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Kees Groenendijk,
Elspeth Guild & Robin
Barzilay

The Legal Status of Third Country
Nationals who are Long-Term Resi-
dents in a Member State of the EU

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6500 KK Nijmegen
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Editors Carolus Grütters
 Ashley Terlouw

Lay-out Hannie van de Put

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THE LEGAL STATUS OF THIRD COUNTRY NATIONALS WHO ARE LONG-TERM RESIDENTS IN A MEMBER STATE OF THE EUROPEAN UNION

Kees Groenendijk
Elspeth Guild
Robin Barzilay *

1. Introduction

Out of the total population of the European Union (371,587,000), nationals of the Member States account for 96%. When one adds in nationals of the EEA states and Switzerland together with Union citizens they account for 362,248,000 of the Union's population. This report is about some of the remaining 9,339,000 who are third country nationals.¹ This number of third country nationals² of course also includes persons whose residence is only of short duration.

On 1 May 1999 the European Community was granted the power to adopt measures *inter alia* on:

- (1) conditions of entry and residence, and standards on procedures for the issue by Member States of long term visas and residence permits for third country nationals (Article 63(3)(a) EC); and
- (2) the rights and conditions under which nationals of third countries, who are legally resident in a Member State, may reside in other Member States (Article 63(4) EC).

The European Commission is responsible for proposing legislation in the area.³ Although the EC Treaty, as amended by the Treaty of Amsterdam, does not

* c.groenendijk@jur.ru.nl. This report has been published by the Council of Europe in the Community Relations Series, Strasbourg, August 2000.

1 *Eurostat Yearbook 1997*.

2 In this report we will use the term "third country national" to mean anyone who is not a national of a Member State of the European Union. In the report on the Member States in Chapter 3 all comments about third country nationals exclude, unless specifically stated, the rights which they may have by virtue of agreements between their state of nationality and the European Union. In these reports we will use the term "non-national" or "alien" to describe third country nationals undifferentiated on the basis of any rights which may arise as a result of Community law.

3 Which competence for the five years following the entry into force of the Amsterdam Treaty is shared with the Member States.

require the adoption of legislation on these two areas within a specific time frame, the Vienna Joint Action Plan of the European Council and Commission⁴ committed the European Community to adoption of measures in these two areas within five years of the entry into force of the Treaty (i.e. 1 May 1999). In order to prepare for the adoption of European Community legal instruments in these fields, the European Commission requested the preparation of this report on the legal status of third country nationals who are long-term residents in the Member States.

The European Commission has twice before published reports on the status of third country nationals in the European Union. First in 1989, it presented its report on *The Social Integration of Third Country Migrants residing on a Permanent and Lawful Basis in the Member States*.⁵ Subsequently it presented a report of independent experts on the topic: *Experts Report on Policies on Immigration and the Social Integration of Migrants in the European Community*.⁶ Both of these reports provide a rich source of information on integration of third country nationals in the Member States. Neither, however, focus specifically on the legal status of third country nationals as regards residence.

The European Commission has also maintained a network of independent national experts, one from each Member State, who have been commissioned to prepare an annual report on the implementation of Community legislation on migration in each Member State. Although third country nationals were to some extent outside the scope of the reports, they were included as regards the immigration related aspects of the Community's third country agreements, most specifically with Turkey, the Maghreb countries (Algeria, Morocco and Tunisia) and the Central and Eastern European countries (CEECs). This rather heterogeneous group of agreements all covers different areas of migration.

The European Commission, therefore, commissioned this study which seeks to provide detailed information about the situation of third country nationals lawfully resident in the Member States which can be used as a basis for future legislation in the field. As regards the terminology, the Commission requested that the study cover legally resident migrants, no matter what the basis of their lawful residence, provided that its duration exceeded five years or it was "permanent" or the equivalent. The methodology which we adopted was as follows:

4 Council of the European Communities and Commission of the European Communities, *Action Plan Towards an Area of Freedom, Security and Justice*, December 4 1998, OJ 1999 C 19/1.

5 European Commission, *The Social Integration of Third Country Migrants residing on a Permanent and Lawful Basis in the Member States*, SEC(89)924 Final, Brussels, 22.6.89.

6 European Commission, *Experts Report on Policies on Immigration and the Social Integration of Migrants in the European Community*, SEC(90)1813 Final, Brussels, 28.9.90.

1. A review of the available literature at European level, the existing studies and at the Member State level, official reports, textbooks and academic and non-governmental studies;
2. Submission of a detailed questionnaire on the subject to: officials of each Member State; an expert lawyer in each Member State; a relevant non-governmental organisation in each Member State, followed by interviews where appropriate to clarify the answers given in the questionnaires;
3. Analysis of the information received and a comparison of the similarities and differences in the Member States.

The specific aspects of the legal status of third country nationals which we were requested to cover were as follows:

1. The acquisition of long resident status;
2. The rights attached to the status;
3. The possibility for family members to benefit from the status;
4. The loss of the status;
5. Removal or deportation;
6. The possibility to obtain nationality.

Not all aspects were relevant to all Member States. We have tried, however, to prepare the report focussing on these six elements to provide as far as possible the coordinates for comparison. In order to place the issue in its proper framework, we have commenced with an overview of the Community's existing framework for the treatment of third country nationals. Any new legislation which is proposed by the Commission needs to take into account the existing binding European Community law on third country nationals and build on that, bearing in mind the similarities and differences of the legal regimes in the Member States. The drafting of new Community legislation will also be guided by the declared aim to integrate long term resident migrants in the societies of the Member States and to prevent social exclusion.

2. The International and European Community Framework relating to Third Country Nationals Resident in the Member States

There are two fundamentally different approaches to considering the status of third country nationals within the territory of the Member States. We shall consider both of them here briefly. The first perspective is to focus on the status of a third country national as such – this is to say, to take as a starting point the fact of difference, the fact of being a third country national and to set out the rights and duties which apply to the individual in this capacity compared to and differentiated from the rights and duties of citizens of the state. The second perspective is to take Community law as the starting point and see when

and to what extent it differentiates between third country nationals and Community nationals.

The first perspective is based on the principle of international law expressed by the European Court of Human Rights as follows:

“As the Court has observed in the past, Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including the European Convention on Human Rights, to control the entry, residence and expulsion of third country nationals.”⁷

International law contains only limited obligations on states to respect the choices of individuals as to the country in which they live. First, the principle of admission to the state of which one is a national is well-established and contained, inter alia in Protocol 4 European Convention on Human Rights (ECHR). Secondly, the enjoyment of family life can found a claim to remain at least on the territory of a state of which an individual is not a national contained, inter alia, in Article 8 ECHR. Thirdly, persons are entitled to remain on the territory of a state of which they are not nationals if the only alternative is to return them to a place where they fear inhuman and degrading treatment or punishment⁸ or persecution on defined grounds.⁹ Beyond these grounds the crossing of external borders is generally considered, in international law, a reserve of national sovereignty.

From this perspective, the starting point for the Community as regards the consideration of third country nationals resident in the territory of the Member States is the exercise of the Community's competence pre 1 May 1999. Such a consideration embraces two main lines: first, the rights derived from the relationship of third country nationals with a Community national principal; Secondly, the rights of third country nationals within the territory of the Member States resulting from the exercise of the Community's competence to settle agreements with third countries (Article 310 EC).

Third Country Nationals as Family Members and Employees

The first comprehensive rights of free movement, economic activity and residence for third country nationals are found in Articles 10-12 of Regulation 1612/68. These rights include the right of family members of Community nationals exercising economic free movement rights to accompany or join their Community national principal in the host state, to engage in economic activities

7 *Chahal* [1996] EHRR European Court of Human Rights judgment 15.11.96, para. 73.

8 Art. 3 ECHR and Art. 3 UN Convention against Torture.

9 UN Convention on the status of refugees 1951 and Protocol 1967.

there and for children to enjoy equal treatment in all education related rights. The family members, of any nationality, include spouses, children under 21, dependent relatives in the ascending and descending lines and those who lived under the roof of the worker in the home state. In 1998 the Commission proposed amendments to the Regulation to remove the dependency requirement for family members.¹⁰

Third country nationals also enjoy a right of movement and economic activity within the Union in their capacity as employees of a Community based enterprise who are sent to provide services for their employer in another Member State. This right, resulting from the Court's caselaw, has been the subject of a proposal in 1999 by the Commission for a directive on posting third country nationals.¹¹

Third Country Nationals and Third Country Agreements

By the EEA Agreement 1991, the Community extended to a group of third country nationals, on the basis of their nationality, equivalent free movement rights to those which it grants to nationals of the Member States. The EEC-Turkey Association Agreement 1963 and its 1970 Protocol,¹² through its subsidiary legislation, provides the next most complete system of protection of third country nationals already resident in the Member States of the Union, protecting security of residence of workers and their family members and guaranteeing non-discrimination in working conditions and social security.¹³ Through a step by step acquisition of rights, Turkish workers are entitled to renewal of their work and residence permits after one year's employment on the territory of a Member State provided their jobs are still available, after three years the right to change employment within the sector and after four years employment free access to the labour market of the Member State.¹⁴ For the spouses and children of Turkish workers, rights to access to the labour market and security of residence are also included.¹⁵ Protection against expulsion is also included: the State's grounds for expulsion are limited to public policy, public security and public health.¹⁶

10 OJ 1998 C 344/9.

11 OJ 1999 C 67/12.

12 OJ 1973 C 113/2.

13 For a fuller analysis of the rights of Turkish workers under the Agreement see Rogers 1999; O'Leary 1998; Gutmann 1999; Gacon and Staples 1999.

14 Art. 6 Decision 1/80.

15 Art. 7 Decision 1/80.

16 Art. 14 Decision 1/80; the Court of Justice has recently held that the public order grounds for expulsion are to be given the same meaning as for Community nationals, judgement of 10 February 2000, case C-340/97 *Nazli*.

The Maghreb Agreements of 1976¹⁷ (and now renewed by the Agreements signed in 1995 and 1996 except in the case of Algeria)¹⁸ only provide protection from discrimination in working conditions, social security and dismissal.¹⁹ However, this right has been particularly important to workers of these nationalities as regards access to social security benefits both for themselves and their family members. From the number of cases which have come before the Court of Justice on this issue it is clear that non-discrimination in social security, at least, is by no means self-evident or respected in the Member States as regards migrant workers.²⁰

The Europe Agreements: Central and Eastern European Countries, Baltic States and Slovenia

Country	Date of Signature	Entry into Force
Bulgaria ²¹	08.03.1993	01.02.1995
Czech Republic ²²	04.10.1993	01.02.1995
Estonia ²³	12.06.1995	01.02.1998
Hungary ²⁴	16.12.1991	01.02.1994
Latvia ²⁵	12.06.1995	01.02.1998
Lithuania ²⁶	12.06.1995	01.02.1998
Poland ²⁷	16.12.1991	01.02.1994
Romania ²⁸	08.03.1993	01.02.1995
Slovakia ²⁹	04.10.1993	01.02.1995
*Slovenia ³⁰	10.06.1996	01.03.1999

* For individuals a right of establishment is delayed.

17 Algeria: OJ 1978 L 263/2.

18 For example, Tunisia: OJ 1998 L 97/2.

19 A similar provision protecting workers from discrimination in working conditions and social security is also to be found in Annex VI of Lome IV, but it is disputed whether this provision, because of its placement in an Annex, is capable of direct effect. For a discussion on the non-discrimination provisions of the Maghreb Agreements see *inter alia* Staples 2000; Weiss 1998, p. 313.

20 C-1 8/90 *Kziber* [1991] ECR I-199; C-58/93 *Yousfi* [1994] ECR I-1353; C-103/94 *Krid* [1995] ECR I-719; C-113/97; C-126/95 *Hallouzi-Choho* [1996] ECR I-4807; *Babahenemi* [1998] ECR I-83.

21 OJ 1994 L 358.

22 OJ 1994 L 360.

23 OJ 1998, L 68.

24 OJ 1993 L 347.

25 OJ 1998 L 26.

26 OJ 1998 L 51.

27 OJ 1993 L 348.

28 OJ 1994 L 357.

29 OJ 1994 L 359.

30 OJ 1999 L 51/l.

As regards the meaning of non-discrimination in working conditions, the question has come before the Court as regards the Maghreb Agreements only once where the Court confirmed that in principle the right does not extend to the field of extension of residence permits unless there is a continuing right to work.³¹

The CEEC agreements provide for a right of free movement for the purpose of self-employment and a degree of protection from discrimination in working conditions.³² These agreements are the newest and the Court of Justice has yet to clarify the extent of the rights either to self-employment or to non-discrimination as regards working conditions. On the first point a number of references from the UK and the Netherlands are currently pending before the Court.³³ On the second point no case has been referred.

Third Country Nationals and European Community Law

Turning then to the second perspective, its starting place could be Article 1 of the European Convention on Human Right: "*The High Contracting parties shall secure to everyone within their jurisdiction the rights and freedoms defined in... this Convention*". This approach starts from the principle of equal application of Community law to all and from that point identifies the departures from the principle where third country nationals are treated differently.

Unlike the provisions of Community law relating to the free movement of persons which tend to exclude third country nationals subject to exceptions where they are included, other areas of Community law are inclusive. For example, third country nationals are equally entitled to rely on Community law relating to protection of workers under Article 137 EC, et seq.³⁴ They are included in Community provisions on free movement of capital.³⁵ Their rights as recipients of services³⁶ and to protection of Community consumer law are not differentiated from those of Community nationals. As regards the Customs Union, there is no differentiation of the rights and obligations of persons on the basis of their nationality. Indeed, any area of Community law which one considers outside that of free movement of persons and citizenship of the Union

31 C-416/96 *El Yassini* [1999] (not yet reported).

32 Martin and Guild 1996, p. 295 et seq. van Raepenbusch 1997, p. 41. Peers 1995.

33 Case C-63/99 *Cłozczuk* (EC-Poland) OJ C121/12, Case C-235/88 *Kondova* (EC-Bulgaria) OJ 1999, C246/15, Case C-257/99 *Barkoci and Malik*, (EC-Czech Republic) OJ 1999, C 265/2 and Case-268/99, *Jany and others* EC-Poland/Czech Republic) OJ 1999, C 265/4.

34 For example, in the case of *Süzen* where a third country national sought to rely on Community law on protection to acquire rights on the transfer of ownership of an undertaking, no party challenged the right of Mrs Süzen to rely upon Community law.

35 C-1 63/94 and C-250/94 *De Lera* [1995] ECR I-4821.

36 C-484/93 *Svensson* [1995] ECR I-3955.

appears to apply without distinction on the basis of nationality, even transport policy.³⁷

Within the field of free movement of persons, the differentiation which exists is becoming increasingly fragmented. For example, the limitation of Regulation 1408/71 to Community nationals is considered by the Commission itself to be contrary to the Member States obligations under Article 1 of the First Protocol in conjunction with Article 14 of the ECHR as interpreted by the European Court of Human Rights.³⁸ We have already made reference to the proposals of the Commission to extend the scope of Article 49 second paragraph EC to third country nationals. One of the amendments which the Amsterdam Treaty has made to the EC Treaty is to clarify that the scope of the internal market includes third country nationals.³⁹

The extension of rights and obligations to those present on the territory or, in the language of the European Convention on Human Rights, within the jurisdiction of the Contracting States, rather than their reserve to citizens of the state is one of the hallmarks of the last 50 years. The development of international human rights norms applicable to all persons irrespective of their nationality, has changed the nature of citizenship law. Some observers have characterised this as the development of a new personhood applicable without regard to national frontiers.⁴⁰ European states, for instance, may not reserve any of the rights contained in the European Convention on Human Rights to their own citizens unless such a reserve comes within the permitted exceptions contained in the Convention itself.⁴¹ The areas where rights remain, in principle, reserved for citizens are entry, residence, economic activity and expulsion from the territory (which, not just in the Community's case, are subject to many exceptions) and electoral rights (which a number of Member States extend to third country nationals). This development can be seen either as a devaluation

37 C-230/97 *Ayowemi* [1999] ECR I-6781.

38 Proposal for a Regulation amending Regulation 1408/71 as regards its extension to nationals of third countries COM (97) 561 of 12.11.1997.

39 Art. 62 EC.

40 Turner 1986; Soysal 1994.

41 The European Court of Human Rights held that the a Turkish citizen who lawfully lived and worked in Austria for more than ten years could not be refused an unemployment benefit solely on the ground of his nationality. The refusal of the benefit constituted a violation of Art. 14 ECHR read together with the right to property granted in Art. 1 of the First Protocol to the ECHR. The relevant unemployment benefit is paid partly out of contributions of workers, partly out of public funds. The Court held: "*However, very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention.*" (see § 42 of the judgement); *Gaygusuz v. Austria* 16.9.1996, Reports of Judgements and Decisions 1996-IV.

of the concept of citizenship in that rights which previously were considered exclusive to citizenship are no longer so,⁴² or a widening of citizenship: if the essence of citizenship is the rights which attach to it, then "citizenship" is, in fact, being extended to persons within the jurisdiction or on the territory of the states which have bound themselves by human rights treaties.⁴³

Within the context of European Community law this question of citizenship rights has been much discussed both by jurists and political scientists.⁴⁴ Nonetheless, the Court's judgement in *Calfa*⁴⁵ has settled for the moment at least one of the fundamental questions about citizenship of the Union: it is not a citizenship in the sense of Article 4, Protocol 4 ECHR in so far as the expulsion of a holder of the citizenship from one State which is part of the territory included in the citizenship right to another State on the basis of the holder's underlying nationality is permissible. No consideration about justification of internal exclusion was considered necessary by the Court in reaching its decision. To this extent then too, the differentiation of rights within the context of European Community law on the basis of "citizenship" related and "other" is extremely flexible. This may be an advantage in seeking to institute at this time a coherent Community legal structure as regards resident third country nationals.

Third Country Nationals and International Treaties relating to Labour Migration

Looking then beyond the European Union, on the international level, what specific measures relating to migrant workers are relevant to this study? At the UN level a number of measures specific to the treatment of migrants have been opened for ratification. Most recently there is the UN Convention on the Treatment of All Migrant Workers and their Family Members. Notwithstanding the Commission's call to the Member States to ratify this convention⁴⁶ none has so far. The 1949 ILO Convention 97 on migrant workers is useful in so far as it includes obligations to provide equal treatment for migrant workers within a large field and security of residence after five years residence in certain circumstances where that residence is no longer secured by a continuing employ-

42 See for instance Schnapper 1994; although her premise is not to attack the extension of rights to third country nationals, her defence of citizenship rights may be seen as having such a consequence.

43 By this we mean the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the UN human rights conventions which followed extending and giving particularity to those rights, including the UN Convention relating to the Status of Refugees 1951 and its 1967 Protocol.

44 For a review of the recent literature see Staples 2000.

45 C-348/96 [1998] (not yet reported).

46 European Commission Communication on Immigration and Asylum Policy 1994 COM (94) 23.

ment contract. ILO Convention 143 of 1975 also relating to migrant workers has enjoyed very little support from the Member States.

Turning then to the Council of Europe level, leaving aside the general human rights commitments of the European Convention on Human Rights which have consequences for the treatment of migrants, the European Social Charter of 1961 (and 1996 which is in the process of ratification) applies to all Member States. Here the rights for migrant workers are fundamentally in the field of equal treatment with nationals of the state in the economic and social fields. The general labour protection rights of the Charter apply to all persons within the territory. Family reunion, however, is included, but limited to a reciprocal basis among the state signatories. The European Convention on Establishment, signed in 1955, applies only on a reciprocal basis, but is a useful precedent providing for wide equal treatment rights in the economic and social fields. Also, it provides for security of residence of migrants: from the moment of admission on a long-term basis, after five years economic activity or a long-stop possibility after ten years residence. In this sense it is not so far from the Gradin proposal⁴⁷ to define long resident third country nationals on the basis of five years residence with a continuing residence right for a further five years. What is missing though is the inclusion of those migrants who are granted a permanent or durable residence right from admission.

The Establishment Convention 1955 also provides for increasing levels of security of residence and protection against expulsion depending on the length of residence of the migrants and important procedural guarantees to their status. The European Convention on the Legal Status of Migrant Workers 1977 has also been signed by all but one of the Member States participating in the Schengen acquis at the time it was incorporated in the EU (1999). It provides a useful basis for protection of civil, economic and social rights of migrants at a level equal to that of own nationals. It also requires the issue of documents and security of residence for the purpose of employment. Again, the Commission has encouraged Member States to ratify this convention as a good basis for coordination of migration policy.⁴⁸

The latest framework for the movement of migrant workers is the General Agreement on Trade in Services (GATS), annex to the World Trade Organisation Agreement. While the GATS obligations of the Member States include undertakings to admit personnel of other GATS countries' service providers, it

47 European Commission Proposal for a Convention on Rules for Admission of Third Country Nationals to the EU Member States OJ 1997, C 337/9..

48 European Commission Communication on Immigration SEC(91) 1855.

does not include provisions on the treatment of those workers so posted to the Union.⁴⁹

It is within this context of Community and international law that this study has been carried out. We approach each national section in the light of the general commitments. Finally we will draw some conclusions from our research on the common aspects of the national status among the Member States and the places of substantial divergence. In order to place the comparison within a Community legal framework we have used as a yardstick the Community provisions on Turkish workers.

49 See GATS Agreement Part I, annexed to WTO Agreement.

EU Member States' adherence to International Treaties relating to Labour Migration: 1949 – 1999

<i>Measure</i>	<i>UN/International Labour Labour Organisation (ILO)</i>	<i>Council of Europe</i>
Convention 97 on Migration for Employment	1949: 8 EU-states ⁵⁰ parties ⁵¹	
European Convention on Establishment		1955: 10 EU-states parties ⁵²
European Social Charter (original)		1961: all EU-states parties ⁵³
Convention 117 on Social Policy	1962: 3 EU-states parties ⁵⁴	
Convention 143 concerning Migrant Workers	1975: 3 EU-states parties ⁵⁵	
European Convention on the Legal Status of Migrant Workers		1977: 6 EU-states parties ⁵⁶
UN Convention on the Protection of the Rights of All Migrant Workers; not yet in force; not ratified by any EU Member State	1990	

50 Belgium, 1953; France, 1954; Germany, 1959; Italy, 1952; Netherlands, 1952; Portugal 1978; Spain, 1967; UK, 1951.

51 Parties here means Member States which have ratified the relevant instrument. Where an instrument has been ratified the year of ratification is included. If it has only been signed the name of the state and the year of signature are between brackets. Plender 1997.

52 (Austria, 1957); Belgium, 1965; Denmark, 1965; (France, 1955); Germany, 1965; Greece, 1965; Ireland, 1966; Italy, 1965; Luxembourg, 1969; Netherlands, 1969; Sweden, 1971; UK, 1969.

53 The European Social Charter only covers migrants tangentially. Its main concern is the securing of economic and social rights for persons on the territory. All the EU Member States are parties.

54 Italy, 1966; Portugal, 1981; Spain, 1973.

55 Italy, 1981; Portugal, 1978; Sweden, 1982.

56 (Belgium, 1978); France, 1983; (Germany, 1977); (Greece, 1977); Italy, 1995; (Luxembourg, 1977); Netherlands, 1983; Portugal, 1983; Spain, 1983; Sweden, 1983.

3. Reports on the Law of the Member States

Austria

The immigration legislation of Austria has been revised repeatedly since 1990. The current legislation was adopted in 1997 (*Fremdengesetz*). It entered into force in January 1998.⁵⁷

1. THE POSSIBILITIES RELATING TO ACQUISITION OF LONG RESIDENT STATUS

a. Conditions for obtaining the status

There are two types of residence permits differentiated on the basis of purpose.⁵⁸ The first, evidenced by a temporary residence permit (*Aufenthaltserlaubnis*), is available without quota for students, employees transferred for a short period by an employer which is internationally active, and their family members, and seasonal workers.

The second, which is of interest to this report, is evidenced by the issue of an establishment permit (*Niederlassungsbewilligung*) which is issued to those intending to live in Austria for an unlimited duration. Except as regards its issue to family members of Austrians and EEA nationals, it is subject to a quota (a major component of Austrian immigration law) and the requirements of sufficient income, accommodation and health insurance.⁵⁹ As a result of changes contained in the 1997 Act, there is a differentiation between those migrants who were resident as at 1.1.1998 and those who arrived after that date. For those arriving after the date, the permit is issued for specific residence purposes, the most important are an “all purposes” permit, which includes employment and self-employment, an “all purposes except employment” permit which is normally for family reunification, and a “private residence” permit for those who are wholly self-sufficient without engaging in economic activity. A change of purpose of the permit is normally possible after four years, specifically for family members who wish to seek employment (though they will also need work permits under a separate scheme⁶⁰). For those migrants who were already resident in Austria before that date, permits follow the same system but where an individual seeks to change the type of permit, which is usually the case where a family member wishes to engage in economic activities, the waiting period is eight years until 31 December 2001. From 1 January 2002 a change

57 Bundesgesetz über die Einreise, den Aufenthalt und die Niederlassung von Fremden (*Fremdengesetz 1997*), *Bundesgesetzblatt (BGBl)* 1997, I, p. 995 (FrG).

58 Art. 7 FrG.

59 Art. 10 and Art. 12(1) FrG.

60 *Ausländerbeschäftigungsgesetz (AuslBG)*.

of permit for family members already resident before 1 January 1998 will be possible without a waiting period.

In order for an application to succeed there must be space available in the relevant quota which is set annually. Family members of Austrians and EEA nationals are excluded from the quota system.⁶¹

Quotas			
Category	1998	1999	2000
key workers and their family members	1860	1130	1010
family members of aliens who immigrated before 1998	4550	5210	5000
children aged 14+ of aliens who immigrated before 1998	550	550	360
migrant workers plus family members	950	1120	1000
persons without intention to work	630	660	490
border commuters	124	100	140
Total	8664	8770	8000

For those seeking a permit based on employment, a work permit must be obtained which is subject to a separate quota system limiting the number of foreign workers in the labour force. However, there are numerous exceptions, for instance family members of Austrian citizens, journalists of foreign media, artists and other specific categories.

The establishment permit is initially valid for one year, then renewed twice each time for two years and on application.⁶² The issue of a first establishment permit is discretionary. At each renewal a review of the relevant factors, such as income and housing is carried out and an assessment is made. For instance where the housing requirement is fulfilled otherwise than by a contractual relationship between the third country national and the landlord (or ownership) the housing requirement may not be considered fulfilled. Further the individual must not present a risk to public order.⁶³ The law grants applicants an entitlement to renewal of their permit where they fulfil all the conditions, though some of these conditions leave room for discretion.

After five years' residence on the basis of an establishment permit with a time limit the person is entitled to a permit for an unlimited period (*unbefristete*

61 Niederlassungsverordnung 1998, BGBl. I, 371/1997 and Niederlassungsverordnung 1999, BGBl. I, 424/1998.

62 Art. 19(6) and Art. 23(4) FrG.

63 Art. 18 FrG.

Niederlassungsbewilligung) provided all the requirements of its first issue are still fulfilled. Although the third country national is entitled to the permit, some conditions leave room for discretion. The permit may be refused if it is considered probable that a ground for refusal may occur in the future.⁶⁴

b. The procedures for obtaining the status

The competence to make decisions with respect to the issue of establishment permits lies with the head of the provincial administration (*Landeshauptmann*), who may delegate this competence to the regional administration (*Bezirksverwaltungsbehörden*).⁶⁵ There is the possibility of administrative review by the Minister of Interior and thereafter appeal to the administrative courts under the general rules on administrative remedies.⁶⁶ The establishment permit is issued as a stamp in the passport of the permit-holder.⁶⁷

According to the aliens' registration authority of the Ministry of Interior in July 1999 496,590 non-nationals were issued with a residence permit, out of which 221,327 were permanent establishment permits (*unbefristete Niederlassungsbewilligungen*). Of those permits 61% had been issued to nationals of states formerly part of Yugoslavia and 21% to Turkish nationals. The share of permanent permits as part of all valid permits increased from 6% in 1994 to 24% in 1997 and to 44% in 1999.⁶⁸ However, this percentage actually may be even higher. Because not all resident third country nationals are included in the registration system, some experts estimate that in July 1999 approximately 55% of all third country nationals in Austria held a permanent establishment permit.

2. THE RIGHTS ATTACHED TO THE STATUS

Holding a permanent establishment permit does not lead to any extra rights, apart from the fact that the holder does not have to apply for renewal of the permit at regular intervals. Neither does it provide special rights with respect to security of residence, which depends on the duration of residence not on the type of residence permit, nor with respect to social security benefits or access to employment.

a. Family reunion

Family members of third country nationals who hold a permanent establishment permit do not have a privileged position with respect to family reunion. They must await a quota opening before an application for a permit for family

64 Art. 24 FrG

65 Art. 89 FrG.

66 Art. 94(4) FrG.

67 Art. 3(2) Fremdenengesetz-Durchführungsverordnung.

68 *Biffli* 1999, p. 35/36.

members will be admissible. For migrants residing in Austria on 1.1.1998, family members only include spouses and children under 14, though a special category applies to children whose admission has been delayed as a result of the lack of a quota place and have therefore gone over the permitted age.⁶⁹ For migrants arriving after that date “family members” include spouses and children up to 19 years of age and, provided that they migrate at least within one year of the principal, a quota place is reserved for them though the family members do not have access to the labour market.⁷⁰

Due to the fact that the quota for family reunion has been gradually reduced from 10,520 in 1996 to 5,210 in 1999, in recent years the quota is usually exhausted by or even before July. Hence, third country nationals who hold a permanent establishment permit, may have to wait one or two years before their family members can join them, after they have met all the other conditions for family reunion. The migrant must declare the wish to effect family reunion at the outset.⁷¹

b. The right to work

The permanent establishment permit does not exempt third country nationals from the obligation to hold a work permit. After long residence the person may acquire a work permit valid for five years, giving access to the labour market in Austria. This permit (*Befreiungsschein*) is renewable if the third country national has been employed for at least 2.5 years in the past five years or for five years in the past eight years. If the work permit is not renewed, the third country national may find it impossible to obtain a new work permit later, since the application of a new work permit then will be, as is the case with respect to newcomers on the labour market, subject to a separate quota regime under the Law on Employment of Aliens (*Ausländerbeschäftigungsgesetz*).

Access to employment may be restricted to the grounds for which the establishment permit was issued. If the permit was issued for “private residence” the individual will not have the right to work unless he or she seeks a change of ground. As explained above, for family members a waiting period of four or eight years applies, depending on whether the persons were admitted before 1998 or not. Access to employment after this waiting period still is conditional on obtaining a work permit under the separate quota system.⁷² Children of

69 Art. 21(3) and Art. 113(1) FrG.

70 Art. 21(1) and (2) FrG.

71 This rule only applies to new immigrants. The fact that migrants who were admitted to Austria before 1998 did not state that wish at the time of their admission to Austria is no reason for refusing family reunion.

72 Art. 1 and Art. 4(6) AuslBG.

immigrants, after a waiting period of at least five years under certain conditions, are entitled to a work permit valid for five years.⁷³

c. Social security and assistance

Generally, access to social security, such as unemployment benefits, health insurance or child benefits, will be conditional on the person being lawfully employed. Third country nationals holding a permanent establishment permit enjoy no better status than those without.

Until August 1998 many third country nationals were excluded from a special benefit in case of prolonged unemployment. After a decision of the Constitutional Court third country nationals with permanent residence in Austria are entitled to this benefit (*Notstandshilfe*), if they reside in Austria on the basis of a residence permit, which does not preclude employment. If they have been resident for less than eight years they may lose the right to this benefit after a full year's unemployment and may run the risk of withdrawal of their establishment permits followed by expulsion.

Third country nationals are excluded from social assistance (*Sozialhilfe*) in most Austrian provinces. In some provinces they only have access to certain forms of assistance after a waiting period and not on the same basis as Austrian citizens. Most provinces exclude third country nationals from a special housing subsidy (*Wohnbeihilfe*).

d. Voting rights

All third country nationals are excluded from voting rights at national level, regional level, local level and in referenda. They are not eligible for election to workers councils at company level, nor to public chambers of labour. Further they are excluded by the constitution from employment in the public service.

e. Education, grants and scholarships

Access to primary and secondary education is not related to the residence status of the child or the parents. For access to a university, it is required that either the student or one of his parents has five years of residence in Austria.⁷⁴

One of the parents must have resided legally for at least five years in Austria in order for the child to be eligible for scholarships for secondary education. University scholarships are only granted if the student and one of the parents have lawful residence in Austria and have been subject to income tax over the preceding five years.⁷⁵

73 Art. 15(1)(3) AuslBG.

74 Art. 34 Universitäts-Studiengesetz, BGBl. I, 48/1997 and Art. 1(3) Personengruppenverordnung, BGBl I, 211/1997.

75 Art. 4(2) Studienförderungsgesetz, BGBl. I Nr. 305/1992.

3. THE POSSIBILITY FOR FAMILY MEMBERS TO BENEFIT FROM THE STATUS

Where the principal has a permanent permit, spouses and minor children admitted under the quota system are eligible for establishment permits valid for one year on two occasions before obtaining a permit of unlimited duration.⁷⁶ But there is no provision of law which provides for the status of family members to become independent of that of their principal after a period of time. If the relationship ends (death, divorce, expulsion of the principal etc.) before they have resided in Austria for four years their permits may be withdrawn.⁷⁷

4. LOSS OF THE STATUS

Where there was fraud in the acquisition of the permit it is void and the migrant is liable for expulsion.⁷⁸ Absence from the territory is not explicitly mentioned in the legislation as a ground for loss of the status.

5. REMOVAL OR DEPORTATION

This is an area where there has been substantial change in the law between 1997 and 1998. Previously, holding a permanent establishment permit did not protect a migrant from expulsion where he or she failed to continue to fulfil any aspect of the law relevant for instance to the issue of a visa such as insufficient income, inadequate housing, public security grounds or even traffic offences.⁷⁹ The law was strongly criticised not only by non-governmental organisations but also by the Austrian courts. The Constitutional Court in several cases held a decision to expel a third country national after long legal residence on the ground of a late application for renewal of the permit because the applicant lacked adequate housing to be a violation of the right to family life guaranteed in Article 8 ECHR.⁸⁰ The *Fremdengesetz* (FrG) now limits the grounds of expulsion. There are optional grounds and mandatory ones. The system is based on a graded system of security of residence with increasing security after 5, 8 and 10 years residence in Austria. After five years, expulsion for lack of income is no longer permissible so long as the person is willing to earn sufficient means of subsistence and there is a possibility that he or she actually will be able to do so. After eight years criminal convictions which do not constitute a threat to public peace, order or security are not sufficient for expulsion; after

76 Art. 24(2) FrG.

77 Art. 20(1) FrG.

78 Art. 16 and Art. 34(1) FrG.

79 *Regelung des Aufenthalts von Fremden in Österreich – Aufenthaltsgesetz, Bundesgesetz 466/1992.*

80 *Wiener Integrationsfonds 1996, p. 23-25; Pochieser 1996; Morscher 1997; Migration News Sheet, May 1997.*

10 years, expulsion may only follow conviction in respect of specified serious crimes.⁸¹

Second generation immigrants who grew up and lived half of their life in Austria and have been resident in the country during the last three years enjoy absolute security of residence. Expulsion of these third country nationals is prohibited.⁸²

6. OBTAINING NATIONALITY

New rules on Austrian citizenship and its acquisition came into force on 1 January 1999. Naturalisation is now subject to a residence requirement of ten years in most cases.⁸³ Minors may be naturalised as Austrian citizens after four years residence and adults after six years where special reasons exist.⁸⁴ Among the special reasons are refugee status, citizenship of an EEA state or birth in Austria.⁸⁵

A “right” to Austrian citizenship only comes into being after 30 years of residence on the territory.⁸⁶ A person who has been resident for 15 years may be granted citizenship if he or she can prove lasting personal or professional integration in Austria.⁸⁷

Applicants must prove knowledge of German,⁸⁸ and where naturalisation is discretionary the public good and the extent of the applicants’ integration must be taken into account. Where a migrant has been subject to a prison sentence of three months naturalisation will be refused.⁸⁹ The other requirements which must be fulfilled are: there are no pending criminal proceedings; there is no prohibition on residence in force; the migrant is not a threat to public order or security; he or she has secure accommodation and source of maintenance; the migrant will renounce any other citizenship which he or she holds. The spouse and children may be naturalised with the applicant if they fulfil the statutory conditions.

7. GENERAL COMMENTS

One of the difficulties with the Austrian legislation is the lack of certainty which it provides to long term migrants about their security of residence. While this has been addressed to some extent by the 1997 changes to the legislation, it is still not particularly satisfactory. The situation as regards access to employment,

81 Art. 34-37 FrG.

82 Art. 35(4) and Art. 38(2) FrG.

83 Art. 10(1) Staatsbürgerschaftsgesetz (StBG), BGBl. I, 124/1998.

84 Art. 10(4)(1) StBG.

85 Art. 10(5)(4-6) StBG.

86 Art. 12(1) StBG.

87 Art. 12(1)(b) StBG.

88 Art. 10(a) StBG.

89 Art. 10(1)(2) StBG.

social benefits and family reunion remains highly complex and must be difficult to administer consistently.

A typical aspect of the Austrian legislation is the combination of a quota system at first admission and another quota system for work permits. Moreover, there is no exemption from the obligation to hold a work permit even after long lawful residence or employment.

Belgium

1. THE POSSIBILITIES RELATING TO ACQUISITION OF LONG RESIDENT STATUS

α. Conditions for obtaining the status

In Belgium a special status for non-nationals with long lawful residence or close ties with persons residing in the country, the establishment permit (*vestigingsvergunning, permis d'établissement*), was codified in the Aliens Act of 1980.⁹⁰ This permit is in principle only granted to third country nationals who previously have obtained a residence permit not restricted to a specific employment or other temporary aim. Third country nationals with five years of continuous lawful residence have on application a statutory right to this permit. Periods covered by a residence permit as student or as a family member of a student are not taken into account. Other periods of unstable residence e.g. pending the decision on an asylum request, are taken into account once the person has obtained an unlimited residence permit.⁹¹

Certain categories of non-nationals are entitled to the permit without the five year waiting period:

- union citizens and their third country family members using their right to free movement under Community law;⁹²
- non-Belgian spouses, children or parents of Belgian citizens;⁹³
- the spouses and children under 18 years and dependent on aliens having an establishment permit;⁹⁴
- persons who fulfil the condition for acquisition of Belgian nationality.⁹⁵

90 Act of 15 December 1980 (Wet betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, Loi sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers).

91 Art. 14 (2) and Art. of the Act; see also Denys 1995, p. 75.

92 Art. 40ff of the Act; EU citizens are entitled to the establishment permit after a maximum five month residence on the basis of a provisional residence, Art. 45 of Royal Decree of 8 October 1980, as amended on 12 June 1998. Students from EU Member States are excluded from this privilege. In 1997 the Minister of Interior issued an instruction to refuse an establishment permit to third country family members of EU citizens who had entered Belgium without the required visa. This instruction caused extensive litigation (e.g. Raad van State 13 November 1997, *Tijdschrift voor Vreemdelingenrecht* 1997, p. 259 with note by L. Walley) and resulted in a reference by the Raad van State (23 November 1999 no. 83.584) to the EC Court of Justice, case MRAX, C-459/99).

93 Art. 40(6) of the Act.

94 Art. 15(1)(2) of the Act

95 Art. 15(1)(1) of the Act.

If a third country national meets the above requirements, an establishment permit can be refused only in case of criminal conviction for serious crimes or repeated convictions. Insufficient income is not a ground for refusal.⁹⁶

There are no statistical data on the percentage of third country nationals holding an establishment permit or on the number of permits issued. Since 62% of all registered non-citizens in Belgium are EU citizens, since the majority of the third country nationals probably will have lived more than five years in the country and the non-Belgian family members of Belgian citizens, of EU citizens and of persons having an establishment permit are also entitled to that permit, it is likely that over three quarters of all non-nationals in Belgium hold an establishment permit.

b. The procedures for obtaining the status

A request for an establishment permit must be made to the local authorities who transmit the application to the Minister of Interior or his representative. In case the Minister does not refuse the permit within five months, it is deemed to be granted and the document has to be issued. The permit grants an unlimited right to reside in Belgium. The person's data will be removed from the alien's register and are henceforth registered in the general municipal population register.⁹⁷ The document issued is valid for five years and upon request automatically renewable.⁹⁸

In case of refusal of the establishment permit the Minister of Interior may be asked to review the decision. The Minister has to seek the advice of the Advisory Commission on Aliens on the request for review. The person has the right to appear with a lawyer before the Commission. The Minister is not bound to follow the Commission's advice.⁹⁹ Against a negative decision on review an appeal may be filed with the State Council (Raad van State, Conseil d'Etat).¹⁰⁰

2. THE RIGHTS ATTACHED TO THE STATUS

a. Family reunion

Acquiring an establishment permit does not give a third country national more rights to family reunification compared to persons holding an unrestricted residence permit.¹⁰¹

96 Art. 15(4) of the Act; see Taverne et. al. 1985, p. 33.

97 Art. 16 and 17 of the Act and Art. 30 Royal Decree of 8 October 1981.

98 Art. 18 of the Act and Art. 31 of Royal Decree of 8 October 1981.

99 Art. 64-67 of the Act.

100 Art. 69 of the Act.

101 Nys 1996.

b. The right to work

Third country nationals with an establishment permit are exempted from the requirement to have a labour permit for employment.¹⁰² However, they still are required to have a special permit for self-employment.¹⁰³

c. Social security and social assistance

Third country nationals having an establishment permit, generally, do not have more rights to social security than persons holding a residence permit. In most branches of social security lawfully resident third country nationals have equal rights with Belgian citizens. Since access to unemployment benefits depends on the possession of a valid work permit, third country nationals holding an establishment permit have a better position than those with a residence permit. Certain benefits (e.g. special unemployment benefits for school-leavers or special benefits for handicapped) are granted only to Belgian citizens, EU citizens and third country citizens entitled to national treatment under international instruments, such as the non-discrimination clauses in the Agreements between the EC and the Maghreb countries.¹⁰⁴ The right to pensions for elderly workers and family benefits has been extended to all third country nationals having five years of residence in Belgium.¹⁰⁵

The establishment permit does not grant the third country national holding it any additional right to social assistance. Since the permit can not be withdrawn on the ground on reliance on social assistance, persons holding the establishment permit will in practice feel free to apply for assistance without the risk of removal, that may compel a third country national with a temporary residence permit to refrain from applying for social assistance. Some social benefits, e.g. the minimum income (*minimex*), are only granted to Belgians, EU-citizens, refugees and stateless persons.

Other benefits, such as subsidies for the renovation of housing are only granted to non-nationals having an establishment permit.

d. Voting rights

Voting rights in municipal elections have been granted to resident EU-nationals in Belgium only in 1999. The constitutional amendment allowing for this extension also opened the possibility to grant active and passive voting rights in mu-

102 Art. 2(3) of the Royal Decree of 9 June 1999 implementing the Act of 30 April 1999 on the employment of foreign workers.

103 Act of 19 February 1965 on the exercise of independent professional activities by aliens, Belgisch Staatsblad 26 February 1965.

104 The judgements of the ECJ in the cases *Kziber* [1991], ECR I-199, *Yousfi* [1994] ECR I-1353 and *Babahenini* [1998], ECR I-183 are examples of benefits that are not granted to all third country nationals having an establishment permit.

105 Art. 122 of the Act of 8 August 1980 and the Act of 20 July 1971 as amended by Royal Decree No. 242 of 31 December 1983.

municipal elections to resident third country nationals. Such an act cannot be adopted before the year 2001.¹⁰⁶

e. Education, grants and scholarships

The access to obligatory education does not depend on the nationality or the residence status of the child or its parents. Institutions of higher education may levy special fees for students from third countries where their parents do not live in Belgium. However, students having an establishment permit are exempted from this fee.¹⁰⁷ The right to scholarships depends among others on the length of residence (five years) in Belgium and on reciprocity in the country of origin, unless it is a developing country. Hence, long-term resident third country nationals, generally, have equal access to education, grants and scholarships.

3. THE POSSIBILITY FOR FAMILY MEMBERS TO BENEFIT FROM THE STATUS

Family members of a third country national having an establishment permit admitted for family reunification are entitled to the same residence status. Generally they will receive a normal residence permit valid for one year on admission. After six more months they are issued their own establishment permit. This permit gives them a secure residence status. The permit can not be withdrawn in case the marriage ends or when the children leave the parental home. Once the family members have obtained an establishment permit they also have free access to employment.

4. LOSS OF THE STATUS

An establishment permit gives considerably more security of residence in comparison with the (temporary) residence permit. The latter permit may lose its validity through simple expiration, in case of unemployment or lack of means, in case the aim of the residence is no longer pursued (e.g. partners do not live together or study is finished) or on the ground of less serious offences against public order.¹⁰⁸ An establishment permit only loses its validity in case of long absence, expulsion, fraud or dissolution of the marriage that has been the ground for granting the permit.

106 Art. 8(4) and 8(5) of the Belgian Constitution as amended by the Act of 11 December 1998.

107 Art. 59 of the Act of 21 June 1981, Moniteur belge of 6 July 1981.

108 Art. 10 and Art. 3 of the Act. Walleyen 1999.

An establishment permit may lose its validity if the holder is absent from Belgium for longer than one year.¹⁰⁹ However, even after longer absence there is a right of return under certain circumstances.¹¹⁰

Fraud is not mentioned in the Aliens Act as a ground for loss of an establishment permit.¹¹¹ However, the State Council ruled that an administrative act may be revoked in the event of a fraudulent behaviour.¹¹² In two situations establishment permits were withdrawn on the ground of fraud. First, a refugee status was withdrawn because the person has used incorrect information on the basis of which the refugee status had been granted.¹¹³ Secondly, an establishment permit may lose its validity in case of a marriage of convenience.¹¹⁴

5. REMOVAL OR DEPORTATION

An establishment permit loses its validity in the event of expulsion on the ground that the alien has caused serious offence against public order or national security of the country. The decision has to be taken by Royal Decree under responsibility of the Minister of Interior after prior consultation of the Advisory Commission on Aliens. An appeal may be filed with the State Council. This appeal does not automatically suspend the expulsion, but on request the Council may grant an interim injunction suspending the expulsion. The expulsion decision automatically imposes a ten years prohibition on entry to Belgium, unless it is suspended or withdrawn.¹¹⁵

Some of the restrictions on 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. Only the personal behaviour of the person may be a ground for expulsion. Where political activities of the person are the ground for expulsion, the decision has to be tabled in the Council of Ministers.¹¹⁶ In the 1990s several ministerial instructions have restricted the cases where an expulsion order can be made. These instructions followed the decision of the European Commission of Human Rights in

109 The person may apply for an extension of the validity of the permit before leaving Belgium, in case a return after the date of expiration is foreseen, Art. 19 of the Act.

110 Royal Decree of 7 August 1995, Belgisch Staatsblad of 2 September 1995.

111 In the case of a third country national who had used a false passport, the court held that, because she was married to a Belgian national she had the right to establish and, according to Art. 20-25 Aliens Act could only be deported on the ground of serious offence against public order or national security, Raad van State 3 November 1998, *Tijdschrift voor Vreemdelingenrecht* 1999, p. 185.

112 Judgement in the case *Van Dessel*, c.e., 7.2.1961, R.A.A.C.E., p. 157.

113 CPRR, 98-1577/F898, *Revue du droit des étrangers* 1999, nr. 105, p. 629.

114 Conseil d'Etat 3.8.1995, nr. 54.780, *Revue du droit des étrangers* 1999, nr. 105, p. 629 and Art. 146bis of the Civil Code inserted by the Act of 4 May 1999, *Moniteur Belge* of 1 July 1999.

115 Art. 26 of the Act.

116 Art. 20(2) and (3) of the Act.

the case *Moustaquim v. Belgium* and the case law of the Court in Strasbourg on Article 8 ECHR. The instructions of 1990 contained three basic rules. Third country nationals born in Belgium and EC citizens having an establishment permit could only be expelled on grounds related to national security. Third country nationals with ten years legal residence and refugees with convention status can only be expelled after having been convicted and received a prison sentence of five years or more. Third country nationals with an establishment permit having under ten years of legal residence in Belgium can only be expelled after a prison sentence of three years or more. Another ministerial instruction of 1995 extended the protection of third country nationals born in Belgium to those 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, this instruction allows for expulsion of both categories if the person is considered extremely dangerous and where there is a high risk of recidivism.¹¹⁷

The Green Parties (Agalev-Ecolo) twice introduced a bill in Parliament aiming at the integration of those ministerial rules in the Aliens Act. The first initiative in the early nineties was unsuccessful. In 1999 a similar bill was introduced after a campaign of several NGO's supporting family members of persons threatened with deportation and family members of deportees living in Belgium.

The earlier instructions 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 eighties to five in 1995 and ten in 1996.¹¹⁸ Expulsion on national security grounds is extremely rare. It only occurs after the person is convicted of a crime. An example is the case of members of the Algerian GIA-movement who were convicted for terrorist activities.

In practice the number of third country nationals with long legal residence who have problems with the authorities regarding the loss of their residence rights because of long 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 third country nationals threatened by expulsion on public order grounds.¹¹⁹

117 Instruction of the Minister Wathelet of 8 October 1990, reprinted in *Tijdschrift voor Vreemdelingenrecht* 1992, nos. 60/61, p. 91 and Ministerial instruction of 17 February 1995, extensively analysed by De Schutter 1997.

118 See Groenendijk, Guild and Dogan 1998, p. 27 more details on the practice.

119 Groenendijk, Guild and Dogan 1998, p. 29.

6. OBTAINING NATIONALITY

Under the current nationality law first generation immigrants may apply for naturalisation after five years of residence. This period has been reduced to three years by a Bill amending the Code of Belgian Nationality, which was adopted by the Belgian Parliament in March 2000 and will enter into force on 1 May 2000.¹²⁰ The naturalisation procedure is cumbersome, involving an advice of the King and of the Minister of Interior and a decision by the Parliament.¹²¹ Persons, over 18 years born in Belgium to non-Belgian parents may acquire Belgian citizenship in a simple procedure and with little or no costs involved. The new law has extended this simple procedure to all persons over 18 years of age with seven years of lawful residence in Belgium and having a permanent residence right. They acquire Belgian nationality as from the date of registration unless the public prosecutor raises objections within one month.¹²² The third generation acquires Belgian nationality at birth.

7. GENERAL COMMENTS

Belgium introduced the establishment permit already twenty years ago. The status is granted to large categories of third country nationals (e.g. family members) relatively shortly after admission in the country. The statutory protection against expulsion has been supplemented by ministerial rules, which implement the Strasbourg case law on Article 8 ECHR and further restrict the possibility of expulsion of third country nationals with long residence in Belgium.

Once the new nationality law enters into force, most third country nationals holding an establishment permit will have the opportunity to obtain Belgian nationality by way of simple declaration.

¹²⁰ Art. 9 of the Act of 1 March 2000, *Belgisch Staatsblad* of 5.4.2000.

¹²¹ Art. 19 and Article 21 of the 1984 Code of Belgian Nationality.

¹²² Art. 4 of the Act of 1 March 2000, amending Art. 11 of the Code of Belgian Nationality.

Denmark

The rules governing the residence status of long-term resident third country nationals are to be found in the Danish Aliens Act. Most of the relevant statutory rules in the Act were revised in 1998.¹²³ Previously the residence right of major groups of third country nationals became *de facto* permanent after a period of three years. The 1998 amendments replaced this mechanism of an automatic secure residence right by rules on the issue of permanent residence permits. Moreover, since 1998 three additional requirements have to be fulfilled in order to obtain the permanent status. According to the new legislation newly arrived immigrants are entitled to a special introduction programme. As part of a governmental law-and-order initiative in 1996 it has become easier to expel third country nationals who have committed drug-related crimes, extended to other types of crimes in 1998.

1. THE POSSIBILITIES RELATING TO ACQUISITION OF LONG RESIDENT STATUS

a. Conditions for obtaining the status

A permanent residence permit is issued upon application to a third country national, who holds a residence permit and has lawfully lived in Denmark for more than the last three years for the purpose of permanent residence.¹²⁴

Unless particular reasons make it inappropriate, it is a condition for the issuing of a permanent residence permit that the third country national in question:

- (i) has completed an introduction programme offered to him pursuant to the 1998 Act on Integration of Aliens in Denmark¹²⁵ or, if this is not the case, has completed another comparable course offered to him;
- (ii) during his stay in Denmark has not, within a period fixed by the Minister of Interior, been sentenced to suspended or non-suspended prison sentence; and
- (iii) has no debt due to the public authority exceeding 6,700 euros; a permanent residence permit may be issued if the alien in question has concluded an agreement on settlement of the debt and observes such agreement.¹²⁶

123 Act No. 473 of 1 July 1998, amending the Aliens Act, which entered into force partly immediately, partly on 1 January 1999. The Act was amended again by Act No. 140 of 17 March 1999 and consolidated by the Consolidation Act No. 539 of 26 June 1999 of the Danish Ministry of Interior.

124 Art. 11(3) Aliens Act.

125 Act No. 474 of 1 July 1998.

126 Art. 11(5) Aliens Act.

b. The procedures for obtaining the status

Under the new Aliens Act the residence rights of a third country national will not *de facto* become permanent after three years of residence. Now a permanent residence permit is issued *upon application*. The application is submitted directly to the Danish Immigration Service. Third country nationals residing outside the Copenhagen area may submit their applications via the local police offices, but they may also send their applications directly to the Danish Immigration Service. The decision whether a permanent residence permit shall be granted is made by the Danish Immigration Service.¹²⁷ Decisions made by the Danish Immigration Service can be appealed to the Minister of Interior.¹²⁸

The permanent residence permit has no limitation of validity and will be issued in the form of a residence card. A time-limited residence permit is issued by a stamp in the passport.

A third country national who fulfils the conditions mentioned in Article 11 of the Aliens Act is entitled to a permanent residence permit. The discretion of the authorities is restricted to granting the permit in cases where not all statutory conditions are fulfilled.¹²⁹

There are no data available on the number of third country nationals holding a permanent residence permit.

2. THE RIGHTS ATTACHED TO THE STATUS

a. Family reunion

The person who holds a permanent residence permit has a conditional right to family reunion. Persons holding a temporary residence permit have no right to family reunion, except for refugees.

Foreign spouses or cohabitants over 18 years of age of a third country national above the age of 18, who is holding a permanent residence permit for more than 3 years, are, on application, entitled to a residence permit. This implies that the third country national residing in Denmark must have completed six years of lawful residence in Denmark before becoming eligible for family reunion with his closest family members. Formerly, five years of lawful residence were sufficient. The justification for the new rule is that in this way a third country national residing in Denmark, who is entitled to family reunion with his or her spouse or cohabitee, has such ties with Danish society that (s)he can contribute to the spouse's or cohabitant's integration into Danish society.

127 Art. 46(1) Aliens Act.

128 Art. 46(2) Aliens Act.

129 Art. 11(4) (5) Aliens Act.

Minor children of a permanent resident will be granted a residence permit, provided the child lives with the person exercising a legal obligation of parental responsibility.

While spouses and children of a permanent resident are *entitled* to a residence permit, other family members with close ties to the permanent resident may be granted a residence permit.¹³⁰

In a speech on New Year 2000 the Danish Prime Minister has announced the government's intention to introduce more restrictive rules on family reunification.¹³¹ A bill was put before Parliament in February 2000.¹³²

b. The right to work

Long-term residents holding a permanent residence permit no longer need a work permit in order to take up employment.¹³³

c. Social security and social assistance

Third country nationals with permanent residence in Denmark are entitled to equal treatment with respect to social security and benefits related to employment. Pensions, disability and survivors benefits usually are granted to non-nationals only when they meet minimum residence requirements or on the basis of international agreements.

With respect to social assistance Danish law does not distinguish between Danes and third country nationals who hold a permanent residence permit. They have the same rights as Danish citizens, with regard to social assistance.

d. Voting rights

Third country nationals residing in Denmark are not allowed to participate in national elections. By contrast, the Municipal Election Act since 1981 extends the voting rights to third country nationals on the additional condition that they have been resident in the realm for three years prior to election day.

Denmark in April 2000 ratified the Council of Europe Convention on the Participation of Foreigners in Public Life at Local Level.

e. Education, grants and scholarships

Permanent residents, generally, have the same access to education as Danish citizens. The right to state education grants or student scholarships is conditional on Danish citizenship, international agreements, or on the rules laid down by

130 Art. 9(1)(2) Aliens Act.

131 *Migration News Sheet*, January 2000, p. 2.

132 Draft Bill no. L208/1999-2000.

133 Art. 14(1)(iii) Aliens Act.

the Minister of Education which grant certain categories of third country nationals equal treatment with Danish citizens.¹³⁴

3. THE POSSIBILITY FOR FAMILY MEMBERS TO BENEFIT FROM THE STATUS

Admitted family members of third country nationals obtain a residence permit. This permit remains dependent on the continuing relationship with their principal as long as it is still temporary. After three years they are entitled to an independent permanent residence permit under the general rules, provided they meet the conditions of Article 11 Aliens Act.

4. LOSS OF THE STATUS

A permanent residence permit may always be revoked if the third country national has obtained this residence permit by fraud.¹³⁵

A residence permit lapses if the third country national either gives up his residence in Denmark, or stays abroad for more than six consecutive months. Once a third country national has lawfully lived for over two years in Denmark, the permanent residence permit only lapses when the period of absence is more than twelve consecutive months. Absence due to compulsory military service or alternative service does not count as absence for this purpose. However, upon application, it may be decided that a residence permit must be deemed not to have lapsed on the ground of a long stay abroad.¹³⁶

A temporary residence permit may be withdrawn if the reasons for granting it no longer exist (e.g. divorce or unemployment). A permanent residence permit cannot be withdrawn on those grounds.¹³⁷

5. REMOVAL OR DEPORTATION

The guiding principle with respect to expulsion is that the length of lawful stay in Denmark determines what sentences for criminal offences can lead to the expulsion of a non-national: the longer the residence in Denmark the more protection against expulsion. The provisions on expulsion have been changed in 1998 to the effect that expulsion is possible for less severe sentences than before. A third country national who has lawfully stayed in Denmark for more than the last seven years may only be expelled if (s)he is sentenced to a prison sentence of four years or more,¹³⁸ or is sentenced to prison for two years or more if that sentence either includes several crimes or the third country national has previously been sentenced to a non-suspended imprisonment in Denmark.¹³⁹

134 Art. 2 of consolidated Act no. 558 of 31 July 1998 on state education grants.

135 Art. 19(2) Aliens Act.

136 Art. 17 Aliens Act.

137 Art. 19(1) and 19(2) Aliens Act.

138 Before this would require a sentence of six years imprisonment.

139 Art. 22 Aliens Act.

After three years of residence expulsion of a third country national after a prison sentence of two years is possible. A third country national may also be expelled if (s)he has been sentenced to prison for one year or more, if that sentence relates to specified crimes or if the third country national has previously been sentenced in Denmark to imprisonment.¹⁴⁰

As part of a governmental law-and-order initiative in 1996, it became possible to expel third country nationals in the best-protected category in all cases of drug-relating crimes resulting in a non-suspended sentence of imprisonment for violation of the anti-drug legislation or the provisions of the Criminal Code on drugs, irrespective of the length of the prison sentence.¹⁴¹ As a result of the 1998 amendment of the Aliens Act, the possibility of issuing an expulsion order irrespective of the actual duration of imprisonment was extended to cases of conviction under another 24 enumerated provisions of the Criminal Code, i.e. violence against public officials, assault, theft and human trafficking. In making an expulsion order the court has to consider whether expulsion is disproportionate bearing in mind the applicant's circumstances, in particular because of:¹⁴²

- the third country national's ties with the Danish society, including whether the third country national came to Denmark in his or her childhood;
- the duration of the third country national's stay in Denmark;
- the third country national's age, health, and other personal circumstances;
- the third country national's ties with persons living in Denmark;
- the consequences of the expulsion for the third country national's close relatives living in Denmark;
- the weakness or strength of the ties of the third country national with his or her country of origin or any other country in which (s)he may be expected to take up residence; and
- the risk that the third country national will be ill-treated in his or her country of origin or any other country in which (s)he may be expected to take up residence.

These rules reflect the Strasbourg case law on Article 8 ECHR. However, the introduction of the possibility to order expulsion irrespective of the length of the prison sentences, restricts the protection of the proportionality principle enshrined in that case law. There is a presumption in favour of expulsion of third country nationals falling within the scope of the new broader expulsion rules,

140 Art. 23 Aliens Act.

141 Art. 22(4) Aliens Act, as amended by Act No. 1052 of 11 December 1996.

142 Art. 26(1) Aliens Act.

applicable to types of crimes described above, unless displaced by humanitarian criteria.¹⁴³

Generally expulsion can be ordered only by a court as part of a criminal sentence.¹⁴⁴ Long-term resident non-nationals can only be expelled by order of the administration when such is deemed necessary for reasons of national security. In this case an order can be made irrespective of their residence status. A number of Supreme Court judgements in 1998 and 1999 have limited the effect of the 1996 and 1998 amendments of the Aliens Act, with explicit reference to the case law of the European Court of Human Rights on Article 8 ECHR, setting aside expulsion decisions of lower courts which had been reluctant to apply ECHR norms.¹⁴⁵

In November 1999 the High Court in Copenhagen ordered the expulsion of a 23 year old Turkish national who was born and raised in Denmark, after having served a three years prison sentence for theft with violence.¹⁴⁶ A cousin was given a longer prison sentence for the same offence, but could not be expelled because he had acquired Danish nationality. The court's decision is thought to have provoked violent protest and caused public debate.¹⁴⁷

6. OBTAINING NATIONALITY

The normal residence requirement for naturalisation is seven years. This period is reduced for various categories of third country nationals: Nordic citizens (two years), third country nationals married to a Danish citizen (four years, if the marriage has lasted for three years, including one year of non-marital cohabitation if relevant) and stateless persons and refugees (six years).¹⁴⁸ Further, the third country national must prove that (s)he is able to support him or herself, (s)he must not have been sentenced to a prison sentence. Only those persons who have, in a written and oral test, proven their command of the Danish language will be granted Danish citizenship.

Danish nationality may also be acquired by a declaration of the intent to become a Danish citizen, if the person has resided in Denmark for at least 10 years, including a total of five years within the preceding period of six years.¹⁴⁹ Such a written declaration has to be submitted to the regional state

143 Art. 26(2) Aliens Act.

144 Art. 49 Aliens Act.

145 Supreme Court judgments published in the weekly *UfR* 1999, pp. 271, 275, 1390, 1394, 1500, 1503 and 1507.

146 Supreme Court judgement of 24 November 1998, *UfR* 1999, p. 275.

147 *Migration News Sheet*, January 2000, p. 5.

148 See Ministry of Justice Circular No. 90 of 16 June 1999 on Danish citizenship by Naturalisation.

149 Art. 3 of the Act on Danish Citizenship, Consolidated Act No. 28 of 15 January 1999.

authorities by the third country national having reached the age of 18 years, and before reaching the age of 23 years.

In a reaction to the public debate on the above mentioned criminal case before the High Court, the Danish government has announced its intention to amend the nationality legislation on acquisition of nationality by second generation immigrants via simple declaration.¹⁵⁰ An amendment to the effect that acquisition of citizenship by declaration is conditioned upon the absence of a criminal record was adopted by Parliament in December 1999.

7. GENERAL COMMENTS

Generally Denmark appears to accept that aliens who are admitted for three years or more should enjoy security of residence. Security of residence for third country nationals depends on the grounds on which they are admitted in Denmark. The rules of family reunion contain an exceptionally long waiting period.

¹⁵⁰ *Migration News Sheet*, January 2000, p. 15.

Finland

The statutory rules on long-term resident non-nationals are relative recent ones. They are to be found in the Aliens Act of 1991 and the Aliens Decree of 1994.¹⁵¹

1. THE POSSIBILITIES RELATING TO ACQUISITION OF LONG RESIDENT STATUS

a. Conditions for obtaining the status

A permanent residence permit has to be issued upon request to a third country national who has lawfully resided in Finland with a temporary residence permit for two consecutive years, unless the residence permit was granted for an inherently temporary¹⁵² or other specific purpose only, such as study, employment in a fixed-term project, with an international organisation, with a religious community, as sportsman or as a posted worker with a foreign company.¹⁵³ The two-year period starts on the day the temporary residence permit became valid. For refugees the period of residence is considered to begin on the day of entry into Finland.¹⁵⁴

A permanent residence permit may be refused only on special grounds, e.g. the third country national has been guilty of a crime or other reprehensible conduct, during the first two years but has not been deported. The Supreme Administrative Court decided in 1996 that an application for a permanent residence permit may not be rejected on other grounds than those set out in the Aliens Act.¹⁵⁵

Since the Aliens Act lays down precise rules on which third country nationals are entitled to a permanent residence permit, the room for discretion of the authorities is greatly reduced.

b. The procedures for obtaining the status

In order to be granted a permanent residence permit the third country national should apply at the local police authorities. A valid passport or another travel document and a passport photograph is needed for the application. If the local

151 Aliens Act of 1991 (no. 378), as amended lastly by Act No. 537 of 1999 and Aliens Decree of 1994 (no. 142), as amended by Act No. 538 of 1999.

152 The Supreme Administrative Court ruled that factual nature of the residence is decisive, not the status an applicant is actually holding, see Supreme Administrative Court 18.11.1996, no. 3571, diary numbers 1662/7/96 and 2017/7/1996

153 A person granted admission for a temporary purpose may be granted a change to a one year permit for a non-temporary purpose.

154 Art. 16(5) of the Aliens Act and Art 15 Aliens Decree. The purpose of the third country nationals stay is considered to be permanent if the time-limited residence permit of the third country national is marked with the letter 'A'.

155 KHO 18.11.1996 No. 3571.

police consider that it cannot issue a permanent residence permit, it must submit the permit application to the Directorate of Immigration for a decision.¹⁵⁶

A decision made by the Directorate of Immigration under the Finnish Aliens Act may be appealed to the County Administrative Court as provided for in the Administrative Procedure Act on the grounds that the decision is contrary to the law. Subject to leave, there is a further appeal to the Supreme Administrative Court.¹⁵⁷

Permanent permits will be entered in the passport of the third country national in the form of a sticker.¹⁵⁸

Permanent permits are valid indefinitely. When the holder's passport is renewed, the permit is automatically transferred to the new one.

Statistical information is not available in Finland on the number of persons holding a permanent residence status.

2. THE RIGHTS ATTACHED TO THE STATUS

a. Family reunion

Amendments in 1998 introduced provisions on family reunion into the Aliens Act.¹⁵⁹

The foreign spouse and the foreign unmarried and minor children of a third country national residing in Finland with a residence permit of a permanent nature or with a permanent residence permit may be issued a residence permit. Family reunion may be refused on grounds related to public order or other weighty grounds or for lack of means.¹⁶⁰ Finnish nationals, citizens of other Nordic countries residing in Finland, refugees and third country nationals with residence permits on grounds of subsidiary protection are entitled to family reunion. For these categories the ability to support family members is not required.¹⁶¹

Other relatives of the third country national or the spouse, e.g. parents, grandparents or adult children, may be issued a residence permit where refusal of the permit would be unreasonable. This will apply if the relative is fully dependent on the person residing in Finland or the persons in question intend to continue their earlier close family life in Finland.¹⁶² The Act provides that the definition of family members in the European Social Charter shall govern the

156 Art. 19(2) Aliens Act.

157 Art. 57 Aliens Act.

158 Isotalo Castrén, par. 4.1.

159 Art. 18b-18d Aliens Act.

160 Art. 18c(2) Aliens Act.

161 Art. 18c(1) Aliens Act.

162 Art. 18c(3) Aliens Act.

reunification of family members who are nationals of the Parties to the Charter.¹⁶³

b. The right to work

A third country national who holds a permanent residence permit is exempted from the requirement to have a work permit.¹⁶⁴

c. Social security and assistance

Eligibility for Finnish social security benefits is not dependent on nationality. To be eligible for social security benefits a third country national must be residing in Finland. Persons migrating to Finland can be considered to be residing in Finland immediately if they enter Finland with the purpose of permanent residence and hold a residence permit for one year.

In order to get pensions or a disability allowance, the third country national must have resided in Finland for a certain period of time. For instance, to qualify for child allowances the third country national must have resided in Finland for 180 days before the date on which the child is due to be born. Residence in Finland and eligibility for social security benefits are defined by the Act respecting Residence-Based Social Security. This Act is used as the yardstick for determining whether applicants satisfy the residence requirements for the benefits that are provided under this Act, irrespective whether the person holds a permanent or a non-permanent residence permit.

Eligibility for social assistance, as well as for social security, is not dependent on nationality. To be eligible for social assistance a third country national must be residing in Finland. Persons migrating to Finland can be considered to be residing in Finland immediately if they enter the country with the purpose of permanent residence and hold a residence permit for one year.

d. Voting rights

In 1976, the right to vote and stand for election in municipal elections was granted to the nationals of other Nordic countries after three years of residence. Since 1995 EU citizens and citizens of Iceland and Norway, who are 18 years of age, are entitled to vote in municipal elections if they were domiciled in the municipality 51 days before the elections. Other non-nationals are entitled to vote in the local elections after two years of residence.¹⁶⁵

According to the new Constitution of Finland, which came into force on 1 March 2000, all third country nationals permanently resident in Finland and

163 Art. 18b(3) Aliens Act.

164 Art. 25(1)(1) Aliens Act.

165 Chapter 4, section 26(1) Municipality Act, as amended on 22.12.1995.

over 18 years of age, have the right to vote in municipal elections and municipal referenda on conditions prescribed by an act.¹⁶⁶

e. Education, grants and scholarships

Third country nationals are entitled to educational grants if they have lived in Finland for at least two years for purposes other than studies, and their residence in Finland is considered to be permanent.

3. THE POSSIBILITY FOR FAMILY MEMBERS TO BENEFIT FROM THE STATUS

As a rule, family members who are authorised to join a principal in Finland will be granted an independent status after two years of residence. The only grounds for withdrawal of the permanent residence permit once issued to family members are as those which apply to the principal (assuming that he or she is a third country national) or to any other third country national with such a permit. In this respect there are no rules giving a privileged position to second generation immigrants.

4. LOSS OF THE STATUS

A third country national's residence permit may be revoked where the person, in the application, intentionally gave incorrect information about his or her identity or other circumstances, which influenced the decision, or if the third country national withheld information, which could have been important to the decision.¹⁶⁷

A permanent residence permit automatically ceases to be valid if the third country national to whom it was issued is deported from Finland, announces his permanent departure from Finland, or has continuously resided outside Finland for two years. However, the person may request the Directorate of Immigration to decide that the permit continues to be valid.¹⁶⁸

Unemployment is not a ground for withdrawal of a permanent residence.

5. REMOVAL OR DEPORTATION

A third country national who holds a temporary or permanent residence permit may be deported on the ground that (s)he has committed a criminal offence for which the minimum statutory punishment is one year of imprisonment or more, or has committed several criminal offences, engages in espionage or illegal intelligence activity or activity which endangers Finland's foreign relations, or if the person's behaviour constitutes a danger to the safety of others.¹⁶⁹

¹⁶⁶ Art. 14 of the new Constitution.

¹⁶⁷ Art. 21(1) Aliens Act.

¹⁶⁸ Art. 22 Aliens Act.

¹⁶⁹ Art. 40 Aliens Act.

Whenever a third country national's deportation from Finland is under consideration, all relevant matters and circumstances must be assessed. The Aliens Act especially refers to the duration of the third country national's stay in the country, the child-parent relationship, family ties, other bonds to Finland and, in case of offences to the public order, the nature of the offence or offences involved. However, no one may be deported to an area where (s)he may be threatened by capital punishment, torture or other inhuman or degrading treatment or if (s)he cannot return there because of an armed conflict or environmental catastrophe.¹⁷⁰

From the legislative history of the Aliens Act it appears that deportation of a non-national, who is born in Finland and has lived his or her whole life there or is of Finnish origin (i.e. one of his or her parents is or has been a Finnish national) may hardly come into question.

The Supreme Administrative Court has, in deportation cases where the person has family life in and strong ties with Finland, applied the case law of the European Court of Human Rights with respect to Article 8 ECHR. In 1999, in two cases third country nationals were deported notwithstanding family ties with Finland; in both cases the person had been convicted for drug offences to prison sentences in the one case of 14 months and in the other of five years and six months.

A deportation order is made by the Directorate of Immigration on a proposal by the local police. Before an order is made the person concerned and the Ombudsman for Aliens must be given the opportunity to be heard. A deportation order may include a ban on re-entry for a maximum of five years.¹⁷¹ Deportation orders may be appealed with the County Administrative Court. The appeal has suspensive effect. A deportation order may not be enforced before it has become final, unless the non-nationals agrees to be deported in writing in the presence of two witnesses.¹⁷²

The general statistics on deportation indicate that 169 expulsion orders were made in 1997 and 181 in 1998. In 1997, the Supreme Administrative Court overruled 7 orders and approximately 58% of the orders were actually enforced. According to a survey in 1999, conducted by the Police Department of the Ministry of Interior, 62% of the expulsion orders were made in relation with criminal behaviour. There are no statistics available on the number of expulsions of long-term residents.

170 Art. 31 and Art. 41 Aliens Act.

171 Art. 42 and Art. 43 Aliens Act.

172 Art. 62 Aliens Act.

6. OBTAINING NATIONALITY

The requirements for naturalisation are: 18 years of age, residence in Finland for the five years preceding the application, good character (including no criminal record, regular payment of taxes and alimony), sufficient knowledge of the Finnish or Swedish language to cope with everyday situations, and sufficient income to support the family. This last condition may be lifted if the applicant is dependent on public assistance.¹⁷³ Reduced residence requirements apply for Nordic citizens (two years), for spouses of a Finnish citizen (three years residence and two years of marriage) and for former Finnish citizens.

A third country national with uninterrupted habitual residence in Finland since the age of 16 years and at least five years of residence before that age may acquire Finnish nationality upon declaration with the local police. This declaration can be made between the age of 21 and 23 years.¹⁷⁴

Finland does not favour multiple nationality, especially with regard to adults. A third country national normally acquires Finnish citizenship only on condition that (s)he renounces his or her previous citizenship. However, a third country national is not required to renounce his or her previous citizenship if the legislation of his or her former home country or the procedures followed there make it impossible.

A reform of the Finnish Nationality Act is being prepared that takes a more positive view of multiple nationality. It intends to make the application of the Act in practice more flexible than it is at present.

7. GENERAL COMMENTS

Finland has a residence system for third country nationals which is quick to recognise the long-term nature of economic and other migrants with the grant of a durable residence right after two years. The status is durable. Its loss generally seems to result from criminal activity, which has been the subject of a criminal conviction.

¹⁷³ Art. 4 of the Nationality Act of 28 June 1968 (No. 401), as amended in 1984 (No. 584), in 1995 (No. 155) and in 1998 (No. 481).

¹⁷⁴ Art. 5 Nationality Act.

France

France during most of the last century has been a country of immigration. Two third of the non-national residents of France are from outside the EU. Nationals from the Maghreb countries account for 60% of third country nationals.

The French immigration law dates back to 1945.¹⁷⁵ It has been amended frequently in recent years. The document evidencing a durable residence right was introduced in 1984.¹⁷⁶

1. THE POSSIBILITIES RELATING TO ACQUISITION OF LONG RESIDENT STATUS

a. Conditions for obtaining the status

The legal status which gives a durable residence right is evidenced by the issue of a *carte de résident*. The following have a statutory right to such a residence permit:¹⁷⁷ those with a special relationship with a French citizen (spouse for more than one year, mother, father or child of a French citizen); where the family member's relationship is with a third country national with a long residence permit and where the family member has been admitted for the purpose of family reunion there is a right to a long residence permit; refugee with convention status and family members¹⁷⁸ of such persons and recognised stateless persons with three years regular residence in France;¹⁷⁹ after ten years lawful residence.¹⁸⁰ Those who have been in possession of five consecutive one year residence permits for the purpose of private and family life or have been granted territorial asylum are entitled to a permanent residence permit.¹⁸¹ The individual must also fulfil the additional requirements that he or she is not a threat to public order¹⁸² and is lawfully residing in France.

Normally family members and recognised refugees receive evidence of their status by way of a durable residence permit fairly quickly either after arrival in France or recognition by the authorities as a refugee. While there is a power to grant a durable residence permit after three years residence in France on a temporary permit, few third country nationals succeed to obtain the status within this period. Normally either they obtain their durable resi-

175 Ordonnance of 2.11.1945, as amended lastly by the Law of 11.5.1998 (*Loi Chevènement*), hereafter Ord.

176 Art 14-18 Ord. of 1945 introduced by the the Law of 17.7.84, *Journal Officiel* 19.7.84. The residence card replaced the former so-called privileged residence document.

177 Art. 15 Ord.

178 Where they married before the principal was recognised as a refugee or where they have been married for more than one year.

179 Art. 15(11) Ord.

180 Students are excluded from this provision.

181 Art. 15(13), 12bis and 12ter Ord.

182 Including living in polygamy, Art. 15bis of the Ord.

dence status shortly after arrival (i.e. family members etc.) or after ten years when they acquire a right to it (or where applicable five years).

b. The procedures for obtaining the status

Acquisition is on application to the *préfet* of the *département* where the third country national lives or in Paris with the head of the metropolitan police. It is for the third country national to prove that he or she is entitled to the status. A decision to refuse the issue of a residence card can only be made after an independent commission established with each regional administration (*Commission du titre de séjour*) has been consulted. The third country national may present his case before the commission. The *préfet* is not obliged to decide in accordance with the opinion of the commission.¹⁸³ Against the decision of the *préfet* there is administrative review with the Minister of Interior and an appeal with the administrative tribunal and a further appeal with the *Cour Administrative d'Appel*. The remedies do not have suspensive effect.

The status is issued in the form of a separate document (*carte de résident*) commonly called "*carte de dix ans*".

A durable residence permit is valid for ten years and automatically renewable. There is no such thing as an unlimited permit in French law as regards third country nationals. The legislation provides for such a permit only for Community nationals.¹⁸⁴

From data of the Ministry of the Interior it appears that at the end of 1992 more than two third of all registered third country nationals held either the residence card or the equivalent residence document for Algerian citizens.

2. THE RIGHTS ATTACHED TO THE STATUS

a. Family reunion

No extra rights to family reunion attach to the status. The requirements for family reunion are the same for all resident third country nationals who want to reunite with their family members in France. Where a third country national has a temporary residence permit he or she is only entitled to family reunion after one year of residence in France.¹⁸⁵

According to the law relating to formally registered relationships of unmarried partners (*la Loi PACS*) which came into force on 15.11.99 and its implementing secondary legislation, a same sex partner may apply for an one year

183 Art. 12quater Ord.

184 Art. 9-1(3) Ord. and Decree of 23.9.1998; both are not yet implemented in practice.

185 The requirements for family reunion are specified in the Art. 29-30bis and Art. 12bis of the Ord. and in a Decree of 6.7.1999, *Journal Officiel* of 8.7.1999, p. 10108.

renewable residence permit to remain in France with his or her partner.¹⁸⁶ After three years of cohabitation, if one partner is French, and after five years if the partner is a foreigner with residence in France otherwise than as a student, the partner is entitled to a residence card.

b. The right to work

The holder of a durable residence permit has access to all employment and to independent professional activities without having to apply for a work permit.¹⁸⁷ However, certain professions have been reserved for French citizens or EU-nationals.

c. Social security and social assistance

Equal treatment in social security benefits is not restricted to aliens having a residence card. It is normally granted to non-nationals with temporary residence permits as well, provided that permit is valid for more than six months.¹⁸⁸ The residence card guarantees equal treatment with French nationals with regard to certain non-contributory benefits (e.g. compensation for victims of crime).

Persons holding a residence card have equal rights as French nationals to social assistance.

d. Voting rights

All third country nationals are excluded from voting rights at the national level. Similarly they are excluded from electoral rights at the local level as a result of the 1992 interpretation of Article 3(4) of the Constitution by the *Conseil Constitutionnel*: the *communes* are represented in the Senate, therefore third country nationals' participation in their formation would be contrary to the exclusion of third country nationals from electoral rights at the national level. The issue of granting voting rights in municipal elections to long resident third country nationals has repeatedly returned to the political agenda since the early 1980s.

e. Education, grants and scholarships

Persons holding a residence card have equal rights with French nationals with respect to access to education, study grants and scholarships.

¹⁸⁶ Law of 15.11.99, Art. 12 and Circular letter of 10.12.99.

¹⁸⁷ Art. 17 Ord.

¹⁸⁸ Art. L. 115-6 of the Social Security Code.

3. THE POSSIBILITY FOR FAMILY MEMBERS TO BENEFIT FROM THE STATUS

Family members (spouse and minor children) of a third country national with a long residence card will be granted the same status if they have entered legally and were admitted for family reunion.

Family members whose entry or stay is irregular may be granted a temporary residence permit for family reunion. Several categories of third country nationals are entitled to such a permit, especially family members of French citizens.¹⁸⁹ All third country nationals who have resided in France under temporary residence permits relating to family reunification may apply at the discretion of the authorities for a residence card after 3 years.¹⁹⁰ After five years they are entitled to a residence card.¹⁹¹

Parents of French nationals who are legally resident in France are entitled to a residence card.¹⁹² Parents of French nationals who have entered and resided in France irregularly are entitled to a temporary residence permit.¹⁹³ The minute they get their temporary permit they may apply immediately for a residence card.

Children admitted for family reunion are entitled to a residence card once 18 years of age if their non-French parent holds a residence card.¹⁹⁴

Third country nationals born in France, who may opt for French 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.¹⁹⁵

4. LOSS OF THE STATUS

Where fraud is alleged against a third country national who has acquired a durable residence permit which fraud was relevant to the decision to grant the individual the status, it can be withdrawn.¹⁹⁶ The *Conseil d'Etat* held that it is not necessary for the allegation to be proven by a court. It is sufficient that the *préfet* must have good grounds.¹⁹⁷

The residence card automatically expires if the third country national lives outside France for more than three years, except if the holder has applied for and received permission to extend that period.¹⁹⁸ Problems do arise in practice with the renewal process. Three years absence from France is a ground for

189 Art. 12 bis(7) Ord.

190 Art. 14 Ord.

191 Art. 15(13) Ord.

192 Art. 15(3) Ord.

193 Art. 12(6) Ord.

194 Art. 29(III) Ord.

195 Last sentence of Art. 15 Ord.

196 *Conseil d'Etat* 9.6.1999 (*Yacoubi*); *Conseil d'Etat* 13.11.1992 (*Riaz*).

197 *Conseil d'Etat* 16.11.1994 (*Fazilat*); *Conseil d'Etat* 1.4.1998 (*Kaabouni*).

198 Art. 18 Ord.

non-renewal. Divorce or an application for public assistance may be considered as evidence of fraud in the acquisition of the status and therefore a ground from refusal to renew the residence permit.¹⁹⁹ Constituting a threat to public order cannot be a ground for non-renewal since 1997.²⁰⁰

The card may be withdrawn in case the holder employs third country nationals without the required labour permit. The card must be withdrawn in case of polygamy.²⁰¹ Unemployment is not a ground for withdrawal of the residence card.

5. REMOVAL OR DEPORTATION

The residence right also ends if the Minister of Interior or the préfet make an expulsion order or a criminal court issues a banning order (*interdiction du territoire*) in the event of conviction for certain crimes specified in the Criminal Code.²⁰²

Once a third country national has a durable residence right administrative authorities may make an expulsion only in a small number of circumstances where the third country national constitutes a serious threat to public order.²⁰³ These include where a third country national has been convicted and sentenced to a prison sentence of at least one year, though a prison sentence for certain crimes will always constitute grounds for expulsion: drugs related, breach of the labour code or illegally offering collective housing.

Special protection against expulsion extends to third country nationals with 15 years habitual residence or 10 years lawful residence in France;²⁰⁴ third country nationals resident in France since the age of six; spouses of French citizens and parents of French minors.²⁰⁵ Only third country nationals under 18 years enjoy absolute protection against expulsion.²⁰⁶

The case law of the European Court of Human Rights with regard to the protection against expulsion of aliens with long residence and close family ties in the country of residence has been integrated by the *Conseil d'Etat* in French law in 1991.²⁰⁷ In recent years the Minister of Interior has repeatedly issued

199 Interviews with expert lawyers in 1997 and 1999.

200 Law of 24 April 1997.

201 Art. 15bis and Art 15ter Ord.

202 E.g manslaughter, drug trafficking, terrorism and violation of State security; see Art. 130-30, 213-2, 414-6, 431-19, 442-12, 222-48 of the Criminal Code.

203 Art. 23 of the 1945 Ord.; see Dictionnaire Permanent Droit des Etrangers, under "Expulsion" and Gacon-Estrada and Rodier 1996.

204 Even for this group, however, expulsion is permitted under Art. 26 Ord. on the basis of overriding considerations of national interest.

205 Art. 25 Ord.

206 Art. 25 and Art. 26 Ord. However, the administration may order the expulsion of the child's parents.

207 Conseil d'Etat 18.1.1991 (*Beldjoudi*) and 19.4.1991 (*Belgacem*).

instructions 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.²⁰⁸

The third country national has to be informed by the authorities of their intention to make an expulsion order. The authorities must present the case before a commission composed of three judges (*Commission d'expulsion*). The third country national has the right to present his views to the commission. The opinion of the commission is advisory only, but it is followed by the authorities in the large majority of the cases. From data of the Commission in Paris, handling almost 30% of all expulsion cases in France, it appears that in recent years the number of expulsion cases concerning third country nationals with special statutory protection has steadily decreased: from 73 in 1996 to 26 in 1999. Moreover, the Commission during these four years in the majority of those cases has held that the person should not be expelled.²⁰⁹

6. OBTAINING NATIONALITY

Naturalisation as a French national is discretionary. Generally, five years residence in France is required. Some third country nationals, however, enjoy a right to acquire French citizenship by declaration. These include third country national children born in France who continue to live in France up to their majority, provided they have lived in France:

- (1) Where the declaration is made at the age of 13 the child must have resided in France from the age of 8;
- (2) Where the declaration is made at the age of 16 the child must have been resident in France from the age of 11;
- (3) Where the declaration is made at the age of 18 the child must have been resident in France for five years after the age of 11.

A third country national 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.²¹⁰

Spouses of French nationals also enjoy a privileged access to nationality where they have been married for one year (which period is reduced where a child has been born to the couple) and their residence is regular.²¹¹

208 Circular letters of the Minister of Interior of 25.10.1991, 8.2.1994, 5.4.1996, and 16.7.1997 and 1.12.1999.

209 Groenendijk, Guild and Dogan 1998, p. 37 and recent data provided to the authors.

210 Art. 21(7) and Art. 21(11) of the Civil Code as amended by the Law of 16.3.1998, *Journal Officiel* of 17.3.1998, p. 3935.

7. GENERAL COMMENTS

In France a durable residence status is granted to large categories of immigrants relatively early after admission to the country. The residence right is not permanent, but linked to a card that is valid for ten years. This may give rise to problems at the occasion of the renewal of the card. Only the free access to all employment is directly related to the status.²¹² Most other rights are related to having lawful residence, or to close family ties with a French national or to the duration of the (lawful) residence in France. The French legislation explicitly recognises that long residence in the country without a residence title under certain circumstance gives a right to a temporary residence permit, that may lead to the durable residence status.²¹³ The rules and the practise on protection against expulsion are complicated, partly due to the fact that expulsion orders may be given both by administrative authorities and by the criminal courts.

211 Where the marriage breaks down within one year after a declaration for French citizenship there is a presumption that the marriage was fraudulent even though the marriage may have lasted many years before the declaration Art. 21-2 Civil Code.

212 Art. 12bis(3) Ord.

213 Art. 12bis (3) Ord. as amended lately by the law of 11.5.1998 (Loi Chevènement)

Germany

In the second half of the last century Germany has received by far the greatest number of immigrants of all EU Member States. The present German Aliens Act (*Ausländergesetz*, AuslG)²¹⁴ was enacted in 1990 after a heated debate about family reunion and the (lack of) demand for immigrant workers in the labour market.²¹⁵ The Act of 1990 considerably restricted the wide discretionary powers of the administration and codified the case law and the administrative instructions which had extended the security of residence of long resident third country nationals under the 1965 Act.

1. THE POSSIBILITIES RELATING TO ACQUISITION OF LONG RESIDENT STATUS

In German law, there are two residence permits, which provide for permanent residence: the unrestricted residence permit (*unbefristete Aufenthaltserlaubnis*) and the establishment permit (*Aufenthaltsberechtigung*). As first admission is always for a limited period of time, the unrestricted residence permit and the establishment permit are only issued after a period of lawful residence in Germany on the basis of another residence document.

a. Conditions for obtaining the status

A third country national is entitled to the *unrestricted residence permit*²¹⁶ if he or she has held a temporary residence permit for five years, has a work permit and is employed, has a command of the German language, satisfies the housing requirements and no public order objections exist, or if he or she has held a residence permit on humanitarian grounds for eight years.²¹⁷ Where the third country national has retired, subsistence must be secured by his own means.²¹⁸

The *establishment permit* provides third country nationals with the most secure residence rights. It is no longer possible to restrict the activities of the third country national, once the establishment permit is issued.²¹⁹ The third country national is entitled to an establishment permit after eight years of lawful residence in Germany on the basis of a temporary residence permit or three years with the unrestricted residence permit, provided this permit was granted after eight years of holding a residence permit on humanitarian grounds. In both

214 *Ausländergesetz*, hereafter AuslG of 9.7.1990, *Bundesgesetzblatt I*, p. 1354.

215 See Rittstieg and Rowe 1992, p. 11f; Renner 1998, p. 21f.

216 See *Gemeinschaftskommentar zum Ausländerrecht*, § 24 AuslG, Neuwied; Renner, *Ausländerrecht in Deutschland*, p. 378f.

217 Art. 24(1) and art. 35 AuslG.

218 Art. 24(2) AuslG, social benefits for which contributions have been paid, are considered as income.

219 Art. 2 (1) AuslG; *Gemeinschaftskommentar zum Ausländerrecht*, § 27 AuslG.

cases, sufficient income secured by his own means or payment of at least 60 monthly pension contributions are required.²²⁰ Moreover, the person should not have been convicted during the last three years for a crime of intent or to juvenile punishment or to imprisonment for six months or longer, or a considerable fine. Finally, sufficient housing must be available and no other public order objections present.²²¹

b. The procedures for obtaining the status

Residence permits are only issued on application, except for permits issued to unmarried minors, who were born and are resident in Germany. These minors are granted permanent status automatically, as long as their mother holds a residence permit or an establishment permit.²²²

The application is made to the local foreigners office (*Ausländerbehörde*), where the third country national lives.²²³ On refusal, there is administrative review before a superior administrative authority²²⁴ and, if that procedure leaves the decision of the local foreigners office unchanged, there is a right of appeal to the administrative court (*Verwaltungsgericht*). There is a further appeal to the administrative court of appeal (*Verwaltungsgerichtshof/Oberverwaltungsgericht*), if leave to appeal is granted. After an amendment to the legislation in 1996, this appeal is restricted to certain grounds, which are present in very few cases only.²²⁵ Therefore, since 1996 the vast majority of the appeals to the administrative courts of appeal are declared inadmissible.

The permit is stamped into the national passport. There is no limitation on its validity.

At the end of 1998 just over half of the 5.5 million non-German residents issued with residence documents held one of the two secure residence status: 36% held an unrestricted residence permit and 15% held an establishment permit.²²⁶ At that time the non-German population totalled 7.3 million persons, of which two thirds had been living in Germany for six years or more.²²⁷ Among Turkish nationals, by far the largest group of third country nationals in Germany, the percentage having an establishment permit was clearly above the average (25%); another 30% held an unrestricted residence permit.

220 Art. 27(2)(3) AuslG.

221 Art. 27(2)(5) referring to Art. 24 (1)(2) to (6) AuslG; same exceptions for spouses, see: Art. 27(4) AuslG.

222 Art. 21 AuslG.

223 Art. 63 AuslG.

224 Which is normally the *Regierungspräsidium*.

225 Cfr. Art. 124 *Verwaltungsgerichtsordnung* (VwGO), Schenke 1997, pg. 90f.

226 Beauftragte der Bundesregierung für Ausländerfragen, *Bericht über die Lage der Ausländer in der Bundesrepublik Deutschland*, Berlin February 2000, p. 238.

227 *Ibidem*, p. 237.

2. THE RIGHTS ATTACHED TO THE STATUS

a. Family reunion

In German law the right to family reunion with spouses²²⁸ and children²²⁹ depends, apart from other conditions such as sufficient income and housing, on the residence status of the principal. A spouse of a first generation principal holding a residence permit or an establishment permit is entitled to a residence permit, if the couple was already married when the principal entered Germany and the principal informed the authorities about the marriage. These requirements do not apply if the principal holds an establishment permit.²³⁰

A spouse of a second generation principal, who was born in Germany or entered as a minor, holds an unrestricted residence permit or an establishment permit, has lived eight years in Germany and is over 18 years of age has the same statutory right. The authorities have to issue the permit, when the other conditions are fulfilled.²³¹

In all other cases, admission for family reunion is discretionary.²³²

The residence permit is usually valid for one year to be renewed each year. At each renewal, all the requirements for admission have to be met. After five years residence, the spouse is entitled to an unrestricted residence permit, if (s)he has sufficient command of the German language, satisfies housing requirements, has sufficient income and is not liable to expulsion.

Other family members may only be admitted in case of extreme hardship (*außergewöhnliche Härte*).²³³

Third country spouses and minor children of a German national living in Germany are entitled to a residence permit without further conditions. Their residence permit normally will be valid for three years.²³⁴

b. The right to work

Once a third country national has obtained an establishment permit, he or she has free access to the labour market no longer needs a labour permit.²³⁵ Hav-

228 Art. 18 AuslG.

229 Art. 20 AuslG.

230 Art. 18(1)(1) and (3) AuslG.

231 Art. 18(1)(4) AuslG.

232 Compare: Dollinger and Speckmaier 1997, p. 61f.

233 See Art. 22 and Art. 23(4) AuslG.

234 Art. 23(1) AuslG.

235 Art. 284(1.2) Sozialgesetzbuch III.

ing an unrestricted residence permit only grants free access to the labour market after six years of lawful residence on the basis of a time-limited residence permit or if the person was born in Germany.²³⁶ Family members of a third country national holding an unrestricted residence status, who have not yet obtained that residence status themselves, need a labour permit, which can be refused on labour market grounds, e.g. there are German or EU citizens or other privileged foreign residents available for the job.²³⁷ Currently, in certain regions these family members may be excluded from all employment.

c. Social security and social assistance

Third country nationals who hold an unrestricted residence permit or an establishment permit have access to social security benefits on the same conditions as German nationals.

Social assistance is also granted to third country nationals. However, it may be a ground for withdrawal of a temporary residence permit, not of the two unrestricted residence documents.²³⁸

In theory receiving social assistance may be a ground for expulsion of a third country national who holds an unrestricted residence permit or an establishment permit.²³⁹ However, in practice this is rare. They have a better protection against expulsion, than a person with a temporary residence permit which may be withdrawn on this ground and the person expelled under discretionary powers.²⁴⁰

d. Voting rights

Third country nationals resident in Germany are excluded from participation in all elections at federal, Länder and municipal level. The constitutional court (*Bundesverfassungsgericht*) has held, that the principles of democracy do not allow the legislator to grant these persons the right to vote, as they are not part of the nation's people (*Staatsvolk*).²⁴¹

e. Education, grants and scholarships

Children of permanent residents have equal access to education, but are not covered by the relevant constitutional guarantee. They have the same right as

236 Art. 286(1)(1)(b) *Sozialgesetzbuch III*.

237 If the principal is a German citizen, a special work permit (*Arbeitsberechtigung*) grants free access to all employment, Art. 2 *Arbeitsgenehmigungsverordnung* and Art. 286 *Sozialgesetzbuch III*.

238 See Art. 12(2) *AuslG*.

239 See Art. 48(1) *AuslG*.

240 Art. 12(1) and art. 46(6) and (7) *AuslG*.

241 Cfr. BVerfG, judgement of 31.10.1990, *NJW* 1991, p. 162ff.; critical: Rittstieg 1994, p. 365ff. The exception made for the participation of resident EU-citizens in municipal elections demonstrates, that the principle is no longer applied to all non-nationals.

German citizens to scholarships, if they have lawfully worked for five years in Germany or one of their parents has worked in the country for three years during the last six years.²⁴²

The *numerus clausus* rules in university education are disadvantageous for third country nationals.²⁴³ After five years of residence they have equal rights to assistance for profession training.²⁴⁴

3. THE POSSIBILITY FOR FAMILY MEMBERS TO BENEFIT FROM THE STATUS

The spouse of a third country national who holds an **unrestricted residence permit**, is entitled to that permit, once the spouse fulfils the all general conditions but one: if the principal is working in Germany the spouse does not have to be employed as well. If one spouse has sufficient income to support the family, the other spouse is not required to have an income.²⁴⁵ Third country nationals married to a German national are entitled to an unrestricted residence permit after three years, if they have sufficient command of the German language and there are no public order objections.²⁴⁶

The spouse of a third country national who holds an **establishment permit**, is entitled to that permit, once the spouse fulfils the general residence and public order requirements. It is sufficient that one of the spouses has a permanent labour permit, a regular income and has paid a minimum number of social security contributions.²⁴⁷

A third country national who was born in, or came to Germany for family reunification as a minor, is entitled to the unrestricted residence permit at the age of 16 if the child has held a temporary residence permit for at least eight years. No other requirements apply. If the second generation immigrant has less than eight years residence the permit will be granted only if he or she has command of the German language and sufficient income or is considered to be integrated in German society on the basis of his or her education in Germany.²⁴⁸ The permit may only be refused if there is a personal ground for expulsion, the child has committed certain crimes during the past three years, or the child cannot support him or herself without social security benefit, unless (s)he is in education.²⁴⁹

242 Art. 8(2) *Bundesausbildungsförderungsgesetz*.

243 Art. 27 and 23(2)(3) *Hochschulrahmengesetz*.

244 Art. 59 and art. 63 *Sozialgesetzbuch III*.

245 Art. 25(1) *AuslG*.

246 Art. 25(3) *AuslG*.

247 Art. 27(4) *AuslG*.

248 Art. 26(1) *AuslG*.

249 Art. 26(3) *AuslG*.

4. LOSS OF THE STATUS

Both permits may be withdrawn if they have been acquired on the basis of incorrect information provided by the third country national.²⁵⁰ The permits lapse when the third country national has left Germany permanently or is absent for more than six months without prior authorisation of the authorities.²⁵¹

The permits cannot be withdrawn on the ground of a period of unemployment that occurs after their issue. In theory, receiving public assistance may be a ground for expulsion (see above).

5. REMOVAL OR DEPORTATION

In practice the most important ground for loss of permanent residence status is deportation on public order grounds, especially after a conviction for drug trafficking or another serious crime.

German law provides that a third country national *has to be expelled* when convicted of a malicious crime to an unsuspended prison sentence of least three years.²⁵² The person *should be expelled* after an unsuspended prison sentence of at least two years.²⁵³ In a reaction to violent actions of Kurdish organisations in 1997 the Aliens Act was amended to include in this category a conviction for participation in a banned demonstration that results in violence.²⁵⁴ A third country national *can be expelled*, if the person has violated public order in any other way.²⁵⁵

Third country nationals, holding an unrestricted residence permit or an establishment permit, according to the law, enjoy increased protection against expulsion. With respect to these (and other) privileged third country nationals the statutory obligation to make an expulsion order in case of the most serious violations of public order does not apply. In these cases expulsion should generally be ordered, but the authorities may abstain from making such orders in exceptional cases.²⁵⁶ However, in practice such exceptions are rare. Hence, the permanent residence status does not really provide additional protection against expulsion.

Total protection from expulsion only exists for minor children under 14 years. In spring 2000 public discussion about the statutory rules on expulsion has started again after a proposal by the Christian Democratic Party (CDU)

250 Art. 48 *Verwaltungsverfahrensgesetz*.

251 Art. 43 and Art. 44 *AuslG*.

252 Art. 47(1) *AuslG*.

253 Art. 47(2) *AuslG*, exceptions are rare.

254 Amendments introduced in Art. 47(2) *AuslG* by the Act of 29.10.1997.

255 See Artt. 46, 45 *AuslG*

256 Art. 48(1) *AuslG*; with respect to these privileged third country nationals in the cases referred to in Art. 47 (2) *AuslG* expulsion does no longer normally occur but is in the discretion of the authorities.

that a conviction to a prison sentence of one year should always result in an expulsion order, without any regard to the circumstances of the case.²⁵⁷ Commentators rightly pointed out that the application of such a rule could easily result in violation of Article 3 or Article 8 ECHR.²⁵⁸

6. OBTAINING NATIONALITY

In 1999 the German Nationality Act (*Staatsangehörigkeitsrecht, StAG*) was changed after a long political debate.²⁵⁹ Under the new legislation, which entered into force on 1.1.2000, children born in Germany to non-German parents automatically acquire German nationality at birth, if one of the parents has eight years of lawful residence in Germany and holds either an unrestricted residence permit for three years or an establishment permit. German nationality is acquired irrespective of whether or not the child at birth also acquires another nationality.²⁶⁰ If the person has dual nationality, he or she between the age of 18 and 23 years has to opt for one of their nationalities and lose the other. If no choice has been made at the end to the 23rd year, the person under the present law will automatically lose German nationality.²⁶¹

A transitional provision has been made for immigrant children born in Germany and not older than 10 years. If, at the time of birth, one of the parents fulfilled the above requirements with respect to the length of the residence in Germany and the permanent residence status, they may opt for German citizenship for the child up until the end of the year 2000.²⁶²

In 1993 the Aliens Act had been amended in order to grant second-generation immigrants who had 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.²⁶³ After the 1999 revision, the right to acquire German nationality by naturalisation is granted to non-nationals with eight years of lawful residence in Germany. At the moment of the decision on citizenship application the applicant has to hold an establishment permit or an residence permit, to be loyal to the German constitution, to have sufficient command of the German language and sufficient income, and not to be liable to expulsion.²⁶⁴ The income requirement does not apply to per-

257 Cfr. *Süddeutsche Zeitung*, 11/12 March 2000, p. 1.

258 Gutmann 2000, p. 1ff.

259 Act of 15.7.1999 (*Gesetz zur Reform des Staatsangehörigkeitsrechts*), *Bundesgesetzblatt I*, p. 1618.

260 Art. 4(3) and (4) StAG.

261 Art. 29 StAG; exceptions to this obligation to choose are provided in Art. 29(4) StAG.

262 Art. 40b StAG.

263 Art. 85-91 AuslG.

264 Art. 85 AuslG.

sons under 23 years having eight years of residence in Germany.²⁶⁵ Dual nationality at naturalisation is accepted in exceptional cases only.²⁶⁶

7. GENERAL COMMENTS

The present German legislation presents a divided picture. On the one hand, Germany in 1999 adopted one of the most liberal naturalisation laws in the EU. Only in the UK both first and second generation immigrants have easier access to the nationality of the country of residence. On the other hand, there is a tendency to enlarge the possibilities for expulsion of third country nationals with long lawful residence, or even those born in the country, on public order grounds.

265 Art. 85(3) AuslG.

266 Art. 87 AuslG.

Greece

Greek law on permanent residence is to be found in Law 1975/1991.²⁶⁷ While the main case law on the legal status of long term immigrants in Greece dates from 1936,²⁶⁸ Greek experts in the field of immigration consider that the country is still in transition from a country of emigration, mainly feeding the labour markets of North Western Germany, the USA and Australia, to one attracting migrants. It is apparent from the framework of the law that there is accommodation for migration both at the “top” end of the labour market, managers of enterprises and highly skilled technicians and at the “bottom” end, shepherds and other agricultural workers.²⁶⁹ As is common in countries which have historically been the source of substantial emigration, special provisions in Greek law protect the work and residence rights of persons who, although they have acquired the nationality of their country of residence (outside Greece), are still considered by Greece to be Greek (i.e. of Greek origin).

1. THE POSSIBILITIES RELATING TO ACQUISITION OF LONG RESIDENT STATUS

a. Conditions for obtaining the status

The third country national must have entered Greece for the purpose of work with a prior authorisation to work with the employer who requested admission in Greece for the purpose of employment. He or she is then granted a one year work and residence permit which is renewable annually for five years. After five years the third country national is eligible to apply for a two year work and residence permit to the Ministry of Public Order and after 15 years of work and residence the individual is entitled to a permanent residence permit.²⁷⁰ Periods of studies or spent in prison do not count towards the 15 years.²⁷¹ However, family members of third country nationals resident in Greece for at least five years may be granted a permanent residence permit as well. In addition to the period of work and residence the individual must have made social insurance contributions for 120 months. The public order re-

267 *Official Gazette* 184A. The law was amended in 1996 (Law 2452/1996), in 1997 (Law 2533/1997), 1998 (Law 2646/1998) and 1999 (Law 2713/1999).

268 Council of State judgements nrs. 496/1936 and 602/1936. In both cases the court quashed the refusal to renew the residence permit of a person who had lived in Greece for many years, considering that the eventual deportation of the applicant would have very serious consequences for the conditions of his life and work in Greece which were created during his long stay in the country and with the permission of the Greek State.

269 Art. 22(7) Greek Aliens Law 1975/1991.

270 Art. 13 Greek Aliens Law 1975/1991.

271 Art. 13(4) Greek Aliens Law 1975/1991.

quirement is general and does not directly relate to the question of issue of permits.

b. The procedures for obtaining the status

The status is acquired on application to the relevant local aliens police authority. If the application has been refused the third country national is entitled to file an appeal before the Ministry of Public Order. Appeal against a negative decision is possible to the Supreme Administrative Court of Greece (Council of State).

The permanent residence permit is granted in the form of a card, which, at the same time, has the function of an identity card.

Once a permanent residence permit has been granted it is valid unless withdrawn.

Because the Aliens Law only came into force in 1992 and requires very long period of lawful work and residence before a third country national becomes eligible for a permanent residence permit (15 years of continuous employment on the basis of one or two year permits), the Ministry of Public Order does not appear ever to have issued a permanent residence permit of this kind to third country nationals admitted for employment. Permanent residence permits based on refugee status were issued – for the first time in 1979 to Vietnamese boat people in a total of 150 cases.

2. THE RIGHTS ATTACHED TO THE STATUS

a. Family reunion

Eligibility for family reunion only comes when a third country national has been resident in Greece for 5 years on the basis of a work and residence permit, i.e., when (s)he is in possession of the two year work and residence permit.²⁷² The specific conditions for family reunion are set out in subsidiary legislation.²⁷³ The third country national must be able to support and accommodate the family before they will be authorised to join him or her. Further, the family members will not be admitted to Greece if their presence will endanger public order or national security.²⁷⁴

b. The right to work

A third country national who has obtained a permanent residence permit as a result of working and residing in Greece for 15 years, is, of course (as the work is the basis for the grant of the initial permit), entitled to work.

272 Art. 14(1) Greek Aliens Law 1975/1991.

273 Presidential Decree 5/1998 Conditions and Procedures for Family Reunion of Third Country Nationals, Official Gazette 15 A'.

274 Art. 14(4) Greek Aliens Law 1975/1991.

c. Social security and social assistance

Third country nationals residing and working legally in Greece – irrespective of the length of their stay in the country – have equal access to social security with Greek citizens. They are not entitled to social assistance, although some allowances concerning children may be granted. The main rule is that in Greece social assistance can only be granted to Greek citizens and to citizens of one of the EU Members States legally residing in Greece. Some third country nationals (i.e. Turkish citizens) are entitled to disability allowances by application of the 1954 European Convention on Social and Medical Assistance.²⁷⁵

d. Voting rights

Third country nationals are excluded from voting rights at the national²⁷⁶ and local level. At the national level, only a Greek citizen who is descendent of a Greek father is eligible for the presidency.²⁷⁷

e. Education, grants and scholarships

Children of third country nationals lawfully residing in Greece are entitled to education (primary and secondary) on the same basis as Greek citizens. They also have the possibility of following an education at university level, provided they have finished Greek secondary education. They may be granted scholarships, but not on the same basis as Greek citizens.

3. THE POSSIBILITY FOR FAMILY MEMBERS TO BENEFIT FROM THE STATUS

The family members get the same type and duration of residence permit as their principal. The residence status of family members is dependent on their principal with regard to duration, renewal and revocation.²⁷⁸ Third country nationals admitted when minor are entitled, when they become adult and have sufficient resources, to an independent residence permit, provided they have sufficient income.²⁷⁹ In order to be eligible for an independent permanent residence permit the third country national has to fulfil the normal 15 years of residence requirement.

4. LOSS OF THE STATUS

Where a residence permit has been acquired by fraud it is withdrawn.²⁸⁰

A permanent residence permit is not withdrawn in the event of absence from the territory.

275 Ratified by Greece with the Law 4017/1959.

276 Art. 1(3) Constitution of Greece.

277 Art. 31 Constitution of Greece.

278 Art. 14(3) Greek Aliens Law 1975/1999.

279 Art. 14(4) Greek Aliens Law.

280 Art. 7(5) Greek Aliens Law. Voulgaris 1995, p. 33.

5. REMOVAL OR DEPORTATION

Greek immigration legislation does not provide directly for the circumstances under which the holder of a permanent residence status may lose this. According to Article 27(1) of the 1975/1991 law, a third country national may be expelled on the basis of an administrative decision on four grounds: (i) a conviction which results in a sentence of imprisonment or confinement (where the court did not order the third country national's expulsion; the court's jurisdiction also extends to including expulsion as part of a sentence on a criminal conviction of at least three months imprisonment²⁸¹); (ii) failure to comply with the provisions of aliens legislation (specifically Law 1975/1991 but also the relevant decrees); (iii) where the third country national's presence is a threat to public order, national security, public health or public morals (however, concrete grounds must be given²⁸²); (iv) where the third country national presents him- or herself to the authorities on more than one occasion and each time claims to be a national of a different country.²⁸³

However, expulsion will not take place:

- a. if the third country national is a minor and one of his or her parents is, or both are, residing in Greece²⁸⁴;
- b. if the third country national is the mother of a Greek minor and there is no danger for the public or national security; and
- c. if the third country national is over 80 years and there is no real danger for the public or national security.²⁸⁵

In expulsion cases the Supreme Court will take into consideration the family life of the third country national in Greece. In a 1998 case the fact that the third country national had lived in Greece for nine years was an important circumstance for deciding the suspension of the expulsion order, because this expul-

281 Art. 74(1) Greek Penal Code; there are also powers to expel a third country national immediately in the event of long sentence and special provisions for the expulsion of the mentally unstable. Certain types of crimes can result in expulsion with a long or permanent ban on return – for instance drugs related convictions; see ECJ 19.1.1999, *Donatella Calfa* ECR I-C348/96.

282 Committee of Suspensions of the Council of State, 377, 442/1996.

283 The expulsion power is expressly limited by Greece's international commitments, with specific reference to the duty of non-refoulement.

284 Also it was judged that the expulsion of a minor third country national, whose custody and parental care was exercised by a Greek uncle, would provoke an irremediable damage to the minor. See, Committee of Suspensions of the Council of State, 110/1998.

285 Art. 28 Greek Aliens Law 1975/1991.

sion would have severe consequences for his family life.²⁸⁶ A long period of residence has also been an important factor in other expulsion cases.²⁸⁷

6. OBTAINING NATIONALITY

A third country national who has reached the age of 18 and resides in Greece may apply for Greek nationality by submitting a declaration of naturalisation before the municipal authorities. The decision is made by the Ministry of the Interior.

In order to acquire Greek citizenship it is required that the third country national, if (s)he is not of Greek origin, has resided in Greece ten years out of the 12 years of residence in Greece prior to the moment of the submitting of the declaration or has resided in Greece for five years after the moment of submitting the declaration. However, a shorter period of residence applies to third country nationals of Greek origin, third country nationals who were born in Greece and the spouses, permanently resident in Greece, of a Greek citizen and having children.²⁸⁸

The decision whether to grant Greek citizenship or not is not subject to judicial control as it is considered by Greek law to be a political act. Only a decision that mentions the reasons for refusal, for which there is no obligation, may be challenged before the State Council.

7. GENERAL COMMENTS

The length of time a third country national must live and work in Greece before acquiring a possibility of a permanent status is surprising. It must be quite complicated for both the administration and the individual to prove 15 years work and residence. Under the circumstances it is understandable that there is not one case of such a permit being issued.

286 Committee of Suspensions of the Council of State, 746/1998 (the Breich case).

287 Judgements of the Council of State (Committee of Suspensions), 2190/1989, 738/1993 and 5208/1995.

288 Law 2503/1997; See also Rozakis 1999.

Ireland

In Ireland the Aliens Act of 1935 is still in force.²⁸⁹ The Government has announced its intention to replace the 1935 Act with a statute which will set out the main elements of immigration and residence law.²⁹⁰ The Act recently has been supplemented by the Immigration Act of 1999, which contains new provisions on deportation but is only a partial response to the need for revision of the old legislation.²⁹¹

1. THE POSSIBILITIES RELATING TO ACQUISITION OF LONG RESIDENT STATUS

a. Conditions for obtaining the status

Irish law does not provide a special secure residence status for long-term resident third country nationals, though provisions may be made for such a status in forthcoming legislation on immigration and residence. However, there is currently an administrative practice of granting a non-national, who has been legally resident in Ireland for five or ten years, depending on the status of the applicant, the opportunity to obtain a residence stamp giving him or her "permission to remain without condition as to time". A parent or dependent family member of a third country national who has acquired Irish citizenship or who has been legally resident for more than five years may, where he or she is financially independent of support from the State, after five years of residence apply to obtain a residence stamp giving him or her permission to remain without condition as to time. Other non-nationals may apply for a five-year stamp after five years' legal residence and, after ten years' legal residence, may apply for a stamp giving them residence permission without condition as to time.

This residence permit only entitles the person to unlimited residence, and other requirements on third country nationals (work permits, visas, registration, etc.) continue to apply.

There is no legal right to this status, which is not provided for in legislation, but is part of administrative practice only. There are no published rules relating to this practice, though the position has been outlined in an information leaflet on immigration published by the Department of Justice, Equality and Law Reform.²⁹²

289 Immigration Act of 10 April 1935, No. 14 of 1935.

290 Department of Justice, Equality and Law Reform, Press Release of 5 February 1999.

291 Immigration Act of 7 July 1999, No. 22 of 1999.

292 Information Leaflet Immigration No. 2. The leaflet is not entirely clear and it is understood that this may be amended in the near future to clarify and amend the regime.

During 1999 a total of 99 persons were granted this unlimited residence status.²⁹³ Statistics on the number of third country nationals who currently hold this status are not available, since statistics were not kept before 1999. It is thought that a relatively small percentage of the resident non-national population holds this status, as it is open to legal residents to apply for Irish nationality after five years and Irish law does allow multiple nationality.²⁹⁴

b. The procedures for obtaining the status

The decision to grant the residence permission without condition as to time is made by the Minister for Justice, Equality and Law Reform. The status is given by way of a stamp in the applicant's passport.

2. THE RIGHTS ATTACHED TO THE STATUS

In Irish law there are no additional rights accorded to a third country national with permission to remain without condition as to time.

There is no privileged position with respect to family reunification for persons with a permanent permission to remain.

These persons are not exempted from the requirement to hold a work permit when entering into employment or a business permit in case of self-employment. However, the Department of Enterprise, Trade and Employment's practice is to grant a work permit without condition as to time following the annual granting of a work permit for five years.

The fact of possessing a residence stamp allowing residence without condition as to time does not distinguish such long term residents from other legally resident third country nationals. Social security contributions are paid and benefits consequently enjoyed by all who work as employees or self-employed people in the State, including legally resident third country nationals, irrespective of their length of residence. The Irish social welfare scheme, generally, does not distinguish between Irish nationals and residents of any other nationality.²⁹⁵ However, some public services are available on the basis of physical residence, others depend on legal residence or the particular purpose of residence. Some are linked to nationality.

293 A further 328 persons obtained a "without conditions" stamp on their passports on the basis of their entitlements to Irish citizenship, for example by descent.

294 Moreover, British citizens are excluded from the application of the Immigration Act 1935. Hence, they do not need a residence permit and cannot be deported, Section 10 Immigration Act and 1999 Immigration (Exemption) Order of 20 April 1999, S.I. No. 97 of 1999.

295 Note, however, that the possibility of a parent or dependent family member obtaining an unlimited residence permission after five years may be lost if (s)he is not financially independent of support from the State.

The only third country nationals able to benefit from publicly funded educational grants and scholarships are those with official refugee status or those granted humanitarian leave to remain in Ireland.

All legally resident third country nationals have the right to vote and stand for election in local elections.

3. THE POSSIBILITY FOR FAMILY MEMBERS TO BENEFIT FROM THE STATUS

As mentioned above parents or dependent family members of third country nationals who have Irish citizenship or who are themselves legally resident for more than five years can, as a matter of administrative practice, apply to obtain residence permission for five years as a visitor and, subsequently, apply for residence without condition as to time. This is, however, conditional on them being financially independent of support from the State.

Otherwise, there are no specific legislative or administrative rules relating to the residence or other rights of family members of third country nationals with permission to remain indefinitely in Ireland. However, generally, their residence would be linked to that of the long-term resident and would be for a similar duration. It is possible for the family member to obtain an independent residence right and special consideration would be given to any special humanitarian features of an application.

Second generation immigrants will be Irish citizens provided they are born in Ireland.²⁹⁶

4. THE LOSS OF THE STATUS

Apart from the deportation provisions of the 1935 Act (see below sub 5), there is no law or published administrative practice addressing the question of the consequences of fraud in acquiring residency status. Where a resident third country national has provided false evidence in relation to nationality or identity, the person is liable to criminal conviction under the Act. It might also constitute a good reason for withdrawal of the residency, including long-term residency, status. In such a case, the very basis for *legal* residence may be thought to be lacking.

Generally, where a third country national is absent from Ireland for a period of more than around eighteen months, his or her long-term residency may be revoked. However, this does not necessarily mean that (s)he will be deported from the jurisdiction. Instead, the third country national may re-submit an application to remain within the jurisdiction to the Department of Justice.

296 Art. 6(1) Irish Nationality and Citizenship Act of 17 July 1956, No. 26 of 1956.

5. REMOVAL OR DEPORTATION

Prior to 1999, the 1935 Aliens Act provided that the Minister of Justice could make orders relating to the deportation of non-nationals from Ireland.²⁹⁷ After the Supreme Court upheld a decision of the High Court that the delegation of powers to make deportation orders and set out the procedure relating to deportation was excessively broad and inconsistent with Article 15(1) of the Irish Constitution²⁹⁸, the Immigration Act of 1999 was introduced in part to end this unconstitutional situation. The Act provides in primary legislation, the policies, principles and procedures relating to the deportation of non-nationals.

Under the 1999 Immigration Act a deportation order may be made by the Minister in respect of a legally resident third country national:

- a. who has served or is serving a term of imprisonment imposed on him or her by a court in Ireland;
- b. whose expulsion has been recommended by a court in Ireland before which such person was indicted for or charged with any crime or offence;
- c. who has contravened a restriction or condition imposed on him or her in respect of landing in or entering into or leave to stay in the State; or
- d. whose expulsion would, in the opinion of the Minister, be conducive to the common good.²⁹⁹

There is no bar on a third country national with 'permission to remain without condition as to time' being deported. In considering expulsion the third country national must be given an opportunity to make representations.³⁰⁰ When determining whether to make a deportation order, the Minister has to take into account eleven factors enumerated in the Act. Among these factors are: the age of the third country national, the duration of residence, the family and domestic circumstances, the nature of the third country national's connection with Ireland, the employment record and prospects, the character and conduct of the third country national, and humanitarian consideration.³⁰¹ A deportation order is subject to the possibility of judicial review by the High Court and, eventually, of an appeal to the Supreme Court.³⁰²

A third country national who has been ordinarily resident in Ireland for a period of at least five years and who is employed or engaged in business will

297 Art. 5(1)(e) Immigration Act.

298 *Sorin Laurentiu v. Minister for Justice, Equality and Law Reform* (Supreme Court) May 1999.

299 Art. 3(2) Immigration Act. Apart from the categories listed here another six categories are liable for expulsion.

300 Art. 3(3) Immigration Act.

301 Art. 3(6) Immigration Act.

302 Costello 1990, p. 87.

be given three months' notice of the expulsion decision. However, this protection, which appears to be designed to enable such a person to obtain a "breathing space" to arrange his or her affairs before being compelled to leave,³⁰³ is not available to a person who has served, or is serving, a term of imprisonment or to a person whose deportation is recommended by an Irish court before which (s)he has been indicted for or charged with any crime or offence.³⁰⁴

In the *Fajjonu* case³⁰⁵ the Supreme Court considered the extent of the possibility to deport the non-national parents of a child who, by virtue of her birth in Ireland, was an Irish citizen. It was held that constitutional provisions relating to the family³⁰⁶ severely limited the freedom of the Minister to deport: "where an alien has resided for an appreciable time in the State and has become a member of a family within the State containing children who are citizens, those children have a constitutional right to the company, care and parentage of their parents within that family, a right which those citizens are entitled to exercise in the State subject to the exigencies of the common good". The effect of the *Fajjonu* judgement is that a third country national with a dependent Irish child has strong protection against deportation.³⁰⁷ It is thought that the *Fajjonu* principle will extend to protect the foreign spouse of an Irish citizen from expulsion, at least to the extent that the citizen spouse can be regarded as constitutionally entitled to the presence of the foreign partner.³⁰⁸

However, it is possible that a foreign parent will lose the protection once the child ceases to be dependent upon him, either because the foreigner leaves the family unit or because the child grows up. Further, the protection under *Fajjonu* is not absolute and the expulsion might be justified in sufficiently grave cases where the factors favouring expulsion outweigh the constitutional right to family life.

There is no evidence that the case-law of the European Court of Human Rights has influenced national law or practice, or that changes have resulted from such case law to date. There are few if any references to the relevant Strasbourg case-law on Article 8 ECHR in the Irish general or legal press.

303 *The State (Goertz) v. Minister for Justice* [1948] IR 45, 46 (Supreme Court) (per Maguire CJ).

304 Art. 3(9b) Immigration Act

305 *Fajjonu v Minister for Justice* [1990] 2 IR 151, [1990] ILRM 234 (Supreme Court).

306 See art. 41 of the Irish Constitution.

307 Costello 1990, p. 82.

308 See Kelly 1994, 67.

No third country nationals with permission to remain indefinitely were deported in the years 1997-1999.³⁰⁹ It is highly unusual for persons who are legally resident in Ireland for a significant period of time to be deported. Much of the public debate on the issue of deportation relates to unsuccessful applicants for asylum who may have been residing in Ireland for a number of years while their cases are being processed.

6. OBTAINING NATIONALITY

Persons born in Ireland are automatically Irish citizens from birth.³¹⁰ A spouse of an Irish national is entitled to make a declaration accepting Irish nationality following three years of marriage, provided the marriage is subsisting.³¹¹ After five years of residence (of which only one year has to be immediately before the application) a third country national may apply for naturalisation. The other requirements are: the applicant is of full age and of good character, intends to continue to reside in Ireland, and makes the prescribed declaration of fidelity to the nation and loyalty to the Irish state.³¹² The Minister of Justice has “absolute discretion” to grant or refuse applications.³¹³ He may waive the statutory requirement for naturalisation, including the length of residence for certain categories of applicants.³¹⁴

In 1999, a bill proposing to amend the Irish Nationality and Citizenship Acts was introduced. The bill intends to replace the *jus soli* clause in the present legislation with a more complex regime, implementing the Good Friday Agreement. Under the bill birth on the island of Ireland gives an entitlement to Irish citizenship. If such person performs an act which only Irish citizens can do, it shows that one is an Irish citizen from birth; but if no such act has been done, that does not mean that one is not an Irish citizen. Moreover, Irish nationality is acquired solely by virtue of birth in Ireland by those not entitled to another nationality (in order to avoid statelessness).³¹⁵

309 In the years 1994-1997 the number of deportation orders served was ten or less per year. In 1998 64 deportation orders were served of which 60 applied to unsuccessful applicants for asylum; the remaining four applied to EEA citizens.

310 Art. 6(1) Irish Nationality and Citizenship Act of 1956.

311 Art. 8 Irish Nationality and Citizenship Act of 1956.

312 Art. 4 Irish Nationality and Citizenship Act of 1956 as amended by the Irish Nationality and Citizenship Act of 1986.

313 Art. 15 Irish Nationality and Citizenship Act of 1956.

314 Art. 16 Irish Nationality and Citizenship Act of 1956.

315 Art. 6(4) of the Irish Nationality and Citizenship Act of 1956 as proposed under Section 3 of the Irish Nationality and Citizenship Bill 1999. This more restrictive approach to the

attribution of nationality at birth could limit the effects of the *Fajjonu* case, mentioned in par. 5.

Italy

Italy has only come to consider itself a country of immigration over the past 20 years. The convening of an immigration conference in Rome in June 1990 is considered the first attempt to define Italian immigration policy involving all the competent ministries, immigrants associations, trade unions and employers. Before that its position in Community and international venues has been as a country of emigration whose interests lie in the protection of emigrants. Between 1946 and 1975 over 7 million people left Italy.³¹⁶ Until a decade ago, the status of non-nationals and citizenship used to be regulated by a handful of antiquated norms: norms in the field of public security that dates back to the thirties, while the citizenship laws had been passed at the beginning of the century.³¹⁷ Some norms governing the entry, sojourn and work of third country nationals were enacted in 1986 and 1990.³¹⁸ An extensive reform of the status of third country nationals was passed in 1998 and entered into force in March 1998 and in November 1999. The citizenship legislation was reformed in 1992, and in 1999 proposals to amend it further have been made, for the purpose of encouraging non-nationals born and resident in Italy to acquire Italian nationality.³¹⁹

With the Law No. 40 of 1998 on immigration and the legal status of aliens³²⁰ has Italy finally acknowledged that part of successful control of migration depends on the creation of a long term and durable status. The new law has been consolidated with elements of previous immigration legislation in

316 Calavita 1996.

317 The laws governing public security were codified by Royal Decree of 18 June 1931, No. 773. See Violini 1998, p. 37 ff.; Clerici 1998, p. 45 ff.; Bariatti 1996, p. 465ff.; Nascimbene 1996, p. 12 ff.

318 Law No. 943 of 1986 on foreign workers and the control of illegal immigration and Legislative Decree on Urgent Provisions Regarding the Political Asylum, Entry, and Resident of Non EC Foreigners and the Regularisation of Non-EC Nationals and Stateless Persons Already Present in Italian Territory No. 416 of 30.12.1989, converted into Law No. 39 of 28.2.1990..

319 Law No. 91, dated 5 February 1992, gave new norms in the field of citizenship and repealed Law No. 555 of 13 June 1912. See Nascimbene 1992; Pastore 1999, p. 95-115.

320 Law of 6 March 1998, no. 40 (*Disciplina dell'immigrazione e norme sulla condizione dello straniero*) *Gazzetta Ufficiale* of 12 March 1998, suppl. No. 59.

the Legislative Decree on immigration.³²¹ It does not include Community nationals, but only those from third countries.³²²

1. THE POSSIBILITIES RELATING TO ACQUISITION OF LONG RESIDENT STATUS

The permanent residence status is called the residence card (*carta di soggiorno*). It was created by Article 7 the new law no. 40/1998 and consolidated as Article 9 of the Legislative Decree on immigration no. 286/1998.

a. Conditions for obtaining the status

A third country national may acquire this status if:

- he or she has lived in Italy for at least 5 years;
- he or she holds a residence permit which is capable of being renewed without limit;
- he or she has sufficient funds to live (and support any family members); the minimum is determined by reference to the minimum guaranteed by Italian social assistance;³²³
- he or she has not been convicted of a crime specified in the law.³²⁴

b. The procedures for obtaining the status

The third country national must apply on the form specified by the Ministry of the Interior to the police authority (*questura*); confirm where he or she has been living in Italy over the preceding 5 years, and provide the documentation proving the requirements. The authority must reach a decision on the application within 90 days.³²⁵ If refused the third country national may appeal to the regional administrative court.³²⁶

The residence card is available by right to those who fulfil the statutory requirements.

The residence card is for an unlimited period but it must be reissued every 10 years on request of the third country national.³²⁷ It is not yet entirely clear whether at the point of reissue the authorities are entitled to check that the conditions of its first issue are still met.³²⁸

321 Legislative Decree of 25 July 1998 No. 286 of 1998, *Gazzetta Ufficiale* of 18 August 1998, suppl. Ord., No.191 (*Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero*) hereafter TU.

322 Nevertheless, the norms mentioned here make provision for being applied also to Community nationals if they are more favourable to them.

323 Art. 9(1) TU.

324 In Art. 380 and Art. 381 Criminal Procedure Code.

325 Art. 16 and Art. 17 Presidential Decree of 31 August 1999, no. 394, *Gazzetta Ufficiale* of 3 November 1999, suppl. Ord., No. 258. This decree contains rules implementing the TU.

326 Art. 19(3) TU.

327 Art. 17(2) Presidential Decree 394/1999.

328 Art. 6(5) TU.

The residence card is a separate document which also constitutes an identity document for 5 years after its issue. A new document is issued after presentation of recent photographs.³²⁹

Since the new law only entered into force in November 1999, few if any new residence cards have been issued to third country nationals. However, the authorities have issued residence permits without a time limit (“*a tempo indeterminato*”) which, in practice, appear to be equivalent to the residence card.

2. THE RIGHTS ATTACHED TO THE STATUS

a. Family reunion

There is no difference in the right to family reunion for a holder of the long resident status and a holder of a limited residence permit.³³⁰

b. The right to work

The holder has an unlimited right to work, with the exception of jobs that are explicitly reserved for Italian and/or EU nationals.³³¹

c. Social security and social assistance

The holder is entitled to use social security benefits, to public housing and to social assistance benefits.³³²

d. Voting rights

The 1998 immigration law seeks to extend to third country nationals holding a residence card the right to vote and stand for municipal elections in accordance with the Council of Europe convention on the participation of foreigners in public life at the local level 1992.³³³ However, the Constitutional amendment required for this extension of voting rights to third country nationals while introduced in the Italian Parliament in September 1997, but has not yet been approved. Hence the voting rights have not yet been granted to third country nationals.

e. Education grants and scholarships

The holder is entitled to equal access with Italians to education and related benefits.³³⁴

329 Art. 17(2) of the Presidential Decree 394/1999.

330 Art. 28 TU.

331 Art. 9(4)(b) TU.

332 Art. 34(1), Art. 40(6) and Art. 41 TU.

333 Art. 2(4) and Art. 9(4)(d) TU. On the Constitutional amendment, see Pastore 1999, p.112.

334 Art. 38(1) and Art. 39(5) TU.

3. THE POSSIBILITY FOR FAMILY MEMBERS TO BENEFIT FROM THE STATUS

Although the same conditions apply to family reunion for holders of short and long residence status, the family members are admitted under different conditions. Where the principal has a long residence status his or her family members enjoy the same status. The status is even applicable where the family members are still abroad and once issued is independent of the principal. The residence card gives the family member a secure residence right that is no longer dependent on their principal (spouse or parent).

The residence card is also granted to the non-Italian spouse and minor children of Italian citizens or of EU citizens resident in Italy.³³⁵ There are no special provisions for second generation migrants.

4. LOSS OF THE STATUS

There is no specific provision in the law on the loss of the status on ground of fraud.

The residence card may be withdrawn if the holder is convicted for one of the crimes that are ground for refusal of the card. If after such withdrawal expulsion of the third country national is not allowed, the person will be granted a simple residence permit (*permesso di soggiorno*).³³⁶ The residence card cannot be withdrawn on the ground of unemployment or long absence of the holder from Italy. However, the status is lost in case no application for renewal is made after expiry of the card. It is not entirely clear whether the card may be withdrawn where at the time of renewal the conditions for its issue are no longer present.

5. REMOVAL OR DEPORTATION

The only two grounds for expulsion of a holder of this status are: the event of serious requirements of public order or national security and where the holder belongs to a group defined by law as dangerous or belonging to criminal organisations, such as the Mafia.³³⁷ Only the Minister of Interior may make an expulsion order on the former ground. On the latter ground, it may also be ordered by the head of the local branch of the state administration (*prefetto*).³³⁸ Certain categories of third country nationals cannot be expelled if there are close family ties or humanitarian reasons; thus nobody under the age of eighteen may be expelled (unless the minor follows an expelled parent) and the same rule also applies to third country nationals cohabiting with relations up to the fourth degree, or with a spouse, who holds Italian nationality; to

335 Art. 9(2) TU.

336 Art. 9(3) TU.

337 Art. 9(5) TU.

338 Art. 13(1) and 13(2) TU.

pregnant women and to women during the first six months after the birth of a child.³³⁹

Expulsion may also be ordered by a criminal court as an extra sanction or as substitute for a prison sentence.³⁴⁰ The Court of Cassation recognised that the expulsion of a third country national, especially if it is subsequent to a conviction for drug-related offences, can conflict with Article 8 of the European Convention on Human Rights, as it may put the unity of the third country national's family at risk. A sentence of conviction may not, therefore, be followed by automatic expulsion, as the judge must evaluate, case by case, how dangerous the offender is, taking into consideration the effects that such an order would have on the conditions of the third country national's family life (in addition to Article 8, the Court of Cassation also mentions Article 3 ECHR, which outlaws inhuman and degrading treatment to which the third country national may be subject as a result of his expulsion.³⁴¹

6. OBTAINING NATIONALITY

According to Law No. 91 of 5 February 1992, when the foreign person has lived in Italy for a certain period, citizenship can be conferred by a Decree of the President of the Republic, having heard the State Council, and on the application of the Ministry of the Interior. Citizenship may be granted to a non-national who has resided legally in Italy for at least ten years. The residence requirement is reduced to five years for stateless persons, to four years for EU citizens and to three years for persons, whose mother, father or at least one direct ancestor within the two previous generations held or holds Italian citizenship by birth, or was born in Italy.

Simplified citizenship procedures apply for spouses of Italian nationals, third country nationals born in Italy once they reach majority and minor children of third country nationals who acquire Italian citizenship. The 1992 law explicitly allows dual nationality.

7. GENERAL COMMENTS

Not only is there no jurisprudence yet concerning the rules on the permanent residence status under the new law which only came into force in November 1999), but so far there has not yet been a grant of the residence card. If the provisions of the law work out in practice and in their interpretation as liberally as they appear on paper, then Italy has really taken to heart the numerous

339 Art. 19(2) TU.

340 Art. 15 and 16 TU. For an analysis of the law and practice under the former (1990) immigration legislation, see Nascimbene 1998, p. 421 ff. and Bonetti 1998, p. 223 ff.

341 See Decision No. 2194, dated 10 July 1993, in *Rivista di diritto internazionale*, 1994, p. 530 and the comments of Pustorino 1995, p. 23 ff.

calls of the EU (not least by the European Councils at Tampere in October 1999) to provide security and equality for long resident third country nationals.

Luxembourg

Luxembourg has long been a country of immigration though this migration has been primarily from other Member States of the European Union. The Law of 1972 on the entry and residence of aliens distinguishes between a temporary residence authorisation valid for maximum of one year and an identity card for third country nationals admitted for long residence.³⁴² The Grand Ducal Decree of the same year specifies the requirements for the issue of the cards to third country nationals living in Luxembourg.³⁴³ However, the Luxembourg authorities do not consider that there exists any special legal status for long resident third country nationals. They indicated that there is no special secure status for such persons. Since 1972, although there have been changes to the Law (in 1975, 1977, 1993, 1994 and 1995) and the Decree (1995), there has not been a fundamental change of the legal status of third country nationals by legislation.

1. THE POSSIBILITIES RELATING TO ACQUISITION OF LONG RESIDENT STATUS:

a. Conditions for obtaining the status

In order to obtain a residence card for aliens (*carte d'identité d'étranger*) third country nationals must produce:

- (i) a valid passport and visa for entry where required;
- (ii) he or she must not constitute a threat to public peace, security or health;
- (iii) he or she must have sufficient resources to support him or herself and any family members, and to pay to leave (in the region of 75,000 LUF each person)

There is no right to a residence card. In practice the authorities also require:

- (iv) evidence of affiliation to a social security authority;
- (v) adequate housing;
- (vi) a bank guarantee in favour of the Ministry of Justice in the sum of 400,000 LUF.

Third country nationals admitted for employment are issued with the card, only after they have obtained a work permit B or C.

342 Art. 4 of the Law of 28 March 1972, (*Loi concernant (1) l'entrée et le séjour des étrangers ...*) (Mémorial A. 1972, p. 818).

343 Grand Ducal Decree of 28 March 1972 on the formalities to be fulfilled by resident aliens (Mémorial A, 1972, p. 823).

The discretionary power to refuse a residence permit must be exercised subject to the jurisprudence of the European Court of Human Rights which is carefully considered by the Luxembourg courts.

There are no statistical data on the number of cards issued to third country nationals.

b. The procedure for obtaining the status

The third country national must apply on the prescribed form to the local authorities. The Minister of Justice is competent to refuse the application for a residence card.³⁴⁴ On refusal there is a right of appeal to the Administrative Tribunal. The residence card is a separate card delivered to the individual. It is valid for five years and is renewable on application where all the relevant requirements for its issue are still fulfilled.

2. THE RIGHTS ATTACHED TO THE STATUS

a. Family reunion

There are no special family reunion rights which attach to the status. The general requirements for family reunion (sufficient income and housing and a work permit B) apply.

b. The right to work

The card does not exempt the holder from the obligation to obtain a work permit. Here there is an inversion. Normally it is third country nationals who have been granted work permits in categories B (valid for four years) or C (valid indefinitely), who are issued the identity card.³⁴⁵ Work permit B may be granted after one year of employment; work permit C is granted to third country nationals who are born in Luxembourg or have five years of uninterrupted residence and employment in the country.³⁴⁶

c. Social security and assistance

The third country national has to be covered by the social security legislation before the card is issued. Rights under that legislation are not conditional on holding the five year card. With respect to social assistance the third country national is required to be self sufficient.

344 Art. 11 of the Law.

345 Art. 2 Grand Ducal Decree of 12 May 1972 on the employment of foreign workers on the territory of Luxembourg (Mémorial A.1972, p. 945).

346 Art. 3 Grand Ducal Decree of 12 May 1972.

d. Voting rights

Third country nationals are excluded from voting rights in Luxembourg both at national³⁴⁷ and local level.³⁴⁸

3. THE POSSIBILITY FOR FAMILY MEMBERS TO BENEFIT FROM THE STATUS.

The spouse of a person who holds an identity card for aliens usually will be issued first with a residence authorisation valid for one year and renewable twice. After three years the spouse will receive an identity card for aliens valid for five years. When the family members of a third country national with this status are also given it, they do not obtain of itself, a right to work.

There are no special arrangements for the residence status of the second generation.

4. LOSS OF THE STATUS

Where the holder has acquired the status by virtue of a material fraud the status is withdrawn and the third country national is liable to expulsion.³⁴⁹ Moreover, the card is void if the holder is absent from Luxembourg for more than six months.³⁵⁰

5. REMOVAL OR DEPORTATION

Withdrawal or refusal to renew an identity card valid for five years is possible for ten different reasons: where he or she works without work permit, is convicted of a crime which may lead to extradition, no longer fulfils his obligations towards his family members, refuses a medical examination; is a threat to public peace security or health or does not have sufficient means.³⁵¹ Once the status is lost the person is liable for expulsion.³⁵²

Before making a decision on a withdrawal, a refusal to renew the card or an expulsion order, the Minister of Justice has to seek the advice of an independent commission (*Commission consultative en matière de police des étrangers*). The third country national has the right to present his case before the commission. However, the proceedings before the commission do not have suspensive

347 Art. 32 Constitution of Luxembourg.

348 The Constitution permits, by way of derogation, that voting rights at local level may be conferred on non-Luxembourgeois – Art. 9(2) and (3).

349 Art. 5(5) of the Law.

350 Art 8 Grand Duchal Decree of 28 March 1972.

351 Art. 5 and Art. 6 of the Law.

352 Art. 9 of the Law.

effect.³⁵³ The Minister is not bound by the opinion of the commission. From his decision there is an appeal with the administrative tribunal.

There is a series of court decisions applying Article 8 ECHR to the Luxembourg situation.³⁵⁴ Some decisions have had the effect of requiring a recognition de jure of special status based on long residence and family circumstances. In a recent judgement the tribunal held that refusal to renew the identity card of a third country national with 12 years of residence in Luxembourg constituted a disproportional interference with the family life between the mother and her child of ten years.³⁵⁵

Expulsion of persons who are entitled to acquire the status of indigenous Luxembourgish by declaration or option may not be expelled as long as the option can be exercised.³⁵⁶

6. OBTAINING NATIONALITY

The normal residence requirement for naturalisation is ten years.³⁵⁷ This period is reduced to five years for stateless persons, refugees and persons born in Luxembourg, and to three years for non nationals married to a Luxembourg citizen.

Special facilities to acquire nationality apply for young people between the ages of 18 and 25 years, who were born in Luxembourg from foreign parents or who entered at young age and completed schooling in Luxembourg between the ages of 6 and 15 years; and where a child is over 18 and his or her parents acquire Luxembourg citizenship easier conditions apply.³⁵⁸

7. GENERAL COMMENTS

The legislative situation in Luxembourg more closely resembles the situation in Spain and Italy before the new immigration laws came into force several years ago. There is little recognition in the law of the obligations to secure residence for long resident third country nationals arising from international law.

353 Art 1-6 Grand Duchal Decree of 28 March 1972 on the advisory commission on aliens (Mémorial A. 1972, p. 830).

354 See: Tribunal Administratif (TA) 24.2.97, 9500 CHIYA; TA 18.2.99, 10687 Ramdedovic; TA 25.11.98, 10670 Lutovac; TA 20.10.97, 10183 Ferhat confirmed by judgment of 27.1.98 10422 C.

355 TA 23.12.1999, 11500 Mwang Chuchu.

356 Art. 10 of the 1972 Law.

357 Art. 6 of the Law of 22 February 1986 on Luxembourg nationality.

358 Art. 19-21 of the 1986 Law. See also M. Liénard-Ligny, 'Le droit de la nationalité en Belgique et au Luxembourg', in: P. Weil and R. Hansen (eds), *Nationalité et Citoyenneté en Europe*, Paris 1999 (La Découverte), p. 199-220.

Netherlands

The Netherlands has experienced a net immigration ever since the late 1960ies. The main rules of Dutch immigration law are to be found in the Aliens Act of 1965 and the Aliens Circular, a loose-leave publication of instructions of the Ministry of Justice to the immigration authorities and the local police. A Bill proposing a total revision of the Aliens Act has been introduced in Parliament in 1999 and was still under discussion in April 2000.³⁵⁹

1. THE POSSIBILITIES RELATING TO ACQUISITION OF LONG RESIDENT STATUS

a. Conditions for obtaining the status

The principle that certain categories of non-citizens should have a secure residence status on the basis of their long lawful residence was introduced by the Aliens Act of 1965. Third country nationals and union citizens 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.³⁶⁰ The person's income has to be at least equal to the standard amount of public assistance benefits. Employed persons should have a stable employment record and an employment contract for one year with their present employer.³⁶¹ The income requirement does not apply to persons with ten years of residence in the Netherlands.³⁶² An establishment permit will be refused for reasons of public order where the person has been convicted and sentenced to two years in prison.³⁶³

Refugees granted convention status receive a residence status almost identical to that of the establishment permit immediately on admission.³⁶⁴ Until 1994 spouses and children under 18 years, admitted for family reunion with a Dutch national or with a person holding an establishment permit, after they had lived in the country for one year on the basis of a residence permit, automatically acquired a statutory right to remain permanently in the Netherlands. Family members no longer acquire this special residence status. Family members admitted before 1994 continue to hold their permanent residence right.³⁶⁵

359 Bill of the Aliens Act 2000, Tweede Kamer 1998-1999, 26732.

360 Art. 13 Aliens Act.

361 Aliens Circular 1994, chapter A4, under 7.7.2

362 Art. 13(4) Aliens Act.

363 Aliens Circular 1994, chapter A4, under 4.3.2.2.

364 Art. 10(1)(b) and Art. 15 Aliens Act.

365 Art. 10(2) Aliens Act, the deleted Art. 47 Aliens Decree and Art. III of Royal Decree of 6 January 1994, *Staatsblad* 1994, no. 4.

Third country nationals who fulfil the requirements specified in the Aliens Act and the Aliens Circular are entitled to an establishment permit. The requirements are specified in such detail that there remains little room for discretion. Since 1965 the statutory rules concerning establishment permits have been amended on minor points only. Most relevant ministerial instructions have been in force for more than ten years.

b. The procedures for obtaining the status

The application for the establishment permit has to be made to the head of the regional police force. A fee of 220 euro has to be paid. The Minister of Justice has mandated his statutory competence to decide these applications to the regional police.³⁶⁶

In case of refusal of an establishment permit the person may file a request for administrative review with the Minister of Justice. The Minister has to ask the independent Advisory Commission on Aliens Affairs for its opinion on the request for review, if the third country national has more than five years residence in the country.³⁶⁷ The person has the right to present his case before the Commission. The Minister usually decides on the basis of the opinion of the Commission, but he is not obliged to do so. In case the permit is also refused on review, an appeal may be made to the Aliens Chamber of the District Court of The Hague, presently the first and final instance of judicial control in immigration cases.³⁶⁸

An establishment permit entitles the third country national to permanent residence in the Netherlands. There are no time limits or other restrictions linked to this permit.³⁶⁹ The permit is issued in the form of a credit card type document. The authorities have to renew the relevant document every five years.³⁷⁰ This renewal is automatic and does not involve any discretionary decision.

In January 2000 almost half of the registered third country nationals held a permanent residence status. According to the Aliens Registration System out of a total of 564,000 non-nationals over 11 years of age holding a residence document, 25% held an establishment permit, 5% the refugee status and 11% were family members with the statutory permanent residence right, 17% held an EC residence card; 31% were holding a temporary residence permit and

366 With respect to nationals of certain countries (Belgium, Luxembourg and Surinam) only the Minister of Justice has the competence to refuse an application for an establishment permit, Aliens Circular 1994, chapter A4, under 7.1 and 7.9.

367 Art. 31(2)(a) Aliens Act.

368 Art. 33a Aliens Act and Art. 6.4 General Act on Administrative Law (Algemene wet bestuursrecht).

369 Art. 10(1)(a) and Art. 13(2) Aliens Act.

370 Art. 33(7) Aliens Regulation.

11% were asylum seekers or other third country nationals with provisional residence rights or with tolerated residence pending immigration procedures.³⁷¹

In 1998 more than half of the first generation immigrants from non-EU countries had lived for five years or longer in the Netherlands; 85% of the first generation immigrants from Turkey and Morocco had been living for five years or more in the Netherlands.³⁷²

2. THE RIGHTS ATTACHED TO THE STATUS

a. Family reunion

Third country nationals with an establishment permit have almost the same rights to family reunification as Dutch nationals. For both groups the level of stable income required is 70% of the standard amount of public assistance benefits and certain publicly funded benefits are also considered as income for this purpose. With regard to other third country nationals 100% of standard amount is required and most types of public benefits are not counted as income. In all cases under Dutch law admitted family members will receive a residence permit valid for one year and renewable for one year until they are entitled to their own establishment permit.³⁷³ Dutch law provides for the admission of cohabitees under almost the same conditions that apply for spouses.

b. The right to work

The establishment permit grants access to employment without a work permit.³⁷⁴ There are no special statutory requirements for self-employment of third country nationals.

c. Social security and assistance

Persons who hold an establishment permit have equal access to social security benefits with Dutch nationals. However, the entitlement to certain benefits is conditional on contributions or the length of residence in the Netherlands.³⁷⁵

371 Letter of the Taakorganisatie Vreemdelingen­zorg of 22.3.2000. The figures on establishment permits and family members with permanent residence rights may include union citizens who acquired that residence status. The establishment permit gives better protection against loss of residence rights in case of long unemployment than the protection under Community rules on free movement.

372 H. Folkerts, 'Allochtonen in Nederland: vijf grote groepen', *Maandstatistiek bevolking* 1999, no. 4, p. 17. Citizens of Turkey and Morocco are the two largest groups of third country nationals resident in the Netherlands.

373 See Art. 10(1)(c) Aliens Act and the definition of "community citizen" in Art. 1 Aliens Act.

374 Art. 4(2)(a) Aliens Employment Act (*Wet arbeid vreemdelingen*) of 21 December 1994, *Staatsblad* 1995, no. 959.

375 E.g. nationals of Turkey and of the Maghreb countries under the anti-discrimination clauses in the Association or Co-operation Agreements are entitled to certain privileges

Third country nationals with an establishment permit are entitled to equal treatment with Dutch nationals under the General Public Assistance Act.³⁷⁶ Reliance on public assistance is not a ground for withdrawal of an establishment permit, whilst a (temporary) residence permit may be withdrawn on that ground.

d. Voting rights

The right to vote and stand for election for the municipal councils has been extended in 1985 to all non-Dutch nationals with five years of lawful residence in the Netherlands.³⁷⁷ Participation in the national and provincial elections is restricted to Dutch nationals.

e. Education, grants and scholarships

Lawfully resident third country nationals have equal access to all forms of publicly financed education. Third country nationals who hold an establishment permit and their spouses and children who live with them are entitled to student grants and scholarships under the same conditions as Dutch nationals. This equal treatment is also extended to lawfully resident students under 21 years if one of their parents has more than three years of residence in the Netherlands.³⁷⁸ The latter rule covers children of persons holding an establishment permit who no longer live in the family.

3. THE POSSIBILITY FOR FAMILY MEMBERS TO BENEFIT FROM THE STATUS

Third country nationals married to a Dutch national or to a third country national holding an establishment permit are entitled to their own establishment permit after five years of lawful residence, if the total family income meets the standard mentioned above.³⁷⁹

Children of persons holding an establishment permit, who are admitted for family reunion, are entitled to an establishment permit once they are 18 years old and have lived in the country for five years. No income requirement applies. The permit can only be refused on the ground that the child has been

under the General Pension Act that are not granted to lawfully resident nationals of other third countries, irrespective of whether they hold an establishment permit or not.

376 Art. 7(2) of the General Public Assistance Act (*Algemene Bijstandswet*) of 12 April 1995.

377 Act of 29 August 1985, *Staatsblad* 1995, no. 478 amending Art. B3 of the Electoral Act (*Kieswet*). The right to participate in municipal elections was extended to all resident EU citizens by the Act of 3 July 1996, *Staatsblad* 1996, no. 392, implementing Directive 94/80/EC.

378 Art. 7 Student Grants Act (*Wet op de Studiefinanciering*) and Art. 3(1)(a)-(d) Student Grants Decree.

379 Aliens Circular 1994, chapter A4, under 7.7.2.

convicted to a long prison sentence for a serious offence against public order.³⁸⁰

4. LOSS OF THE STATUS

The establishment permit may be withdrawn if it has been acquired on the basis of incorrect information provided by the third country national.³⁸¹ The courts have interpreted this provision to cover cases where the applicant has been silent on facts that, if known to the authorities, would have been a ground for refusal and the applicant reasonably could have been aware of the relevance of these facts. Whether the applicant provided the incorrect or incomplete information deliberately or not is irrelevant.³⁸² The 1999 Bill for the new Aliens Act proposes to codify this case law.

The types of acts that qualify as deception are presenting false documents, remaining silent about a criminal record, or making incorrect allegations as to marital status or cohabitation.

The permit has to be withdrawn once the alien has moved residence outside the Netherlands. A stay abroad of more than nine months may be considered as a definite departure.³⁸³

The establishment permit provides considerably more protection against deportation than a normal residence permit: deportation is no longer possible in case of unemployment, lack of means, reliance on social assistance and change of the aim of the residence.

5. REMOVAL OR DEPORTATION

An establishment permit is valid until it has been withdrawn by the Minister of Justice. Apart from fraud in acquisition and absence from the territory, withdrawal is possible on three grounds only: repeated offence against the immigration legislation, conviction for a serious crime or serious threat to national security. In practice the first ground is never used and the third one hardly ever.³⁸⁴

The practice of deportation of persons after long lawful residence on public order grounds over many years has been subject of public debate. The national courts and the Strasbourg case law have gradually restricted the discre-

380 Aliens Circular 1994, chapter B2, under 3.3.

381 Art. 14(1)(a) Aliens Act.

382 Raad van State 7 July 1986, *Rechtspraak Vreemdelingenrecht 1986*, no. 16; Raad van State 1 July 1991, *Rechtspraak Vreemdelingenrecht 1991*, 36; Raad van State 10 October 1991, *Migrantenrecht 1992*, no. 23.

383 Art. 14 Aliens Act and Aliens Circular, chapter A4, under 7.6.2.

384 The Bill for the new Aliens Act in Art. 20 proposes to delete the first ground and to extend the third ground by deleting the qualification "serious" with respect to threat to national security.

tion of the administration: only final convictions to a long prison sentence are accepted, and the length of the residence and the consequences for family members have to be taken into consideration.³⁸⁵

Since 1990 the ministerial instructions contain a “sliding scale” and special rules protecting certain categories. This scale is applicable to both temporary and permanent residents. The scale is based on the length of the prison sentence and the duration of the residence. After five years residence the permit will only be withdrawn and the person deported on the basis of a prison sentence of which over 24 months have to be served; after ten years residence deportation is only permitted on the basis of a sentence of more than 60 months and solely in cases of serious violence or drug trafficking; after fifteen years on the basis of a sentence of over 96 months or in case of large-scale drugs trafficking. Second generation immigrants born in the Netherlands or admitted for family reunification and having resided in the country for fifteen years can no longer be expelled on public order grounds; this protection is extended to all third country nationals after twenty years residence.³⁸⁶ These rules provide clear standards for the criminal courts when sentencing, for the immigration and prison officials, and for the third country nationals concerned. In case deportation is allowed according to the “sliding scale” the administration still has to consider whether the deportation is permitted under Article 3 or Article 8 ECHR.³⁸⁷

The 1999 Bill for a new Aliens Act originally proposed to introduce a new ground for refusal and withdrawal of the establishment permit: that this decision is urgently needed in the general interest.³⁸⁸ The government has deleted this element of the Bill after criticism in the press and in Parliament.

A decision to withdraw the permit is subject to administrative and judicial review on the same basis as a refusal of the permit. The Minister has to request the opinion of the Advisory Commission on Aliens Affairs, which has to invite the third country national for a hearing. Generally, during the review the deportation order will be suspended. If needed, the person may seek an interim injunction from the President of the District Court. Turkish citizens after two years of

385 Swart 1978, p. 214; Swart 1984; Groenendijk 1987; Groenendijk, Guild and Dogan 1998, p. 51.

386 Aliens Circular, chapter A4, under 4.3.2.2. Kuijer and Steenbergen 1999 at p. 287-299 describe the application and the case law on these rules.

387 District Court The Hague 27 March 1997, *Vreemdelingenbulletin* 1997, no. 13, p. 19 and District Court The Hague (REK) 11 September 1997, *Rechtspraak Vreemdelingenrecht* 1997, no. 10.

388 Art. 19(1)(e) and Art. 20(e) of the Bill on the Aliens Act 2000, *Tweede Kamer* 1998-1999, 26732.

residence there have a statutory right to suspensive effect based on Article 3(2) of the European Convention on Establishment.³⁸⁹

6. OBTAINING NATIONALITY

First generation immigrants can acquire Dutch nationality only by naturalisation after five years of residence. The main other conditions are a basic (oral) knowledge of the Dutch language and no serious criminal record. The applicant should make an effort to get rid of his former nationality if this can be reasonably required.³⁹⁰ This rule was not applied between 1992 and 1997. Since 1997 it is applied liberally: the ministerial instructions provide for twelve categories exempted from this obligation.³⁹¹

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 25 on the sole condition that the person has lived in the Netherlands since birth. The third generation receives Dutch nationality automatically at birth.³⁹²

7. GENERAL COMMENTS

The Netherlands has more than three decades of experience with a secure residence status and its beneficial effect on the social integration of immigrants from third countries. The number of expulsions of persons with this status has been reduced due to the Strasbourg case law on Art. 8 ECHR and the implementation of Association Council Decision 1/80. Recently, access to the status for family members has been postponed until five years after admission with a view to act against so-called sham marriages. Equal treatment of third country nationals in most fields is not related to holding the permanent residence status but to the length of the residence in the country.

389 Art. 103 Aliens Decree.

390 Art. 8 and Art. 9 of the Act on Netherlands nationality of 19 December 1984, Staatsblad 1984, no. 628.

391 See Handleiding voor de toepassing van de Rijkswet of het Nederlanderschap of 1 September 1999, Staatscourant 1999, no. 204, p. 12ff.

392 Art. 6 (option) and Art. 3(3) (birth) of the Act on Netherlands nationality. A Bill proposing to make the acquisition by second generation immigrants through option conditional on a confirmation by the competent authorities has been pending before Parliament since 1994; the second version of this Bill (Tweede Kamer 1997-1998, 25891) has been adopted by the Second Chamber in March 2000.

Portugal

1. THE POSSIBILITIES RELATING TO ACQUISITION OF LONG RESIDENT STATUS

Portugal only recently became a country of immigration rather than a country of emigration. Since 1998 Portugal has a new Aliens Act. In this new act the expulsion provisions especially have been changed. The long-resident third country national seems now to be better protected against expulsion than in the previous law.

a. Conditions for obtaining the status

The 1998 Aliens Act created a new status of permanent residence.³⁹³ A third country national is eligible for this permanent status if he or she has resided lawfully in Portugal for at least ten years and has not committed a crime in this period of time which carries a sentence of one year imprisonment.³⁹⁴ There does not appear to be a differentiation as to the basis on which the third country national has lived in Portugal so long as the ten years of lawful residence are completed. If the applicant is from a Portuguese speaking country the residence requirement is reduced from 6 to 10 years.

b. The procedures for obtaining the status

The status is acquired by application to the Immigration Service (*Servico de Estrangeiros e Fronteiras*).³⁹⁵ The request may be filed with a regional office of the service. After a negative decision the third country national may appeal to the Immigration Service. In case the application is also refused on review the person may appeal to the administrative tribunal.

The permanent status will be issued as a special document, in the form of a card.

The permanent residence permit is valid for an unlimited time. However, once issued, the card itself must be renewed each five years.³⁹⁶

Data on the number of persons holding the status are not available.

2. THE RIGHTS ATTACHED TO THE STATUS

a. Family reunion

The holder of the permanent residence permit is entitled to family reunion. No distinction is made between temporary residents and permanent residents.³⁹⁷

393 Art. 82(1b) Aliens Act, law 244/98 of 8 August 1998.

394 Art. 85(1) Aliens Act.

395 Art. 80(1) Aliens Act.

396 Art. 84 Aliens Act.

397 Art. 56 Aliens Act.

b. The right to work

Third country nationals holding a permanent residence permit have free access to the labour market.

c. Social security and social assistance

All persons lawfully resident in the country are eligible to social security and to social assistance.

d. Voting rights

The Portuguese Constitution permits the exclusion of third country nationals from voting and other electoral rights at national and local level.³⁹⁸ However, by virtue of bilateral agreements some third country nationals are entitled to exercise political rights – such as Brazilian nationals after five years residence in Portugal.³⁹⁹

e. Education, grants and scholarships

Permanent residents have equal access to education, and may receive grants and scholarships on the same basis as Portuguese citizens.

3. THE POSSIBILITY FOR FAMILY MEMBERS TO BENEFIT FROM THE STATUS

The family members do not benefit from the status which is personal to the principal. They must fulfil the condition of six or ten years residence themselves and have an additional requirement on criminal convictions: they must not have been convicted of a crime carrying a prison sentence of more than one year. The descendants born in Portugal of third country nationals holding a permanent residence permit are also entitled to such a permit. In order to be eligible for this status the parent must submit an application within six months after the registration of the birth of the descendant.⁴⁰⁰

Third country family members of Portuguese citizens are granted rights similar to those of family members of EU citizens under Community law.⁴⁰¹

4. LOSS OF THE STATUS

Where a permanent residence permit has been acquired by fraud it may be withdrawn on the basis of the general rules under the Code of Administrative Procedure.

398 Art. 15(2) Constitution of Portugal.

399 Art. 7 Luso-Brazilian Convention of 7 September 1971; see on this convention: Rui Manuel Moura Ramos, *La double nationalité et les liens spéciaux avec d'autres pays, Les développements et les perspectives au Portugal*, *Revisto de Direito e Economia* (16-19), p. 577-605.

400 Art. 89 Aliens Act.

401 Art. 58 of Decree-Law No. 244/1998.

The permanent status is also lost if the third country national remains outside Portugal for a consecutive period of 24 months or 30 months in total over a three year period.⁴⁰² However, if the third country national before leaving Portugal has submitted a special request at the Immigration Service to prevent withdrawal of his permanent residence permit on this ground and this request is accepted, the third country national will not lose the permit.⁴⁰³

5. REMOVAL OR DEPORTATION

The status can be lost where an expulsion order is made against the third country national. Expulsion orders may be made on grounds that the third country national:

- a. is acting against Portuguese national security;
- b. is committing acts in Portugal that could threaten the national interests;
- c. is intervening in Portuguese political activities without authorisation;
- d. having committed acts or engaged in activities that, had they been known by the regulatory authorities when the residence permit was granted, would have resulted in the withholding of the residence permit.⁴⁰⁴

Further, deportation may be ordered by a court along with criminal sanctions whenever the third country national has committed a serious crime. In order to expel a third country national on this ground a sliding scale is applicable. A third country national who is resident in Portugal for less than four years may be expelled if he has been sentenced to one year's imprisonment at least. Expulsion may be ordered in case where the third country national has been resident for a period of residence of more than four years, but less than ten years if he or she has been sentenced to at least three years imprisonment. The third country national, whose stay in Portugal exceeds ten years, may only be expelled if the third country national's behaviour constitutes an extreme danger for the public order or the national security of Portugal.⁴⁰⁵

6. OBTAINING NATIONALITY

Third country nationals legally resident in Portugal can acquire Portuguese nationality:

- a. by option, whenever the applicant's father, mother or parents have acquired, by non-original means, Portuguese nationality;
- b. by option, where the third country national is married to a Portuguese citizen;

402 Art. 93(2b) Aliens Act.

403 Art. 93(3) Aliens Act.

404 Art. 99(1) and 101 Aliens Act.

405 Art. 101 Aliens Act.

- c. by option, by someone who lost Portuguese nationality while a minor as a result of a decision of his or her parents;
- d. by naturalisation, provided that the following requirements are met: the third country national is at least 18 years old, has resided in Portugal for at least ten years, has a sufficient knowledge of the Portuguese language, is morally and civilly fit and can provide his or her own subsistence. Third country nationals from Portuguese speaking countries may acquire Portuguese citizenship after six years of residence and spouses of Portuguese nationals have a right to acquire Portuguese citizenship after three years of marriage.

7. GENERAL COMMENTS

Like in the case of Greece the very long waiting period (10 years) before accepting that a migrant is entitled to security of residence seems rather harsh. In the interests of the community as a whole a short and simpler procedure might be preferable.

Spain

Spanish immigration law has been characterised, at the end of the 1980s and early 1990s, by a series of regularisation programmes⁴⁰⁶ which attempted to bring some order into the status of third country nationals on the territory. In 1993 a system of quotas for the admission of foreign workers was introduced. Approximately 1% of the Spanish population is not Spanish of which half are nationals of other Member States. Of third country nationals, Latin Americans, Moroccans and Polish nationals make up the largest single groups.⁴⁰⁷

The permanent residence permit was first introduced in Spanish law by the 1996 Aliens Decree⁴⁰⁸ and constituted an important innovation in Spanish immigration law. Neither the Spanish Immigration Act of 1985⁴⁰⁹ nor its first implementing rules of 1986⁴¹⁰ included the concept of the permanent residence permit.

In January 2000 a new Immigration Act has been adopted by the Spanish Congress.⁴¹¹ The Act has entered into force on 1 February 2000. The new Immigration Act is a comprehensive legislation, containing provisions on the rights and freedom of non-nationals, on their residence status, on the social integration of immigrants and measures against racial discrimination. The new Act is a major step with respect to the consolidation of the permanent residence status and the protection of the rights of permanent residents, which are now guaranteed in a Constitutional Law (*Ley Orgánica*). The 1996 Aliens Decree is still in force, as the rules on the implementation of the new Act have yet to be adopted.⁴¹²

1. THE POSSIBILITIES RELATING TO ACQUISITION OF LONG RESIDENT STATUS

a. Conditions for obtaining the status

The new Immigration Act defines the concept 'permanent residence'. According to Art. 30(1) of the Act permanent residence is the status which authorises a

406 There have been regularisation programmes in 1985, 1991, 1996 and 2000.

407 At 22%, 14% and 11% respectively, Ministerio de Trabajo 1997; Eurostat 1997; Comelius 1994.

408 Royal Decree 155, 1996, 2nd of February 1996 (hereafter: 1996 Aliens Decree) which introduced the regulation implementing the 1985 Spanish Immigration Act (Constitutional Law).

409 Constitutional Law No. 7/1985 of 1 July 1985, on the Rights and Freedom of Aliens in Spain.

410 Royal Decree No. 1119/1986 of 26 May 1986.

411 Constitutional Law No. 4 of 11 January 2000 on the rights and freedoms of aliens in Spain and their social integration, BOE of 12.1.2000 (hereafter: Immigration Act).

412 The rules on the implementation of the new Act have to be adopted before 1 August 2000.

person to reside in Spain indefinitely and to work under the same conditions as Spaniards.

Third country nationals are entitled to the status once they have resided on a temporary basis for five years in the country.⁴¹³ There are no additional requirements with regard to means of support or housing. Persons who fulfil the five years requirement are entitled to the permanent status. Article 30(2) permits the relaxation of the residence requirement with respect to persons having special bonds with Spain. Such special circumstances are to be established by decree.

b. The procedures for obtaining the status

An application for the status is made to the *Delegacion de Gobierno*. The local aliens police gives its opinion on the application before the decision to issue such a permit is made. After a negative decision a review is possible, either *Recurso de Alzada* or *recurso de Reposición*, depending on the nature of the refusal.⁴¹⁴ In case the permit is also refused on review, an appeal may be made to the Administrative Court.

The permit is granted in the form of a card.

A permanent residence permit is valid indefinitely. Under the 1996 Aliens Decree the document had to be renewed every five years. The status of permanent residence endures until and unless it is withdrawn for the grounds which are specified in the law.

2. THE RIGHTS ATTACHED TO THE STATUS

a. Family reunion

All immigrants with lawful residence in Spain are entitled to family reunion. In this respect permanent residents are not treated differently than temporary residents or Spanish citizens.⁴¹⁵ Family reunion is permitted as a right to the following resident aliens: legally wedded spouse, unmarried children under 18, handicapped children over 18 for whom the applicant is responsible, ascendants of the applicant who are economically dependent on him or her and where it is necessary for them to reside in Spain, and any other family members where residence is necessary for humanitarian reasons.

413 Art. 30(2) Immigration Act.

414 Arts. 114-116 and Art. 118 Administrative Act No. 30/1992 of 26 November 1992, amended by Act No. 4/1999 on 13 January 1999.

415 Art. 16 and Art. 17 Immigration Act.

b. The right to work

A permanent residence status gives the third country nationals the right to work on equal conditions as Spaniards. As a result permanent residents are exempted from the work permit-requirement. Other third country nationals resident in Spain still need a work permit before undertaking professional activities. According to article 35(2) of the Immigration Act after five years of employment on the basis of a work permit valid for one year, which has been renewed four times, the person is entitled to a permanent work permit. Thus the work and residence permits are intended to become permanent at the same time.

Third country nationals are allowed to be employed in the public administration in accordance with the principles of equality, merit and ability, but not as a civil servant in the public sector.⁴¹⁶

c. Social security and social assistance

A permanent residence right does not place the third country national in a privileged position as regards access to social security benefits, because all resident non-nationals have access to these benefits under the same conditions as Spanish nationals.⁴¹⁷ According to the new Immigration Act all third country nationals, if registered as a resident with a municipality, have equal access to public health care, public housing and social assistance as Spanish nationals.⁴¹⁸

d. Voting rights

Resident third country nationals are excluded from voting rights at the national level.⁴¹⁹ At the local level third country nationals may be granted active or passive voting rights in the terms established by law or bilateral agreements.⁴²⁰ However, the acquisition of the permanent residence status has no consequence for these rights which apply to all resident aliens.

e. Education, grants and scholarships

All aliens under the age of 18 years have the right to education on the same conditions as Spaniards. Also they will not be treated differently with regard to grants or scholarships.⁴²¹ Resident aliens have rights to teaching to the extent permitted under other laws. However, in both cases, the acquisition of permanent residence status does not affect the right.

416 Art. 10(2) Immigration Act and Art. 23(1) and Art. 13(2) of the Spanish Constitution.

417 Art. 14(1) Immigration Act.

418 Art. 12(1), Art. 13 and Art. 14(2) Immigration Act.

419 Art. 13(2) and Art. 23(1) of the Constitution.

420 Art. 6 Immigration Act. Spain has concluded agreement on this issue with the Netherlands, Denmark, Norway and Sweden.

421 Art. 9 Immigration Act.

3. THE POSSIBILITY FOR FAMILY MEMBERS TO BENEFIT FROM THE STATUS

The new Immigration Act contains a whole chapter on family reunion.⁴²² The residence permit for family reunion will depend on the residence permit of the principal. Family members thus reunited are not subject to the quota provisions on work permits.⁴²³ There is no special provision for independent residence permits for family members except for children raised in Spain. However, where a resident alien and his or her spouse have lived together for two years in Spain, on the subsequent breakdown of the marriage provided the reunited spouse has a work permit, he or she may receive a residence permit. The two year period may be shortened. Also the time period does not apply where the main resident alien dies.⁴²⁴

Regarding the second generation the new Immigration Act does not contain any explicit provision. The 1996 Aliens Decree envisaged that those born in Spain to an alien father or mother, holder of a permanent residence permit, shall automatically acquire the same status.⁴²⁵ Permanent residence permits are also issued to foreign children born in Spain who have been living lawfully for three years in Spain before their 18th birthday and third country nationals of Spanish origin over 18.⁴²⁶

4. LOSS OF THE STATUS

The new Immigration Act, unlike the 1985 Act, does not include specific provisions on the loss of a temporary or a permanent residence permit as a result of fraud, unemployment or lack of means of resources. However, entering Spain without fulfilling the proper requirements is a serious violation which can result in expulsion.⁴²⁷

Under the former law a permanent residence permit was no longer valid if the holder was absent from Spain for more than six months. Further, the permit could be withdrawn on the ground of lack of means, insufficient housing, loss of nationality, or in case the conditions for the issue of the permit were no longer present.⁴²⁸ It is not yet clear whether and, if so, to what extent these old rules will continue to be applicable under the new legislation.

422 Chapter II of Title I (Arts. 16 and 17) of the Immigration Act.

423 Art. 38(2)(b) Immigration Act.

424 Letter from Ministry of Interior of 4 April 2000.

425 Art. 55 of the 1996 Aliens Decree.

426 Art. 52(2) of the 1996 Aliens Decree. Family reunion covers spouses, children and the economically dependent parents of the third country national.

427 Art. 49 Immigration Act.

428 Art. 60 of the 1996 Aliens Decree.

5. REMOVAL OR DEPORTATION

Expulsion may result from the loss of the status of permanent residence. Further permanent residents are only liable for expulsion in two situations. First, a permanent resident may be expelled, in case of a repetition of very serious crimes. The crime is considered to be serious when the permanent resident is discriminating or he is using migrant workers without having obtained the corresponding work authorisation. Secondly, the permanent resident may also be expelled if he is not a repeat offender, but the offence is serious enough to expel the person solely on the basis of this crime. An infraction is considered to be very serious when the third country national is participating in activities that may harm the relations with other countries, if (s)he is participating in activities contrary to the public order, is a member of an organisation dealing with clandestine immigration, if (s)he has committed a third serious violation, provided that, in the past two years has been sentenced for two serious violations of the same nature, or if (s)he participates in the realisation of illegal activities.⁴²⁹

Spouses, parents and minor or handicapped children who are the responsibility of a person resident in Spain, may not be expelled from the territory if they have had a lawful residence for more than two years in Spain.⁴³⁰ Depending on the circumstances this period can be reduced.

The responsibility to initiate an expulsion procedure lies with the local or regional police.

The third country national is entitled to appeal against the withdrawal of the permit or an expulsion order.⁴³¹

6. OBTAINING NATIONALITY

In order to be eligible to apply for naturalisation as a Spanish citizen a third country national must have been resident in Spain for a minimum of ten years without interruption. The period is interrupted if the third country national is refused a residence permit. The period is reduced to five years for refugees and two years for nationals of South American countries, Portugal, the Philippines, Equatorial Guinea and Sephardic Jews. Third country nationals who have been married to a Spanish national for more than one year benefit from a reduction of the residence requirement to one year.

7. GENERAL COMMENTS

On the one hand the new Spanish Immigration Act has improved the legal position of permanent residents: permanent residents are exempted from the work

429 Art. 53(2)(b), Art. 49 and Art. 50 Immigration Act.

430 Art. 53(3) Immigration Act.

431 Art. 18 Immigration Act.

permit system; the permanent residence permit is valid indefinitely and does not need to be renewed; it will be granted after five years of lawful residence on the basis of a temporary residence permit. On the other hand the new Immigration Act has introduced some provisions which do not guarantee security of residence, for instance the possibility of expulsion of the permanent resident on the ground of participation in illegal activity.

Many of the changes to the immigration regime benefit all resident aliens, not just those who have acquired permanent status. This reduces discrimination between categories of aliens whose continued residence on the territory is permitted.

Sweden

Provisions concerning long-term migrants are to be found mainly in the Alien Act of 1989 Act.⁴³² The act was amended in 1997 inter alia with a view to limit the possibility for family members, other than spouses or children, to reunite with the permanent resident third country national in Sweden.

1. THE POSSIBILITIES RELATING TO ACQUISITION OF LONG RESIDENT STATUS

a. Conditions for obtaining the status

The general rule is that a third country national who resides in Sweden for more than three months must hold a residence permit.⁴³³ Swedish law provides for two types of status: time limited residence permits (*Uppehållstillstånd*) and permanent residence permits (*Permanent Uppehållstillstånd*).⁴³⁴ The intention, as expressed in the travaux préparatoires of the Swedish Aliens Act, is that a permanent residence status should be granted to third country nationals, whose long-term future is in Sweden, as quickly as possible. In practice this applies in respect of third country nationals whose residence is a result of Sweden's commitment to give international protection to persons at risk in their country of origin. Permanent residence permits are given to third country nationals who are granted asylum, who receive a residence permit for family reunification, on the basis of other close ties with Sweden, for the purpose of approved labour immigration, and to third country nationals who are allowed to stay in Sweden for humanitarian reasons.

There is a trend in respect of other third country nationals to give temporary permits, an option which the law permits to the authorities (the Swedish Immigration Board), even where the third country nationals intention is to settle in Sweden and he or she has obtained a permit abroad for this purpose.

Moreover, it is also a possibility to obtain a permanent residence permit after having resided lawfully in Sweden for a number of years. Permanent residence permits may be issued to third country national workers who have completed four years in Sweden lawfully under temporary residence permits and who have special qualifications.⁴³⁵ There is a bill pending in parliament that proposes to reduce the possibilities to apply for a residence permit after entry in Sweden.

There is no statutory right to a permanent residence permit.

432 Alien Act of 1989: 529 as amended October 1997.

433 Chapter 1, art. 4 Aliens Act.

434 Chapter 2, art. 2 Aliens Act.

435 Brorsson, par. 3.3.

In 1997 approximately 100,000 third country nationals held permanent residence permits. A total of 39,000 persons were granted residence permits in 1998 for various reasons. No annual statistics are available on the number of third country nationals who were issued a permanent residence permit.

b. The procedures for obtaining the status

A residence permit application by a third country national who is not in Sweden must be submitted to a Swedish delegation or consulate in the country of origin of the third country national or in the country where (s)he is domiciled. An application by a third country national in Sweden is submitted to the Swedish Immigration Board.

A third country national may appeal to the Aliens Appeal Board against a decision by the Swedish Immigration Board concerning rejection of an application for a residence permit.⁴³⁶

The document which evidences the right has the form of a sticker. This residence permit certificate is to be entered into the passport or a document replacing the passport. The sticker is valid for three years and renewable. The renewal is not dependent on continuing to fulfil the initial conditions. The permanent resident permit is valid until it has been withdrawn. So even if the sticker has not been renewed the person still holds the permit.

2. THE RIGHTS ATTACHED TO THE STATUS

a. Family reunion

Those third country nationals who are residing in Sweden on the basis of a temporary permit are not entitled to family reunion. A general prerequisite for family reunion in Sweden is that the principal has been granted a permanent residence permit.⁴³⁷

b. The right to work

Third country nationals holding a permanent residence permit or married to a Swedish national are exempted from the work permit-requirement and may take up employment immediately.⁴³⁸ Family members who are admitted to join permanent residents in Sweden are permitted to take employment as well.

c. Social security and assistance

Those third country nationals obtaining residence permits which lead to registration as a resident in Sweden are entitled to the same social welfare safe-

436 Chapter 7, art, 3(1) Aliens Act.

437 Chapter 2, art. 4 Aliens Act.

438 Chapter 4, art. 10 Aliens Act.

guards as other residents in terms of health care, medical treatment, social allowance, etc.⁴³⁹ Permanent status gives a right to social assistance.

d. Voting rights

While all third country nationals are excluded from voting in national elections, third country nationals and stateless persons who have been resident in Sweden for three years are eligible to vote and to stand for election in local and county elections, and to vote in local referenda.⁴⁴⁰ Sweden is a signatory of the 1992 Council of Europe Convention on the Participation of Foreigners in Public Life at Local Level.

e. Education, grants and scholarships

Permanent residents have equal access to education as Swedish citizens. In order to be eligible for grants the third country national must hold a permanent residence permit and fulfil certain requirements concerning employment (two years) or residence (for years, in case he does cohabits with a Nordic or EU citizen).

3. THE POSSIBILITY FOR FAMILY MEMBERS TO BENEFIT FROM THE STATUS

Spouses and children of parents of Swedish citizens or foreigners who hold a permanent resident permit will, generally, be given a permanent resident permit on admission.⁴⁴¹

Although the intention of the law is to give security of residence as quickly as possible to third country nationals whose future is in Sweden, other family members will normally be granted a one year residence permit extended for one further year before permanent residence will be extended to them too. The Swedish Immigration Board advised the authors of the report that temporary permits are given only when the spouses or cohabitants have newly met.⁴⁴²

4. LOSS OF THE STATUS

Residence permits *may* be revoked if the third country national has furnished incorrect particulars of his identity. There shall be no revocation, however, if the incorrect particulars have had no apparent effect on the decision to award the permit, or if there are other special grounds which argue against revocation. A residence permit *may* also be revoked if the third country national has deliberately furnished other incorrect particulars than those concerning his identity or

439 Information of the Ministry for Foreign Affairs; Melander, p. 1328.

440 Instrument of Government Act of 1975 and Election Act of 1997.

441 Campbell and Fischer, Sweden, par. III-7.

442 Letter from Swedish Immigration Board of 25.11.1999.

has deliberately concealed circumstances of importance in the award of the permit.⁴⁴³

However, in deciding whether revocation is the correct course of action the authorities are under a duty to consider the third country nationals connections with Swedish society and other humanitarian considerations. If the third country national has been resident for four years or more a decision to revoke on grounds of fraud may only be taken if the most extraordinary reasons exist justifying such action.

A permanent residence permit shall be revoked if the third country national ceases to be domiciled in Sweden.⁴⁴⁴ The permit cannot be revoked on account of unemployment or lack of means.

5. REMOVAL OR DEPORTATION

A residence permit, temporary or permanent, may be revoked, and as a result the third country national may be expelled from Sweden, if the third country national has acted "in a manner which gives rise to serious criticism of his way of life",⁴⁴⁵ or if there is reason to suppose that he will engage in sabotage, espionage or illicit intelligence activities in Sweden or any other Nordic country. These rules, however, do not apply to a third country national already resident in Sweden for more than three years.⁴⁴⁶

A third country national may be expelled from Sweden if he is convicted for a crime punishable by imprisonment or if a court revokes a conditional sentence of probation imposed on the third country national for such an offence. Expulsion may also be ordered if the third country national has committed a crime punishable by imprisonment under the Aliens Act. The third country national may, however, not be expelled unless the nature of the offence and other circumstances are such that it may be feared that the person will continue to engage in criminal activity in Sweden, or unless the offence is of such kind that the person ought not to be allowed to remain in Sweden.⁴⁴⁷

A third country national who, at the time the proceedings are instigated, has been the holder of a residence permit for at least four years or who, at that time, has resided in Sweden for at least five years, may not be expelled

443 Chapter 2, art. 9 Aliens Act.

444 Chapter 2, art. 12 Aliens Act.

445 This ground has never been applied in practice (Bill 1994/95: 179). Recently, a government commission has suggested that the ground should be abolished, SOU 1999:16 Ökad rättsäkerhet i asylärenden, p. 436.

446 Chapter 2, art. 11 Aliens Act.

447 Chapter 4, art. 7 Aliens Act.

unless there are exceptional grounds for this expulsion, such as drug trafficking or murder.⁴⁴⁸

A third country national who entered Sweden before his or her 15th birthday and has resided there for five years is no longer liable to expulsion.⁴⁴⁹ Hence, this category of second generation immigrants enjoys absolute protection against expulsion, a protection considerably higher than the minimum level of protection granted by the interpretation of Article 8 ECHR in the recent case law of the European Court of Human Rights.

From expulsion orders made by the Swedish Immigration Board there is an appeal to the Aliens Appeal Board.⁴⁵⁰ In case of expulsion orders made by a criminal court the general rules on appeals in criminal cases apply. A judicial expulsion order may be cancelled by the government.⁴⁵¹ The Immigration Board may suspend the enforcement of an expulsion order and grant the third country national a temporary residence permit. As long as a judicial ban on re-entry is in force no residence permit may be issued.

Expulsion on account of a criminal offence is to be determined by the court in which the criminal proceedings take place. On other grounds the decision may be taken by the Swedish Immigration Board. The court, considering expulsion, shall pay due regard to the third country national's links to Swedish society. In this connection the court should pay particular attention to the living conditions and family circumstances of the third country national and the length of time he has resided in Sweden.⁴⁵² In the *travaux préparatoires* of the Aliens Act reference is made to the proportionality principle: the stronger the links with the country, the more serious the criminal offences have to be, before expulsion is justified.⁴⁵³

The Swedish Supreme Court in 1996 and 1997 decided two expulsion cases concerning third country nationals both convicted for drug offences. In the first case the person had residence in Sweden for more than four years and was married several years with a Swedish woman with whom he had a daughter. The Court held that the links with Sweden were such that he could not be expelled on account of the criminal offences. In the other the third country national resided in Sweden for more than three years, lived in a permanent relationship with a Swedish woman with whom he had a daughter. In this case the

448 Chapter 4, art. 10(2) Aliens Act. This protection is extended to nationals of other Nordic states after two years residence.

449 Chapter 4, art. 10(4) Aliens Act.

450 Chapter 7, art. 3 Aliens Act.

451 Chapter 7, art. 15 and art. 16 Aliens Act.

452 Chapter 4, art. 10(1) Aliens Act.

453 Bill 1993/94:159, p. 16.

Court allowed the expulsion on the ground that with respect to employment and social adaptation, the person had not noteworthy links with Sweden.⁴⁵⁴

6. OBTAINING NATIONALITY

A third country national may obtain citizenship through naturalisation if (s)he is over eighteen years old, has been a resident in Sweden for five years, holds a permanent residence permit, and has lived a respectable life (e.g. has regularly paid taxes and maintenance).⁴⁵⁵

Shorter periods of residence apply for convention refugees and stateless persons (four years), spouses of a Swedish citizen (three years) and Nordic nationals (two years).

Knowledge of the Swedish language is not required in order to acquire Swedish citizenship.

Special rules applies to the second generation: where a third country national arrived in Sweden and completed five years residence there before the age of 16 and continues residence thereafter, he or she may acquire citizenship by a simple written declaration to the Swedish Immigration Board. Application has to be made between the ages of 21 and 23.

In recent years third country nationals in the process of naturalisation encountered the problem of establishing their identity. In 1996 out of a total number of refusals of naturalisation of 4406, 2606 were for this ground. In January 1997 the Government appointed a Parliamentary Committee to review the citizenship act which reported in November 1997 criticising the Swedish authorities approach to identity as out of step with European norms.⁴⁵⁶ As a result the citizenship law has been amended in this respect.⁴⁵⁷ Where a third country national has resided in Sweden for eight years and makes out a probably case that he or she is the person stated, naturalisation should be allowed.

7. GENERAL COMMENTS

A special feature of the Swedish system is that there is no entitlement to the permanent residence permit, but that such permits are, generally granted to third country nationals whose future is expected to be in Sweden before or soon after entry in the country. The residence status of second generation immi-

454 Nytt Juridisk Arkiv, Adv. I: Rättsfall från Högsta Domstolen 1996, p. 365 and 1997, 172.

This information is based on the extensive analysis of the legislative history and the case law on expulsion, see R. Olseke, 'Sweden', to be published in the *European Journal of Migration and Law*.

455 Art. 6 Swedish Nationality Act (1950: 382)

456 Medborgarskap och identitet SOU 1997: 178.

457 The amendment of section 6 of the Nationality Act entered into force in January 1999.

grants is made secure by a statutory provision explicitly excluding expulsion after five years of residence.

United Kingdom

The UK has been considered a country of immigration since at least the end of World War II when substantial numbers of immigrants came to the UK to fill labour vacancies.⁴⁵⁸ The main provisions of UK immigration law are codified in the Immigration Act of 1971 and the Immigration Rules, made by the Home Secretary under the Act. Both the Act and the Rules have been frequently amended over the years.

1. THE POSSIBILITIES RELATING TO ACQUISITION OF LONG RESIDENT STATUS

a. Conditions for obtaining the status

UK law provides for the acquisition of a permanent residence status known as indefinite leave to remain (ILR).⁴⁵⁹ The status may be granted prior to entry, at the border or after entry. It applies principally to five groups of persons. First, those recognised as refugees under the Geneva Convention are immediately granted this status. Children⁴⁶⁰ or parents of British citizens or third country nationals with ILR admitted for the purpose of family reunion are granted the status on admission to the UK if in possession of the relevant entry clearance acquired prior to arrival in the UK. Spouses admitted or allowed to remain for the purpose of family reunion either with a British citizen or a third country national with ILR are eligible to apply for the status after completing one year's limited leave. Third country nationals admitted for work, self-employment, retirement or investment related purposes are eligible to apply for the status after four years of continuous residence permits. The final group are those who are granted protection other than in accordance with the Geneva Convention, who, by virtue of a published concession, are entitled to apply for ILR after four years of residence.⁴⁶¹

In the categories, which are not protection related, the third country national must show that they have sufficient means of support and accommodation, that they and any relevant family members will not need recourse to public funds. In addition, spouses are required to provide evidence of the continuation of cohabitation and those in employment, self-employment and investment re-

458 Macdonald and Blake 1995, supplement 1998.

459 Immigration Act 1971 s.3(1).

460 Children arriving to join both parents or their only parent who is settled in the UK are given ILR on arrival. Children arriving with one parent who is only given one year's permission to enter the UK as a spouse, are usually given the same status as the parent they are accompanying even if their other parent is settled in the UK.

461 www.opengov.uk: White Paper – Fairer, Faster and Firmer – A Modern Approach to Immigration and Asylum, 1998.

lated categories are required to provide evidence that they have been continuously engaged during the four year period in the activity for which they were admitted. The prospect of being able to continue in the existing capacity is an important consideration in the decision to grant ILR. For example in employment cases continuation with the present employer is an express requirement and the employer must give a certificate to this effect.

There is a discretion to refuse indefinite leave to remain to applicants on the basis of general public policy grounds. This discretion is not normally exercised against the applicant unless there are strong reasons to refuse, for instance relating to criminal convictions.

b. The procedures for obtaining the status

If applying from within the UK the status is acquired by making an application on a specific form before the existing residence permit expires. Failure to apply in time will mean that third country nationals become overstayers, which will remove their eligibility for ILR and break the continuity of their residence permits. However, some categories of persons who are entitled to apply for ILR under family reunion provisions may require entry clearance before they can enter the UK, i.e. children and spouses entering for settlement. Therefore, the application for entry clearance leading to ILR must be made prior to entering the UK in the country where they are living.

In general, the ILR permit is by way of a stamp in the third country national's passport. Those who are granted ILR for protection reasons, are given a special travel document which is stamped accordingly.

The status is of unlimited duration and does not need to be renewed. When the third country national changes his or her passport the new passport is automatically endorsed. It lasts as long as the third country national remains resident in the UK but is deemed abandoned if the third country national leaves the UK with the intention of giving up residence. This intention may be inferred where the third country national is absent for more than two years. Therefore, it may be that in some instances if return is within two years, only limited leave is granted on re-entry in circumstances, where the immigration authorities consider that the person is no longer intends to be ordinarily resident in the UK. In contrast, if return after two years ILR status may be retained, this will usually occur in circumstances where the extended absence was involuntary.⁴⁶²

⁴⁶² See *R v Immigration Appeals Tribunal ex p. Ng* [1986] Imm AR 23, QBD; also *Secretary of State for the Home Department v Haria* [1986] Imm AR 165, *R v Costa* [1974] Imm AR 69, *R v Ali* [1981] Imm AR 51.

The application for ILR is always to the Immigration and Naturalisation Directorate. Refusal gives rise to a right of appeal to the Immigration Appellate Authority.⁴⁶³

The total number of third country nationals with ILR is not known. In 1998 70,000 persons were accepted for settlement in the UK; in 1997 59,000 persons were accepted for settlement. In both years approximately 7,000 persons were accepted for settlement pre-entry.⁴⁶⁴

2. THE RIGHTS ATTACHED TO THE STATUS

a. Family reunion

The right to family reunification is the same for third country nationals with ILR as for British citizens and slightly more generous than for those third country nationals resident in the UK without ILR. In particular, it provides for the possibility of family reunion for dependent parents and relatives in the second degree if they can show that they are economically or emotionally dependent, or for more distant relatives in exceptional compassionate circumstances and without other relatives to turn to in their country of residence.⁴⁶⁵ As regards unmarried partners, a published concession permits third country nationals with ILR to be joined by their unmarried partners where the relationship has lasted at least two years.⁴⁶⁶

b. The right to work

A third country national with ILR in the UK is entitled to take any employment of his or her choice or to establish him or herself in business in the UK subject to the same regulations, which apply to British citizens. Family members of third country nationals with ILR are also entitled to work and enter into self-employment, if they are admitted under family reunion provisions, subject to the same general legal framework as British citizens. Those who were previously tied to doing a particular job can change employment without permission and persons who were resident on independent means can take up employment or go into business if they so chose.

463 Section 14 Immigration Act 1971.

464 Immigration and Nationality Directorate, *Annual Report 1999*.

465 A person coming to the UK for settlement on the basis of family reunion must intend to become ordinarily resident in the UK – *Rashida Biba v Immigration Appeal Tribunal* [1988] Imm AR 298, CA.

466 They must be legally unable to marry under UK law, for example the partners are of the same sex, see www.homeoffice.gov.uk/ind/concess .

c. Social security and assistance

There is no distinction in UK law between social security and social assistance. In the UK there is just a difference between contributory and non-contributory benefits of which some are means-tested and others are not. Entitlement will vary greatly according to immigration status such as whether there is a condition determining their entitlement to have recourse to public funds and also their entitlement to work. Generally third country nationals with ILR are entitled to social security if they fulfil the conditions required to make a successful claim.

Whether third country nationals can have recourse to public funds will determine whether they can have recourse to non-contributory benefits. This is regardless of requirement that some benefits are means-tested. Often families will find that some members are entitled to claim assistance where others are not, and that some claiming even if entitled to could effect the success of any further immigration applications by family members who are not entitled to claim.

Generally, third country nationals with ILR are entitled to non-contributory benefits. However, there are exceptions included in the new Immigration and Asylum Act 1999 where the individual with ILR was admitted subject to a condition that they would not be a burden on public funds or an undertaking by another family member.⁴⁶⁷

If they are waiting for relatives or dependants to join them, taking advantage of these benefits may have negative effects. Family reunion entry clearance and settlement entitlement will be dependent on them being maintained without recourse to public funds, which is difficult to prove if the principle is receiving benefits

d. Voting rights

Third country nationals ordinarily resident in the UK may only vote in national and local elections, if they are nationals of a Commonwealth country. They need not have ILR to be eligible to vote, all they require is to be registered on the electoral role.⁴⁶⁸ All other third country nationals are excluded from both active and passive voting rights until they acquire British citizenship.

⁴⁶⁷ The Asylum and Immigration Act 1996 and Social Security (Persons From Abroad) Miscellaneous Regulations 1996 introduced immigration tests for non-contribution based benefits. The Immigration and Asylum Act 1999 extends this principle to include aliens who are admitted with ILR subject to a condition or a formal undertaking that he or she will not be a charge to the public. Under these provisions he or she will not have access to public funds for a period of five years when they will be entitled to apply for naturalisation. It is unclear how this will be enforced. However, these provisions do not apply to contribution based social assistance such as job-seekers allowance, health insurance and state education.

⁴⁶⁸ Representation of the People Act 1983.

e. Education, grants and scholarships

A third country national with ILR is entitled to education, grants and scholarships on the same basis as British citizens. However, to be entitled to qualify for home student fees there is a requirement that they have been resident in the UK (or EEA) for the preceding three years for reasons other than education. This rule applies equally to British citizens, EEA nationals and third country nationals with ILR.

3. THE POSSIBILITY FOR FAMILY MEMBERS TO BENEFIT FROM THE STATUS

Family members admitted for the purpose of family reunification, either with a third country national in possession of ILR or a British citizen, are eligible for ILR either on admission to the UK (in respect of parents and other wider relatives and children arriving to join a sole parent or both parents who are already resident in the UK) or after a one year probationary period (in respect of spouses or any children who arrive in the country with that parent). The family members acquire the status as a result of their relationship with the third country national or the British citizen already in the UK. Once they have acquired this status it is independent and they are not at risk of losing it even if the principal dies or divorces them.

Children born in the UK to third country national parents with ILR are automatically British citizens. Therefore the question of the second generation arises only very rarely in the UK as that generation is normally British. For those cases where children are born in the UK to third country nationals before they acquire ILR, on the acquisition of ILR the minor children may apply to register as a British citizen. There is a very wide discretion for the Secretary of State to register as a British citizen any child under the age of 18. Normally, this discretion will only be exercised where it is clear that the child's future is in the UK.

4. LOSS OF THE STATUS

The status of ILR carries a durable residence right, which is only extinguished by a continuous absence from the UK for two years or more (see above) or a deportation order being made and effected. Where the status has been acquired as a result of materially incorrect statements or documents its acquisition is null and the person may be liable for expulsion as a result. This power has been clarified by the courts⁴⁶⁹ and was put on a statutory footing in 1996.⁴⁷⁰ The types of acts that may amount to deception are making false allegations as to

469 *R v IAT ex p Karim* [1986] AR 428.

470 Immigration and Asylum Act 1996.

marital status, stating that there is continuing cohabitation when the partners to the marriage are in fact separated or using a false identity.⁴⁷¹

5. REMOVAL OR DEPORTATION

It is unlikely that a person who has been granted ILR will be deported. There are three instances where it may occur, and each will have a different effect on the status of the third country national. Firstly, and the most common is on the basis of a recommendation by a Court as part of a sentence for criminal activity.⁴⁷² However, this recommendation is not binding on the immigration authorities and is quite often not acted upon. If a decision is taken to deport the person the ILR status is not revoked until the deportation is effected. The second method is when the Secretary of State deems that it is conducive to public good to deport the third country national.⁴⁷³ In this instance the ILR status is revoked when the decision to deport the individual is made. This may include family members of a person who is the subject of a deportation order.⁴⁷⁴ The final reason for deportation of a person with ILR status is when that status was acquired by fraud. Under those circumstances the status is not void *ab initio*, but remains effective until a decision to deport is made.

In all cases the final decision whether to proceed with an expulsion decision (or recommendation in the case of a criminal court) rests with the Home Secretary. There is an appeal right against the decision, which has suspensive effect.⁴⁷⁵ Where the decision is taken on national security grounds special appeal rights apply.⁴⁷⁶

There are no provisions relating specifically to expulsion of second generation migrants except minor children. Whether a child of a person with ILR can be expelled with them is not dependent solely on the issue of whether the child is a British citizen or not. When a person subject to deportation has children aged ten or over, the Home Office will consider a number of factors including whether the child was British by birth or entitled to claim citizenship. If the child has been in the UK for some time and is nearing the age of 18, has left home, or married, it will be unusual for them to be deported.

The UK has recently incorporated most of the substantive rights contained in the European Convention on Human Rights in the form of the Human Rights

471 Section 3 Immigration Act 1971 (as amended).

472 Section 3(6) Immigration Act 1971.

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

474 Section 3(5)(c) Immigration Act 1971.

475 Section 15 Immigration Act 1997. The Immigration and Asylum Act 1999 has limited dramatically the numbers of persons who will have a right of appeal against deportation but this limitation does not affect those who have already acquired a permanent residence right.

476 Special Immigration Appeals Commission Act 1987.

Act 1998. When in force, this will prohibit the Secretary of State excluding or deporting a third country national in contravention of their rights under Article 3 and Article 8 ECHR. Therefore, in such circumstances the Secretary of State may not be able to deport or exclude a person

6. OBTAINING NATIONALITY

Third country nationals become eligible to apply to naturalise in the UK after five years residence provided they have already had the status of ILR for a period of one year. The length of residence required for eligibility is reduced to three years where the third country national is married to a British citizen.⁴⁷⁷ Naturalisation is discretionary and subject to a good character test⁴⁷⁸ and for those naturalising on the basis of five years residence, a language test⁴⁷⁹ and the intention to make the UK their main home. Those under 18 years may be registered as British citizens at the discretion of the authorities.⁴⁸⁰ Children born in the UK to parents who have ILR (or who are British citizens) acquire British citizenship automatically. In UK nationality law “parent” does not include the father if he is not married to the mother. Therefore, if the father is the person who has ILR or British citizenship, but the parents are not married at the time of birth, the child will not automatically be a British citizen. The only way for the child to acquire citizenship in these circumstances is through registration, when the parents marry or the mother acquires ILR.

7. GENERAL COMMENTS

Like the Swedish system the UK indicates an intention of providing a durable residence right for those whose future is in the UK. However, while the residence status does in fact appear to be durable, the waiting periods to acquire it are less generous than, say, in Finland. The issue of a secure residence status for the second generation in the UK is dealt with primarily in nationality law rather than in immigration law.

477 Section 6 British Nationality Act 1981.

478 *R v Secretary of State for the Home Department ex p. Fayed* [1997] 1 All ER 228, CA.

479 In English, Welsh, or Scottish Gaelic; the test is administered either by the immigration authorities in London or by the police in other areas. Very few people in fact are refused on this ground. Elderly or infirm applicants can be excused from this test at the discretion of the Home Office.

480 Section 3 British Nationality Act 1981: the discretion is in principle unlimited though the authorities do issue general guidance on how it will be exercised. The most important criterion are the child's connections with the UK e.g. whether the child is settled in the UK and whether the child's future is likely to be in the UK. If the child is approaching the age of 18, the Home Office will also take into consideration whether the child is on good character and the length of time the child has lived in the UK.

4. Conclusions

This study has looked in depth at the legal status of third country nationals who are long term residents in a Member State of the European Union.

All but one of the Member States have in their immigration legislation rules providing a special status granting some form of permanent or durable residence status to third country nationals with long legal residence in the country. In Ireland such a status so far has been developed in administrative practice only, but plans for codification of such status are under consideration.

In Member States with a long experience of large-scale immigration the status was introduced already several decades ago: e.g. in Belgium in 1980, France in 1984, Germany in 1965, Netherlands in 1965 and the UK in 1971. In Member States where immigration is a relative new phenomenon, such as Finland, Greece, Italy, Portugal and Spain, the status has been introduced more recently.

We have looked at six main categories of rights and conditions:

1. acquisition of the status;
2. the rights attached to the status;
3. the position of family members;
4. fraud in acquisition;
5. deportation after acquisition; and
6. obtaining nationality.

The study has brought to light a number of important similarities and differences which are summarised in the schedules on the following pages and are discussed in this chapter. This analysis, however, will also be placed in the context of the existing rights of third country nationals in the European Union – with specific reference to Turkish nationals protected under Decision 1/80. Why? Because Turkish nationals are the largest group (approximately 20%) of third country nationals in the European Union. The great majority of these Turkish nationals – in Germany and the Netherlands more than four fifth – are living in the EU for more than five years. They are also the group of third country nationals (leaving aside the privileged position of EEA nationals) whose position in Community law is the most clearly spelt out in Decision 1/80 and the sixteen judgements of the Court of Justice interpreting that Decision. Taken together they form a set of rules that is a clear example of what has been termed the “denizen” status, a status approaching but not yet equal to citizenship.⁴⁸¹

481 See Hammar 1990. The term “denizen” was first used by John Locke, see Bauböck 1994.

Summary of central elements of permanent or durable residence status in the national law of Member States

	Austria	Belgium	Denmark	Finland	France
Secure residence status in law?	Yes	Yes	Yes	Yes	Yes
Years of residence for obtaining secure residence status	5	5	3	2	After 3, 5 or 10 years
Secure residence status: right or discretion?	Right	Right	Right	Right	Discretion/Right
Is residence status permanent?	Yes	Yes	Yes	Yes	No, valid for 10 years
Right to family reunion?	Yes, but subject to quota	Yes	After 3 years with permanent permit	Yes	Yes
Employment	Work permit required	Free access	Free access	Free access	Free access
Social security. equal as citizens?	Yes, with some exceptions	Yes, with some exceptions	Yes	Yes	Yes
Social assistance. equal as citizens?	No	Yes	Yes	Yes	Yes
Voting rights	No	No, constitution allows after 2001	Local elections after 3 years	Local elections after 2 years	No
Loss of status in event of fraud?	Yes	Yes	Yes	Yes	Yes
Loss of status in event of unemployment/lack of means?	No, only if he is unwilling or unable to be self-sufficient	No	No	No	No
Loss of status in event of absence from territory?	No	Yes, after 1 year	Yes, after 1 year	Yes, after 2 years	Yes, after 3 years
Naturalisation (years of residence)	10 years	3 years	7 years	5 years	5 years
Percentage third country nationals with secure residence status	45-55%	No data	No data	No data	Approximately 65%

	Germany	Greece	Ireland	Italy	Luxembourg
Secure residence status in law?	Yes, 2 permits	Yes	No, only administrative practice	Yes	Yes
Years of residence for obtaining secure residence status	Unrestricted residence Permit: 5 Establishment permit: 8	15	5 or 10	5	5 years lawful employment
Secure residence status: right or discretion?	Right	Right	Discretion	Right	Discretion
Is residence status permanent?	Yes	Yes	Yes	Yes	No, valid for 5 years
Right to family reunion?	Yes	After 5 years	Yes	Yes	Yes
Employment	Free access	Free access	Work permit required	Free access	Work permit required
Social security. equal as citizens?	Yes	Yes	Yes	Yes	Yes
Social assistance. equal as citizens?	Yes	No, only on treaty basis	Yes	Yes	No
Voting rights?	No	No	Only for local elections	No	No
Loss of status in event of fraud?	Yes	Yes	Yes	Yes	Yes
Loss of status in event of unemployment/lack of means?	No		Yes	No	Yes
Loss of status in event of absence from territory	Yes, after 6 months	No	Yes, after approx. 18 months	No	Yes, after 6 months
Naturalisation (years of residence)	8 years	10 years	5 years	10 years.	10 years
Percentage third country nationals with secure residence status	Approximately 50%	0%	No data	No data	No data

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	Netherlands	Portugal	Spain	Sweden	UK
Secure residence status in law?	Yes	Yes	Yes	Yes	Yes
Years of residence for obtaining secure residence status	5	10	5	4	4
Secure residence status: right or discretion?	Right	Right	Right	Discretion	Rule of practice
Is residence status permanent?	Yes	Yes	Yes	Yes	Yes
Right to family reunion?	Yes	Yes	Yes	Yes	Yes
Employment	Free access	Free access	Free access	Free access	Free access
Social security. equal as citizens?	Yes; one exception	Yes	Yes	Yes	Yes
Social assistance. equal as citizens?	Yes	Yes	Yes	Yes	Yes
Voting rights	At local level after 5 years	At local level after 5 years on basis reciprocity	At local level on basis reciprocity	At local level after 3 years	Only Commonwealth citizens
Loss of status in event of fraud?	Yes	Yes	No explicit provision	Yes	Yes
Loss of status in event of unemployment/lack of means?	No		No		No
Loss of status in event of absence from territory?	Yes, after 9 months	Yes, after 2 years or 30 months in a 3-year period		Yes, if domiciled abroad	Yes, after 2 years
Naturalisation (years of residence)	5 years	10 years	10 years	5 years	5 years
Percentage third country nationals with secure residence status	Approximately 50%	No data	No data	No data	No data

1. Acquisition of the status

Eleven of the fourteen Member States with statutory rules on long term residents provide for a right to the status for third country nationals who fulfil the conditions specified in the law. Only in Luxembourg, Sweden and the UK the authorities have discretion to grant or withhold the status. However, it appears that in Sweden and the UK the status is, normally, granted in practice to third country nationals who fulfil the statutory requirements

There are broad similarities in the national laws of the Member States as regards the acquisition of long resident status. The first is the fact that the actual level of security varies substantially from one Member State to another, but that is something we shall look at further below.

Secondly, in all Member States this is a status which is acquired on application, not automatically (except in the case of some family members in some States). The requirements to be fulfilled in the application vary but not excessively. Principally, the person must be in a regular position.⁴⁸² The person should normally have been admitted to the State in a capacity, which leads to the status, should have completed a period of residence in the country, have sufficient income or stable employment (though a number of states appear to make the status available also to the economically inactive) and not have recently committed serious offences.⁴⁸³

In seven Member States (Austria, Belgium, Germany, Italy, Luxembourg, the Netherlands and Spain) the special status is granted after a residence of 5 years. Shorter periods of residence (2 to 4 years) apply in four Member States: Denmark, Finland, Sweden and the UK. Two Member States require considerable longer periods of residence: ten years in Portugal and fifteen years in Greece. In France the period varies (3, 5 or 10 years) for different categories of third country nationals. In seven Member States five years is also the normal length of residence required for naturalisation.⁴⁸⁴

In several Member States the status is granted to categories of third country nationals without a residence requirement, e.g. to family members or convention refugees.

482 Unless the consequences of a regularisation procedure has this effect; In some cases family members are not required to be in a regular position, see for instance France for family members of French nationals.

483 In a few Members States additional requirements apply: e.g. a long employment record, payment of social contributions and knowledge of the German language for certain categories of third country nationals are required in order to qualify for the German establishment permit.

484 A period of five years residence is also used as a criterion for granting additional rights and protection to categories of non-nationals in Art. 12 of the European Convention on Establishment and Art. 8 ILO Convention No. 97 on Migrant Workers.

The Swedish legislation is based on the principle that the status should be granted soon after entry to those persons who are admitted for permanent residence in order to assist their integration in society.

There are variations between the Member States as to whether the documentation of the status is by way of a sticker in a passport or by a separate document which may also in some case take the place of an identity document.

The duration of the status and the duration of the document on which it is endorsed are not equivalent. In some cases the document must be renewed and in that case there is the opportunity for the state authorities to check whether the conditions of its issue are still fulfilled (such as in Austria). But this is by far the minority position. In most Member States the renewal, if required, is automatic and the evidence of the status is automatically endorsed in any new document, which the individual obtains, independent of any question about whether the State is considering action to curtail the status (e.g. the UK). The status continues even if the document is not renewed in time. In other states the renewal is automatic and only subject to question where long absence from the country or an issue of public order or public security is at play (e.g. France).

In most Member States only central or regional authorities have the competence to make decisions on issue or refusal of the permanent residence status. In case of refusal there is the possibility of administrative review and/or appeal to a court.

There are two places in the procedure discussed so far where the question of discretion enters: first at the point of application and, secondly, the consideration of an application. In most Member States some level of discretion is exercised at the point of grant of the status though normally this is limited to questions of appreciation whether the statutory criteria are fulfilled, e.g. the question whether previous convictions justify refusal of the status on public order grounds. In some States there appears to be virtually no discretion left to the State (Belgium, Italy, the Netherlands, Spain) while in others the law reserves a wide discretionary power to the State (Sweden and the UK).

With respect to four Member States data on the percentage of third country nationals having the permanent status are available: Austria, France, Germany and the Netherlands. In all four States approximately 50% or more of the registered third country nationals have a permanent or durable residence status.

How then does this system relate to that created by Decision 1/80 of the EC Turkey Agreement? The conditions are similar – the requirement of a period of residence on the territory and economic activity. In respect of Article 6(1) of Decision 1/80 the requirement is lawfully employment for one year, followed

by a further three years and free access to the labour market after 4 years economic activity and residence. The Court's interpretation of these provisions has provided a strong foundation for harmonisation. The substance is that it is for the Member States to control first admission and access to the labour market. But after that, once the rights are in acquisition and most importantly when achieved after four (workers) or five years (family members), they have a Community definition and nature which is consistent in meaning and content to prevent differential application across the Community.⁴⁸⁵

Once the status is acquired, the national residence document is only declaratory of the existence of the right to reside and does constitute a condition for its existence. Member States no longer have the power to restrict the residence right directly conferred on a Turkish national by Community law by refusing to extend his residence permit on the ground that the application was late.⁴⁸⁶

The important variation here between the Community's approach in Decision 1/80 and the Member States in the status of long resident third country nationals is that regarding the residence or employment status which the individual must have before the long resident status is acquired. This appears to be used as a form of discrimination in some states to exclude some third country nationals who have long residence and to favour others. The Court of Justice, in its interpretation of Decision 1/80 has used a particularly useful formula to deal with this problem: if the worker is someone whose position in the labour force is stable and secure then the person comes within the ambit of the Decision, irrespective of the grounds on which the person was admitted.⁴⁸⁷ This approach has much to recommend it in terms of clarity and simplicity.

2. The Rights Attached to the Status

In this area we found some difference between the Member States.

In the case of *family reunion*, there are some important differences between the Member States approach, but the Commission has already analysed these in its 1999 proposal for a Directive in this field. In most Member States third country nationals are entitled to family reunion before they have five years of residence or have acquired the permanent residence status. Only in Sweden, where the permanent status is generally granted on admission, is the right to family reunion directly related to having that status. In Germany and the UK the right to family reunion is slightly wider for third country nationals having a

485 C-192/89 *Sevince* [1990] ECR I-3461.

486 C-434/93 *Bozkurt* [1995] ECR I-1475; C329/97 *Ergat* judgement of 16.3.2000 (not yet reported).

487 C-237/91 *Kus* [1992] ECR I-6781; C355/93 *Eroglu* [1994] ECR I-5113; C-1/97 *Birden* [1998] ECR I-7747.

permanent residence status. In Denmark family reunion is allowed only after three years of residence with the permanent status and in Austria it is subject to a quota system.

In thirteen Member States third country nationals with permanent residence status have *free access to the labour market*. Once the status is acquired, they are exempted from the obligation to have a work permit. In Luxembourg and Ireland after five years of employment a permanent work permit is issued. In Austria long-term resident third country nationals receive work permits valid for five years. If the person happens to be unemployed at the time of renewal of the permit, this may have serious consequences for his or her employment and residence status.

The entitlement to *social security benefits and social assistance* is seldom directly related to having a permanent residence status. In most cases benefits are related to lawful employment or residence, the duration of the residence, contributions paid or nationality of the person. In almost all Member States third country nationals with long legal residence have equal rights as the citizens of the host country. Some States make exceptions for certain special benefits. The Court of Justice in several judgements has held the exclusion of such benefits to be incompatible with the non-discrimination clause in the Agreements between the EEC and the Maghreb countries.

As regards *social assistance*, there is a marked difference between the large majority of the States which seek to minimise difference of a discriminatory nature between long resident third country nationals and own nationals on the one hand, and those States which seek to reserve economic benefits for their own nationals (Austria, Greece and Luxembourg) on the other hand. The latter approach raises the question whether this differentiation is justified and in accordance with the ruling of the European Court of Human Rights in *Gaygusuz* where the Court found that to reserve for own nationals a continuation benefit after the end of a contributory unemployment benefit on the grounds only that the applicant was a third country national was contrary to Article 14 ECHR and Article 1 of the First Protocol.⁴⁸⁸ Moreover, the latter approach undermines the principle of integration and equality.

In Denmark, Finland, Ireland, the Netherlands and Sweden long resident third country nationals are entitled to *vote and stand for election* at the municipal level. In Portugal and Spain this right has been granted on the basis of reciprocity. In the UK a rather complex position obtains resulting from the colonial past; it benefits mainly Commonwealth citizens. In most of these states the right of third country nationals to take part in the elections is related to a period of

488 See chapter 1 at footnote 41.

lawful residence, not to having a permanent residence status. The 1992 Council of Europe's Convention on the participation of foreigners in public life at local level and the granting of voting rights in municipal elections to Union citizens has stimulated the public and parliamentary on this issue in several Member States. In Belgium a constitutional amendment has been adopted allowing for local voting rights to be extended to resident third country nationals after the year 2001. In Italy the provision in the 1998 Immigration Act extending active or passive voting rights in local elections is not yet operative, because the necessary constitutional amendment has not yet been adopted.

Access to education, grants and scholarships is a more complex question. Access to primary and secondary education is not related to the residence status of the child or its parents in any of the Member States. Apart from a quota system (*numerus clausus*) for admission to certain university studies in some States, access to education appears to be on a non-discriminatory basis in most Member States for long-term resident third country nationals. In most States access to grants and scholarship is subject to qualifying conditions which third country nationals are less likely to fulfil than own nationals, for instance residence requirements. Many Member States grant third country nationals with long residence or a permanent residence status the rights to scholarships as nationals (e.g. Belgium, Germany, France, Italy, Netherlands Portugal, Sweden and the UK).

If one looks at Decision 1/80 as regards the position of Turkish workers there are substantial differences. First, the regime relating to family reunion rests within the competence of the Member States. Once admitted, however, there is a right of residence and after five years there is a right of employment. For children there is a separate regime, including a directly effective right for the children of Turkish workers which have free access to the labour market after having completed vocational training in the Member State.⁴⁸⁹ There is a right to access to social security as defined in Regulation 1408/71 on a non-discriminatory basis with nationals.⁴⁹⁰ The children of Turkish workers are entitled to non-discriminatory access to education in the Member States. The Decision is silent on the question of voting rights.

3. The position of family members

There are substantial differences between the Member States on the extent to which family members enjoy a secure status as a result of their relationship with a third country national with the status. In some countries this is considered self

489 C355/93 *Eroglu* [1994] ECR I-5113 C-210/97 *Akman* [1998] ECR I-7519.

490 C-262/96 *Sürül* judgement of 4.5.1999 (not yet reported), confirming the direct effect of art. 3 of Association Council Decision 3/80.

evident and the permanent status is granted at admission (Italy, France, Sweden) or after one year (Belgium, UK). In other Member States family members have to fulfil all or most requirements for the status themselves. Some States with respect to spouses have reduced the residence or income requirements. In Germany and the Netherlands it is sufficient that the family income meets the standard. The differentiation between the countries as to the appreciation of this issue does not break down into a simple North-South division between traditional countries of emigration and countries of immigration. It is not clear where the basis for the difference lies.

Several Member States grant a permanent status to third country national spouses of their own nationals under more liberal conditions. In Belgium, Italy, Portugal and Spain these spouses receive a status similar or identical to third country spouses of EU citizens who used their freedom of movement.

In several Member States there is a policy in favour of generous treatment of the *second generation*, which is born on the territory or which were minors at the time of admission. They are entitled to the permanent status at birth (Portugal, Spain), once they reach the age of 18 years (France, Netherlands) or at the moment they qualify for the acquisition of the nationality of the host country in a simple procedure (Belgium, France). In some states this is associated with the previous acquisition by at least one of the parents of the long residence status. In Germany having completed vocational training in Germany entitles the child to an unrestricted residence permit once it is 18 years of age. This provision probably served as a model for the similar rule in Article 7(2) of Association Council Decision 1/80.

4. Loss of the status

Where fraud is detected as regards a material aspect of the acquisition of the permanent residence status, in all Member States the rule is for the withdrawal of the status or its declaration as void.

In ten Member States unemployment or lack of means of subsistence are no ground for the loss of the status.

Absence from the country is a ground for withdrawal or loss of the status in ten Member States. The duration of the period abroad varies from six months (Germany) to three years (France). In Sweden and the Netherlands the status may be withdrawn if the holder have chosen domicile in another country. In the law of four Member States there is no explicit provision on the consequences of absence for the status.

In interpreting the meaning of the protection of Turkish workers in Decision 1/80 the Court of Justice took a position similar to that of the Member States – fraudulent conduct in acquisition, in respect of which the person has been con-

victed, has the effect of nullifying the acquisition of rights.⁴⁹¹ A Turkish worker may lose his residence rights under Decision 1/80 in case of voluntary unemployment, if no new employment is found within a reasonable period,⁴⁹² or the worker has permanently left the labour market.⁴⁹³ Moreover, loss of the residence status may result if the person leaves the territory of the host state for a significant length of time without legitimate reasons.⁴⁹⁴

5. Removal or deportation

This is one of the most important areas of the study. The real meaning of whether a status is secure or not depends on whether the State can deport the third country national and if so on what grounds.

In the national laws of the Member States there is much variation regarding the grounds on which an individual can be deported. Two types of situations must be discerned though the result for the third country national is the same in both of them: first, those situations which permit the third country national, notwithstanding the possession of a lawful residence permit, to be the subject of a deportation measure. The second situation is where the law permits the withdrawal of the permit for a particular reason. The third country national is then without a residence basis and is irregularly on the territory and therefore liable to deportation on that ground. While the difference between these two situations is subtle in law, it may be used as an argument that the measure of withdrawing the permit is not the same as deportation. Our investigation indicates that while it is not the same it is tantamount to the same thing. In some states the difference is that an expulsion order always implies a ban on the re-entry of the person in that state, whilst removal may not imply such a ban on re-entry.

Returning then to the main question, all Member States have provided in their national legislation for the possibility of removal or expulsion on grounds of public order or public security. In a few states expulsion on these grounds is mandatory in certain cases (Austria, Denmark and Germany) or it includes a power to deport on general preventative grounds (Germany). Several Member States have codified the principle that the longer the residence, the more serious the violation of public order has to be, before withdrawal of the residence right and expulsion are justified. In most states expulsion is possible only after a final conviction to a long prison sentence or for certain specific crimes (drug

491 C-285/95 *Kol* [1997] ECR I-3069.

492 C-191/95 *Tetik* [1997] ECR I-329; C-340/97 *Nazli* judgement of 10.2.2000 (not yet reported).

493 C-434/93 *Bozkurt* [1995] ECR I-1475.

494 *Ergat* judgement of 16.3.2000 (not yet reported); C-351/95 *Kadiman* [1997] ECR I-2133.

trafficking; organised crime, etc.) Some states have a graded system of security of residence with increasing security after 5, 8, 10 or 15 years of residence. In Austria, Denmark and Portugal such a system is codified in the immigration law. In the Netherlands a detailed “gliding scale” is laid down in ministerial instructions. Finally there are those states which limit the power of deportation to public security, policy and health equal to or not far from the lines of Directive 64/221 (Belgium, Finland, Sweden, UK). In all Member States the case law of the European Court of Human Rights on Article 8 ECHR has influenced the law or the practice on expulsion, or both. In several states this has resulted in a proliferation of ministerial instructions referring to the Strasbourg case law or to long lists of circumstances to be taken into account in statutory law (e.g. France, Denmark). The latter solution creates less clarity and security both for the authorities and for the long term resident third country nationals than the alternatives: a graded system or application of the criteria of Directive 64/221.

As to the competence to make an expulsion order the national law varies considerably between Member States. In some states only criminal courts may make an expulsion order, in other states this is the exclusive competence of high administrative authorities, and in several states both judicial and administrative authorities have a competence in this respect. In the UK the competent administrative authority may or may not act on the advice of the courts. All Member States in their national law have developed a system of administrative and judicial review in cases of withdrawal of the permanent residence status or expulsion. Apparently, the introduction of these remedies has been influenced by the obligations of Member States under European instruments, such as Article 3(2) and Article 7 of the European Convention on Establishment, Article 1 and Article 2 of Protocol No. 7 to the ECHR, Article 19(7) of the European Social Charter and Article 8 and Article 9 of Directive 64/221. Hence, at least the first remedy against an expulsion order or a decision to withdraw a permanent or durable residence status, generally, has suspensive effect.

Several Member States have provisions in their national law, which forbid the removal or expulsion of certain categories of third country nationals, and thus grant these persons full security of residence. Persons under the age of 18 years may not be expelled from France, Greece, Italy and Spain. Austria and Sweden grant full protection against expulsion to second generation immigrants who have resided in the country during most of their youth. The Netherlands does not allow removal or expulsion of non-nationals with 20 years of residence in the country. States that grant citizenship to second generation immigrants automatically at birth in the country (Germany, UK) provide these persons with full protection against expulsion through their nationality law.

In Decision 1/80 Article 14 a Turkish worker and his family members in Community law are entitled to protection against expulsion except on the grounds of public policy, security and health which are to be given a similar meaning to the same terms in Directive 64/221 with respect to EU citizens and their family members.⁴⁹⁵

6. Obtaining Nationality

Notwithstanding the older academic literature, which indicates very substantial differences in acquisition of nationality in the Member States, there are clear indications that the systems are beginning to approach one another in Europe. There are still substantial differences as regards whether dual nationality is permitted or not with Austria, Denmark and Germany being the most strict and Belgium, Ireland, France, Portugal and the UK the most flexible. In Italy and the Netherlands either the law or the practice on dual nationality has become more flexible during the 1990ies. In Sweden the issue has been under discussion for considerable time in relation to its policy on the social integration of immigrants. However, the much discussed difference between *ius sanguinis* and *ius soli* is much blurred now in the Member States of the European Union, especially after Germany at the beginning of the new Millennium introduced the *ius soli* for the second generation immigrants. Even in the last state to maintain a system of complete *ius soli*, Ireland, there are proposals to change the law to a more mixed system. In most other Member States a combination of birth on the territory and the status of the parents is critical to the acquisition either automatic or by declaration of nationality by the second generation.

All Member States have a simpler and faster system of acquisition for the second generation born in the country: automatic acquisition at birth, the right to opt or make a declaration, or a reduction of residence and other requirements for naturalisation. In twelve Member States second generation immigrants have a right to obtain the citizenship of the state of residence under certain conditions.⁴⁹⁶ Several Member States, which do not grant citizenship to immigrant children at birth, grant automatic citizenship to the third generation: a child is born on the territory to parents born on the territory (e.g. in Belgium, France and the Netherlands). As regards spouses, again there are differences which are not so substantial: in all Member States third country national spouses of nationals are entitled to nationality on application under more liberal conditions, e.g. after a shorter period of residence on the State accompanied by a marriage of a specified duration. In several Member States, in case one of the spouses fulfils all requirements for naturalisation, the other spouse will, general-

495 C-340/97 *Nazli* judgement of 10.2.2000 (not yet reported).

496 P. Weil and R. Hansen 1999, p. 14.

ly, be naturalised at the same time, even if he or she does not fully meet all requirements.

From our study it is apparent that the differences among the Member States with respect to the national law on the treatment of third country nationals are not so extreme as to make the question of harmonisation one, which would require many years of slow rapprochement. Moreover, there is a strong foundation of commonality which could be built upon to develop a common status for third country nationals which would assist in the development of the internal market and in the achievement of the objective of the Community as expressed in the conclusions of the European Council at Tampere: to assimilate the rights of third country nationals as far as possible to those of nationals of the Member State. Further we note that the Member States and the Community already enjoy the benefit of a strong harmonising measure: Association Council Decision 1/80 which covers the issue at least in part as regards the largest group of third country nationals in the Union – Turkish nationals. National authorities and courts in several Member States have already many years of experience with the implementation of the rights contained in Decision 1/80. If these rights as interpreted by the Court of Justice were taken as the starting point for the development of rights for all Europe's third country nationals, the Community would build on a secure foundation. This would simplify the system of law applicable to third country nationals in general in the Union and ensure that there could be no diminution of the rights of third country nationals.

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- F. Bienfait, Association pour le Droit des Etrangers, Brussels
- M. van de Putte, Centrum voor Gelijkheid van Kansen en Racismebestrijding, Brussels
- S. Sarolea, avocate, Nivelles
- L. Walley, advocaat, Brussels

Denmark

- K. Hansen, Danish Immigration Service, Copenhagen
- H. Peitersen, Danish Immigration Service, Copenhagen
- J. Vedsted-Hansen, University of Aarhus Law School, Aarhus

Finland

- C. Krause, Åbo Akademi University, Turku
- H. Nyback, Åbo Akademi University, Turku
- S. Sirva, lawyer, Refugee Advice Centre, Helsinki
- T. Sinkkanen, Immigration Department, Ministry of Interior, Helsinki
- W. Wagello-Sjölund, Immigration Department, Ministry of Interior, Helsinki

France

- H. Gacon-Estrada, avocate, Paris
- J.P. Guardiola, Sous-Directeur de l'Administration des Étrangers, Préfecture de Police, Paris
- J. De Croone, Ministère de l'Intérieur, Paris

Germany

- S. Beichel, Rechtsanwalt, Nagold
- R. Gutmann, Rechtsanwalt, Schorndorf
- M. Schlicker, Büro der Beauftragte der Bundesregierung für Ausländerfragen, Berlin

Greece

- E. Kalantzi, avocate, Athens
- Ministry of Foreign Affairs, Athens
- E.N. Moustaira, University of Athens, Athens

Ireland

- J. Handoll, solicitor, Dublin
- D. O'Sullivan, Immigration & Citizenship, Department of Justice, Equality and Law Reform, Dublin

Italy

- M. Balboni, University of Bologna, Bologna
- B. Nascimbene, University of Milan, Milan
- S. Pomes, Eurojus, Rome

Luxembourg

- A. Fatholahzadeh, avocat, Luxembourg
- S. Wagner, Ministry of Justice, Luxembourg

The Netherlands

- J. Boeree, District Court, Amsterdam
- S. Stenfert Kroese, advocaat, Rotterdam

Portugal

- M. Armando Oliveira, Universidade Alberta, Lisbon
- F. Garcia da Rocha, Immigration Service, Lisbon

Spain

- C. Gortázar, Universidad Pontificia Comillas, Madrid
- E. Menéndez Sebastián, PhD student, Institute of European Studies, San Pablo CEU University, Madrid.
- Ministry of the Interior, Madrid

Sweden

- S. de Geer, lawyer, Stockholm
- K. Jönsson, lawyer, JuristForum AB, Stockholm
- F. Martinsson, Swedish Immigration Board, Norrköping

United Kingdom

- S. Cox, barrister, London
- A. Meacher, AIRE centre, London