

The administrative condition of immigrants

General aspects and topic remarks*

O. A very brief introduction; **I.** Preliminary delimitation of the communication's subject: **1.** Who is *immigrant*?; **2.** What aspects does the immigrants' *administrative condition* involve?; **II.** Immigrants in the Constitution; **III.** Becoming an immigrant; **IV.** The expulsion of immigrants; **1.** The administrative expulsion of illegal immigrants; **2.** The judicial expulsion of legal immigrants; **V.** Conclusions

O. A very brief introduction

In the end of 2007, there were 434.000 legal immigrants in Portugal. This number shows a huge increase of immigration in the last three decades, as the statistics' analysis prove. In 1980, 50.751 immigrants had legal residence in Portugal. Ten years later, this number doubled to 107.767¹. Between 1991 and 2001, there was a growth of 83% of immigrants in the country (which contributed to a demographic increase of the Portuguese population by 22%). Today, the number of legal immigrants is four times more than in the beginning of the 1980's. Immigrants represent, though, less than 5% of the population, a very small percentage compared to other European Union's member States (3,6% to the European average: 6,8%)².

These numbers may surprise, considering that Portugal has always been envisaged as a country of emigration. In fact, the discoveries of the XV and XVI centuries and the colonisation that came with them determined the adventurous character of Portuguese people, who searched for better living conditions in Africa, India and Brazil. More recently, in the late 1960's, the political regime's antidemocratic nature and the poverty experienced by people living in the interior justified a new wave of emigration, this time to nearer countries in Europe (specially France, but also Switzerland and Germany). The

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¹ See Jorge GASPAR, **A autorização de permanência e a integração do imigrantes (Uma análise político-jurídica)**, in *OD*, 2001/IV, pp. 959 ff., 983 (supported by data provided by the Foreigner and Borders' Board).

² Source: Site of the Portuguese Presidency — *www.presidencia.pt*.

country's political stabilisation, throughout the 1980's, with the economic development attached to it, drastically reduced the emigration flux.

On the contrary, the 1970's introduced Portugal to the new reality of immigration, mainly because of the abandon of the colonies, which made Portuguese people who were living in the African colonies return. Likewise, many African people who looked for better living conditions — and peace — arrived in the ancient metropolis. Besides, throughout the 1990's, Portugal was more and more confronted with citizens from the European Community, using their freedom of circulation, benefiting from the overture provided by Portugal's ratification of the Treaty of Rome and consequent adhesion to the European Community.

The fall of the Berlin wall, in 1989, and the Russian *Perestroika* were also responsible for the coming of many citizens from Eastern countries like Romania, Ukraine, Moldavia, attracted by the heavy investment in major public works (like *Vasco da Gama* bridge, completed in 1998) and public events (like *Expo 1998*)³. Of course, our privileged relations with Brazil justify the strong presence of Brazilian people in our country — presently the biggest foreign community living in Portugal⁴.

One must say, however, that immigration numbers are decreasing since 2004, due mostly to the economic crisis the country has been facing, which carries with it a drastic reduction of employment. On the contrary, a slow rise of emigration emerges, to Angola, of people trying to profit from the economic development the country is experiencing after the end of the civil war.

The need to accommodate foreign people that enter the country and wish to stay for relatively long periods, working, studying or involving themselves in charitable tasks, both from a factual and from a juridical point of view,

³ See Júlio CARNEIRO PEREIRA, **Direito à emigração e imigração com direitos**, in *RMP*, n° 90, 2000, pp. 113 ff., 115-116.

⁴ According to the information provided in the site of the Portuguese Presidency mentioned above, 55% of immigrants come from States part of CPLP (*Comunidade dos Países de Língua Portuguesa* = Portuguese (language) speaking countries), 28% from the EU member States, 11% from South American States, 5% from Asian States and 4% from other countries.

The "Relatório de Actividades 2007 - Imigrantes, Fronteiras e Asilo" (*Report of 2007 Activities - Immigrants, Borders and Asylum*), made by the Foreigner and Borders' Board (see <http://www.inforpress.publ.cv>) concludes that Brazil is the biggest immigrant community in Portugal, with 66.354 persons (15%). Cape Verde is on second place, with 63.925 persons and Angola occupies the third place, with 32.728 residents (the numbers refer to legal immigrants).

justifies the existence of immigration laws and immigration policies⁵. Not that the State is forced to welcome immigrants: a general principle of International Law authorises States to simply forbid the entrance of non citizens in their territories — and also to restrict the entrance and to establish reasons to order their expelling from the country (once respecting a due process)⁶. Moreover, States may not recognise foreign people the same rights they allow their citizens, even if a minimum standard is mandatory (for instance, access to justice, prohibition of arbitrary discrimination, respect for human dignity)⁷. Nonetheless, historically, foreign people — mainly traders — have been entitled with a right to hospitality or a right of natural partnership and communication, which comprehends the right to travel, the right to reside in the welcome country, the right to trade, the right to acquire citizenship and the right not to be arbitrarily expelled⁸.

In what concerns Portugal, the regulation of immigration is based on two main lines: on the one hand, the obligations assumed towards the European Union, concerning both guaranteeing freedom of circulation and right of residency to EU citizens, and controlling entrance and permanence of citizens from third countries⁹; on the other hand, the universal dimension of fundamental rights in the Portuguese Constitution, anchored in article 12, founded in the principle of human dignity (article 1), and echoing the Universal Declaration of Human Rights (article 16/2)¹⁰.

⁵ About the Portuguese policy for immigrants' integration, see the Resolution of the Council of Ministers 63-A/07, of the 3rd May.

⁶ See Rui MOURA RAMOS, **Estrangeiro**, in *Polis*, II, Mem Martins, 1984, cc. 1215 ff., 1217.

⁷ See the proposal of a "Chart on a minimum standard of rights for foreigner and minorities", in José Joaquim GOMES CANOTILHO (org.), **Direitos humanos, estrangeiros, comunidades migrantes e minorias**, Oeiras, 2000, pp. 27 segs; *idem*, **Enquadramento jurídico da imigração**, in *Actas do I Congresso sobre Imigração em Portugal – Diversidade, Cidadania, Integração*, Lisboa, 2004, pp. 152 segs, 160 [which would comprehend obligations of *facere* (adopting protective measures) and of *non facere* (not adopting arbitrary discriminatory measures)].

⁸ José MARTÍNEZ DE PISÓN, **Derechos de la persona o de la ciudadanía: los inmigrantes**, in *Persona y Derecho*, n° 49, 2003, pp. 43 ff., 51.

⁹ On the international and European frame of human rights' protection within the European Community, both towards European citizens and third countries' citizens, Maria Concepción PÉREZ VILLALOBOS, **La cultura de los derechos fundamentales en Europa. Los derechos de los inmigrantes extracomunitarios y el nuevo concepto de ciudadanía**, in *Derecho Constitucional y Cultura. Estudios en homenaje a Peter Häberle*, coord. Francisco Balaguer Callejón, Madrid, 2004, pp. 701 ff..

¹⁰ In this sense, José MARTÍNEZ DE PISÓN, **Derechos de la persona...**, *cit.*, p. 47 and 71 ff.; José Alberto de MELO ALEXANDRINO, **A nova lei de entrada, permanência, saída e afastamento de estrangeiros**, in [http:// www.fd.ul.pt / ICJ/Iuscommunedocs](http://www.fd.ul.pt/ICJ/Iuscommunedocs), pp. 24-27.

In the following text, we will try to resume the main aspects of the administrative condition of immigrants going through the Law of Immigration presently in force (Law 23/07, of the 4th July = LI¹¹)¹² — more precisely, Foreigner Law (*Lei dos Estrangeiros*). This is a necessary remark because the Law doesn't define immigrants — and hardly mentions the word. To achieve that goal, there are some preliminary steps we have to take, to circumscribe the subject and the object of this communication (**I.**). Once establishing those operative concepts, some words on the constitutional status of immigrants are also required (**II.**). Then we can go ahead to explaining the powers of administrative authorities concerning the admission, the permanence and the expelling of immigrants (**III.** and **IV.**). We will summarise some conclusions at the end (**V.**).

I. Preliminary delimitation of the communication's subject

This presentation's theme demands some previous remarks. On the one hand, establishing the meaning of the term "immigrant" (**1.**). On the other hand, explaining what aspects are going to be focused under the expression immigrants' "administrative condition" (**2.**).

1. Who is *immigrant*?

The LI doesn't provide any definition for *immigrant*. The law uses the expression *entrepreneurial immigrant* once (in article 60/2), and mentions the term *illegal immigration* in only one Section (V.), leaving no clues to their content. So, one is forced to build an operative notion of immigrant to the purpose of this presentation. And this task will be performed on a *negative basis*, gradually excluding some categories of people until we reach the universe with which we are going to work.

a) First of all, immigrants are not Portuguese citizens. An immigrant is an alien, a stranger, someone who is not "one of us"¹³ — the other¹⁴. This doesn't

¹¹ The practical aspects of the regime are regulated in Decree 84/07, of the 5th November.

¹² Extensively on the legal framework established by this Law, José Alberto de MELO ALEXANDRINO, **A nova lei de entrada...**, *cit., passim*.

¹³ On the historic perspective of the relation between State and aliens, see Cecilia CORSI, **Lo Stato e lo straniero**, Milan, 2001, pp. 1 ff..

mean immigrants cannot turn into Portuguese citizens. The acquisition of Portuguese citizenship by immigrants is possible on the terms of Law 37/81, of the 3rd October (altered by the fourth time and republished by Organic Law 2/06, of the 17th April¹⁵), in the following situations:

i.) Originally: by birth in Portuguese territory (article 1/1/d), e)¹⁶ and f)];

ii.) Not originally: by declaration, adoption or naturalisation [articles 2, 3 and 4; 5; and 6, respectively].

Though we don't want to go into details, it should be mentioned that there are time premises which have to be verified previous to the citizenship's acquisition: for instance, if by marriage, only three years after the wedding day¹⁷, assuming the marriage lasts (article 3/1)¹⁸; if by naturalisation, if the foreigner has legal residence in Portugal at least for six years (among other things: see article 6/1¹⁹)²⁰. The knowledge of the language is also an issue, at

¹⁴ A doubt may arise in what concerns stateless persons, but as long as they are not Portuguese citizens [which they will automatically turn into if they are born in Portugal (see article 1/f) of Law 37/81, of the 3rd October), or if they apply to the attribution of Portuguese citizenship, on the basis of the same law], they are strangers and so can become immigrants.

¹⁵ This law greatly enlarged the legal possibilities of naturalisation, and is envisaged as a contribute to immigrants' integration (through the loss of their condition of strangers) – see Jorge PEREIRA DA SILVA, “**Culturas da cidadania**” – **Em torno de um acórdão do TC e da nova lei da nacionalidade, Anotação ao Acórdão do TC 599/2005**, in *Jurisprudência Constitucional*, n^o 11, 2006, pp. 81 ff., spec. 85 ff.

One must remark that this integration is firstly aimed towards Portuguese society, but also and secondly, because of EU citizenship, a way to penetrate in other member States' societies, benefiting from the statute of European citizen.

¹⁶ The hypothesis described in this sub-heading is really a mix between recognition and acquisition, because the individual has to declare s/he wants to be recognised as Portuguese since the day he was born — which means that, if no one (his parents, namely) makes this declaration instead of her/him, only when s/he reaches legal majority can this declaration occur and the Portuguese citizenship be registered — see article 21/5 (with the effects determined by article 11: since birth) and see also article 211 of LI (communication to the Board for foreigner and borders' matters). We should underline, however, that a foreign person who was born in Portugal and has residence in the country cannot be expelled, according to article 135/a) of LI — a similar (and exclusive) guarantee to the one Portuguese citizens have (article 33/1 of the Constitution).

¹⁷ Article 186 of Law 23/07, of the 4th July, punishes anyone who gets married just in order to obtain a visa, an authorization of residency or Portuguese citizenship. Imprisonment may go from one to four years.

¹⁸ The civil partnership is equivalent to the traditional marriage, according to article 3/3. The situation has to be judicially recognised, though, previously to the request for Portuguese citizenship made by the foreigner's spouse.

¹⁹ Comparing article 6/1 of the Law of Citizenship with article 126 of LI, concerning the attribution of long time residency statute, we conclude that the latter is much more demanding than the former — in other words, it is easier to become Portuguese than to get the long time residency permit...

²⁰ But see the exceptions to the six years residence rule in numbers 3, 4, 5 and 6 of article 6.

least if the person has reached majority [article 6/1/c)]; if not, the fact that the minor has had contact with the country or with the education system — as stated in article 6/2/a) and b) — establishes the presumption that the connection is strong enough for the bond of citizenship to be established.

b) Secondly, citizens of EU member States are not subject to LI — so, they are neither considered foreigner nor, truly, immigrants. The reason for this differentiation derives from the Union Treaty, which recognised the EU citizenship for economic and political purposes [see Part II of the European Community Treaty, which will turn into Part II of the Treaty on the functioning of the European Union, when (and if...) the Treaty of Lisbon enters into force]. Only the Portuguese State has the power to establish the criteria for citizenship's attribution²¹; but the subjective extension of this power is slightly disturbed by the existence of a *double link of citizenship*²² that, nevertheless, depends on the previous attribution of a national link. In other words and appealing to a George Orwell image: in Portugal (as in any other EU member State), there are foreign people more foreign than other²³...

The need to grant special conditions of freedom of circulation, residency and access to work justifies the existence of an autonomous legal framework applicable to EU citizens: Law 37/06, of the 9th August (which transposes directive 2004/38/CE, of the European Parliament and the Council, of the 29th April). We must underline that this regime is extended to Switzerland's citizens and to the citizens of States that are part of the Economic European Space Agreement (Iceland, Norway and Liechtenstein), according to article 3/4 of Law 37/06, and also to any member of a Portuguese citizen's family, regardless of her/his citizenship (article 3/5 of Law 37/06).

Basically, the difference of treatment between foreigner from third countries and foreigner from the EU and equivalent categories relies on:

i.) the fact that the latter don't need visa to get into Portugal (a document of identification is sufficient)²⁴ — the former do;

ii.) the fact that EU citizens and family members may have residency in Portugal for three months without any formality²⁵ — foreigner from third

²¹ About the basis of this State's competence, see Emilio CASTORINA, **Introduzione allo studio della cittadinanza**, Milan, 1997, pp. 7 ff..

²² Cfr. José Joaquim GOMES CANOTILHO, **Enquadramento...**, *cit.*, p. 162.

²³ This happens since 1993, year in which Decree-Law 60/93, of the 3rd March first regulated the framework of entry, permanence and leave of Portuguese territory by EU citizens (now substituted by Law 37/06, below mentioned in the text).

²⁴ Article 4 of Law 37/06.

countries need to get a short term visa or a residency visa. Brazilian citizens have a special prerogative, under article 217/5 of LI and article 6/2 of the *Agreement for reciprocal contracting*, signed in Lisbon between Portugal and Brazil on the 11th July 2003: they don't need to get the short term visa, once these requests are transformed in requests for temporary residency authorizations²⁶ (see article 75 of LI)²⁷;

iii.) the fact that EU citizens and family members can get long term residency permits of five years either if s/he works in Portugal, or has enough means to support herself/himself and family, and subscribed a health insurance (if demanded by hers/his State of origin to Portuguese citizens staying there in identical circumstances); or is studying in a public or private education establishment, legally recognised, and has enough means to support herself/himself and family, and subscribed a health insurance (if demanded by hers/his State of origin to Portuguese citizens staying there in identical circumstances²⁸) — foreigner from third countries need to fulfil more demands to get (temporary and permanent) residency permits²⁹;

iv.) the fact that EU citizens and family members get the right to live permanently in Portugal after five consecutive years of stay³⁰, and from then on benefit from a special protection against banishment, only possible if based on serious reasons of public order or public security³¹ — and if they had residency in Portugal in the past ten years or are minor, authorities can only invoke imperative reasons of public security to banish the person³². Rather differently, citizens from third countries with permanent residency authorisations are in a more fragile situation, although they can't be

²⁵ Article 6 of Law 37/06.

²⁶ According to article 84 of LI, the residency permit substitutes the identification card, having in mind, however, the regulation inscribed in the Treaty of Porto Seguro, signed on that city between Brazil and Portugal, in 2000 (approved for ratification by Resolution of the Republic Assembly n° 83/2000, of the 28th September, and ratified by the Presidential Decree n° 79/2000, of the 14th November). Decree law 154/03, of the 15th July gives execution to this Treaty and states the same equivalence between residency authorizations and identity cards (article 5/1). Nevertheless, the political rights involved in this Treaty, namely the right to vote and be elected in local elections, demand a period of stay of at least 3 years (article 5/2 of the Treaty), which means the equivalence isn't immediate in all cases.

²⁷ In what concerns dispensing the visa, we should also pinpoint the special situations referred to on articles 122 and 123 of LI. See below, note 62.

²⁸ Articles 10, 7/1 (and 2), and 14 of Law 37/06.

²⁹ See LI, articles 77 e 80.

³⁰ Articles 10 and 13 of Law 37/06.

³¹ Article 23/2 of Law 36/07.

³² Article 23/3 of Law 36/07.

arbitrarily expelled — as article 134 of LI demonstrates. As to the immigrants with long term residency statute, the situation is identical to EU citizens (see article 136/1 of LI).

These brief notes show that foreign citizens in Portugal are not all alike, and that EU citizens (and equivalent) have a special statute compared to citizens from third countries. But, are we in condition to affirm that all citizens from third countries staying in Portugal, not Portuguese, not EU citizens or equivalent, are (according to the law) immigrants? The answer is no, for three reasons:

i.) The condition of immigrant involves a *free will* to leave the country of origin in order to go to another State that provides employment, education or another kind of experience which constitutes a value to the individual. In other words, it is a *voluntary choice* — even if it's sometimes hard to affirm, given the extreme poverty situation faced by people in the country of origin. So, a refugee or a beneficiary of political asylum must not be considered immigrant — and neither does a victim of human traffic³³;

ii.) The will to leave the country of origin must be a *product of self-determination, not a duty*. That's why LI excludes diplomats and members of international organizations (and families, and staff) from the obligation to obtain an authorisation of residency (article 87)³⁴;

iii.) Being an immigrant implies a *detachment from the country of origin and the establishment of a connection* — stronger or weaker — *to the new welcome community*. That connection takes form within a certain period of time, certainly superior to a short visit. In other words, tourists aren't immigrants because they don't come with the purpose of staying: like Paul Bowles puts it, in *The sheltering sky* (confronting tourists with travellers), a tourist generally hurries home at the end of a few weeks or months.

So the last question would be: how much time should the stay last and what kind of objectives must an immigrant pursue in the welcome country? Looking at the kinds of visas LI regulates, we would say that an immigrant is someone who is granted a permanent residency authorisation [LI, articles 74/1/a), 76 and 80], or someone who is given the statute of long term

³³ LI supports this analysis: see articles 4/2/b) and 109/2 and 5 (for victims of human traffic).

³⁴ See other examples of “forced immigration” in Jorge GASPARG, **A autorização...**, *cit.*, pp. 966-967.

resident, according to articles 125 and ff. of LI (see specially 126) – or, if we think on illegal immigrants, someone who is living in the country for at least five years, although illegally. Precisely, both the former cases demand a *five year period of stay in Portugal* previous to the attribution of the permit, that has no time limit [although it must be revalidated every five years: articles 76/2, 129/8 and 130/2 of LI] — the same period of time within which EU member States' citizens may obtain the right of living permanently in Portugal. The difference between the two statutes concerns mainly the domain of the language: *basic knowledge* to get the authorisation; *fluency* to be recognised as a long term resident (see articles 80/1/e) and 126/1/e) of LI).

In order to limit the subjective universe of this presentation, we are going to assume that *an immigrant is a foreign citizen who has lived (legally) in Portugal for at least five years, not necessarily working but having enough means of self subsistence for herself/himself (and her/his family, if the case) so not to rely on the national security system, and therefore has been given a permanent residency authorisation or has been attributed the statute of long term resident.* Before that, either s/he is a tourist or a visitor (even if a long time one).

Three last remarks: first, the condition of immigrant is gradual — one isn't an instant immigrant, *one becomes an immigrant* (see **III.**); second, from the perspective we just adopted, *the time factor is decisive* to qualify an immigrant, more than the administrative process — because one can be an immigrant from a *material* perspective but not from a *formal* one: that's why there are legal and illegal immigrants³⁵; third, *being an immigrant* — and not a mere visitor — involves time and connection to the welcome community but *doesn't imply a perpetual state*, because immigrants may stay for as long as they live, but they may also acquire Portuguese citizenship and no longer be immigrants. And, of course, they may go back home.

2. What aspects does the immigrants' *administrative condition* involve?

³⁵ This point is debatable, since we must admit that, from a certain point of view, an immigrant is someone to whom the State has recognized a right to stay — in that case, it would be better to talk about illegal visitors, who never reached the formal statute of immigrants. And if so, illegal immigrants would only be the ones who lost the statute, after having achieved it. In practice, though, we talk about illegal immigrants as much as meaning any foreign citizen who has illegally entered in Portugal as referring to legal immigrants who turned illegal (because their authorizations were cancelled, or because they lost the long term residency statute, or they were expelled...). In this text, although we depart from a restrict concept of (legal) immigrant, when we deal with expulsion, we will also have illegal *visitors* in mind (see **IV.**).

Immigrants are persons who can be viewed in multiple ways. Considering the work division of this VIII Conference and also our academic skills, the analysis will focus on the legal framework provided by LI, leaving aside problems such as social integration of immigrants or economic effects of immigration³⁶. More reluctantly, we will also exclude a deep incursion on the political condition of immigrants — restricting ourselves to brief notes on Constitutional norms on the subject (II.). Finally, a passionate dimension of immigrants' statute relies on the problem of which fundamental rights they should be attributed/recognized³⁷, namely in what way can their rights be diminished or reformatted in order to conceal with the moral and juridical values of the welcome country — which alone could well be the theme of another conference...

The object of our presentation will then circumscribe to the brief description of the legal framework in what concerns admission, concession of long term residency permits and expulsion by the administrative authorities and, in what relates to expulsion, also by the judicial power (towards legal immigrants).

II. Immigrants in the Constitution

Like LI, the Portuguese Constitution (=PC) hardly mentions the word "immigrant". The PC states the right to leave (article 44), but not the right to enter³⁸. In fact, besides article 74/2/j), founding the State's duty to grant immigrants' support to ensure their children's right to education, there's no other reference. It is a common absence in other constitutional texts, though. The protective norms towards immigrants don't appear as such but instead as guarantees provided to foreigner (that they are, essentially)³⁹ or to minorities

³⁶ On this side of the problem, see António CLUNY, **Multiculturalismo, interculturalismo e imigração em Portugal no início do séc. XXI**, in *RMP*, n° 97, 2004, pp. 103 ff.

³⁷ On the various "masks" immigrants may be envisaged with by the welcome community, José Joaquim GOMES CANOTILHO, **Enquadramento...**, *cit.*, pp. 152 ff.

³⁸ That's why José Joaquim GOMES CANOTILHO (**Enquadramento...**, *cit.*, p. 159) affirms the PC consecrates the right to *emigrate*, not the right to *immigrate*.

³⁹ It is, for instance, the approach of the French *Conseil d'État* — see the note to Décision n° 2003-484 du 20 novembre 2003, by Nicolas FERRAN: **La politique de maîtrise des flux migratoires et le respect des droits et libertés constitutionnels**, in *Revue du Droit Public et de la Science Politique*, 2004/1, pp. 275 ff. — as well as of the Italian *Corte Costituzionale*: Paolo PASSAGLIA and Roberto ROMBOLI, **La condizione giuridica dello straniero nella prospettiva della Corte**

(because they usually keep their cultural and religious traditions, sometimes confronting the welcome country's ones)⁴⁰ — or even, as happens in the US Constitution, their relevance to the legislator derives from article 1, Section 8, which deals with the Congressional power to legislate on naturalization matters⁴¹.

In the PC, the principle of equivalent protection of foreigner's civil rights is stated in article 15/1. It derives from the principles of human dignity (article 1) and of fundamental rights' universalism (article 12): men are born free and equal, independently from their place of birth and should be recognised equal rights. This statement echoes article 1 of the Universal Declaration of Human Rights, the basic catalogue received by our Constitution in article 16/2, to help to interpret and to complete the norms related to fundamental rights, in order to achieve the best level of protection. One should also add article 12 of the International Pact about Civil and Political Rights, where the rights to leave the country of birth, of legal entrance and of free circulation in a welcome State are established. Last but not the least, one must mention the prohibition of expulsion except for relevant reasons and the right to a due process, with contradictory hearing and judicial review, stated in article 13 of the IPCPR: both enter the catalogue of our Constitution through the open clause of article 16/1.

The principle of equivalent protection, received in article 15/1 of the PC, is central to grant the effectiveness of immigrants' fundamental rights — at least civil and social rights⁴². If we join the imperatives of universal and equal protection established in articles 12 and 13 to article 15/1, we conclude that,

Costituzionale, in *II Jornadas Italo-españolas de Justicia Constitucional. Problemas constitucionales de la inmigración: una visión desde Italia y España* (coord. by Miguel Revenga Sánchez), Valencia, 2005, pp. 11 ff., spec. 27 ff. —, and of the Spanish *Tribunal Constitucional*: J. Luis García Ruiz, **La condición de extranjero y el Derecho Constitucional español**, in *II Jornadas Italo-españolas de Justicia Constitucional. Problemas constitucionales de la inmigración: una visión desde Italia y España* (coord. by Miguel Revenga Sánchez), Valencia, 2005, pp. 489 ff., spec. 500 ff..

⁴⁰ Justifying the nearness between the concepts *immigrants* and *minorities*, Ana Luisa PINTO e Mariana CANOTILHO, **O tratamento dos estrangeiros e das minorias na jurisprudência constitucional portuguesa**, in *Estudos em homenagem ao Conselheiro José Manuel Cardoso da Costa*, II, Coimbra, 2005, pp. 231 segs, 234.

⁴¹ “It would not make sense to allow Congress to pass laws to determine how an immigrant becomes a naturalized resident if the Congress cannot determine how that immigrant can come into the country in the first place” — <http://www.usconstitution.net/constnot.html#immigration> (accessed on the 1st February 2009).

⁴² In the US, there's the leading case *Plyler v. Doe*, of 1982, where the Supreme Court affirmed that the right to education must be granted equally both to American children and to immigrants' children.

as a matter of principle, the Portuguese State cannot differentiate citizens from immigrants, as long as these latter are legally staying in the country. In the words of Mário TORRES, "in what concerns the general rights granted to Portuguese citizens, the Constitution admits only one position: whether full equivalence, *without restrictions*, between citizen and foreigner, or *exclusivity* of certain rights to Portuguese citizens"⁴³. And it goes without submitting the extension to any condition of reciprocity, if not expressly affirmed.

This equivalence admits exceptions – which contribute to create several categories of foreigners⁴⁴ –, but only in what concerns political rights and the exercise of certain functions⁴⁵. These constitute the truest expression of the connection to the values and policies developed by the State, and are reserved to Portuguese citizens – one is even exclusive of the original citizens: the right to be a presidential candidate (article 122 of the PC). As much as the sovereign State can limit the entrance of foreign persons in its territory⁴⁶ based in a principle of national independence, so does sovereignty also justifies the power to restrict certain rights to State's citizens – those which reflect a will to participate in the community's main choices and so demand a stronger bond (of citizenship).

Sensing the need to integrate immigrants within their welcome sub-communities, the PC allows the legislator, since 1989⁴⁷, to regulate their rights to vote and to be elected in municipal elections⁴⁸. This norm also applies,

⁴³ Mário TORRES, **O estatuto constitucional dos estrangeiros**, in *SI*, n° 290, 2001, pp. 7 segs, 22.

⁴⁴ As the Constitutional Court affirms – **A jurisprudência constitucional sobre o cidadão estrangeiro**, *Report of the 10th trilateral conference Portugal, Spain, Italy, which took place in Madrid, from the 25th to the 27th September 2008*, p. 2 (available at <http://tribunalconstitucional.pt/tc/textos0202html>).

⁴⁵ As the Constitutional Court puts it, "the exceptions to the principle of equivalence of rights between foreigner and Portuguese citizens established in the Constitution are easy to understand, once they rely on foreigners' relationship with the *institutionalized political community* – with which foreigners have, most certainly, a fragile bond (...)" – **A jurisprudência constitucional sobre o cidadão estrangeiro**, *cit.*, p. 5.

⁴⁶ See Charles P. GOMES, **Les changements juridiques dans les cas d'immigration en France et aux États-Unis**, in *RFSP*, 200/3, pp. 413 segs, 413.

⁴⁷ The 2nd constitutional revision introduced number 4 in article 15, which was altered in 1992, assuming the actual redaction.

⁴⁸ Immigrants' right to vote in municipal elections is regulated in Law 56/98, of the 18th August, altered by Law 23/00, of the 23rd August and by Organic Law 1/01, of the 14th August. Article 2 attributes the right to vote, dividing non Portuguese citizen voters in three categories: EU citizens, citizens from Portuguese speaking countries (part of CPLP) and other citizens – all of them based in reciprocity and subordinated to an inscription in the local area census services. As to the first, however, the right is automatically attributed, as long as to the second the right exists if they have

naturally, to EU citizens, whose *enlarged citizenship* justifies the extension — and they have the right, likewise, to vote in the European Parliament's elections, based on reciprocity (article 15/5 of the PC, introduced in the constitutional revision of 1992).

The Constitutional Court has been called to analyse some situations concerning foreigners' rights (not necessarily immigrants, in the restricted sense we have defined). Most of the decisions concern judicial rights of defence: access to justice in matters of asylum and extradition, financial assistance, due process of expulsion, right to judicial review — and have been oriented by the principles of equal protection and prohibition of non proportional restrictions⁴⁹. There are decisions about access to public functions (because article 15/2 of the PC restricts the access to public charges that don't have a "predominantly technical dimension"⁵⁰) and to social security as well.

Perhaps the most important group of judgements are the ones involving expulsion: on the one hand, the Constitutional Court denies the automatic effect of expulsion based on a penal condemnation, when the offender is a legal resident — appealing to the prohibition of penalties' automatic effect and also based on the freedom of circulation (articles 30/4 and 44 of the PC, respectively)⁵¹. On the other hand, the High Court for constitutional matters decided several cases of constitutional incidents related to norms which allowed the expulsion of foreigners condemned by crimes committed in Portugal not considering the fact that they had minors at charge. These norms were considered unconstitutional on the basis that they lead to the expulsion of the offender's children with Portuguese citizenship — who can't be expelled,

residency in the municipality for at least two years, and to the third if they have residency in the municipality for at least three years previously to the electoral act.

Article 5 allows them the possibility to be elected to municipal charges, assuming the same division mentioned above, and based on reciprocity: EU citizens, automatically; citizens from Portuguese speaking countries, if they have legal residency for at least four years, and as to the others, if they have legal residency for at least five years.

⁴⁹ For the detailed references, see Ana Luisa PINTO e Mariana CANOTILHO, **O tratamento dos estrangeiros....**, *cit.*, pp. 238 and ff.

⁵⁰ The Constitutional Court has considered these to comprehend professions like judge, policeman or high charges at the public administration that involve the power to unilaterally define subjective situations – see **A jurisprudência constitucional sobre o cidadão estrangeiro...**, *cit.*, p. 5.

⁵¹ See cases 359/93 and 288/94 (see also case 442/93, involving an offender whose entrance in Portugal was illegal — the automatic effect was not considered unconstitutional in that situation).

according to article 33/1 of the PC, and couldn't be left behind⁵². One must add that family protection (article 36/6 of the PC) and the jurisprudence of the ECJ and the ECHR concur, moreover, to the prohibition of a foreign offender's expulsion whenever s/he has children at charge in Portugal, even if they are not Portuguese⁵³ — the LI conforms to that, as we can see in article 135/c).

III. Becoming an immigrant

As we said above, a foreign person in Portugal isn't necessarily an immigrant — s/he *might become one*. In fact, apart from tourists and (longer or shorter term) visitors, there are persons who stay for considerable periods of time and grow a connection to the country that ends in the attribution of a statute: the long term resident statute⁵⁴. The LI regulates these aspects, following very closely 10 European directives and one frame decision of the Council (see the list in article 2)⁵⁵. The transposition of these directives practically empties the power of the Portuguese legislator on the subject. In other words, he is strictly bonded to a superior framework, due to the fact that the entering and staying of third country citizens in Portugal is a way to penetrate in a territory larger than our frontiers and a way to access a much bigger market than our own only.

This said, how can one become an immigrant⁵⁶?

First, the foreigner has to enter the country legally⁵⁷ — or, exceptionally, benefit from an extraordinary legalization period⁵⁸ —, which means getting a

⁵² On this jurisprudence, see Anabela LEÃO, **Expulsão de estrangeiros com filhos menores a cargo (Note on the decision 232/04 of the Constitutional Court)**, in *JC*, n° 3, 2004, pp. 25 segs.

⁵³ See Carla AMADO GOMES, **Filiação, adoção e protecção de menores. Quadro constitucional e notas de jurisprudência**, in *RCEJ*, n° 13, 2008, pp. 7 segs,

⁵⁴ Jorge GASPAR (**A autorização...**, *cit.*, p. 963) departs from a similar concept: an immigrant is an alien who arrives in the welcome country and reaches to install there on the basis of labour or economic motivations.

⁵⁵ On the European policy for immigration, see Miguel GORJÃO-HENRIQUES, **A Europa e o «estrangeiro»: Talo(s) ou Cristo?**, in *Temas de Integração*, n° 6, 1998, pp. 23 ff.; Henry LABAYLE, **L'Union Européenne et l'immigration. Une véritable politique commune?**, in *Mouvement du Droit Public, Mélanges en l'honneur de Franck Moderne*, Paris, 2004, pp. 1217 ff.; Helena PÉREZ MARTÍN, **Libertad de circulación y de residencia: ciudadanía e inmigración en la Constitución Europea**, in *Colóquio Ibérico: Constituição Europeia. Homenagem ao Doutor Francisco Lucas Pires*, Coimbra, 2005, pp. 593 ff., spec. 604 ff..

⁵⁶ To consult practical data on the numbers of residence permits given by the Foreigner and Borders' Board up to 2007, go to <http://www.sef.pt/portal/v10/PT/asp/estatisticas>.

⁵⁷ See the conditions of entrance refusal in article 32 of LI — which partially correspond to the reasons of visa denial (article 52 of LI). We underline the fact that

visa. In the case of someone who wishes to stay for a long period, working or studying, s/he needs a *residency visa* [article 45/e) of LI]. Portuguese consulates in the country of origin are competent to emit the visas [article 48/1/b) of LI], within 60 days after the presentation of the request (article 58/4 of LI)⁵⁹, but they must previously consult the Portuguese Foreigner and Borders' Board (*Serviço de Estrangeiros e Fronteiras, SEF*)⁶⁰, which has 20 days to respond — the silence means a favourable answer [article 53/1/a) and n° 6 of LI]. The visa must be denied if one of the situations mentioned in article 52/1, 3 and 4, occur: if the person was expelled from the country (and is still within the period of non readmission⁶¹); if the person is included in the European⁶² or in the national system of non admission⁶³; if the person, even if not (yet) spotted in these systems, constitutes a serious menace to public

Portuguese authorities can't refuse the entrance to foreign citizens in the cases described in article 36 of LI: foreign people who were born in Portuguese territory and there usually reside; foreign people who are in charge of minors with Portuguese citizenship; and foreign people who are in charge of minors with a third State citizenship legally residing in Portugal.

See also note 62, about article 122/1/j) e n) of LI.

⁵⁸ In Portugal, there were, until now, three extraordinary legalisations: in 1992 (Law 212/92, of the 12th October), in 1996 (Law 16/96, of the 24th May) and in 2004 (see article 71 of Decree 6/04, of the 26th April, referring to article 52/3 of Decree Law 244/98, of the 8th August, altered by Decree Law 34/03, of the 25th February).

⁵⁹ But see the exception in n° 3 of article 53, concerning the urgency of a residency visa's concession for independent professional activity.

⁶⁰ For the structure and competences of the Board, see Decree-Law 252/00, of the 16th October.

⁶¹ This period should be fixed in the decision of expulsion. The LI fixes five years as a maximum period (article 144), which doesn't mean, of course, that after that lapse of time, the foreigner has automatically the right to re-enter.

⁶² The European system of surveillance is the Schengen System. It was developed after the Schengen Agreements of 1985/1990, that aimed to abolish the internal controls within the frontiers of the EU members and establish common rules on visas, on the right of asylum and on external controls towards citizens of third States. The Schengen System is a compensatory measure to counterbalance the freedom of dislocation in the European space and consists on a data base that collects information on people and goods, in order to fight organized crime. The System is passing through a technical evolution, aiming quicker information transmission, which gave birth to several decisions of the Council that created SIS II (Schengen System II).

Nowadays, only Cyprus, Romania and Bulgaria are out of the Schengen System, among EU members. Norway, Iceland and Switzerland, though not EU members, are linked to the Schengen System through a cooperation agreement.

For further details, see <http://europa.eu/scadplus/leg/pt>.

⁶³ See articles 32 and 33 of LI: the situations concern reasons of public security (internal or external), and may rely on suspicions (though these must be "strong") about the possible practice of acts contrary to the public order and public internal and external security. The protection of public health can also be invoked as a reason for not allowing the foreigner's entry — according to José Alberto de MELO ALEXANDRINO, **A nova lei de entrada...**, *cit.*, p. 15, article 32/2 is too vague when it refers to "other contagious infectious or parasitic illnesses detected in national territory".

order, to public security or to public health⁶⁴; if the person was condemned for a crime that, in Portugal, would involve a period of imprisonment superior to one year; if the person doesn't have means of self subsistence; if the person doesn't possess a valid journey document; and if the person didn't subscribe a travel insurance. Apart from the right of personal data rectification (article 52/5 of LI), these decisions are not subject to judicial review.

Residency visas are the first step to obtain a residency authorisation and are valid for 4 months (article 58/1 and 2 of LI). There are 6 types of residency visas⁶⁵:

i.) in order to the exercise of subordinate labour (article 59 of LI). The concession of this visa depends on a contingent — fixed annually by the Government — of labour opportunities neither taken by Portuguese workers nor by workers from EU countries and equivalent nor, finally, by foreign workers already resident in Portugal (article 59/1). The only exception is the one described in n° 7: in that case, the foreign worker may get the job if s/he has a contract and is able to prove that the offer was rejected by the workers mentioned in n° 1;

ii.) in order to the exercise of an independent profession or willing to create an enterprise (article 60 of LI);

iii.) in order to developing scientific investigation or a highly qualified activity (article 61 of LI);

iv.) in order to study at the secondary level, within students' interchange, or to develop training or doing voluntary work (article 62 of LI);

v.) in order to study at the university level (article 63 of LI); and

vi.) in order to regroup a family (article 64 of LI). The request is presented to the Portuguese Foreigner and Borders' Board by the foreign person who's already living in Portugal on the basis of a permanent residency authorisation or has been already recognized the statute of long time resident — see article 103 of LI. The decision is taken by the Director of the Board (article 102 of LI), within 3 months⁶⁶, must conform to the conditions prescribed in article 101

⁶⁴ Even if the visa is emitted, the person may not be allowed the entrance if s/he became a public health menace afterwards. In this case, the refusal of entrance must be founded in the existence of an illness recognised by the WHO or specially identified by the national authorities. The foreign citizen may be invited to go through medical tests in order to prove s/he doesn't suffer from any of those illnesses — see article 32/2 and 3 of LI.

⁶⁵ See also articles 10 ff. of Decree 84/07, of 5th November.

⁶⁶ Note that article 105/1 and 3 is equivocal. On the one hand, n° 1 says that the decision is notified “as soon as possible and in any case, within three months”; on the

(basically, demanding that the foreigner who lives in Portugal has lodging and means of subsistence to support the familiar), and can not violate article 106 of LI (that is to say, the resident does not fulfil the conditions of article 101, or the family member is refused entrance in the country for public security or public health reasons). We must add that LI considers *family members* all the categories of persons listed in article 99, and is extensive to the partner of a civil partnership and hers/his children, if the requester had their legal custody.

After this first step, foreign persons are ready for the **second** phase: to get the temporary residency authorisation [article 74/1/a) of LI]⁶⁷. The authorisation is valid for one year and is renewable for periods of two years⁶⁸ (article 75/2 of LI). Besides the general principles to which administrative powers are subdued⁶⁹, the conditions for this authorization's concession are established in article 77 of LI and deal both with *positive* premises (valid visa⁷⁰; presence in Portuguese territory; lodging; means of subsistence) and

other hand, n° 3 states that if after six months no decision surges it means the request has been deferred. So, only six months after the presentation of the request is the requester admitted to ask the Board to certify the silent approval and communicate it to the Consulate competent to the visas' emission. Before that, whether he gets a favourable answer or he must wait for the passing of time (this solution is repeated in articles 117/4 and 7, and 129/3 and 5 of LI).

This solution raises at least two questions:

- Is the Board allowed to refuse the request after three months?
- After three months, is the requester allowed to propose an action in order to condemn the Board to the emission of the decision (favourable or not), on the terms of articles 66 and ff. of the Administration Judicial Process Code?

⁶⁷ See also articles 51 and ff. of Decree 84/07, of 5th November.

⁶⁸ In the case of students at the university level, article 91/2 of LI states that this authorization is valid for one year and renewable for periods of another year. We must also mention the exceptional case of persons victim of human traffic to whom is allowed, on the basis of Section V of Chapter VI, the permanence in the country strictly for investigations' purposes (if the person so wishes), for periods of one year, renewable for equal time (as long as the circumstances justify the stay).

⁶⁹ Among which the equality principle, forcing authorities to observe equal criteria in giving authorizations to immigrants whose situations are objectively similar to precedent ones which benefited from favourable decisions – see case 080/02, of the 6th November 2003, decided by the Portuguese Administrative Supreme Court.

⁷⁰ Section VII deals with special cases, which don't require a valid visa previous to the authorization's concession. Article 122 includes seventeen very different situations, from foreign people's children born in Portugal, to sick people that need local medical assistance, to foreign citizens (who lived in the ancient colonies) who have actually paid service to the Portuguese Army, among others. Since LI is in force (September 2008), 8312 authorizations have been given on the basis of this article (source: http://www.portugal.gov.pt/PORTAL/PT/Governos/Governos_Constitucionais/GC17/Ministerios/MAI/Comunicacao/Notas_de_imprensa/281105_mai_com_legalizacao_imigrantes.htm, accessed on the 4th February 2009).

The case described on n) is particularly relevant, because it concerns foreign persons victim of labour exploitation, who entered the country illegally, on the basis of false

with *negative* ones (not having committed crimes to which correspond imprisonment superior to one year; not being prohibited to enter Portuguese territory; not constituting a menace to public security or to public health). The request is extendable to minors at charge of the requester (article 81/2 of LI).

The authorizations' renewal is submitted to the same prescriptions, and also to the proof of fiscal and social security obligations' compliment (see article 78 of LI). In the special case of imprisonment, the foreign citizen may still ask for renewal, but only if he wasn't subject to an order of expulsion (article 79 of LI).

Portuguese Foreigner and Borders' Board is competent to decide on the request of residency authorizations (article 81 of LI). The first request must be deferred within 60 days – 30 days for the renewal. In this last case, if the answer isn't communicated to the applicant in the delay of 6 months, the decision is considered favourable (article 82/3 of LI)⁷¹. In case of denial, the applicant may ask the administrative court to review the act (article 82/4 of LI). There is, likewise, judicial review if the authorization is cancelled by the Board based either on the foreign person's expulsion, or on the fact that s/he has become a menace to public security or public health, or because s/he has been away from Portuguese territory for a considerable period of time (see article 85/1 and 2 of LI – specially 7, for judicial review). We must underline that to these general conditions of cancellation (and refusal of renewal requests) some others may join, like the ones mentioned in article 95 of LI (concerning authorizations for studying at the superior level, or for developing

promises of work – as long as they have denounced the situation to Portuguese authorities and cooperate with them in order to punish the employers. This exception, as well as the one mentioned in j) is, in the end, a way of continuous (extraordinary?) legalisation.

Article 123 is even more special – in fact, it mentions an “exceptional regime” –, because it applies to cases of humanitarian interest and others based on arguments of national interest or public interest, namely the fact that the person exercises relevant activity on a scientific, cultural, sportive, economic or social area.

⁷¹ The law doesn't refer to silent approval of the first request – it only admits it for renewal. Which leaves two possible interpretations:

- when the Board doesn't answer a request for residency (temporary or permanent), the applicant should use the special administrative action for the authorities' condemnation on the emission of a lawful act (articles 66 ff. of the Administrative Process Judicial Code), within one year after the end of the six months. The applicant's situation will be, nonetheless, illegal until the Administrative Court decides. A possible corrector of this law hole would be to admit the use of the urgent remedy established in article 109 of the Administrative Process Judicial Code;

- when the Board doesn't answer a request for residency (temporary or permanent), the rule of article 82/3 also apply to the case, which means a silent approval, in order to a better protection of immigrants' expectatives.

professional training or charity activities) and the ones referred to by article 108 of LI.

After being in the country for at least five years, foreign citizens may apply, either to a permanent residency authorization⁷² or to the long term resident statute⁷³ – that’s the **third** step. In fact, the only difference between the prerequisites defined for each is the knowledge of Portuguese language (see articles 80/1/e) and 126/1/e) of LI). So, after the *first step* – visa -, and the *second* – temporary residency authorisation⁷⁴ -, at the *third* moment, the visitor finally (and formally) becomes an immigrant.

Permanent residency authorizations and long term residency statutes allow the immigrant a rest on bureaucratic procedures. They have no time limit (see articles 76/1 and 129/8 of LI), though the titles they materialize on⁷⁵ must be renewed every five years (articles 76/2 and 130/2 of LI). It doesn’t mean they can’t be lost: as we saw above, authorizations may be cancelled. And, concerning the long term residency statute, it may also be revoked, on the basis of: - fraud on the obtaining; - judicial expulsion; - acquisition of a long term residency statute on other State of the EU; or - leave of the EU or the Portuguese territory for a period of 12 consecutive months or for six consecutive years, respectively (see article 131/1 of LI). These decisions, as well as the authorizations’ refusals or the statutes’ concessions, are subject to judicial review by administrative courts, though LI grants a special protection on the cases of long term residency denial and revocation: the judicial process automatically suspends the efficacy of the measure (article 132/3 of LI)⁷⁶.

We can be tempted to say that, in practice, this difference doesn’t amount to much, because judicial administrative process grants interim protection through immediately suspending the act’s effects, according to article 128/1 of the Administrative Judicial Process Code. Once we give it a second look, though, things may not be that simple:

- *Primo*, when judicial action doesn’t suspend, on its own, the act’s effects, the defendant forcibly needs to present a request for interim protection, which doubles the means and the costs, and leaves suspension on the hands of the

⁷² See also articles 64 and ff. of Decree 84/07, of the 5th November.

⁷³ See also articles 74 and following of Decree 84/07, of the 5th November.

⁷⁴ The special situation of Brazilian citizens must be remarked, because of the 2003 Lisbon Agreement – see *supra*, I.1. b) ii.).

⁷⁵ *Título de residência* and *Título CE de residente de longa duração*, respectively.

⁷⁶ This solution differs from the ones prescribed on article 85/7 of LI (and unnecessarily on articles 96/4 and 106/7 of LI): these actions don’t suspend the acts effects by themselves. Curiously, articles 106/8 and 108/7 of LI, concerning family regrouping, have a different approach, probably in order to provide a stronger protection when family values are at stake.

judge (first, when he analyses the reasons presented by the Board to continue execution; second, when he decides the request for interim relief). The solution of article 132/3 of LI relies on a *unique process* and leaves the judge *no margin to reject the denial/cancellation's effects' suspension*;

- *Secundo*, when the law talks about a process that immediately suspends acts' effects', it points to a special procedure, because, in principle⁷⁷, judicial action in the administrative courts doesn't work like that. On the other hand, as we just saw, if the defendant doesn't benefit from a special clause, he must use the general means of defense regulated in the Administrative Judicial Process Code, which involve two actions: the request for interim relief (suspension) and the request to annul the act.

The special process LI points to, when referring to the immediate suspension of the act's negative effects may well be the injunction for civil rights and liberties' protection, consecrated on article 109 of the Administrative Judicial Process Code. First, because it is an urgent process that specially adjust to the values at stake in a process of this type. Second, because it is abnormally quick (theoretically, the problem would be solved in about a week). And third, because the efficacy of the protection provided makes interim relief measures much less useful.

As we saw above, the Constitution grants foreign citizens in Portugal equal rights as if they were nationals, except for the exercise of sovereign powers (judges; deputies to the Republic Assembly; members of Government; Chief of State) and for public jobs that don't concern strictly technical aspects (see article 15/2 of the PC). So, norms like articles 83 and 133 of LI are basically useless and may induce in error, for one may think that the rights there enunciated are the only ones attributed to the immigrant (like education, work, professional training, health care and access to justice). Even if it is more or less consensual that these lists relate to the rights more commonly exercised by immigrants, there's a risk of seeing them as closed lists – an interpretation contrary not only to the principle of equality resulting from article 15/2, but also to the principle of the rights' universality, founded in article 12 (both of the PC).

So, except for the impossibility of exercising some sovereignty charges and public functions, and for the possibility of expulsion⁷⁸, (legal) immigrants are just like Portuguese citizens and EU citizens and equivalent, and must receive absolute equal treatment by the Administration. True, their statute (both the ones who are given authorizations and the ones who detain the long term

⁷⁷ We must remind the actions previewed in urban planning laws, promoted by the Public Attorney, which adopt the same solution of immediate suspension (though they accept the judge may review the suspension's "concession"). About this solution, see Carla AMADO GOMES, **A tutela urgente no Direito do Urbanismo – algumas questões**, in *Textos dispersos de Direito do Património Cultural e de Direito do Urbanismo*, Lisboa, 2008, pp. 181 ff., spec. 225 ff..

⁷⁸ Once again, we remind, however, the rule stated in article 135 of the LI, forbidding foreign citizens' expulsion in some cases.

residency statute) is somehow precarious, because the titles may be revoked anytime by the Administration. But the revocation's motives are listed and judicial review is granted in all cases (as well as free legal assistance).

IV. The expulsion of immigrants

There are two types of expulsion: the one determined by the Administration and the one determined by the judge. This difference has its roots in the guarantee established in article 33/2 of the PC⁷⁹: foreign citizens who are legally in the country can only be expelled by judicial order.

Let's give a quick look at both, signalling the premises they stand in. Before that, however, we would like to leave three previous remarks:

1. There are four categories of immigrants who can't be expelled in any case⁸⁰: the ones who were born in Portugal and live here; the ones who have children with Portuguese citizenship living in Portugal at charge; the ones who have children without Portuguese citizenship living in Portugal *effectively* at charge; and the ones who have been living in Portugal since before they were 10 years old (article 135 of LI);
2. The decision of expulsion, when it comes from the Administration, is not considered a political act: it can be judicially reviewed by the administrative courts⁸¹. This is specially important because leaving the interpretation of concepts like "a menace to public order" (even more if it's just a presumption), or "a menace to State's dignity" solely in Administration's hands could imply a totally arbitrary analysis⁸²;

⁷⁹ On the meaning of article 33/2 of the PC, see Jorge MIRANDA and Rui MEDEIROS, **Constituição da República Portuguesa, Anotada**, I, Coimbra, 2005, pp. 366-367.

⁸⁰ These categories were introduced by Law 244/98, of the 8th August, which was replaced by the present LI.

⁸¹ Specifically on due process and access to justice by immigrants in Portugal, André Gonçalo DIAS PEREIRA, **Garantias processuais e acesso ao direito e aos tribunais. A protecção específica dos estrangeiros**, in José Joaquim GOMES CANOTILHO (org.), **Direitos humanos...**, *cit.*, p. 201 segs.

⁸² Ultimately, one would be very near the XIXth century's doctrines which considered that if a State couldn't freely expel a foreigner it wouldn't truly be independent, like the US Supreme Court affirmed in the *Chinese Exclusion Case* of 1889 (*Chae Chan Ping vs. United States*) – see Charles P. GOMES, **Les changements juridiques...**, *cit.*, pp. 426-427.

3. According to article 143 of LI – that echoes article 33/6 of the PC, concerning extradition⁸³ –, the expulsion cannot involve sending the foreign citizen to a country where s/he can be subjected to torture or degrading treatment (on the terms of article 3 of the ECHR). The immigrant must prove the fear of persecution in order to avoid being sent to that country. In cases as such, the administrative measure or the sentence that decrees the expulsion must mention the alternative destination.

1. The administrative expulsion of illegal immigrants

The expulsion of an immigrant by the Foreigner and Borders' Board obeys to a principle: only illegal immigrants can be expelled by the Administration without prior pronouncement of a judge (articles 140/2 and 145 of LI). Illegal immigrants are the ones who entered in Portugal without a valid visa⁸⁴, or who are staying in the country without valid authorization (temporary or permanent) – either because they never managed to get it or because it was cancelled – or, finally, who have seen the long term residency statute revoked.

When a foreign citizen is found illegally staying in Portugal, s/he can be detained by police authorities (article 146/7 of LI) and delivered to the Board, though he should be presented to a criminal judge within 48 hours. This judge may determine either the periodical obligation of presentation in the Board until the process is concluded, or the obligation of staying in the residence with electronic surveillance or, finally, the confinement in a temporary shelter centre, if security reasons so require (see articles 142/1, 146/2 of LI, and 3 of Law 34/94, of the 14th September, about shelter centres⁸⁵) – in this last case, the sheltering may never exceed 60 days (articles 146/3 of LI and 3/2 of Law 34/94)⁸⁶. Preventive custody is expressly excluded (article 142/1 of LI). If the

⁸³ In this sense, José Joaquim GOMES CANOTILHO and Vital MOREIRA, **Constituição da República Portuguesa Anotada**, I, 4^a ed., Coimbra, 2007, pp. 531-532.

⁸⁴ Remember that the visa is dispensed in the 17 cases mentioned in article 122 of LI – see above, note 62.

⁸⁵ See also Decree-Law 85/00, of the 12th May, turning sheltering spaces in airports equivalent to shelter centres, on the basis of Resolution of the Council of Ministers 76/97, of the 17th April.

⁸⁶ Article 4/3 of directive 2008/115/EC, of the European Parliament and the Council, of the 16th December, on illegal immigrants' return to their home countries, recognizes member States the option to determine more favorable rules than the one establishing a maximum period of six months for illegal immigrants' confinement in shelter centers (see article 15/5 and 6).

foreign person expresses her/his will to voluntarily abandon national territory and has documents to do so, s/he must be delivered by the judge to the Board and conducted to the border within the minimum period. Note that, in this case, no decision of expulsion is pronounced and the foreigner is forbidden to re-enter the country (only) for one year (article 147/2 LI).

Celerity characterises the process of expulsion; nevertheless, it necessarily involves a contradictory hearing and other instruction measures (see, above all, articles 32/10 of the PC, and 148 of LI)⁸⁷. The project of decision is transmitted to the Director of the Board and must make the bedding clear, likewise it must establish the expelled person's legal obligations, the period for which s/he will be forbidden to re-enter the country, and must mention the countries to which the person cannot be sent to, on the basis of article 143 (article 149/3 of LI). Immigrants who have been attributed the long term residency statute and who lost it can only be administratively expelled after some aspects have been considered, like the extent of their permanence in the country, their age, personal and familiar consequences of the expulsion, and the strength of the bond established with Portugal (or the lack of ties with the country of birth) – article 136/2 of LI.

The Board is also empowered to recognize and execute banishment decisions originated in other EU member State against third countries citizens. The conditions for the recognition are established in article 169, and must involve the authorities of the State who took the decision of banishment and the authorities of the State that issued a residency authorization to the foreigner – if not the same and whenever the authorization was issued (nº 4). We underline that LI aims to harmonize the obligation of recognition with the faculty of envisaging the banishment decision *within the national and the European context*. Looking at article 169/2, this purpose becomes very clear: when the banishment was decreed on the basis of a serious menace to public order or to public security, the Board must double check *the clear and present danger* the person may constitute to Portugal or to the EU. Proportionality is at stake here, considering the adequacy of the measure and balancing its most restrictive aim to the foreigner freedom of circulation.

Curiously, and once more demonstrating the idea that this recognition must be an *ultimo ratio* decision, article 169/5 excludes it whenever the State that decreed the banishment postpones or suspends its effects. This alerts us to the possibility of revision of an expulsion's decision – by the Administration only, we think, so not to affront the principle of *res judicata*. The postponement/suspension has, we think, an external dimension only: once the foreigner wants to re-enter in Portugal, the expulsion regains its effects.

These decisions are subject to judicial review: by administrative courts, whenever the Board makes the recognition (article 171/3 of LI); by the Court of Second Instance, when the recognition is made by the judicial courts (article 169/3, sending to articles 152 to 158 of LI).

⁸⁷ On the right to a contradictory hearing in this context, see case 01176/06, of the 15th May 2007, decided by the Portuguese Administrative Supreme Court.

This decision can, as we have already mentioned, be subject to judicial review, in administrative courts. However, article 150 of LI says that the claim's presentation doesn't suspend the execution. Therefore, apparently, LI makes the defence excessively costly, because the foreign person might have to leave the country before proving hers/his right. It must be emphasized, though, that the Portuguese Constitutional Court never admitted that the automatic suspension of administrative acts' effects generated by a judicial impugnation of their validity is part of the right to effective judicial protection (although article 268/4, *in fine*, of the PC, states that this right includes the possibility to *ask for* injunctive relief measures)⁸⁸.

One must remind, nonetheless, that article 128 of the Administrative Judicial Process Code establishes that the presentation of a claim for suspending an administrative act's effects automatically provides temporary relief, at least until the Administration proves the public damage of suspension, through convincing the judge to order the continuity of the execution until the final decision on the injunction process is taken. In other words, suspension is not automatic, it must be required. But the placing of the injunction before the court immediately suspends the execution of the expulsion's order, at least until the Administration convinces the judge of the necessity of its continuity.

2. The judicial expulsion of legal immigrants

When the immigrant is legally staying in Portugal, the expulsion can only be decreed by a judge. There are two types of situations in which a judicial expulsion may raise:

i.) The expulsion can be accessorially imposed to an immigrant condemned for a crime to which corresponds a punishment superior to one year of imprisonment. One must underline that several aspects should be considered before decreeing this extreme measure, like the gravity of the crime, the offender's personality, the time for which s/he is staying in Portugal, the social background, among others. Above all, the fact that the immigrant has

⁸⁸ On the contrary, the US Supreme Court decided that the guarantee of automatic suspension of an expulsion order is inherent to the principle of due process [in the *Japanese Immigration case* of 1903 (*Kaoru Yamataya vs. Fisher*)], stating that the person must be recognized the right to defend herself before being expelled from the territory.

permanent residency (meaning s/he is in the country for at least five years prior to the condemnation) implies that the expulsion can only be determined if hers/his conduct represents a serious danger to public order or to public security (see article 151/2 and 3, and also article 136/1 of LI).

The order of expulsion's execution is commanded by the judge of punishments' execution, after two thirds of the punishment are completed or, if the good behavior of the offender so allows, when half of the punishment is completed (article 151/4 and 5 of LI).

ii.) The expulsion should be asked to judicial courts by the Foreigner and Borders' Board – articles 152/1 and 153/1 of LI. The reasons are listed in article 134/1 of LI and concern mainly national and European security⁸⁹ (however, there's a clause [d]) that relates to “the abusive interference in the exercise of political participation's rights reserved to nationals” whose significance is a mystery). These cases must consist on a serious breach of confidence in the immigrant's conduct that justifies the request for expulsion⁹⁰⁻⁹¹.

The Board decides to initiate a judicial process of expulsion after investigating the immigrant's conduct and reuniting the necessary elements of proof (article 153 of LI). Once the claim is presented to the competent judge, the audience is appointed to the next five days, thus notifying both the immigrant, the witnesses identified in the process and the regional director of the Board (article 154/1 of LI). This audience can only be delayed once, for ten days, on the basis of one of four reasons (article 155/1 of LI): - if the defendant so asks, to prepare the defense; - if the defendant is absent (the immigrant's presence in the audience is mandatory – article 154/2 of LI); - if some indispensable witnesses miss; - if the court needs some days to develop extra diligences in order to discover the truth.

If the court decides to expel the immigrant, the sentence must contain the same elements as the equivalent administrative measure: the bedding; the

⁸⁹ One can affirm that when the immigrant becomes a menace to European security and is listed in the Schengen information system (indicated by any member State), the Portuguese Foreigner and Borders' Board is obliged to expel her/him. See case 0473/02, of the 7th November 2002, decided by the Portuguese Administrative Supreme Court (a legalisation was at stake there, but the principle is also applicable in our context).

⁹⁰ In this sense, Jorge MIRANDA and Rui MEDEIROS, **Constituição...**, *cit.*, p. 367.

⁹¹ If the Board suspects the immigrant may attempt to escape before the judgment, a request must be presented to the judge so special surveillance measures will be adopted, as set in article 142/1 of LI.

immigrant's legal obligations (namely, the delay s/he is given to leave the country); the mention of entrance interdiction and the period for which it will last; and the indication of the countries to which s/he cannot be sent to, on the basis of article 143 of LI (see article 157/1 of LI). Immigrants who have been attributed the long term residency statute can only be expelled after some aspects have been considered by the court (as well as by the Board, in the cases of administrative expulsion), like the duration of their permanence in the country, their age, the personal and familiar consequences and the strength of the bond established with Portugal (or the lack of ties with the country of birth) – article 136/2 of LI. Pondering these aspects reveal, of course, a need to observe proportionality parameters⁹².

The appeal is made to the Court of Second Instance (*Tribunal da Relação*) but does not suspend the effects of the decision – so the immigrant must leave the country in the shortest period. The Board may give the immigrant the option to leave the country voluntarily, or ask the Court to determine: - the sending to a temporary shelter centre⁹³; - the obligation to stay indoors or to use means of electronic surveillance; - or the periodical presentation to the Board or to police authorities (article 160 of LI). We must remark the diminishing of protection this process reveals in the phase of appeal when compared to the administrative expulsion. The point is, once the effects of the decision are not suspended until the appeal is decided, this solution is much more penalizing than the temporary relief provided by the administrative courts on the basis of article 128/1 of Administrative Judicial Process Code.

This decision is communicated to the country of destination's authorities and also to the Schengen Information System – whenever the immigrant is considered a menace to European security (if the reasons for expulsion concern only national security, the communication is restricted to the national list of non admissible persons), according to article 157/2 of LI. During the period for which the expulsion lasts, the immigrant cannot re-enter the country; if he does so, he may be subject to imprisonment up to 2 years or a penalty up to 100 days (see article 187 of LI).

⁹² See Jorge MIRANDA and Rui MEDEIROS, **Constituição...**, *cit.*, p. 367.

⁹³ If the immigrant disobeys the order of expulsion, s/he can be detained by police authorities and presented to a judge who, if the expulsion is not possible within 48 hours, sends her/him to a temporary shelter centre until the order can be executed (article 161 of LI).

V. Conclusions

After this quick overview of the immigrants' administrative condition in Portugal, we can conclude that:

1. The Law ignores the concept "immigrant"; it prefers to talk about "foreigner". Bearing in mind that an immigrant is someone who willingly leaves hers/his country of origin in search of new opportunities of work, study or personal fulfilment in another country where s/he will join a new community for a considerable time, we've drawn a concept that has its basis on a time period of at least a five years stay in Portuguese territory;
2. Considering the extended citizenship provided by the Union Treaty and the need to enforce the freedoms of circulation, establishment and residency within the European space, EU citizens benefit from a special regulation and are not qualified as foreigner – nor immigrants – by Law 23/07, of the 4th July (*Foreigner Law*, known as *Immigration Law*, although the word immigrant is mentioned only once...);
3. A foreigner who enters in Portugal isn't immediately an immigrant; s/he might become one, depending on the purpose and on the time of the stay. There are, so to speak, **three steps** to reach the immigrant level: a visa, a temporary residency authorisation, and a permanent residency authorisation or a long term residency statute. Once the last step is achieved, the legal immigrant no longer has a precarious situation and s/he can only be forced to leave the country in given situations – and some immigrants can't be expelled at all (article 135 of LI) -, and by a judge's order;
4. Expulsion is the natural consequence for a foreigner who is found illegally staying in Portuguese territory – that is to say: who entered illegally or who entered legally but lost the title of permanence. In this case, the Foreigner and Borders' Board is empowered to expel her/him, following a due process which includes contradictory hearing and legal assistance. The administrative decision may be judicially reviewed by administrative courts;
5. Legal immigrants can also be expelled, but in this case, the Portuguese Constitution demands a judicial process. There's a list of reasons which can be on the basis of the judicial expulsion, and the sentence is

subject to review by a higher court – in this case, civil law courts are competent to decide. The time of permanence in the country, the person's age, the family situation and the bond with the country of origin are factors to be considered before the expulsion is decreed;

6. When expelled, a foreigner can't re-enter Portuguese territory for at least five years. And if the expulsion's motive relates to European security, the immigrant is identified as a menace in the Schengen Information system and will likewise be *persona non grata* in all EU States.

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