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churches' commission for migrants in europe

***TOWARDS A RIGHT OF PERMANENT
RESIDENCE FOR LONG-TERM MIGRANTS***

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This paper has been elaborated as part of CCME's work in the year of European Churches Responding to Migration 2010 and findings were presented by Lilian Tsourdi at the conference held in Vienna 18-19 December 2010. It has been updated and edited in autumn 2011. CCME gratefully acknowledges the support to this study and paper by the Church of Sweden.

The Churches' Commission for Migrants in Europe (CCME) is the ecumenical agency on migration and integration, asylum and refugees, and against racism and discrimination in Europe. Members are Anglican, Orthodox and Protestant Churches and Councils of Churches as well as church-related agencies across Europe. CCME formally cooperates with the Conference of European Churches and the World Council of Churches.

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Brussels, September 2011



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1. INTRODUCTION

In 1984 the then Churches' Committee on Migrant Workers started an initiative in order to stimulate debate on concrete proposals for security of residence for migrant workers in Europe. The efforts culminated in a proposal for a "European Right of Settlement for Migrant Workers"¹. The initiative was born out of the need to defend the rights of migrant workers who do not seek or do not have access to naturalization in the receiving country but have lived there for a considerable period of time. The Working Group on Migrant Workers' Rights noted that the migrants' rights were insufficiently guaranteed under existing national legislation and international agreements. A universal "right of permanent residence" would bring an end to the complexity of existing legislation and enable migrants to better exercise their rights. This initiative was crucial for the adoption of a Recommendation on the right of permanent residence for migrant workers and members of their families by the Parliamentary Assembly of the Council of Europe².

Ever since, the Churches' Commission for Migrants in Europe has continued to advocate for inclusive policies at European and national levels not only for migrant workers but also for refugees and minority ethnic groups. The political setting and challenges have changed since the first time the necessity for a right to permanent residence was voiced, but the need for such a right remains the same. That is why when CCME together with the Conference of European Churches launched a focus year of "European Churches responding to Migration" it pronounced "a right to a long term residence status after five years of legal stay, irrespective of the reasons of stay" as its main aim on the political level. The "Migration 2010" initiative intended to make visible churches' programmes in Europe with and for migrants, refugees and minority ethnic people, and to encourage churches to share their work and experience with each other. It proposed a specific focus-theme for each month taking note of relevant dates for the churches as well as of international days relating to migration issues. The month of December 2010 was focused on promoting migrants' and other legally settled groups' right to permanent residence.

¹ CCMWE, *A European Right of Settlement for Migrant Workers*, Brussels, 1984. In the second edition of the proposal the term "settlement" was substituted with the term "permanent residence" for greater clarity.

² Recommendation 1082 (1988) on the right of permanent residence for migrant workers and members of their families, 30 June 1988



The purpose of this study is to present a concise overview of the current situation in Europe concerning the rights of residence of legally staying or legally present aliens. The study will thus consider the long-term residence rights not only of migrant workers but also of other categories of aliens such as refugees, beneficiaries of international protection, beneficiaries of complementary protection according to national law, as well as non-deportable aliens who have received a national "toleration" status. The study does not seek to be exhaustive in its analysis but rather to briefly depict the existing framework first at the Council of Europe level, then at the European Union level and finally to present a "snapshot" on the national regulation of residence status in five States: Germany, Romania, Sweden, Switzerland and the United Kingdom. The intention is to ascertain what level of security of residence is offered at both European and national levels and for which particular legal categories of persons, and therefore to present the strengths and weaknesses of the current system. As the research will reveal, significant gaps persist in the access of different categories of aliens whose presence is legally acknowledged to a secure residence status leading to their marginalisation and hindering their integration in the host state. The study of adequate solutions for aliens whose presence is undocumented remains beyond its scope. This is of course without prejudice to the fact that governments owe respect for the human rights of undocumented migrants present within Europe, notwithstanding their undocumented status.

CCME believes that full integration can only be achieved if all categories of aliens who have remained in a European state³ continuously for 5 years and whose presence is legally recognised are granted access to a long-term resident status. Therefore this extends not only to migrant workers and their family members but also to other aliens who are refugees, beneficiaries of subsidiary protection or are granted residence on humanitarian or any other (not strictly temporary) ground. The exclusion of certain categories of aliens from a long term resident status, although their presence is legally recognised, distinguishes different categories of alien nationals without an objective justification. It leads to social exclusion and chronic marginalization of large numbers of aliens who are part of our societies, despite the fact that their presence in a Europe is legally sanctioned.

³ Reference is being made not only to the European Union Member States but to all European States that are parties to the Council of Europe.



2. COUNCIL OF EUROPE INITIATIVES

Important initiatives for the protection of long-term migrants⁴ have taken place within the framework of the Council of Europe. The protection extended to long-term migrants has on the one hand taken the form of specific initiatives dealing with their status and special position. On the other hand aliens in general and long-term resident aliens in particular are protected by the European Convention on Human Rights⁵. The case-law of the Court is pertinent in ensuring aliens' rights and although it is not conclusive on the issue of residence it provides some guidance and establishes relevant safeguards.

1. INITIATIVES DEALING SPECIFICALLY WITH THE PARTICULAR

POSITION OF ALIENS

A significant effort to ensure equal treatment for migrants was attempted with the adoption of the *European Convention on Establishment*⁶. Its aim was to grant migrants from one State Party to the Convention, living in another State Party, equal treatment with nationals in a range of areas, to liberalise access to employment and other "gainful occupations" and to grant migrants who have lived in the country for several years, security of residence and protection against sudden forced departure⁷. The Convention entered into force in 1965 and has now been signed by 12 State Parties to the Council of Europe. Although the principles underpinning the Convention were quite liberal it suffers from several weaknesses.

⁴ This is the terminology used often by both the Parliamentary Assembly and the European Court of Human Rights.

⁵ *Convention for Fundamental Rights and Freedoms*, Rome, 4/11/1950: Entered into Force 3/9/1953-CETS 005, as amended by Protocol 11 which entered into force 1/11/1998-CETS 155, and by Protocol 14 which entered into force 1/06/2010-CETS 194, available at: <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm>

⁶ *European Convention on Establishment*, Paris, 13/12/1955: Entered into Force 23/2/1965-CETS 019, available at: <http://conventions.coe.int/treaty/Commun/QueVoulezVous.asp?NT=019&CM=0&CL=ENG>

⁷ Groenendijk, Kees, Guild, Elspeth, Dogan, Halil, *Security of residence of long-term migrants: A comparative study of law and practice in European countries*, Study for the Council of Europe, Strasbourg 1998, at p. 13, where the authors mention as well a series of sources on the history of the drafting of this Convention. The study is available at: http://www.coe.int/t/dg3/migration/documentation/Legal_texts/Security_residence_long-term_migrants_report_en.pdf



Its scope is restricted to nationals of the Member States, it applies on a reciprocal basis, national immigration rules determine the content of several of its provisions, and there is no effective system of international supervision of its implementation⁸. The practical effects of the Convention are nowadays extremely limited given that 11 out of the 12 States that have ratified it are also Member States of the European Union.

The *European Social Charter*⁹ provided an additional safeguard to the security of residence of migrant workers, as it established that “workers lawfully residing within their territories are not expelled unless they endanger national security or offend against public interest or morality”¹⁰. Nevertheless, it still failed to provide a right of permanent residence for long-term migrants. The *European Convention on the Legal Status of Migrant Workers*¹¹ is another binding Council of Europe instrument that moved towards the direction of securing residence rights for migrant workers. The Convention provides a useful basis for the protection of civil, economic and social rights of migrants at a level equal to that of own nationals¹². It also requires the issuance of documents and security of residence for the purpose of employment¹³. Article 9 of the Convention that regulates the issue of residence permits nonetheless does not establish a right to permanent residence after a given time period. The rule is therefore that residence is terminated when a migrant worker is no longer employed. A period of extension of residence of a few months is to be granted only in the cases of temporary incapacity to work as a result of illness, accident, or involuntary unemployment.

⁸ Groenendijk, Kees, ‘Long-Term Immigrants and the Council of Europe’ in Guild, Elspeth and Minderhoud, Paul, (eds) *Security of Residence and Expulsion- Protection of Aliens in Europe*, Kluwer Law International, 2000, at p 10

⁹ *European Social Charter (revised)*, Strasbourg, 3/5/1996: Entered into Force 1/7/1999 · CETS 163, available at:
<http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=163&CL=ENG>

¹⁰ Article 19(8) *European Social Charter*. The text has remained unchanged in the revised version of the Charter of 1996.

¹¹ *European Convention on the Legal Status of Migrant Workers*, Strasbourg, 24/11/1977: Entered into Force 1/5/1983 · CETS 093, available at:
<http://conventions.coe.int/treaty/Commun/QueVoulezVous.asp?NT=093&CM=0&CL=ENG>

¹² Groenendijk, Kees, Guild, Elspeth, Barzilay, Robin, *The legal status of third-country nationals who are long-term residents in a Member State of the European Union*, Study published by the European Community, Nijmegen 2000, at p. 9

¹³ *Ibid.*



Apart from the above-mentioned legal instruments, one must note a series of Recommendations by the Parliamentary Assembly and the Committee of Ministers which focused on security of residence for long-term migrants. The first of these was adopted in 1988¹⁴, and basically sought to *establish a right of permanent residence for migrant workers that had spent at least five years in one of the Member States*. In the explanatory memorandum the Rapporteur stressed that millions of *de facto* permanent residents faced insecurity and had difficulties integrating into the host society due to their precarious status, while at the same time their ties with their countries of origin had weakened¹⁵. The Recommendation also called for the recognition of the right to family reunification,¹⁶ for equal treatment in the fields of access to employment, employment conditions and social benefits as well as for the right to vote and to stand for election at the local level. Additionally, the Recommendation called on the Committee of Ministers to draw up a European Convention on the right of permanent residence of migrant workers and their families¹⁷, an initiative which however the Committee of Ministers did not take up.

Nevertheless, some years later and mainly under the influence of the jurisprudence of the European Court of Human Rights under Articles 3 and 8, which provided safeguards against the expulsion of certain categories of aliens and will be developed below, the Committee of Ministers adopted a subsequent Recommendation. This 2000 *Recommendation*¹⁸ extended its scope beyond migrant workers to *include all categories of long-term migrants*. It stressed that security of residence was not only vital to migrants' integration but also to social stability¹⁹. It sought to establish common standards regarding the acquisition of a secure residence status by defining the beneficiaries and the conditions to its acquisition and withdrawal, as well as a set of rights that should be enjoyed by

¹⁴ *Recommendation 1082 (1988) on the right of permanent residence for migrant workers and members of their families*, 30 June 1988, available at: <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta88/erec1082.htm>

¹⁵ *Report on the right of permanent residence for migrant workers and members of their families'* (Rapporteur : Mr Altug), Doc. 5904, available at: <http://assembly.coe.int/Documents/WorkingDocs/Doc88/EDOC5904.pdf>

¹⁶ Point 9, Recommendation 1082 (1988)

¹⁷ Point 11, Recommendation 1082 (1988)

¹⁸ *Recommendation Concerning the Security of Long-Term Migrants*, Rec(2000)15, 13 September 2000, available at: <http://www.unhcr.org/refworld/docid/4278e13d4.html>

¹⁹ Preamble, Recommendation Rec(2000)15



long-term immigrants in the same terms as nationals, and by putting into place procedural guarantees concerning the expulsion of long-term resident migrants. Although it constituted a considerable effort in securing residence, this non-binding instrument was further weakened by the numerous reservations made by States and by the fact that it afforded States a wide margin of discretion to include further qualifying rules and procedures at a national level.

Finally, a *2001 Recommendation* of the Parliamentary Assembly supported the view that the application of expulsion measures against long-term immigrants is disproportionate and discriminatory and that *expelling persons who have already served a prison sentence constitutes double punishment*²⁰. This Recommendation called for a complete ban on the deportation of persons born or brought up in the host country or to under-age children and maintained that expulsion may be applied only in highly exceptional cases, when the person concerned represents a real danger to the state. The Recommendation also called upon the Committee of Ministers to formulate an additional protocol to the ECHR. However such an action was not taken up by the Committee of Ministers, which considered that the existing legal instruments and the case-law of the Court provided adequate protection in this field²¹.

II. PROTECTION BY THE EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR)

The European Convention on Human Rights has been instrumental in ensuring respect for the rights of aliens by the Council of Europe States Party. As Article 1 of the Convention establishes, signatory states must secure the rights and freedoms that are prescribed in the Convention to “everyone within the jurisdiction”. This means that, in theory at least, the rights and freedoms recognised by the ECHR are universally available to all individuals, including non-nationals, be they nationals (e.g., immigrants or refugees) or non-nationals (e.g., stateless) of a

²⁰ *Non-Expulsion of Long-Term Immigrants, Recommendation 1504(2001)* available at: <http://assembly.coe.int/documents/adoptedtext/ta01/erec1504.htm>

²¹ Doc. 9633, 6 December 2002, *Non-expulsion of long-term immigrants Recommendation 1504 (2001)*, Reply from the Committee of Ministers adopted at the 820th meeting of the Ministers’ Deputies (4 December 2002), available at: <http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doco2/EDOC9633.htm>



foreign state²². It follows that considerations of nationality, residence or domicile are irrelevant to a determination of a claim of a violation of the ECHR²³. The Convention has provided significant safeguards around the expulsion of aliens, although it should be stressed that according to the long-standing case-law of the Court “the Convention does not guarantee the right of an alien to enter or to reside in a particular country, and as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory²⁴”.

However, freedom of states to control immigration is not unlimited. First of all, *Article 3 of the Convention* imposes a restriction, by prohibiting torture or inhuman or degrading treatment or punishment. The Court has interpreted this article as having an extraterritorial effect²⁵, and thus prohibiting the expulsion of an alien “to another State where there [are] substantial grounds for believing that he would be in danger of being subjected to torture²⁶”. The prohibition is absolute, with no qualifications or exceptions²⁷. The fundamental character of this Article is shown also by the fact that no derogation may be made from its provisions under Article 15 even in times of war or public emergency²⁸. This principle was later examined in the context of expulsion of non-nationals who are considered a threat to national security²⁹, where the Court stressed once more that the Convention prohibits *in*

²² Lambert, Helene, *The position of aliens in relation to the European Convention on Human Rights*, Council of Europe Publishing, 2007, at p. 9

²³ *Ibid*

²⁴ See among others *Case of Abdulaziz, Cabales and Balkandali v. UK*, (Application no. 9214/80; 9473/81; 9474/81), Judgment, Strasbourg, 28 May 1985, at par. 67, available at: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=3&portal=hbkm&action=html&highlight=abdulaziz%20%20cabales%20%20balkandali&sessionid=63119971&skin=hudoc-en>

²⁵ *Case of Soering v. UK*, (Application no. 14038/88), Judgment, 07 July 1989, available at: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=soering&sessionid=20750387&skin=hudoc-en>.

²⁶ *Case of Soering v. UK*, at paragraph 88

²⁷ Ovey and White, *Jacobs and White, The European Convention on Human Rights*, Oxford University Press, 2006, 4th edition, p. 74

²⁸ *Ibid*

²⁹ *Case of Chahal v. the United Kingdom*, (Application no. 70/1995/576/662), Judgment, 25 November 1996, available at: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=chahal&sessionid=20750387&skin=hudoc-en>



absolute terms torture or inhuman or degrading treatment or punishment, *irrespective* of the victim's conduct³⁰. The Court recently reaffirmed this principle³¹.

In addition, restrictions are also placed by *Article 8 par 1 of the Convention*, which stipulates that "everyone has the right to respect for his private and family life, his home and his correspondence". The Court considers that although this right is not absolute and States may deport non-nationals convicted of criminal offences "their decisions in this field must, in so far as they may interfere with a right protected under paragraph 1 of Article 8, be necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued³²". In assessing the necessity and proportionality of such expulsions the Court has developed several criteria that examine the seriousness of the crime and the conduct of the offender, his ties with the host country and country of origin, and the situation for his family members if he is deported. In particular, the Court has paid special attention to whether the non-nationals have lived in the host state from a very young age³³, whether they have formed a marriage or partnership in the host state³⁴, and whether they are in fact second generation migrants³⁵. However even in cases where the Court acknowledges that there are strong ties with a host country to which the applicant came at very young age, and

³⁰ Ibid, at para.79

³¹ Case of *Saadi v. Italy*, (Application no. 37201/06), 28 February 2008, available at: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=saadi%20%7C%20italy&sessionid=20750387&skin=hudoc-en>

³² *Case of Boultif v. Switzerland*, (Application no. 54273/00), Judgment, Strasbourg, 2 August 2001, at paragraph 46, available at: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=boultif&sessionid=63120876&skin=hudoc-en>

³³ See for example *Case of Nasri v. France*, (Application no. 19465/92), Judgment of 13 July 1995, available at: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=nasri&sessionid=63121780&skin=hudoc-en>

³⁴ See for example *Case of Boultif v Switzerland*, op.cit.

³⁵ See for example *Case of Beldjoudi v. France*, (Application no. 12083/86), Judgment of 26 March 1992 available at: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=5&portal=hbkm&action=html&highlight=beldjoudi&sessionid=63121704&skin=hudoc-en>, and *Case of Mehemi v. France*, (85/1996/704/896), Judgment of 26 September 1997, available at: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=mehemi&sessionid=63121755&skin=hudoc-en>



where he has formed a family, the serious nature of an offence can render an expulsion proportionate to the aims of a democratic society³⁶.

Although the Court's case-law has provided safeguards regarding the non-removal of non-nationals, the issue of their legal status remains left to a great extent to the discretion of states. Article 8 governs the status in relation to the right to residence documents of those who cannot be expelled³⁷. The Court has frequently stated that Article 8 does not normally go as far as guaranteeing an individual the right to a particular kind of residence permit, so long as the solution proposed by the authorities permits him to enjoy his right to respect for family and private life³⁸. The Court has very rarely pronounced that a particular permit may be required, and this always in very specific contexts, for example in a case concerning an EU national residing in another Member State³⁹ and in the case of a family of ethnic Russians who were residing in Latvia, were not removed by authorities, but had not been able to regularize their status for years⁴⁰. States have complied with judgments of non-removal in very different terms. For example in the United Kingdom, compliance has generally resulted in the withdrawal of the expulsion order and in the alien being authorised to remain on ECHR grounds and granted Humanitarian Protection⁴¹. In Austria, however, aliens allowed to remain following the withdrawal of an expulsion order on the basis of Article 3 have been refused residence permits and denied the right to work⁴². This amounts to a gap in legal

³⁶ See for example the *Case of Üner v. Netherlands*, (Application no. 46410/99), Judgment of 18 October 2006, available at:

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Uner&sessionId=63121655&skin=hudoc-en>

³⁷ Mole, Nuala and Meredith, Catherine, *Asylum and the European Convention on Human Rights*, Council of Europe Publishing, 2010, at p.193

³⁸ *Ibid*, at p. 194

³⁹ *Affaire Aristimuño Mendizabal c. France*, (Application n° 51431/99), Arrêt, Strasbourg, 17 janvier 2006, available only in French at :

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=aristimuno%20%20mendizabal%20%2051431/99&sessionId=63123029&skin=hudoc-en>

⁴⁰ *Case of Sisojeva and others v. Latvia*, (Application no. 60654/00), Judgment, Strasbourg, 15 January 2007, available at:

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=sisojeva&sessionId=63123232&skin=hudoc-en>

⁴¹ Lambert, *op.cit.* at page 54

⁴² *Ibid*. See also Mole and Merdith *op.cit.* at p. 193 that mention the case of Ahmed where the applicant was not expelled to Somalia as this would constitute a breach of Article 3 ECHR but was left in a precarious legal situation and destitution which led to his suicide.



protection. Although states most of the time grant some kind of residence permit to persons that cannot be deported, this is often a short-term permit which carries only minimal rights and might not provide access to the labour market. In such cases, where it is obvious that the stay of deportation is not temporary, persons should also have the opportunity to obtain a long-term residence permit that will enable them to regularize their status, access the labour market and the welfare system, and live in dignity.

3. INITIATIVES AT THE EU LEVEL

Long –Term Resident Status: the Directive, its extension and persisting limitations

At the European Union level, the need to establish a comprehensive framework and to harmonise national legislation concerning the rights of long-term third-country national residents emerged as well. The first effort in this area was a *Resolution adopted in 1996* in the framework of the Third Pillar on the status of third-country nationals residing on a long-term basis in the territory of the Member States⁴³. This non-binding resolution, which was a French initiative, formulated principles on granting long-term resident status, and the rights attached to that status⁴⁴. The purpose was to further integration; however the provision on monitoring implementation by peer review remained a dead letter and the resolution had little visible effect in the Member States⁴⁵. Only with the adoption in 2003 of *Council Directive 2003/109/EC*⁴⁶- the so-called Long Term Residents'

Case of Ahmed v. Austria, (Application No. 51431/99), Judgment of 17 January 2006, available at:

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=ahmed&sessionid=63123366&skin=hudoc-en>

⁴³ Council Resolution of 4 March 1996, Official Journal C 080 , 18/03/1996 P. 0002 – 0004, available at: [http://eur-](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31996Y0318(02):EN:HTML)

[lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31996Y0318\(02\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31996Y0318(02):EN:HTML)

⁴⁴ Groenendijk, Kees, "The legal integration of potential citizens: denizens in the EU in the final years before the implementation of the 2003 Directive on long-term resident third country nationals", in Bauböck, Rainer, Ersbøll, Eva, Groenendijk, Kees and Waldrauch, Harald (eds.) *Acquisition and loss of nationality. Policies and trends in 15 European states, vol. 1: Comparative Analyses*, Amsterdam University Press, IMISCOE series, 2006, at p. 5, also available electronically at:

http://www.imiscoe.org/natac/documents/chapter_10_denizenship.pdf

⁴⁵ Ibid

⁴⁶ *Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents*, available at: <http://eur->



Directive - was this matter effectively regulated for the first time at EU level. The Directive is the main instrument regulating the granting of residence rights to non-EU nationals. Its underlying principles had been elaborated by the special meeting of the European Council in Tampere in 1999. The Tampere Council recognised the necessity for the EU to ensure fair treatment of third country nationals who reside legally on the territory of its Member States⁴⁷. It envisioned a more vigorous integration policy, aimed at granting third country nationals rights and obligations comparable to those of EU citizens⁴⁸. Finally, it acknowledged that third country nationals who hold a long-term residence permit should be granted a set of uniform rights, as similar as possible to those enjoyed by EU citizens in that Member State⁴⁹.

I. THE PROTECTION AFFORDED BY THE LONG-TERM RESIDENTS' DIRECTIVE

The first efforts

Seeking to achieve the goals set by the Tampere Council, the European Commission published its *proposal for the Directive in March 2001*⁵⁰. In its Explanatory Memorandum the Commission recalled the spirit of the Tampere Conclusions and stressed that full integration also entails the right for long-term residents to reside in other Member States⁵¹. A genuine area of freedom, security and justice, a fundamental objective of the European Union, is unthinkable without a degree of mobility for third-country nationals residing there legally, and particularly for those residing on a long-term basis⁵². The Commission's proposal included refugees but not persons under a subsidiary form of protection in accordance with international obligations, national legislation or the practice of the

lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:016:0044:0053:EN:PDF [*Long-Term Residents' Directive*]

⁴⁷ Tampere European Council, *Presidency Conclusions*, 15-16 October 1999, point 18 available at: http://www.europarl.europa.eu/summits/tam_en.htm

⁴⁸ Ibid

⁴⁹ Presidency Conclusions, point 18

⁵⁰ *Proposal for a Council Directive concerning the status of third-country nationals who are long-term residents*, COM (2001) 127 final, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2001:0127:FIN:EN:PDF>

⁵¹ Ibid, Point 5.6 Explanatory Memorandum.

⁵² Ibid



Member States⁵³, as subsidiary protection had not yet been harmonized at EU level.

The adoption of Long-Term Residents' Directive

The *Directive was adopted in November 2003*, after two years of negotiations. It binds all EU Member States except Ireland, the United Kingdom⁵⁴ and Denmark⁵⁵. At its outset the Directive recalls the Tampere commitments and stresses that the integration of long-term resident third country nationals is a key element to promoting economic and social cohesion⁵⁶. The basic requirements for the conferral of long term resident status are: legal and continuous residence in a Member State for 5 years prior to the submission of the application⁵⁷, economic means requirements, that is stable and regular incomes sufficient to maintain the applicant and the members of his family without recourse to the social assistance system⁵⁸ and comprehensive sickness insurance⁵⁹. In addition, Member States *may* impose the fulfilment of integration conditions as an additional requirement⁶⁰. Such conditions are usually adequate knowledge of the national language and/ basic knowledge of the legal system, culture and history. Member States may refuse to grant long-term residence status for reasons of public policy and public security⁶¹. Persons who fall in the scope of the Directive receive a long-term resident's permit which is valid at least for 5 years and is automatically renewable upon expiry⁶². They enjoy equal treatment with nationals in such areas as access to employment, education, social security and assistance, although Member States retain the discretion to restrict equal treatment in certain proscribed cases⁶³.

⁵³ Article 3(2)(b), COM (2001) 127 final

⁵⁴ Point 25 Preamble, Directive 2003/109/EC

⁵⁵ Point 25 Preamble, Directive 2003/109/EC

⁵⁶ Point 2, Point 4 Preamble, Directive 2003/109/EC

⁵⁷ Article 4(1), Directive 2003/109/EC. Article 4(3) specifies that periods of absence that are shorter than 6 consecutive months and do not exceed in total 10 months shall not interrupt the period of residence in question.

⁵⁸ Article 5(1)(a), Directive 2003/109/EC

⁵⁹ Article 5(1)(b), Directive 2003/109/EC

⁶⁰ Article 5(2), Directive 2003/109/EC

⁶¹ Article 6(1), Directive 2003/109/EC. However economic considerations on behalf of a member state cannot validly form the basis of the justification of such a decision.

⁶² Article 8(2), Directive 2003/109/EC.

⁶³ Article 11(2), Directive 2003/109/EC.



Furthermore, the Directive provides for the right of residence in a second Member State, subject to certain conditions⁶⁴.

Gaps and Weaknesses

Despite the progress the Directive marked towards the attainment of secure residence status for a large number of third country nationals, it also contained serious limitations. Refugees and beneficiaries of subsidiary protection, as well as persons authorized to stay on the basis of a national status of complementary protection were excluded from its scope⁶⁵. This rule created an unjustified distinction⁶⁶ between beneficiaries of protection and other third country nationals and hinders significantly the former category's integration. A secure legal status and durable residence permits would ensure their effective access to social and economic rights in the host society, establish their right to freedom of movement within the EU, and provide them with the stability and security required in order to meaningfully integrate⁶⁷. Another important weakness of the Directive was the possibility for Member States to include integration conditions as a prerequisite to long-term resident's status. Such exclusive policies which envisage secure legal status as remuneration for completed integration rather than a tool to enhance integration can have a particularly negative impact-especially among the most vulnerable groups of migrants⁶⁸.

⁶⁴ Chapter III, Directive 2003/109/EC

⁶⁵ Article 3(2) Directive 2003/109/EC

⁶⁶ This arises as States authorise the presence of all such categories of third country nationals on their territory in view of their established protection needs as well as further humanitarian considerations.

⁶⁷ See ECRE, *The Way Forward : Towards the Integration of Refugees in Europe*, July 2005, available at: <http://www.ecre.org/files/Integ.pdf>

⁶⁸ See Groenendijk Kees, 'The Long-Term Residents Directive: Denizenship and Integration' in Baldaccini, Anneliese, Guild Elspeth and Toner Helen (eds), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy*, Oxford, Hart Publishing, 2007, pp. 442-446 as well as Carrera Sergio, Wiesbrook, Anja, *Civic Integration of Third-Country Nationals Nationalism versus Europeanisation in the Common EU Immigration Policy*, CEPS Liberty and Security in Europe, Justice and Home Affairs, October 2009, available at: <http://www.ceps.eu/book/civic-integration-third-country-nationals-nationalism-versus-europeanisation-common-eu-immigrat>



II. EXTENDING THE SCOPE OF THE LONG-TERM RESIDENTS' DIRECTIVE

The first efforts

Upon the adoption of the Long –Term Residents Directive in 2003 the Council and the Commission called in a May 2003 statement for the extension of the Directive to cover beneficiaries of international protection. In 2007 the Commission issued a proposal⁶⁹, the main aim of which was to offer beneficiaries of international protection legal certainty about their residence in a Member State, and rights comparable to those of EU nationals after 5 years of legal residence⁷⁰. The notion of persons benefiting international protection was to be confined to the Qualification Directive⁷¹ definition and the duration of the asylum procedure was to be taken into account in order to calculate 5 years of legal residence in a Member State. However, a mechanism for the transfer of responsibility for protection would remain outside the scope of the Directive⁷². As compensation for this, although the proposal envisaged amendments in order to enhance respect for the principle of non-refoulement⁷³.

⁶⁹ *Proposal for a Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection, COM(2007)298 final*, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0298:FIN:EN:PDF>

⁷⁰ *Ibid*, *Explanatory Memorandum*, at point 3.

⁷¹ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0083:EN:HTML>

⁷² *Explanatory Memorandum*, at point 3. This consideration was based on the fact that transfer of responsibility merits a different proposal as it may occur even before the long-term resident status is acquired and independent of it and it required a sufficient level of harmonization of Member States asylum procedures. See as well the Study on behalf of the European Commission " *The transfer of protection status in the EU, against the background of the common European asylum system and the goal of a uniform status, valid throughout the Union, for those granted asylum*" by the Danish Refugee Council, the Migration Policy Institute and the Institute for Migration and Ethnic Studies that was finalized in 2004 and examined different policy options for the transfer of responsibility. The study is available at: http://ec.europa.eu/home-affairs/doc_centre/asylum/docs/transfer_protection_status_rev_160904.pdf

⁷³ See proposed amendments to Articles 8,11,12,22 and 25 of Directive 2003/109/EC.



The European Parliament adopted its position in April 2008⁷⁴, for the most part supporting the Commission's proposal, but calling for additional support for the economic means and integration conditions of beneficiaries of international protection, in view of their particular vulnerabilities. It brought forth additional amendments to count periods of temporary protection in reckoning the duration of the procedure, when temporary protection is followed by international protection. The Council agreed on a majority position⁷⁵ in December 2008⁷⁶. The Council proposal extended the scope of the Long-Term Residents Directive to beneficiaries of international protection as defined by the Qualification Directive, but not to beneficiaries of further categories of complementary protection. Finally, the Council position included no exceptions to the economic means and integration conditions requirement. However, given that unanimity that was at that point required for the adoption of this Directive, negotiations had to continue as all national delegations but one agreed on the text of the Directive.

The entry into force of the Lisbon Treaty⁷⁷ influenced the ongoing negotiations of the Directive. Its introduction led to legal changes, and it brought the proposal under the ordinary legislative procedure, where co-decision of the Council and the European Parliament applies. The European Parliament in its draft report of August 2010⁷⁸ supported the Commission's proposal that the full duration of the

⁷⁴ P6_TA(2008)0168, European Parliament legislative resolution of 23 April 2008 on the proposal for a Council directive amending Directive 2003/109/EC to extend its scope to beneficiaries of international protection (COM(2007)0298 — C6-0196/2007 — 2007/0112(CNS)) (2009/C 259 E/27), available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:259E:0126:0129:EN:PDF>
See as well the resolution in its draft form accompanied by the Explanatory Statement of the Rapporteur MEP Martine Roure, released 19.02.2008, available at: http://www.europarl.europa.eu/meetdocs/2004_2009/documents/pr/709/709345/709345en.pdf

⁷⁵ See the relevant Council Press Release *Press Release, 2908th meeting of the Council Justice and Home Affairs*, Brussels, 27 and 28 November 2008, at: <http://europa.eu/rapid/pressReleasesAction.do?reference=PRES/08/344&format=HTML&aged=0&lg=en&guiLanguage=en>

⁷⁶ Proposal for a Council Directive amending Directive 2003/109/EC to extend its scope to beneficiaries of international protection, 2007/0112(CNS), 16476/08, 2 December 2008, at: <http://register.consilium.europa.eu/pdf/en/08/st16/st16476.en08.pdf>

⁷⁷ See Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, C306/1

⁷⁸ Draft Report on the proposal for a directive of the European Parliament and of the Council amending Directive 2003/109/EC to extend its scope to beneficiaries of international protection (COM(2007)0298 – C6-0196/2007 – 2007/0112(COD)), Committee on



procedure should be counted toward the required 5 years of legal residence and clarified that any other period of legal residence, including temporary protection before the granting of international protection, should be taken into account as well. However, it departed from its earlier position in that it did not call for a qualification of the economic means or integration conditions requirement for beneficiaries of international protection, even on a case-by-case basis. Informal contacts between the European Parliament and the Council followed and agreement between the two institutions was found in late 2010. The LIBE Committee unanimously approved the amended text in November 2010⁷⁹ and in December 2010 the full Parliament endorsed this with a vote at its December 2010 plenary session, in Strasbourg, leading into a “first-reading” agreement.

Extension of the Directive to cover beneficiaries of international protection

On May 2011 the extension of the EU rules on long-term residents amending Directive 2003/109/EC was adopted by the Council and the European Parliament⁸⁰. Member States, apart from Ireland, the United Kingdom and Denmark which are not participating in the application of the rules, will have to transpose the Directive in two years⁸¹. Beneficiaries of international protection, that is recognised refugees and subsidiary protection beneficiaries, will have access to long-term residence status with exactly the same terms as other third country nationals. However, a rather complicated compromise was reached regarding the calculation of the duration of legal residence for beneficiaries of international protection. Member States should count “at least half of the period” between the date on which the application for international protection was lodged and the date on which a residence permit on protection grounds is actually delivered to a beneficiary of

Civil Liberties, Justice and Home Affairs, Rapporteur: Claude Moraes, 30 August 2010, available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-443.143+01+DOC+PDF+Vo//EN&language=EN>

⁷⁹ European Parliament Press Release, *Residence rights for refugees and people under international protection*, 29th November 2010, available at: <http://www.europarl.europa.eu/en/pressroom/content/20101129IPR02769/html/Residence-rights-for-refugees-and-people-under-international-protection>

⁸⁰ Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:132:0001:0004:EN:PDF>

⁸¹ Ibid



international protection⁸². That is the rule unless the asylum examination process exceeds 18 months in which case the whole time-period is to be taken into account⁸³. Therefore, refugees and beneficiaries of international protection could wait up to 9 months more than other third country nationals to be granted the long-term resident status. Moreover, they *require* Member States to refuse long-term residence status in the event that refugee or subsidiary protection status had to be revoked under certain circumstances set out in the Qualification Directive (new Article 4(1b)); they also *permit* (but do not require) Member States to withdraw long-term residence status in the same circumstances⁸⁴. Finally, a mechanism for the transfer of responsibility for protection continues to remain outside the scope of the Directive.

Gaps and weaknesses

The adopted extension is a positive step in closing the gaps left by the Long-Term Residents Directive as adopted in 2003. However, the text contains important shortcomings. The most significant limitation is that refugees and beneficiaries of subsidiary protection are expected to comply with exactly the same economic means and integration conditions requirements as other third country nationals. As several civil society organizations stressed since the original Commission proposal for extension, such rules fail to take into account the particular situation of beneficiaries of international protection, who have often been denied access to the labour market, and who experience increased vulnerability due to the physical and psychological trauma of their forced flight⁸⁵.

In addition, significant numbers of persons with protection needs will still be refused the opportunity to regularize their stay permanently. UNHCR had proposed the inclusion of persons with any type of residence status based on a complementary form of protection, even if not recognized by the Qualification

⁸² New Article 4(2) Long-Term Residence Directive.

⁸³ Ibid

⁸⁴ Peers, Steven, *Statewatch Analysis No 114: Extending EU long-term resident status to refugees and persons with subsidiary protection status*, available at: <http://www.statewatch.org/analyses/no-114-ltr.pdf>

⁸⁵ See among others ECRE, *Comments from the European Council on Refugees and Exiles on the Proposal for a Council Regulation amending Directive 2003/109/EC to extend its scope to beneficiaries of international protection*, March 2008, available at: <http://www.ecre.org/files/ECRE%20Comments%20LTR%20Proposal%20March%202008%20ofinal.pdf>



Directive⁸⁶. Their inclusion would not only ensure that all persons with international protection needs would ultimately enjoy a standardized set of rights, but would also maintain the integrity of the system underlying the determination of who qualifies for long-term resident-status⁸⁷. Indeed, there is no justifiable reason of differentiation for beneficiaries of subsidiary protection or for third country nationals who are granted residence on humanitarian or any other ground⁸⁸. The main criteria for obtaining long-term resident status should be the length of the legal stay, regardless of the grounds on which the right of residence was granted, unless the third country national resided in a Member State solely on temporary grounds⁸⁹. One must note that such persons continue to be excluded notwithstanding the fact that under national regulations they might qualify for a national permanent residence status. In addition, persons under a stay of deportation because they cannot be returned to their country of origin, often for reasons that are not of a temporary nature, will continue to remain outside the scope of the extension and will have minimal access to social rights.

Finally a point of concern is the differentiation established between beneficiaries of international protection and the rest of third country nationals in what concerns the calculation of the duration of legal residence. UNHCR in its updated comments on the proposal⁹⁰ noted with concern this differentiation as it sustained that legal and continuous residence is the main criterion required by the Directive and international protection seekers fulfil this criterion during the time they await for their decision⁹¹.

⁸⁶ UNHCR Observations on the Commission Proposal for a Council Directive Amending Directive 2003/109/EC Establishing a Long-Term Residence Status to Extend its Scope to Beneficiaries of International Protection, February 2008, at page 3, available at: <http://www.unhcr.org/47cc1bbb2.html>

⁸⁷ Ibid

⁸⁸ This point was put forth by the Meijers Committee in their January 2008 *Note on the proposal to extend the scope of the LTR directive*, available at: http://www.commissie-meijers.nl/assets/commissiemeijers/Commentaren/2008/CM08002%2011%20Note%20on%20the%20proposal%20to%20extend%20the%20scope%20of%20the%20LTR%20directive_LIB E.pdf

⁸⁹ Ibid

⁹⁰ Updated UNHCR Observations on the Proposal for a Directive of the European Parliament and of the Council Amending Directive 2003/109/EC Establishing a Long-Term Residence Status to Extend its Scope to Beneficiaries of International Protection, August 2010, available at: <http://www.unhcr.org/refworld/docid/4c601c5e2.html>

⁹¹ As UNHCR mentions this is indeed acknowledged by the Member States as they do wish to take into account part of this period.



4. REGULATION OF LONG-TERM RESIDENCE AT THE NATIONAL LEVEL

In this section the regulation of long-term residence and the requirements for the acquisition of such status at the national level will be briefly analysed for 5 countries: Germany, Romania, Sweden, Switzerland and the United Kingdom. The transposition of the Long-Term Residents Directive has often led to the situation where two types of permanent residence exist: a national permanent residence permit and the EC long-term residence permit⁹². As highlighted below, national practices vary concerning the prerequisites to acquiring a long-term residence status, mainly regarding the duration of stay prior to granting the status. In addition, criteria within each national system for granting a permanent residence vary depending on the immigration category concerned. This leads to a set of complicated rules that burden national administrations during their examination and are not cost-effective, while they at the same time render the status of a significant number of persons precarious, often despite the fact that they have built substantial ties with the host country.

⁹² IOM, *Comparative Study of the Laws in the 27 EU Member States for Legal Immigration*, 2009, at p. 52



I. THE CASE OF GERMANY⁹³

German law establishes the granting of two permanent residence titles: a settlement permit (Niederlassungserlaubnis) and a permanent residence in the EC (Erlaubnis zum Daueraufenthalt-EG), which are both very similar. A settlement permit is unlimited, entitles its holder to engage in gainful employment and is unrestricted in duration. The preconditions include maintenance-related clauses such as a secure livelihood, payment of contributions into a statutory pension scheme and possession of a sufficient living space for the applicant and his family. In addition the Residence Act requires that applicants have held previously a limited residence permit for five years. Furthermore, the Immigration Act which entered into force in January 2005 provides also for integration-related requirements. Non-EU immigrants can be required to successfully complete an

⁹³ Sources:

- Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet (Aufenthaltsgesetz - AufenthG), Ausfertigungsdatum: 30.07.2004, Stand: Neugefasst durch Bek. v. 25.2.2008 I 162, durch Artikel 1 des Gesetzes vom 12. April 2011 (BGBl. I S. 610) geändert worden ist available at: http://www.gesetze-im-internet.de/bundesrecht/aufenthg_2004/gesamt.pdf
- Deutscher Bundestag Drucksache 17/5093 17. Wahlperiode 16. 03. 2011, available at: <http://dip21.bundestag.de/dip21/btd/17/050/1705093.pdf>
- Parusel, Bernd, Working Paper 30, The Granting of Non-EU Harmonised Protection Statuses in Germany Research Study II/2009 in the framework of the European Migration Network (EMN), German National Contact Point and Research Section of the Federal Office, February 2010, available at: http://www.bamf.de/nn_1034446/SharedDocs/Anlagen/EN/Migration/Publikationen/Forschung/WorkingPapers/wp30-schutzgewaehrung-in-deutschland.templateId=raw.property=publicationFile.pdf/wp30-schutzgewaehrung-in-deutschland.pdf
- Gutmann, Rolf, Field Researcher for Germany, IOM, Comparative Study of the Laws in the 27 EU Member States for Legal Immigration, 2009
- ECRE, *Complementary Protection in Europe*, July 2009, available at: http://www.ecre.org/files/ECRE_Complementary_Protection_July_2009.pdf
- Striek, Tineke, Bocker, Annita, van Oers, Ricky, *The INTEC Project, Draft Synthesis Report: Integration and Naturalisation Tests: the new way to European Citizenship*, Centre for Migration Law, Radboud University Nijmegen, the Netherlands, October 2010
- Diakonie, CARITAS, Aktion Bleibenrecht-Aufruf 2009: Kettenduldungen beenden – humanitäres Bleiberecht sichern, available at: http://www.aktion-bleiberecht.de/media/090511_pm_108_Statement1.pdf



integration course which consists both of a basic and an advanced language course which aim at imparting an intermediate level of German (B1) as well as an orientation course which aims at imparting a basic knowledge of the legal system, culture and history. According to the first findings of the INTEC Project, not passing the integration test will not automatically lead to the refusal of a permanent residence permit - this will depend also on whether the immigrant in question has attended the course "properly". The permanent residence in the EC was enacted in order to comply with the Long-Term Residents Directive. The requirements for its acquisition are similar; the difference is that this type of permit constitutes at the same time an entitlement to residence in another EU Member State. In addition, third-country nationals that have acquired an EU long-term residence permit in another Member State are granted a residence permit for their stay in Germany.

The Residence Act provides for a multitude of residence permits that are granted for reasons of international law or for humanitarian or political reasons. Those who have been granted with a *Refugee status in the sense of the Geneva Convention* receive at first a three year residence permit. If after 3 years they continue to fulfil the criteria for being granted refugee status they receive a settlement permit. Those who have been granted a *subsidiary protection*-a status which includes both the granting of protection under the reasons established under the EU Qualification Directive and the granting of protection on a national basis - receive initially a residence permit with a duration of at least one year. They can claim a permanent residence permit after residing in Germany for 7 years if they fulfil the other above-mentioned requirements.

From the multitude of other national statuses the research will focus on certain provisions which affect larger numbers of persons. German law also foresees an *exceptional leave to remain the so-called "Duldung"*. A Duldung is granted if a person is legally obliged to leave Germany but removal is impossible for "factual or legal reasons", as well as for "reasons of international law or humanitarian reasons" or for pressing humanitarian or personal reasons. There are factually two forms of Duldung: it is possible for the supreme authority of the Länder to suspend the removal of *particular groups of foreigners* for a maximum duration of six months and furthermore deportation can be stayed *on an individual basis* because of the personal circumstances. Duldung does not confer any right of residence; it does not constitute a temporary residence title, legally the residence remains unlawful with the obligation persisting to leave the country without delay. However in practice, and as there is no limit in law of how many consecutive six months periods this non-status can be extended for, thousands of persons had for



many years been in the German territory based on this exceptional leave to remain.

In order to address this unviable situation the law provided for the *granting of residence within the framework of the regulations governing old cases "Altfallregelung"*. This regulation provided for granting a residence permit strictly on a case-by-case basis for persons that have integrated themselves on both an economic and social level. The provision is intricate and establishes different requirements for various categories but one can discern two basic criteria through which integration is defined: adequate knowledge of the German language and economic independence through gainful employment. For persons that did not fulfill the criteria of securing a livelihood by their own means for themselves and their dependants the law provided for a "residence permit on trial" until December 2009 which would be extended only if the foreigners had managed in the meantime to secure their livelihood to a greater extent. However, as a result of the economic crisis many applicants who had received a "residence permit on trial" did not manage to fulfill the prescribed criteria. Therefore in December 2009 it was decided to extend the legal deadline of the "residence permit on trial" through an elaborate provision for persons who had either succeeded to find part-time employment or to follow a school or apprenticeship course.

A new development is that in March 2011 a possibility to acquire a permanent residence permit was introduced in the residence law for *well-integrated adolescents and young adults* (Bleiberechtsregelung für ‚integrierte‘ Jugendliche und Heranwachsende). The law stipulates that this concerns youths that were either born in Germany or arrived in the country before they were 15 years old, have followed successfully 6 years schooling or vocational training and are currently older than 15 and less than 21 years old. In addition, parents of beneficiaries of this residence permit as well as their underage children may also acquire a residence permit if they fulfill certain criteria.

The final category of residence permits that we will touch upon is *the residence permit in cases of hardship* (Aufenthaltsgewährung in Härtefällen). This consists of a residence permit by means of an instruction issued by the competent supreme Land authority in cases of particular hardship and at the request of a "Commission for Cases of Hardship". It concerns aliens whose obligation to leave Germany has already become final and in the event that there is no possibility of a residence permit being issued or extended in accordance with other legal provisions. The hardship commissions decide themselves with which cases they deal; a foreigner cannot file such an application. A residence permit will be granted on a discretionary basis if pressing humanitarian or personal reasons justify the alien's



presence in Germany. The duration of residence in Germany as well as the social and economic integration of the individual in the country will be factored in the evaluation of each individual case.

II. THE CASE OF ROMANIA⁹⁴

The right of permanent residence may be granted, upon request, for an undetermined duration, to non-nationals who hold a temporary right to reside. However, the following categories are excluded: holders of a right to temporary residence for the purpose of study, asylum applications, beneficiaries of temporary humanitarian protection or of other types of temporary protection, and holders of a diplomatic or official visa. According to the Law on Asylum, refugees are issued with a temporary residence permit for three years with the possibility of extension, and beneficiaries of subsidiary protection receive a one year permit, also extendable. The law also provides that the responsible authorities may grant the beneficiaries of refugee status or subsidiary protection the right of permanent residence in the country. In their assessment they will take into account their level of their integration within society. The Law on Asylum also defines a category of temporary humanitarian protection beneficiaries who originate from conflict areas, during the period of armed conflict. Temporary humanitarian protection is granted, if there are indications or information that a massive and spontaneous inflow of

⁹⁴ Sources:

- EMERGENCY ORDINANCE No. 194 of 12 December 2002 (**republished**)(*updated*) on the status of aliens in Romania**) (updated to the date of 26 June 2007*), available at: http://ori.mai.gov.ro/api/media/userfilesfile/Legislatie/Legislatie%20nationala/OUG_194_2002_2007_EN.pdf
- Methodological Norms of 9 September 2004 (*updated*9) for the enforcement of Government Ordinance no. 44/2004 on the Social Integration of Aliens Who Were Granted a Form of Protection or a residence permit in Romania, as well as of citizens of European Union Member States and of the European Free Trade Agreement, available at: http://ori.mai.gov.ro/api/media/userfilesfile/Legislatie/Legislatie%20nationala/OUG_44_2004_EN.pdf
- LAW No. 122 from 4 May 2006 on the Asylum in Romania, Published in: Official Journal No. 428 from 18 May 2006, available at: http://ori.mai.gov.ro/api/media/userfilesfile/Legislatie/Legislatie%20nationala/L_122_2006_EN.pdf
- Ulrich, Louis, Stănciugelu, Ștefan, Mihăilă, Viorel, Bojincă, Marian, *The Beneficial Regularisation of Immigration in Romania*, Soros Foundation Romania, 2010



persons who need protection may be expected from the conflict area. It is granted for a fixed period, not to exceed 2 years. Persons who benefit from temporary humanitarian protection may submit asylum applications only after temporary protection ceases.

The conditions to be granted a permanent residence under the Aliens act are:

1. continuous and legal stay on the territory of Romania during the last 5 years prior to submission of the request;
2. means of subsistence at a level of the minimum net wage, unless they are family members of Romanian citizens;
3. social health insurance ;
4. legal tenancy of their place of accommodation;
5. knowledge of the Romanian language at a satisfactory level.

However some exceptions apply. Aliens of Romanian origin or born in Romania, as well as those whose stay is in the interest of the State, may be granted permanent residence without the need to fulfil the above conditions. Minors whose parents hold a permanent right to residence are also exempted. Finally, aliens who prove that they have performed investments of at least 1.000.000 Euro or have created more than 100 full-time jobs may be granted the right to permanent residence without the need to fulfil the 5-year continuous and legal stay criterion. The permanent residence permit is issued for a period of 5 years and is renewable.

The Alien's Law also stipulates a category of tolerated stay. The law defines toleration as permission to stay on the territory, granted to a non-national who does not have a right to reside but cannot leave Romania for objective reasons. This category includes persons believed to be victims of trafficking, non-nationals against whom a measure of return has been ordered, but who could not be removed for 6 months, non-nationals whose presence on the territory of Romania is required by important public interest as well as those for whom the Romanian Migration Office has determined that they are unable to leave Romanian territory for other objective reasons. The law mentions that toleration is granted for 6 months, extendable *until the reasons for its issue no longer exist*. There is no provision for access to permanent residence for this category of aliens.



III. THE CASE OF SWEDEN⁹⁵

In Sweden, too, a variety of rules are applicable to the different categories of non-nationals. However, a characteristic of this national legal order is that certain categories of aliens receive a permanent residence permit immediately, i.e. without having to fulfil the criterion of prior continuous legal stay. This pertains to a national long-term residence status. The issue of the EU long-term resident status is also regulated through specific provisions that transpose the EU Long-Term Residents Directive. In this case, and for those who fulfil the criteria, EU Long-Term Residents status will be granted in addition to national permanent residence status. It must be noted that, as also stipulated in the Directive, persons who receive a residence permit on humanitarian protection grounds are not eligible for the EU long-term resident status.

Persons who receive *a residence permit for the reason of employment* will initially receive a residence permit that covers the work contract or a work permit of 2 years-whichever is shorter. This permit can be extended for another 2 years. After that they can apply for a permanent residence permit if they continue to be employed, therefore in total after 4 years of having a temporary residence permit. Persons who receive a *permit on the basis of family unity* will immediately receive a permanent residence permit if they had lived together in the country of origin for 2 years. Otherwise they will receive a temporary permit, usually for two years, which is extendable. The general principle is that the Migration Board grants a permanent residence permit after the couple has lived together for two years.

Three categories of aliens can receive *a residence permit for protection reasons*: refugees, beneficiaries of subsidiary protection and persons otherwise in need of protection. This last status, a national complementary protection status, can be

⁹⁵ Sources:

- Aliens Act (2005:716), Issued: 29 September 2005, available at: <http://www.sweden.gov.se/content/1/c6/06/61/22/bfb61014.pdf>
- Act amending the Aliens Act (2005:716) , issued on 17 December 2009, available at: <http://www.sweden.gov.se/content/1/c6/06/61/22/94531dbc.pdf>
- Aliens Ordinance (2006:97) , Issued: 23 February 2006, available at: <http://www.sweden.gov.se/content/1/c6/07/56/18/7cbd265a.pdf>
- Johnson, Christina, Field Researcher for Sweden, IOM, Comparative Study of the Laws in the 27 EU Member States for Legal Immigration, 2009
- ECRE, *Complementary Protection in Europe*, July 2009, available at: http://www.ecre.org/files/ECRE_Complementary_Protection_July_2009.pdf



granted to non-nationals who need protection because of an external or internal armed conflict or, because of other severe conflicts in their country of origin, have a well-founded fear of being subjected to serious abuses, or to those unable to return because of an environmental disaster. All three categories receive as a rule a permanent residence permit immediately upon recognition. However, compelling considerations of national security or public order can impose a shorter period. In any case a residence permit granted to this category of aliens may not be valid for less than one year. Exceptionally, failed asylum seekers may receive a temporary residence permit if they have had employment that provides them with the means to sustain themselves and pay for their insurance for at least six months, and that will continue for one year after the date of the application. Resettled refugees receive a permanent residence permit immediately after they enter the country.

Two further categories of residence permit exist. First, a permit may be granted if an overall assessment of the situation of the non-national reveals the existence of *exceptionally distressing circumstances* which justify that they should be allowed to stay in Sweden. In making this assessment, particular attention is paid to their state of health, their adaptation to Sweden, and their situation in the country of origin. Children may be granted residence permits under this section even if their circumstances do not have the same seriousness required for an adult. Persons falling under this category will receive a permanent residence permit unless the permit is granted on grounds of sickness and the alien's sickness or need of care in Sweden is temporary. In addition, the alien may receive a permit when there are *impediments to the enforcement of refusal of entry or expulsion orders*. These exist when the alien would risk persecution, the death penalty, corporal punishment, torture or other degrading treatment or punishment in the country of return or a real risk of being transferred to such a country by the country of return. This category of aliens receives a temporary or permanent residence permit, depending on the circumstances.



IV. THE CASE OF SWITZERLAND⁹⁶

Persons who remain in Switzerland for longer than three months require a permit. Residence permits are issued by the Cantonal Migration Offices. A distinction is made between short-term residence permits (autorisation de courte durée-duration of less than 1 year), authorisation to stay (autorisation de séjour-limited duration residence permits) and settlement permits (autorisation d'établissement-unlimited duration residence permit). Switzerland has signed an association agreement to Schengen/Dublin that was fully implemented on 26 October 2004. There are different rules concerning EU-EFTA nationals and non-EU EFTA nationals. The paper will examine only the latter category.

As a general rule, authorities will initially issue third country national aliens with a one-year residence permit. This permit is normally renewed every year unless there are reasons against a renewal, such as criminal offences, dependence on social security, or specific labour market conditions. Permanent "*settlement permits*" are granted after five or ten years' residence. The right to settle in Switzerland is not subject to any restrictions. The Federal Office of Migration fixes the earliest date from which the competent national authorities may grant settlement permits. As a rule, third-country nationals are in a position to be granted a settlement permit after ten years' regular residence in Switzerland. According to the Alien's Law the last five of the 10 years of residence should be uninterrupted and based on an authorization to stay (thus excluding short-term residence permits). US and Canadian nationals are subject to a special regulation. Under the Alien's Law, an authorisation to settle may also be granted on the basis of a shorter duration if this is justified by *important considerations*. Purely economic reasons however, such as investments or job creation, do not normally

⁹⁶ Sources:

- Loi sur l'asile (LAsi) du 26 juin 1998 (Etat le 1^{er} avril 2011), available at: http://www.admin.ch/ch/f/rs/142_31/
- Loi fédérale sur les étrangers (LEtr) du 16 décembre 2005 (Etat le 24 janvier 2011), available at: http://www.admin.ch/ch/f/rs/142_20/index.html
- Règlement des Conditions de Séjour Version 1.7.09 (Etat 1.7.09), available at : http://www.ejpd.admin.ch/content/dam/data/migration/rechtsgrundlagen/weisungen_und_kreisschreiben/weisungen_auslaenderbereich/aufenthaltsregelung/3-aufenthaltsregelung-f.pdf
- ECRE, *Complementary Protection in Europe*, July 2009, available at: http://www.ecre.org/files/ECRE_Complementary_Protection_July_2009.pdf



suffice for this exceptional category of authorisation to stay. A settlement authorisation can be also granted on the basis of an uninterrupted residence of five years' duration based on authorisation to stay *if an alien is well-integrated* in Switzerland, in particular if they are proficient in one of the national languages. Otherwise, integration is attested by respect of public order and democratic principles, and willingness to participate in the labour market and to acquire professional qualifications.

Recognised refugees and stateless persons are granted a permanent residence permit after 5 years of legal residence in Switzerland, if no reason to revoke international protection exists. Their stay during the asylum procedure is counted towards the 5 years. *Persons, who benefit from provisional protection*, those exposed to a serious general danger, especially during international or internal conflict or during situations of generalised violence, may also be granted a settlement permit. The Alien's Law stipulates that such a permit may be issued 10 years after the granting of a provisional protection status. Failed asylum seekers who cannot be deported or asylum seekers who withdrew their application may be granted a special residence permit, *a permit on grounds of exceptional circumstances*. Such persons should have lived in Switzerland for 5 years, counted from the submission of their asylum application; their place of stay should always be known to the authorities; and their case should raise exceptionally severe circumstances in case of deportation, because of their progressed integration. This category of persons has access to a permanent residence permit after 10 years of uninterrupted and legal stay in Switzerland, counted from the date that they have been authorised to remain under the permit on grounds of exceptional circumstances, therefore 15 years after the submission of their asylum claim. Finally persons who are *admitted provisionally to the territory*, whose return or execution of the deportation order is not possible, not lawful or cannot reasonably be demanded, receive a residence title of at most one year that can be prolonged. This category of aliens can apply for an authorisation to stay if they have resided in Switzerland for more than 5 years. Their request will be examined considering their level of integration into Swiss society, their family situation and the possibility to return to their country of origin. If they do acquire an authorisation to stay then they can access a permanent residence permit if they fulfil the general criteria described above, which apply to all aliens.



V. THE CASE OF THE UNITED KINGDOM⁹⁷

Indefinite Leave to Remain (ILR) in the UK corresponds to long-term residence. Different sets of requirements apply to different categories of applicants in terms of duration of stay and integration-related conditions. In all cases specific requirements pertaining to each category should have been complied with throughout the stay and should be complied with at the moment of application. This means that in the case of a protection-based status persons will only be granted an indefinite leave to remain if they still qualify for protection at the moment of application. *Immigrants falling within employment or business categories* have to fulfil 5 years of continuous residence within that category. *Refugees and persons granted leave on humanitarian protection grounds (HP)* (the equivalent of subsidiary protection in the UK) are originally granted a residence permit for five years. After this period they may apply for an indefinite leave to remain.

⁹⁷ Sources:

- UK Border Agency, *Immigration Rules*, last updated April 2011, available at: <http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/>
- UK Border Agency, Asylum Policy Instructions, *Discretionary Leave*, available at: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apis/discretionaryleave.pdf?view=Binary>
- UK Border Agency, Asylum Policy Instructions, *Humanitarian Protection and Discretionary Leave*, available at: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/>
- Striek, Tineke, Bocker, Annita, van Oers, Ricky, *The INTEC Project, Draft Synthesis Report: Integration and Naturalisation Tests: the new way to European Citizenship*, Centre for Migration Law, Radboud University Nijmegen, Netherlands, October 2010
- Bernard, Ryan, Field Researcher for the UK, IOM, *Comparative Study of the Laws in the 27 EU Member States for Legal Immigration*, 2009
- ECRE, *Complementary Protection in Europe*, July 2009, available at: http://www.ecre.org/files/ECRE_Complementary_Protection_July_2009.pdf
- Immigration Directorate's Instructions, *Long Residence*, available at: http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/IDIs/idiscapten8/longresidence/Long_Residence_IDI- final_d1.pdf?view=Binary



Persons who don't qualify as refugees or humanitarian protection beneficiaries but may still not be returned to their countries of origin because that return would involve breach of human rights may be granted with *discretionary leave to remain (DL)*. This category applies to both asylum and non-asylum cases and involves potential violations of the right to family and private life, medical cases, certain categories of unaccompanied minors, as well as persons who would have qualified for refugee or humanitarian protection status but are excluded. A different temporary residence permit is granted depending on the reason discretionary leave to remain was granted. Persons who cannot be returned due to human rights considerations receive a 3-year renewable residence permit, unaccompanied minors receive a permit for 3 years or until they reach the age of 17.5 years, and persons excluded from refugee or humanitarian protection receive a 6-month renewable permit. A person will normally become eligible for consideration for indefinite leave to remain after six continuous years of Discretionary Leave. However, where a person is covered by exclusion they will not become eligible for consideration for settlement until they have completed ten continuous years of Discretionary Leave. Any time spent in prison in connection with a criminal conviction would not count towards the six or ten years.

Persons who do not fit any of the above categories might still access indefinite leave to remain *on the grounds of long-residence*. The rule is that persons falling under this category can request indefinite leave to remain after 10 years of continuous lawful residence, or 14 years of residence irrespective of legality. However in these cases the permit may be refused if granting leave would be against the public good.

Apart from criteria regarding duration of stay since April 2007, most categories of immigrants who apply for indefinite leave to remain are required to demonstrate knowledge of the language and life in the United Kingdom. However certain categories are exempt from this requirement: refugees, persons granted a humanitarian protection status or discretionary leave to remain and persons granted leave to remain as victims of domestic violence. Those younger than 18 and those older than 65 years old are also exempt from this requirement. Those already proficient in English are required to pass a "Life in the UK Test" focused on civic knowledge. Those with a lower level of English are required to successfully complete an "English for Speakers of Other Languages" course (ESOL), which includes defined syllabus material on citizenship, at an accredited college. Those who do not fulfil this requirement, unless exempt, are not eligible for indefinite leave to remain.



5. CONCLUDING REMARKS

The Syrian family A. came in 1996 to Germany⁹⁸. This 4-person family based in Nordrhein-Westfalen can provide for their own subsistence through employment. The children achieve outstanding school results, speak perfect German, and participate in the local athletic union. The family has good relations with their neighbours. However, after 13 years the family has not yet been able to have access to a secure residence status but only a tolerated stay, because their asylum application was once rejected as “manifestly unfounded”. There is only a possibility to apply for a secure residence status to the “Hardship-cases Commission”, a discretionary procedure.

This case illustrates the actual difficulties that thousands of individuals who are part of European societies face daily. The intricate regulations of residence rights at national level and the absence of a coherent framework at a European level in some cases leave individuals, whose presence in the state is legally acknowledged, in an indefinite limbo with temporary residence permits that have to be renewed every few months and do not provide access to the labour market and social welfare. In some cases other national legal orders provide the possibility to acquire a secure legal status but only after as long a time as 10 years, which can result in exclusion from social opportunities necessary to integrate. In addition the conditions to access such a status frequently involve economic means and integration requirements that are difficult to be met by those who have been denied for years access to the labour market or who find themselves in a position of vulnerability due to illness or trauma. On the other hand, certain national legal orders provide for automatic permanent residence for categories such as migrant workers, and recognised refugees and beneficiaries of subsidiary protection.

At the Council of Europe level, a series of recommendations of the Parliamentary Assembly and the Committee of Ministers provide useful guidelines for the right to a secure residence status of non-nationals and safeguards regarding their expulsion. However these instruments are not legally binding. They allow states a wide margin of appreciation to define the category of aliens that can be considered long-term migrants, and are further weakened by the fact that states have made

⁹⁸ This is a real-life case taken with the permission of Diakonie Germany and Caritas Germany from their 2009 publication entitled *Kettenduldungen beenden: humanitäres Bleiberecht sichern: Erfahrung zur Praxis der Bleiberechtsregelungen vom November 2006 und August 2007*, available online at: <http://www.aktion-bleiberecht.de/media/Bleiberechtsbroschuere.pdf>



reservations to a number of their provisions. On the other hand, the European Convention on Human Rights contains essential guidelines both in terms of the protection of all non-nationals, as it is applicable to all individuals under the jurisdiction of signatory members, as well as particularly in the cases of the expulsion of aliens. However, as described above, the case-law of the Court is not conclusive on the type of residence permit that should be accorded to aliens, apart from very specific contexts, and thus leaves the matter to the discretion of national authorities.

At the European Union level, one must acknowledge the adoption of the Long-Term Residents Directive and its recent extension to refugees and beneficiaries of subsidiary protection as an extremely positive step toward securing residence rights for third-country nationals. However, this still leaves unregulated the situation of further categories of non-nationals who either do not meet the criteria of the Directive or belong to a legal category that is excluded from the application of the Directive, even though their presence in a Member State's territory is legally sanctioned. An additional worrying point is that a provision qualifying the economic means and integration requirements for refugees and beneficiaries of international protection was not included, even on a case-by-case basis, although national legal orders exempt such categories from the obligation to fulfil such criteria.

Almost 25 years after the first call of the Churches' Commission for Migrants in Europe for a secure residence status for migrant workers and their families the need is still present to advocate for such a right, this time extending its application to all aliens after five years of legal stay irrespective of the reasons for stay, unless it involves a strictly temporary ground. In addition, this right should apply regardless of the categorisation that national authorities give to the authorisation to stay, e.g. where that is characterised as a stay pending deportation or a tolerated stay, as long as the situation involves an acknowledgement of the physical presence of an alien in the territory and continuous residence for 5 years. It follows that a completely undocumented presence falls beyond the scope of the proposed right, though without any prejudice to the respect owed by governments for the human rights of the undocumented migrants present in their territory. Finally consideration should be given to particularly vulnerable persons who should be exempted, at least on a case-by-case basis, from the economic means and integration requirements.