

- CHAPTER XIV -
COUNTRY REPORT PORTUGAL

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Study on return policies – Portugal

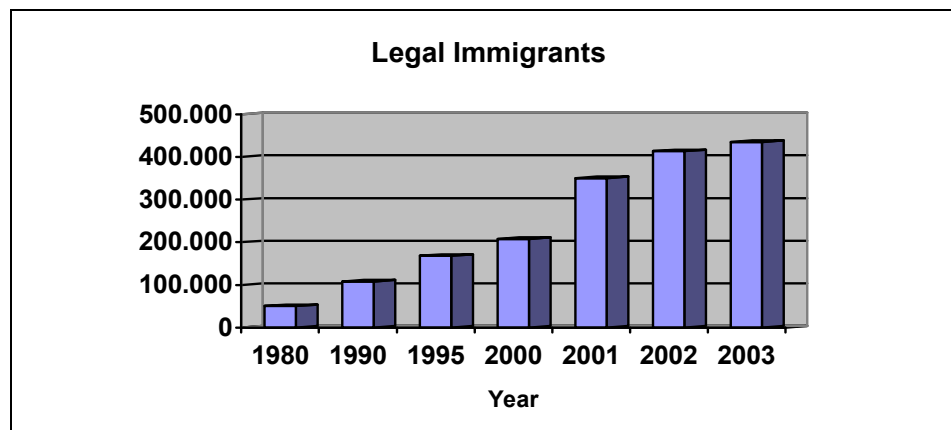
Constança Urbano de Sousa *

1. Trends in Immigration in Portugal (Facts and figures)

1.1 The quantitative changes in immigration flows: From Emigration to Immigration Country

1.1.1 Immigration

Up until the mid 1980's, Portugal was primarily a country of emigrants. The number of legally-resident immigrants in Portugal rose from 50,750 in 1980 to 107,767 in 1990 and 207,607 in 2000⁸⁹⁷. In 2001, the number of legal immigrants was 350,503, which then rose to 434,548 in 2003. This abrupt increase of the number of legal immigrants residing in Portugal in 2001 and 2002 was a direct cause of Decree-Law 4/2001, which introduced amendments in the Decree-Law n° 244/98 (hereinafter Aliens Act) creating a stay permit for all illegal immigrants working in Portugal at the time. This new regime adopted on 15 January 2001 made legalization possible for 183,655 immigrant workers until 2003.



Source: Aliens and Borders Service

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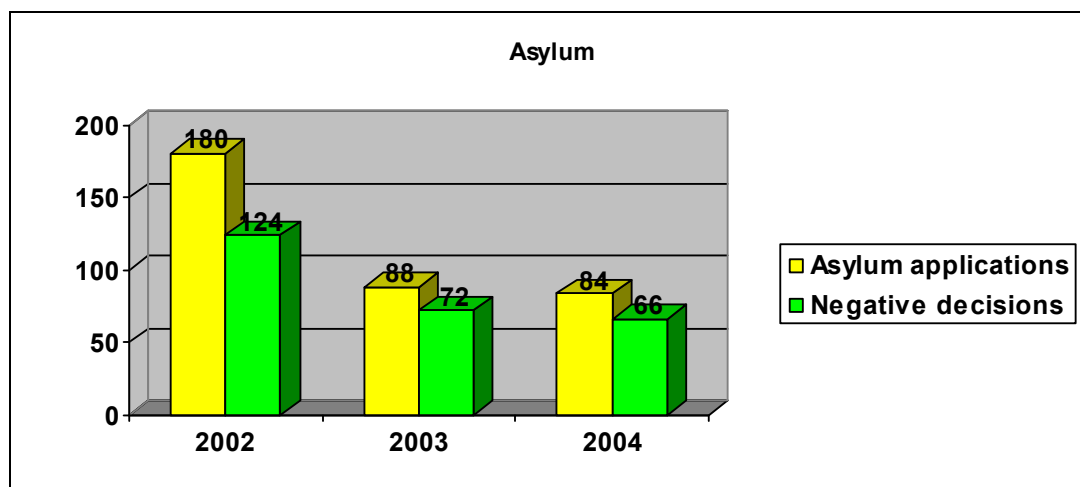
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Hence, from the existing 434,548 legal immigrants in 2003, 183,851 were holders of a “stay permit” while 250.697 were holders of a “residence permit”.

In March 2003, Decree-Law 34/2003 came into force and amended the 1998 Aliens Act. It repealed the existing policies regarding permanence authorization no longer allowing the legalization of immigrant workers in illegal situations. It only contemplated the extension of the stay permit granted until 2003 as long as the permit holder had a work contract and had made all the required tax and social security payments.

1.1.2 Asylum

Immigration in Portugal is essentially economic and family-based. As a consequence, the number of asylum-seekers is very low with a tendency to decrease, despite the legal definition of asylum and subsidiary protection as a subjective right.



Source: Aliens and Borders Service (Asylum and Refugees Unit)

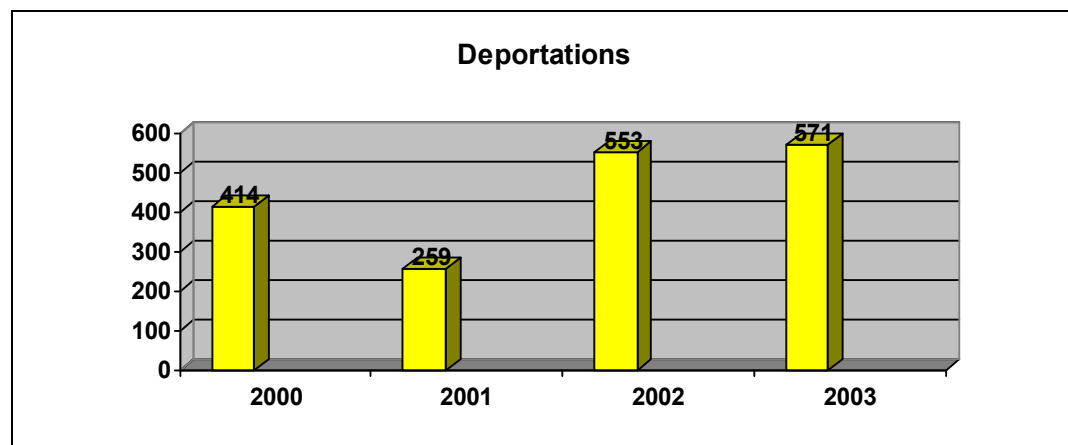
⁸⁹⁷ Source of statistical data: The Aliens and Borders Service (SEF), available in www.sef.pt

Between 1998 and 2001 the number of applications fell steadily. Thus, 338 asylum applications were submitted in 1998, 277 in 1999, 202 in 2000 and only 193 in 2001. In 2002 this number increased to 245 asylum applications and fell drastically to 116 in 2003.

1.2 Return and repatriation

There are no specific figures available about the number of foreigners obliged to return to their country of origin after rejection of an asylum claim or a claim for subsidiary protection (termination of subsidiary protection; withdrawal of refugee status). The data on these categories of aliens are included (without specification) in those relating with expulsion in generally.

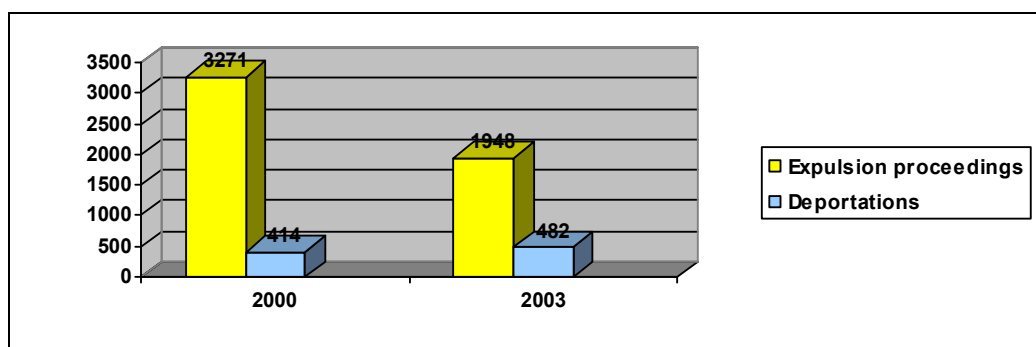
In Portugal there is no public debate on return and repatriation and we assist to a toleration of the authorities upon illegal immigrants. The number of deportations is relatively low, if compared with the large number of illegal immigrants staying in Portugal.



Source: Aliens and Borders Service

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The success rate of the enforcement of an expulsion order is very low. In 2000 the Aliens and Borders Service initiated 3,271 expulsion proceedings and deported 414 aliens. 13% of the expulsion proceedings ended with an effective deportation. In 2003, 1,948 administrative expulsion proceedings against illegal aliens were initiated. Only 420 expulsion orders were enforced and 60 take the form of supervised departure. 25 % of all expulsion procedures ended with effective deportation.



Source: Aliens and Borders Service

2. Legal status of aliens obliged to return

2.1 *Legal status of rejected asylum seekers and persons claiming subsidiary protection*

The Law 15/98, dated 25 March⁸⁹⁸ 1998 (hereinafter Asylum Law), establishes the legal framework for asylum and protection of refugees. The right to political asylum is guaranteed by article 33 (8) of the Portuguese Constitution as a human right. As defined by the 1951 Geneva Convention, refugees are entitled with a subjective right

⁸⁹⁸ Published in the Official Journal (Diário da República) n. ° 72, of 26 March 1998.

of asylum in Portugal (article 1 (2) of Asylum Law)⁸⁹⁹. According to article 8 of the Asylum Law, foreign citizens not covered by the refugee definition have the right to a residence permit on humanitarian grounds, when they are or feel unable to return to their country of origin, as a result of armed conflicts or systematic violation of human rights (subsidiary protection).

The 1998 Asylum Law defines two stages in the asylum procedure, which is applicable to subsidiary protection (single procedure): a preliminary stage for assessing the admissibility of the application, and if admissible, the stage for establishing refugee status (granting asylum) or granting subsidiary protection (residence permit on humanitarian grounds).

In the first stage of the asylum procedure it is the director of the Aliens and Borders Service (which reports back to the Minister for Home Affairs) who is responsible for taking a well-founded decision on the admissibility of the application. The aim of the stage is to quickly identify those applicants who manifestly do not require protection, and those whose application should be analyzed. Should the application be turned down, the Asylum Law provides two levels of appeal: the first is an administrative appeal to the Office of the National Commissioner for Refugees (ONCR). By a negative decision of the ONCR a judicial appeal can be lodged without suspensive effect⁹⁰⁰. That is to say, the applicant must voluntarily leave the Portuguese territory within 10 days. After this period he or she is subject to immediate expulsion⁹⁰¹.

Should the application be admitted, the applicant may stay in national territory with a provisional residence permit and enjoy asylum seeker legal status (social aid, health care, legal aid, etc.) until the final decision. The Minister of Home Affairs is responsible for taking the final decision on granting asylum or humanitarian residence, on the basis of the National Commission for Refugees' proposal.

⁸⁹⁹ About the asylum procedure in Portugal see Sousa, Constança Urbano, "Le régime juridique de la protection subsidiaire au Portugal", in *La Protection de réfugiés dans la U.E.: un complément de la Convention de Genève?*, Bruylant, Brussels, 2002; "The asylum single procedure in Portugal", in Hailbroner, Kay, *Study on the Asylum Single Procedure (one-stop shop) against the background of the Common European Asylum System and the goal of a Common Asylum Procedure*, European Communities, Brussels, 2003, pp. 319-338.

⁹⁰⁰ Article 16 (2) Asylum Law.

⁹⁰¹ Article 15 (1) Asylum Law.

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A judicial appeal against the Home Affairs Ministry's refusal of asylum or subsidiary protection can be lodged with automatic suspensive effect⁹⁰². Should the Court confirm refusal, the applicant may remain in national territory for up to 30 days, after which he shall be subject to the Aliens Act⁹⁰³. This means that he shall be subject to expulsion under the terms and effects of the Aliens Act. To avoid expulsion the rejected asylum seeker can opt for voluntarily return on the basis of a Return Program organized by the IOM and financed by the Portuguese State.

2.2 *Refugees whose status has been terminated*

When the refugee loses his or her right to asylum, he or she may be liable of being expelled, because his or her right of residence expires.

The Minister of Home Affairs is the competent authority to declare the loss of asylum in following cases: renunciation of the asylum right by the refugee; the voluntary re-settlement in the country he or she left or out of which he or she stayed for fear of persecution; the decision of expulsion of the refugee taken by the court; voluntarily departure of national territory by the refugee, thus settling in another country⁹⁰⁴.

Only the Court of Appeal (second jurisdiction court) can declare the loss of the right of asylum in following cases: practice of forbidden activities by the refugee⁹⁰⁵; when the alien obtained asylum by fraudulent means; the existence of facts which, had they been known at the time of granting asylum, would have implied a negative decision; the request and the obtaining by the refugee of the protection of the country of his or her nationality; the voluntary re-acquisition of the nationality he or she had

⁹⁰² Article 24 (1) Asylum Law.

⁹⁰³ Article 25 Asylum Law.

⁹⁰⁴ Articles 39 (1) and 36 (a), (g), (i) and (j) of the Asylum Law.

⁹⁰⁵ These activities are defined in article 7 of the Asylum Law as being: Interference, in a way forbidden by law, in the Portuguese political life; performance of activities which might turn to be harmful to the internal or external safety, to public order or that might endanger Portugal's affairs with other States; acts there are contrary to the objectives and principles of the United Nations, or of Treaties or Conventions of which Portugal is a party or adheres to.

lost; the voluntary acquisition of a new nationality, if he or she enjoys the protection; the voluntary re-settlement in the country he or she left or out of which he or she stayed for fear of persecution; the cessation of the reasons which justified the grant of asylum.

If the loss of the asylum is due to the refugee's illegal activities, the Court will determine the immediate expulsion (article 37 (1) of the Asylum Law). If the Court decides on the loss of the right to asylum because previous reasons that justified the granting of asylum ceased to exist, then the alien in question becomes entitled to a residence permit⁹⁰⁶. In all other cases, the loss of asylum shall determine the subjection of the alien concerned to the provisions of the general law concerning the stay of aliens within national territory. Should he not be covered by provisions foreseen in the Aliens Act for legalizing his stay, (for example, marriage with a Portuguese national), the end of refugee status means that the foreign national will be subjected to expulsion.

⁹⁰⁶ Article 37 (3) of the Asylum Law and article 87 (1) (c) of the Aliens Act.

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2.3 *Persons whose humanitarian residence permit has been terminated*

Those benefiting from humanitarian residence permit can only enjoy the status for a maximum of 5 years, which is renewable⁹⁰⁷. Humanitarian residence permit can only be renewed following an analysis of the situation in the country of origin by the Ministry of Home Affairs, on the basis of a sound opinion from the National Commissioner for Refugees⁹⁰⁸.

Non-renewal of the residence permit on humanitarian grounds places the concerned alien in an illegal situation and therefore can be expelled from the country.

The Aliens Act, however foresees a plethora of ways to legalise the situation under the terms and effects of article 87. Pursuant to article 87 of the Aliens Act residence permits will be issued to third-country nationals who suffer from prolonged illness, preventing them from returning to their country of origin; live in partnership with a Portuguese national, a national of the EEA or a third-country national holding a residence permit; have undertaken scientific, cultural or economic activities, considered to be of vital interest to the country; have minor children with residence permit in Portugal or with Portuguese nationality. Should he not be covered by any of the situations which the Aliens Act foresees for legalising his stay, the end of subsidiary protection status means that the foreign national will be subject of expulsion. Nevertheless, in order to avoid expulsion, which results in a minimum five year ban from entering Portuguese territory, the alien can leave voluntarily the Portuguese territory⁹⁰⁹.

⁹⁰⁷ Article 8 (2) of the Asylum Law.

⁹⁰⁸ Articles 8 (3), and 34 (1) of the Asylum Law.

⁹⁰⁹ Article 100 of the Aliens Act.

2.4 *Persons whose temporary protection has been terminated*

The Council Directive 2001/55/EC of 20 July 2001 on temporary protection⁹¹⁰ was transposed into the Portuguese legal order by Law no. 67/2003, dated 23 August⁹¹¹. According to Article 4 of Law no. 67/2003, the implementation of temporary protection depends on declaration “of a mass influx of displaced persons” established by a Council Decision adopted according to the EC Directive (EC procedure of temporary protection). This declaration triggers the enforcement of the measures foreseen in Law no. 67/2003, which is co-ordinated by an inter-ministerial committee to be established by the Government whenever the Council adopts such a declaration⁹¹². Law no. 67/2003 is also applicable, with the necessary adaptations, to cases of national procedure of temporary protection (irrespective of an EU Council Decision), when decided by a Resolution of the Portuguese Government⁹¹³.

The provisions of Article 7 of Law no. 67/2003 concerning the duration of temporary protection, are similar to those of Article 4 of the Directive: one year, that may be extended automatically by six monthly periods for a maximum of one year, without prejudice to the EU Council’s Decision which terminates temporary protection (or Cabinet decision, when temporary protection is a national procedure). Temporary protection can only be extended for a year maximum, beyond the two years’ limit, based on continued grounds for temporary protection, recognised by a decision of the EU Council (or the Cabinet when it is a national temporary protection procedure)⁹¹⁴.

Article 8 of Law no. 67/2003 governs cessation of temporary protection, in the same terms as Article 6 of the Directive. In other words, temporary protection shall come to an end “when the maximum duration has been reached; or at any time, by EU Council Decision (or resolution of the Portuguese Cabinet, in the case of a na-

⁹¹⁰ Hereinafter, the Directive.

⁹¹¹ Official Journal (*Diário da República*, I Serie-A, no. 194, p. 5459) dated 23 August 2003.

⁹¹² Articles 4(2) and 5(1) of Law no. 67/2003.

⁹¹³ Article 4(3) of Law no. 67/2003.

⁹¹⁴ Article 7 (2) of Law no. 67/2003

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tional procedure⁹¹⁵), based on the fact that the situation in the country of origin permits the safe and durable return of those granted temporary protection”.

When temporary protection ends, the sponsor has the duty to voluntarily return to his country⁹¹⁶, and falls under the terms and effects of the general law on aliens⁹¹⁷ (that is to say, the Immigration Act⁹¹⁸), without prejudice to the provisions on voluntary return⁹¹⁹ or on enforced return⁹²⁰.

Implementation of the general law on aliens’ protection – as required by Article 20 of the Directive– is not explicitly foreseen. Nevertheless, a displaced person whose temporary protection has ended can always apply for asylum or subsidiary protection in Portugal, under the terms of the Asylum Act⁹²¹. According to Article 1 of the Asylum Act refugees have the subjective right to asylum, protected in the Constitution as a fundamental right⁹²². Furthermore, a foreign national who does not meet the criteria for recognising refugee status and that is prevented or feels unable to return to the country of his nationality or habitual residence, for reasons of serious insecurity as a result of armed conflicts or from repeated outrage of human rights that occurs therein, have a subjective right to a residence permit on humanitarian grounds (subsidiary protection), guaranteed by Article 8 of the Asylum Act.

Article 23 of Law 67/2003 governs voluntary return during the duration of temporary protection whilst it does not contain any specific provision on voluntary return of those whose temporary protection has ended. Thus, in accordance with Article

⁹¹⁵ For the termination of temporary protection decided by the Portuguese Government, the law does not set a similar requirement to the one in Article 6 (2) of the Directive regarding the equivalent Council Decision, namely, that such decision complies with human rights and fundamental freedoms and the principle of non-*refoulement*.

⁹¹⁶ Article 22(2) of Law no. 67/2003.

⁹¹⁷ Article 22(1) of Law no. 67/2003.

⁹¹⁸ Decree-Law no. 244/98, with later amendments brought in by Decree-Law no. 34/2003. The Immigration Act is published in the Official Journal (*Diário da República*, I Serie-A, no. 47, dated 25 February 2003).

⁹¹⁹ Article 23 of Law no. 67/2003.

⁹²⁰ Article 24 of Law no. 67/2003.

⁹²¹ Law no. 15/98, published in the Official Journal (*Diário da República*, I Serie-A, no. 72, dated 26 March 1998).

⁹²² Article 33(8) of the Constitution.

23(1) and (3) sponsors of voluntary protection have the right to voluntarily return to their country and the Portuguese state must facilitate their return with respect for human dignity and assess any requests to return and the grounds on which they are based. Article 23(2) foresees that a decision to return be taken with a free and clear conscience.

These provisions of Article 23 of Law 67/2003 do not fully transpose the obligations imposed by Article 21 of the Directive concerning voluntary return of sponsors of temporary protection. Firstly, with the exception of paragraph 2 (which could be applicable to decisions to return voluntarily after temporary protection has ended) Article 23 of Law 67/2003 only governs voluntary return before temporary protection ends, and does not foresee any measures for facilitating the voluntary return of those persons whose temporary protection has ended, with respect for human dignity, as required by Article 21(1) of the Directive. Article 23(3) of Law 67/2003, which stipulates that a request for voluntary return and its grounds be assessed is only applicable when the persons are exercising their right to voluntary return before temporary protection has ended – because once it has ended, it is not a right but, in accordance with Article 22(2) of Law no. 67/2003, a duty. This provision does not comply with Article 21(2) of the Directive which stipulates a request be assessed “*on the basis of the circumstances prevailing in the country of origin*”, since it only requires assessment of the request for voluntarily return solely on the grounds on which the request is based or, in other words, the personal motives of the applicant. Now, the return of the beneficiary of temporary protection, during protection or when it has ended, can only occur with respect for human dignity⁹²³ or with due respect for human rights and fundamental freedoms and obligations regarding non-*refoulement*⁹²⁴, if, prior to this, States have checked to see if the prevailing conditions in the country of origin will allow a safe and durable return. This, however, is not expressly foreseen in Law no. 67/2003.

Secondly, Article 22(2), although it foresees the obligation of the Portuguese competent authorities – which are not defined in the Law – to certify that the indi-

⁹²³ Article 21(1) of the Directive.

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vidual decision to voluntarily return is taken with a free and clear conscience, this is not enough to meet the obligation imposed on the Portuguese State by Article 21(1) to ensure that such a decision is taken “in full knowledge of the facts”. In fact, if this provision of the Directive were to be fulfilled, a provision with greater regulatory detail, would have to be adopted in order to guarantee that the persons in question be supplied reliable information about the specific situation in their country of origin, including the possibility of exploratory visits (this facility is foreseen in Article 21(1) of the Directive, which the Portuguese legislator has not taken up).

Lastly, Law no. 67/2003 does not contain any provisions concerning special incentives for voluntarily return. Only Article 126-A(1) of the Aliens Act foresees the possibility for the Portuguese State to support voluntary return under the auspices of programs established with the IOM, applicable to foreign citizens in general. Unlike other foreign citizens, the beneficiaries of temporary protection who have benefited from support for voluntarily return through the IOM, are not, according to Article 126-A(4) of the Immigration Act, subject to a ban on entry or registration with the SIS for the purposes of non-admission. As for voluntarily return, Law no. 67/2003 does not foresee any special support programs for people who have benefited from temporary protection, nor does it contain any provision concerning the status of those who have benefited from such a program – to be created in accordance with the general regime of the Immigration Act – specifically, the possibility of continuing to benefit from rights granted to the beneficiaries of temporary protection (exercising a professional activity, social welfare, housing, medical care, etc), as foreseen in Article 21(3) of the Directive. Without such incentives for voluntarily return, it would be very difficult to consider that the obligation which Article 21(1) of the Directive imposes on the Portuguese State “*to take the measures necessary to make possible the voluntary return of persons enjoying temporary protection or whose temporary protection has ended*” has been fulfilled.

Regarding the enforced return of persons whose temporary protection has ended, Article 24 of Law 67/2003 – which transposes Article 22 of the Directive – refers to

⁹²⁴ Article 3(2) of the Directive.

general legislation on aliens, requiring, nevertheless, that such return be conducted with due respect for the principle of human dignity and taking into consideration “*any compelling humanitarian reasons which may make return impossible or unreasonable in specific cases*”.

Whenever the return of persons who have benefited from temporary protection would seriously affect their health, article 25(1) foresees that their return be delayed and that the persons in question be granted residence in Portugal whilst this is the case. Lastly, article 25(2) of Law no. 67/2003 foresees that families who have been covered by temporary protection, whose children are minors and attend the last school period, be granted residence conditions allowing the children concerned to complete the current school year. This provision, nevertheless, is more restrictive than that of article 23(2) of the Directive, which aims to allow the school year to be completed. In Portugal the school year is divided into three terms (September to Christmas, January to Easter, and Easter to July). Only when the child in question is in the last school period, which begins after Easter, will article 25(2) of Law no. 67/2003 allow the family to stay in national territory. Since the Portuguese legislator used the faculty foreseen in article 23(2) of the Directive, it should have foreseen the family staying in Portugal in order to allow their children who were minors to complete the school year, regardless of the school period they were in.

2.5 Regularisation of illegal immigrants

2.5.1 The Decree-Law 4/2001: legalization of illegal immigrant workers

The Decree-Law 4/2001 came into force on 15 January 2001 and made substantial amendments to 1998 Aliens Act. The “stay permit” was the cornerstone of the Decree-Law 4/2001 and was created for the purposes of solving the illegal situation of thousands of foreign citizens, who over the past few years, have entered Portugal to take up paid employment.

The stay permit was issued to all foreign citizens working in Portugal whether they have entered Portugal legally (for example, on a tourist or short stay visa, which

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does not allow the holder to take up a professional activity) or illegally (for example, without a visa or those who have stayed beyond the expiry date)⁹²⁵. This new regime made legalization possible for 183,655 immigrant workers until 2003.

2.5.2 The Decree-Law 34/ 2003: the restriction of admission of immigrants

Decree-Law 34/2003 was approved in 2003 and came into force on 12 March 2003. In addition to bringing in deep-seated changes to the 1998 Aliens Act, the Decree-Law 34/2003 transposed Council Directive 2001/51/EC on carrier sanctions, Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorized entry, transit and residence and Council framework Decision 2002/946/JHA on the strengthening of penal framework to prevent the facilitation of unauthorized entry transit and residence, into Portuguese law.

The most significant amendment had to do with the restriction of economic immigration. Firstly, this new regulation repealed the right to a stay permit with the intention of preventing the legalization of immigrant workers in Portugal. Secondly, it implemented the obligation of an annual limit of concessions to work visas, defined by the Government (quota system).

2.5.3 The increase of illegal immigration and the regulation of illegal immigrants in 2003 and 2004.

The repeal of the stay permit established by Decree-law 34/2003 did not contemplate the existence of thousands of immigrant workers in Portugal and as a consequence, prevented the possible regulation of their situation.

⁹²⁵ About the Decree-Law 4/2001 see Sousa, Constança Urbano, "The New Portuguese Immigration Act", in *European Journal of Migration and Law*, 2002.

With the existing elevated number of illegal immigrants of Brazilian nationality and the diplomatic pressure exerted by the Brazilian Government, in July 2003 an Agreement was established with Brazil which allowed the legalization of Brazilians who had entered Portugal up to 11 July 2003. By 8 September, which marked the final date of the registration period for all Brazilian workers wishing to regulate their situation, 29,486 Brazilian workers had already manifestly demonstrated this intention.

However, this exceptional regulation was viewed critically by other Immigration Associations which claimed it discriminated against illegal immigrants of other nationalities. Hence, a Regulation 6/2004 implementing the Aliens Act was approved in 2004 which established an exceptional regulation process for all immigrants working without a residence permit, stay permit or work visa.

Only aliens who had regularly come into Portugal until 12 March 2003 (with a tourist visa or an exemption from visa within a 3 month stay period) and had paid their tax and social security on their earnings would be allowed to benefit from this regulation.

In order to organise this regulation process, the High Commissioner for Immigration and Ethnic Minorities implemented a pre-register obligation which ran until 14 June, 2004. About 47,000 illegal immigrant workers manifested the intention to regulate their situation. Excluded from this process were all the aliens who came to Portugal after 12 March 2003, as well as those who worked in a parallel working market without making any social security or tax deductions.

3. Legal and administrative arrangements concerning return and repatriation

3.1 Competences and procedures for deportation decisions

Portuguese law differentiates between various kinds of decision pursuant to which an alien may be required to leave the territory.

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First, the kind of measures adopted depends whether the alien is in Portugal or is at the border and wishes to enter the Portuguese territory. Secondly, measures are differentiated in regard to the status of the alien (asylum seeker, legal immigrant or illegal immigrant). Thirdly, all measures have different effects regarding the prohibition of re-entry the Portuguese territory within a defined period of time and enrolment in the Schengen Information System.

3.1.1 Refoulement at the Border

Refoulement is immediately enforceable (within a 48 hours period or as soon as possible) and takes place at the border post in two cases: by an administrative order of refusing entry (article 22 Aliens Act) or by a decision on the inadmissibility of an asylum or subsidiary protection application introduced at the Portuguese border (article 20 of the Asylum Law). The competent authority to decide is the Aliens and Borders Service.

Aliens who do not meet requirements for entering national territory may submit an application for asylum or humanitarian residence at the border post, and await the decision there. Asylum applications are examined in a single procedure. The director of the Aliens and Borders Service must take a well-founded decision on the application within 5 days, following the 48-hours period given to the Portuguese Refugee Council (the representative of UNHCR in Portugal) to give its opinions and interview the asylum seeker⁹²⁶. Should the application be turned down, the applicant may request re-assessment within a 24 hour period by the National Commissioner for Refugees, with suspensive effect. He, in turn, has 24 hours to give his final decision⁹²⁷. If the National Commissioner for Refugees does not turn in the request within this time, it is deemed admissible and the applicant may enter and stay in national territory⁹²⁸. Should the National Commissioner for Refugees deem the

⁹²⁶ Article 18 of the Asylum Law.

⁹²⁷ Article 19 (1) of the Asylum Law.

⁹²⁸ Article 20 (3) of the Asylum Law.

application inadmissible in his final decision, the applicant must leave immediately and is allowed a 48 hour maximum stay, to allow him to get a lawyer to lodge a judicial appeal⁹²⁹. If his return is not possible, the decision to detain the rejected asylum seeker at the accommodation centre at the airport has to be adopted by a judge. According to article 20 (1) of the Asylum Law, the Law 34/94 on provisional accommodation centres is applicable during the detention of asylum seekers at the border post (international zone of the airport or port).

There are no legal provisions on ban from Portuguese territory or register in the Schengen Information System for the purpose of non-admission in case of refoulement at the frontier. Thus, the refoulement at the frontier does not prevent the rejected foreign citizen to return legally to Portuguese territory.

This is the most important measure of forced departure. In 2003, the Aliens and Borders Service took 3 700 refusal of entry decisions. The main grounds for the refoulement at the border are the lack of visa (1443), the insufficiency of subsistence means (986) and the lack of proof on the purposes of the entry (558).

3.1.2 Transfer of rejected asylum seekers under the Dublin Regulation.

An application for asylum may be rejected if another EU Member State is responsible under the Dublin Regulation. Once another EU Member State accepts this responsibility, the director of the Aliens and Borders Service shall, within five days, render the decision of transfer of the application to this State and the applicant shall be notified (article 29 (3) and (4) of the Asylum Act).

The asylum seeker shall leave the Portuguese territory voluntarily. Otherwise, the Aliens and Borders Service shall enforce the decision of transferring the applicant (article 30 of the Asylum Act).

There are no legal provisions on ban from Portuguese territory or register in the Schengen Information System for the purpose of non-admission in case of transfer of

⁹²⁹ Article 20 (2) and (4) of the Asylum Act.

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rejected asylum seekers under the Dublin Regulation. Thus, such a transfer does not prevent the rejected foreign citizen to return legally on the Portuguese territory.

3.1.3 Immediate expulsion of rejected asylum seekers

The rejection of an application for asylum submitted in national territory shall be notified to the asylum seeker within twenty four hours, mentioning that he or she must leave the country within 10 days. If the rejected asylum seeker doesn't voluntarily leave the Portuguese territory within this period of time, he or she shall be immediately subject to expulsion under the terms and effects of article 15 (1) of the Asylum Law.

There is no need for a decision on expulsion. Thus the expulsion in this cases is an *ex lege* consequence of the rejection of the asylum application and immediately enforceable.

For this type of expulsion there are also no provisions on ban from Portuguese territory. Thus, the rejected asylum seeker can return on the Portuguese territory if he or she meets the legal conditions for entry set down in the Aliens Act.

3.1.4 Refoulement in the framework of readmission agreements

An illegal immigrant can be expelled on the basis of readmission agreements. Portugal has concluded readmission agreements with France (1993), Spain (1994), Bulgaria (1997), Lithuanian (1999), Hungary (2000), Estonia (2001) and Romania (2002). Portugal is also part of the Schengen Group- Poland readmission agreement. These agreements provide for readmission of own nationals and foreigners that are illegal in Portugal.

In the framework of these readmission agreements, the immediate removal of aliens who illegally enter or stay in Portugal is possible. According to article 129 of the Aliens Act, the Aliens and Borders Service is the competent authority to make the readmission application, and falls this request is admitted to enforce the

readmission decision. An expulsion procedure only takes place in case of refusal of readmission.

The readmission of the illegal foreigner implies the ban of entry the Portuguese territory for 3 years (article 133 of the Aliens Act) and register in the national list of persons prohibited to entry (article 25 (2) of the Aliens Act).

The immediate removal on the basis of the agreement with Spain seems to be effective. Thus, 2003 85 removals were made to Spain and only 5 to France. There is no available data to evaluate the impact of other readmission agreements.

3.1.5 Order of leaving the national territory

The order of leaving the national territory takes place when a foreigner enters or stays illegally in Portugal and is an alternative to an expulsion proceeding. According to article 100 (1) of the Aliens Act in well founded cases a illegal immigrant may not be detained and expelled but only notified by the Aliens and Borders Service to leave the country voluntarily within a 10 to 20 day period. If he contravenes this order to voluntarily leave the Portuguese territory he will be liable to administrative expulsion.

If the notified alien leaves the territory voluntarily, an expulsion order will not be signed and therefore he or she will not be under a formal ban from re-entry to the Portuguese territory. The ban from re-entry within a period of at least 5 years will be ordered only if the alien leaves Portuguese territory with the financial aid of a return program established by the IOM with the financial support of the Portuguese State (article 126-A (2) of the Aliens Act).

2003, 2007 aliens were notified to leave the Portuguese territory. The main nationalities were Brazilian (449), Ukrainian (390), Romanian (265) and Angolan (121).

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3.1.6 Supervised departure (escort to the boarder)

If an illegal alien is detained by the police, the detention must be validated by a court. During the judicial hearing of the alien, the judge must inform the alien that he can opt to leave the territory, instead of being subject of an expulsion proceeding (article 126 (1) of the Aliens Act).

If the detainee declares the wish to leave the territory the judge will order the supervised departure (escort to the border), that must be enforced as soon as possible (article 126 (2) of the Aliens Act). The main benefit of this alternative measure is that an expulsion order will not be signed and the alien will be banned from re-entry during only one year⁹³⁰ (and not at least 5 years as prescribed for expulsion orders). He will be also subject of a registration in the Schengen Information System for non-admission purposes. In 2003, 60 expellees opt for this kind of deportation.

3.1.7 Expulsion

Under the terms and effects of article 102 of the Aliens Act expulsion orders may be adopted by an administrative or by a judicial authority.

According to article 109 of the Aliens Act expulsion can be decided by a judicial authority when it is an accessory sanction by conviction of a criminal offence or when the alien concerned has entered or stayed legally in Portuguese territory, holds a valid residence permit or is a asylum seeker, whose application was not rejected. In the first case the expulsion is part of a criminal sentence. In the second case, the expulsion decision is autonomous. An alien subject to an administrative or judicial order of expulsion is banned from re-entry into Portuguese territory for a defined period of time, not less than 5 years (article 105 of the Aliens Act). The enforcement of the expulsion order implies the enrolment of the expellee in the Schengen Information System or in the national list of non-admissible persons (article 114 (2)

⁹³⁰ Article 126 (2) of the Aliens Act.

of the Alien Act). The expellee must be notified of his or her register in the Schengen Information System (article 114 (3) of the Alien Act).

3.1.7.1 Administrative expulsion of illegal staying immigrants

An administrative expulsion is only admissible if the alien concerned entered or stayed illegally in Portugal (article 99 (1) (a) and 117 (1) of the Aliens Act) and only takes place when there is no notification to leave the Portuguese territory voluntarily or no judicial order of escort to the border, taken by option of the expellee.

If he became illegal, because his residence permit was cancelled, he can only be expelled by a judicial decision. According to Article 33(2) of the Constitution of the Portuguese Republic, any foreign citizen who has entered or is staying legally in Portugal has a basic right to only be expelled via a judicial decision. Provided that the third country national has entered Portugal legally, the Constitution stipulates that expulsion must be determined by a judicial decision. In such circumstances, Portuguese case-law, in particular rulings handed down by the Court of Appeal, has considered that it should be a court of law and not the Aliens and Borders Service that expels a foreign citizen whose residence permit has expired⁹³¹. If this is so, it is even more applicable when a residence permit has been cancelled.

The administrative expulsion proceeding begins with the detention of the illegal immigrant by the police. Within a maximal term of 48 hours the detainee must be present to the criminal judge for validation of the detention and application of coercive measures, if an escort to the frontier is not decided on the request of the detainee (Article 117 (1) of the Aliens Act). The criminal courts (or, where they are not available, the first instance courts) can apply all measures ruled in the Criminal Process Code (preventive arrest, house arrest, bail, etc.) and the specific coercive measures ruled in the Immigration Laws: periodical presentation before the Aliens

⁹³¹ Ruling handed down by the Lisbon Court of Appeal, 22 February 1995, quoted in Paulo Manuel Costa, *Regime Jurídico de Entrada e Permanência de Estrangeiros* (The Legal Framework for the Entry and Stay of Foreign Citizens - Annotated and Commented), Rei dos Livros, Lisbon, 1999.

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and Borders Service and detention in a temporary accommodation centre (article 106 of the Aliens Act). Because of the lack of accommodation centres the most commonly coercive measure is the preventive arrest in a penitentiary institution. If the judge decides the provisional arrest of the illegal alien, the Aliens and Borders Service must commence administrative expulsion proceedings (article 117 (2) of the Aliens Act). The duration of the preventive arrest in a penitentiary institution is limited to the necessary time to conclude the expulsion procedure and cannot exceed 60 days.

The hearing of the alien during the proceeding is guaranteed by article 118 of the Aliens Act. The director of the Aliens and Borders Service is competent to sign the expulsion order (article 119 of the Aliens Act). The alien must be notified of the decision. The notification must include the elements set out by the article 114: explanation of the grounds; his duties (especially of leaving the country within a defined period of time); the duration of the interdiction of re-entry; the indication of the country, where the alien cannot be expelled if he benefits from the non refoulement guarantee (article 120 (1) of the Aliens Act). Furthermore, the notification makes reference to the right of appeal and its term, and indicates the enrolment of the alien in the Schengen Information System or in the national list of non-admissible persons (article 120 (2) of the Aliens Act).

3.1.7.2 Judicial expulsion

If the alien is legally in Portugal he or she may only be subject to a judicial expulsion order. According to article 33 (2) of the Constitution “*Expulsion of persons who have entered, or staying legally in, the national territory, who have obtained a residence permit, or who have lodged an application for asylum that has not been refused, shall be determined by a judicial authority only*”.

Legal immigrants residing in Portuguese territory can be the subject of a judicial expulsion order if they act against national security, public policy or public moral; their presence or activities in Portugal constitute a threat to the interests or the

dignity of the Portuguese State or its nationals; they make abusive interference in the exercise of political rights reserved to nationals; or they have practiced acts which would have prevented their entry in Portuguese territory if they had been previously revealed (article 99 (1) of the Aliens Act).

The competent court to adopt an autonomous expulsion order is the criminal court of first instance where the alien resides or he or she was found. When this kind of court does not exist, the order is taken by the courts of first instance with general competence.

The director of the Aliens and Borders Service is the authority with competence to initiate a judicial procedure for expulsion (article 103 of the Aliens Act).

Once the case has been received, the judge will set the trial which should take place within 5 days in the presence of the alien in question. The alien has the right to appeal, provide witnesses and the necessary evidence to defend himself or herself⁹³². Trial may be postponed up to a maximum period of 10 days upon the alien's request or in other situations namely if he or she is unable to attend the hearing, if witnesses considered indispensable are still to be found or if the judge finds it necessary to provide additional evidence⁹³³.

An expulsion decision will necessarily make reference to the provisions stated in Article 114 (1): grounds, legal obligations of the expellee, a ban of entry from national territory with indication of its expiry date, indication of the country to which the alien who benefits from *non refoulement* should not be deported to, right if appeal.

According to article 101 of the Aliens Act, expulsion may also be ordered by a court along with criminal sanction whenever the illegal or legal immigrant has committed a crime. According to the jurisprudence of the Supreme Court of Justice and the Constitutional Court the accessory sanction of expulsion can not be an automatic consequence of a criminal conviction. This jurisprudence is based on article 30(4) of the Constitution. This regulation read as follows: "no sentence shall

⁹³² Article 112 of the Aliens Act.

⁹³³ Article 113 of the Aliens Act

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involve, as an automatic consequence, the loss of any civil, occupational or political rights”.

Article 101 of the Aliens Act contains special rules protecting some categories of non-deportable aliens from the accessory sanction of expulsion and a “sliding scale” based on the length of the prison sentence and the duration of the residence. The longer is the period of residence, the more serious the breach of public order needs to be to give rise to the possibility of an accessory sanction of expulsion. Thus, according to article 101 (1) a foreigner who don’t hold a residence permit (illegal immigrant or holder of a visa or a stay permit) may be deported if he or she committed a crime punished with a 6 or more months prison or with an alternative fine sanction.

A foreign citizen who holds a temporary residence permit may be expelled if he or she has been sentenced to more than one year prison. When the court applies the accessory sanction of expulsion to resident aliens, it has to take into account the gravity of the crime committed, the personality of the alien, the risk of repetition, the degree of his or her integration in the Portuguese society, the time of residence and special prevention (the need of the accessory sanction to prevent the alien from committing more crimes)⁹³⁴.

If the alien concerned has a permanent residence permit (obtained after 8 years residence or after 5 years, if he is national from a Portuguese Speaking country) he may only be subject of an accessory sanction of expulsion, if his behaviour constitutes a sufficient serious threat to the public order or to national security⁹³⁵.

The accessory expulsion sanction is immediately enforced when the alien has accomplished 2/3 of the period of the imprisonment punishment. When he accomplished half of the period of the imprisonment punishment, the enforcement of the expulsion can be ordered by the judge⁹³⁶.

⁹³⁴ Article 101 (2) of the Aliens Act.

⁹³⁵ Article 101 (3) of the Aliens Act.

⁹³⁶ Article 101 (5) of the Aliens Act.

According to article 34 of the Law 15/93, when foreigners are sentenced for crimes related with drug traffic the court may apply an accessory sanction of expulsion and order the ban of the territory for 10 years.

Lastly, if an alien re-enters the Portuguese territory during the ban of entry he can be sentenced to 2 years prison or an alternative fine. The court may also apply an accessory sanction of expulsion (article 136-B of the Aliens Act).

The accessory sanction of expulsion is responsible for the largest number of judicial expulsions of legal aliens. Most of them were convicted to crimes related with drug trafficking. Thus, 2003 from the 91 judicial expulsions enforced, 60 were decided on the basis of a sentence for drug trafficking (66 %).

3.2 Measures to secure enforced return

3.2.1 Coercive measures during the expulsion proceeding

According to article 117 of the Aliens Act any alien who illegally enters or stays in Portugal (because he doesn't have a visa, residence permit or stay permit, or because he didn't leave the Portuguese territory voluntarily after the expiration of validity of his visa, residence permit or stay permit) may be detained by the police and is taken to the custody of the Aliens and Borders Service. Within 48 hours the alien must be presented before a judge for the validation of the detention⁹³⁷. This judge decides on the application of coercive measures, like the placement in a provisional accommodation centre during the expulsion proceeding (article 106 (1) (b) of the Aliens Act).

Law 34/94 establishes the legal regime of the provisional accommodation centres. Aliens may be held in these centres for humanitarian (measure of social support⁹³⁸)

⁹³⁷ Article 28 (1) of the Constitution provides that "Detention shall, within forty eight hours, be subject to the scrutiny of a judicial authority; the judicial authority shall order either the release of the person concerned or a suitable coercive measure".

⁹³⁸ According to article 2 of the Law 34/94 the following categories of aliens can be accommodated in these centres: asylum seekers without means of subsistence during the procedure and rejected

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or security reasons (detention measure). For security reasons, accommodation in these centres is a detention measure decided by a judge. According to article 3 (1) of the Law 34/94 and article 4 the detention of an alien in these centres can be decided by the judge in one of following situations:

- To ensure the enforcement of an expulsion decision;
- To punish the disobedience of a judicial order of periodic presentation to the authorities;
- To ensure the presence of the alien before a judicial authority;
- When an alien attempts to illegally enter Portuguese territory and stays in the international zone of the port or airport for more than 48 hours.

The detention on security grounds is maintained until the alien obtains residence permission or until the enforcement of an expulsion decision or of a decision on *refoulement* at the border. In any case, the detention cannot exceed 2 months and has to be re-examined by a judge every 8 days (article 3(2) of the Law 34/94).

Despite the legal regulation of provisional accommodation centres by the Law 34/94 of 14 September 1994, this Law has not yet been implemented. Administrative detention centres to accommodate aliens in case of refusal of entry (Decree-Law 85/2000) can only be found at international areas of airports⁹³⁹. Thus, in Portuguese territory provisional accommodation centres are not available to detain illegal immigrants. Alternatively, the judge can decide the provisional arrest or any other coercive measure foreseen in the Criminal Procedure Code, such as the periodical presentation before the authorities, home arrest conditional release, or bail⁹⁴⁰. The

asylum seekers during the period allowed to voluntarily leave the Portuguese territory. Accommodation is decided by the Aliens and Borders Service on the request of the alien.

⁹³⁹ Pursuant to Decree-Law 85/2000 of 12 May specific areas in the international zone of the airports are provisional accommodation centres ruled by Law 34/94, where aliens who are subjected to a decision of refusal of entry, are detained before the administrative order of *refoulement* is enforced. According to article 22 (1) and (2) of the Aliens Act, the decision to deny entry is adopted after hearing the alien concerned, and has to be notified to him with reference to the grounds of refusal and to his right of appeal. The alien can be expelled within 48 hours. Should the immediate deportation not be possible within 48 hours, the judge must decide on his or her detention in the accommodation centre at the airport.

⁹⁴⁰ Article 106 of the Aliens Act.

most used measure is the preventive arrest in one penitentiary institution during the administrative expulsion proceeding. That means that illegal immigrants (who haven't committed any crime) are frequently detained in normal penitentiary institutions together with sentenced criminal offenders. In any way, the maximal period of the preventive arrest during the administrative expulsion proceeding is 60 days (article 117 (3) of the Aliens Act).

3.2.2 Coercive measures to enforce an expulsion decision

According to article 122 the Aliens and Borders Service is the competent authority to enforce administrative or judicial expulsion orders.

As a principle, the alien who is subject of an expulsion order must leave the Portuguese territory within the defined period of time⁹⁴¹. Meanwhile he can be subject of coercive measures decided by a judge, namely the detention in an accommodation centre or the obligation to periodical presentation before the Aliens and Borders Service⁹⁴². Latter is the only measure applicable, because the accommodation centres have not been implemented until now.

If the alien doesn't leave the territory within the term defined in the expulsion order he will be detained and the officials of the Aliens and Borders Service will escort him to the border within a term of 48 hours. If the escort to the border within this time limit is not possible, than according to article 124 (2) the judge must decide on the detention of the alien in a temporary accommodation centre. Only this coercive measure is foreseen in the law. That means that the judge cannot apply other measures like preventive arrest. Considering that accommodation centres for aliens have not yet been implemented, there is no other mean to detain an alien longer than 48 hours with the purpose of enforce an expulsion order.

⁹⁴¹ Article 123 (1) of the Aliens Act.

⁹⁴² Article 123 (2) of the Aliens Act.

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Pursuant to article 123 (1) of the Aliens Act, an alien sentenced to an expulsion decision must leave Portuguese territory within the period specified in the expulsion order. During this period, the judge can order the detention on an accommodation centre (but not the preventive arrest) or the obligation of periodical presentation before the Aliens and Borders Service. Only the latter measure is applicable, because, as mentioned above, the accommodation centres have not yet been implemented.

If the alien doesn't leave the Portuguese territory within the period specified in the expulsion order, he will be detained and escorted to the border. If the forced departure is not possible within 48 hours, the detention in the accommodation centre at the frontier (international zone of the airport) must be decided by a judge⁹⁴³.

3.3 *Legal and factual barriers to enforce deportation*

The lack of temporary accommodation centres and judges' resistance in still applying criminal law measures such as preventive arrest to immigrants who have not committed any crime, are considered the two main reasons that hamper expulsion procedures.

Another factor which contributes to hamper the enforcement of an expulsion order is the lack of cooperation from the aliens' countries of origin, which many times do not provide the aliens with the necessary documents for their expulsion. If readmission agreements were to come into force, the procedure could be much easier.

Another factor which hampers expulsion is the difficulty many times found in determining the identity or nationality of the alien in question, especially if he or she is holders of false documents⁹⁴⁴.

The fact that provisional accommodation centres are still inexistent makes the

⁹⁴³ Article 124 of the Aliens Act.

⁹⁴⁴ Oliveira, op cit., p. 455.

expulsion decision more difficult. Despite being aware of the legal reasons for preventive arrest, judges many times refuse to convict people who have not committed any crime except entering and residing illegally in Portugal with the aim of achieving better living standards. Many judges consider that placing these aliens in penitentiary institutions along with convicted criminals is inhuman and inappropriate, and for this reason, judges who are supposed to validate the detention of aliens (which may only occur within a maximum period of 48 hours) many times prefer to set them free and apply non custodian coercive measures, such as regular presentation to the Aliens and Borders Service.

These types of measures are however ineffective in ensuring the expulsion of illegal aliens. It is quite common for aliens who have been notified to abandon national territory or who have been subject of expulsion procedures to disappear.

3.4 Requirements as to the conditions in the country of origin

Both article 38 of the Asylum Law and Article 104 of the Aliens Act do not allow foreign nationals to be expelled to a country where the foreign national might be persecuted for the reasons on which the law based the granting of asylum. To benefit from this guarantee, the expellee must invoke and prove the fear of persecution (article 104 (2) of the Aliens Act). If no country accepts him, there is a juridical vacuum, because there are no rules on his status (he remains in Portugal as an “official clandestine”).

These are not the only legal provisions protecting foreign national from expulsion. Articles 3 and 8 of the European Convention on Human Rights which are directly applicable in Portuguese law and above domestic law are particularly important for protecting foreign nationals from expulsion. Therefore, in accordance with the case-law of the European Court of Human Rights, article 3 of the Convention obliges the Portuguese state without derogation to not expel a foreign national, when such expulsion could lead to his being tortured or subjected to degrading or inhuman treatment.

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Also, Article 8 of the convention may be used to prevent expulsion should it interfere unjustifiably in his right to a private and family life.

Although these provisions prevent expulsion, they do not mean that a legal stay permit is awarded. This means that in extreme cases illegal stay of foreign nationals may be "tolerated", without any available mean to obtain leave to remain.

3.5 Deportation of unaccompanied minors and other vulnerable persons

There is a major legal impeachment for the deportation of unaccompanied minors. According article 16(4) of the Aliens Act the departure of unaccompanied minors is forbidden, when they don't have the permission of their legal agent. An expulsion measure against a minor in this condition can't be enforced, and the minor may stay as a tolerated illegal alien in Portugal. There is no legal provision regarding the regularisation of minors prevented to return.

Other vulnerable persons, especially those who suffer from prolonged illness, preventing them from returning to their country of origin, can apply for a residence permit under the terms of article 87 of the Aliens Act.

3.6 Deportation by air, see and land transport

There are no different deportation procedures according the mean of transport. The most used mean is the air transport. Sometimes the alien is expelled under escort provided by the Aliens and Borders Service.

In 2003, 571 deportations were enforced: 557 by air transport, 12 by land transport and 2 by sea transport. 98% of all deportations are enforced by air transport.

All expulsions are enforced individually and to up this date, no charters have been organized for this purpose.

4. Impact of EU regulations, directives and measures on return procedures

4.1 *Dublin II and Eurodac*

According to the information made available from the asylum section of the Frontiers and Borders Service⁹⁴⁵, the Eurodac system has had a positive performance within the domain it was created for. It not only identifies undocumented asylum seekers but also identifies rejected asylum seekers.

The impact of the Eurodac system on the Return Policy is, however, limited due to its application being restricted to the determination of the State Member responsible for analyzing the request, as pursuant to the Dublin II Regulations. Its application for other purposes not foreseen in article 1 of Eurodac Regulation will necessarily imply the approval of another legal instrument which will contemplate new purposes for Eurodac to become more efficient within the scope of the Return Policy.

Dublin Regulations II functions in a less satisfactory way. On the one hand, the transfer of asylum seekers to the responsible State Members in terms of Dublin Regulations II is not always enforced. On the other hand, many of the asylum seekers who are effectively transferred in pursuant to the Dublin Regulations II are not always deported in cases in which the request for asylum has been denied.

When asylum seekers are transferred to Portugal and their request is denied, they are subjected to the administrative expulsion regime foreseen in the Aliens Acts. In cases in which the asylum seeker is not taken into preventive arrest, there is a strong probability that they will try to abandon national territory and continue to request asylum in other E.U. Member States. This leads to the successive enforcement of the Dublin Regulations II⁹⁴⁶.

Hence, Eurodac and Dublin II Regulations are not contemplated as instruments which facilitate the return of rejected asylum seekers to their countries of origin. It would be more efficient to establish an expulsion mechanism for rejected asylum

⁹⁴⁵ Interview conducted with the Aliens and Borders official responsible for processing and analyzing applications (Cláudia Rocha).

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seekers which would function at a European Union level, rather than having to transfer these people to the State Member responsible for them under the terms of Dublin Regulations II. This way, “asylum shopping” may be avoided.

4.2 Recognition of return decisions

The Council Directive 2001/140/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third-country nationals⁹⁴⁷ was transposed into Portuguese legal framework by Law no. 53/2003, of 22 August⁹⁴⁸. However there is no available information about the impact of this new regulation in the return practice.

According to Article 1, taken together with Article 2 of Law no. 53/2003, this Act governs the recognition and enforcement in Portugal of an expulsion decision issued by an administrative authority in an EU Member State, in Iceland or in Norway against a third country national – who is not a national of any of the EU Member States, of the Member States of the European Economic Area (Iceland, Liechtenstein and Norway) or of Switzerland⁹⁴⁹ or who is not a family member of a citizen of the Union, of the European Economic Area or of Switzerland, who has exercised his/her right of free movement⁹⁵⁰ – and is on Portuguese territory.

Thus, Law no. 53/2003 merely ensures recognition and enforcement of an administrative expulsion decision against a foreign citizen who does not possess one of the aforesaid nationalities or is not related to a citizen of the Union, of the European Economic Area or Switzerland who has exercised his right of free movement. As for the scope of personal application, Portuguese law therefore does not comply with the Directive since it excludes from the obligation to enforce an expulsion decision,

⁹⁴⁶ Interview conducted with the Aliens and Borders official responsible for processing and analyzing applications (Cláudia Rocha).

⁹⁴⁷ Hereinafter, the Directive.

⁹⁴⁸ Published in the official journal, *Diário da República*, I Série A, no. 193, of 22 August 2003, p. 5400.

⁹⁴⁹ Article 2(a) of Law no. 53/2003.

⁹⁵⁰ Article 3(2) of Law no. 53/2003.

those against a citizen of Liechtenstein or Switzerland or the respective family member since these categories of foreigners are not included neither explicitly or implicitly in the scope of application of the Directive.

As for the nationals of Norway and Iceland, although they are encompassed by the notion of citizens of a third country given in Article 2(a) of the Directive, we could defend their exclusion from the scope of application of Law no. 34/2003, since the Directive goes beyond the Schengen *acquis* in relation to these States in accordance with recital no. 8.

Pursuant to Article 3(1) of Law no. 53/2003, an expulsion decision decreed by the administrative authorities of a Member State of the European Union, of Norway or of Iceland against a foreign citizen covered by this Law, will be recognized in Portugal and enforced by the Aliens and Borders⁹⁵¹ provided that the foreign citizen in question meets the following requirements:

1. he is in Portugal illegally;
2. he has been the subject of an administrative expulsion decision based on failure to comply with rules of issuing State on the entry or residence of alien in the territory of the issuing State.

Since Article 3(1)(b) of the Directive does not impose that the foreign citizen be staying illegally in the territory of the enforcing Member State – Portugal, in the case - as a pre-condition for enforcing an expulsion decision, I believe that the restriction imposed by Article 3(1) of Law no. 53/2003 goes against the aim of the Directive to allow enforcement of an expulsion decision taken by one Member State by the Member State where the foreign citizen is to be found.

Nevertheless, this can be explained because, according to the Portuguese legal order, administrative expulsion of a foreign citizen is only possible when he/she has enter and stayed in Portugal illegally. Whenever a foreign citizen enters and stays legally in Portugal – because he does not need a visa and is within the authorized period of stay, because he has a work permit, a residency permit, or some other document which allows him to stay legally in Portuguese territory – his expulsion

⁹⁵¹ The competent entity for the enforcement under the terms of Article 4(1) of Law no. 53/2003.

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can only be decreed by judicial decision and not by an administrative decision taken by the Aliens and Borders Service – even if its aim is to enforce an expulsion decision taken by another Member State of the European Union ⁹⁵².

Thus, in those cases in which foreign citizens are in Portugal legally, the legislator should have foreseen the possibility for a court - and not BIS – to take the necessary measures to enforce the expulsion decision taken by another Member State and, as a result, expel the citizen in question from Portuguese territory. That is the only way to fully comply with the Directive without undermining the right of foreign citizens that are legally in Portugal to not be expelled by an administrative decision as guaranteed in the Constitution.

It was, perhaps, an attempt to get round this constitutional obstacle which led the Portuguese legislator to partially transcribe, out of context, the second paragraph of Article 3(1)(a) of the Directive in Article 3(3) and (4) of Law no. 53/2003. According to the provision of Article 3(3) of Law no. 53/2003, if the foreign citizen in question holds a residence permit granted by the enforcing Member State or another Member State of the European Union, the enforcement of the expulsion decision can only be carried out if these States withdraw the residence permit. Article 3(4) of Law no. 53/2003 provides that “the existence of an expulsion decision provides grounds for the residence permit to be withdrawn if this is authorized by the national legislation of the State which issued the permit”.

Several comments need to be made on the confused wording which has been taken out of context, of Article 3(3) and (4) of Law no. 53/2003, which is the result of a clumsy copy and paste of Article 3(1)(a) of the Directive.

First of all, it does not comply with the provisions of the Directive because the cases in which a residence permit to be withdrawn are those in which the expulsion order was decreed on one of the grounds foreseen in Article 3(1)(a)⁹⁵³ of the Direc-

⁹⁵² See Article 33(2) of the Constitution and Article 101 taken together with Article 109 of Decree-Law no. 244/98, of 8 August (Immigration Act).

⁹⁵³ “Serious and present threat to public order or to national security in the case of the conviction of a third country national for an offence punishable by a penalty involving deprivation of liberty of at least one year or where there are serious grounds for believing that a third country national has

tive and not in the case foreseen in sub-paragraph b) in which the expulsion decision is based on the mere illegal entry and stay of the foreign citizen in the territory of the issuing State (the only case which implies, in accordance with Law no. 53/2003, the Aliens and Borders Service's obligation to recognize and enforce the expulsion decision).

Secondly, these provisions of Law no. 53/2003, as they are currently worded raise interpretation difficulties making their implementation illogical at times because they cover the cases in which Portugal is the issuing or the enforcing State, as well as the cases in which Portugal or another Member State (issuing State or another) was the country which granted the residence permit. In order to find some logic in Article 3(4), we should interpret it as bringing in a new legal basis for canceling a residence permit granted in Portugal – that is, an administrative expulsion decision, not from Portuguese territory, but from the territory of a Member State of the EU (and not from Norway or Iceland!). In other words, Article 3(4), of Law no. 53/2003, by allowing a residence permit to be cancelled on the basis of there merely being an expulsion decision issued by the administrative authorities of a Member State on the basis of the foreign citizen in question having merely come in and stayed in its territory illegally without the correct papers, thus - by making a third country national technically illegal in Portugal on the basis of his residence permit having been withdrawn - allows his expulsion from Portuguese territory through an administrative procedure.

However, this interpretation of the law is clearly unconstitutional. This is because, according to Article 33(2) of the Constitution of the Portuguese Republic, any foreign citizen who has entered or is staying legally in Portugal has a basic right to only be expelled via a judicial decision, which must be based on a legally relevant motive (breach of the peace, law and order, or having committed a serious crime). This right – included in the catalogue of the Rights, Freedoms and Guarantees – has additional legal protection in that the law can only restrict this right in those cases which are explicitly foreseen in the Constitution and provided that it does not reduce the scope

committed serious criminal offences or the existence of solid evidence of his intention to commit such offences within the territory of a Member State”.

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of the contents of the constitutional precept which enshrines it (Article 18(2) and (3) of the Constitution).

Nevertheless, even if the Constitution allowed the right enshrined in Article 33(2) to be restricted by law, the truth is that such an interpretation of Article 3(4) of Law no.53/2003 would affect the basic contents of the constitutional provision and would quash the basic right of a third country national who is in Portugal legally, to only be expelled from Portuguese territory on the basis of a judicial decision. This is because it would allow a foreign citizen with a residence permit to be expelled on the basis of an administrative decision by technically placing him in an illegal situation owing to the mere administrative decision of expulsion from another State, based on illegal entry or stay. In other words, the remote cause of expulsion of a third country national from Portuguese territory would not be a judicial decision based on a relevant national interest but an administrative expulsion decision taken by another State. In any case, provided that the third country national has entered Portugal legally, the Constitution stipulates that expulsion must be determined by a judicial decision. In such circumstances, Portuguese case-law, in particular rulings handed down by the Court of Appeal, has considered that it should be a court of law and not the Borders and Immigration Service that expels a foreign citizen whose residence permit has expired⁹⁵⁴. If this is so, it is even more applicable when a residence permit has been cancelled, particularly when not on the basis of a judicial decision, taken in view of a relevant national interest (keeping law and order or a serious breach of the peace, etc.), but following an expulsion decision taken by the administrative authorities of another country, which the foreign citizen entered or stayed in illegally.

In addition, the provisions of Article 3(3) and (4) of Law no. 53/2003, are not applicable for enforcing an expulsion decision against a third country national, who is in the country legally under the auspices of a work visa, stay permit (a legal status

⁹⁵⁴ Ruling handed down by the Lisbon Court of Appeal, 22 February 1995, quoted in Paulo Manuel Costa, *Regime Jurídico de Entrada e Permanência de Estrangeiros* (The Legal Framework for the Entry and Stay of Foreign Citizens - Annotated and Commented), Rei dos Livros, Lisbon, 1999.

which is different to a residence permit), or purely simply without a visa but within a legal period of stay.

Since one of the legal pre requisites of Articles 1 and 3(1), of Law no. 53/2003, for recognising such a decision has not been met, the illegal stay of the third country national in question in Portuguese territory, the BIS cannot enforce it, which means that Portugal will not be meeting the obligation laid down by the Directive to recognise and enforce expulsion decisions taken by another Member States. In order to transpose this obligation within the current Portuguese framework, the legislator would have had to foresee judicial competence for expelling a legally resident foreign citizen in Portugal based on the mere fact that an expulsion decision had been taken by another State.

Under the terms and effects of Article 4(3) of Law no. 53/2003, the Aliens and Borders Service is the competent entity for enforcing expulsion measures

Article 5 of Law 34/2003, regulates enforcement of expulsion but only in the case in which the third country national is in Portugal illegally and when an expulsion decision has been taken against him, based on failure to comply with the rules of the issuing State on the entry or residence of aliens. Thus, in accordance with subsections 1 and 2 of this Article, the third country national in question will be detained and handed over to the Aliens and Borders Service, for the purposes of expulsion, and a judge should validate his arrest within 48 hours, who can impose coercive measures on him. According to Article 106 of the Immigration Act, in addition to applying coercive measures foreseen in the Code of Criminal Procedure (for example, preventive arrest, home arrest), the judge can also decide periodical presentation to the Aliens and Borders Service or place him in a temporary accommodation centre (not yet implemented). If the judge decides the preventive arrest in a penitentiary institution, this measure can only be applied for as long as it takes to enforce the expulsion decision and can never go beyond sixty days (Article 117(3) of the Aliens Act).

Article 5(3) of Law no. 53/2003 only gives the third country national in question the right to appeal against the judge's decision which validates his detention and hands him over to the Aliens and Boarders Service custody, under the same terms as an

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against a judicial expulsion decision. In other words, an appeal is made to the Court of Appeal (2nd instance) without suspensive effect (Article 116 of the Aliens Act). This Article fails to mention the right to a judicial appeal against the decision, which enforces the expulsion issued by another Member State - or, in other words, the expulsion from national territory pursuant to such a decision. *A contrario* interpretation of this provision, which would lead us to conclude that the Portuguese legislator did not want to guarantee the third country national in question, the right to appeal against an expulsion decision should be discounted: in addition to going against Article 4 of the Directive, it would breach the basic right to effective judicial protection via contesting the expulsion through the courts (Articles 20 and 268(4) of the Constitution). Thus, we can conclude that the expulsion order itself could be appealed against through the courts in accordance with the general rules on the matter. Such rules do not, however, guarantee the third country national effective jurisdictional protection of his rights - for example, of not being expelled to a country where he may suffer inhuman treatments – since the appeal does not have suspensive effect.

4.3 Effect of EU measures on return

There is not noticeable effect of Regulation Nr. 93 and No. 694/2003 and other EU measures (Council Decision Nr. 97/340/JAI on information for voluntary return; green paper on return policy) on the Portuguese return and repatriation policies. There is no available data how these measures were received by the NGO's.

5. Voluntary return

Rejected asylum seekers and other illegal immigrants are allowed to return freely to their origin country, once they are detained by the policy. According to article 100 of the Aliens Act before detention and before a procedure of expulsion is initiated, the illegal alien can be notified by the Aliens and Borders Service to leave voluntarily the Portuguese territory within a time period from 10 to 20 days. In this case he or

she will not be subject of a ban of re-entry the territory. This is an incentive to voluntary return.

In order to encourage voluntary return, Article 126 –A of the Aliens Act foresees state aid for co-operation programmes established with IOM. At the moment, the only existing program financed by the Portuguese State is the Voluntary Return Program organised by IOM. This program was created for legal or illegal immigrants, asylum seekers or temporary protection beneficiaries who wish to return to their country of origin or to any other country who accepts them but they do not have the sufficient financial resources. The Program finances the return trip and subsistence expenses for a certain period of time. With the exception of aliens who benefit from temporary protection, the beneficiaries of the Voluntary Return Program are banned from entering Portugal within a period of at least 5 years and can be found in the Schengen Information System with the purpose of non-admission (Article 126-A (2) and (4) of Immigration Law).

There were also two other Programmes financed by the European Refugee Fund: the OIM Program for the Guinea-Bissau Citizens with Temporary Protection Status ⁹⁵⁵ and the INDE –voluntary return program for nationals of East Timor.

There are many factors which hamper voluntary return namely the lack of information about the possibility of financial aid for the trip, insufficient financial to provide aliens with enough means of subsistence during an initial phase or the lack of travel documents. The family ties in the host country, political, economic, social, religious situation in the home country are also factors that may hamper the voluntary return. But other factors, such the economic and social situation of the illegal immigrant, his fear or shame for the failure to succeed in a better life abroad can hamper his willingness to return voluntarily.

On the other hand, there is no real policy to assist voluntary return. Firstly, the financial means provided by the Portuguese State to aid the IOM Voluntary Return Programmes are insufficient to cover all existing needs. Another important factor

⁹⁵⁵ In 1998 a Cabinet Resolution no. 94/98 granted temporary protection to citizens from Guinea-Bissau who had come directly from the area of conflict, for an initial period of one year renewable on the basis of a decision from the Minister for Home Affairs, for an additional year.

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that heavily dissuades the use of voluntary return programs of the IOM with the financial support of the Portuguese State, is the prohibition to enter Portuguese territory within a period of at least 5 years and the enrolment in the Schengen Information System for purpose of non-admission in any Schengen Country during this period, under the terms of article 126-A of the Aliens Act.

6. Instruments for an effective return policy

Taking into consideration the existing legal and factual barriers between each State Member in relation to the return of illegal aliens, as well as the transnational nature of this policy, measures such as the introduction of European minimum standards on return, the establishment of a closer cooperation on return of third-country nationals and the mutual enforcement of return decisions, could contribute to making the Return Policy of all State Members more efficient.

On the other hand, in order to guarantee a satisfactory Return Policy, it is necessary that the countries of origin of these immigrants comply with their readmission obligations. The amount of money brought in by these immigrants (including illegal immigrants) constitutes an important source of income and wealth for their countries of origin. It is only possible to realistically contemplate the effective enforcement of readmission rules within the framework of an aid system for the economic development of these countries. Hence, closer links should be established between economic assistance policies and the readmission obligations of third countries.

Insofar as the problem of the return of rejected asylum seekers is concerned, the implementation of extraterritorial procedures of asylum requests does not seem viable. According to the position of the Frontiers and Borders Services, the new concepts of processing asylum claims abroad create impassable difficulties for the establishment of a legal regime and competence norms which such procedures should be subjected to⁹⁵⁶. Even if an agreement were to be reached in relation to these crucial issues,

⁹⁵⁶ Interview conducted with the Aliens and Borders official responsible for processing and analyzing applications (Cláudia Rocha).

namely that of establishing an applicable legislation or the competent authorities (pertaining to the State Members or to the State in which the asylum seeker is to be found), these solutions do not seem to have any additional impact in terms of return matters. In case of a negative decision, there would always be the problem of the return of the person in question, not from the territory of a State Member but from the territory of another State. If any legal, practical or financial difficulties in this state were to exist as far as the Policy of Return is concerned, then this would contribute to increasing the flux of illegal immigrants into EU territory even more.

If the political option of the European Union is to avoid asylum seekers, then it seems more viable to build up reception facilities in international protected areas or “safe” regions. This is only made relevant from the preventive perspective of the Return Policy.