passports by the Estonian authorities before July 1993 lose their validity.³²³

For one category the Act contains an explicit right to a residence permit: aliens who were settled in Estonia in July 1990, have passed the Estonian language examination and applied for Estonian citizenship before July 1995 were entitled to a temporary residence permit pending the decision on their request for naturalisation.³²⁴ Persons who were settled in Estonia on that date and do not apply for a residence permit in time, are no longer allowed to work in Estonia and have to leave the country.³²⁵ According to the survey mentioned above, in 1996 over 90% of resident aliens had filed an application and 75% had actually received a residence permit. Nearly one quarter of the respondents in the survey believed that the requirement to have residence and work permits would make it harder for non-citizens to obtain employment.³²⁶

The combined result of these policies is that at the end of 1997 a considerable part of the population of Estonia are long-term immigrants, the majority of whom are stateless and a minority does not have a valid residence document at all.³²⁷ These long-term immigrants have no special protection against expulsion in respect of their long lawful residence in Estonia under Estonian legislation.³²⁸ They do not have free access to employment and their chances of acquiring Estonian citizenship are limited.³²⁹

reviewed an earlier version of the Alien Act pointed to the lack of precision as to legal remedies making reference to Article 3 of the European Convention on Establishment, see Opinion on the Law on Aliens of Estonia, Strasbourg 6.7.1993.

³²²Article 20(2) Aliens Act.

³²³Article 19 Aliens Act.

³²⁴Article 21(4) Aliens Act.

³²⁵Article 21(7) and 21(8) Aliens Act.

³²⁶IOM 1997, p. 8.

³²⁷According to press reports in December 1997 the Estonian government discussed a Bill aiming at the regularization of an estimated 50.000 "illegal" residents who were settled and registered before July 1990 and have not yet applied for the permits under the 1993 Aliens Act, Migration News Sheet, January 1998, p. 4.

³²⁸Such protection may be provided by international instruments. Estonia has ratified both the Fourth and the Seventh Protocol to the ECHR. These Protocols outlaw collective expulsion and provide procedural guarantees against sudden expulsion of lawfully resident aliens.

³²⁹In its Advice on Estonia's request for membership of the European Union the European Commission states that Estonia has to take measures to speed up naturalization procedures in order to improve the integration in the Estonian society of its Russian speaking population that has not acquired Estonian citizenship, see COM(97) 2006 def. of 15.7.1997, p. 19.

The Estonian Citizenship Act of 1995 requires that aliens applying for naturalisation a.o. must have lived on the basis of a permanent residence permit in Estonia at least five years prior to and one year after the date of application. They also must be able to speak, read and write the Estonian language.³³⁰ The provision in the previous Citizenship Act that the language requirement may be waived in respect of stateless persons, who have permanently resided in Estonia for at least ten years, has been deleted.³³¹ The new legislation only permits waiver of the language requirement in exceptional cases, e.g. speech- or visually handicapped persons; persons born before 1930 are exempt from the requirement to write the Estonian language.

In practice the Estonian language test appears to be a barrier which only relatively few non-Estonian residents have been able to surmount. Considering the size and the long period of residence of the alien population, the number of naturalisations is rather limited. Over half of the respondents in the survey commissioned by the IOM expressed the desire to acquire Estonian citizenship. Only one in five had actually applied for naturalisation. Two thirds of the rest said they did not apply because they could not pass the language exam.³³² It has been announced that the Estonian government is considering the introduction of a bill granting Estonian citizenship to children born in Estonia to non-Estonian parents.³³³ Unless this rule will have retroactive effect, it will take a whole generation for the present descendants of the immigrants who settled in Estonia during the Soviet occupation, to regain citizenship of their country of residence.

³³⁰Articles 6, 8 and 34 of the Act on Citizenship adopted on 19.1.1995, see Sanikidze 1996, p. 90ff.

³³¹Article 7 of the 1993 Law on Citizenship, see EURODOC, European Bulletin on Nationality, Strasbourg, March 1997.

³³²IOM 1997, p. 17/18. On naturalization practice in Estonia see Open Society Institute 1997, p. 41-61.

³³³Migration News Sheet January 1998.

4.4 Hungary

Since 1988 Hungary has positive net migration. The majority of immigrants, whether asylum seekers, migrant workers, self-employed, family members or students, are ethnic Hungarians from outside the borders.³³⁴

The 1993 Act on Entry and Residence of Aliens in Hungary and on Immigration³³⁵ and its secondary legislation contain rules on three types of residence documents: temporary residence permits, permanent residence permits and immigration permits. The last status is meant for settled immigrants. The status can be acquired if the person meets the following requirements: three years of uninterrupted lawful residence in Hungary, sufficient income and accommodation, no criminal record, no threat to public health and the ability to integrate into Hungarian society (basically sufficient knowledge of the Hungarian language). The spouse and minor children of a person in possession of an immigration permit are entitled to this permit without the otherwise applicable three year residence requirement. Children born in Hungary to parents in possession of an immigration permit automatically obtain the same status as their parents.³³⁶ Each year the government sets a quota for the total number of immigration permits to be issued that year. Immigrants for family reunification, asylum seekers and ethnic Hungarians are admitted outside the quota.

An immigration permit grants the right to move to and reside in Hungary without any restriction in time. The person is issued a special identity card (the "blue booklet"). Persons holding this permit are exempt from the obligation to have a work permit. With respect to social and family benefits and public education they are entitled to equal treatment with Hungarian nationals.

In 1996 approximately 70,000 persons living in Hungary held an immigration permit, two thirds being persons of Hungarian descent who emigrated from countries in the region.³³⁷ About 60% are economically active and 5% retired persons; the remaining 35% are students or dependent family members.

During the first three years after an immigration permit has been issued the rules on expulsion are the same as for aliens holding other residence documents. After this three year period a person in possession of an immigration permit can only be expelled from Hungary and the permit withdrawn on three grounds: serious criminal activities against *ordre public* (e.g. membership of a terrorist organisation, drug trafficking or smuggling of persons), being a threat to national security, or a prison sentence of more than two years.³³⁸

³³⁴Szoke 1992; Tóth 1995.

³³⁵Act no. LXXXVI of 14.9.1993.

³³⁶Articles 17-22 Aliens Act; Articles 20-36 of Cabinet-Decree No. 64 of 30.4.1994 and Articles 20-29 of Decree of the Minister of the Interior No. 9 of 30.4.1994 .

³³⁷Source: Central Statistical Office; the exact number is not known, because only the number of permits issued is registered; the number of permit holders who left the country or acquired Hungarian nationality is unknown; Tóth 1995, p. 60.

³³⁸Article 32(2) and 32(3) Aliens Act and Article 46 of the Decree of the Minister of the Interior no. 9 of 30.4.1994.

Before 1993 most of the immigration rules lacked a clear statutory basis. The 1993 Act has improved the legal status of resident aliens, though these rules still confer a wide discretion on the immigration authorities. The new legislation creates an appeal right against a decision to refuse or withdraw an immigration permit. Those appeals have suspensive effect on forcible departure.³³⁹ Actual expulsion of a person in possession of an immigration permit is exceptional, estimated at less than five cases per year. Under Hungarian law no category of aliens has an absolute guarantee against expulsion.³⁴⁰

Reference to the case law of the ECtHR with respect to the right to family life has been made in some judgements of Hungarian courts reported in legal journals. Lawyers supported by NGOs in immigration cases often refer to the Strasbourg case law. Awareness of the relevance of this case law among the judiciary appears gradually to be expanding.

In practice having an immigration permit is a condition for naturalisation. The normal residence requirement for naturalisation under the Act on Hungarian citizenship of 1993 is eight years. This period is reduced to three years for the spouses and minor children of Hungarian citizens and to one year for aliens who can prove that they are descendants of a person who was a Hungarian citizen.³⁴¹

³³⁹Tóth 1995, p. 65.

³⁴⁰ There is a relative protection that an alien may not be expelled to a country where he or she would face inhuman treatment or persecution: Articles 32(2) and 35(3) Aliens Act and Articles 31 and 44 of the Decree of the Minister of the Interior no. 9 of 30.4.1994.

³⁴¹Article 4 of the Act on Hungarian Citizenship, Act Nr. LV adopted on 1.6.1993, Mohay 1994 and Tóth 1995.

4.5 Italy

Italy has a long tradition as a country of emigration. Since the second half of the nineteenth century millions of Italians settled abroad. In the late 1970s Italy became an immigrant-receiving country. The 1981 census revealed a net increase in population due to return migration and new immigration. As large-scale immigration is a relatively new phenomenon, the alien population is still relatively small: estimated at between 1 and 2% of the total population. Nationals of other EU member states account for approximately one fifth of the registered aliens.³⁴²

The main rules of Italian immigration law were codified in an Act of 1990, commonly known as the "Martelli Law", after its primary author and sponsor, the then Deputy Prime Minister Claudio Martelli.³⁴³ One of the purposes of the law was to facilitate the integration of aliens from non-EU states who were already residing in Italy and had received a residence permit, mostly during the previous regularisation campaigns. The law provided for temporary residence permits (*permesso di soggiorno*) to be issued for a period of up to two years. When the conditions under which the original permit was issued are still present, the permit was usually renewed for a period twice the duration of the original permit.

The Martelli Law provided a special secure residence status only for spouses of Italian citizens, after three years lawful residence in Italy. This permit was valid for an indefinite period of time.³⁴⁴ This special status was lost on divorce. The non-Italian spouse then had to apply for a normal, temporary residence permit for another purpose, such as employment, self-employment or study. There were no special rules to protect this category of migrants against expulsion. An expulsion order could be made either by the Minister of the Interior or, in respect of a serious criminal offence, by a court. The general rules on expulsion were applicable to all aliens.³⁴⁵ A Decree-law of December 1995 would have provided protection against expulsion for certain categories: aliens under the age of 16 years, persons with at least five years residence in Italy living with relatives of Italian nationality, and women at least three months pregnant.³⁴⁶ However, this decree-law was not confirmed and hence did not enter into force.

Since 1994 the Italian government has been working on a new legislation that would grant a special secure residence status to long-term immigrants. In 1997 a Bill for a new immigration law was introduced in the Parliament. The Bill introduced a new permanent residence permit issued to aliens with long lawful residence in Italy. The new status was presented as a form of quasi-citizenship. Aliens holding this permit would be entitled to

³⁴²Martiniello 1992; Rosoli 1993; Calavita 1994: 303; Zincone 1995; Eurostat 1996.

³⁴³Act of February 28, 1990, No. 39 on Urgent Provisions Regarding the Political Asylum, Entry, and Residence of Non-EC Foreigners and the Regularisation of Non-EC Nationals and Stateless Persons Already Present in Italian Territory.

³⁴⁴Article 4 of Act 39/1990.

³⁴⁵Article 7 of Act 39/1990 and Articles 235 and 312 Penal Code; an English translation is published by Corrado and Tardioli.

³⁴⁶Migration News Sheet December 1995.

vote and stand for office in local elections. In November 1997, the Chamber of Deputies approved the Bill after the government had amended the provision on the voting rights pending as amendment of the provision on elections in the Italian Constitution.³⁴⁷

In March 1998, the new Act on immigration and the status of aliens was enacted.³⁴⁸ An alien lawfully residing for more than five years on the basis of a temporary residence permit with unrestricted renewability, who has sufficient income for him-/herself and his/her family, and who has not committed certain specified crimes, is entitled to a residence card (*carta di soggiorno*). This residence card is valid for an indefinite period of time. The card is also issued to the alien spouse, children under age and parents of an Italian national and to EU nationals resident in Italy.³⁴⁹ The residence card entitles the alien: to enter Italy without a visa, to perform all economic activities that are not expressly reserved for Italian nationals, to enjoy all public benefits and facilities unless provided otherwise, and to participate in public life at local level, including the right to vote in municipal elections in accordance with the provision of chapter C of the 1992 Convention on the Participation of Foreigners in Public Life at Local Level.³⁵⁰

Withdrawal of the residence card is only possible in case the alien has committed the same serious crimes that are a ground for the refusal of the card. An expulsion order against an alien holding a residence card can only be issued for serious reasons of public order or national security and in certain cases specified in other acts. The Minister of the Interior has to give advance notice of such expulsion orders to the Prime Minister and the Minister of Foreign Affairs. A similar protection against expulsion is granted to alien children under 18 years, aliens living with an Italian spouse or relative and women who are pregnant or within six months after having given birth to a child.³⁵¹

According to the 1992 Nationality Act, one of the general requirements for naturalisation is ten years of lawful residence in Italy. The Act reduces the required residence period to five years for refugees and stateless persons, to four years for EU citizens, to three years for descendants of former Italian nationals (mainly emigrants) and for aliens born in Italy, and, finally, to six months for persons who have been married at least three years to an Italian citizen.³⁵²

³⁴⁷ Migration News Sheet April 1994, March 1997 and December 1997 ; Zincone 1995, p. 145.

³⁴⁸ Act of 6.3.1998, no. 40, Disciplina dell'immigrazione e norme sulla condizione dello straniero, Gazzetta Ufficiale 12.3.1998.

³⁴⁹ Article 7(1) and (2) of the 1998 Immigration Act.

³⁵⁰ Article 7(4) of the 1998 Immigration Act.

³⁵¹ Articles 7(3), 7(5), 11(1) and 17(2) of the 1998 Immigration Act.

³⁵² Article 9 of the Act of 5 February 1992, No. 91/1992.

4.6 Lithuania

Before independence in 1989 less than 400 aliens were living in Lithuania, mostly citizens of Poland, Germany or the USA. After 1989 the number of residents without Lithuanian nationality increased, because not all persons who were residing in the country at the time of independence, availed themselves of the opportunity to opt for Lithuanian nationality.

The entry and residence of aliens is governed by two Acts of 1991, the Law on the Legal Status of Foreigners in the Republic of Lithuania and the Law on Immigration,³⁵³ and by a Decree on immigration matters of 1992.³⁵⁴ A working group has been commissioned to draft new immigration legislation. In 1997 a draft was ready for discussion in Parliament.

The current legislation does not provide for a special status for aliens on the basis of long residence. A special status is granted to officially recognised refugees. Moreover, an alien is entitled to a permit for permanent residence if (s)he is an immediate relative or dependent of a citizen of Lithuania, maintains or is married to a citizen of Lithuania, has legal means of support in Lithuania, and in other cases established by law.³⁵⁵

Persons who had been permanent residents of Lithuania up to 1991, and have not acquired citizenship under 1989 Citizenship Act, are by law treated as aliens with permanent residence rights.³⁵⁶

In 1993, just over 300 aliens received an immigration permit allowing them to enter Lithuania for permanent residence. Such permits were granted to 1,966 aliens in 1994, to 2,270 aliens in 1995, and to 1,526 aliens in 1996.³⁵⁷ In October 1997 a total of 27,886 non-nationals had been issued with residence permits. The majority of these persons are former citizens of the USSR, who already had residence in Lithuania before 1991.

Admitted aliens, whatever the ground for admission, in many respects have equal rights with Lithuanian citizens. However, aliens with permanent residence hold a privileged position: free access to the labour market and to any other economic activity, access to employment in the public service for functions not explicitly reserved for Lithuanian citizens, the same economic, social rights and equal rights to education and social security with Lithuanian citizens.³⁵⁸

³⁵³Both Acts were adopted on 4.9.1991, The first Act came into force on that same date, the later came into force on January 1, 1992; for the texts see Sanikidze 1996, p. 231-240.

³⁵⁴Regulations on the Procedures of Dealing with Immigration Issues, confirmed by the Government on 21.2.1992.

³⁵⁵Article 6(2) of the Act on the Legal Status of Foreigners.

³⁵⁶Article 6(3) of the Act.

³⁵⁷For a bibliography of recent literature on migration to Lithuania see Sipaviciene a.o. 1997, p. 34-36.

³⁵⁸Articles 10, 16-18, and 22 of the Act on the Legal Status of Foreigners.

Both Acts contain provisions on the loss of residence status. A residence permit may be revoked, if it has been obtained by fraud, if the alien commits a crime punishable with imprisonment or is engaged in activities directed against the Republic.³⁵⁹ Moreover the Minister of the Interior may order the expulsion of an alien who breaks the law or whose action poses a threat to national security, public health and morality and refuses to depart.³⁶⁰ The expulsion decision is made by the court upon the request of the Ministry of the Interior. So far the few expulsion orders which have been issued, are mainly on the ground of fraud. None of the aliens concerned has actually been expelled, primarily for lack of funds to pay the costs of forced departure. Lithuania ratified the ECHR in 1995. So far Article 8 ECHR has not influenced expulsion practice.

Lithuanian legislation does not grant any alien absolute protection against expulsion. However, this is provided for in the recently prepared draft Law on the Legal Status of Aliens.

The citizenship legislation provides for simplified acquisition of citizenship for persons married to Lithuanian citizens where both spouses have resided in the country for the last three years (the normal residence requirement is ten years). Moreover, in these cases the requirement of permanent employment or a stable source of income does not apply.³⁶¹

³⁵⁹Article 14 of the Law on Immigration.

³⁶⁰Article 36 of the Act on the Legal Status of Foreigners.

³⁶¹Articles 12 and 14 of the Law on the Citizenship of the Republic of Lithuania of 5.12.1991, see Sanikidze 1996, p. 244.

4.7 Poland

Poland has a long tradition as a country of emigration. However, after 1989 the number of emigrants leaving Poland rapidly declined and the number of legal immigrants, which had been negligible before, increased considerably. Between 1994 and 1997 more than 30,000 persons were issued visas with work permits and hence allowed to reside in the country for (self-)employment. Data on the number of resident aliens in Poland are not available. Many migrants stay in Poland for relatively short periods of time before moving to another destination.³⁶²

A new Aliens Act, replacing the Act of 1963, was adopted in July 1997 and came into force in December 1997.³⁶³ The new legislation provides for two kinds of residence permits: permission to reside for a specified period and permission to settle. The first permit is granted for a specific purpose and may be valid for up to two years. It may be renewed. Permission to settle is issued for an indefinite period of time. The alien granted this permission will be issued with a permanent residence card. That document is valid for ten years and renewable thereafter.³⁶⁴

In order to qualify for permission to settle an alien has to fulfil three conditions: have permanent family or economic ties with Poland, sufficient income and accommodation for the alien and his or her family, and three years residence on the basis of a temporary residence permit. Permission to settle may be refused if: the alien still has obligations with respect to the country of origin or to persons living in that country, the alien, on conviction, receives a long prison sentence, or (s)he is considered to be a threat to national security, public order or public health.³⁶⁵ Aliens in possession of a permanent residence permit issued under the former Aliens Act automatically obtained permission to settle under the new Act.³⁶⁶

From 1992 to 1998 more than 16,500 permanent residence permits have been issued. This figure does not include dependants, having the same residence status as their principal.³⁶⁷ Most of the persons granted permanent residence permits in those years are citizens of Ukraine, Russia, Kazakhstan, Belarus or other successor states of the USSR. However, considerable numbers of such permits have been issued to citizens of Vietnam, Germany and Bulgaria.³⁶⁸ Over this period approximately 3,000 persons have been refused permanent residence permits.

³⁶²Since its ratification of the Geneva Convention on Refugees in 1991 Poland has granted refugee status to 800 persons, the majority of these persons have already left Poland, information from the Ministry of the Interior.

³⁶³Act on Aliens adopted on 25.7.1997 that entered into force on 27.12.1997. Part of the administrative regulations implementing this act came into force on 5.1.1998.

³⁶⁴Articles 19(4) and 20(2) Aliens Act.

³⁶⁵Articles 19 and 13(1) Aliens Act.

³⁶⁶Article 110 Aliens Act.

³⁶⁷Article 21(3).

³⁶⁸From 1992 to July 1997, 2,633 Ukrainian citizens acquired this status, 1,450 Russians, 928 citizens of the former USSR, 897 citizens of Kazakhstan, 805 citizens of Belarus, 898 Vietnamese, 749 Germans, 257 Bulgarians, 183 Italians.

An alien in possession of permission to settle can only be expelled from Poland after this permission has been withdrawn.³⁶⁹ A decision to withdraw permission to settle and to order the person to leave Poland may be made on three grounds: the alien is convicted in Poland to a prison sentence of three years for an intentional crime, the interests of defence, national security or the protection of public order so require, or the alien has left Poland permanently.³⁷⁰ The first ground appears to offer aliens having permission to settle a relatively high level of protection against forced departure. However, the second ground apparently grants the administration a rather wide discretion on expulsion. Decisions to grant, refuse or withdraw permission to settle may be made only by the Ministry of the Interior. Decisions on temporary residence permits can be made by the regional administrations.³⁷¹

The normal residence requirement for naturalisation under the 1962 Act on Polish Citizenship is five years. This period is reduced to three months for the spouses of Polish citizens.³⁷² A transitional provision in the new Aliens Act entitles aliens who migrated to Poland between 1992-1996, to apply for recognition as Polish citizens before the end of 1998 where they had obtained, prior to entry, a permanent residence permit on the basis of the 1963 Aliens Act, and have been resident in Poland ever since.³⁷³

³⁶⁹Article 52(2) Aliens Act.

³⁷⁰Article 24 Aliens Act.

³⁷¹Article 82 Aliens Act.

³⁷²Kedzia 1987, p. 1198 ff.

³⁷³Article 109(1) Aliens Act of 1997.

4.8 Russia

In the years immediately before and after the 1991 collapse of the USSR, Russia probably received more immigrants than any other country in Europe. Due to the limited reliability of the statistical data, it is hard to say whether Russia or Germany was the largest immigration country in those years. It is estimated that in the five years (1990-1994) approximately 4 million persons migrated to Russia from successor states of the USSR. The majority of those migrants were of Russian origin.³⁷⁴ Most immigrants received citizenship of the Russian Federation shortly after entry. Estimates of the number of aliens resident in Russia vary between 300,000 and 500,000, depending on the governmental department making the estimate. An independent estimate set the number at 100,000 in 1996, i.e. less than 0,1% of the total population. In 1993 approximately 16,000 aliens held a residence permit.³⁷⁵

In 1992 the Russian government established the Federal Migration Service, which was entrusted with making and implementing migration policy, and the preparation of legislation concerning migration.³⁷⁶ In the following years several Acts on different aspects of migration and the status of certain groups of migrants in Russia have been adopted: the 1993 Act on Refugees³⁷⁷, the Act on Forcibly Displaced Persons (i.e. ethnic Russians forced to leave other states formerly in the USSR), which was adopted in 1993 and radically amended in 1995,³⁷⁸ and the Act on Exit from and Entry to the Russian Federation of 1996.³⁷⁹

Since 1992 drafts for two bills, one on migrant workers and the other on the legal status of aliens generally are under preparation. Both bills are pending before the Duma since 1996.³⁸⁰ For the time being the legal status of aliens in Russia is still defined by the 1981 Act on the legal status of aliens in the USSR.³⁸¹ According to that act authorities of the Ministry of the Interior may end the residence of an alien on the ground of breach of the immigration legislation or because there is no further reason for continued residence. Expulsion is possible where the activities of the alien jeopardise state security or public order, or when necessary to protect public health and morality or to safeguard legitimate interests of other persons and finally for breach of immigration, customs or currency legislation or any other Soviet legislation.³⁸² These provisions grant a virtually unlimited discretion to the administrative authorities. In the 1981 Act there is no rule providing

³⁷⁴Messina 1997, p. 87-107; CIS Conference 1996, pp. 7, 49 and 183/4.

³⁷⁵Zayonchkovskaya 1994, p. 10.

³⁷⁶Decree of the Russian Government of 1.3.1993, no. 173.

³⁷⁷Act of the Russian Federation on Refugees of 19.2.1993.

³⁷⁸Act of the Russian Federation on Forcibly Displaced Persons of 19.2.1993, replaced by the Act of 20.12.1995.

³⁷⁹The Act on Exit and Entry was adopted on 15.8.1996 and entered into force a week later. An English translation of all three Acts is published in Sanikidze 1996, p. 315ff.

³⁸⁰Messina 1997, p. 104; Migration News Sheet December 1997.

³⁸¹Act on the legal status of foreign citizens in the USSR of 24.6.1981, Vedomosti Verchovnovo Soveta SSSR 1981, no. 26, p. 836; on that Act see Boguslawski 1987; Chapter III of that Act was abrogated by Article 37 of the 1996 Act on Exit and Entry.

³⁸²Articles 30 and 31 of the 1981 Act.

security of residence to long-term migrants without Russian citizenship. The actual number of expulsions appears to be small.

The 1991 citizenship legislation provides for a simplified form of acquisition of Russian citizenship by way of registration for five categories of aliens, including spouses of Russian citizens and ex-citizens of the USSR who migrated to Russia from the former USSR Republics after 1991.³⁸³ The latter may opt for Russian citizenship before the end of 2000. Originally the time limit for this option expired in February 1995 but has now been extended until the end of 2000.³⁸⁴

³⁸³Article 18 of the Act on the Citizenship of the Russian Federation of 28.11.1991 that entered in to force on 6.2.1992.

³⁸⁴Article 18(d) of the Act as amended on 18.1.1995.

4.9 Slovenia

The Law on Aliens of the Republic of Slovenia adopted in 1991 distinguishes between temporary residence permits and permanent residence permits.³⁸⁵ Permanent residence permits may be issued to aliens after three years continuous residence in Slovenia on the basis of a temporary residence permit, on condition that they have sufficient income and their residence is still aimed at one of the purposes set out in the law: education, specialisation, employment, medical treatment, business, marriage to a citizen of Slovenia or another justified reason.³⁸⁶ The three-year residence requirement does not apply to children under 18 years and spouse of persons in possession of permanent residence permits.³⁸⁷ In 1997 an amendment to the Law on Aliens was adopted extending the residence requirement from three to eight years.³⁸⁸ However, the constitutionality of this amendment has been challenged before the Constitutional Court. The Court has suspended the amendment pending its final decision in the case.

In January 1995 there were 3,338 aliens who held permanent residence permits in Slovenia. A year later this number had increased to 3,778.

An alien in possession of a permanent residence permit may be ordered to leave the country on two grounds only: a prison sentence of at least three years for a criminal offence, or several convictions.³⁸⁹ An alien in possession of a temporary residence permit may be ordered to leave the country on six different and widely worded grounds. Hence permanent residence permits give far better protection against expulsion. Moreover, an order to leave the country in respect of persons holding permanent residence permits can only be made by the competent authorities at the Ministry of the Interior. For persons holding temporary permits the regional administrative authorities may make the order.³⁹⁰ The authority making the order to leave the country is under a statutory duty to take into account the length of the aliens' residence in the country, his or her personal, economic and other connections with Slovenia, as well as the consequences of the measure for the alien's family.³⁹¹

The Aliens Act explicitly prohibits expulsion to a country where the alien's life would be endangered because of racial, religious or national affiliation or political opinion, or in which the alien would be exposed to torture, inhuman or degrading treatment.³⁹²

In the years 1995 and 1996 no person holding a permanent residence permit was forced to leave the country.

³⁸⁵ Article 14 of the Law on Aliens published in the Official Gazette of 5 June 1991.

³⁸⁶ Articles 13(2), 16(1) and 19(3) of the Law on Aliens.

³⁸⁷ Article 17 Law on Aliens.

³⁸⁸ Official Gazette 1997, No. 44.

³⁸⁹ Article 24 Law on Aliens.

³⁹⁰ Article 25(1) Law on Aliens.

³⁹¹ Article 25 Law on Aliens.

³⁹² Article 33 Law on Aliens.

According to the 1991 Citizenship Act, the normal residence requirement for naturalisation is ten years. This period is reduced to one year for spouses of Slovenian citizens and for Slovenian expatriates and their descendants up to the third generation. These persons also have to meet most of the seven other general conditions for naturalisation.³⁹³ Simple acquisition of Slovenian citizenship is only provided for aliens resident in Slovenia on the day of the plebiscite on independence in December 1990. They can acquire citizenship by filing a declaration with the municipal authorities.³⁹⁴

³⁹³Articles 10 and 12 of the Citizenship Act of 5.6.1991.

³⁹⁴Article 40 Citizenship Act.

4.10 Sweden

Until the beginning of the 1980s, immigration to Sweden was dominated by Nordic citizens, mostly Finns.³⁹⁵ In 1986, intra-European immigration was overtaken by immigration from the rest of the world. A growing proportion of newly arriving aliens are refugees. At the end of 1996 over half a million aliens, i.e. 6% of the total population of Sweden (8.3 million) were living in the country. Among the alien population 30% are from Nordic countries, 34% from other European countries (mainly ex-Yugoslavia, Turkey and Poland) and 20% from countries in Asia.³⁹⁶

Sweden first introduced in 1954 a system requiring aliens to obtain a permanent residence permit.³⁹⁷ The present Aliens Act of 1989 provides for time-limited residence permits (*Uppehållstillstånd*) and permanent residence permits (*Permanent Uppehållstillstånd*). The latter permits grant permission to stay in Sweden for an unlimited period.³⁹⁸ However, the sticker documenting the residence right has to be renewed every three years. The criteria for acquiring this status differ between different categories of immigrants: family members of residents, second generation immigrants, persons with a parent who was born Swedish, workers having special qualifications.³⁹⁹ An alien who marries or cohabits with someone who is permanently resident in Sweden, normally gets a temporary residence permit for the first two years. After two years and if the marriage or cohabitation still continues, a permanent permit is granted. A migrant worker may be granted a permanent permit after (s)he has worked under a work permit for more than four years and has exceptional qualifications.⁴⁰⁰ A general requirement is that settlement in Sweden is supposed to be permanent and that the person is accepted for immigration by the Swedish Immigration Board. Moreover, the alien should not have committed a serious crime or be considered a threat to national security.⁴⁰¹ There is no statutory right to a permanent residence permit. An alien holding a permanent residence permit does not need a work permit.⁴⁰²

On 1.1.1997 approximately 100,000 immigrants held permanent residence permits granted on grounds other than asylum and EEA rules. Most EEA nationals have secure residence rights. They make up 45% of the registered aliens. Hence, we estimate that over two thirds of the alien population of Sweden holds a permanent residence permit or another secure residence status.

Both temporary and permanent residence permits may be withdrawn where the alien leaves Sweden to reside in an other country, has received the permit by giving false information,

³⁹⁵Ornbrant and Peura 1993, p. 205.

³⁹⁶Swedish official statistical publications, Population Statistics, part 3, Statistical Reports 1997.

³⁹⁷Melander 1987, p. 1305.

³⁹⁸Chapter 2 section 2 of the Aliens Act of 1989: 529 as amended in October 1997.

³⁹⁹Chapter 2 section 4 Aliens Act; Brorsson, par. 3.3.

⁴⁰⁰Engstrom 1993, p. 173.

⁴⁰¹According to press reports, a North African man married to a Swedish woman and father to one child was refused a permanent residence permit although he had lived in Sweden for 17 years, since he was considered a potential threat by the Swedish security police (Migration News Sheet December 1996).

⁴⁰²Chapter 1 section 5 Aliens Act.

has worked without a work permit, has acted "in a manner which gives rise to serious criticism of his way of life", has been engaged in espionage in one of the Nordic countries, or is convicted of a criminal act and sentenced to prison.⁴⁰³ Expulsion orders on the latter ground can only be made by a criminal court. In the other cases the order is made by the Swedish Immigration Board.⁴⁰⁴ A court considering whether a foreigner should be expelled must pay due regard to the foreigner's living conditions and family circumstances and the length of time the person has resided in Sweden.⁴⁰⁵ An expulsion order implies a temporary or permanent ban on return to Sweden.⁴⁰⁶ An alien, who at the time the criminal procedures starts, had resided in Sweden on the basis of a residence permit for four years, cannot be expelled unless the court finds that exceptional grounds (e.g. drug trafficking and murder) justify the expulsion. The same protection is granted to Nordic citizens after two years of residence.⁴⁰⁷ An alien who entered Sweden before the age of 15 years and at the time of the proceedings has been residing in Sweden for five years may no longer be expelled.⁴⁰⁸ In 1997 a bill has been introduced to restrict withdrawal of residence permits on the ground of incorrect information to aliens having less than four years lawful residence in Sweden.

From decisions to refuse or withdraw permanent residence permits and from expulsion orders made by the Swedish Immigration Board, there is an appeal with the Aliens Appeal Board.⁴⁰⁹ Judicial expulsion orders may be appealed under the general rules for appeals in criminal cases. The Immigration Board may suspend the enforcement of an expulsion order and grant the alien a temporary residence permit. Judicial expulsion order may be cancelled by the government.⁴¹⁰ Where an international body competent to consider individual complaints requests Sweden to suspend an expulsion order, a stay of the execution shall be granted, unless exceptional grounds justify immediate implementation.⁴¹¹

The general residence requirement for naturalisation under the Swedish Citizenship legislation is five years.⁴¹² Second generation immigrants may opt for Swedish citizenship. Where they have been resident in Sweden for a total of five years before the age of 16 years and have continued their residence after that age, they acquire citizenship by making between the age of 21 and 23 years a simple written declaration with the Swedish Immigration Board.

⁴⁰³Chapter 2 sections 9-12 Aliens Act.

⁴⁰⁴Chapter 4 sections 5 and 8 Aliens Act.

⁴⁰⁵Chapter 4 section 10(1) Aliens Act. The Government in 1992 commissioned a study mainly concerning expulsion of aliens due to criminality, but also looking at the effects of criminality on citizenship issues. The commission presented its final report in February 1994, Migration News Sheet July 1993 and April 1994; EURODOC 1997, p. 163.

⁴⁰⁶Chapter 4 section 14(2) Aliens Act.

⁴⁰⁷Chapter 4 section 10(2) Aliens Act.

⁴⁰⁸Chapter 4 section 10(4) Aliens Act.

⁴⁰⁹Chapter 7 section 3 Aliens Act.

⁴¹⁰Chapter 7 sections 15 and 16 Aliens Act.

⁴¹¹Chapter 8 section 10a Aliens Act.

⁴¹² The Swedish Citizenship Act (1950:382); Engstrom 1993, p. 178 ff.

4.11 Switzerland

Introduction

Foreign nationals account for a relatively high percentage (19%) of the resident population of Switzerland: 1.3 million registered aliens out of a total population of 7.1 million at the end of 1996. Switzerland has by tradition a large alien population: as early as 1910, this proportion amounted to 14,7 percent.⁴¹³

Establishment permit

The Act on the residence and establishment of aliens of 1931 provides for a residence permit for temporary stay (*permis de séjour; Aufenthaltsbewilligung*) and an establishment permit (*autorisation d'établissement; Niederlassungsbewilligung*) for aliens admitted for permanent residence.⁴¹⁴

The establishment permit is normally granted to aliens after ten years of continuous lawful residence in Switzerland, if they hold a valid passport and their past behaviour justifies the issue of the permit.⁴¹⁵ There is no explicit income requirement in the legislation nor is there a statutory right to the permit after ten years. The cantonal aliens police have a wide discretion on this issue. In exceptional cases, an establishment permit may also be granted before expiry of this term, for instance for professors on appointment at a Swiss university.⁴¹⁶ However, important categories of aliens normally are issued an establishment permit after five years of residence in Switzerland:⁴¹⁷ aliens married to Swiss citizens for more than five years, aliens married to persons holding an establishment permit with whom they have been living in a common household for more than five years, refugees and stateless persons with convention status, citizens of all member states of the EEA and citizens of the USA.⁴¹⁸ The spouse and children under 18 years of aliens in possession of an establishment permit are granted establishment permits automatically with the admission for family reunification.⁴¹⁹ In 1997 the Swiss Federal Court confirmed a judgement refusing to grant an establishment permit to an Iranian family of four who arrived in Switzerland in 1985 and obtained refugee status in 1988. The refusal was based on the fact that the father, after having worked for three years, had been dependent on public assistance for many years. The Court remarked that an alien could be expelled on that ground.⁴²⁰

⁴¹³Klaus 1996.

⁴¹⁴Article 6 of the Act of 26.3.1931: *Loi fédérale sur le séjour et l'établissement des étrangers*.

⁴¹⁵The period of ten years is embodied in Article 11(5) of the Regulation of 1.3.1949 (*Règlement de la loi fédérale sur le séjour et l'établissement des étrangers*) according to which an establishment permit is granted to aliens not holding a recognised and valid legitimation document if they have been lawfully resident in Switzerland without interruption for more than ten years.

⁴¹⁶Gutzwiller & Baumgartner 1997, p. 29.

⁴¹⁷Articles 7(1) and (2) of the Act.

⁴¹⁸On the basis of bilateral agreements or of the reciprocity principle applied by the Swiss authorities, Gutzwiller and Baumgartner 1997, p. 28.

⁴¹⁹Article 17(2) of the Aliens Act.

⁴²⁰TF 27.10.97, Migration News Sheet January 1998.

An establishment permit grants the right to reside in the canton that issued the permit for an unlimited period of time. The relevant document for purposes of administrative control is issued for three years only. The expiry of that period does not affect the residence right of the person. The establishment permit allows the holder to transfer his/her domicile to another Canton without prior authorisation, if the arrival is declared within eight days, and to have access to all types of employment, except professions which are reserved by law to Swiss nationals, and to other economic activities without restrictions by the aliens police.⁴²¹

At the end of 1997 almost three quarters of resident aliens were in possession of an establishment permit. From the table below it appears that the percentages of aliens with this privileged status (73%) has been quite stable over the last few years. 27% of resident aliens hold a temporary residence permit, valid for one year. Further, there were 30,000 permits valid for seasonal labour or shorter residence for less than one year and over 81,000 asylum seekers either temporarily admitted or waiting for the (final) decision on their asylum request or not yet expelled after the refusal of their request.⁴²²

	Aliens with residence or establishment permit	Aliens with establishment permit	
1994	1,300,089	941.626	72,4%
1995	1,330,574	956.922	71,9%
1996	1,337,581	965.758	72,2%
1997	1,340,783	982.879	73,3%

Source: *Bundesamt für Ausländerfragen*

Expulsion and protection against expulsion

The validity of an establishment permit ends when an expulsion order is made against the alien, when the alien reports to the authorities that (s)he moved residence outside Switzerland or when (s)he has been abroad for an uninterrupted period of more than six months. This period upon request can be extended up to two years. The permit may be withdrawn where it has been obtained by fraud.⁴²³

The Swiss law permits three forms of expulsions:⁴²⁴

a) Expulsion as preventive measure: Article 70 of the Swiss Constitution permits the federal government to expel an alien if he or she endangers the internal and external security of Switzerland. Expulsion on this ground occurs seldom.

b) Administrative expulsion: the cantonal authorities may order the expulsion of an alien on the grounds of a conviction by a judicial authority for a crime or offence, for failure to

⁴²¹Article 3(10) Regulation of the Aliens Act.

⁴²²Wurzburger 1996, p. 269 and Neue Zürcher Zeitung 28.1.1998; Federal Office for Refugees.

⁴²³Article 9(3) and 9(4) Aliens Act; Raess-Eichenberger 1997, kap. 3.1.5, p. 2.

⁴²⁴Schäppi 1996.

adjust to the established order, for breach of public order due to mental illness or for long-term dependence on public assistance.⁴²⁵

This rather wide discretionary power is somewhat restricted by the statutory provision that expulsion may only be ordered if it appears reasonable under all the circumstances, taking into account the following factors: the seriousness of the offence, the length of residence of the alien in Switzerland and the harm caused by expulsion to the alien and his or her family.⁴²⁶ Beyond these rules and the general rule that an alien may not be forced to depart in violation of the international obligations of Switzerland⁴²⁷, no other special statutory protection against expulsion is provided for aliens in possession of an establishment permit. There is a right of appeal against the expulsion order to the Federal Court.

The expulsion order specifies the period during which the alien will not be allowed to return to Switzerland, running from a minimum of two years to an indefinite period. The expulsion order can be temporarily suspended or completely revoked. Following this decision, the former residence right does not revive.

c) Judicial expulsion: the Swiss Penal Code empowers the courts to make an expulsion order as part of the sentence of an alien convicted and sentenced to prison. The court may order the expulsion from Switzerland for any period between three to fifteen years. The jurisdiction to expel aliens with residence permits is a secondary punishment.⁴²⁸

In Swiss law there is no category of aliens having absolute protection against expulsion.

The influence of the European Convention on Human Rights can be seen in the judgements of the Swiss courts.⁴²⁹ The Federal Court held in a judgement of 1983 that in certain circumstances Article 8 ECHR gives a claim for aliens with a *Niederlassungsbewilligung* to a further right to stay in the country if the private interest prevails the public interest to expel them.⁴³⁰ The same Court held that the father of two children, who had been living for 20 years in Switzerland and had been sentenced for incest with his two daughters, could be expelled from that moment that he lived separately from his wife and did *de facto* no longer have contacts with his children.⁴³¹

⁴²⁵Article 10 Aliens Act.

⁴²⁶Article 11(3) Aliens Act and Article 16(3) of its Regulation.

⁴²⁷Article 14a(3) Aliens Act.

⁴²⁸Article 55 of the Penal Code.

⁴²⁹E.g. TF 15.11.1996 BGE 122 II 433, concerning the expulsion of a second generation immigrant, and TF 3.10.1996, BGE 122 II 385 concerning the refusal to grant an establishment permit to the spouse dependent on a person holding a permit; see also Wurzbürger 1996, p. 288 and 310.

⁴³⁰ATF 109 Ib 183.

⁴³¹Raess-Eichenberger 1997, kap. 3.3.1, p. 4; for other cases on conviction for incest, see Wurzbürger 1996, p. 316.

Simple acquisition of Swiss nationality

Persons born to non-Swiss parents can acquire Swiss nationality only through naturalisation. The normal residence requirement for naturalisation is twelve years. This period is reduced to five years for aliens married to Swiss citizens for three years. For second generation immigrants the residence requirement is reduced to six years, as a result of the rule that the years of residence in Switzerland between the age of 10 and 20 years count double.⁴³² In 1994 a bill intending to simplify the acquisition of Swiss citizenship for second generation immigrants was rejected in a popular referendum. Since naturalisation procedures are handled at the municipal level, there may be differences in naturalisation practice between the municipalities.⁴³³ The comparatively long residence requirement for naturalisation and the absence of alternative procedures for simple acquisition of Swiss nationality for certain categories of resident aliens is one of the explanations for the relatively high percentage of aliens in the population of Switzerland.

⁴³²Articles 15(2) and 27 of the Federal Law of 29.9.1952 on the Acquisition and Loss of Swiss Nationality.

⁴³³Migration News Sheet July 1994.

4.12 Ukraine

In 1995 the total population of Ukraine was estimated at 52 million persons, of which in the official statistics approximately 72% were designated as ethnic Ukrainians and 22% as ethnic Russians.⁴³⁴ In the years before and after the collapse of the USSR Ukraine experienced large scale immigration of persons of Ukrainian origin from Russia and other regions of the (former) USSR as well as a return of peoples who had been deported during the Stalin period, primarily the Crimean Tatars. The Ukraine citizenship legislation adopted in 1991 grants citizenship to all residents of Ukraine at the time the law entered into force irrespective of their ethnic origin or language, unless they had the citizenship of another state or objected to acquiring the Ukrainian citizenship.⁴³⁵ Hence most immigrants who arrived before the end of 1991 automatically became Ukraine citizens. Later immigrants have to apply for naturalisation. The recent returnees generally have the citizenship of their former country of residence, many Crimean Tatars have the citizenship of Uzbekistan. More recently, refugees from Armenia, the Northern Caucasus, Tajikistan and from other countries in Asia and Africa have migrated to Ukraine.⁴³⁶ In recent years the immigration was clearly outnumbered by large-scale emigration resulting in a decrease of the total population of Ukraine.⁴³⁷

The 1994 Act on the Legal Status of Aliens in Ukraine distinguishes between permission for temporary and permanent residence.⁴³⁸ An alien may receive permission for permanent residence, if the person:

- has a legitimate source of income in Ukraine;
- is an immediate relative (father, mother, child, brother, sister, spouse, grandfather, grandmother, grandchild) of a citizen of the Ukraine;
- is dependent on a citizen of Ukraine or has as a dependent a citizen of Ukraine and, finally, in other cases provided for by the laws of Ukraine.

The law states that the procedure for issuing residence permits and other matters related to immigration will be determined by the Law on Immigration. That law in 1997 had not yet entered into force.⁴³⁹

The 1994 Act provides for equal treatment of aliens with Ukrainian citizens in several areas. Aliens holding permission for permanent residence have a privileged position. They are granted equal rights with citizens of Ukraine with respect to access to salaried employment and self-employment (except for functions explicitly reserved for Ukrainian citizens by law), to medical assistance, to free education and to public housing.⁴⁴⁰

⁴³⁴UNDP 1996, p. 6.

⁴³⁵The Act on the Citizenship of Ukraine, adopted 8.10.1991 that came into force on 13.11.1991.

⁴³⁶Schlager 1997, p. 31; Albertini 1997; CIS Conference Secretariat 1996, p. 184; Evtoukh 1995; Shamhur and Malinovska 1994.

⁴³⁷Messina 1997, p. 126.

⁴³⁸Adopted on 4 February 1994; came into force on 30 March 1994; Albertini 1997.

⁴³⁹Article 3 of the Act on the Legal Status of Aliens.

⁴⁴⁰Articles 8, 10, 12 and 14 of the Act on the Legal Status of Aliens.

An alien may be expelled from Ukraine, if his actions violate the security interests of Ukraine or the protection of public order, if it is necessary for the protection of health, rights and legitimate interests of citizens of Ukraine, or if the alien has flagrantly violated the legislation on the legal status of aliens. Decisions on expulsion are made by "the internal affairs bodies of the Security Service of Ukraine". The alien may file an appeal against such a decision with a court. However, the appeal does not suspend the execution of the expulsion order by the internal affairs bodies.⁴⁴¹ There is no differentiation as to the grounds for expulsion between aliens having permission for temporary or permanent admission. Neither does the law oblige the authorities to take into account the length of the period of lawful residence. The actual number of expulsions appears to be rather low, primarily due to lack of financial means.⁴⁴²

Under the 1991 citizenship legislation the general conditions for naturalisation are: renunciation of foreign citizenship, uninterrupted residence in the territory of Ukraine for the past five years, knowledge of the Ukrainian language sufficient for communication and sufficient lawful income and observance of the Ukraine constitution and the Ukrainian legislation.⁴⁴³

The residence requirement does not apply to persons who entered Ukraine for permanent residence and were born or have a parent or grandparent born in Ukraine and (among other requirements) do not hold citizenship of another state.

Women who are married to Ukrainian citizens may, subject to renunciation of their foreign citizenship, be naturalised in a simple procedure. The legislator apparently preferred not to offer this opportunity to the alien spouses of Ukrainian women.

⁴⁴¹Article 32 of the Act on the Legal Status of Aliens.

⁴⁴²Rösch-Metzler 1996, p. 169.

⁴⁴³Article 17 of the Law on the Citizenship of Ukraine.

5. CONCLUSIONS AND RECOMMENDATIONS

This research starts from the position that a secure residence status is a necessary element of any policy aiming at integration of immigrants in the host society. On the one hand the impetus to integrate depends crucially on whether the immigrants feel their residence status is secure. "Immigrants who fear that they can be removed from their host society's territory ... will, at best, be hesitant or half-hearted in their integration efforts. Living in uncertainty is not conducive to investing years of language or vocational training, one's savings, emotions and loyalties in the host society or to looking for a marriage partner there."⁴⁴⁴ On the other hand, public authorities, employers, teachers, colleagues and neighbours will be less inclined to treat immigrants as equals, give them a fair chance or the necessary support in the process of integration, if they feel that the immigrant one day may be forced to leave the society again.

Most of the 18 countries included in this study grant some form of secure residence status to long-term immigrants. However, the substance of that status varies considerably between the countries. Generally, speaking the countries in Western and Northern Europe with a tradition of immigration going back several decades or even longer, have developed an elaborate set of statutory rules granting security of residence to aliens admitted for an indefinite period. Countries in Southern and Central Europe, some of which recently changed from emigration- to immigration-countries, recently introduced a special status (e.g. Austria, Estonia, Poland, Hungary Lithuania and Spain), or are on the point of doing so (Italy). In those states the status often does not grant a high level of protection against expulsion. Finally, some countries in Central and Eastern Europe have not introduced such a status into their legislation (Russia and Ukraine) or if there is a permanent residence status, the protection against expulsion does not differ from the limited protection granted to aliens holding a temporary permit.

Size of the alien population

The size of the total alien population in the countries studied varies from less than 1% in Lithuania, Hungary, Poland and Russia, between 1% and 2% in Italy and Spain, to 19% in Switzerland and probably an even higher percentage in Estonia. The latter country stands out because it is the only one in this study where as a result of a conscious policy the majority of the aliens with long residence on the territory is stateless. Generally, the size of the alien population of a country is influenced by the extent of immigration, whether immigration is an old or recent phenomenon and by the opportunities for alien immigrants to acquire nationality of the country of residence.

Simple acquisition of nationality

Acquiring nationality of the country of residence in most countries is the only way to full security of residence. Several states provide absolute protection against expulsion for

⁴⁴⁴Experts 1990, p. 18.

certain categories of long-term immigrants before they acquire nationality of the country (Austria, the Netherlands, France, Sweden and the UK).

The residence requirements and other conditions for naturalisation vary widely between the countries included in this study: from five years in eight of the 18 countries to twelve years in Switzerland. For some categories of settled aliens simplified forms of acquiring nationality are provided, generally for the second generation, for alien spouses of the nationals or for refugees with convention status.

Second generation immigrants born in the country of residence in all old Council of Europe member states studied enjoy a privileged position. They are granted nationality by birth (UK) where their parents have permanent residence, or automatically at the age of 18 years (France). Elsewhere they may either opt at 18 years for the nationality (Belgium and the Netherlands), are entitled to naturalisation (Germany) or the residence requirement for naturalisation is reduced (Switzerland). In none of the seven CEEC countries does the nationality law grant a privileged position to second generation immigrants.

From the table below it appears that some countries with a relatively high percentage of aliens in the population also have set relatively high requirements for obtaining a permanent residence status or acquiring the nationality of the country (e.g. Germany, Switzerland and, with respect to naturalisation, Austria). In other countries that experienced large-scale immigration but made it easier to obtain permanent residence status and nationality, the percentage of aliens is considerably lower (e.g. UK, France and the Netherlands).

Acquiring the permanent residence status

The conditions for acquiring secure residence status vary widely between the states studied.⁴⁴⁵ Generally, this status is granted only after the alien immigrant has lawfully been resident for some years, has sufficient income or stable employment, and has not recently committed serious offences. The period of residence required varies from three to five years in eleven countries, to ten years in Switzerland (see the table below). Several countries also require sufficient accommodation. Some moreover require long employment records and payment of social security contributions (2-3 years in Spain and 60 months in Germany). Sufficient knowledge of the language is a requirement for this status only in Germany and Hungary.

⁴⁴⁵For a similar conclusion see Çinar, Hofinger and Waldrauch 1995, p. 33; Waldrauch and Hofinger 1997, p. 278.

	% aliens in population	Secure residence status	Years residence required for secure status	Secure residence status: right or discretion	% aliens with secure status	Absence allowed	Years of residence required for naturalis.	Second-generation born on territory acquires nationality
Austria	9	yes	5	right			10	No
Belgium	9	yes	5	right	>75	1 year	5	decl. at 18
Denmark	4	yes	5			1 year	7	option at 16
Estonia	20-25	yes	3	discretion			6	no
France	6	yes	3/10	discretion/right	93	3 years	5	autom. at 18
Germany	9	yes	5/8	right	53	6 months	10	right to naturalis.
Hungary	1	yes	3	discretion	40	no restriction	8	no
Italy	1-2	yes	5	right			10	3 years for naturalis.
Lithuania	< 1	yes	--	--	> 75		10	no
Netherlands	5	yes	5	right	± 66	9 months	5	option at 18
Poland	< 1	yes	3	discretion			5	no
Russia	< 1	no	--	--	--	--	5	no
Slovenia	< 1	yes	3 (8)	discretion	10		10	no
Spain	1	yes	6	right	< 1	6 months	10	1 year res. for naturalis.
Sweden	6	yes		discretion	> 66		5	option at 21-23
Switzerland	19	yes	10/5	discr.	72	6 months	12	reduced res. req. for naturalis.
Ukraine	< 1	no	--	--	--	--	5	no
UK	4	yes	4	discr.	> 50	up to 2 years	5	at birth to settled parents

blank = no data available; -- = not applicable

In some countries on fulfilling the conditions an alien is entitled by right to a permanent residence permit (Austria, Belgium, Germany and the Netherlands). In other states the switch from temporary to permanent resident status is in the discretion of the authorities. In UK law the status is discretionary, but normally granted after four years of residence. In practice, even in countries where there is a right in law, proving that one has fulfilled the requirements may be problematic.

In recent years the largest groups of resident aliens acquiring the secure status were persons admitted for family reunification or refugees with convention status (see the data on France and the UK in chapter 3). As only a minority of immigrants was admitted for employment in recent years, they do not make up a significant proportion of those acquiring the status.

In Central and Eastern European countries permanent status is primarily granted to immigrants admitted on the basis of their ethnic ties with the country. They often receive the protected status directly after admission. Family members of aliens with the permanent status and refugees in some countries also receive that status at the time of admission (e.g. in France). Elsewhere these immigrants have to fulfil residence requirements as well (Belgium).

In most Western European countries with long experience of immigration the majority of the resident aliens currently holds a secure residence status: over 50% in Germany, over two-thirds in Belgium, the Netherlands and Sweden, 72% in Switzerland and more than 90% in France. Two qualifications have to be made. High and low percentages do not necessarily evidence a country's commitment to integration of alien residents. First, the level of security varies widely among the countries. Secondly, a low percentage may indicate that it is hard to obtain the secure status, that many immigrants have arrived only recently, or that it is easy to obtain citizenship of the country of residence. Our research indicates that the statement "by the 1980s well over half of the foreigners in Europe already had permanent residence in their host countries - a virtually irrevocable status..."⁴⁴⁶ is incorrect. Not only were Northern and Western European countries regularly threatening long resident aliens with expulsion, but in Southern and Central Europe even the concept of a special, protected status was unknown.

Security of residence: losing the permanent status

The security of residence of aliens holding this status to a large extent depends on the number of grounds on which the status may be lost and the probability that such grounds will actually materialise.

In most countries studied permanent residence status can be lost on the ground that the alien provided incorrect information on application, has long been absent from the country or has been convicted of serious crimes. Some countries allow withdrawal of the status on several other grounds: lack of income, disappearance of the original ground for admission to the country or for an offence against public order. In the latter cases the residence permit may be called permanent, but it grants little security of residence. We will return to that issue below.

Expulsion orders may be made by administrative authorities, by the courts, or in several countries (France, Italy, Spain, Sweden and Switzerland) by both. An expulsion order usually carries a ban on return to the country. Such a ban may have far-reaching consequences for the family members of the person concerned, since such a ban may be in force up to ten years or, in certain countries, even for an indefinite period of time.

Protection against expulsion

In most countries studied the expulsion of immigrants with permanent residence status is, either in law or in practice, restricted to cases where the alien has been convicted of a

⁴⁴⁶Soysal 1994, p. 122.

serious crime and sentenced to a long prison term. Expulsion orders without a (final) conviction have become increasingly rare. Even in the few cases where national security is the ground for expulsion, the persons were usually convicted of terrorist activities or other serious crimes. Expulsion orders made against Iraqi residents during the Gulf War, members of the Algerian GIA and a few cases of espionage are the rare examples mentioned. The number of expulsions on economic grounds in the countries where this is still permitted by law, is unknown.

From our study it appears that in several countries with large alien populations during the last decade there has been a sharp decrease of the number of expulsion orders made against aliens with permanent residence status. In recent years in Belgium and the Netherlands less than ten expulsion orders per year are made against long-term alien residents. In the UK, with a substantially larger alien population, just over 100 expulsion orders are made annually on the only legal ground which may be used against long resident aliens. As this number includes temporary resident aliens expelled on this ground as well, the number of expulsions of long resident aliens may be considerably lower. The reports on Denmark and Hungary indicate that the number of such expulsion orders is minimal. Even in countries where the number of expulsion orders may be higher (France and Germany), the number of expulsion orders actually implemented by forced departure is small, partly due to an elaborate system of administrative and judicial controls. In these and other countries a range of alternative measures is used to avoid the high emotional and other costs and the harsh consequences of forcible departure of a long-term resident for the person and his or her family. Suspension of the expulsion order, giving a formal warning, replacing the permanent residence permit with a temporary one, or restriction of the residence right to a certain region, all are used as alternatives, often with the aim of giving the alien a chance to rehabilitate after the person has served the prison sentence.

This clear decrease in the use of the power to expel a resident alien has been influenced by three developments: (a) the increasing length of the residence of immigrants, (b) the case law of the European Court of Human Rights in Strasbourg on the meaning of the right to family life protected in Article 8 ECHR (see para. 2.1), and (c) the case law of the European Court of Justice in Luxembourg on the Community law rules restricting the power of the EU member states to expel EU-citizens (see para. 2.3) or Turkish workers and their family members (see para. 2.4).

The vast majority of the alien population of the seventeen EEA-countries and Switzerland has already lived in those countries for more than ten years. In many countries studied the case law of the Court in Strasbourg, has clearly influenced the statutory rules, ministerial instructions to the immigration authorities or case law of the national courts with regard to the protection against expulsion of long-term residents irrespective of their nationality. One third of all aliens living in the seventeen EEA-countries are citizens of another EEA-country and hence enjoy the considerable level of protection against expulsion under the Community law rules on free movement of persons. Turkish citizens make up one fifth of the third country nationals living in EEA countries. Their residence status is influenced both by the EEC-Turkey Association Agreement and the European Convention on Establishment (see para. 2.2). The latter Convention apparently has contributed to the procedural guarantees against expulsion of long-term resident aliens and to free access to

employment and other economic activities of aliens with permanent residence permits in most of the twelve Council of Europe member states that have ratified it. In many countries covered by this study, the implementation of human rights conventions and other international agreements has gradually diminished the sharp differences in legal status between citizens and aliens having long residence in the country.⁴⁴⁷

Compared to the size of the alien population the number of expulsions is minimal. However, in several countries considerable numbers of expulsion orders are made. Even when only some are implemented in practice, this policy creates serious insecurity among immigrants. In a survey conducted in Germany in 1995, 20% of the Turks and 10% of the Greeks and the Italians interviewed reported they had experienced problems in the last three years which made them insecure about their right to remain in Germany.⁴⁴⁸

Differences among countries

Substantial differences are apparent in respect of five issues:

a) rights attributed to the status: In some countries free access to employment and other economic activities, equal treatment in social benefits, a more liberal right to family reunification, or the right freely to choose residence or to leave the country of residence and return to it, are attached to this status. In other states the only advantage the alien acquires is that (s)he is no longer obliged to apply with the aliens police for a renewal of the temporary permit every year or two.

b) grounds for losing the status: In countries granting a high level of security of residence the permit in law or in practice can be lost on three grounds only: fraud, long absence from the country or long prison sentences (Belgium, Netherlands, Sweden and the UK). Aliens holding a secure status in those countries do not need to be afraid of losing their residence rights in the event of unemployment, serious illness, loss of income or accommodation, receiving public assistance, divorce or other change in family situation, offences against public order, breaking laws which are not punishable by long prison sentences. However, in several states one or more of these grounds may be used by the administration to withdraw a permanent residence permit. If the status can be lost where the grounds for granting the original permit have disappeared or for any violation of national laws (e.g. Lithuania and Russia) the status can hardly be called a secure one.

c) level of protection against expulsion: In some countries any offence against public order may be ground for expulsion, whilst elsewhere the grounds are restricted: only for certain specified crimes or after a long prison sentence. Several countries grant special protection to certain groups: minors, family members or former citizens. In some countries there is a complete ban on expulsion of certain categories: in France for minors, in Austria, the Netherlands and Sweden for the second generation and in the Netherlands for all immigrants after 20 years residence.

⁴⁴⁷Soysal 1994; Hammar 1994.

⁴⁴⁸Mehrländer 1996, p. 387.

d) opportunities for bureaucratic hurdles: Different problems apply in different countries:

- the standard of proof expected by the authorities on application for the status;
- the need to apply for a renewal of the status (France) or the card documenting permanent residence status;
- the refusal of entry at the border on return from a long stay abroad (e.g. the UK).

The second and third problem in some countries can result in automatic loss of the status.

e) procedural guarantees: In several countries the competence to make decisions on issue and withdrawal of permanent resident permits or on expulsion of long-term immigrants can only be made by the national or regional authorities and not at the local level. The availability of administrative and judicial remedies varies widely. The obligation to ask an independent commission to give its opinion before an expulsion order can be made, to allow the alien to be represented before that commission, the possibility of review by a court and the suspensive effect of such appeal, are among the guarantees against a sudden and unfair decision on expulsion. They also avoid the risk of a decision being made without taking into account the consequences for the long-term migrant and his or her family. In several of the countries examined none of these procedural guarantees (required by the European Convention on Establishment) were provided for in the national legislation.

From our case studies it appears that in some countries expulsion of immigrants with long residence has been a hot political issue in the 1980s and early 1990s. During that period NGOs were actively campaigning against expulsion. After clear rules providing better protection were introduced, the debate disappeared in Belgium and the Netherlands. In the UK the public debate on expulsion cases does not relate primarily to long-term legal immigrants. In these three countries the relevant rules have hardly been changed during the last decade. In contrast, in other countries (e.g. France and Germany) the issue of expulsion continues to return to the political agenda and statutory rules have been changed repeatedly in the 1990s. In both countries this resulted in a complex set of rules, a large number of disputes and court cases, and uncertainty about the law among lawyers and immigrants. Whilst the political debate creates the impression that large numbers of long-term resident aliens are expelled, there are indications in our study that the number of expulsion orders actually implemented in these two countries in practice may be relatively small.

Moreover, according to our respondents in both countries there are clear regional differences in the application of the rules on the status of long-term immigrants, related to the political composition of the governments of the *Länder* in Germany or of the political colour of the government that appointed the *préfet* in France. Apparently there are not only differences in the relevant law and its application between countries but within countries as well. The absence of clear rules is one of the causes of these differences. The difference in the size of the alien population might also explain part of these differences.

In Austria both NGOs and the Constitutional Court stimulated the recent introduction of a secure residence status and better protection against expulsion.

Common problems and solutions

In our study we found that similar problems arise in several countries. We mention six of those common problems. We also mention solutions to those problems used in some countries, that in our view are fair rules or good practices.

(1) switching residence status for the second generation at 18 years: This is a crucial problem mentioned in many countries in our study. The time when the social status of children normally changes, secondary education has ended and children are becoming independent from their parents, is also the age at which young people are most prone to commit criminal acts. It is here that second generation immigrants most risk losing the residence status they derived from their parents or the strong protection against expulsion provided by the law (e.g. in France and the Netherlands). In those situation some young people fail to apply in time for a permanent residence status or for the nationality of the country of residence. If they come in contact with the police suspected of having committed a crime, their residence that has been lawful for many years, then is discovered no longer to be lawful and they run the danger of expulsion.

Various solutions apply in different countries: automatic acquisition of a secure residence status or nationality at the age of 18 for persons born in the country or having resided there for the five years preceding that age; an absolute ban on expulsion of those who entered at an early age and have lived in the country most of their lives (Austria and Sweden); the option on nationality of the country of residence at an earlier age (16 years in France). The British rule that a child of settled immigrants born in the UK acquires British nationality at birth, avoids this problem altogether.

(2) vague concepts in the law: Concepts such as "public order", "public security", "serious offence", "consequences for family members" or "the interests of the State" are used in statutory provisions on expulsion in many countries. These and other vague concepts allow a wide discretion to the administrative authorities and courts which apply these rules in individual cases. In order to restrict this discretion and enhance the protection of settled immigrants against expulsion, legislators have introduced different kinds of specifications: only a conviction for certain crimes (e.g. drugs trafficking, murder or espionage) or a prison sentence exceeding a specific duration (over one, three or five years) may give rise to an expulsion order⁴⁴⁹; in some countries the range of crimes or the length of the prison sentence varies with the length of the lawful residence of the immigrant in the country (e.g. in Austria, Denmark, Germany and the Netherlands).

(3) interruption of residence by a stay abroad: Immigrants often make long trips abroad in order to visit family members, to arrange their financial affairs or to see whether a definite return to the country of origin is feasible. The period allowed for such visits while maintaining the secure residence status in the countries studied varies between six months and three years.

⁴⁴⁹A related problem is the extent to which convictions in other countries are taken into account. The use of the Schengen Information System has made this problem more acute.

Setting periods under one year is asking for problems. Several countries allow the resident alien to apply for an extension either before or during the period abroad. Disputes should not take place at the border (UK).

(4) interruption of the lawfulness of residence: Most states make uninterrupted periods of lawful residence a requirement for acquiring secure residence status or nationality. A short interruption between two temporary residence permits has the effect of invalidating the previous residence period. In our view, short interruptions should not be held against the alien where a new residence permit has been issued. In some countries there is a rule that such interruptions are disregarded.⁴⁵⁰

(5) late applications for the status or renewal of the document: Often problems arise when applications are not filed in time, due to illness, change in social situation, stay abroad or detention. In some *départements* in France the administration informs the immigrant by letter that (s)he has to renew the residence card within a few weeks. Several countries have a statutory rule explicitly stating that the need to renew the residence document periodically does not restrict the permanent residence right of the person. The document is only declaratory, the right remains.

(6) relation between criminal courts and immigration authorities in expulsion cases: Expulsion orders mainly are made against aliens convicted of serious offences. If two different authorities are making decisions with regard to the same acts committed by a person, problems of co-ordination may arise. The judge when considering what will be a just sentence may want to know whether the alien will be entitled to remain or forced to leave the country. Many settled immigrants consider expulsion and forced departure a more severe punishment than a fixed prison term. On the other hand, immigration authorities often feel obliged (or are under a statutory obligation) to take into account the behaviour of the person during his time in prison or the consequences of forced departure for family members after the prison sentence has been served. Respondents from various countries mentioned that judges in criminal courts and lawyers specialising in criminal cases often have limited knowledge of immigration law. In some new Council of Europe member States the knowledge of relevant international instrument is rather limited as well. In some new Council of Europe member states the knowledge of the relevant international instruments is rather limited as well. Moreover, those judges often have little information on the consequences of expulsion for the alien's family members. These co-ordination problems arise especially in countries where both the courts and the immigration authorities may make an expulsion order, such as France, Hungary, Italy, Spain, Sweden and Switzerland. These problems are partially solved where only a court may make an expulsion order (in Denmark and Lithuania) or only the court may make an expulsion order on the ground of a criminal conviction and the court is informed by the immigration authorities, or where the immigration authorities have the exclusive power to make expulsion orders (Belgium, Germany, Netherlands and the UK). In the UK the court may advise the Home Secretary on expulsion.

⁴⁵⁰E.g. Article 97 of the German Aliens Act of 1990.

Four arguments used to justify expulsion of aliens

1. The alien is a guest in the country of residence and the hospitality ends when the alien becomes a burden to the host country.
2. Preventing the alien from becoming a burden for the country of residence again (special prevention).
3. The threat of expulsion and the actual forced departure of an alien will cause fears among other aliens, especially compatriots, which will reduce their inclination to commit similar acts (general prevention).
4. Under international law states are, within the limits set by human rights treaties, free to expel non-citizens from their territory.

Whatever the general validity of these arguments, each of the four becomes less convincing the longer the alien has lawfully resided on the territory of another country and even more so for second generation immigrants born, raised and educated on the territory.

After long residence it is no longer appropriate to compare the immigrant with a guest. Expulsion of an alien whose family and other close contacts all continue to live in the country of residence, might well increase rather than diminish the chances of renewed undesirable conduct, due to the likelihood of illegal return, lack of social control or exclusion from regular employment. The general prevention argument is doubtful both from an empirical and from a moral perspective. A human being is used as an instrument to induce certain behaviour in other human beings. On the fourth argument Schermers, former member of the European Commission on Human Rights, wrote in his partly dissenting opinion in *Lamquindaz v UK*: "I doubt whether modern international law permits a state which has educated children of admitted aliens to expel these children when they become a burden. Shifting this burden to the state of origin of the parent is no longer clearly acceptable under modern international law. It is at least subject to doubt whether a host country has the right to return those immigrants who prove unsatisfactory."

Three models of restricting expulsion of long-term immigrants

Under Article 8 ECHR member states, when considering the expulsion of long-term immigrants, are obliged to take into account not only the seriousness of the offence, but also the duration of the residence of the immigrant and the consequences of expulsion for the person and his or her family members (see the case law reviewed in para. 2.1). In many member states similar obligations exist in statute (e.g. in Austria, Germany, Slovenia and Switzerland) or the case law of the national courts. Several states have introduced more concrete rules, thus providing more clarity and security both to immigrants and national authorities. Three different models can be distinguished.

Model A

After a certain period of lawful residence an alien is no longer expellable or only expellable on conviction for a crime specified by law. In the Netherlands after 20 years residence an alien is no longer expellable and after 10 years only after a prison sentence of over five years for drugs trafficking or serious violence. Second generation immigrants,

born in the country or admitted for family reunification are no longer expelled when they have resided in the country for 15 years. Even more liberal rules apply in Austria and Sweden. In the latter country expulsion is not permitted where the child entered before the age of 15 years and has five years of residence.

Model B

After a certain period of lawful residence or once a permanent residence permit has been issued the person is granted with respect to expulsion the protection that EU/EEA-nationals under Community law are entitled to immediately on entry into another EU country. This means that the grounds for expulsion are severely restricted and certain grounds are ruled out completely (see para. 2.3). In Belgium aliens holding an establishment permit, issued after five years residence, are entitled under the immigration legislation to the same protection against expulsion as EU/EEA-citizens. In the Netherlands Turkish workers and their family members enjoy a similar protection as a result of the implementation of the rules made under the EEC-Turkey Association Agreement.

Model C

In this model the extent of the protection increases with the duration to the residence of the alien. The longer the residence the more serious the offence has to be before expulsion is an option. In Denmark after four years residence expulsion is possible only after a prison sentence of four years or after a sentence of one year if recidivism is likely; after seven years of residence an alien may only be expelled after a prison sentence of six years or more, repeated criminal offences or on national security grounds. Similar thresholds are provided in the legislation of other member states as well. Often the length of the prison sentence is used as a measure of the seriousness of the offence committed. This simple measure creates clarity for all concerned. However, with the culturally defined variations in sentencing patterns in Europe, it might not be a reasonable criterion for harmonisation. The same offence might result in a far longer sentence in one state than in another state. This may be a reason for preferring the other models for the purpose of harmonisation. The second model has proved rather effective in many EU member states over a long period of time.

As regards **second generation immigrants** there is an urgent need for special rules both in immigration law and in nationality law. For these persons Model A appears to be the best suited. Aliens born in the territory or admitted before the age of 6 years should not be expellable before the age of 18 years (as guaranteed under French law) nor after the age of 18 if they have resided in the country during most of their youth (as in Austria, Sweden and the UK for children born there to settled immigrants).

It should be noted that these three models are not mutually exclusive. The models might be used in conjunction to cover different situations. Elements of these models can and actually are combined in several countries.

The pressing need for legislative action to provide consistency in protection against expulsion for long-term resident aliens is evidenced by the recent case law of the European

Court of Human Rights. At the moment, the judges at the ECtHR are in effect being required to fill the legislator's role in order to give effect to the rights contained in Article 8 ECHR. This unfortunate state of affairs and the need for action has been summarised by Judge Pettiti (*Nasri v France* judgement 13.7.1995) as follows: "The European Convention excluded from its substantive law the deportation of aliens by States (except collective deportation). However, when Article 8 and, in circumstances of exceptional gravity, Article 3 are invoked, the Court may examine individual cases without overstepping the limits of what is laid down in Article 8 concerning the notion of private life. But this line of decisions does not provide a solution to the general problem, which is a matter for the member States of the Council of Europe, if they have the will to harmonise their policies in this field and co-operate ... with a view to strengthening the protection of families..."

Policy and legislative options

A. for governments:

- (a) **grant security of residence** to long-term immigrants along the lines of one or more of the three models described above;
- (b) **introduce a permanent residence permit** for long-term resident aliens granting them and their family members, permanent residence rights terminable only on grounds of conviction for a serious crime to a long prison sentence, access to all economic activities, equal treatment with nationals in housing, education, social benefits and other civil and administrative rights;
- (c) **facilitate acquisition of nationality** for the second generation either automatically at birth to parents settled in the country or at the time they reach 18 years, or the right to opt for nationality if born or having long residence in the country at the time they turn 18;
- (d) **ratification of the European Convention on Establishment**; this reinforces the legal status of the citizens of other state parties to the convention with long residence in that country and of nationals of the state party resident on the territory of other state parties (see para. 2.2).

B. for the Council of Europe:

- (a) the Committee of Ministers issues a **Recommendation on the legal status of aliens with long residence on the territory of the member states**, covering at least the following elements:
 - conditions for acquisition and loss of permanent residence status
 - restrictions on expulsion
 - access to employment and other economic activities
 - equal treatment with nationals
 - special protection of the second generation
 - procedural guarantees
 - facilitating acquisition of citizenship
- (b) urge governments of member states to **ratify the European Convention on Establishment and the European Convention on Nationality** of 1997;

(c) draw up a **Protocol to the European Convention on Establishment** extending the rights granted under that convention to all aliens admitted for permanent residence or with five years of lawful residence in the country.

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