

ORGANIC¹ LAW ON RIGHTS AND FREEDOMS OF ALIENS IN SPAIN AND THEIR SOCIAL INTEGRATION² (Aliens law)

Summary and comments by UNHCR

After two years of debate, Organic Law 4/2000 on the Rights and Freedoms of Aliens in Spain and their Social Integration (Aliens Law) entered into force on 11 January 2000³. The new law aims at facilitating the difficult process of aliens' integration into Spanish society by ensuring them certain essential rights. This paper critically examines the background and content of this new legal instrument, mindful of its potential significance for aliens in Spain within the framework of the European Union.

1. *CONTEXT: Demographics, immigration and xenophobia in Spain*

Contrary to a general tendency within the European Union, the Aliens Law represents a significant step towards improving aliens' conditions in Spain. The Law provides the State with the necessary legal instruments to deal with immigration in a more liberal manner by granting new rights to aliens, including rights to sanitary care and housing, and by enlarging the scope of other rights, including the rights to social security and education. In an attempt to prevent illegal human trafficking and xenophobia, new felonies have been regulated by the new law.

The motivation underlying this new law may be found in the fact that Spanish society has felt the need to regularize the issue of immigration. There was also a general consensus that the previous Aliens Law was not capable of tackling the immigration phenomenon in a comprehensive way. These factors, among others, contributed to the urgent need to formulate a new immigration policy.

It is also important to note that Spain is the only European Union country with a physical presence in Africa through its Moroccan enclaves of Ceuta and Melilla. Every day, between 40 to 60 thousand aliens cross the borders of these cities, only to return the same day to Morocco. The control of legal entry into these two

¹ Organic laws deal, among other issues, with the development of fundamental rights and public liberties. According to art. 81 of the Spanish Constitution, their approval, modification and derogation require an absolute Congress majority, which is fifty percent plus one of the votes of all members of Congress.

² Boletín Oficial del Estado, Núm. 10, 12-1-2000. This organic law repealed Organic Law 7/85 on the same subject. The first initiative in Congress to repeal the Organic law 7/85 was tabled by the United Left party (former communists).

³ The parliamentary debate on the aliens law received great and constant attention in the mass media during the last three months of 1999. According to the document "Inmigración y recsno - Octubre, Noviembre y Diciembre de 1999 - Análisis de radio, televisión y prensa española", Ministerio de Trabajo y Asuntos sociales, Madrid, at least one out of three news was related to this subject in the last three months of 1999.

cities has become cumbersome, as individual screening presents strong difficulties. In an attempt to bring illegal immigration under control, strong measures have been established along the border. These measures, which include a 3.2 meter-high double barbed-wire fences, sensors, and closed-circuit video monitoring, have proven insufficient to effectively prevent illegal migration in its entirety. The government therefore, decided at the beginning of 1999 to reinforce control measures by regularizing most illegal immigrants in Ceuta and Melilla, authorizing them to gain access to the Iberian peninsula through a procedure that takes less than two months.

Another valuable element put forward by immigration experts is the historical and recent experience of Spain as a country of emigrants. Spain has an emigration history, which started during the Colonial period at the end of the XV century and went on until the XX century, when many Spaniards were forced to find economic solutions abroad as a direct result of the shortages and difficulties that resulted from three years of civil war.

In comparison with other European countries, the total number of aliens in Spain is relatively low. The average number of aliens within the EU is around 6% of the total population, whereas it only reaches 1.4% in Spain. While the number of Spaniards residing abroad in 1995 was more than 2.1 millions, aliens residing in Spain in 1996 were less than 600.000, half of them originating from European Union countries⁴.

The demographic situation in Spain may be considered an additional element contributing to the adoption of a law favouring immigration. A recent United Nations study has highlighted a significant demographic shift in Europe. "Due to low fertility (less than two children per couple), the populations of Europe and Japan are expected to decrease in size during the 21st century....,.... whereas, both Europe and Japan will have significantly older populations in the near future due to low fertility and greater longevity." It has therefore been argued that if Europe and Japan "wish to keep the size of the their working age population (15-64 years) constant at 1995 levels, relatively large migration flows will be required."⁵

According to Eurostat,⁶ one quarter of the population growth-rate in 1999 in Europe was due to natural growth while the remaining three-quarters was the result of international migration (717,000 persons). In 1999, Spain recorded the lowest rate of gross birth rate of 9.4 per 1,000 inhabitants while the average in the EU was 10.6⁷. Within this context, the Aliens Law could be viewed as a positive development in Spain's efforts to maintain the size of its current population.

⁴ Vallés Miguel S. and others, "Las encuestas sobre inmigración en España y Europa", Ministerio de Trabajo y Asuntos Sociales, Madrid, 1999, pages 43 and following.

⁵ Replacement Migration: Is it a Solution to Declining and Ageing Populations? Population Division, Department of Economic and Social Affairs, United Nations, Press Release, 6-1-2000.

⁶ The Statistical Office of the European Communities in Luzembourg

⁷ Eurostat, News Release, "Natural increase of the EU population at its lowest level since the War, News No 2/2000, 6-1-2000

Against this background, it is important to question to what extent this law represents a clear political will on the part of lawmakers in Spain to facilitate immigration and integration of aliens. In this regard, it is necessary to explain the Spanish legislative procedure. The Spanish Parliament (Cortes Generales) consists of two chambers –Senate and Congress.⁸ Once an Ordinary or Organic draft law has been approved by Congress, the Senate has the power to modify or to veto it. Congress has then the power to accept or not the modifications or the veto passed by the Senate⁹. If modifications approved by the Senate are rejected by the Congress, the draft law previously adopted by Congress will be enacted without further voting. In other words, Congress decisions override Senate decisions.

In late 1999, and after 23 months of discussion, a parliamentary committee formed by all political parties agreed on a draft text for the Aliens Law on the rights and freedoms of aliens and their local integration in Spain. This text was fully supported by the then Minister of Labour.¹⁰ Nevertheless, when the Congress was ready to approve the draft law in December 1999, the ministers of Finance, Interior, and Foreign Affairs voiced their serious concerns over basic points of the draft. According to them, the implementation of the Bill would have potentially harmful effects on a number of fronts. First, they claimed that there would be serious fiscal consequences, as the economic rights accorded to aliens would put a heavy burden on the State and the taxpayers¹¹. Second, there were concerns relating to the State's ability to control immigration, as it was perceived that Spain would become an easy entry point for aliens wishing to gain access to the rest of Europe. Finally, concerns were raised regarding the international implications of the law, in relation to commitments undergone by Spain within the framework of the European Union¹².

In a race against the clock, the ruling Popular Party (PP) tabled draft amendments in the Senate (where it has majority) in response to these concerns. However, none of the other political parties agreed with the amendments. Although it lasted less than a week, the debate was hard and the PP was totally isolated in one of the issues that had become crucial in the run-up to the general elections in Spain. When the bill went back to the Congress, all political parties, with the exception of the PP, voted against the modifications endorsed by the Senate, and the law was

⁸ Art. 66 of the Spanish Constitution

⁹ Art. 90 of the Spanish Constitution

¹⁰ the minister of Labour, Manuel Pimentel, expressed in an unambiguous manner “persons who are coming to Spain are not taking away even one job from a Spaniard, because Spaniards do not want the jobs that the aliens have to accept. (...) It is good for Spain that aliens come to work and that they can do it with all their rights. This is no longer a debatable hypothesis, but a reality that we must accept. Immigrants are not a danger, so there is no reason to act by fear or prejudice”. El País, Madrid, 16-1-2000, page 7

¹¹ For example, public medical attention and medicines cost the public Health Service, per year and per person, an average of 142.000 pesetas (aprox. U\$ 823). Rafael Matesanz, General Director of the National Institute of Health. El País, 2-2-2000

¹² The vanishing of “the difference between legal and illegal residence is contrary to the Tampere European Council Conclusions 4,18 and 21, according to Leopoldo Calvo-Sotelo, from the Ministry of the Interior. El Mundo, Madrid, 21-1-2000, page 5.

finally enacted¹³.

After the adoption of the law, the PP pledged to modify it if it reached sufficient majority in the upcoming national parliamentary elections to be held on 12 March 2000. Given that the general elections have given the PP an absolute majority, it will not be surprising if the amendment of the aliens law is placed as a high priority on their political agenda.

The violent xenophobe incidents that took place in the Mediterranean town of El Ejido (Andalucía) during one whole week in early February 2000, have been qualified by several sectors of the Spanish society as the most serious and destructive that have ever occurred in the last decades. Houses and shops belonging to aliens mainly from Morocco were either destroyed or set on fire; immigrants were beaten with sticks and iron bars, and more than 55 persons were hospitalized¹⁴. So far, the NGO SOS Racism has given legal advice to more than 600 immigrants suffering from wounds and material damages caused by the racist xenophobe attacks¹⁵. According to specialized NGOs, it appears that the attacks were the result of a well-planned strategy. Although in a much lesser dimension, there have been in the past some attacks against nationals from developing countries in Spain¹⁶. Minorities and illegal immigrants seeking work were the victims of racist acts in previous years. "Convictions for racist activity show that perpetrators are often members of the far right, neo-Nazis and skinheads, but also young people in general, private citizens and police officers¹⁷."

The serious incidents of El Ejido illustrate that integration of aliens is far from being achieved and that righteous laws are not enough to change mentalities and favour tolerance. Laws in favour of the integration of immigrants are a significant step forward. Nevertheless, their fair and transparent implementation, coupled with the necessary political will, are the best means to improve the actual situation

2. SUMMARY: *Main features of the Aliens Law*

The Aliens Law differentiates between aliens, aliens in Spain, resident aliens and aliens registered in municipal census lists¹⁸. Different rights are ascribed to aliens

¹³ "The Government suffers most humiliating defeat on aliens bill at the end of legislature" titled "Migration News Sheet", January 2000, No. 202/1000-01, page 3.

¹⁴ El País, 9-2-00, Madrid, page 15

¹⁵ El País, 19-2-00, Madrid, page 29.

¹⁶ It is worth noting that half of Spanish nationals reserve the term 'alien' for Moroccans and in general for poor aliens. Aliens from the European Union are considered to be either tourists or specialized workers. Vallés Miguel S. and others.

¹⁷ "The situation regarding Racism and Xenophobia in the European Community – Looking Reality in the Face – annual Report 1998", Part II, European Monitoring Center on Racism and Xenophobia, Vienna, pages 7, 13, 15.

¹⁸ However, the law does not explain how each of these categories are delineated. It is expected that the

according to these categories. The Aliens Law also makes provisions for other vulnerable social groups, including women, children and asylum seekers.

2.1 Aliens

Under the Aliens Law, aliens are granted freedom of movement, the right to choose their place of residence, the right to perform remunerated activities either by self-employment or employment by another, as well as access to social security, and the right to be hired at the service of the Public Administration. Aliens, regardless of their administrative status, have also the right to specific social benefits. Furthermore, aliens have the right to free legal counsel and to interpreters in administrative and judicial proceedings that may lead to the denial of their entry or to their expulsion and obligatory exit from Spanish territory, as well as in all asylum related asylum. Aliens over the age of 16 who wish to undertake a profitable activity, must obtain a specific administrative authorization.

Aliens who have been victims or witnesses of human trafficking, illegal immigration, or exploitation through prostitution may be exempted of administrative responsibility. They will not be expelled on the condition that they report the offence and cooperate with the investigating authority. In this case, these aliens may decide to either return to their country of origin or stay in Spain with a work permit and facilities for social integration.

2.2 Aliens who are in Spain

Aliens who are in Spain will have rights to assembly and association and the right to casualty care under the public health service in they contract grave or accidental illnesses, and until they are considered medically recovered. They will also have the right to join trade unions in the same conditions as Spanish nationals, and the right to strike. Aliens who were in Spanish territory prior to 1 June 1999 will be regularized if they can accredit to have either lodged a request for residence or work permit in Spain, or if they obtained it within the last three years.

2.3 Aliens registered in towns

Aliens registered in the census of the municipalities of their habitual residence have right to medical assistance and to the public system of aid for housing under the same conditions as Spanish nationals. They will also enjoy free legal counsel, subject to proof of in sufficient financial resources, in the same conditions as Spanish nationals.

implementation regulation of the Organic Law will do it.

2.4 Resident aliens

Resident aliens in Spain are granted the right to vote in municipal elections, access to the public system of aid for housing, and the right to social security and to general, basic and specific social benefits in the same conditions as Spanish nationals. They will also enjoy free legal counsel, subject to proof of insufficient financial resources, in the same conditions as Spanish nationals.

The Aliens Law also grants the right of aliens to family reunion with some relatives which are exhaustively enumerated and include: the spouse (only one); unmarried children (under 18 years old) or if they are incapacitated, including adopted children; minors or incapacitated if the resident alien is their legal representative; ascendants who depend economically of the resident alien; and any other family member on humanitarian grounds.

2.5 Women

Pregnant alien women who are in Spain will have the right to medical assistance during the pregnancy, delivery and the post-natal period .

2.6 Minors

Minor aliens (under 18) will have the right to mandatory and non-mandatory education and the right to medical assistance in the same conditions as Spanish nationals. Those minors under public administrative guardianship will be granted residence permits from the time they are placed in the custody of the appropriate child protection services.

2.7 Asylum seekers and refugees

As with other categories of aliens, refugees are granted through the Aliens Law the right to free legal counsel and interpreter. Provisions on travel documents, visas and entry through official border points will not, however, be applicable to persons who apply for asylum upon entering Spain. Aliens not holding the required documents may be authorized to enter Spain provided that there are exceptional reasons of a humanitarian nature or of public interest or in compliance with commitments acquired by Spain. Displaced aliens received in Spain on humanitarian grounds, or as a result of an international agreement or commitment, and those recognized as refugees, will obtain residence permit.

The Aliens Law states that refugees will have the right to access expulsion proceedings if trying to accede illegally Spanish territory. This is an exception to

the rule established by this law, according to which no expulsion proceedings will be needed for those who attempt to enter the country illegally. The law therefore ensures that asylum seekers will have access to legal counsel, administrative procedures in which they will be able to launch their asylum claim, and the possibility of appeal at the judicial level. The asylum law specifically refers to Art. 4.1 of the national refugee law, which regulates the procedure for the presentation of the refugee claim and lifts the sanctions for refugees who have entered the country illegally.

2.8 Stateless persons

Aliens lacking personal documents and who accredit that they are not recognized as nationals by their country¹⁹ may be issued identity papers by the Spanish authorities and granted stateless status, pursuant to article 27 of the 1954 Convention relating to the Status of Stateless Persons²⁰.

2.9 Right of entry

The entry refusal issued to an alien by the Spanish authorities must be reasoned and must provide information on the appeals that may be filed against the decision, the deadline for doing so and the authority responsible for the appeal. The Government may exceptionally issue a temporary list of countries whose nationals will not require a reasoned decision if denied entry into Spain

2.10 Legal status of aliens

The aliens law differentiates between following legal statuses:

- *Visitor status*: Allowed to stay in Spanish territory Up to a maximum period of 90 days, which may be extended to another 90.
- *Temporary residence*: from 90 days up to 5 years.
- *Permanent residence*: authorization to reside indefinitely and to work under the same conditions as Spanish nationals.

Aliens may be granted temporary residence after accrediting an uninterrupted stay of two years in Spain. Their stay may be then regularized through registration in a municipal census at the moment of lodging the request and subject to the accreditation of sufficient financial resources.

¹⁹ The 1954 Convention relating to the Status of Stateless Persons, ratified by Spain, defines as stateless “a person who is not considered as a national by any State under the operation of its law. (art 1.1)

²⁰ “The contracting States shall issue identity papers to any stateless person in the territory who does not possess a valid travel document”. Article 27, 1954 Convention relating to the Status of Stateless Persons

2.11 Offences

Violations of the alien statutory instruments and the sanctions scheme have been defined in Title III of the Aliens Law, and categorized as minor, serious, and very serious violations.

The illegal dealing with manpower, promoting, favouring or facilitating illegal traffic of persons are all crimes punishable by the penal code.

2.12 Analysis

The Aliens Law represents a positive development for the rights of aliens at a time when the trend elsewhere in Europe is increasingly restrictive. Legal measures have been approved to facilitate the Regularization of aliens in a relatively short period of time (2 years), as well as to speed up the renewal of work and residence permits (3 months), to facilitate family reunion, to counter racism and xenophobia and to combat human trafficking. Previously existing measures adopted on asylum have been preserved and refugees may benefit from the very positive provisions of the new Aliens Law.

BO Spain is in the process of carefully assessing the provisions of the new Aliens Law that may affect persons of concern to UNHCR. Based on that assessment BO is expected to play an important role during the following months, particularly in providing its opinions to the Government's drafting commission of the implementing decree of the Aliens. The office already presented its proposals regarding the implementation of the law's First Transitory Provision on the Regularization of Aliens who are in Spain, in order to ensure the inclusion of asylum seekers .

3. MAIN ARTICLES AND COMMENTS

A summary of the main articles follows:

Art. 1. The term 'alien' applies to all those who do not have Spanish nationality. In cases of persons to whom the European Union regulations are applicable, the Aliens Law will prevail only when its provisions may be more favourable to them.

Art. 3. All provisions related to the fundamental rights of aliens will be interpreted in accordance with to the Universal Declaration of Human Rights and the international treaties to which Spain is a party. Cultural identity and religious and ideological beliefs, will not justify the acting against those international instruments.

Art. 4. All aliens have the right and the duty to keep their identity documents. In exceptional circumstances, their identification cards, including passports, may be

withdrawn (refers to art. 57).

Art. 5. Aliens who are legally in Spain under the provisions of the present law have freedom of movement and the right to choose their place of residence. Limitations may be imposed according to international treaties or following judicial decisions, in cases of state of emergency, martial law and for security reasons.

Art. 6. Resident aliens in Spain will have the right to vote in municipal elections.

Arts. 7, 8 and 11. Aliens will have the rights of assembly, (art. 7) association (art. 8), and the right to join trade unions under the same conditions as Spanish nationals as well as the right to strike (art. 11).

Art. 9. Minor aliens (under 18) will have the right to basic, compulsory education, free of charge, in the same conditions as Spanish nationals as well as access to the public scholarship and aid system.

Art. 10. Aliens will have the right to wage-earning and self-employment; access to social security and to be employed in the Public Administrations.

Art. 12. Aliens registered in the census of their municipalities of habitual residence and minor aliens have right to medical assistance²¹ in the same conditions as Spanish nationals. Aliens will have the right to casualty care under the public health service if they contract grave or accidental illnesses and until they are considered medically recovered. Pregnant alien women will have right to medical assistance during pregnancy, delivery and the post-natal period.

Art. 13. Resident aliens and aliens registered in the census lists of the municipalities of their habitual residence have the right to the public system of aid for housing under the same conditions as Spanish nationals.

Art. 14. Resident aliens have the right to gain access to the social security system and to general, basic and specific social benefits under the same conditions as Spanish nationals. All aliens, regardless of their administrative status, have right to basic social services and benefits.

Art. 16. When the alien's spouse and/or relatives have acquired residence on family reunion basis, they will continue to keep it, even when the matrimonial link has been broken.

Art. 17. The following persons have the right to family reunion with an alien resident:

- The spouse (only one). A divorced and re-married resident alien may reunite with the new spouse after accrediting that the first marriage has concluded

²¹ In practical terms, any alien may have access to medical assistance by being registered in the municipal census lists of towns. Thus the residence permit is not required for this purpose.

according to legal proceedings and that the duties on housing, spouse's pension and maintenance provided by law have been settled.

- Aliens' Unmarried children (under 18 years old) or discapacitated, including those adopted by the resident alien resident and the spouse .In cases of children of only one of the spouses, the latter must exercise the custody alone. Minors or discapacitated children if the resident alien is their legal representative.
- Ascendants who economically depend on the alien resident, when the need for family reunion has been justified.
- Any other family member if the need for family reunion on humanitarian grounds is justified

Art. 18. Organizations of aliens, created according to the law, have right to intervene as concerned parties in administrative procedures to defend immigrants.

Art. 20. Aliens have the right to free legal counsel and access to an interpreter in administrative and judicial proceedings related to entry denial, expulsion, mandatory exit from the territory and in all proceedings related to asylum.

Comment: *This provision is more explicit than asylum legislation currently in force concerning legal counsel. Although the latter refers to the asylum seeker's right to legal counsel, it does not specify that it may be free²².*

Law 1/96 on Pro Bono Legal Assistance already provided for free legal assistance. All asylum seekers and refugees in Spain have always enjoyed free legal assistance , mainly provided by Bar Associations and specialized NGOs. Due to the limited presence of asylum specialized NGOs in Spain, these can only assist a limited number of cases, basically if they are aware of IC's arrivals in advance, or if specifically requested by ICs. Nonetheless, specialized NGOs provide more coverage than Bar Associations to asylum seekers by interviewing them, helping them gather evidence, supporting asylum requests, assisting in family reunion procedures, and counselling²³.

Art. 20. 2. Alien residents and aliens registered in the census of the municipalities of their habitual residence will enjoy free legal counsel under the same conditions as Spanish nationals, regardless of the nature of the proceedings and subject to accreditation of insufficient financial resources.

Art. 21. This article addresses those acts which, directly or indirectly, lead to discrimination against aliens.

²² Refer to arts. 4.1 and 5.4 of Asylum Law; arts. 5.2, 8.4, 19.2 of the Implementing decree (203/95) of the refugee law.

²³ Assistance usually consists of consultation during the interview, drafting of the request of re-examination of the decision of inadmissibility to the regular RSD (border procedure) and in some cases representation at the appeal stage.

Art. 22. Aliens may seek judicial protection against any discriminatory practice through summary proceedings as foreseen by the Spanish Constitution for violations of fundamental rights and freedoms.

Art. 23. Aliens must enter Spain with valid travel documents and visa and through official entry points. Visas will not be required if stipulated under existing international agreements and of aliens with residence in Spain.

- Provisions on travel documents: visa and entry requirements will not be applicable to persons who request asylum at the moment of entering into Spain. The granting of asylum will be governed by the provisions of the specific regulatory scheme on asylum.
- Aliens who do not fit the established requirements, may be authorized to enter Spain for exceptional humanitarian reasons, reasons of public interest or in compliance with commitments acquired by Spain. These aliens will be provided with the documents established by implementing regulations²⁴.

Art. 24. Aliens will neither be allowed to enter Spain nor to obtain a visa if they have been deported from Spain or from a country with which there is an agreement to this effect

Any refusal of entry issued to an alien by the Spanish authorities must be reasoned and must provide information on possibilities of appeal, including the deadline and the authority before whom the appeal must be formalized.

Comment: *This provision (art. 24.2) was the most controversial one during the parliamentary debate. It is BO's understanding that Spain may become the only country or one of the rare countries where the denial of admission shall be reasoned and where the rejected alien will have right to appeal. It is likely that the work of the Tribunals, which have to decide on the appeals, will increase in a significant way.*

Art. 25. Spanish diplomatic missions and consular offices will issue visas within an administrative process of a maximum period of three months. Aliens who are already in Spain and who comply with the requirements to obtain residence permit may be exempted by the Ministry of the Interior from the visa requirement for humanitarian reasons, cooperation with justice and sanitary reasons. The Government, may exceptionally issue a temporary list of countries whose nationals will not require a reasoned decision if denied entry into Spain

Art. 26. The exit from Spain will be mandatory in cases of expulsion by judicial order, expulsion or return by administrative decision, administrative denial of requests lodged by aliens who are presently in Spanish territory at that time.

²⁴ Although it is not mentioned in art. 23.3, it should be understood that it refers to Law 5/84, amended by Law 9/94, the asylum law currently in force. Art. 23.4 covers persons under temporary protection, called "displaced individuals" by the First Additional Provision of the Royal Decree 203/95.

Art. 27. Aliens can be in Spain under either of the following legal status:

- Visitor status: authorized to stay for a maximum of 90 days. Nevertheless it may be renewed for 90 more days up to a maximum of 180 days (art. 29.1).
- Temporary residence: from 90 days up to 5 years (art. 29.2).
- Permanent residence: authorization to reside indefinitely in Spain and to work under the same conditions as Spanish nationals (art. 30).

Art. 29. Aliens may obtain temporary residence if they accredit an uninterrupted stay of two years in Spain, if they are registered in a municipal census at the moment of lodging the request, and if they accredit sufficient financial resources for their subsistence.

Comment: *The openness reflected in this provision (art. 29.3) were the cause of it could be considered as an automatic legalization of illegal aliens. In practical terms, it means that any illegal alien who has been illegally in Spain for two years may be accorded temporal residence. The application of this provision could become a pull factor for aliens to come to Spain. Some commentators have pointed out two major concerns with regard to this provision. The first concern is the likely use of fabricated evidence to accredit an uninterrupted stay in Spain. The second is that the police could act in a repressive way to detect illegal immigrants before they could reach the two years deadline.*

Art. 31. Aliens lacking identification documents and claiming that they are not recognized as nationals by their country²⁵ may be issued with identity documents by the Spanish authorities and granted stateless status, pursuant to article 27 of the 1954 Convention relating to the Status of Stateless Persons²⁶. Displaced aliens received in Spain for humanitarian reasons or as a result of an international agreement or commitment, and those recognized as refugees, will obtain authorization for residence.

Comment: *The provision on displaced aliens (art. 31.2) could be interpreted in line with the temporary protection system within the Spanish asylum law currently in force²⁷. Given that article 31.2 does not specify the kind of residence permit to be given to displaced persons, it may be interpreted that a specific provision should*

²⁵ The 1954 Convention relating to the Status of Stateless Persons defines as stateless “a person who is not considered as a national by any State under the operation of its law.” (art. 1.1)

²⁶ “The Contracting States shall issue identity papers to any stateless person in their territory who does not possess a valid travel document.” Article 27, 1954 Convention relating to the Status of Stateless Persons.

²⁷ “1. For humanitarian reasons or as a result of an international agreement or commitment, (...) the Government may receive in Spain groups of displaced individuals who, as a result of grave conflicts or disturbances of a political, ethnic or religious nature, have been forced to abandon their country or origin or may not remain there (...)”

“3. The displaced individuals (...) may benefit from the programmes of reception and integration intended for refugees (...)”

“4. (...) The competent authority may grant authorization for the holders of these residence permits to work, under the stipulations of the legislation on aliens.” First Additional Provision, Royal Decree 204/95.

be applied²⁸.

Arts. 23.4 and 31.2 relating to externally displaced persons lead to a reflection on the temporary protection system in Spain. Temporary protection in Spain (displaced status), is available to groups. Implementing Decree 204/95 states that temporary protection in Spain may be extended to groups who have been forced to leave their country “as a result of grave conflicts or disturbances of a political, ethnic or religious nature²⁹.” According to UNHCR, groups of persons who have been victims of indiscriminate violence have been placed under UNHCR’s (extended) mandate by the United Nations General Assembly .

Humanitarian status is applied in Spain to those cases in which asylum seekers do not fit the requirements for refugee status, in particular those who “as a result of grave conflicts or disturbances of a political, ethnic or religious nature, have been forced to leave their country³⁰.” Although it is clear that the definition of those who can be granted humanitarian status is the same of a displaced person, in the practice this coincidence is not being acknowledged by the Spanish authorities, who continue to grant such persons only humanitarian and not displaced status. According to the law, displaced persons can benefit from those reception and integration programmes and the same social benefits accorded to refugees, as well as renewable residence permits. These benefits are not guaranteed to persons under the humanitarian status.³¹

BO Spain is taking a more proactive approach to convince the authorities to grant displaced status to individuals who fall within the scope of the Spanish definition of displaced persons pursuant to First Additional Provision, 6, Implementing Decree 203/1995.

Art. 32. At the request of the body that exercises the guardianship, minor aliens will be granted residence permits from the time they are placed in the care of this body.

Whenever the security forces locate an undocumented person whose age cannot be exactly established, Minors Courts will act to determine identity, age, relatives and personal circumstances of the person. If the outcome determines that the undocumented is a minor, the competent authority will decide either to return the minor to his place of origin or to authorize his stay in Spain.

Art. 33. Aliens above 16 years of age shall have administrative authorization to undertake any professional or labour lucrative activity. Working contracts will not

²⁸ First Additional Provision, Implementing Decree 203/1995 “4. These individuals will be furnished with annually renewable residence permits, (...) if three years past from the date of entry into Spain and the situation which caused the individuals to flee their country of origin has not change, the validity of the residence permits may be extended for longer periods of time.”

²⁹ First Additional Provision, Implementing Decree 203/1995

³⁰ Art. 17.2, Spanish refugee law 5/1984 as amended by Law 9/1994, currently in force

³¹ First Additional Provision, Implementing Decree 203/1995

be invalidated with regard to the rights of employees , if the employers have not obtained authorization from the administration.

Comment: *This provision aims at guaranteeing the basic rights of aliens who work illegally in Spain. The employer will be obliged to pay aliens their due salaries and all additional benefits, regardless of their legal status. Furthermore, it may be understood that the period of time during which the alien worked illegally, will be considered valid to accredit the two year period needed to obtain temporal residence in accordance with art. 29.3.*

Art. 35. To obtain an initial work permit for workers under a wage-earning contract, employment situation of nationals shall be taken into account.

Art. 37. The Government, after hearing the Superior Council on Immigration Policy³² and the most representative trade unions and business organizations, will annually establish labour quotas to receive non-resident foreign workers in Spain³³.

Art. 38. Exceptions to the annual quotas system set up in art. 37 are foreseen. Some exceptions Cases alien workers have a direct employment offer by a manager. Those who have enjoyed refugee status, will be also exempted during the year following the loss of such status.

Title III (arts. 46 and following). This title establishes the violations of the alien statutory instruments and determines the sanctions scheme. Three categories of violations are included: minor, serious, and very serious.

Art. 50. This article defines the participation in any activities that jeopardize the foreign security of the State, or any other activity which may harm the relations of Spain with other countries, as a very serious infringement.

Art. 53. It is up to the administrative authorities to decide whether to fine or to expel the alien from Spain who falls within the scope of art. 50.

Comment: *Although this provision may be applied to both asylum seekers and refugees, BO Madrid believes that the Spanish authorities are obliged to take into account art. 32 of the 1951 Convention throughout the decision making process. Although neither the Aliens Law nor the preceding law specifically mention the principle of non-refoulement, both laws provide for an equal application of the refugee related provisions to all asylum seekers, regardless of whether they have entered the country legally or illegally³⁴.*

³² This Council is to consist of representatives of the State, Autonomous Communities and municipalities, pursuant to art. 64 of the Aliens Law.

³³ The 1999 quota consisted of 30,000 non-EU workers, with an increase of 7% from 1998. The quota for the year 2000 has not yet been announced.

³⁴ Art. 36.2 7/1985 and art. 54.2b, Law 4/2000. The latter repeals the former.

A difference between the former and the new law lays in the provisions for return. The previous law stated that “expulsion proceedings for devolution would not be opened against asylum seekers”³⁵. The administration understood “devolution” as the action of sending a person back to his country of origin or departure³⁶. Nevertheless, the implementing decree to that law did no longer provide a definition for word “devolution”. The Aliens law, uses the word “return” instead of “devolution”³⁷. The forthcoming implementation decree is expected to contain a definition of the term “return”.

Given that fundamental rights and freedoms recognized in the Spanish Constitution are to be interpreted in accordance with the Universal Declaration of Human rights and international treaties ratified by Spain,³⁸ which become internal legislation at the moment of their ratification by Parliament³⁹, the principle of non refoulement is upheld in Spain.

Therefore, any return of an asylum seeker is to be considered in the light of to article 33 of the 1951 Convention relating to the Status of Refugees.

Art. 54. 2. b. The authorities are not obliged to open expulsion proceedings to return aliens, for those who attempt to enter the country illegally with the exception of asylum seekers⁴⁰ as stated in the national refugee law currently in force (art. 4.1 of the law 5/1984)⁴¹.

Art. 54.4 and Art. 56. When the return of an alien who was deported and has violated the prohibition of entry into Spain cannot be performed within 72 hours, the administrative authorities may request from the judicial authority that the alien be interned. The Alien Detention Centres are not of a penitentiary nature and will be equipped with social, legal, cultural and health facilities. The only restriction that the aliens will have will be the right of movement (derecho ambulatorio). The alien may stay in the centre for a maximum period of 40 days. (Art. 58.2)

Art. 56.4 and Art. 58.4. The detention of an alien for the purposes of the return , as well as the filing of proceedings and the final decision on the expulsion will be

³⁵ Art. 35.2, Law 7/85

³⁶ Art. 85.1 and 2, Implementing decree 1119/1986

³⁷ Art. 54.2, Law 4/2000

³⁸ Art. 10.2 of the Spanish Constitution

³⁹ Art. 96.1 of the Spanish Constitution

⁴⁰ Presently, in border points such as Ceuta and Melilla (bordering Morocco), aliens who are caught in the process of trespassing the sensor double razor wire fences monitored by TV, will be immediately sent back to the other side of the border without any written expulsion proceedings.

⁴¹ Art. 4, Implementing decree 203/1995: “Where to submit the request for asylum:

1. Any alien who wishes to be granted asylum in Spain must submit his request for asylum to any of the following governmental agencies (...)

2. When the Representative of the UNHCR in Spain requests that the Spanish Government urgently admits a refugee or refugees recognized under its mandate (...)

reported to the Ministry of Foreign Affairs and to the Embassy or Consulate of the alien's country.

Comment: *The application of these provisions may create controversy in relation to asylum seekers who are finally rejected once all administrative and judicial remedies have been exhausted, including legal proceedings to seek the application of art. 3 of the European Human Rights Convention. However, if the case has been decided in accordance with asylum and aliens regulations and the rights of the rejected person have been respected, UNHCR should have no objection to the application of these provisions.*

Art. 58.3. A judge may place a minor alien in an alien internment centre if the minor's parents or guardians are there, and if there are facilities to guarantee family privacy.

Art 55. Aliens who have entered or are in Spain illegally, due to having been either victims or witnesses of illicit trafficking of human beings, illegal immigration, or exploitation by prostitution, may be exempted from administrative responsibility and from deportation if they report the offence and cooperate with the investigating authority. If exempted of administrative responsibility, aliens may decide to either return to their country of origin or stay in Spain with a working permit and facilities for social integration.

Art. 60.2. The Government will create Provincial Offices to bring together all immigration services depending from different bodies of the State administration.

Comment: Despite the fact that the Government created an Aliens Office in 1991⁴², very few have been established since. It is worth mentioning that art. 60.2 refers to 'immigration'⁴³. Although in principle this provision would exclude refugees, in the context of the law and according to current practice, that asylum seekers and refugees may also be included by this regulation.

The Ceuta Alien Office, for example, is also responsible for asylum and is run by police in civilian clothes. The extension of residence and work permits will be decided within a maximum period of three months since the lodging of the application. Failure by the administration to reply within the stipulated period of time is called 'administrative silence' which can be either positive or negative. In this case it will be a 'positive administrative silence', thus it will be understood that the extension or renewal has been granted. However, it may be understood that this rule will not be applied to applications for visa (refer to art. 25.4).

First Transitional provision. (Illegal) aliens who arrived in Spain prior to 1 June 1999 will be regularized if they can accredit to have either lodged a request for

⁴² Royal Decree 1521/91

⁴³ The previous provision refers to aliens: "Different services responsible for processing alien dossiers will be located in only one Provincial management centre (art. 1, Royal Decree 1521/91)

residence or work in Spain or obtained such authorization within the last three years⁴⁴.

Comment. *The Implementing Decree of the First Transitory Provision⁴⁵ stated that rejected asylum seekers and those whose submitted their applications until 1 February 2000 can apply for work and residence permit. In principle, the decree does not request asylum seekers to withdraw their asylum request if opting for regularization. However, there could be a different interpretation and application of the law by the administrative authorities in practice, as it seems that there is no general consensus. The definite interpretation will probably be given by the courts, as soon as the first disagreements arise. After the adoption of the aliens law, BO Madrid issued a written opinion shared with the main NGOs dealing with refugees, expressing its support to the proposed regularization of asylum seekers rejected at any stage of the procedure. In respect of the regularization for asylum seekers whose applications are pending, UNHCR emphasized that opting for the regularization should not automatically exclude the asylum seeker from the Refugee Status Determination procedure.*

Final Provisions. First to fourth. These provisions have upgraded the offences of illegal trafficking with labour and facilitating the illegal trafficking of persons to the category of crimes punishable by the penal code.

Fifth Final Provision. Pursuant to the Schengen Implementation Covenant, the Government will take the necessary measures to keep updated and accurate the Schengen Information Data System.

**BO Madrid
14 March 2000**

⁴⁴ It is estimated that 70,000 undocumented aliens may benefit from this provision. During the 90s, the government decided to allow the regularization of illegal immigrants on two occasions. Consequently, 108,321 aliens were regularized in 1991, 1992 and 24,691 in 1996. “Anuario de Migraciones, 1997”, Ministerio de Trabajo y Asuntos Sociales, Madrid. El País, Madrid, 13-1-2000, page 24.

⁴⁵ Art. 1.2, Implementing Aliens Decree 239/2000 of 18 February