



# **ADMISSION AND STAY BASED ON HUMAN RIGHTS AND HUMANITARIAN GROUNDS: A MAPPING OF NATIONAL PRACTICE**

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# TABLE OF CONTENTS

<b>INTRODUCTION</b>	<b>03</b>
 <b>ARGENTINA</b>	<b>06</b>
 <b>AUSTRIA</b>	<b>08</b>
 <b>BRAZIL</b>	<b>10</b>
 <b>FINLAND</b>	<b>11</b>
 <b>HONG KONG</b>	<b>13</b>
 <b>MOROCCO</b>	<b>14</b>
 <b>THE NETHERLANDS</b>	<b>16</b>
 <b>NEW ZEALAND</b>	<b>18</b>
 <b>PORTUGAL</b>	<b>20</b>
 <b>SPAIN</b>	<b>22</b>

# INTRODUCTION

## ADMISSION AND STAY BASED ON HUMAN RIGHTS AND HUMANITARIAN GROUNDS: A MAPPING OF NATIONAL PRACTICE

We commit to adapt options and pathways for regular migration in a manner that facilitates labour mobility and decent work reflecting demographic and labour market realities, optimizes education opportunities, upholds the right to family life, and responds to the needs of migrant in a situation of vulnerability, with a view to expanding and diversifying availability of pathways for safe, orderly and regular migration. (Global Compact for Safe, Regular and Orderly Migration, Objective 5)

We commit to respond to the needs of migrants who face situations of vulnerability, which may arise from the circumstances in which they travel or the conditions they face in countries of origin, transit and destination, by assisting them and protecting their human rights, in accordance with our obligations under international law. We further commit to uphold the best interests of the child at all times, as a primary consideration in situations where children are concerned, and to apply a gender-responsive approach in addressing vulnerabilities, including in responses to mixed movements. (Global Compact for Safe, Regular and Orderly Migration, Objective 7)

### OBJECTIVE AND SCOPE

As affirmed in the Global Compact for Safe, Regular and Orderly Migration (GCM), all migrants, regardless of their migration status, are entitled to the full respect, protection and fulfilment of their human rights. The GCM further enjoins states and other stakeholders to take concrete measures to ensure that migrants are able to access and enjoy these rights in practice, with a particular focus on ensuring the human rights of migrants who face situations of vulnerability.

The Office of the High Commissioner for Human Rights (OHCHR), in collaboration with DLA Piper Law Firm, has undertaken a pilot mapping of national forms of admission and stay which are based on human rights or humanitarian protection grounds. This mapping project considerably benefitted from the contributions and inputs of civil society organisations other stakeholders at the national level. The **rationale** of this research is linked to the need to better understand existing mechanisms to deliver human rights protection to migrants in vulnerable situations. The Secretary General has noted that notwithstanding the gradual expansion of refugee protection, many people are compelled to leave their homes for reasons that do not fall within the 1951

definition of a refugee.<sup>1</sup> Where migrants in situations of vulnerability fall outside the specific legal category of “refugee”, care must be taken to ensure that their human rights are nevertheless respected, protected and fulfilled. Some migrants will need specific protection because of the situations they left behind such as natural disasters, climate change and environmental degradation, lack of access to economic and social rights, including the right to health or food, and separation from family; the circumstances in which they travel or the conditions they face on arrival; or because of personal characteristics such as their age, gender identity, disability or health status.<sup>2</sup>

The main **objective** of this mapping is to identify national legal mechanisms of admission and stay that are based on human rights and humanitarian grounds. Admission and stay can refer to admission into a country, protection from removal, the grant of legal status as well as the grant of residence. Human rights and humanitarian grounds can be based on international human rights obligations that prohibit removal, or other human rights and humanitarian considerations.

The research addresses three main questions: a) what are the human rights and humanitarian *grounds* of admission and stay that exist at the national level? b) what is the

<sup>1</sup> Report of the Secretary General, A/70/59, para. 18

<sup>2</sup> Global Migration Group, Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations, p. 5-7, and Global Compact for Safe, Orderly and Regular Migration, Objective 7.

content of the protection granted? Does this protection only imply a suspension of removal or would it also involve the grant of residence? What are the rights attached to such protection? c) what procedures have States put in place to assess these claims based on human rights and humanitarian grounds?

## METHODOLOGY

Using a questionnaire prepared by OHCHR, the information presented in the country summaries of this publication were collated by lawyers of DLA Piper Law Firm or in some cases by national NGOs. The research focused on the examination of national legislation and administrative or other regulations, and in addition, in some instances case law was used as a source of information. While OHCHR and DLA Piper have attempted to ensure geographical representation in the case studies, the research was also limited to countries in which relevant information could be collected. The initial research was conducted in some 27 countries and the 10 country summaries included in this publication represent a sample of those countries in which examples of relevant practice were found. The summaries present information related to each particular country without claiming to be exhaustive. OHCHR intends to continue this research as an ongoing project and to continue to analyse national practices of admission and stay from a human rights lens.

## MAIN FINDINGS

### 1. Grounds of protection and/or residence based on human rights and humanitarian considerations

The mapping report identified a number of grounds for admission and stay based on existing national practices. These include:

- An absolute prohibition of non-refoulement under international human rights law arising from the right to life and the prohibition of torture and other cruel, inhuman or degrading treatment or punishment;
- The risk of human rights violations in case of return to the country of origin, which are different from and broader than the absolute prohibition of non-refoulement;
- Presence of situations of serious human rights violations in the country of origin;
- Occurrence of natural disasters in the country of origin;
- Health status and unavailability and/or inaccessibility of the right to health in the country of origin;

- Protection of the right to private and family life in the country of destination;
- Presence of bonds with the country of destination, which take into account length of stay, as well as employment, social, family and emotional ties;
- Where migrants are victims of smuggling and witnesses or victims of trafficking, in some cases including when they do not cooperate with authorities because of safety or humanitarian considerations;
- Being a victim of domestic, sexual and gender-based violence in the country of destination;
- Migrants who are victims of crimes in the country of destination, including labour exploitation and crimes motivated by racism or other grounds of discrimination;
- The presence of humanitarian grounds that may raise issues that are relevant to international human rights law obligations;
- Exceptional humanitarian grounds that are assessed by the authorities in exercise of their discretionary powers;
- Practical reasons that impede return, including lack of documents or practical inability to travel on health grounds;
- Being a pregnant woman;
- Being an unaccompanied child.

The listing above shows that human rights and humanitarian grounds of non-return and residence can be associated with situations that can be present in the country of origin or in the country of destination, and that in accordance with a human rights-based approach the personal circumstances of the individual migrant holds significant weight. This is consistent with the framework establishing the concept of migrants in vulnerable situations.

The research further shows that **international human rights law** plays a key role in preventing removal and/or granting residence to people who are not refugees. In some cases, national provisions that establish a ground of non-return and/or residence are explicitly meant to give effect to international human rights obligations, such as the right to private and family life or the right to life in connection to the right to health. In other legislation, **humanitarian grounds** have been interpreted in the context of international human rights law. Even where a humanitarian provision does not prescribe the application of international human rights obligations, it creates a space where human rights considerations can arise and play a significant role in decision-making. This can happen in the context of an individualized assessment or through

specific programmes addressed to particular nationalities. Finally, in some countries, humanitarian grounds are understood as entirely within the discretionary prerogative of the authorities.

## II. Content of protection and rights attached to residence

In many cases, human rights and humanitarian considerations are grounds for **temporary residence**, which is usually renewed as long as the reasons for granting it persist. When renewal is not possible or after a prescribed length of time, some legal frameworks allow migrants to apply for other residence permits, including long-term residence.

Grounds of non-removal may lead to a **suspension of deportation**, without a legal status or residence permit attached to it. This can include situations when non-removal is grounded on international human rights obligations, such as the principle of non-refoulement. Migrants who are given a “tolerated” status in a country usually have very limited access to rights, including in regard to the right to work, health and education, which can itself be a further cause of vulnerability for the individual.

**Access to rights and social services** usually varies according to the ground of residence, with residence on humanitarian and human rights grounds often enjoying lower levels of access to rights and social services

alongside more limited access to work authorizations. However, in some countries, access to work, education and health is granted on an equal basis regardless of the grounds of residence.

## III. Procedural aspects

In some countries, human rights and humanitarian considerations are included in law or regulations as grounds to apply for a stay of removal and/or a residence permit. Therefore, an individual has the possibility to submit a claim for protection from removal and/or to apply for a residence permit. The assessment of human rights and humanitarian claims is sometimes included as a **final step in a single asylum procedure** after the refugee claim has been rejected. In other cases, the **procedure** follows the one applicable for residence **permits** and the migrant is required to file a specific application to the competent authority. Finally, in other cases, an individual can submit an **appeal on humanitarian grounds**, when other forms of protection or residence have been rejected.

In some countries, an individual cannot submit a specific request for such protection, and human rights and humanitarian grounds are only assessed at the initiative of the authority or *ex officio* in the context of a removal procedure.

### KEY MESSAGES

1. Human rights and humanitarian considerations are grounds for the admission and stay of migrants in several countries around the world. The inclusion of such grounds in national legislations is an effective tool to ensure the protection of the human rights of migrants in vulnerable situations.
2. International human rights law plays a key role, as it establishes obligations that prevent removal and contribute to the interpretation of the scope and content of humanitarian grounds.
3. Differential treatment in relation to access to rights and services based on the grounds under which protection or residence is granted, may amount to discrimination and should be avoided. Serious limitations to access to rights for people who cannot return to their country of origin may constitute a form of indirect refoulement.
4. States have put in place a range of different procedures to assess protection or residence claims based on human rights and humanitarian grounds. When specific human rights or humanitarian considerations are considered as a ground of non-removal, it should be possible for the migrant to claim protection and residence on these grounds through a rules-based and established procedure.

# ARGENTINA



## GROUNDINGS OF PROTECTION AND/OR RESIDENCE

### TEMPORARY RESIDENCE FOR HUMANITARIAN REASONS

Humanitarian reasons are one of the specific criteria for the granting of temporary residence permits.<sup>1</sup> The concept of “humanitarian reasons” has been linked to international human rights obligations. In particular, humanitarian reasons refer to the situation of migrants who: a) do not qualify as refugees, but whose return would violate the prohibition of non-refoulement; b) if returned to their country of origin, would be subjected to human rights violations, as defined in international human rights treaties; c) are victims of trafficking and/or smuggling; d) are at risk of death in the country of origin due to lack of medical treatment.<sup>2</sup>

### PROTECTION FROM DEPORTATION AND RESIDENCE BASED ON HUMANITARIAN REASONS AND FAMILY REUNIFICATION

Argentinian law recognizes migration as a human right and establishes access to regularization as an obligation of the State and a right of migrants.<sup>3</sup> The law establishes that regularization must be the first response of the State to the irregular situation of migrants rather than detention or expulsion. Once the migratory irregularity has been verified, an individual has 30 days to regularize their situation.<sup>4</sup> To that effect, authorities must provide adequate information<sup>5</sup>, free legal advice<sup>6</sup> and consider the simplification of procedures.<sup>7</sup>

Humanitarian reasons and family reunification are criteria for admission that can justify the entry and stay, as permanent or temporary residents, of people who otherwise would be barred from entry to Argentina.<sup>8</sup> The scope of these criteria has evolved through subsequent decisions of the administration and the judiciary.

### SPECIFIC PROGRAMS OF ACCESS TO RESIDENCE FOR PARTICULAR NATIONALITIES

Argentinian law allows and encourages the State to establish programs to facilitate access to residence for migrants of specific nationalities who have human rights protection needs due to the situation in their country of origin and/or in the country of migration and face problems in accessing regular pathways of regularization. These programs are usually grounded in the criteria of humanitarian reasons, family unity and ties to the country that have been described above. The 2013 regularization of migrants from Senegal<sup>9</sup> and the Dominican Republic<sup>10</sup> acknowledged the economic and social ties that these groups had developed to Argentina and their vulnerability to human rights violations, in particular of the right to work and social security, due to their lack of regular status. The 2017 ad hoc access to residence and suspension of deportations of Haitians<sup>11</sup> was motivated by the situation in Haiti, in particular the repeated natural disasters. Similarly, the 2018 decisions adopted to facilitate access to residence for Venezuelan migrants through Mercosur criteria<sup>12</sup> took into consideration the social, political and humanitarian crisis in Venezuela and the obstacles that this group face in obtaining documents in their country of origin.

### FAMILY REUNIFICATION AND BONDS WITH THE COUNTRY (ARRAIGO)

Family unity is a central consideration in decisions concerning return and granting of residence. Family reunification is recognized as one of the objectives of Argentina’s migration law and policies<sup>13</sup> and the need to protect this principle constitutes a reason to grant admission and stay to migrants who would otherwise be included in grounds of non-admission.<sup>14</sup> The concept of family reunification has been interpreted in a progressive way and is now linked to the right to family unity and family life. In addition, administrative and judicial decisions have developed the concept of “arraigo” – bonds with the country – that means that regularization and return decisions must take into account the length of stay (de facto residence), the bonds of employment, as well as family and emotional ties that the individual has developed in the country and the best interests of any children involved in the decision.<sup>15</sup>

# ARGENTINA



## CONTENT OF PROTECTION

Residence for humanitarian reasons is temporary, but its minimum and maximum duration is not established by law or regulation. The specific programs adopted for particular nationalities have facilitated access to regular categories of temporary residence permits, such as one year (renewable) temporary residence permits under the criteria of self-employed work for Senegalese and humanitarian reasons for Dominicans; two year temporary residence for Haitians; and two year temporary residence under the Mercosur criteria for Venezuelans. When a temporary residence permit is granted, the migrant receives a national identity document, which identifies the individual and specifies the migratory category.

Permanent residence may be requested for reasons of family unity or due to bonds with the country after two years of temporary residence for people from Mercosur countries or after three years of temporary residence for others.<sup>16</sup> According to the Constitution and the law, all migrants regardless of their migratory status, have equal access as national to rights, in particular with regard to social services, public goods, health, education, justice, work, employment and social security.<sup>17</sup>

## PROCEDURE

When an individual's stay is found to be irregular, the authority competent for admission and residence (National Direction of Migration, NDM) must order them to regularize their situation within a specific period of time.<sup>18</sup> Migrants who wish to apply for a residence permit must request an appointment with the NDM, bring the documentation requested according to the category for which they intend to apply to and pay the corresponding fee. Migrants have the right to appeal a regularization or a return decision to the administrative authorities and before the judiciary, and this appeal has suspensive effect. Indeed, Argentinian law demands the judicial review of all return decisions.<sup>19</sup>

There is no specific procedure or interview to apply for the temporary residence on humanitarian grounds. Therefore, in practice, obtaining residence on humanitarian grounds depends on a specific provision of the NDM according to the nationality of the migrant or on the system of administrative and judicial appeals.

<sup>1</sup> Law 25.871, Art. 17

<sup>2</sup> Law 25.871, Art. 61

<sup>3</sup> Law 25.871, Art. 9

<sup>4</sup> Law 25.871, Art. 86

<sup>5</sup> Decree 616/2010, Art. 17

<sup>6</sup> Law 25.871, Art. 29

<sup>7</sup> Law 25.871, Art. 23

<sup>8</sup> Decree 616/2010, Art. 23

<sup>9</sup> Law 25.871, Art. 3.d

<sup>10</sup> Law 25.871, Art. 29

<sup>11</sup> [https://jurisprudencia.mpd.gov.ar/Boletines/2017.03.%20Migrantes%20\(nacional\).pdf](https://jurisprudencia.mpd.gov.ar/Boletines/2017.03.%20Migrantes%20(nacional).pdf)

<sup>12</sup> Decision 002/2013. Available at : <http://www.mpd.gov.ar/uploads/documentos/refugiados/Disposicion%20regularizacion%20senegaleses.pdf>

<sup>13</sup> Decision 001/2013. Available at : <http://www.mpd.gov.ar/uploads/documentos/refugiados/Disposicion%20regularizacion%20dominicanas.pdf>

<sup>14</sup> Decision 1143/2017. Available at : <https://www.boletinoficial.gob.ar/#!DetalleNorma/160342/20170320>

<sup>15</sup> Decision 594/2018. Available at : <https://www.boletinoficial.gob.ar/#!DetalleNorma/178907/20180216>

<sup>16</sup> Law 25.871, Art. 22

<sup>17</sup> Article 14 of the Constitution; Law 25.871, Art. 6

<sup>18</sup> Law 25.871, Art. 61

<sup>19</sup> Law 25.871, Art.61

# AUSTRIA



## GROUNDINGS OF PROTECTION AND/OR RESIDENCE

### RESIDENCE PERMIT TO PROTECT THE RIGHT TO PRIVATE AND FAMILY LIFE

A residence permit is granted if a person cannot be returned because the removal would be in violation of the right to private and family life within the meaning of Article 8 of the European Convention of Human Rights.<sup>1</sup> While assessing whether the removal would permanently violate the right to private and family life, the authority takes into account several criteria, such as the length of stay in Austria, the actual existence of a family life and its intensity, the degree of integration, the criminal justice integrity, the bond to the country of origin, the requirement of public order and the question of whether the family life was created at a time where the insecure residence status was already present. A combined residence permit and work permit (residence permit plus) is granted when an additional criteria is met. This second requirement is the fulfilment of the Integration Agreement (module I) or the exercise of a legitimate employment at the time of the decision, with a minimum monthly income.<sup>2</sup>

### RESIDENCE PERMIT FOR CONTINUOUS RESIDENCE

A residence permit can be issued if it has been proven that a person has resided continuously in Austria for five years, of which at least half, but in any case three years, they have been legally resident.<sup>3</sup> The applicant has to fulfil some additional requirements that include proof of local accommodation, sufficient income and health insurance.

A residence permit plus is granted when the requirement of the Integration Agreement (module I) or employment with a minimum monthly income limit is also met.

### TOLERATED STAY

Tolerated stay is granted when deportation is inadmissible or practically impossible.<sup>4</sup> Deportation is for example inadmissible when the removal of a person who does not qualify for subsidiary protection<sup>5</sup> would still infringe the prohibition of non-refoulement under Articles 2 (right to life) or 3 (prohibition of torture) of the European Convention on Human Rights (ECHR) or Protocol No. 6 or No. 13 to the ECHR for the abolition of the death penalty. Deportation is also inadmissible when it is in conflict with the recommendation of an interim measure by the European Court of Human Rights. Deportation can be also impossible for practical reasons not attributable to the individual, for instance when the home country has not issued the appropriate documentation.

### SPECIAL PROTECTION RESIDENCE PERMIT AFTER 1 YEAR OF TOLERATED STAY AND FOR WITNESSES OR VICTIMS OF TRAFFICKING AND VICTIMS OF VIOLENCE

When the conditions that led to tolerated stay continue to exist after one year, the authority can issue a special protection residence permit. The conditions for granting this permit are: the person must have a clean criminal record and does not pose a threat to the public or the security of Austria.

This residence permit can also be granted to witnesses or victims of human trafficking in order to ensure prosecution or the enforcement of civil claims in connection with such criminal acts.

The special protection residence permit is also granted to victims of violence in an irregular situation in order to protect them against further violence.<sup>6</sup>

<sup>1</sup> Article 55, Asylum Act 2005

<sup>2</sup> Article 55 (1), Asylum Act 2005

<sup>3</sup> Article 56, Asylum Act 2005

<sup>4</sup> Article 46 (a), Aliens Police Act 2005

<sup>5</sup> Article 8, Asylum Act 2005

<sup>6</sup> Article 57, Asylum Act 2005



# AUSTRIA



## CONTENT OF PROTECTION

The residence permit and the residence permit plus are issued for twelve months and are not renewable. However, after one year, the person can apply for a residence permit under the Settlement and Residence Act. The special protection residence permit is issued for twelve months and can be extended provided that the person still meets all of the qualifying conditions.

All people with a residence status in Austria are entitled to the right to healthcare and education. While residence permit plus entails unrestricted access to the labour market, access to work with the residence permit is only possible with an employment permit, which is tied to a particular job. With a special protection residence

permit, access to work is possible after the release of an employment permit, which can be granted without an examination of the labour market.

Even if deportation is inadmissible or impossible, the tolerated stay does not instead constitute a residence permit and does not entail any of the rights associated with residence status. Tolerated persons are generally denied access to the Austrian labour market. The toleration card only serves to prove the identity of a person and can be terminated at any time in case of changed circumstances. After one year of toleration, a special protection residence permit can be issued.

## PROCEDURE

Applications for residence permits are submitted to the respective competent authority. The tolerated stay can only be granted when the application for another status was unsuccessful but deportation is not possible. The decision of the Federal Office for Immigration and Asylum (BFA) can be appealed.

The administrative appeal is decided by the Federal Administrative Court. It is then possible to make an ordinary or extra ordinary appeal against this decision or to file a complaint for breach of a constitutionally guaranteed right.

# BRAZIL



## GROUNDINGS OF PROTECTION AND/OR RESIDENCE STATUS

### TEMPORARY RESIDENCE PERMIT FOR HUMANITARIAN RECEPTION

According to the 2017 Migration Law, a temporary residence permit for humanitarian reasons can be granted to people from any country which is in a situation of imminent and/or enduring instability, where there is armed conflict, major calamity, environmental disaster or serious violations of human rights or international humanitarian law, or in other cases established by the regulation.<sup>1</sup>

The “humanitarian visa” was initially created to respond to the mass arrivals of Haitians to Brazil after the 2012 earthquake. Most recently, access to temporary residence has been provided to people arriving from neighbouring countries, namely from Venezuela, which was recognized as being affected by a “humanitarian crisis”.<sup>2</sup>

### CONTENT OF PROTECTION

The temporary residence permit for humanitarian reasons for nationals of bordering countries is granted for two years. 90 days before its expiry, migrants can request a permanent residence permit if they do not have criminal records in Brazil and can prove a means of subsistence.<sup>3</sup>

All migrants in Brazil have the same rights as citizens. The new Migration Law recognizes, among others, the right of migrants to public health, social welfare services and social security and the right to public education, without discrimination on grounds of nationality and immigration status.<sup>4</sup>

### PROCEDURE

The request for a temporary residence permit must be presented to the Federal Police by submitting the required documentation, which includes an identity card or passport and birth or marriage certificates or certificates issued by consular authorities.

Since March 2018, the documentation required for nationals from bordering countries, namely Venezuela, has been simplified and no fees are currently charged from these migrants.

<sup>1</sup> Law 13445/2017, Art. 14(3)

<sup>2</sup> Presidency of the Republic, Decree 9.285, 15 February 2018

<sup>3</sup> Interministerial Ordinance 9, 14 March 2018, Art. 3

<sup>4</sup> Law 13445/2017, Art. 4

# FINLAND



## GROUND OF PROTECTION AND/OR RESIDENCE

### NON-REFOULEMENT UNDER INTERNATIONAL HUMAN RIGHTS LAW

In Finnish law, the principle of non-refoulement states that no one may be returned to a country where they could be subject to the death penalty, torture, persecution or other treatment violating human dignity or from where they could be sent to such a country.<sup>1</sup>

The prohibition of non-refoulement has been implemented mainly through the grant of subsidiary protection.<sup>2</sup> Subsidiary protection is granted if there are substantial grounds for believing that the person, if returned, would face a real risk of being subjected to serious harm. Serious harm is understood as consisting of the death penalty or execution; torture or other inhuman or degrading treatment or punishment; serious and individual threat as a result of indiscriminate violence in situations of international or internal armed conflict.<sup>3</sup>

Moreover, a temporary residence permit for a maximum of one year at time is issued when a migrant is excluded from subsidiary protection,<sup>4</sup> but when they cannot be removed from Finland because they are under the threat of death penalty, torture or other treatment violating human dignity.<sup>5</sup>

### RESIDENCE PERMIT WHEN RETURN IS NOT POSSIBLE FOR TEMPORARY HEALTH REASONS OR PRACTICAL OBSTACLES

A temporary residence permit may be issued in cases where the return of an individual is not practically possible because of temporary reasons of health or for any other reason. Situations where the return cannot be effected due to the refusal of the individual are not covered. Applicants do not have to prove secure means of support in order to be granted this residence permit.<sup>6</sup>

### RESIDENCE PERMIT ON COMPASSIONATE GROUNDS (RIGHT TO HEALTH, RIGHT TO FAMILY LIFE AND OTHER RELEVANT ISSUES)

A continuous residence permit on compassionate grounds may be issued if return would be manifestly unreasonable with regard to health conditions, ties to Finland or other “compassionate grounds”, particularly in consideration of the circumstances a person would face in the home country or the vulnerable situation of the individual. Authorities have interpreted these compassionate grounds as arising from international human rights law obligations as well as national law. Evidence of secure means of support is also not required to be granted this permit.<sup>7</sup>

<sup>1</sup> Aliens Act, Section 147

<sup>2</sup> Subsidiary protection is a standard of the Common European Asylum System and is regulated by the EU Directive 2011/95

<sup>3</sup> Aliens Act, Section 88

<sup>4</sup> Subsidiary protection is only granted if exclusion clauses do not apply. Exclusion criteria are related to: the commission of a) crimes against peace, war crimes, crimes against humanity; b) serious crimes; c) acts contrary to the purposes and principles of the United Nations; or the fact that the individual constitutes d) a danger to the community or to the security of the State. In Finnish law, the criteria of exclusion from subsidiary protection are defined in Section 88 (2) of the Aliens Act

<sup>5</sup> Aliens Act, Section 89

<sup>6</sup> Aliens Act, Section 51

<sup>7</sup> Aliens Act, Section 52

# FINLAND



## CONTENT OF PROTECTION

For those who are excluded from subsidiary protection, but protected from removal by non-refoulement, a temporary residence permit is granted for one year at a time. In comparison, subsidiary protection status is granted for four years, after which a person may apply for an extended permit, which is granted for a further four years.

Temporary residence permits when return is not possible for temporary health reasons or practical obstacles are initially granted for a maximum of one year and can be extended if the conditions continue to be met. After a continuous residence of two years, a continuous residence permit is granted, if the reasons for granting the permit still persist.

The residence permit on compassionate grounds is first given for one year, following which an extended permit may be granted for up to four years, if the individual still meet the initial requirements.

A permanent residence permit may be granted after four years of continuous stay in Finland on the basis of a continuous residence permit, if the requirements for granting a continuous residence permit still exist.

During the application procedure, all applicants are accommodated in reception centers, unless they prefer to stay in private accommodation. After being granted a residence permit and regardless of the grounds of the permit, individuals may apply for a municipal place, which means acquiring an apartment in a municipality, becoming a resident of that municipality, being entitled to integration services, and having access to rights and services including healthcare and education. Some limitations apply to temporary permits. For instance, migrants who are granted a residence permit on the ground that they are excluded from subsidiary protection, but protected by non-refoulement, have no right to work. The residence permit granted when return is not possible for temporary health reasons or due to practical obstacles does not allow family members of the permit-holder to seek family reunification in Finland through a residence permit on the basis of family ties.

## PROCEDURE

The Finnish Immigration Service examines in a single procedure whether there are grounds for a) refugee status, b) subsidiary protection status, 3) temporary residence permit for exclusion cases protected by non-refoulement, 4) temporary residence permit for temporary health reasons or practical reasons, and 5) continuous residence permit on compassionate grounds.<sup>8</sup> The procedure includes an interview with the applicant<sup>9</sup> and the right to appeal any decision to the Administrative Court and the Supreme Administrative Court.<sup>10</sup>

<sup>8</sup> Aliens Act, Section 94

<sup>9</sup> Aliens Act, Section 97

<sup>10</sup> Aliens Act, Section 190 and 196

# HONG KONG



## GROUND OF PROTECTION AND/OR RESIDENCE

Under the Unified Screening Mechanism, individuals can submit claims for non-refoulement protection against removal from Hong Kong to another territory. Among the applicable grounds for non-refoulement protection, is included a prohibition on returning a person to a State, where there are substantial grounds for believing that they would be in danger of being subjected to torture. This ground of protection is explicitly based on the Convention against Torture, in particular Article 1.1 (definition of torture) and

Article 3.1 (prohibition of refoulement).<sup>1</sup> Non refoulement protection is also granted when there are substantial grounds to believe that there is a personal and substantial risk of violation of an absolute and non-derogable right under section s.5(2)(c) of the Hong Kong Bill of Right.<sup>2</sup> Absolute and non-derogable rights include the right to life under Article 2 of the Hong Kong Bill of Rights and the prohibition of torture and other cruel, inhuman or degrading treatment or punishment under Article 3.

## CONTENT OF PROTECTION

The irregular migrant status of all non-refoulement claimants does not change because of the non-refoulement claim, regardless of its results. Therefore, all non-refoulement claimants, even if their claims are substantiated, and their children, even if born in Hong Kong, remain as irregular migrants. When a non-refoulement claim is substantiated, the removal of the migrant is temporarily halted until the claimed risks cease to exist or the claim is withdrawn, finally deemed unsubstantiated or a positive decision is revoked. Non-refoulement claimants may still be removed to a third State, different from that in which a risk exists for the claimant. Claiming non-refoulement protection does not

affect the validity or preclude the issuance of a removal or deportation order against the migrant. Non-refoulement claimants are not issued identity documents. When they use medical services provided by public hospitals, they are required to pay for the medical expenses chargeable for “non-eligible persons”. In case of financial difficulties, they can apply for a medical fee waiver. Non-refoulement claimants have no right to work, including non-paid work, although substantiated claimants can apply for permission to work, which is granted on the discretion of the Immigration Department. Children can only go to school if the Immigration Department does not object.

## PROCEDURE

Non-refoulement claims are assessed by the Immigration Department under the Unified Screening Mechanism. After the submission of a written signification and claim form, the applicant is requested to attend an interview and provide further information and evidence relevant to the claim. An appeal (for claims based on torture) or a petition (for claims based on all applicable grounds except torture) must

be filed with the Torture Claims Appeal Board or the Non Refoulement Claims Petition Office within 14 days after the notification of the decision, unless special circumstances justify a late submission. Access to lawyers is guaranteed during the Immigration Department stage, however, it is up to the lawyers to decide whether to continue their representation at the appeal or petition stage.

<sup>1</sup> Immigration Ordinance, section 37U, Cap.115 and Part VIIC.

<sup>2</sup> Court of Final Appeal, *Udamaka v the Secretary for Security* ([2013] 2 HKC 75)

# MOROCCO



## GROUNDINGS OF PROTECTION AND/OR RESIDENCE

### NON-REFOULEMENT TO CRUEL, INHUMAN OR DEGRADING TREATMENT AND PROHIBITION OF REMOVAL OF PREGNANT WOMEN AND OF CHILDREN

Moroccan law contains a prohibition of the removal of pregnant women and of children as well as the prohibition of removal of a migrant to a country where they would be exposed to cruel, inhuman or degrading treatment.<sup>1</sup>

### EXCEPTIONAL RESIDENCE PERMIT

While Moroccan law establishes the criteria to request residence permits (registration card and residence card),<sup>2</sup> the decree of implementation of the law also establishes that the Director General of National Security may issue an exceptional residence permit for a period of more than 3 months and less than one year when “the nature of the presence of certain foreigners in the Moroccan territory requires it”.<sup>3</sup>

### REGULARIZATION CAMPAIGNS

From 1 January 2014 to 31 January 2014 Morocco implemented the first regularization of migrants on an exceptional basis. The categories of migrants in an irregular situation who could benefit from the regularization were the following: a) spouses of Moroccan nationals who have been married for two years; b) spouses of other foreigners in a regular situation after four years of marriage; c) children from the two categories mentioned above; d) foreigners with at least two years of regular employment contracts; e) foreigners with five years of continuous residence in Morocco; f) foreigners with serious illnesses who can apply for regularization after one year of presence in Morocco.<sup>4</sup> A second exceptional regularization of migrants in an irregular situation took place from 15 December 2016 to 31 December 2017. In this second regularization, the criteria were made more flexible and included: a) women and their children; b) unaccompanied children; c) spouses of Moroccan nationals or foreigners in a regular situation, regardless of the length of their marriage; d) foreigners who can prove a professional activity, but who do not have an employment contract; e) foreigners who have not been able to prove five years of residence in Morocco but who have a college education or an equivalent.

## CONTENT OF PROTECTION

Despite including a prohibition on the removal of pregnant woman and of children as well as a bar on return where there is a risk of cruel, inhuman or degrading treatment, Moroccan law does not provide a specific legal status and/or residence permit to migrants protected from such return, nor does it identify the rights to which the individual would be entitled.

The exceptional residence permit can be granted for a period of more than 3 months and less than one year.

Migrants who have benefitted from the two regularization campaigns received a one-year renewable residence permit.

<sup>1</sup> Law 02-03, Art. 29.

<sup>2</sup> Law 02-03, Art. 5-20

<sup>3</sup> Decree 2-09-207 of 1 April 2010, Art. 10

<sup>4</sup> Circular 8303 of 16 December 2013 governing the exceptional operation to regularize the residence situation of foreigners

# MOROCCO



## PROCEDURE

The criteria to grant an exceptional residence permit allow the Moroccan authorities wide discretion. The documents to be provided are limited to the standard form completed in two copies; a copy of the passport; two photographs of identity; documents which can prove residence in Morocco; and relevant supporting documents.<sup>5</sup>

Applications for regularization were submitted to the Foreigners Office and examined by a Commission. Applications that received a favourable opinion from the

Commission were addressed to the competent police office in order to issue a residence permit. Applications that received an unfavourable opinion were addressed to the National Commission for Monitoring and Appeals. Applicants were notified of the rejection of their application and of the possibility of lodging an appeal with the National Commission for Monitoring and Appeals.

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<sup>5</sup> Order 500-124

# THE NETHERLANDS



## GROUNDINGS OF PROTECTION AND/OR RESIDENCE

### RESIDENCE PERMIT TO PROTECT THE RIGHT TO PRIVATE AND FAMILY LIFE

A person whose return would be in violation of the right to private and family life within the meaning of article 8 of the European Convention of Human Rights, can qualify for a residence permit. While assessing whether the removal would violate the right to private and family life, the authority needs to take into account several circumstances, including the period of residence in the Netherlands; the relationship of migrants and their families with the Netherlands, the country of origin and third countries; issues which would interfere with the exercise of family life outside the Netherlands; and medical circumstances.

### RESIDENCE PERMIT TO PROTECT FROM HONOUR-BASED VIOLENCE

A fixed term residence permit can be granted to a migrant who faces an immediate and severe threat of honour-based violence.<sup>1</sup> The following circumstances need to be fulfilled: (i) there is a threat of honour-based violence both in the Netherlands and in the country of origin; (ii) there is an immediate threat which will not change in the foreseeable future; (iii) the threat of honour based-violence is severe; and (iv) the individual does not have any other possibility to apply for a residence permit.

### RESIDENCE PERMIT TO PROTECT FROM DOMESTIC VIOLENCE

A fixed term residence permit can be granted to a victim of domestic violence.<sup>2</sup> All the following criteria need to be fulfilled: (i) there is a real threat of domestic violence in the Netherlands; (ii) the victim cannot escape the domestic violence by moving to the country of origin, because there is also a threat of violence by family members in the country of origin; (iii) the domestic violence triggered the break up of the relationship or marriage; (iv) the domestic violence is not related to honour-based violence; and (v) the individual does not have any other possibility to apply for a residence permit.

### RESIDENCE PERMIT FOR VICTIMS AND/OR WITNESSES OF HUMAN TRAFFICKING

Victims and witnesses of human trafficking can receive a fixed term residence permit if they have reported to the police or otherwise cooperated in the criminal investigation or prosecution.<sup>3</sup> Victims of human trafficking can also be granted a residence permit if they demonstrate that they are unable or unwilling to report to the police or otherwise cooperate with the criminal investigation and prosecution of the human trafficker, because of a serious threat and/or a medical or psychological impairment.

<sup>1</sup>Aliens Order, Article 3.48; Aliens Circular, paragraph B8(2)

<sup>2</sup>Aliens Order, Article 3.48; Aliens Circular, paragraph B8(2)

<sup>3</sup>Aliens Order, Article 3.48; Aliens Circular, paragraph B8(3)



# THE NETHERLANDS



## RESIDENCE PERMIT FOR EXTERNAL CAUSES THAT IMPEDE DEPARTURE

A fixed term residence permit can be granted if a person cannot depart from the Netherlands due to external causes, such as the lack of valid travel documents or the inability to travel because of medical conditions.<sup>4</sup>

## SUSPENSION OF DEPARTURE FOR VIOLATIONS OF ARTICLE 3 ECHR DUE TO HEALTH STATUS

A migrant will receive a suspension from enforced departure if there is a real risk that their removal would violate article 3 of the European Convention of Human Rights because of their health status.<sup>5</sup> There is only a real risk of violation of article 3 if: (i) the Medical Advisors Office advises that if no medical care is provided, a medical emergency situation will arise; and (ii) if the medical care is not available in the country of origin; or (iii) the medical care is available but not accessible. A medical emergency is a situation in which it can be proved that if adequate care is not provided within a period of three months this will cause death, disability or other severe physical or mental harm. After one year of suspension of departure, individuals may apply for a residence permit for medical treatment if they show that they have actively tried to access medical care in their country of origin and to organizing their departure from the Netherlands.

## CONTENT OF PROTECTION

The migrant receives a residence permit if the legal requirements detailed above are fulfilled.<sup>6</sup> In some cases, temporary residence permits can be extended. For instance, the residence permit for victims of human trafficking can be extended as long as the criminal investigation or prosecution is ongoing or the presence of the witness in the Netherlands is required.<sup>7</sup> The residence permit based on the “external cause” policy has a validity of one year. Extension is possible, unless circumstances change and the individual can go back to the country of origin or

another country.<sup>8</sup> The residence permit for victims of honour and domestic violence cannot be extended, but after one year, the applicant may apply for a residence permit on non-temporary humanitarian grounds if the threat persists or in case of compelling humanitarian grounds.<sup>9</sup>

All individuals in the Netherlands are entitled to access necessary medical care. All children under the age of eighteen are entitled to attend school. Access to the Dutch labor market depends on the specific residence permit.

## PROCEDURE

Residence permit applications need to be submitted to the Dutch Immigration and Naturalization Service, which is part of the Ministry of Security and Justice and processes all applications of admission and stay in the

Netherlands, including applications for refugee status and subsidiary protection. The migrant has the right to appeal rejection of a residence permit.

<sup>4</sup> Aliens Order, Article 3.48; Aliens Circular, paragraph B8(4)

<sup>5</sup> Aliens Act, Article 64 ; Aliens Circular, paragraph B8(9.1.3), Aliens Circular, paragraph A3(7.1.3)

<sup>6</sup> Aliens Act, Article 28

<sup>7</sup> Aliens Circular, paragraph B8(3.2)

<sup>8</sup> Aliens Circular, paragraph B8(4.4)

<sup>9</sup> Aliens Circular, paragraph B8(2.2)

# NEW ZEALAND



## GROUND OF PROTECTION AND/OR RESIDENCE

### NON-REFOULEMENT UNDER CAT AND ICCPR: PROTECTED PERSONS

New Zealand has specifically incorporated certain aspects of its international obligations with respect to non-refoulement into its national legislation. A person may be recognised as a protected person in New Zealand: a) under the Convention Against Torture if there are substantial grounds for believing that they would be in danger of being subjected to torture if deported; and b) under the Covenant on Civil and Political Rights if they would be in danger of being subjected to arbitrary deprivation of life or cruel, inhuman or degrading treatment or punishment if deported. Issues in relation to the availability and quality of health or medical care in the country of origin are explicitly excluded from the scope of arbitrary deprivation of life or cruel, inhuman or degrading treatment or punishment.<sup>1</sup> Protected status is not granted if there is access to meaningful domestic protection in the home country and deportation to a third country is possible, unless there is a risk in that country of torture, arbitrary deprivation of life or cruel, inhuman or degrading treatment or punishment.<sup>2</sup>

### APPEAL ON HUMANITARIAN GROUNDS

The Immigration and Protection Tribunal (Tribunal) has jurisdiction to hear appeals against deportation liability on humanitarian grounds, which are defined as exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the migrant to be deported from New Zealand. Allowing the person to remain in New Zealand should not be contrary to the public interest.<sup>3</sup> In determining whether deportation would be unjust or unduly harsh, the primary focus is on the personal circumstances of the individual who faces deportation including their immediate family members.<sup>4</sup> Humanitarian appeals may raise issues that are relevant to international human rights obligations,<sup>5</sup> such as the right to family life<sup>6</sup> and the right to social security.<sup>7</sup>

### CANCELLATION OF DEPORTATION ORDER

Immigration officers may, at their absolute discretion, cancel a deportation order. Officers must have regard to any relevant international law obligations, but they have “absolute discretion”, which means that they are entitled to reach any conclusion they think fit, are not under any obligation to apply any specific legal test, nor to inquire further into the personal circumstances of the person or give reasons for any decision. However, to the extent that any international obligations relevant to New Zealand have been taken into account, the officers are directed to make a specific notation which both describes these obligations as well as the facts concerning the deportee’s personal circumstances which prompted the officer’s reference to those international obligations.<sup>8</sup> Given that immigration officials are not obliged to give reasons for their decisions, the scope for judicial review is limited to a *Wednesbury* unreasonableness inquiry.

### RESIDENCE FOR VICTIMS OF DOMESTIC VIOLENCE

People in New Zealand who have been partners of New Zealand citizens or of residence class visa holders and whose partnership has ended due to domestic violence may be granted residence if they establish that they are unable to return to their home country because they would have no means of independent financial support or because they would be at risk of abuse or exclusion from their community due to stigma. The objective of this residence category is explicitly to recognize New Zealand’s international human rights obligations, in particular to end discrimination against women in all matters related to marriage and family relations (CEDAW, Article 16) and protect children from mental and physical violence (CRC Article 19).<sup>9</sup>

<sup>1</sup> Immigration Act, Section 130 and 131

<sup>2</sup> Immigration Act, Section 164

<sup>3</sup> Immigration Act, Section 206 and 207

<sup>4</sup> *Guo v Minister of Immigration* [2016] 1 NZLR 248 at [9]

<sup>5</sup> *Re DZ (Sri Lanka)* [2017] NZIPT 502646 at [35] to [36]

<sup>6</sup> *Re An (Columbia)* [2017] NZIPT 502843

<sup>7</sup> *Re Pienaar* [2017] NZIPT 503372

<sup>8</sup> Immigration Act, Section 177

<sup>9</sup> Operational Manual, 54.5.b

# NEW ZEALAND



## RESIDENCE FOR VICTIMS OF HUMAN TRAFFICKING

Victims of human trafficking who cannot return home because they will be endangered, at risk of being re-victimised or at risk of suffering significant social stigma and financial hardship as a result of being trafficked may be granted a residence visa. The objective of this residence category is also to recognise New Zealand's international obligations, particularly to offer protection and assistance to victims of human trafficking who are likely to be suffering the effects of trauma and abuse and enable trafficking offenders to be prosecuted.<sup>10</sup>

## CONTENT OF PROTECTION

The recognition of protected status does not automatically grant a residency status. However protected persons can apply for permanent or temporary resident visas.<sup>11</sup> As for appeals on humanitarian grounds, the Tribunal may order steps to be taken to give effect to its decision including the grant of a resident or temporary visa, subject to any conditions the Tribunal determines.<sup>12</sup>

Different rights are associated with different types of visas and each visa may be subject to either permanent or time-limited conditions.<sup>13</sup> Migrants with permanent visas have access to education (including free public education, tertiary fee subsidies and student loans) and social welfare.

## PROCEDURE

Claims for refugee or protected status are assessed in a single procedure. The right to appeal on humanitarian grounds has few exceptions and extends to liability to deportation in the context of negative decisions on protected status and visa applications. In some cases, the appeal on humanitarian grounds is a separate and

parallel process, acting as a 'fall back' position if the other appeal(s) on non-humanitarian grounds are not successful.<sup>14</sup> In order cases, appeals on facts are not allowed and the appeal on humanitarian grounds against liability to deportation is the only option available.

<sup>10</sup> Operational Manual, S4.15

<sup>11</sup> Operation Manual, C5.15

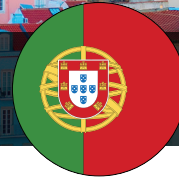
<sup>12</sup> Immigration Act, Sections 209 and 210

<sup>13</sup> Immigration Act, Section 49

<sup>14</sup> Immigration Act, Section 203



# PORTUGAL



## GROUNDINGS OF PROTECTION AND/OR RESIDENCE STATUS

### RESIDENT PERMIT FOR VICTIMS OF HUMAN TRAFFICKING AND SMUGGLING

A residence permit may be granted to victims of human trafficking or smuggling, even if they have irregularly entered the country. The victim needs to meet the following cumulative conditions: a) their presence is of interest in judicial investigations and proceedings; b) they show a clear willingness to cooperate with the authorities in investigating and prosecuting human trafficking or smuggling; c) they have broken the relations with the alleged perpetrators of trafficking and smugglings.<sup>1</sup> In some special cases, a residence permit may be granted with exemption from the first two requirements, according to the victim's personal circumstances, in particular their safety, health and family situation.<sup>2</sup>

### TEMPORARY RESIDENCE PERMIT FOR HUMANITARIAN REASONS

If an individual's situation does not fall under the scope of visa waivers mentioned above nor are they protected under refugee status and subsidiary protection,<sup>4</sup> a temporary residence permit may be granted for humanitarian reasons. This temporary residence permit is issued under an exceptional regime that can only be activated by the administrative authorities.<sup>5</sup> The scope of these humanitarian grounds has not been defined by law or regulation and depends on the administrative practice.

### RESIDENCE PERMIT WITH WAIVER OF VISA

There are situations in which nationals of third countries do not need to hold a visa to obtain authorization for temporary residence. These exceptions are grounded on family ties, continuous residence, protection of unaccompanied children and health conditions. Among others, these persons can obtain temporary residence without a prior visa: a) children born in Portugal who are children of holders of a residence permit; b) children born in Portugal who have stayed there and are attending preschool education or primary school, secondary or professional education; c) children of holders of a residence permit who have reached the age of majority and have habitually resided in Portugal from the age of 10 years; d) adults born in Portugal who have never left the country for residence purposes or have resided there since they were 10 years old or younger; e) unaccompanied children who are under guardianship in Portugal; g) people who suffer from a medical condition that requires prolonged medical assistance in Portugal and for whom return their country of origin represents a risk for their health.<sup>3</sup>

<sup>1</sup> Aliens Law, Art. 109

<sup>2</sup> Decree-Law 368/2008

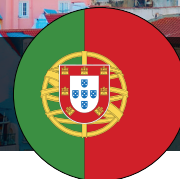
<sup>3</sup> Aliens Law, Art. 122

<sup>4</sup> Subsidiary protection is a standard of the Common European Asylum System and is regulated by the EU Directive 2011/95. A person who does not qualify as refugee is eligible for subsidiary protection when there are substantial grounds for believing that the person, if returned, would face a real risk of being subjected to serious harm. Serious harm consists of death penalty or execution; torture or other inhuman or degrading treatment or punishment; serious and individual threat by reason of indiscriminate violence in situations of international or internal armed conflicts.

<sup>5</sup> Aliens Law, Art. 123



# PORTUGAL



## CONTENT OF PROTECTION

The residence permit granted to victims of human trafficking or smuggling is valid for one year and renewable for equal periods, if the conditions required for its issuance are still fulfilled or if there is need to maintain the protection of the victim.<sup>6</sup> Before the granting of the residence permit, victims of trafficking and smuggling have access to urgent and adequate medical treatment, psychological assistance, translation, interpretation and legal assistance.<sup>7</sup> Further, the holders of residence permits have access to programmes for recovery intended to help them to resume a normal social life, and to the necessary medical and social assistance for their particular situation.<sup>8</sup> Children who are granted this permit enjoy access to the educational system under the same conditions as nationals.

Temporary residence permits with waiver of visa or for humanitarian reasons are granted for one year, then renewable for periods of two years.<sup>9</sup> After five years, the applicant can apply for a permanent residence permit.<sup>10</sup>

All holders of a residence permit have the right to education, work professional guidance and training, healthcare, access to law and courts. Such individuals are also granted equal treatment to social security, fiscal benefits, recognition of study diplomas, certificates or other types of professional titles.<sup>11</sup>

## PROCEDURE

Before the issuing of the residence permit for victims of trafficking and smuggling, a reflection period of maximum 60 days is given, suspending the enforcement of any expulsion order and allowing the person to recover and escape the influence of the perpetrators. The residence permit is issued after the expiry of the reflection period if the conditions are met.<sup>12</sup>

Individuals who are exempted from visa must nonetheless fulfil the requirements for temporary residence, including means of subsistence, accommodation, criminal record and absence of conviction for crime punishable by deprivation of liberty for more than one year. Additional documentation is required according to the specific category. For instance, people who are suffering from an illness that requires prolonged medical assistance must submit a medical certificate issued by an officially recognized health facility and proof of prolonged medical assistance.<sup>13</sup>

Temporary residence for humanitarian reasons is only granted by initiative of the Director General of the Foreigners and Borders Service (SEF) or the Ministry of Internal Affairs. If applicant submits the requested documentation, the National Director of SEF decides whether there is legal basis to start the process.

Documents that the applicant must present include the following: a) passport or other valid travel document or proof of identity; b) certificate of criminal record; c) proof of the exceptional situation that justify the humanitarian reasons. The decisions of the Ministry of Internal Affairs over the requests for residence permit made under the exceptional regime foreseen must be duly founded.<sup>14</sup>

<sup>6</sup> Aliens Law, Art. 109

<sup>7</sup> Aliens Law, Art. 112

<sup>8</sup> Aliens Law, Art. 113

<sup>9</sup> Aliens Law, Art. 75

<sup>10</sup> Aliens Law, Art. 80

<sup>11</sup> Aliens Law, Art. 83

<sup>12</sup> Aliens Law, Art. 111

<sup>13</sup> Aliens Law, Art. 77, Regulatory Decree 84/2007, Art. 61

<sup>14</sup> Aliens Law, Art. 123, Regulatory Decree 84/2007, Art. 62

# SPAIN



## GROUNDINGS OF PROTECTION AND/OR RESIDENCE

### TEMPORARY RESIDENCE FOR HUMANITARIAN REASONS

Temporary residence permits can be granted because of humanitarian reasons.<sup>1</sup> The Aliens Act foresees the possibility to request this permit under the following conditions: a) being a victim of a workplace crime; b) being the victim of crimes motivated by racism or other grounds of discrimination; c) being a victim of domestic violence, provided that a judicial decision has established the status of victim; d) having a serious medical condition requiring specialized health care, not accessible in the country of origin, where the interruption of treatment would pose a serious risk to health or life; e) facing a security risk in case of return to the country of origin, when the requirements for temporary residence are fulfilled.<sup>2</sup> Moreover, the Asylum Act foresees the possibility of authorising residence for humanitarian reasons of a person requesting international refugee protection, who does not qualify for refugee status and subsidiary protection, under the terms laid down by legislation on migration.<sup>3</sup> The Supreme Court has ruled that, in addition to the categories listed in the Aliens Act, residence permits for humanitarian reasons may be granted taking into account the migrant's personal circumstances.<sup>4</sup>

### RESIDENCE FOR WOMEN VICTIMS OF GENDER-BASED VIOLENCE

Women victims of gender-based violence may apply for a residence and work authorization from the moment that an order of protection is issued in their favour or the Public Prosecutor's Office issues a report indicating the existence of signs of gender-based violence. During criminal proceeding, the removal of the migrant is suspended and she is granted a provisional authorization of residence and work. If the criminal proceeding finds that the woman has been a victim of gender-based violence, a residence and work permit will be granted.<sup>5</sup>

### TEMPORARY RESIDENCE FOR EMPLOYMENT, SOCIAL AND FAMILY TIES

When there is a situation of “*arraigo*”, which means that a person has developed enduring employment, social or family ties in Spain, a temporary residence and work permit can be authorized.<sup>6</sup> The necessary conditions to establish employment ties are to show that the migrant has remained in Spain for at least two years and can prove the existence of an employment relationship of at least six months. Requirements to prove social ties are permanence in Spain for at least three years, a current employment contract for a duration of at least one year, and family ties with other resident foreigners or a report issued by the relevant Autonomous Community affirming social integration. In both cases, the migrant must prove that they do not have a criminal record.<sup>7</sup>

### TEMPORARY RESIDENCE FOR COLLABORATION WITH PUBLIC AUTHORITIES

A specific residence and work authorization can be requested by victims or witnesses of an act of human trafficking, smuggling, illicit trafficking of labour, labour exploitation or exploitation of prostitution in order to collaborate with administrative, police, fiscal or judicial authorities to establish charges against organized criminal networks.<sup>8</sup>

Similar to the above, temporary residence status may also be granted to persons who collaborate with administrative, police, fiscal or judicial authorities in matters other than to assist in charges being brought against organised crime.<sup>9</sup>

<sup>1</sup> Law 4/2000 (Aliens Act), Art. 31.3

<sup>2</sup> Royal Decree 557/2011 (Aliens Regulation), Art. 126

<sup>3</sup> Law 12/2009 (Asylum Act), Art. 37 and 46

<sup>4</sup> Supreme Court, Judgement 4256/2012 of 24 February 2012

<sup>5</sup> Aliens Act, Art. 31bis; Aliens Regulation, Art. 131-134,

<sup>6</sup> Aliens Act, Art. 31.3

<sup>7</sup> Aliens Regulation, Art. 124

<sup>8</sup> Aliens Act, Art. 31.3; Aliens Regulation, Art. 135-137

<sup>9</sup> Aliens Act, Art. 31.3; Aliens Regulation; Art. 127

# SPAIN



## SUSPENSION OF REMOVAL FOR PREGNANT WOMEN

Removal of a pregnant woman cannot be carried out when such a measure could endanger the pregnancy or the woman's health.<sup>10</sup>

## CONTENT OF PROTECTION

Temporary residence permits based on humanitarian grounds; based on employment, social or family ties; or in respect of collaboration with public authorities in matters other than those related to organised criminal networks are issued for one year. Within the last 60 days of the validity of the residence permit, migrants can apply for an extension of up to one year. Temporary residence is extended if it is assessed by the competent authorities that the reasons for granting such a residence persist. If the authorities conclude that the reasons for granting temporary residence have ceased, migrants may apply for a residence permit or a residence and work permit provided that they fulfil the particular conditions laid down for obtaining such permits.<sup>11</sup> While temporary residence permits based on employment, social or family ties are accompanied by a work permit, beneficiaries of temporary residence based on humanitarian grounds or

collaboration with public authorities in matters other than those related to organised criminal networks need to make an additional and personal request for the corresponding work permit, which is granted only if specific criteria are fulfilled.<sup>12</sup>

When a criminal proceeding confirms that a woman has been the victim of gender-based violence, a residence and work permit is granted for a five-year period, with the possibility to request long-term residence status.<sup>13</sup>

Residence and work permit for collaboration with public authorities in charges against organised criminal networks is valid for five years, with the further possibility of requesting a long-term residence status.<sup>14</sup>

Suspension of the removal of a pregnant woman does not entail the issuance of a residence permit.

## PROCEDURE

Applications for temporary residence permits based on humanitarian grounds; employment, social or family ties; or collaboration with public authorities in matters other than charges against organised criminal networks are submitted in person to the competent authority, accompanied by the documentation required by the ground of the application.<sup>15</sup> Humanitarian protection can also be granted as a decision of an asylum application when refugee status or subsidiary protection are denied.<sup>16</sup>

If a report of gender-based violence against a migrant woman reveals her irregular situation, the proceeding to extend an administrative sanction is immediately suspended or postponed until the end of the criminal proceedings. The authority before which the complaint

was filed has to immediately inform the woman of her entitlement to apply for a residence and work permit. If the criminal proceeding confirms that the woman has been a victim of gender-based violence, the Public Prosecutor's Office is required to inform the Aliens Office and the corresponding Police Station in order to process the grant of a residence and work permit.<sup>17</sup>

As for residence and work authorization in the context of collaboration against organized criminal networks, exemption from liability for being in irregular situation in the Spanish territory must be requested by the authority with which the migrant is collaborating and granted by the competent provincial Delegate or Subdelegate of the Government, as a precondition for applying for a residence and work authorization.<sup>18</sup>

<sup>10</sup> Aliens Act, Art. 57.6

<sup>11</sup> Aliens Regulation, Art. 130

<sup>12</sup> Aliens Regulation, Art. 129

<sup>13</sup> Aliens Regulation, Art. 134

<sup>14</sup> Aliens Regulation, Art. 136 and 137

<sup>15</sup> Aliens Regulation, Art. 128

<sup>16</sup> Asylum Act, Art. 37 and 46

<sup>17</sup> Aliens Regulation, Art. 131 and 134

<sup>18</sup> Aliens Regulation, Art. 135



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