Conformity Study for Spain
Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States

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ENVIRONMENTAL LAW & POLICY

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The views expressed herein are those of the consultants alone and do not necessarily represent the official views of the European Commission. The national report reflects that legal situation as it stands on 1 August 2008. No subsequent changes have been taken into account.

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ANALYSIS OF THE LEGISLATION TRANSPOSING DIRECTIVE 2004/38/EC ON FREE MOVEMENT OF UNION CITIZENS

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EXECUTIVE SUMMARY

1. Introduction

Spain is a decentralised State divided into 17 Autonomous Communities (*Comunidades Autónomas* hereinafter CA) and 2 Autonomous Cities (Ceuta and Melilla). The distribution of competences between the State and the CA is established by the Constitution (Articles 148 and 149).

Regarding the sources of law in Spain, the Constitution is the primary source of law. International Treaties are also sources of law, with the EC Treaty in particular having supremacy over the Spanish legislation and a special position in the hierarchy of international agreements.

Apart from the Constitution, the primary source of law in Spain is the Law. Regarding the jurisprudence of the Courts, the interpretation of the law given by the Supreme Court is binding upon the inferior courts. As such, it is the Supreme Court that establishes the definitive doctrine regarding a particular issue *erga omnes*. Within each CA, the highest legal body is the Superior Tribunal of Justice, and their interpretation is binding upon lower courts. However, the interpretation may differ from one Tribunal to another, until such time as the Supreme Court delivers a definitive doctrine. The Constitutional Court is as a quasi-legislator, and decisions of the Constitutional Law can be considered as a source of law (negative- when deciding upon the unconstitutionality of a law; and positive- when interpreting the law and the Constitution).

2. Introduction to the main particularities of the legal system of the Member State relating to the transposition of Directive 2004/38/EC.

According to Article 149(1)2º, the State has exclusive competence to regulate nationality, immigration, emigration, aliens and asylum. This means that this matter is reserved to the national parliament or the national government. However in Spain, despite the exclusive legal competence of the State (and thus the national parliament and the Government), the CA have also an important role to play in the application of the principle of equal treatment due to their competence in sectors such as social assistance, health and safety, housing, or education.

The lead ***Government Departments*** in relation to the implementation of Directive 2004/38/EC are the Ministry of Interior (*Ministerio de Interior*), the Ministry of Labour and Social Affairs (*Minsterio de Trabajo y Asuntos Sociales*) and the Ministry of Foreign Affairs (*Ministerio de Exterior*). The Ministry of the Public Administration (*Ministerio de las Administraciones Públicas*) also has competence, especially in relation to implementation of the Directive (see below), although the legislative proposals are published by the Ministry of the President (*Minsterio de la Presidencia*). All these different ministries also carry out activities related to the dissemination on information to the public. In particular, the Ministry of Labour and Social Affairs has a specific website on foreigners that provides brochures and documents in *inter alia* Romanian, Bulgarian, German, English and French. The Ministry of the Public Administration also has a website in Romanian.

Coordination between the different Ministries is ensured through the Inter-ministerial Commission on Aliens (*Comisión Interinstitucional de Extranjería*). Coordination with the CA and municipalities is ensured through the Superior Council on Immigration Policy (*Consejo Superior de Política de Immigración)*. Regarding *registration certificates and residence card*s, the main implementing bodies are the Aliens Bureaus (*Oficinas de extranjería*). *Visas* are granted by the different Consulates.

3. Conclusions of the legal analysis of the transposing measures for Directive 2004/38/EC.

a. Overview of how the requirements have been transposed

Directive 2004/38/EC was transposed into the Spanish legal order by a Royal Decree 240/2007 on 16 February, 2007 (RD 240/2007), which entered into force on 29 March 2007 (almost one year after the deadline established in the Directive). The Spanish authorities consulted with the Forum for Social Integration of Immigrants (*Foro para la Integración Social de los Immigrantes*) as well as with the Permanent Commission of the Labour Tripartite Commission for Immigration (*Comisión Permanente de la Comisión Laboral Tripartita*) and the Inter-ministerial Commission for Aliens Affairs (*Comisión Interministerial Tripartita*). The Council of State generally approved the text submitted by the Government in its Opinion of 2 November 2006.

One of the most important aspects is that the Spanish legislation, namely RD 240/2007, establishes an unconditional right of residence for Union citizens. Although the obligation to register exists, Union citizens have only to prove their identity and nationality. No other conditions (being employed, self-employed, economically independent, or a student) have to be met. In addition, their family members, regardless of their nationality, only need to prove the family link or the relation of dependency to have a right of residence derived from the Union citizen. As a consequence, the Union citizen does not need to show that he/she has sufficient resources for himself/herself and his/her family members and that they cannot become an unreasonable burden to the social assistance system in Spain. The only grounds on which freedom of movement can be restricted are public policy, public security and public health.

b. Conformity problems and complete and accurate transposition

Despite this more favourable treatment, RD 240/2007 has not correctly and completely transposed the Directive. In some cases there are serious mistakes in the understanding of the Directive's requirements. For example, the exemption from the visa requirement for family members holding a residence card from other Member States (Article 5(2) of the Directive) has been understood and transposed by the Spanish authorities as holding a residence card from a *Schengen* State. In addition, RD 240/2007 limits the definition of "other country family members" to the second degree for third country nationals, and restricts the right for dependants who are third country nationals to take up employment. Finally, another serious problem is the exemption from protection against expulsion of family members who retained the right of residence under Article 12 and 13 of the Directive. Such individuals retain the right of residence under the Aliens Act (general immigration rules), implying that the protection against expulsion under Articles 27-29 of the Directive no longer applies to them. In addition, in many cases there is some ambiguity in the way that RD 240/2007 has transposed the obligations of the Directive.

In response to these deficiencies, on 1 July 2008, the Associations *ACOGE* and *Pro Derechos Humanos de Andalucía* lodged recourse before the Supreme Court declaring the illegality of certain provisions of RD 240/2007 as contrary to EC law and Spanish legislation. Nonetheless, it is a conclusion of this report that overall the transposition is satisfactory.

In carrying out this assessment, Instruction 3/2007 interpreting the application of the law, as adopted by the Ministry of Labour, has been taken into account (provided the obligations were clearly included in the law). The responses by the Spanish authorities to the questionnaire distributed by the Commission have also been taken into account and are referenced, as appropriate.

1. Transposition issues related to definitions

"Spouse": the legislation has not included in the concept of spouse "*legal separation*". The transposition should be considered incorrect since in these cases the marital link still exists. The Supreme Courts interpreted *Diatta* as indicating that residence could only be prevented in case of legal separation and not of a *de facto* separation. This is a strict interpretation of *Diatta*. The ECJ simply

stated that the "marital relationship cannot be regarded as dissolved so long as it has not been terminated by the competent authority. It is not dissolved merely because the spouses live separately, even where they intend to divorce at a later date". Furthermore, such strict interpretation may lead to an exclusion of the Community regime at a later stage (not only in case of divorce, death and so on but also in the case of legal separation, as will be analysed when discussing the transposition of Article 12 and 13 of the Directive). For this reason the transposition has been considered incorrect.

"*Registered partnerships*": the provision has been correctly transposed but there may be problems in its implementation. There is no unified legislation on *de facto* unions in Spain or unified register of registered partnerships. The CA do have legislation, but the rights and conditions that need to be met to be considered a *de facto* union or registered partnership differ across the Communities. Instruction 3/2007 indicates that the registers established in the CA are not valid as long as they do not comply with the requirements laid down in Article 2(b) of RD 240/2007. Although this comparative analysis has not yet been undertaken, this clarification would *prima facie* place Spanish-third country national couples or Union citizens who have established their residence in Spain and have registered their partnership in the CA in which they reside in a less favourable position than Union citizens moving into Spain with their partnership registered in another Member State, (at least when contracted with a third country national). It is not evident how this provision will be applied in practice. Although the transposition may be considered correct given the flexibility allowed by the Directive, overall the implementation has been considered ambiguous due to the less favourable treatment of couples who have registered their partnership in Spain.

2. Transposition issues regarding beneficiaries

RD 240/2007 introduces an Additional Provision to the Aliens Act allowing the application of RD 240/2007 to family members of a *Spanish citizen*, even when the Spanish citizen has not exercised his/her right of free movement. However, it is not clear whether Spanish citizens who have exercised the right of free movement would be fully covered by RD 240/2007, or by the more limited regime of the Additional Provision to the Aliens Act. If the Additional Provision also covers Spanish citizens who exercised the right of free movement, then the Spanish legislation is not in conformity with the Directive when applied to third country family members. This is because the conditions for recognition of the marriage under the Aliens Act are more onerous and limit the personal scope of "family members".

RD limits *the personal scope of other family members* under Article 3(2(a)) to the 2nd degree in direct or collateral line, including blood and affinity family members. The Directive does not establish this limitation and therefore the Spanish legislation should be considered not to be in conformity with the Directive. This limitation is an unnecessary and disproportionate. It might not be unusual for an individual to be in charge of his/her nephew or niece (*e.g.* resulting from the death of both parents).

The legislation does not refer to *facilitation of entry visa*, which may render the transposition incomplete since the conditions for short terms visits (up to 3 months) are not the same as those for longer than three months.

3. Transposition issues regarding entry

According to Article 4(2) of RD 240/2007, "the possession of a valid and in force residence card issued by a State applying Schengen Agreement shall exempt those family members from the obligation to obtain an entry visa". As such, Spain only admits family members in possession of a residence card issued by Schengen countries, while the Directive has a broader scope since it refers to residence cards issued under Article 10 of the Directive (those from both Schengen and non-Schengen Member States).

4. Transposition issues regarding residence for up to three months

Under Article 6 of RD 240/2007, "family members of the Union citizen or EEA citizen who are not nationals of one of these States, and are accompanying or joining the Union or EEA citizen and who hold a valid and in force passport, and who have complied with the requirements of entry". This reference creates an unnecessary confusion between "lawful entry" and "lawful residence". When a person needs an entry visa, it would imply that the family member must have entered the country with a visa, leading *de facto* to the obligation to hold a valid visa during these three months. This requirement would be against the Directive. This provision will not have significant consequences for the third country family member (only a fine). However, this clause creates confusion and for this reason the transposition is considered incorrect on this point. Despite the ambiguity of the provision, the practice seems in line with the Directive since Instruction 3/2007 indicates that a short-stay visa is "only required to third country family members for entry purposes" [emphasis included in the Instruction].

5. Transposition issues regarding documents and means of proof

Article 7(1) also includes that the registration certificate will include the alien identity number (NIE). This number will be given *ex officio* by the authorities when issuing the certificate. The allocation of the number is needed for the issuance of the registration certificate, given that without a NIE the person cannot pay the fee for issuance of the certificate. This number is used to deal with the administration, especially for economic relations. It is not, in the case of Union citizens, an ID card. Since this is an additional requirement not foreseen in the Directive, the transposition has been considered incorrect for Article 8(2), 8(5) and 10(2) of the Directive. In addition, it seems that dactyl prints are also requested for third country family members, so violating Article 10(2) of the Directive.

Regarding the means of proof to certify the length of residence, it would seem that the only document accepted is the registration certificate or residence card. This would be against the Directive (Article 21) and arguably against Spanish administrative law. On the basis of the Spanish legislation, any means of proof may be submitted, providing that it proves the situation as described. In addition, the administration tends to request the NIE as proof that the person resides in Spain. This may indirectly violate Article 25 of the Directive. Article 25 in fact has been incorrectly and incompletely transposed by Spain. The legislation only specifies that for family members the possession of the receipt of submission of an application cannot be made a precondition for the exercise of rights or the completion of administrative formalities. As such, the administrative practice may be considered not in compliance with the Directive.

6. Transposition problems for the retention of the right of residence

The way RD 240/2007 has transposed Article 12(2) and Article 13(2) of the Directive on third country family members is one of the most serious cases of nonconformity identified. RD 240/2007 excludes from the Union citizens' regime those third country family members who retained the right of residence, so that after six months they have to request a residence card under the Aliens Act. This implies that these family members will not be protected under Article 27-31 of the Directive. The transposition of these two provisions for third country family members is therefore considered incorrect. In addition, in relation with Article 13(2), the retention of the right is only ensured to the ex-spouse or ex-partner (instead of all family members) and the Spanish act also includes legal separation as one of the causes for the retention of the right of residence.

As a consequence of this approach, transposition of Article 18 is also incorrect. There is no specific provision in the RD regarding the acquisition of the right of permanent residence, since these family members will be subject to the Aliens Act. The condition to obtain the right of permanent residence under the Aliens Act is legal residence for five consecutive years (Article 32 LO 4/2000 and 72(1) Aliens Regulation). The evaluation of continuity will partially follow the specific regime under the

RD, and partially the general regime for aliens under the Alien Regulation, which is less favourable. As such, the transposition is incorrect.

7. Transposition issues regarding permanent residence

Under Article 16(3), "Continuity of residence shall not be affected by temporary absences not exceeding a total of six months a year, or by absences of a longer duration for compulsory military service, or by one absence of a maximum of 12 consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country".

Article 10(6) of RD 240/2007 simply states that "[f]or the purposes of this Article [permanent residence], the continuity of residence shall be evaluated in accordance with the present royal decree." However, no provision of the RD specifically defines continuity. Therefore, we must look at other provisions of the RD that regulate continuity, namely Article 15(3) on the interruption of continuity due to expulsion and Article 14(3) on the evaluation of continuity. Within these Articles, the first three months are not taken into account, effectively increasing the length of residence required for the acquisition of the right of permanent residence by three months. As such, the transposition is considered incorrect.

8. Transposition issues regarding the right to take up employment: dependants

The provision is transposed, but it includes an exception for dependants. Article 3(2) second subparagraph, does not allow dependant family members to take up employment since they then run the risk of losing the status of dependency and being subject to the Aliens Act. This interpretation is against the Directive, since the status of dependency can only be required at the moment of entry. In *Jia*, the ECJ indicates that "the need for material support must exist in the State of origin of those relatives or the State whence they came <u>at the time when they apply to join the Community national</u>." Directive 2004/38/EC has not established any specific exception to the right to take up employment as was the case in the previous legislation. The transposition is therefore considered incorrect.

9. Transposition issues regarding public order and public security (Article 27)

Although Article 15(5(d)) transposes almost all the requirements under Article 27(2) of the Directive, the last sentence, namely "justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted," has not been transposed. Article 119(2) LO 4/2000 states that "The decision shall not take into account different facts from those that have been determined in the instruction phase of the procedure, without prejudice of their legal assessment," and as such could be considered as partially covering that requirement. In addition the Constitutional Court (STC 46/2001 of 15 February, 2001) has declared that "the public order cannot be interpreted as a preventive clause in the face of eventual risks, since in that case, it becomes in itself the highest certain risk for the enjoyment of freedom". However, an express transposition seems needed.

Article 27(3) has only been partially transposed. The obligation of two months has not been transposed and there is no mention of the provision covering the readmission of nationals and persons with disputed nationality (Article 27(4). Spain is not a party to Protocol 4 to the ECtHR.

10. Transposition issues regarding procedural guarantees

In relation to Article 15, nothing is foreseen in RD 240/2007. The only limitations on the right of residence are those based on public security, public order and public health. No mention is made of the procedural guarantees in cases where, for example, the residence card is refused due to a failure to meet the required conditions (i.e. not being a family member). The judicial practice will determine

whether the procedural guarantees laid down in RD 240/2007 for expulsion measures are also applied to other decisions that do not necessarily imply an expulsion measure.

Until that moment, the First Additional Provision indicates that the rules on procedure included in the Aliens Act and Law 30/92 may be applied on a subsidiary basis, provided that they are not against EC law. These procedural guarantees are the same as those applicable to decisions on: "other family members" and family members who retained the right of residence (under the Aliens Act); family members who retained the right of residence under Article 12 and 13; and refusal of entry for reasons other than public security and public health (i.e. failure to provide the necessary documentation). After examination, it is concluded that these provisions do not offer the same guarantees as the Directive. Specifically, the provisions differ in relation to Article 30(3) regarding the time-limit for leaving the country (it could be 15 days or 90 days, or even in certain cases 72 hours), and in relation to Article 31(4) guaranteeing the defence in person.

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SUMMARY DATASHEET

1. Transposing legislation

Directive 2004/38 was transposed in Spain by a Royal Decree 240/2007 on 16 February, 2007. The transposition was almost one year late. In addition, a join Instruction (03/2007) of the Ministry of Labour and the Ministry of Interior has been enacted explaining the Royal Decree (RD) to the competent authorities. The joint Instruction is not legally binding.

Other pieces of legislation relevant for the application of the RD include the Aliens Act (LO 4/2000) and its Regulation, general administrative rules (Law 30/92), and other instruments such as the Resolutions on marriages of convenience. The legislation is easy to find and the instructions are also readily available on the websites of the Ministries. The Spanish authorities were contacted for clarification purposes but no feedback was obtained.

2. Assessment of the transposition

Overall transposition is correct and satisfactory. However, there are some serious misunderstandings some of the Directive's provisions, in particular regarding dependants, retention of the right by third country family members and entry visas.

a) Incomplete transposition or non-transposition

i. Missing transposition (gap)

Article 27(4)	Readmission of nationals: no transposition of the provision covering the readmission of nationals and persons with disputed nationality. Spain is not a party to Protocol 4 to the ECtHR.

ii. Incomplete transposition

Article 3(2)	Other family members: facilitation of entry has not been completely transposed (only facilitation of residence)
Article 14(2), second subparagraph	There is no specific provision in the RD or in the LO 4/2000 or its Regulation ensuring that checks will be carried out only when there is reasonable doubt.
Article 15(1)	Procedural guarantees: the system in RD 240/2007 has not ensured that the guarantees under Article 31(4) also apply to persons affected by the restriction of free movement based on grounds other than public security or public health.
Article 25(1)	Residence documents: only transposed for the application certificate. In addition, practice known as not in compliance.
Article 27(2)	Public order: the principle that justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted has not been transposed.
Article 27(3)	Exchange of information: the obligation of 2 months has not been transposed.

b) Incorrect or imprecise/ambiguous transposition

iii. Incorrect transposition

Article 2(2(a))	Spouse: the legislation excludes from the concept of spouse, legally separated partners.
Article 3(1)	Beneficiaries: the legislation imposes stricter requirements on third country family

	members (especially ascendants) of a Spanish citizen, including most probably Spanish citizens who exercised the right of free movement.
Article 3(2(a))	Other family members: the legislation limits the personal scope to family members up to the second degree in direct and collateral lines (including blood and affinity relatives).
Article 5(2) second subparagraph	Exemption from entry visa: the legislation only applies the exemption to family members holding a residence card from a Schengen State.
Article 6(2)	Right of residence for up to 3 months: the legislation makes the right of residence of third country family members conditional not only on holding a passport, but also on having respected the entry requirements.
Article 8(2)	Registration certificate: the registration certificate includes the Alien Identity Number (which is allocated *ex officio* by the administration)
Article 10(2)	Residence card: the card includes and requires an Alien Identity Number (which is allocated *ex officio* by the administration). In addition, dactyl prints are also requested.
Articles 12(2) and 13(2)	Retention of the right of residence: the legislation excludes from the Union citizens' regime family members who retained the right of residence six month after the event. From the moment of the event onwards, they become subjected to the Aliens Act (normal aliens' regime)
Article 13(2)	Retention of the right of residence: only recognise the ex-spouse/ex-partner and includes legal separation as causes for retention of the right of residence.
Article 16(3)	Continuity: the first three months of residence (unless the person registers) are not counted when demanding rights derived from the length of residence.
Article 18	Permanent residence family members who retained the right: calculated on the basis of the Aliens Act (less favourable in terms of continuity although also 5 years of residence).
Article 21	Proof of continuity: correctly transposed but practice only accepts as proof of length of residence the residence card or the registration certificate (this also affects Article 19 and 20).
Article 23	Right to take up employment: the right of dependant family members of third country nationals to take up employment is limited due to the risk of losing the status of dependents under the Union citizens' regime.
Article 24(1)	The transposition is almost literal but instead of stating "on the basis of the Directive" it states "on the basis of the RD." This may create problems if the RD does not transpose the Directive correctly.

iv. Imprecise/ambiguous transposition

Article 2(2)(b)	Spain has included registered partners as family members despite the fact that the situation of registered partners in Spain is extremely complex.
Article 15(1)	Procedural guarantees: it is not clear whether these decisions will be subject by analogy to the same guarantees as public order/public security decisions (since the provision has not been transposed). In any case, it is not clear that the Aliens Act and general administrative law grant the same level of protection as Article 32(3) of the Directive regarding time-limit to leave the country.
Article 32(1)	It is not entirely clear whether Article 15(5(b)) would allow for revisions of a ban on entry before the two years have elapsed.
Article 35	Abuse of rights: it is not clear whether the provisions will be considered as relating to public order and thus subject to the procedural guarantees or not. If the provisions are not considered as relating to public order, the general legislation will not guarantee the same level of protection as the Directive.

c) Minor instances of non-conformity

Arts.8(3)-(5), 10(2), 19, 20	The application form requests personal data that may not necessary for identification or for establishing a family link, *i.e.* mother and father and similar. However, this is really minor and no additional documents or declaration is requested.

ABBREVIATIONS USED

Art	Article
BOE	Boletín Oficial del Estado
CA	Autonomous Communities
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
RD	Royal Decree
STC	Ruling of the Constitutional Court
STS	Ruling of the Supreme Court
STSJ	Ruling of the Superior Tribunal of Justice

1 INTRODUCTION

This conformity study analyses in detail the provisions of Directive 2004/38/EC on the free movement of EU citizens in its consolidated version, and it compares it with the legislation in place in Spain.

Directive 2004/38/EC repealed the earlier directives on free movement of persons (Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC) as from 30 April 2006.

EU citizenship gives every Union citizen the right to move and to reside freely within the territory of the Member States. The facilitation and promotion of this right, which is at the same time one of the fundamental freedoms of the internal market, is the objective of Directive 2004/38/EC. A second objective of Directive 2004/38/EC was to codify and review the various pieces of legislation and case-law dealing with this issue.

Free movement as a fundamental freedom of the internal market

Free movement is one of the fundamental freedoms of the internal market and can therefore only be restricted in a limited number of pre-determined circumstances. Thus, national legislation cannot adopt more restrictive legislation than provided for in the Directive.

Directive 2004/38/EC introduces, on the one hand, a uniform approach regarding the formalities that Member States can impose upon EU citizens residing in their territory. These formalities are expressly established in the Directive and restricted in function of the duration of the stay in the Member States.

- For a stay of less than three months, the only formality a Member State can impose is the presentation of a valid passport or national identity card.

- For residence of more than three months, a Member State can only require the EU citizen to register in the population register of the place of residence. If a certain number of conditions are complied with, the registration must immediately be validated. The Member State can only require the EU citizen to present proof that he/she is a worker, self-employed person, student or has sufficient resources not to become a burden upon the social security system of the Member State. Member States cannot lay down a fixed amount of what they consider to be “sufficient resources”, but must always take into account the personal situation of the person concerned. Family members of the EU citizen have to present an identity document and proof of the family link to an EU citizen.

- After five years of continuous residence in a Member State, an EU citizen obtains a right to permanent residence. The host Member State shall issue a document certifying permanent residence. A permanent resident has the right to be treated equally to a national of the Member State.

The Directive also determines and clarifies the only acceptable reasons for restriction of the free movement of citizens by Member State authorities, namely for reasons of public order, public security and public health. (For the interpretation and conditions of such exceptions, it is important to rely upon the case-law of the Court of Justice.)

These measures guarantee a strong protection against expulsion for EU citizens who have been long-term residents in another Member State. Such measures need to be proportionate and shall always look at the personal conduct of the individual concerned which must represent a “genuine, present and sufficiently serious threat affecting one of the fundamental interests of society”. In addition, the Directive establishes some procedural safeguards in case an expulsion decision is considered.

1.1 OVERVIEW OF THE LEGAL FRAMEWORK IN SPAIN

Spain is a decentralised State divided into 17 Autonomous Communities (*Comunidades Autónomas* hereinafter CA) and 2 Autonomous Cities (Ceuta and Melilla).

The distribution of competences between the State and the CA is established by the Constitution (Articles 148 and 149). In general, certain areas are the exclusive competence of the State (*e.g.* external relations), while other areas are the exclusive competence of the CA (*e.g.* waters running within the territory of a single Autonomous Community). Some areas are shared competence between the State and the CA. In such cases, the State is usually competent to establish "*basic legislation*" that can be developed by the CA through further legislation, provided the minimums laid down by the basic legislation are respected. The legislation developed by a CA then becomes preferential. In other cases, the CA only has executive powers. Each CA has listed in its "Statute of Autonomy" the responsibilities that it has assumed. The Constitution contains a residual clause stating that competence on matters not claimed by "Statutes of Autonomy" fall to the State.

The Constitution also recognises the autonomy of municipalities,[1] whose competences can be usurped neither by a CA nor by the State (Article 140 of Constitution). Municipalities also have regulatory powers. For example, many municipalities have regulated registered partnerships.

Spanish public administration is therefore composed of:[2]

- General administration at the State (the central or "federal") level.
- The CA administration
- The Local administrations

In addition, the so-called "Public Law Entities" ("*Entidades de Derecho Público"*) with legal personality and dependant on any administration are also considered as part of the "public administration". They are also subject to the administrative procedures and principles when they exercise administrative powers.

Regarding the sources of law in Spain, the Constitution is the primary source of law. International Treaties are also sources of law, with the EC Treaty and having supremacy over Spanish legislation, and a special position in the hierarchy of international agreements.

Apart from the Constitution, the primary source of law in Spain is the Law. However there are different types of laws with different hierarchical value[3]:

- The Organic law, which directly develops the Constitution, in particular fundamental rights and basic institutions;
- The Law (or ordinary law);
- The Royal Law Decrees and Royal Legislative Decrees adopted by the government. In the case of the Law Decrees, they have to be converted into law within a certain period of time to be applicable since they have been issued without the required delegation from the Parliament. The Royal Legislative Decrees are considered as delegations from the Parliament into the government to legislate. This type of decree is normally used when the Parliament has issued Basic legislation that needs to be developed by law instead of regulations.

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[1] The Spanish Constitution also allows municipalities to associate, creating a superior entity called "*mancomunidad*" with increased competences.

[2] Article 2 of Law 30/1992 of 26 November on the Legal Regime of the Public Administrations and of the Common Administrative Procedure.

[3] The sources of law are laid down by the Spanish Civil Code (Article 1.1).

- Regulations: these are adopted by the government (as whole or by specific ministries) and normally are called Decrees and Orders.
- General principles of law and customary law are also sources of law.

Regarding the jurisprudence of the Courts, the interpretation of the law given by the Supreme Court is binding upon the inferior courts and establishes the definitive doctrine regarding a particular issue *erga omnes*. The administration of each CA is headed by a Superior Tribunal of Justice, the interpretation of which is binding upon lower courts. As such and in the absence of definitive doctrine from the Supreme Court, the interpretation may differ from one Tribunal to another. The Constitutional Court is not part of the judicial power since it is considered as a quasi-legislator (sometimes called "*negative legislature*") protecting the Constitution, including the distribution of competences established therein between the Central State and the Autonomous Communities. The decisions of the Constitutional Law can be considered as a source of law (negative- when deciding upon the unconstitutionality of a law; and positive- when interpreting the law and the Constitution).

1.2 FRAMEWORK FOR TRANSPOSITION & IMPLEMENTATION OF DIRECTIVE 2004/38/EC IN SPAIN

1.1 Distribution of competences according to the national Constitution

According to Article 149(1)2º of the Constitution, the State has exclusive competence to regulate nationality, immigration, emigration, aliens and asylum. This means that this matter is reserved to the national parliament or the national government. This also includes the conditions for aliens to enter and reside in Spain. According to Article 13 of the Spanish Constitution, all aliens have the same rights as Spanish citizens although these may be subject to certain conditions by law. The State also holds exclusive competence regarding the conditions according to which aliens may benefit from the same rights as Spanish citizens.

On the basis of this empowerment, immigration law is regulated at central level by Organic Law 4/2000 regulating the rights and freedoms of aliens in Spain and their social integration. The law is developed by a Regulation approved by the Government by Royal Decree 2393/2004. In addition, the specific regime for EU citizens has been established in another Royal Decree (Royal Decree 240/2007). These are the main instruments transposing and implementing Directive 2004/38. The Royal Decrees have the same hierarchical value as the law but they are adopted by the Government in the development of main legislative acts (in this case the Organic Law). Asylum and refugees, ID and passport are also regulated at central level.

The State also has exclusive competence regarding the judiciary, criminal law and procedural law (Article 149(1)5º and 6º, labour law (Article 149(1)7º, borders control and national security (Article 149(1)29º). In addition, the exclusive competence of the State also applies to the regulation of the conditions regarding access to the labour market (*e.g.* work permits) and other social benefits for aliens in Spain. This also implies that much of the basic elements of the immigration law are implemented by agencies, bodies or institutions directly dependant on the central administration (which may reduce the risk of inconsistent application across Spain). Procedural guarantees are also regulated at central level[4].

However, despite this exclusive competence of the State (and thus the national parliament and government), the CA have also an important role to play in the application of the principle of equal treatment due to their competence in sectors such as social assistance, health and safety, housing, and

[4] This includes administrative procedural law. Although the CA have competence to develop this area, it is only in relation to administrative procedure derived from Autonomic legislation or to adapt to the characteristics of an CA. This situation will not apply in immigration procedures but it may be the case in access to social benefits *(e.g.* housing) regulated by the CA.

education. Apart from the competences expressly mentioned in Article 148 of the Constitution, the CA can develop basic legislation elaborated by the State in areas such as social security. Finally, the reforms of the Statutes of Autonomy and the different transfers of competence between the State and the CA have widened the areas on which the CA can regulate and where they can adopt implementing regulations (social security, social assistance, education, health). As a consequence, the CA are key actors in the elaboration and implementation of integration policies.

A final aspect to be mentioned is that some CA have very important legislative powers in the area of civil law derived from privileges assigned in the Middle-Ages. These powers concretely affect the application and efficacy of law, the economic regime of marriages, the regulation of registers, and so on. This is particularly relevant for registered partnerships, since some CA have developed legislation on registered partnerships and *de facto* unions in the absence of national legislation.

Similar to the CA, while municipalities have no direct legislative competence in the area of immigration law, they play a very important role in the application of the principle of equal treatment as well as in the area of civil law *(e.g.* certain municipalities have establish public registers for partnerships).

1.2 General description of organisation of national authorities implementing Directive 2004/38/EC in Spain[5]

The lead ***Government Departments*** in relation to the implementation of Directive 2004/38/EC are the Ministry of Interior (*Ministerio de Interior*), the Ministry of Labour and Social Affairs (*Minsterio de Trabajo y Asuntos Sociales*) and the Ministry of Foreign Affairs (*Ministerio de Exterior*). The Ministry of the Public Administration (*Ministerio de las Administraciones Públicas*) also has competence, especially in relation to implementation of the Directive (see below), although the legislative proposals are published by the Ministry of the President (*Minsterio de la Presidencia*). All these different ministries also carry out activities of public information and dissemination. In particular, the Ministry of Labour and Social Affairs have a specific website on foreigners, which includes brochures and documents in *inter alia* Romanian, Bulgarian, German, English and French. The Ministry of the Public Administration also has a website in Romanian.

These Ministries have important powers regarding the interpretation and implementation of the main acts through which the Directive is transposed. In particular the Ministry of Interior and the Ministry of Labour have issued an Instruction to explain RD 240/2007, which transposes Directive 2004/38. Each one provides support in the areas falling under their scope of activities, namely:

- Ministry of Labour and Social affairs under working conditions, work permits and social assistance;
- Ministry of Interior under documentation and registration of aliens, coordination and control of the national police (and where relevant the Civil Guard) within Spain and at border control; and
- Ministry of Foreign Affairs under instructions regarding visas to be implemented by the consulate and embassies.

Coordination between the different Ministries is ensured through the Inter-ministerial Commission on Aliens (*Comisión Interinstitucional de Extranjería*)[6], which includes representatives of the different ministries and analyses, discusses and provides information on legislative proposals or ministerial proposals that may have an impact on immigration, asylum or aliens. It is also in charge of providing

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5 For a more detailed description of the administrative organisation please see Palomar Olmeda, A., and Descalzo González, A., "La organización administrativa en material de extranjería y asilo" in Palomar Olmeda (coord.), *Tratado de Extranjería, aspectos civiles, penales, administrativos y sociales,* Ed., Thomson Aranzadi, 3rd Edition, 2007, pp.199-230.

6 Royal Decree 1946/2000 of 1 December (BOE n. 289 of 2 December, p.42289 available at: http://www.boe.es/boe/dias/2000/12/02/pdfs/A42289-42291.pdf#

information regarding agreements or actions adopted at EU and international level on these subjects and their impact on and application in Spain.

Coordination with the CA and municipalities is ensured through the Superior Council on Immigration Policy (*Consejo Superior de Política de Immigración*).[7]

Finally three more bodies should be mentioned:

- The Permanent Observatory on Immigration (*Observatorio Permanente de la Inmigración*), which has a more sociological approach and gathers and analyse statistical information;
- The Forum for the Social Integration of Immigrants (*Foro para la Integración Social de los Inmigrantes*), which is a consultative body to promote immigrants integration; and
- The Tripartite Labour Commission for Immigration (*Comisión Laboral Tripartita de Inmigración*), which is also a consultative body focused on access to the labour market and the working conditions of immigrants in Spain.

The day-to-day implementation is decentralised.

Regarding *visas*, these are granted by the different Consulates and embassies of Spain around the world, following the instructions given by the Minister of Foreign Affairs. However, there is an agreement between the Ministry of Foreign Affairs and the Ministry of Interior, published by Resolution of 4 June 1998,[8] which allows the expedition of visas at entry points by the national police.

Regarding *registration certificates and residence card*s, the main implementing bodies are the Aliens Bureaus (*Oficinas de extranjería*). Article 67(2) of Organic Law 4/2000 (the Aliens Act) called for the unification of all different provincial offices dependant on different government bodies dealing with aliens affairs into a single office or bureau which would centralised all services (*e.g.* cards, work permits, certificates and so on) to ensure coordination among the different public administrations involved.

These Aliens Bureaus are established in each province and are dependant on the Delegate or Sub-delegate of the Government in a CA. These Delegations are part of the Ministry of Public Administration, although the Bureaus are functionally dependant on the Ministry of Interior and on the Ministry of Labour and Social Affairs. In the provinces or cities where there is no Aliens Bureau, the Commissariat of Police are competent to receive the documents for registration.

In practice, the Bureaus have a specific section on EU and EEA citizens. The registration certificates are controlled by the National Police (since they are also responsible for IDs for Spanish citizens), who are in charge of providing the forms to be filled in and other necessary documentation. For third-country family members, the section on EU and EEA citizen of the Bureau is in charge of gathering the relevant documentation. All documents are signed by the Government Delegate or sub-delegate.

The Bureaus are also in charge of notifying the person concerned if some information is missing as well as other notifications. In addition, they are responsible for initiating sanction procedures in the case of breaches of the legislation. However, the procedures that may lead to the expulsion of an alien or his/her detention are initiated by the Aliens departments of the national police. The Bureaus will also provide information regarding administrative appeal before the Government Delegate, although in

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[7] Royal Decree 344/2001 of 4 April as modified by Royal Decree 507/2002, of 10 June, BOE n. 83 of 6 April, 12997 (consolidated version at http://extranjeros.mtas.es/es/normativa_jurisprudencia/Nacional/7_RD3442001.pdf).

[8] Resolución de 4 de junio de 1998, por el que se dispone la publicación del acuerdo entre el Ministerio de Asuntos Exteriores y el Ministerio del Interior sobre encomienda de gestión para la expedición de visados de frontera, BOE n. 139, of 11 June 1998 available at http://www.mir.es/SGACAVT/derecho/re/re04061998.html.

the case of refusal of entry the competence regarding administrative appeal is for the Director General of the Police.

Regarding boarders control, the Civil Guard (Guardia Civil) and the National police are the competent authorities and have powers to deny entry of citizens.

Regarding administrative and judicial review, it is possible to appeal against these decisions before the hierarchical superior (i.e. if the resolution is taken by the sub-delegate of the State, appeal can be lodged with the delegate of State). It is also possible to pursue a review procedure with the same authority that issued the decisions. In addition, there is the possibility to request the opinion of the Legal Service of the State or the State Attorney as a guarantee of legality, the competent authority being obliged to modify the resolution accordingly. Finally, there is the possibility to lodge a judicial appeal before the Superior Tribunals of Justice of the CA. Against the ruling of this court it is still possible to go the Supreme Court and, under certain circumstances (*e.g.* for violation of the right to fair trial), to the Constitutional Court. In addition, there are specific judicial procedures for the violation of fundamental rights. However, in most cases the last instance is the Superior Tribunal of the CA, which may creates discrepancies in the application of the law.

2 LEGAL ANALYSIS OF THE TRANSPOSING MEASURES FOR DIRECTIVE 2004/38/EC

Directive 2004/38/EC was transposed into the Spanish legal order by Royal Decree 240/2007 of 16 February 2007[9], which entered into force on 29 March 2007 (almost one year after the deadline established in the Directive). The Spanish authorities consulted with the Forum for Social Integration of Immigrants (*Foro para la Integración Social de los Immigrantes*) as well as with the Permanent Commission of the Labour Tripartite Commission for Immigration (*Comisión Permanente de la Comisión Laboral Tripartita*) and the Inter-ministerial Commission for Aliens Affairs (*Comisión Interministerial Tripartita*). The Council of State generally approved the text submitted by the government in its Opinion of 2 November 2006[10].

The legislation repealed the previous Royal Decree (RD 178/2003), adopting a more favourable regime than the one described in RD 178/2003.[11] One of the most important aspects is that the Spanish legislation, *i.e.* RD 240/2007, establishes an unconditional right of residence for Union citizens. Although the obligation to register exists, Union citizen only have to prove their identity and nationality. No other conditions (being a worker, self-employed persons, economically self-sufficient or student) have to be met. In addition, their family members, regardless of their nationality, only need to prove the family link or the relation of dependency to have a right of residence derived from the Union citizen. As a consequence, the Union citizen does not need to show that he/she has sufficient resources for himself/herself and his/her family members and they cannot become an unreasonable burden to the Spanish social assistance system.

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9 Real Decreto 240/2007, de 16 de febrero, sobre entrada, libre circulación y residencia en España de cuidadnos de los Estados miembros de la Unión Europea y de otros Estados parte en el Acuerdo sobre el Espacio Económico Europeo, BOE n. 51, of 28 February 2007, p.8558 available at: http://www.boe.es/boe/dias/2007/02/28/pdfs/A08558-08566.pdf.

10 Dictamen del Consejo de Estado (expediente 1829/2006) sobre el Project d Real Decreto sobre entrada, libre circulación y residencia en España de ciudadanos de los Estados Miembros de la Unión European y de otros Estados parte en el Acuerdo sobre el Espacio Económico Europeo available at http://www.boe.es/g/es/bases_datos_ce/doc.php?coleccion=ce&id=2006-1829.

11 REAL DECRETO 178/2003, de 14 de febrero, sobre entrada y permanencia en España de nacionales de Estados miembros de la Unión Europea y de otros Estados parte en el Acuerdo sobre el Espacio Económico Europeo, available at http://www.boe.es/boe/dias/2003/02/22/pdfs/A07397-07402.pdf.

This unconditional right of residence for Union citizens is important to understanding the structure and logic of the law, and implies that the only ground on which to restrict freedom of movement are public policy, public security and public health. It also implies that most of the provisions and restrictions for family members (conditions for entry and residence) will only be applicable to third country family members, since family members who are Union citizens themselves have an independent and unconditional right of entry and residence in Spain.

Despite this more favourable treatment, RD 240/2007 has not correctly and completely transposed the Directive. In some cases there are serious mistakes in the understanding of the Directive's requirements. For example, the exemption from the visa requirement for family members holding a residence card from other Member States (Article 5(2) of the Directive) has been understood and transposed by the Spanish authorities as holding a residence card from a *Schengen* State. Another serious problem is the limitation of the personal scope of "other country family members" to the second degree for third country nationals, and the limitation of the right to take up employment for dependants who are third country nationals. Finally, the Spanish legislation excludes from the protection of the Directive family members who retained the right of residence under Article 12 and 13 of Directive. In this case, they retain the right of residence under the Aliens Act (general immigration rules) and therefore the protection against expulsion under Article 27-29 no longer applies to them. In addition, in many cases there is some ambiguity in the way RD 240/2007 has transposed the obligations of the Directive.

On 1 July 2008, the Associations *ACOGE* and *Pro Derechos Humanos de Andalucía* lodged recourse before the Supreme Court to declare the illegality of certain provisions of RD 240/2007 as contrary to EC law and even to Spanish legislation. The recourse is annexed to this conformity study[12]. The recourse includes some of the issues that have been identified during this assessment.

Nonetheless, overall the transposition is satisfactory, with only few serious problems. In carrying out this assessment, Instruction 3/2007 adopted by the Ministry of Labour interpreting the application of the law has been taken into account (provided the obligations were clearly included in the law). The responses by the Spanish authorities to the questionnaire distributed by the Commission have also been taken into account and are referenced, as appropriate.

2.1 Preliminary remarks: relationship with the general Aliens regulatory framework

The transposition of Directive 2004/28/EC takes the form of a Royal Decree which, as shown in section 1, has the legal value of a law but also implies dependency from other more general and hierarchically superior legislative framework. In this case, this more general legislative framework is the Aliens Act, namely Organic Law 4/2000 of 11 January 2000 on rights and freedoms of aliens in Spain and their social integration[13].

Article 1(1) of the LO 4/2000 defines "aliens" as "any person who does not hold Spanish nationality." Thus, Union citizens are considered "aliens" for the Spanish legal order. However, the Aliens regime applicable to Union citizen differs enormously from the legal regime applicable to aliens. Article 1(3) of the Aliens Act states that "nationals of the Member States of the European Union and those to

[12] http://www.intermigra.info/extranjeria/archivos/jurisprudencia/recursoTS240.pdf.

[13] Ley Orgánica 4/2000 de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social, BOE n. 10, of 12 January 2000, p. 1139. The law has been modified many times since its creation partially due to the jurisprudence of the Constitutional Court that has declared the unconstitutionality of several provisions, and thus their nullity, in several rulings. Consolidated version, after the rulings of the Constitutional Court available at http://noticias.juridicas.com/base_datos/Admin/lo4-2000.html. The Ministry of Interior also has consolidated versions and BOE: http://www.boe.es/g/es/bases_datos/doc.php?coleccion=iberlex&id=2000/00544.

whom the Community regime applies shall be subject to the legislation of the European Union, and this law shall only apply in those cases where it may be more favourable."

Thus, the Aliens Act is in principle excluding from its scope Union citizens and their family members, and also the Spanish nationals who exercised their right of free movement, and returned to Spain.

At the same time, RD 240/2007 allows the application of the Aliens Act in several aspects, subject to limits. Firstly, Article 15(5)(a) of RD 240/2007 indicates that the adoption of measures restricting free movement "shall be adopted according to the legislation regulating public order and public security as well as according to secondary legislation developing that regime". The former legislation regulating free movement of Union citizens (RD 178/2003) specifically referred to the Aliens Act. RD 240/2000 has not included such an explicit reference in this area, but it is clear that the reference to legislation on public order and public security is an implicit reference to the Aliens Act, LO 1/92 on citizens' security[14] and the Criminal Code[15], since these are the main acts regulating public order in relation to aliens and Spanish nationals.

However, the omission of the reference to the law is significant since it implies that the principles included in Article 15, which are those enshrined in Articles 27-29 of the Directive, are the real basis for the adoption of any measure based on public order and public security. Furthermore, it implies that the provisions on public order and public security included in those instruments are tempered by the principles in Article 15 of RD 240/2007. Many provisions included in the Aliens Act or in LO 1/92 that could lead to a restriction of free movement of aliens, including expulsion, do not apply to Union citizens and their family members or when they may be applicable, it will not be with the same intensity.

This interpretation is confirmed by the second reference, this time explicit, to the Aliens Act made by RD 240/2007. The Second Additional Provision states that LO 4/2000 will only be applicable on a subsidiary basis in procedural aspects and provided it does not go against EC law. The third reference in the Fourth Final Provision is also explicit, and states that the entry, residence and work of family members is to be regulated by Aliens Act when the conditions laid down in RD 240/2007 are not met. In addition, this provision includes a general reference to the subsidiary application of the Aliens Act provided they are more favourable and do not go against EC law.

Therefore, the application of LO 4/2000 is nuanced by the principles included in RD 240/2007 and is only possible:

1) when it is more favourable to Union citizens and their family members;
2) on a complementary or subsidiary basis (*i.e.,* procedural aspects, public order and public security); and
3) provided that it does not run against EC law.

These conditions limit the margin of discretion of the competent authorities and the courts when applying the legislation to Union citizens and their family members. In addition, the jurisprudence of the Supreme Court, which recurrently refers to the ECJ case law, will also be one of the main interpretative sources in the application of RD 240/2007 and of the Aliens Act and LO 1/92 when applied to Union citizens and their family members.

The fact that the Aliens Act applies when the conditions in RD 240/2007 are not met is relevant since it will prevent, for example, that the right of residence in Spain is automatically lost if the conditions

[14] Ley Orgánica 1/1992, de 21 de febrero, sobre Protección de la Seguridad Ciudadana, BOE n. 46 of 22 February 1992, p. 6209 available at http://www.boe.es/g/es/bases_datos/doc.php?coleccion=iberlex&id=1992/04252

[15] Ley Orgánica 1/95, de 23 de noviembre del Código Penal, BOE, n. 281 of 24 November 1995, pp. 33987 available at http://www.boe.es/g/es/bases_datos/doc.php?coleccion=iberlex&id=1995/25444

in RD 240/2007 are not or no longer met. Refusals to issue a registration certificate or a residence card, or refusal to renew because the conditions are not met or are no longer met are not accompanied with an order to leave the country, since it is possible that the person fulfils the requirements under the Aliens Act. Thus, a new procedure is initiated to examine whether the person concerned has the right of residence by other means under the Aliens Act.

The relationship between these two instruments will be analysed in more detail in the relevant provisions. However, this general framework needs to be kept in mind to understand the assessment of the transposition, as well as the structure and logic of RD 240/2007.

2.2 Definitions, family members and beneficiaries

(a) Definitions: the concept of "family members" (Article 2)

Following the tradition in Spanish legal order of not including definitions when possible, there is no specific provision on definitions in RD 240/2007. Instead there is a delimitation of the personal scope of RD 240/2007. Article 2 RD 240/2007 refers to the application of the RD to the family members of the Union citizen or a State member to the EEA agreement. In doing so, it defines family members within the meaning of Article 2 of the Directive regardless of nationality. The problems detected (regarding spouses, registered partnerships and eventually dependent) will only apply to third country family members since for EU citizens the right of entry and residence is unconditional.

- **"Union citizen"**

This definition has not been transposed as such in RD 240/2007. However, as shown above LO 4/2000 establishing the general regime for aliens clearly indicates that those holding the nationality of a Member States are covered by the Community regime. RD 240/2007 transposes this Community regime and in addition applies to EEA nationals. Finally, Article 17 of the EC Treaty defining the Union citizenship is directly applicable in any case. Nationality is defined by each Member State's legislation[16].

Instruction 3/2007 clarifies that the Royal Decree also applies to citizens from Romania and Bulgaria and that the only specificities for persons coming from these countries refer to free movement of workers according to the Accession Treaty.

- **Spouse**

Article 2(a) includes the spouse of the Union citizen within the scope of the Royal Decree. However it indicates that the status of family member remains provided that the marriage has not been declared void, the spouses are not divorced or legally separated.

The reference to void marriage and divorce does not affect the correctness of the transposition, since in those cases the marital link no longer exists and thus is not possible to talk about a spouse anymore. However, more problematic is the reference to "legal separation", since in these cases the marital link still exists. RD 178/2003 (old regulation) referred to *de facto* separation. However the Supreme Court in its ruling of 10 June 2004[17] declared the provision contrary to law and required that the separation is legal (established by court). This confirms the previous jurisprudence of the Supreme Court (ruling of 4 June 2002)[18], in which the Court specifically referred to the ECJ case law (*Diatta*[19]) to justify its

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[16] C-369/90, *Micheletti* v. *Delegación de Gobierno*, [1992] ECR I-4239, and C-200/02 *Zhu and Chen* v. *Secretary of State for the Home Department* [2004] ECR I-9925.
[17] STS (section 6), of 10 June 2004, case 60/2003.
[18] STS (section 6),of 4 June 2002, case 1827/1998.
[19] Case 267/83 *Diatta* v. *Land Berlin* [1985] ECR 567.

decision. The Supreme Courts interpreted *Diatta* as indicating that residence could only be prevented in case of legal separation and not of a *de facto* separation.

This is a strict interpretation of *Diatta*. The ECJ simply stated that the "marital relationship cannot be regarded as dissolved so long as it has not been terminated by the competent authority. It is not dissolved merely because the spouses live separately, even where they intend to divorce at a later date". Under Spanish legislation, the legal separation is very close to divorce (the spouses will decide about children custody, distribution of property among the spouses, etc.), but the marital link still exits. The provision is intended to fight against marriage of convenience, but under strict legal terms this transposition is not correct. In the case of legal separation, the marital relationship has not been terminated. Furthermore, such strict interpretation may lead to an exclusion of the Community regime at a later stage (not only in case of divorce, death and so on but also in the case of legal separation, as will be analysed when discussing the transposition of Article 12 and 13 of the Directive. For this reason the transposition has been considered incorrect.

Law 13/2005 of 1 July modifying the Civil Code introduced the possibility for persons of the same sex to get married in Spain (Article 44 of the Civil Code), with the same rights and obligations of heterosexual couples (including adoption). The concept of "spouse" under RD 240/2007 therefore also includes same sex spouses.

This is confirmed[20] by Instruction 3/2007[21], which indicates that the concept of "spouse" shall be interpreted as "single spouse" without differentiating between marriage of persons of the same sex or different sex. However, it indicates that the marriage of persons of the same sex is exempted from the application of *lex personalis* when the Member State of origin of one or both spouses has not regulated this right. This is important in terms of the validity of marriages between Spanish citizen and a person from another State and the recognition of marriages in Spain according to international private law. The instruction reminds that at the moment this right is regulated in Belgium, Spain and the Netherlands (and Canada).

The issue of recognition of same sex couples was discussed by Circular-Resolution of 29 July 2005[22] of the Directorate General of Registrars and Notaries (which is legally binding) to promote as much as possible the principle of equality and family protection within the context of recognition of marriages. In this sense, as also indicated by the Instruction, the Spanish legislation will recognise the marriage between persons of the same sex contracted in any country that also allows for this type of marriage, regardless of whether one or both of the spouses come from a country where this right is not recognised. Therefore, the Spanish scope of recognition is extremely broad.

Regarding transsexuals, the Supreme Court (rulings of 7 July 1987 and 15 July 1988)[23] admitted the possibility for transsexuals to have their names changed in Civil Register, thus allowing for marriages. A new Law on modifications of names in the Civil Register will consolidate this jurisprudence.

For more details regarding same sex marriages and transsexuals in Spain, please refer to the study from the European Agency of Fundamental Rights.

[20] In the same sense also the Spanish authorities in the questionnaire.

[21] Instrucciones DGI/SGRJ/03/07 relativas al Real Decreto 240/2007, de 16 de febrero, sobre entrada, libre circulación y residencia en España de ciudadanos de los Estados miembros de la Unión Europea y de otros estados parte en el Acuerdo sobre el Espacio Económico Europeo, http://extranjeros.mtin.es/es/normativa_jurisprudencia/Nacional/Instruccion03-2007.pdf.

[22] Resolución/Circular de la Dirección General de los Registros y del Notariado de 29 de Julio de 2005, BOE n. 188, of 8 August 2005, p. 27817 available at http://www.boe.es/g/es/bases_datos/doc.php?coleccion=indilex&id=2005/13609&txtlen=1000.

[23] SSTS 7 July 1987 and 15 July 1988 (STS 607/1988).

- **Registered partnership**

Spain has included registered partnership as family members despite the fact that the situation of registered partnerships in Spain is extremely complex. There is no comprehensive national law on registered partnerships, despite the fact that many proposals that have been tabled and discussed in the national parliament[24].

Instead, the jurisprudence has extended rights derived from marriage to *de facto* unions (or cohabitation *more uxorio* as the Court prefers to call them) based on the principle of equality and the protection of family. For the recognition of these rights, there is no need to show that the partnership is registered. Instead, a factual analysis is conducted based on *inter alia* the years of cohabitation, *animus convivendi* or exclusivity. In addition, several sectoral acts have extended the rights granted to spouses to cohabitees and partners. Finally, the CA have developed legislation regulating "*de facto* unions" and have created public registers in some cases.

Regarding the jurisprudence, the ruling of the Constitutional Court 222/1992[25] is the leading case which allowed for the extensions of the marital rights to *de facto* unions. It considered that "although marital unions are not equivalent to de facto unions, it is against the Constitution to exclude the possibility for a person who has lived in a durable relationship from subrogation in the lease contract when the partner dies." The basis for this ruling and for the extension of rights is that the Constitution protects the family irrespective whether this family has been created within a marriage or as part of an "affective and durable union". The Constitutional Court also indicated that the legislature could not discriminate between married persons and those living in *de facto* unions, since this would breach Article 14 of the Constitution (equal treatment), although some exceptions are possible[26]. This jurisprudence is still the basis for the recognition of rights to couples outside marriage. The Supreme Court defined *de facto* unions as "cohabitation in which a regime of diary and stable coexistence with temporal durability is consolidated through the years, is practiced externally and publicly, creating common interests and objectives in the family core".[27]

Despite this liberal approach, one essential element is still not recognised: there is no right (neither legal nor derived from jurisprudence) for the surviving partner to benefit from a widower pension.

Regarding sectoral legislation, examples of acts that treat *de facto* unions as equivalent to marriage are Social Security Law, Law of Urban lease, the Criminal Code, the *Habeas Corpus* Law, the Law providing compensation to victims of terrorism[28]. In addition, certain collective agreements have recognised partners' rights as equivalent to those of a married couple, such as maternity/ paternity leave.

Regarding the CA, legislation, only four CA (La Rioja, Murcia, Castilla la Mancha and Castilla y León) have not regulated *de facto* unions. However, "the governments that approved these laws in the [other 13] CA are from different political parties and have different levels of autonomy so that not only the philosophy inspiring each act is different, but also the rights recognised therein",[29] also the

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[24] The Council of State in different occasion has indicated the distortions due to the fragmented approach to de facto unions and the lack of harmonised national legislation. See for example comments to the draft RD 240/20007.

[25] STC 222/1992 of 11 December 1992, BOE n.16.

[26] Three criteria are needed: the discrimination must be an adequate mean to attain the aim desired; the aim must be legitimate; and proportionality between the mean and the aim. Due to a former case, ruling 184/1990, in which the Constitutional Court admitted the possibility of discriminatory treatment between marital unions and *de facto* unions, contrary to ruling 222/1992, some other rulings were needed to consolidate a common line in the ordinary courts.

[27] STS (Section 1) 18 May 1992, in case 1255/90.

[28] For a more detailed analysis of the evolution of the regulation of de facto unions in Spain see Pérez Villalobos, *Las Leyes Autonómicas reguladoras de las parejas de hecho* (Thomson Citivas, Pamplona 2008).

[29] Cfr supra note 27, Pérez Villalobos, p. 173.

requirements to be able to create a *de facto* union are different from one CA to another. Some CA, such as Aragón, Catalonia and Navarra, have powers to regulate civil law, which implies that more rights (related to family law, such as succession, economic organisation of the union, etc.) can be regulated by those acts. In some of the laws, the recognition of a union is based on a durability criterion (they have lived together for a certain period of time, *e.g.* two years in Catalonia, one year in Navarra) or on a formal criterion (they have registered their partnership or they have made a public contract). Having common children is also an element in recognising the existence of a *de facto* union. The most advanced legislation is the Foral Law 6/2000 of 3 July for the legal equality of stable couples, from Navarra.

The following CA have established a public register as the basis of the recognition of a durable relationship: Catalonia (only for homosexual unions, for heterosexual unions is a durability criterion), Aragon, Valencia, Madrid, Balearic Islands, Asturias (but other limited means of proof are possible), Andalusia (but any other means of proof are possible), País Vasco, Canary Islands, Galicia and Cantabria.

To complicate things a bit more, the CA that have not enacted legislation on *de facto* unions have nevertheless created local administrative registers. This is the case of Castilla y León and Murcia.

In conclusion, there is no unified legislation on *de facto* unions in Spain or unified register of registered partnerships. The rights and conditions that need to be met to be considered a *de facto* union or registered partnership differ from CA to CA. Not in all CA is there a public register for unions.

Maybe due to this complexity, Spain has opted for treating "registered partnerships" as family members (Article 2(b) RD 240/2007)) with conditions. The Spanish legislation has laid down a series of conditions that need to be met for a registered partnership concluded in other Member States to be considered as equivalent to marriage in Spain, including:

- the register must be public preventing two simultaneous register in the same Member State;
- the registration must not be cancelled (which needs to be proven); and
- marriage and registration are considered incompatible.

These conditions seem reasonable since the intention of the Spanish legislature seems to be to prevent fraud in line with Article 35 of the Directive. The effect is that Spain is determining whether the partnership is a valid registered partnership for the purposes of the application of the legislation. Since there is no national law in Spain, these conditions are a way of regulating the recognition of registered partnerships from other Member States.

The Instruction 3/2007 also indicates that the registers established in the CA are not valid as long as they do not comply with the requirements laid down in Article 2(b) of RD 240/2007. Although the validity of registers has not been determined, this clarification would place *prima facie* Spanish-third country national couples or Union citizens who have established their residence in Spain and have registered their partnership in the CA in which they are residing in is a less favourable position than Union citizens moving into Spain and having registered their partnership in another Member State, (at least when contracted with a third country national). It is not evident how this provision will be applied in practice. Some clarifications, especially regarding which registers in the CA would not pass the RD 240/2007 conditions[30], would be needed. Already certain associations of migrants have criticised this different treatment and it is one of the contested provisions before the Supreme Court.

Similarly, the Instruction indicates that registered partnerships in a Member State that only partially treats registered partnerships as equivalent to marriage, but without establishing a public registered allowing for the correct verification of this partnership, are not considered valid. In this sense, since it

[30] The Register of Basque Country is considered in line with RD 240/2007 (see information from Intermigra at http://www.intermigra.info/extranjeria/modules.php?name=News&file=article&sid=1097).

may be rather difficult for the administrative authority issuing the registration certificate or residence card to determine which Member States complies with these requirements, the instruction has listed the Member States meeting these conditions, including: the Netherlands, France, UK, Germany, Czech Republic, Denmark, Slovenia, Finland, Luxembourg and Sweden (see below on Article 8 of the Directive for means of proof). As it can be inferred from the list of countries included, the real criterion is not so much that the Member State treats registered partnerships as equivalent to marriage, but rather the existence of an accessible public register. The instruction indicates that this is without prejudice to other Member States adopting similar registered partnerships. Therefore, registered partnerships in those countries will be automatically recognised but the *de facto* union in Portugal are not considered "registered partnerships" for the purpose of the law and thus will be treated as "other family members" (see below Article 3(2)(b)).

Despite all these elements which are in line with the Directive, the Spanish legislation may be less favourable than the current regime established by jurisprudence[31]. It is a paradox that Spain, where the point of reference to grant rights is whether the union constitutes a family and stable relationship, has not adopted a more favourable and flexible approach regarding *de facto* unions. It will be important to see how the provision will be applied in practice. So far, many of the cases relate to third country nationals who have contracted a registered partnership with a sedentary Spanish national in Spain. The Supreme Court has recognised the right to obtain the authorisation for exceptional circumstances under the old regime, which is the same applicable to other family members under Article 3(2(b)) of the Directive.

Although the transposition may be considered correct given the flexibility allowed by the Directive, overall the implementation has been considered ambiguous due to the less favourable treatment for couples who registered their partnership in Spain. In addition, during a visit to an Aliens Bureau issuing the residence card of family members of Union citizens, the civil servant informed the expert that they did not accept registered partnerships despite the clear instructions from the Minister of Labour. These types of non-harmonious application of the law are worthy of further investigation.

- **Descendants and ascendants: the concept of dependency**

The transposition carried out by Article 2(c) and (d) is almost literal. The same remark applies regarding legal separation as made in Article 2(a) on "spouse". The concept also includes adopted descendants[32].

Regarding the concept of "dependent", the Instruction quoted paragraph 22 of the *Lebon*[33] ruling indicating that the status of "dependent" family member is the result of a factual situation, namely the provision of support by the Union citizen without there being any need to determine the reasons for recourse to the Union citizen support or to raise the question whether the person concerned is able to support himself. Therefore, the RD is quoting paragraph 22 of the *Lebon* ruling. The fact that a citizen of the Union supports a relative is decisive in determining whether he/she is dependent. The transposition is therefore correct.

According to *Lebon* and *Jia*[34], dependency is a concept linked to material support. In *Jia*, the ECJ indicates that "the need for material support must exist in the State of origin of those relatives or the State whence they came at the time when they apply to join the Community national." However, the RD excludes from the Community regime dependants family members admitted in Spain under that condition but who took up employment once inside the country, subjecting them to the Aliens Act.

[31] STS (section 6) of 15 December 1998, case 4299/1994.

[32] In the case of adopted children, the resolution on the basis of which the adoption took place has to be certified and has to meet the conditions to deploy effects in Spain. Losada González, "Estatuto legal de los extranjeros en España", p.194 in Palomar Olmeda Coord. *Tratado de Extranjería, Aspectos civiles, penales, administrativos y sociales*, Ed. Thomson Aranzadi, 2007.

[33] C-316/85, *Lebon* [1987] 281.

[34] C-1/05 *Jia* v. *Migrationsverket*, 9 January 2007.

The reason behind this measure is that they will no longer be considered as "dependant" family members and therefore will no longer meet the conditions of RD 240/2007. This issue, which is considered against the Directive, will be discussed more in detail under Article 24 of the Directive.

Finally, the Spanish act refers to "descendants who are "incapable", in Spanish "*incapaz*", which broadens the scope of the Directive. The use of this term "*incapaz*" instead of "*incapacitado*" is significant since in these cases it will be enough to show that the person falls within one of the causes of incapacity without being necessary for the incapacity to be legally recognised[35].

- **Host Member State**

Article 2(3) has not been specifically transposed. However, the provision defining the object of the law (Article 1)[36] clearly establishes that it applies "in Spain" which covers the whole national territory, including Ceuta and Melilla, and the Canary Islands.

(b) Beneficiaries and facilitation of entry and residence (Article 3)

Article 3 deals with the beneficiaries of the Directive and also imposes an obligation on the Member States to facilitate entry for a secondary class of beneficiaries (essentially, members of the extended family).

- **Article 3(1): Union citizens and their family members**

There is no specific provision to transpose Article 3(1) of the Directive. The most relevant provisions are Article 1 (establishing the object of the RD), and Article 2 as well as the specific provisions dealing with the specific rights of entry, exit and residence.

> *Article 1(1) Object*
>
> This royal decree regulates the conditions governing the exercise of the rights of entry and exit, free movement, stay, residence, permanent residence and work in Spain **of Union citizens and citizens of the remaining States members to the EU or EEA,** as well as the limitation to these rights on grounds of public order, public security or public health.
>
> *Article 2 Application to the family Members of an Union citizens or of a State Member of the EEA*
>
> The present royal decree shall also apply, regardless of their nationality, and according to the conditions established herein to **family members of an Union citizen or of State member of the EEA accompanying or joining the Union citizen or the EEA citizen** (…)

Instruction 3/2007 further clarifies:

> 1- Articles 1 and 2 of Royal Decree 240/2007 established the applicability to: (...)
>
> - citizens of the other 26 Member States, including citizens of Bulgaria and Romania which joined the Union on 1 January 2007, who shall only have the specificities derived from the transitional period for free movement of workers according to the Act of establishing the conditions for adhesion of these countries and the Agreement of the Council of Ministers of 22 December 2006, to whom section 4 of these instructions applies.
>
> - family members of the citizens of the 26 Member States of the Union, when they accompany or join the Union citizen in Spain and have the family links listed in Article 2 of RD 240/2007.

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[35] Carrascosa González, Durán Ayago and Carrillo Carrillo, *Curso de Nacionalidad y Extrajería*, Collection El Derecho de la Globalización, n. 11, Ed. COLEX, 2007, p. 251.

[36] This royal decree regulates the conditions governing the exercise of the rights of entry and exit, free movement, stay, residence, permanent residence and work **in Spain** of Union citizens and citizens of the remaining States members to the EEA, as well as the limitation to these rights on grounds of public order, public security or public health. [emphasis added].

Spanish legislation applies to Union citizens, citizens of EEA countries and their family members and Swiss nationals and their family members[37]. The transposition is considered incorrect for third country family members of Spanish nationals, since although covered by RD 240/2007, they are treated less favourably than family members of Union citizens.

- Application to family members of a Spanish citizen

Despite the fact that the Spanish act says "remaining States" and thus would exclude Spanish citizens who have exercised their rights of free movement, the recitals of the RD clearly indicate that only wholly national situations are not covered by the legislation. The previous legislation (RD 178/2003) expressly included family members of a Spanish citizen, even if they had not exercised the right of free movement.[38] The recitals indicate that "to regulate family reunification of Spanish citizens who have not exercised the right of free movement, a third final provision is included which adds two new additional provisions, 19th and 20th to LO 4/2000. These provisions protect the spouse and partners of a Spanish citizen, descendants of less than 21 years old, and descendants above that age who are dependants or incapable".

This Additional Provision to the Aliens Act allows the application of RD 240/2007 to family members of a Spanish citizen, even when the Spanish citizen has not exercised his/her right of free movement. However, it is not clear whether Spanish citizens who have exercised the right of free movement would be covered by RD 240/2007 at full or by this more specific regime. It would seem that the regime introduced by 20th Additional Provision applies regardless whether the Spanish citizen has exercised the right of free movement or not, since the provision does not exclude from its scope of application returning Spanish nationals. This would make the Spanish legislation not in conformity with the Directive when applied to third country family members of a Spanish citizen who exercised the right of free movement, because the regime is more onerous than for Union citizens. For example, the recognition of marriage would be more burdensome (it has to be registered in the Spanish Civil Register, in order to prove legality and produce effects in Spain- which obviously is not required for Union citizens), and to be considered a registered partner would be more difficult, as shown above.

In addition, the personal scope of the concept "family members" is reduced for ascendants. In this case, RD 240/2007 only applies when the ascendant was, at the time of entry into force of the RD, holder of a valid or renewable residence card as a family member of a Community citizen issued under RD 178/2003 (the old legislation on entry and residence of Union citizens). Furthermore, this only applies for the ascendants of the Spanish citizen or of those of his/her spouse (not the partner's). For other direct ascendants, the Aliens Act applies[39]. Other family members and facilitation of entry and residence is not mentioned, although it should be covered by the 19th Additional Provision.

Instruction 03/2007 does not clarify this issue and includes specific details regarding Spanish citizens as well as third country nationals residing in Spain to benefit from RD 240/2007.

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[37] The application of the RD to Swiss citizens and their family members is established in Third Additional Provision.

[38] Article 2 RD 178/2003, SAN, 6th Section, of 19 May 2006, STSJ Canary Islands n. 133/2006, section 2, of 28 April, cited in Curso de Nacionalidad y Extrajería, cfr supra note 35, p. 163.

[39] This different treatment was introduced by RD 240/2007. RD 178/2003 treated family members of Spanish nationals (regardless on whether the person had exercised the right of free movement or not) as family member of Union citizens. This equal treatment was considered needed by the Council of State and the Supreme Court in its ruling of 10 June 2004 (Case 60/2003). The different treatment included by RD 240/2007 was criticised by the Council of State in its Opinion on the draft RD and has recently been criticised by the Spanish Ombudsman in his Opinion of 28 November 2007. The Spanish authorities have indicated that they considered the provision in line with EC law and will not amend the text. In their answer to the Ombudsman's opinion they only focused on sedentary Spanish nationals and did not address the issue of Spanish nationals who exercised the right of free movement. Therefore the ambiguity persists. See http://www.intermigra.info/extranjeria/archivos/impresos/estranxeria.pdf

If the 20th Additional Provision applies not only to wholly internal situations but also to Spanish citizens who exercised their rights of free movement, RD 240/2007 would not be in compliance with the Directive when applied to third country family members. A clarification in the text of the RD 240/2007 seems needed to ensure that Spanish citizens who exercised the right of free movement and their family members are subject at full to RD 240/2007 and not covered by 20th Additional Provision.

- Approach regarding the requirements of "accompanying or joining the Union citizen"

As seen above, the legislation refers to family members who accompany or join the Union citizen. The instruction refers to "join the Union citizen in Spain", which could lead to the interpretation that the Spanish legislation does not cover the case of a third country national residing in Spain and becoming a family member of the Union citizen while residing in Spain. However, the exclusion clause included in the Aliens Act (Article 1(3)) implies that as soon as a person becomes a family member the legislation applicable is RD 240/2007.

a. No need for lawful residence in another Member State

It is clear that RD 240/2007 does not require lawful residence in another Member State. RD 240/2007 only speaks of accompanying or joining the Union citizen regardless of whether they are arriving from another Member State or a third country.

However, RD 240/2007 suggests that the third country family member has to have entered the country in compliance with the entry requirements (Article 6(2) of RD 240/2007). This would imply that the third country family member has to hold an entry visa. However this is only required for residence for up to three months and not for residence for more than three months.

The visa is not required for issuing the residence card of family member, therefore in practical terms, the fact that the person entered the country unlawfully will not have any practical consequences. If the person is intercepted while crossing the borders (*i.e.,* from outside Schengen), the return or devolution of the alien (under Article 58(2) and 60 of Aliens Act) does not apply, since according to RD 240/2007 if the person does not hold the necessary travel documents, the authorities have to give every reasonable opportunity to obtain them before turning the person back (Article 4(4) RD 240/2007). Once in Spain, the presence in the territory without residence card while meeting the conditions will only lead to an administrative fine for not requesting a residence card, and cannot lead to a refusal of the card or an expulsion (Article 15(7) RD 240/2007)[40].

This interpretation would be in line with the ECJ jurisprudence in *MRAX, Jia and Metock*. In *MRAX*, the ECJ ruled that the State could not "refuse issue of a residence permit and issue an expulsion order against a third country national who is able to furnish proof of his identity and of his marriage to a national of a Member State on the sole ground that he has entered the territory of the Member State concerned unlawful". If the family member in question was residing unlawfully in a Member State or was seeking to evade national immigration legislation illicitly, in that case, the ECJ has stated in *Metock* that "the Member State remains entitled to impose other penalties on him which do not interfere with freedom of movement and residence, such as a fine, provided they are proportionate."

[40] In the same line see Goizueta Vértiz, "El Derecho de extranjería: una interpretación en clave dogmatico constitucional", and "Los Dirferentes regímenes jurídicos del derecho a la libre circulación y residencia en territorio español: especial referencia a extranjeros y ciudadanos comunitarios", within the framework of the project *La protección de los derechos fundamentals en el espacio de libertad, seguridad y justicia en la Unión Europe* (EHU 06/43).

b. Third country national residing in Spain and becoming family member

The same applies for third country nationals residing unlawfully in Spain and then become a Union citizen. Since the Aliens Act excludes family members from its scope of application, from the moment a person becomes a family member they are then protected by RD 240/2007. Most of the cases discussed in Spain have involved a third country national staying in Spain irregularly and then marrying a Spanish national or becoming the mother of a Spanish national. In the first case, the administration granted the right to stay with a family member residence card, and in the second cases, the administration and the courts granted an authorisation to stay under exceptional circumstances (which is a kind of regularisation process). An expulsion measure cannot be taken as a substitute for a fine. The main argument has been the protection of family life. It is a constitutional value included in Article 39 of the Spanish Constitution and the Supreme Court that has in many cases supported the entry and residence of family members.

Therefore, the fact that the family member was unlawfully residing in Spain will not be a cause for refusing the residence card. Under the new legislation, third country family members of a Union citizen should receive a family member residence card regardless of whether or not they were lawfully resident[41]. In the case of third country ascendants[42] who are not dependant of Union citizens (case of father of parent of a Union child), most probably the person will receive an authorisation for exceptional circumstances as another family member under Article 3(2) of the Directive (see discussions below). In the case of ascendants of a Spanish national, it is clear that the situation will be an authorisation for exceptional circumstances due to the strict wording of 20th Additional Provision already discussed.

- **Other family members and facilitation**

According to Article 3(2) of the Directive, Member States are obliged to facilitate the entry and residence of other family members (members of the household, dependants, persons who for health reasons need the Union citizen's care, and the partner in a durable relationship).

RD 240/2007 transposes Article 3(2) in Third Additional Provision which introduces a 19th Additional Provision of the Aliens Act. As a consequence, other family members will be subject to the Aliens general regime, although nuanced:

> Facilitation of the right of entry and residence to family members of a Union citizen or a State member to the EEA not included in the scope of application of RD 240/2007 of 16 February on entry, free movement and residence in Spain of Union citizens and citizens of other States members to the EEA.
>
> **The competent authorities shall facilitate** according to LO 4/2000 of 11 January on rights and liberties of foreigners in Spain and social integration and in the present Regulation, that those accompanying or joining a Union citizen or a citizen of State member to the EEA not falling under Article 2 RD 240/2007 **obtain a residence visa** or, when applicable, a **residence authorisation for exceptional circumstances** provided they fall under any of the following circumstances:
>
> (a) any other family members up to second degree in direct or collateral line, consanguineous or by affinity who, in the country from which they have come are dependants or members of the household of the Union citizen or citizen of a State member to the EEA or where serious health grounds or handicaps strictly require the personal care of the family member by the Union citizen or the citizen of a State member to the EEA.

[41] STS (sec 6) 31-10-2000, exemption of the visa for being, at the time of application, married to a Spanish citizen and thus suspended the expulsion decision. Also STS (sec 6) of 20-11-2003 which considered as against the law the refusal of an entry visa and a residence card of family member of a Community citizen because the person was married to a Union citizen but did not meet the at the time condition of 3 years of duration and therefore was unlawfully residing in Spain. This condition was considered illegal and against the Constitutional principle of family protection and the Civil Code which imposes that the spouses live together.

[42] If Union citizens, then unconditional right of residence.

> b) the partner with whom a Union citizen has a durable relationship duly attested provided the partner is not a Union citizen or citizen or a State member to the EEA
>
> The competent authorities shall undertake an extensive examination of the personal circumstances in the requirements for entry, visa or residence permits submitted and shall justify any denial of entry, visa or residence permit of these people.

As a general remark, this provision only applies to third country family members, since family members who are themselves Union citizens have an unconditional right of entry and residence just for being Union citizens. The transposition has been considered incorrect as it limits unnecessarily the scope of other family members, and incomplete, since it does not seem to cover the right of entry.

- Personal scope

Although the RD 240/2007 transposes the three conditions (dependency, household, serious health reasons), the RD limits ***the personal scope of other family members*** under Article 3(2(a)) to the 2nd degree in direct or collateral line, including blood and affinity family members. The Directive does not establish this limitation and therefore the Spanish legislation should be considered not in conformity with the Directive.

The limitation will have significant impact when applied to collateral lines (and for non-dependants ascendants/descendants in direct line). The Directive is trying to favour free movement and therefore the concepts included in the Directive should be interpreted broadly to eliminate obstacles to free movement, and any restriction or exceptions should be interpreted restrictively. The RD establishes an unnecessary and disproportionate restriction which has not been established by the Directive. In fact by limiting to the second degree, the facilitating mechanism would only apply to:

- direct line, ascending to grandparents including blood and affinity relatives, and descending to grandchildren including blood and affinity relatives –provided they are not covered by Article 2; and
- collateral line, only siblings (including both blood and affinity relatives).

Given the life expectancy rates, it is not unusual that there are great-grandparents and great-grandchildren. These would probably fall under the concept of "family member" because they will be either direct descendants or dependents under Article 2. More complicated is the situation of collateral relatives. Here, it would only cover siblings and siblings in law. The legislation thus excludes uncles, aunts, nephews, nieces and cousins. It might not be unusual to be in charge of the nephew or niece (*e.g.* following death of both his/her parents). For these reasons, the Spanish legislation is not considered to be in conformity with the Directive.

These problems might be solved by the Supreme Court in application of the principles of protection of family life which often refers to the "social and moral meaning of family reunification" to recognise the right of residence for exceptional circumstances [43].

In relation to **ascendants** with a dependant Union child, the courts have always recognised the right of residence for exceptional circumstances (even before the *Chen* ruling) as part of the Constitutional obligation to protect family life, regardless whether the ascendant concerned was unlawfully residing in Spain.

This has even been recalled by the Spanish Ombudsman (*Defensor del Pueblo*). In a decision of 10/09/2007, the Ombudsman recommended the issuance of instructions to all Governmental delegations to allow the application for residence for exceptional circumstances to progenitors who are third country nationals, in irregular situation and parents of a Spanish child. The STS of 14 June 1997 (Section 6), STS 1 December 2003 (Section 6) and STS 26 January 2005 (Section 5) referred to in the

[43] See for all STS 28 December 1998, case 5533/1994.

Ombudsman's decision, indicate that the existence of a Spanish national who is a minor and whose parents are third country nationals irregularly residing in Spain is an exceptional circumstance and thus requires that the law protects the minor and allow the parents to reside in Spain. In this case, the mother/father did not receive a residence card as family member since the situation of dependency was reversed (a situation very similar to *Chen*). These rulings were before the entry into force of the new RD 240/2007.

Regarding **durable relationships** (Article 3(2(b)), RD 240/2007 transposes almost literally the provision. There are no guidelines to determine durability or means of proof, despite what the Spanish authorities answered in the questionnaire. Instruction 3/2007 does not mention durable relationship or other family members in general. It will therefore be at the discretion of the authority issuing the residence card.

The Spanish authorities have indicated in the questionnaire that the means of proof are those allowed by the relevant Member State which gives partial effects to partnerships that are equivalent to those granted to marriage, but which do not have a public register. This interpretation will reduce the scope of application of Article 3(2(b)) to a certain type of *de facto* unions, excluding cohabitation *more uxorio* when the Member State from which they have come does not regulate cohabitation at all and does not grant them any effects (*e.g.* Malta and Poland). This exclusion will be against the jurisprudence of the Supreme Court[44] and of Superior Tribunals of Justice[45.] It would also exclude those persons that have a durable relationship but did not live together (where not part of the same household), which also seem to be covered by Article 3(2(b)) where the obligation of cohabitation is not imposed.

This interpretation seems not to be in conformity with the Directive and it will be important to see how this provision is applied in practice. Different interpretation may take place when the persons reside in one of the CA with a more flexible approach to *de facto* union, especially regarding durability and means of proof. This possibility is without prejudice to the fact that the competent authorities are the Government Delegations and not the Autonomous administration.

Although no cases have been identified on the application of this new provision for "other family members" under RD 240/2007[46,] the jurisprudence of the Constitutional Court and the Supreme Court regarding family protection, which refers to the jurisprudence of the European Court of Human Rights and to the ECJ jurisprudence, such as *Carptenter* or *Chen* rulings, will be decisive. The Courts tend to adopt a broad and flexible jurisprudence *favor viatoris*, in family reunification cases, especially given the judicial development of *de facto* unions and the Constitutional obligation of protecting the family.

- Facilitation

Regarding facilitation, the general regime for foreigners applies in this case but with nuances. In fact, the authorities are required to facilitate residence applications by family members for the *residence visa* as well as the *residence authorisation for exceptional circumstances*. However, how this facilitation will take place is clear neither from the law nor from the Instruction.

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[44] The Supreme Court which has considered *de facto* unions as equivalent for family reunification purposes (SSTS 6 May 2000, 15 December 1998, and 28 December 1998) provided the reasons for reunification is cohabitation (STS 9 March 2000).

[45] See STSJ Pais Vasco 184/106 (Contencioso-Administrativo), of 10 March 2006, case 607/2000, regarding a Romanian citizen living *more uxorio* with a Spanish national. The Court gave direct effect to Article 2(2) and 3(2) and on the basis of the Directive and the old legislation recognised the right of residence.

[46] Cases has been found regarding the regime under RD 178/2003, *e.g.* STSJ Pais Vasco 184/106 (Contencioso-Administrativo), of 10 March 2006, case 607/2000, regarding a Romanian citizen living *more uxorio* with a Spanish national. The Court gave direct effect to Article 2(2) and 3(2) and on the basis of the Directive and the old legislation recognised the right of residence.

Firstly, the RD speaks of facilitation of the residence visa, which is normally intended for residence for more than 3 months. The residence visa is regulated in Article 25bis of LO 4/2000 and allows for authorisation of residence for persons without exercising an economic activity. There are three types of residence visa, one of which is the visa for family reunification. Probably RD 240/2000 refers to this visa. The conditions to be granted this visa under Article 18 of LO 4/2000 are that the family has adequate housing and sufficient resources to cover the needs to the family members. The person requesting the reunification has to be a legal resident in Spain and the competent authority must issue a favourable report. These requirements are similar to those of Directive 2003/86.

It is not clear whether the Union citizen will have to prove the family link and sufficient resources or other requirements. Regarding sufficient resources, this would seem to be in line with Directive 2004/38 and thus, could be considered enough facilitation. The Aliens Regulation[47] lists the documents that need to be submitted:

- Copy of the documents certifying the family link, and when needed, certifying the legal or economic dependency, this would cover not only economic dependency but also persons who are under the legal protection of the Union citizen (*e.g.* health reasons)
- Copy of passport or travel document or the registration [of the Union citizen in this case]
- Copy of the residence card, which in this case could only be a copy of the registration certificate
- Proof certifying that the person is a worker and/or has sufficient resources and adequate health insurance. The Ministry of Interior has to determine the amount to be considered as sufficient resources and how to certify that the person has sufficient resources. If during the previous year the person has been sending resources to the persons to be reunified in a sum considered that it can be deduced the economic dependency, the dependency is presumed. There is no guideline regarding sufficient resources and it is left to the discretion of the competent authority.
- Proof of adequate housing

The Spanish system is unconditional for Union citizens and their core family members. Under RD 240/2007 the Union citizen does not have to be a worker or have enough resources to enable family reunification. The residence visa for reunification is included under Article 17 of LO 4/2000 for the reunification of the core family members of third country nationals residing in Spain (spouse, descendants and ascendants). This implies that "other family members" are considered as equivalent to core family members under the general aliens regime, which seems specific enough to ensure the facilitation foreseen in Directive 2004/38. Furthermore, the requirements for obtaining a residence visa for reunification described above do not seem to be against the Directive, especially if compared with the requirements under Article 7 of Directive 2004/38. In addition, the legislation imposes the obligation to "facilitate". If the conditions described in Article 18 of LO 4/2000 are met, probably the authority will not have much margin of discretion.

However, the legislation does not refer to facilitation of entry visa, which may render the transposition incomplete since the conditions for short terms visits (up to 3 months) are not the same as those for residence for more than three months.

Notice that in responding to the questionnaire the Spanish authorities indicated that no residence visa will be required, but rather the visa for short-term stay (there are no purely entry visas in Spain but visas allowing for residence up to 90 days in line with Schengen). However, the Spanish authorities

[47] Real Decreto 2393/2004, de 30 de diciembre, por el que se aprueba el Reglamento de la Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social, BOE n. 6 of 7 January 2005, p. 485 available at: http://www.boe.es/g/es/bases_datos/doc.php?coleccion=iberlex&id=2005/00323.

are referring to core family members (those in Article 2 of RD 240/2007) and not those included in Article 3(2) of the Directive. In addition, 19th Additional Provision clearly states residence visa ("*visado de residencia*") and not to short-stay visa ("*visado de estancia*"), which would have implied facilitation of entry. Whether this is a typo error or whether the right to facilitate will also cover the facilitation of entry needs to be clarified. In any case, the transposition has been considered incomplete on facilitation of entry.

The other possibility regulated by the 19th Additional Provision is the *authorisation for residence for exceptional circumstances*. The authorisation for residence for exceptional circumstances is regulated in Article 31(3) of LO 4/2000 and in Article 45-48 of the Aliens Regulation. This authorisation is mostly granted to people already working in Spain for two years, those living in Spain for three years, as well as to persons needing international protection or for humanitarians reasons (*e.g.* persons who had been victims of crimes of racism or xenophobia, persons needing health treatment in Spain, persons whose life of that or his/her family members is in danger in the country of origin).

It is also used to grant the residence authorisation to persons who are third country nationals unlawfully residing in Spain (*e.g.* they entered the country illegally without a visa) but due to exceptional circumstances (mostly those linked to the protection of the family life, such as being parents of a Spanish citizen), the person has a right of residence. In this case, it is a type of exceptional regularisation. Therefore, this type of authorisation is a specific one and somehow preferential. The documents requested are:

- Passport or travel document, recognised as valid in Spain with a minimum validity of 4 months.
- When required, a employment contract signed by the employee and the employer with a minimum duration of 1 year, the effects of which shall be conditioned to the entry into force of the authorisation for residence and working.
- Documents attesting that the person is in one of the situations referred to in the previous Article.

The most important aspect analysed is the personal circumstances to determine whether the person qualifies to be considered under exceptional circumstances. The competent body shall require the applicant to bring the above mentioned documents and other necessary documents to justify the grounds for the request and shall explain to the applicant that if they are not supplied within a timeframe not longer than one month, the application shall be considered null and void and the procedure shall be filed (Article 46(4) Aliens Regulation).

Similarly, the competent body may request the presence of the applicant for a personal interview. When the interview is carried out, at least two representatives of the administration shall be present, together with an interpreter, if needed, and minutes of the interview will then be signed by all persons present. A copy is given to the person concerned. If the representatives of the administration are convinced that there are sufficient indications to doubt the identity of the persons, the validity of the documents submitted or the veracity of other circumstances on which the application was based, the refusal of the application is recommended and the copy of this act and the minutes are sent to the competent authority. If there were doubts regarding the criteria to follow, the competent authority has to consult the Directorate General of Immigration.

This authorisation will most probably apply when the family member was unlawfully residing in Spain or when the Union citizens does not satisfy the conditions laid down in Article 18 LO 4/2000 (*e.g.* they have not been residents for already one year). Otherwise, it seems that the person concerned will obtain a residence visa, although it is not clear which competent authority will grant this authorisation.

The procedure includes certain documents that in principle should not be requested (see comments to Article 10 of the Directive), in particular regarding the personal circumstances of the person. The Instructions do not include any guidance on the competent authorities (although most probably it will

be the same authority as that which grants residence authorisation for family members of a Union citizen) or how the criteria included in the law shall be interpreted to grant this facilitation.

- Examination of personal circumstances

The last subparagraph of Article 3(2) requiring the examination of the personal circumstances and justification of refusal has been transposed by 19th Additional Provision almost literally. According to this "the competent authorities shall undertake an extensive examination of the personal circumstances in the requirements for entry, visa or residence permits submitted and shall justify any denial of entry, visa or residence permit of these people". This is the only explicit reference to entry in the provision of facilitation of entry and residence of other family members. The transposition of this subparagraph is correct.

The Supreme Courts has given much important to the examination of the personal circumstances becoming the main element to in the decision. Economic considerations (such as having sufficient resources) are secondary. These considerations have been developed under the general Aliens regime. This protective and progressive jurisprudence is based on considerations of human dignity and protection of family life. However the increase of migrant flows into Spain may have an impact on the application of this jurisprudence:

> "Family reunification has a social meaning, so that a refusal cannot be based on the fact that the person residing legally in Spain [the primary holder of the right of residence] lives in a precarious economic situation, since the reunification has to be assessed on the basis of the dimension of the family link with the applicant, which implies taken into account the authenticity of the requested reunification, and the obligation to be give special importance to cohabitation, affective and emotional links, compliance with the legal obligations, as well as the personal and socio-cultural circumstances of the persons concerned, which serve to evidence the existence of a family, which has a broader meaning that a mere parental relation."[48]

In conclusion, although Article 3(2) has been transposed and there is an obligation to facilitate (even specifying the type of authorisations that should be granted), there is little information on how this provision works in practice. The transposition of Article 3(2) carried out by Spain is more favourable in that other family members who are themselves Union citizen will have a right of entry and residence for being Union citizen with no other conditions.

However, overall the transposition is considered incorrect and incomplete for third country family members. Incorrect because of the narrow interpretation of other family members (limited to the second degree) and incomplete because the legislation does not include specific requirements regarding facilitation of entry (and entry visa) and no Instructions has been issued in this regard by the Ministry of Foreign Affairs. The only reference to entry is provided in the last paragraph of the 19th Additional Provision but does not seem sufficient to facilitate entry.

2.3 Rights of exit and entry

Right of exit (Article 4)

Article 4 provides a general right for Union citizens and family members, provided they have the required identity card or passport, to leave the territory of a Member State, with no need for exit visas. It also requires Member States to issue and renew identity cards and passports to their own nationals (if no ID issues, then the passport shall be valid for at least 5 years).

[48] 28 December 1998, case 5533/1994.

The main elements of Article 4 of the Directive have been correctly transposed by Article 5 of RD 240/2007. The elements regarding ID cards and passports are found in the specific legislation on ID cards (LO 1/92 Citizens Security) and Passports (Royal Decree 896/2003).

- **The right of exit with no visa**

Article 4(1) and (2) of the Directive have been correctly transposed by Article 5 of RD 240/2007 which states:

> The Union citizens, or citizens of a State member to the EEA, and their family members regardless of their nationality, shall have the right to leave Spain to travel to another Member State, without prejudice to the presentation of the passport or in force identity card to the authorities in charge of border control, if the exit takes place through an "official exit point" for its required check and without prejudice of the exit bans imposed on grounds of national security or public health or foreseen in the Criminal Code.

According to the Constitutional Court (STC 169/2001) all aliens who entered and stay in Spain lawfully have the right to freely exit the Spanish territory.

The right of exit is only dependant upon presentation of the passport or ID card (when exit takes place through official exit points), thus no exit visa is imposed. Furthermore, Article 18(2) of the Aliens Regulation, which in this point applies as it is more favourable, also allows exit with documents presenting irregularities or even without them.

The only limitations included in the law are those based on public order, public security and public health (the law also refers to the Criminal Code which can be subdue into public order). The Criminal Code and the Criminal Procedural Code restrict the right to leave the country in the case of imprisonment and when applying specific security measures. The measures restricting the right of exit fall under one of these categories:

- Imprisonment for having being found guilty of committing a crime;
- Obligation to be permanently findable (*e.g.* cases where the person is prosecuted or when the person is involved in a criminal proceeding as a suspect, witness and so on); and
- Preventive prison.

These measures apply to both Spanish nationals and EU citizens (and any other alien). A foreigner can be subject to detention in case the person is reclaimed for extradition by the authorities of other State. All these situations fall under the objective justifications under public order grounds and are considered in line with the Directive. Reasons of public health and national security are the ones listed in Article 27. These measures also apply to third country nationals under the Aliens Act (Article 28(1) of Aliens Act and Article 20 of Aliens Regulation).

Security measures are applied when the person has been found not guilty (Articles 101-104 Criminal Code) because of incapacity, psychiatric disorder, committing the crime under the effects of drugs or alcohol and similar (Article 20 of the Criminal Code), so that a penalty cannot be imposed. A security measure *i.e.* reclusion (for example in a hospital, education centre or detox clinic) is the penalty imposed. In these cases, the person cannot leave the centre without the authorisation of the judge and thus cannot leave the country. In addition, other measures can be adopted which do not involve reclusion but may involve restrictions on free movement (see for more details comments on Article 22 of the Directive as well as comments to Article 27-28 of the Directive). Some of these measures imply that the person cannot leave Spain. This is the case of the obligation to reside in a specific place which normally involves inhibitions on the person's movement without the judge's specific authorisation. These measures apply without differentiating between national and EU citizens.

In addition, the Law on Criminal Proceedings establishes the conditions to apply preventive prison (Article 502 of the Law on Criminal Procedure). It is out of the scope of this study to analyse all the

details of the preventive prison. Article 410 of the Law on Criminal Procedure may also restrict exit when the Union citizen or the family member has to attend court proceedings. These provisions apply to both national and EU citizens.

However, the Aliens Act establishes specific conditions for the application of preventive measures on aliens (order not to get close to borders, or presentation before the competent authority periodically). These provisions only apply to persons not covered by RD 240/2007, since RD 240/2007 only refers to the provisions of the Criminal Code. In addition, these provisions are not more favourable and RD 240/2007 expressly states that the Aliens Act only applies to Union citizens and their family members on a subsidiary basis when more favourable and not against EC law. They may, however, apply to "other family members", since as seen before they remain regulated under the general aliens legislation although with specific considerations.

- **IDs and Passports (Article 4(3) and (4))**

Article 9 and 10 of LO 1/92 on Citizens' Security regulates ID cards. It is compulsory for all Spanish nationals to have an ID card which is issued every 5 years, and passport, upon request. It is possible that a Spanish national only has a passport (*e.g.* Spanish nationals who are residents abroad or born abroad).

The ID is, according to Spanish law, a non-transferable document that is valid to certify identity, personal data and nationality. It is compulsory from the moment that a person reaches 5 years old and can be issued upon request for younger people. The ID is valid for 5 years if the holder is between 14-30 years old, for 10 years if between 30-70 years old, and permanent for people older than 70 years old.

The Aliens Act also foresees for an ID card for aliens legally residing in Spain (Article 4(2) of LO 4/2000). The ID is considered as both a right and an obligation. The legislation regulating ID for nationals applies to these IDs. The Aliens ID is considered as the document serving to certify the identity and legal situation of an alien in Spain (Article 105 Aliens Regulation). These documents do not apply to Union citizens and those family members that are subject only to the registration certificate and residence card. However, "other family members" who are third country nationals will be required to obtain a Alien ID.

Notice that the Union citizens and their family members will obtain a National identification number (NIE). The Instruction and the legislation, as well as the application form, only refer to the number but not to the issuance of an ID document, since this ID document proves legal residence which would be contrary to the Directive if applied to Union citizens and their family members[49]. It has been not possible to obtain a copy of a registration certificate to see the format. This was requested at the Police officers in the Aliens Bureau of a Spanish province visited but they were not available. This document has also been requested from the Spanish authorities.

Regarding passports, RD 896/2003 regulates the content and other details. A new passport can be issued every 5 or 10 years (depending whether the holder is less or more than 30 years old). Regarding the Passport format, Spanish passports follow the EU format. Spain follows the Council Resolution of 23 June 1981 and Regulation 2252/2006 on biometric passports.

Right of entry (Article 5)

Article 5 provides a general right of entry for Union citizens and family members upon presentation of an ID or passport, and in the case of family members, upon presentation of passport and when required a visa.

[49] This is also the answer from the Spanish authorities in the questionnaire.

- **Union citizens**

Article 4(1) of RD 240/2007 correctly transposes the provision on entry included in Article 5(1) for family members. It is clear that Article 5 only requires that the passport be valid and unexpired. Valid passport means "issued by the competent authorities of the country of origin or country from which the holder has come or by the international organisations empowered by international law"[50].

Despite the fact that the provision refers to in force passport (has not expired) in practice, entry with expired passports is possible for persons holding a passport from countries Party to the Council of Europe agreement. More information regarding the can be obtained on the website of the Ministry of Interior[51].

- **Family members**

Article 4(2) of RD 240/2007 has correctly transposed Article 5(1) of the Directive for third country family members. However, the provision under Article 5(2) of the Directive of not requiring an entry visa for family members who hold a residence card of family member of a Union citizen issued by another Member State has not been transposed correctly. In addition, the obligation to facilitate has not been transposed.

  - Exemptions from visas

According to Article 4(2) of RD 240/2007 "family members who are not nationals of a Member State or a State member to the EEA shall enter Spain with a valid passport, as well as an entry visa when so required by Regulation (EC) 539/2001. The possession of a valid and in force residence card issued by a State applying Schengen Agreement shall exempt those family members from the obligation to obtain an entry visa".

For the purposes of their entry into Spain, family members will require a short-stay visa, when they are nationals of one of the States listed in Annex I of Council Regulation (EC) 539/2001.

While Spain only admits the residence card issued by Schengen countries, the Directive has a broader scope and refers to all Member States (Schengen and not Schengen), since it refers to residence card issued under Article 10 of the Directive. Therefore, the Spanish legislation is not in conformity with the Directive. The answer given by the authorities is not correct. The legislation refers to Schengen and thus family members with residence cards issued by *e.g.* UK, Ireland, Malta or Cyprus will not be exempt from the obligation to obtain a visa according to the text of the law. This issue is contested in the application for annulment lodged at the Supreme Court.

Instruction 3/2007 clarifies that the visa is only required for entry and not for the issuance of residence cards (see below comments to Article 10). Although the Instructions refer to the short-stay visa (type C visa), it is clear that it is an entry visa. As a consequence of Schengen, the visa permits residence for up to 90 days. There is no visa specifically for entry. In addition, if Spain is not the final destination, the family member may be required to have a transit visa, also according to Schengen Convention and the Schengen Borders Code. Visas will only be checked when the family member enters from a non-Schengen State.

After the reform introduced by LO 14/2003, which aimed to simplify the administrative procedures, the visa is not only an instrument to control entry but also is a documentary proof of the authorisation

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[50] SSTSJ de Madrid of 23 Julio, 6 September and 23 October 2002 (JUR 2003 77457, 152912 and 153270) cited in Palomar Olmeda, A (coordinator), *Tratado de Extranjería,* cfr supra note 5 p. 288.

[51] http://www.mir.es/SGACAVT/extranje/control_fronteras/documentos_entrada.html.

to reside in Spain[52]. This obviously does not apply to family members of the Union citizen, since it is clear that the right of residence derives from the Treaty.

- Facilitation, free of charge as soon as possible

Regarding facilitation to obtain the visa, issuance free of charge, as soon as possible and through an accelerate procedure, Article 4(2) of the RD establishes that the issuance of these visas shall be free of charge and shall be dealt with in a preference way (accelerated procedure) when they accompany or join a Union citizen. The obligation to facilitate is therefore not expressly transposed. However, the accelerated procedure may be considered as a form of facilitation. Nevertheless, a more explicit provision would have been better. No guidelines have been issued regarding facilitation of visas and the accelerated procedure. The website of the Ministry of Foreign Affairs does not provide any specific information on family members. The only information is about issuance of a type C visa.

The visa to be obtained is a short-term visa allowing the person to stay for up to 90 days in Spain. The documents requested to obtain the visa in general are:

- Passport in effect or travel document
- Object and purpose of travelling to Spain and conditions to stay in Spain
- Sufficient resources
- Health insurance
- Adequate housing in Spain
- Guarantees to return to the country

However, for family members of a Union citizen covered by RD 240/2007, less documents are requested. Order/PRE/1283/2007 regulating invitation letters (purpose and object of the stay in Spain) clearly indicates that the beneficiaries of the Community regime do not need to show the object and purpose for travelling in Spain and conditions for stay. Similarly, Order/PRE/1282/2007 on sufficient resources, also exclude from its scope of application the beneficiaries of RD 240/2007. In fact, based on Article 5-8 of RD 240/2007 the only documents that may be required to issue the entry visa for family members are those that serve to prove identity and family link (being one of the core family members included in Article 2 of RD 240/2007, which transposes Article 2 of the Directive).

The Spanish legislation does not make the right of residence conditional on any specific requirement (such as the Union citizen being a worker or having sufficient resources). Therefore, the only documents that may be required from the third country family members to obtain the entry visa are those that prove identity and family link, since these are the only conditions that have to be checked by the Spanish authorities according to RD 240/2007. As such, the only documents required, are:

- Valid passport and in effect (if expired, copy of the passport and of the request for renewal);
- Proof of meeting the conditions of Article 2 of the Directive, which in this case is a proof of being within the scope of RD 240/2007 (family link, dependency, ascendants or descendants);
- Registration certificate of the Union citizen (however, if they are accompanying the Union citizen, this requirement could hardly be requested); and
- Three photographs.

This already counts as facilitation, since the documents requested are similar to those to obtain the residence card of family member of a Union citizen. The most difficult aspects will be to prove the family link: marriage, registered partnership, dependency and so on. Instruction 3/2007 indicates that the burden of proof of being dependant is on the applicant when requesting a type C visa (short-stay visa). It could therefore take time to put together all these documents. For this reason, the statement by Spanish authorities that a visa takes two days to be issued is regarded with some scepticism.

[52] For more information about this reform see Cfr supra note 5, *Tratado de Extrajería*, pp. 295 and al.

Nevertheless, the visa is issued via a preferential procedure, which means that the visa applications by family members will be prioritised. When an appointment is needed, family member will be given an immediate appointment (information provided by Spanish authorities in the questionnaires).

It should be noticed that "other family members" are not within the scope of RD 240/2007, as shown above. They will therefore be subject to the above mentioned provisions of the Aliens Act and the Aliens Regulation (meaning an invitation letter may be required). For more details, see comments above on third country family members.

The visas are issued free of charge (Article 4(2) RD 240/2007). Regarding decisions to refuse visas, these will be analysed under procedural guarantees.

- Exit stamp

Article 4(2) of RD 240/2007 correctly transposes this obligation. However, notice that it only refers to cases where the third country family member holds a residence card issued by a Schengen country. This is contradictory to Article 10(2) of Regulation 562/2006 (Schengen Borders Code) which clearly refers to a residence card issued under Article 10 of the Directive (therefore by any Member State).

- **Lack of the necessary documents**

Article 4(4) of RD 240/2007 transposes Article 5(4) of the Directive. The transposition is correct, almost literal and establishes that "in those cases where a Union citizen or a State member to the EEA or a family member do not have the travel document or visa necessary to entry the territory of Spain, the responsible authorities for border control shall, before turning them back, maximally facilitate that such persons obtain or receive (have them brought to them) in a reasonable period of time the necessary documents or to corroborate or prove by other means that they are beneficiaries under the scope of this Royal Decree, provided the absence of this travel document is the only reason preventing the entry into Spanish territory."

The obligation is on the authorities responsible for borders control. The Spanish legislation has included a *provisio* at the end (provided the lack of documents is the reason not to be able to entry Spain). The proviso should be read together with the general right of entry described in Article 4(1) according to which the only reasons to deny the right of entry is national security and public health. These reasons are those of Article 27 of the Directive. Therefore the transposition has been considered correct. For an analysis of the public order and public health reasons to refuse entry see analysis of Articles 27-29 of the Directive.

- **Obligation to report presence**

The Spanish authorities have not made use of this option for Union citizens or third country family members. Union citizens will only need to report their presence when registering for residence of more than three months. The same applies to third country family members covered by RD 240/2007. Therefore, the transposition is correct.

This is an essential difference with other aliens and "other third country nationals". These are subject to LO 4/2000. According to Article 12 of the Aliens Regulation, in relation to Article 22(1) of the Schengen Convention, aliens entering the Spanish territory from a Schengen State shall report their presence. This reporting is supposed to be done when crossing the border to the border authorities. If it is not done at that moment, the person shall report his/her presence within three days after entering in one of a Commissariat of Police or Aliens Bureau, and the person shall then be included in the Aliens Register. Failure to declare their presence will place the alien in an irregular situation and will be considered a serious offence which may lead to a devolution or expulsion decision (although there are exceptions). Arguably, this obligation to report presence is applicable to "other family members" as a consequence of being within the scope of the Aliens Act within such sort notice (three days) may be

considered as not reasonable (and thus contrary to the Directive). In addition, the sanction of expulsion for "other family members" may be considered as disproportionate in light of the ECJ case law.

Therefore, the Spanish legislation applied to "other family members" who are third country nationals (given that it does not apply to Union citizens) could be considered as not in conformity with EC law.

2.4 Right of residence

2.4.1 Right of residence for up to three months (Article 6)

Article 6 grants an initial right of residence for up to three months with no conditions or formalities other that holding a valid ID or passport, and in the case of third country family members, holding a passport.

This provision has been incorrectly transposed by Article 6 of RD 240/2007:

> *Residence for less than 3 months*
> 1. In those cases where the stay of the Union or EEA citizen, regardless of their purpose, has a duration of less than 3 months, it shall be enough to hold a in force passport or identity card according to which the person has entered the territory of Spain, this period not being counted to derive any rights stemming from the residence.
>
> 2. The previous paragraph shall also apply to family members of the Union citizen or EEA citizen who are not nationals of one of these States, and are accompanying or joining the Union or EEA citizen and who hold a valid and in force passport, and who have complied with the requirements of entry provided in Article 4 of the RD.

The essential requirements, recognition of the right of residence for up to three months with the only requirement of holdings an ID or passport has been transposed. However there are three problems with the transposition:

1) It does not recognise the right for job seekers to reside with no obligation to register up to 6 months. The fact that the RD refers to "regardless their purpose" could be an implicit reference to job seekers, although it is two vague as to consider it as an effective transposition. In any case, the period should have been 6 months and not 3.

2) These first three months are not taken into account to derive rights stemming from residence. This means that they are not taken into account to determine for example whether the person has acquired the right of permanent residence or not. This might be the consequence of the fact that there is no obligation to report their presence in the territory. Registration is compulsory, so if the person has not registered as soon as he/she arrives, the fact that these initial three months are not taken into account may be a kind a penalty for not registration. However, Article 15(8) of RD 240/2007 clearly indicates that the only penalty for not complying with these administrative formalities is a fine. This element in the Spanish transposition is against the Directive. The rights are derived from meeting the conditions and not from complying with the formalities established by the national legislation. Therefore, this approach is not in line with the Directive.

3) The reference in the *provisio* to documents that "should have allowed the persons' entry into the territory of Spain" and in the case of family members, to "having complied with the entry requirements under Article 4" creates an unnecessary confusion between "lawful entry" and "lawful residence", especially since it would only be applicable when the entry took place through an official entry point—the only entry that may require checking the Union citizen's documents. When a person needs an entry visa, it would imply that the family member must have entry the country with a visa, when so required. This will lead to a situation where the person has to hold a valid visa during these three months *de facto*. This requirement would be

against the Directive which only requires a passport. It seems to impose a kind of pre-condition for the right of residence for up to three months[53] that it does not really exists when the RD is analysed in detail.

Article 15(7) of RD 240/2007 states that the expiration of the ID or passport with which the person entered the country may not be a cause for expulsion. Nothing is said regarding the visa basically because the visa is not a requirement for residence (see Article 11(2) of the Directive)[54].

This provision will not have significant consequences for the third country family member, as already commented in Article 3 of the Directive. However, this clause creates confusion and for this reason the transposition is considered incorrect on this point, especially since Spain has already been condemned for requiring visas for issuance of residence card for family members. Despite the ambiguity of the provision, the practice seems in line with the Directive since Instruction 3/2007 indicates that a short-stay visa is "only required to third country family members for entry purposes" [emphasis included in the Instruction].

2.4.2 Right of residence for more than 3 months (Article 7-13)

(a) Conditions under Article 7 (Article 7(1), 7(2) and 7(4))

Article 7 provides for the right of residence to continue after three months where certain conditions are satisfied, being that the Union Citizen is:

- A worker or self-employed person (Article 7(1)(a);
- Has sufficient resources for him/herself and his/her family members (Article 7(1)(b);
- Is a student (Article 7(1)(c); or
- Is a family member of a Union citizen (Article 7(1)(d) and Article 7(2))

Article 7(1) and (2) have been correctly transposed in a more favourable way by Articles 7 and 8 of RD 240/2007:

Article 7 Residence for more than 3 months of Union citizens and EEA citizens.

1. The citizens of a State member to the EU or to the EEA have the right to reside in the territory of Spain for more than 3 months.

Article 8 Residence for more than 3 months for family members of a Union citizen

1. Family members of a Union or EEA citizen that fall under Article 2 of the present RD and who are not nationals of one of those States may reside in Spain for more than 3 months when they accompany or join the Union or EEA citizen, being required to apply and obtain a "residence card of a family member of Union citizen"

The RD establishes an almost unconditional right of residence for the Union citizen and EEA nationals. Article 7(1) of RD 240/2007 only requires the national of an EU or EEA State to have the right of residence for more than three months. The law does not distinguish whether the person is a family member or not, since no conditions are needed to have the right of residence if the person is a Union citizen. No further conditions are required. This is confirmed by the application form to obtain

[53] This provision may also imply that the entry must have been lawful for the short-stay residence to be lawful.

[54] Article 15(7) does not refer to the Union citizen or family member but to "concerned person", as in Article 11(2) of the Directive. It has been interpreted as covering both since that is also the logic of the Directive. In Article 11(2),as in the Spanish act, no reference is made to visa basically because the visa is not a condition for lawful residence. For this reason, the Spanish act has also been interpreted in this line.

the registration certificate.[55] As will be shown when commenting Article 8(3) of the Directive, the only requirement to obtain the registration certificate is to present a passport or ID to prove identity and nationality.

The same applies to third country nationals who are also family members. Under Article 8, the only requirement is to be a family member under Article 2 of the RD (which transposes Article 2 of the Directive), and accompany or join the Union citizen (see comments under Article 3(1) of the interpretation of these concepts)[56]. The wording of the law is softer for family members, *i.e.* it does not say family members shall the right (as done for Union citizens) but "may reside in Spain". However, this may be as a consequence of the need to prove the family link since it is not as a direct right as for Union citizen. Authorities do not have any margin of discretion. Once the family link and/or dependency situations proved, the right is acquired and the authorities must issue the residence card.

Since Union citizens have a right of residence just for being Union citizens (and not for also being workers, students and so on), Spain has not made use of the possibility to limit the personal scope of family members of students under **Article 7(4)** of the Directive. In this point the Spanish transposition is again more favourable.

- **Retention of the status of worker (Article 7(3))**

Since being a worker is not a pre-condition for the right of residence, the RD has not transposed these provisions. This will not have any impact on the special protection enjoyed by workers and self-employed persons, since sufficient resources is not a condition for residence, and EU citizens can never become an unreasonable burden.

Union citizen and his/her family member may only be expelled from the country on grounds of public order and public security, which cannot be invoked for economic purposes (Article 15(5)(c) RD 240/2007). This also applies for the renewal of a residence card or registration certificate: only if the person is no longer a Union citizen or no longer a family member under Article 2 of RD 240/2007 may a card or certificate not be renewed, or for public order/public security reasons.

It could be argued that this lack of transposition could have an impact on the acquisition of the right of permanent residence. However, those provisions, which include specific requirements linked to incapacity and unemployment, have been correctly transposed (as will be shown below). In addition, under Spanish labour law, the worker that is unable to work because of accident or illness retains his/her status of worker and therefore the objectives of the Directive will be achieved.

The Spanish approach is considered in line of the Directive. The only problem may be for Bulgarian and Romanian citizens to which the transitional period applies.

Spanish legislation includes a definition of "worker". Article 1 of the Workers' Statute defines its personal scope as workers that freely provided retributive services within the organisation and under the direction of another person, physical or legal, considered employer or entrepreneur. It is a very broad definition which has always interpreted the concept in line with the jurisprudence of the ECJ.

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http://extranjeros.mtin.es/es/general/SolicitudDeCertificadoDeRegistroComoResidenteComunitario-Ex-16.pdf.

56 As mentioned before, the legislation include "registered partnerships". However during a visit to the Aliens Office in a province of Spain, it was indicated by one of the officials that in general they did not accept registered partnerships. This is despite the fact that the Instruction from the Ministry of Labour has explicitly said that partnerships registered in certain MS should be considered as equivalent to marriage and therefore the partner should be treated as a spouse. This issue needs further follow up but it is outside the scope of this analysis since the Spanish legislation and the Instructions given by the Ministry are very clear on this point.

Regarding unemployment, Title III of the consolidated text of the Social Security General Act (hereinafter TRLGSS), approved by Royal Legislative Decree 1/1994,[57] of 20 June establishes the conditions to obtain the benefits:

1) Involuntary unemployment: the person is unemployed against his/her will. Those are regulated in Article 208(1) of TRLGSS. The means to prove that situation are listed in Article 1 RD 625/1985 of 2 April. *Inter alia*, the situations considered as legal unemployment are those in which the contract has ended for economic or technological reasons, for being fired, for completion of a fixed-term contract, death, incapacitation or retirement of the employer; not passing the probation period; for the resilience of the contract due to substantial modifications of the contract or serious breaches of the employer; and,

2) the unemployed person requesting and receiving the benefits has a will to work again, implying that the person has to show his/her availability to actively seek work and accept an adequate occupation. This is shown through the establishment of a compromise of activity, registration as a job-seeker in the INEM (national institute of unemployment) and comply with the obligations include Articles 207(c), 209(1), 215(1) and 231 of TRLGSS.

(b) Administrative formalities for Union citizens (Article 8)

Article 8 provides for the details for issuance of registration certificates and residence cards for family members who are also Union citizens. The transposition of Article 8 is correct except for job-seekers.

- **Obligation to register and sanctions**

Spain has opted to require the registration for all Union citizens who intend to reside for more than three months. Since there are no conditions, this provision also applies to Union citizens who are family members. The provision also applies to job-seeker. On this point the transposition is not correct since registration should only be required after 6 months (according to Article 14(4)(b) of the Directive, Recital 9 and *Antonissen* jurisprudence).[58]

The persons concerned are obliged to apply for their registration in the Central Register for Aliens personally in the Aliens Office of the province in which they intend to establish their residence or if there is none in the Commissariat of Police. Notice that the person shall be registered in the Central Register for Aliens. It could be argued that this is not in conformity with the Directive. Union citizens go through a preferential queue different from the one for other aliens.

Under the old legislation (RD 178/2003), certain Union citizens could reside without a card or any other formalities.[59] These were: Union citizens who were workers or self-employed, students and beneficiaries of the right of permanent residence; their family members and family members of Spanish citizens who exercised their right of free movement; frontiers workers. It could be considered that the new legislation which imposes requiring a registration certificate is therefore less favourable for these persons.

"In practice, Union citizens tended to request a NIE certificate (basically the allocation of the number) firstly and then a residence card for Community citizens because this card was requested, directly or indirectly by some bodies of the Administration, including the State, normally to certify residence in

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[57] Real Decreto Legislativo 1/1994, de 20 de junio, por el que se aprueba el Texto Refundido de la Ley General de la Seguridad Social, BOE n. 154 of 29/06/1994, p. 20658 http://www.boe.es/g/es/bases_datos/doc.php?coleccion=iberlex&id=1994/14960; http://noticias.juridicas.com/base_datos/Admin/rdleg1-1994.html.

[58] C-292/89 *R.* v *Immigration Appeal Tribunal, ex parte Antonissen*, [1991] ECR I-745.

[59] This was based on the Marseille Agreement of 20 July 2000 between Italy, France, Spain and Germany.

Spain (which shows somehow lack of coordination among administrations since the residence could be proven by the certificate of domicile issued by the municipal authorities where the person resides, as is the case for Spanish citizens), by some private entity, or simply because it was more comfortable to provide proof of identity with the Spanish card than with the passport or the ID from his/her own country"[60]. Maybe for this reasons, and to simplify administrative formalities due to the new unconditional right of residence, the Spanish legislature decided to make registration compulsory.

In addition, the RD and the Instructions include **transitory provisions**, according to which all those Union citizens already residing in Spain have to replace their cards with the registration certificate.

Instruction 3/2007 indicates that those who did not hold a residence card because they were exempted according to the old legislation (RD 178/2003), now have to register and request the registration certificate. The certificate will incorporate the date on which the person shows that he/she started living in Spain. If the person has been living for more than five years, the authorities will issue registration certificate of permanent residence. The burden on proof is on the person. There are no specificities for nationals of new Member States

Regarding, the current holders of a "residence card of Community citizens", either because they fall under Article 8 of RD 178/2003, or because they fall under one of the situations described in Article 6 but nevertheless requested the issuance of the card, they may no longer request for the renovation of the card. Instead a registration certificate will be issued according to Article 7 (registration certificate) and Article 10(1)(registration certificate of permanent residence) of RD 240/2007.

Instruction 3/2007 also requires the Government Delegations and Sub-delegations, and the Provincial Commissariats of Police to carry out the necessary informative activities to facilitate than on 2 July 2007 (three months after the entry into force of RD 240/2007), the obligation to register of all Union citizens residing in Spain is normalised, specially in relation to those that currently do not hold a residence card according Article 6 of RD 178/2003 ("Situation of Residence without a Card").

For requests submitted before the entry into force of the RD, Instruction 3/2007 indicates that these are to be treated according to the RD, except when the person concerned requests the application of the legislation in force at the time of the request, provided it is compatible with the requirements of this RD. This implies that no residence cards can be issued.

Regarding the **sanctions** for failure to comply with the obligation to register, Article 15(8) of RD 240/2007 indicates that "failure to comply with the obligation to request a residence card or a registration certificate will lead to the application of pecuniary penalties applicable in similar circumstances to Spanish nationals in relation to their obligations regarding the National Identity Card." This is the most relevant provision because it is specific. The provision quoted by the Spanish authorities in the questionnaire is more general and regards holding documents. Article 9 of LO 1/92 on Citizens' Security imposes Spanish citizens to obtain an ID card. Article 11 of LO 1/992 requires aliens to hold documents proving their identity and legal situation is Spain. This obligation interpreted in the light of RD 240/2007 only requires the alien to hold an identity document and registration certificate. In any case, the sanction is in both cases the same for Spanish nationals and Union citizens: it is considered to be a petty breach and sanctioned with EUR 300.

- **Deadline for registration**

According to Article 7(1) of RD 240/2007, the application has to be submitted within three months from the date of entry in Spain, thus in line with Article 8(2) of the Directive.

[60] Francisco José Torrubia David (Chief of Aliens Office of Logroño) "La Extranjería desde el punto de vista de la Adminsitración periférica del Estado: Autorizaciones y sanciones administrativas en materia de extranjería" in *Extranjería*, collection Manuales de formación continuada n. 39, Ed. Consejo General del Poder Judicial, Escuela Judicial, 2007, pp.135-136.

- **Issuance of the registration certificate**

Article 7(1) of RD 240/2007 also transposes correctly the obligation to issue the certificate immediately and that will include the name, nationality and address of the registered person, and date of registration certificate.

Article 7(1) also includes that the registration certificate will include the alien identity number (NIE). This number will be given *ex officio* by the authorities when issuing the certificate. The allocation of the number is needed for the issuance of the registration certificate given that without a NIE the person cannot pay the fee for issuance of the certificate. This number is used to deal with the administration, especially for economic relations. It is not, in the case of Union citizens, an ID card. Since this is an additional requirement not foreseen in the Directive, the transposition has been considered incorrect. As shown before, the administration tends to request the NIE as a proof that the person resides in Spain. This may indirectly violate Article 25 of the Directive (see below for more details about this).

Although the legislation requires the certificate to be issued immediately, in practice, the office visited informed that the person receives a receipt of application and then an appointment date, approximately one week after the first visit (depending on the work load in the Bureau), to receive the registration certificate. In fact, the payment is not made on the spot, at least in the office visited. Instruction 3/2007 indicates that if it is not possible to show at the moment of the request the payment of the fee, because the concerned person has not been given a NIE (foreigners identity number), the Office or Commissariat shall give the person the form to pay the tax, which will include the NIE, so that the person concerned can pay the tax for issuance of the registration certificate.

Most probably, if a person downloads the form from internet, and provide the documents needed, the registration will take place immediately (within the day).

Instruction 3/2007 requires the Government delegates and sub-delegates to establish different points to submit requests, dependent of the Aliens Bureaus or the Commissariat of Police which exist within their territorial scope of competence to avoid excessive work loads.

Further information of the practical implementation, concretely the time frame to obtain the registration certificate and its format could not been obtained.

- **Documents to be submitted to obtain the registration certificate**

Article 12 RD 240/2007 transposes Article 8(3) and 8(5) of the Directive correctly, since the same documents are requested to all Union citizens. Article 12 requires the person to submit an application form and present a valid passport or ID. If the document has expired, RD 240/2007 allows the person to submit a copy of the document together with a request for renewal. Finally, the person has to show that the fee to issue the document has been paid. The transposition is correct although in practice there are some elements that could be considered as not in conformity with the Directive.

The request is to be done personally and processed preferentially. The place to submit the requests are the Aliens Bureau of the province in which the concerned person wishes to stay or establish his/her residence, or, if there is none, in the Commissariat of police.

The application form called EX-16 (attached to this CS)[61] is a four pages document, but only the first page is the application form. The other pages are explanations about the documents to be submitted.

[61] The Form is available at the website of the Ministry of Home Affairs, Ministry of Labour, Ministry of Public administration: http://www.mir.es/SGACAVT/modelos/extranjeria/modelos_extranje/ex_16.pdf

The application form is valid for registration certificates (issuance, modifications, and cancellations), residence card of Article 2 family members (issuance and renewal) and for issuance of registration certificates of permanent residence and permanent residence cards.

Regarding the information to be filled in the form, it is basically personal data, including:

- For the Union citizens: NIE, passport number or ID number, name and surname, place of birth, date of birth, sex, marital status, country where the person was born, nationality, father's name, mother's name, domicile in Spain, telephone number, foreseen period of residence, date from which the residence starts.
- For family members: NIE, passport or ID number, name and surname, country of nationality, date of birth, domicile in Spain

The applicant has to give an address for notification purposes.

As mentioned before, if the person does not have a NIE, the authority will give one *ex-officio* when the application is submitted. The information on personal data (place of birth, sex, marital status, mother's and father's name, etc.) is the same data requested from Spanish citizens to have the ID. These personal data are therefore considered as part of verification of identity in Spain. However, in strict terms, the ID or passport should have been enough to prove identity and nationality and thus this information could be considered against the Directive. However, it is not a serious breach. The only documents to be submitted with the application form are:

1) Valid and in force Passport or ID. If it has expired, copy of the Passport or ID and of the request for renewal.
2) Except in the cases where the person has already a NIE before the request is submitted, document showing the payment of the fee for issuing the certificate (in the remaining cases, the administrative bodies shall allocate a NIE and provide the document to pay the tax, so that the payment can take place before the issuance of the certificate).

The imposition of the NIE seems not in conformity with the Directive. As mentioned before, this may also have other consequence in relation to Article 25 of the Directive.

The documents have to be accompanied by the originals and shall be returned once the copies have been checked. In practice the official checks the original and copy to certify authenticity on the spot returning the originals immediately to the applicant.

Other element to be mentioned is that if there are public health reasons according to Article 15 of RD 240/2007 (which transposes Article 27-29 of the Directive), the authorities may request exceptionally a medical certificate of his/her health state (Article 12(4) RD 240/2007). This issue will be discussed more in detail when commenting on Articles 27-29.

- **Sufficient resources (Article 8(4))**

Article 8(4) requires Member States not to lay down a fixed amount as sufficient resources, but they must take into account the personal situation of the person concerned. In all cases, the amount cannot be higher than the threshold below which nationals of the host Member State become eligible for social assistance, or, where this criterion is not applicable, higher than the minimum social security pension paid by the host Member State.

This provision has not been transposed because under RD 240/2007 to have "sufficient resources" is not a condition for residence. This condition only applies to third country nationals under the Aliens

http://www.map.es/servicios/servicios_on_line/extranjeria/modelos_oficiales_solicitudes/ex16/documento_es/Ex-16.pdf.

Act. To date, the legislation has only specified the amount of sufficient resources for entry and nothing is set forth for residence, so leaving it at the discretion of the administration.

Order/PRE/1282/2007 lays down the elements to be considered that a person has sufficient resources. This order does not apply to person within the scope of RD 240/2007 (Article 1(2) of the Order)[62].

(c) Family members who are not nationals of a Member State (Article 9-11)

1. Administrative formalities (Article 9)

Article 9 provides for the issuing of residence cards to the family members of EU citizens. Article 8 of RD 240/2007 correctly transposes this provision. Under Article 8(2), family members of a Union or EEA citizen falling under Article 2 of the RD and who are not nationals of one of those States may reside in Spain for more than three months when they accompany or join the Union or EEA citizen, being required to apply and obtain a "residence card of a family member of Union citizen".

The wording is less direct than for Union citizens. It also refers to "receive and obtain" which in a way could be interpreted that the right derives from obtaining the card and not from meeting the conditions. Article 12(2) of RD 240/2007 states that "the request and treatment of the registration certificate and residence card is not an obstacle to the provisional stay of the persons concerned in Spain or the development of their activities." It is clear that the right is linked to meeting the conditions and not to holding a card. The card simply attests the legality of the residence (says RD 240/2007) so if the person requests the card but this is refused it is because the conditions are not met. The person can attest by any other means of proof that he/she is beneficiary of the rights (Article 8(2) RD 240/2007).

Failure to request for the residence card can only lead to a fine of EUR 300 and will not have further consequences (Article 15(8) RD 240/2007 commented above on registration certificates).

The deadline for submission of the application is within three months from the entry date (Article 8(1)), personally and in the same premises as Union citizens. Normally, the Union citizen will make the requests.

- **Issue of residence cards (Article 10)**

Article 10 is a detailed Article addressing the issue of residence cards to family members of a Union citizen who are not themselves Union citizens. This provision is correctly transposed by Article 8 of RD 240/2007.

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62 According to Article 2 of the Order, the person wanting to enter will have to show that it has at least 10% of the minimum employment salary brut multiplied by the number of days the person intends to stay in Spain and the number of person who will depend on the Union citizen. The total amount must represent 90% of the minimum employment salary regardless of the foreseen duration of the stay. The time frame taken into account to determine sufficient resources will be the number of days from the date of entry in Spain until the return trip certified by the alien. These requirements can be exceptionally tempered by the authorities. When the person is a worker or a student, he/she does not have to provide information about sufficient resources. Regarding information of the pension system (contributive and not contributive) please see responses to the questionnaire.

- General aspects

Article 8(1) clearly states that the residence card shall be named "**residence card of a family member of Union citizen**" in line with Article 10(1). Instruction 3/2007 reminds that the old residence card of family member of a Community citizen now are named "residence card of a family member of a Union citizen".

Article 8(4) indicates that the **residence card shall be issued within three months** from the date on which they submit the application. This is more favourable than the Directive which foresees six months (Article 10(1) of the Directive). The resolution to issue the card shall have retroactive effects so that it is understood that the person concerned has attested his/her residence from the date on which the application was submitted.

A **certificate attesting the submission** of the application **shall be issued immediately** until the residence card is issued. This certificate is enough to attest the situation of legal residence, but the fact the family member is a beneficiary of the rights can be proved by any other means (Article 8(2) RD 240/2007).

Regarding the application form, the comments made in the subsection above are also applicable here, especially regarding the NIE. As to the specific documents to prove identity and family link, Article 8(3) of RD 240/2007 correctly transposes Article 10(2) of the Directive. The application form also reproduces the text of the RD and Instruction 3/2007 provides information regarding the documents accepted as a proof of being under one of the situations described.

The documents that need to be submitted according to Article 8(3) are:

1. a valid passport or ID of the applicant. If the document has expired, a copy of the document together with the application for renewal.

The application form includes the same obligation. The Instruction specifically refers to ECJ jurisprudence on this aspect in the case against Spain (C-153/03), where Spain was condemned for requiring residence visa as a pre-condition to issue a residence authorisation to a family member of a Union citizen. Instruction 3/2007 reminds the authorities in charge of issuing the cards that according to the ECJ, Directive 2004/38/EC and Article 8(3) of RD 240/2007, that the family member holds a residence visa shall never be prerequisite for issuance of a residence card to a family member of a Union citizen, or for the exemption of the residence visa.

2. Document attesting the existence of a family relationship, marriage or registered partnership which gives the right of residence. When needed the document shall be translated and stamped or legalised.

No specific documents are requested, only to prove the family link. However, the competent authority may require, and will usually do, that the information is translated and has some official status (certified copies, stamped or legalised). These requirements seem reasonable to avoid fraud.

Instruction 3/2007 provides more details for spouses and registered partnerships. In the case of spouses who are not legally separated, the Instruction requires that the document submitted should show that the marriage will have civil effects according to the Spanish legislation. This is a matter of recognition of marriages under Spanish international private law.

As to registered partnerships, the Instruction indicates that it shall be attested by a certificate issued by the relevant body in charge of the registered partnerships, attesting the registration in a public registered established for this purpose. This certificate should have been issued as a maximum three months before the date of submission of an application for the residence card of a family member of a Union citizen. This requirement is to reduce risk of partnerships already cancelled. However it may

lead to a situation where, in the case of partnerships just concluded before moving into Spain, a partner cannot join or obtain the residence card until three months have elapsed since the registration. This does not have major impacts since the family member can stay for three months with no need to require a card and the residence will be lawful.

These details are included in the application form which requires the applicant to submit "document certifying, when applicable duly translated and certified or legalised, of the existence of the family link; the validity of the marriage; or certificate issued (as a maximum three months before the date of submission of an application) by the correspondent body in charge of the registration of the partnership, certifying the registration as a partnership."

3. Registration certificate of the Union or EEA citizens whom they are accompanying or joining.

The application form indicates that the registration certificate of the Union citizen must be accompanied by the Union citizen's passport or identity document, in effect, or if the right is derived from a Spanish citizen, his/her ID or the authorisation to verify electronically his/her identity data.

4. Document attesting when so required by Article 2 of the present Royal Decree that the applicant is a dependent family member of the Union or EEA Citizen

Instruction 3/2007 provides details regarding the possible elements to be taken into consideration to considered that the situation of dependency is proven:

- the burden of the proof of being dependant is on the applicant when requesting a type C visa (short-stay visa) or a residence card of a family member of a Union citizen (descendant of more than 21 years old and ascendant of a Union citizen or of his/her spouse or registered partner). Therefore, if the family member is outside Spain, the proof can be submitted when applying for a visa (if a visa is required to enter Spain); or if already in Spain or no visa required, when applying for the card.

- the means of proof are open, accepting the accreditation of the circumstances by any means of proof submitted by the applicant and admitted in Law. In the case of dependency, the applicant has to prove that his/her means of living depend exclusively or mainly, on the ascendant or descendant who is a Union citizen or of his/her spouse or registered partner. The Instructions clearly indicates that provisions under the Aliens Regulation and in particular the specific aspects regarding proof included in Article 39(e) of the Regulation do not apply in this context. This is important since such Article 39(e) is burdensome since it requires attesting that transfers of resources from the person to the dependant took place in the previous years and that there were sufficient. Therefore, the means of proof are kept very flexible (*e.g.* a sworn statement is accepted as proof).

- the means of proof presented must provide objective results, and the competent authorities should give preference to documentary means of proof, and, if possible to documents issued by public authorities (*e.g.* certificates of dependency etc.). The Instruction indicates that lists of means of proof may be elaborated, but that these will only provide examples and will not be an exhaustive list.

- If the mean of proof used is a declaration signed by the family member holder of the right, showing that the beneficiary will be his/her dependant, the Instruction requires the declaration to be accompanied by either a public document recognising the signature (act issued by a notary), or a document showing the identity of the person which has to include the person's signature. This requirement is to allow the public servant to verify that both signatures are the same.

The application form includes some of these elements: 4. In case of descendants of 21 years old or majors of age,[63] or direct ascendants, certification by any means of proof admitted in the Law that his/her means of living derived, exclusively or mainly from the ascendant or descendant (Union citizen or his/her spouse or registered partnership).

5. three recent photographs in colour with white background, ID size.

According to the Commission, this additional requirement is in conformity with the Directive.

The Application form adds the same requirement as for registration certificates regarding the NIE to be able to pay the tax. So if the person did not have a NIE, the administration will give the number *ex officio* and the form to pay the tax for issuance of the card. The requirement to have a NIE is considered against the Directive. However, it seems that dactyl prints are also requested (see Instructions 03/2007 Section Three commented on Article 8(3) of the Directive), which, although it may serve identification purposes, are not listed among the elements of the Directive.

Regarding **other family members**, and thus transposition of Article 10(2)(e) and (f), they are not subject to RD 240/2007 but to the Aliens Act therefore they do not receive a residence card of a family member of a Union citizen but an authorisation for residence under exceptional circumstances (or a residence visa, allowing them to obtain a authorisation as family members). According to the 19th Additional Provision of the Aliens Act, the authorities shall require the presentation of a document issued by the relevant authority in the country of origin or country from which they are arriving certifying that they are dependants or members of the household of the Union citizen, or proof of the existence of serious health grounds which strictly require the personal care of the family member by the Union citizen. Similarly, it shall be required to attest the existence of a durable relationship with the Union citizen. Therefore, the transposition is correct[64].

- **Validity of residence cards (Article 11)**

Article 11 provides for the period of validity of residence cards and that certain temporary absences will not render the card invalid. Article 11 has been correctly transposed by Article 8(5) and 14(3) of RD 240/2007.

Article 8(5) of RD 240/2007 transposes Article 11(1) of the Directive almost literally, so that the residence card of a family member of a Union citizen is be valid for five years from the date of issue, or for the envisaged period of residence of the Union or EEA citizen, if this period is less than five years.

Article 13 RD 240/2007 regulates the renewal of the residence card if needed before the right of permanent residence is acquired. The RD only states that ascendants and descendants do not have to proof the family link anymore. However, all the other documents have to be submitted again: passport or ID, certificate of marriage and partnerships, proof of dependency, payment of tax. The measure is to avoid fraud and to ensure that the conditions are still met, but this may be considered too burdensome for the family member.

Regarding absences, Article 14(3) indicates that the validity of the residence card of a family member of the Union shall expire for absences of more than six months. However, the validity of the card shall

[63] There is what seems to be a typo error since it says descendants of more than 21 years old or majors of age. Dependency only needs to be proven when 21 or more years old according to the law and even the application form. The reference to majors of age may create confusion as to whether persons above 18 years old need to proof dependency (which will be against the Spanish legislation and the Directive).

[64] No information has been obtained regarding the type of documents that may be required. The expert requested to the competent authorities the application form for other family members but at the time of drafting this report, the authorities have not answered.

not be affected by absences of a longer duration when it is attested that they were due to compulsory military service or, when they do not extend for more than 12 consecutive months and are due to pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country.

Although the structure of the provision is different, the objective is the same. In addition to the cases listed in the Directive, the RD also establishes that the validity of the card is not affected by longer absences when the holder is a person cooperating with NGOs, foundations or associations of general interest and moves to a third country to carry out research activities or development aid projects. The same applies when the family member moves to another Member State to participate in study programmes promoted by the EU, such as Erasmus programme.

(d) Retention of the right of residence in the event of death, departure, divorce, annulment or termination

Article 12 and 13 of the Directive establishes that family members can retain the right of residence on a personal basis in case of death, departure, divorce, annulment or termination of the marriage/registered partnership. They will remain under the protection of the Directive but they will have to meet certain conditions to acquire the right of permanent residence (*e.g.* being a worker, self-employed, sufficient resources or being a member of a family already constituted in the host Member State). The general Aliens regime could apply to them but only for family reunification purposed.

The way RD 240/2007 has transposed these provisions for third country family members is one of the most serious cases of nonconformity identified. RD 240/2007 excludes third country family members who retained the right of residence from the Union citizens' regime so that six months after the event, they have to request for a residence card under the Aliens Act. This implies that these family members will not be protected under Article 27-31 of the Directive. The transposition of these two provisions for third country family members is therefore considered incorrect.

- **Retention of the right of residence by family members in the event of death or departure of the Union citizen (Article 12)**

Article 12 provides that family members retain the right to reside when the Union citizen dies or leaves the Member State.

- Family members who are EU citizens (Article 12(1)

Article 9(1) of RD 240/2007 simply states something that it is obvious according to the Spanish regime: that the right of residence of family members of a Union citizen who are also Union citizen is not affected by his death or departure (neither by the divorce, legal separation, annulment of marriage nor termination of the partnership). The right is not retained. It is simply not affected since these persons have the right of residence already on a personal basis for being Union citizens. Therefore, no other conditions have to be met.

- Family members who are not EU citizens (Article 12(2)

Article 9(2) transposes almost literally Article 12(2) of RD 240/2007, so that the Union or EEA citizen's death does not entail the loss of the right of residence of his/her family members who are not nationals of a EU Member State or EEA State, provided they have been residing in Spain as family members for at least one year before the Union citizen's death. The RD imposes on the family member the obligation to report the death. The right is retained on a personal basis.

After six months of the event, and provided the family member has not obtained the right of permanent residence, the family member will have to obtain a residence authorisation according to the Aliens Act (Article 96(5) of Aliens Regulation). Therefore, after this six months, unless they have

acquire the right of permanent residence, these family members are completely excluded from RD 240/2007 (and thus from the Directive's protection) and subject to the Aliens Act. This is a serious case of non-conformity.

To obtain a new authorisation, the person concerned shall show that he/she is registered in the social security system as worker or self-employed persons or that has sufficient resources for him/herself and his/her family members, or that they are members of a family already constituted in the host Member State of a person satisfying those requirements. There is no reference to sufficient resources under Article 8(4) because it has not been transposed. The evaluation will be carried out under the Aliens Act which does not specify any amount for sufficient resources, leaving the decision to the discretion of the competent authority evaluating the application.

With regard to Article 12(3), Article 9(3) transposes almost literally this provision of the Directive. Article 9(3) states that "[t]he Union or EEA citizen's departure from Spain or his/her death shall not entail the loss of the right of residence of his/her children or of the parent who has actual custody of the children, irrespective of nationality, if the children reside in Spain and are enrolled at an educational establishment, for the purpose of studying there, until the completion of their studies".

Regarding the interpretation given of "completion of studies", the answers given by the Spanish are not clear. On the one hand, they state that "although in principle it could be considered that the interpretation is the completion of studies in the centre in which the child is enrolled, there would be no problem in extending the term and cover studies in other establishment provided the conditions are still met". The response continues with an enigmatic sentence. "On the other hand, according to Article 9(3)[65] of RD 240/2007, the Union or EEA citizen's departure from Spain or his/her death shall not entail the loss of the right of residence of his/her children or of the parent who has actual custody of the children, irrespective of nationality, if the children reside in Spain and are enrolled at an educational establishment, for the purpose of studying there, until the completion of their studies". Therefore, the Spanish authorities go back to the starting point.

Nothing in the Spanish text implies that the provision should be limited to studies in the specific centre in which they are enrolled. Article 9(3) is a literal transposition of the Directive on this point. The provision says "enrolled in an educational centre", implying that it could be any educational centre (school, high school and university). It does not have to be the same all the time, provided there is a certain continuation in the enrolment and the person is enrolled for the purposes of studying. The only condition that could be referred to by the Spanish authorities is that the parent who has actual custody, retains this custody.

- **Retention of the right of residence by family members in the event of divorce, annulment of marriage or termination of registered partnership (Article 13)**

Article 13 is similar to Article 12 in that it provides for family members to retain their right of residence in case of divorce, annulment or termination of a civil partnership. For family members who are Union citizens, see comments under Article 12.

As a general remark, the Spanish act also includes legal separation as one of the causes for the retention of the right of residence. See comments above at Article 2 on family members. On this point the transposition is also incorrect.

For family members who are not Union citizens, as mentioned before, the family member should notify to the authorities the change in the situation. However, there is no sanction linked for failure to notify since it is not expressly included in the law[66.]

[65] The response states Article 9(4) but it is a mistake.

[66] See *Extranjería*, cfr supra note 60, p.143.

Apart from the issue of legal separation, Article 9(3) transposes almost literally Article 13(2) requirements. However the transposition is incorrect because of the complete exclusion of family members from the Union citizens' regime (see comments above).

Article 9(3) refers to difficult circumstances and leaves the list opened. The reference to domestic violence is only as an example. With regard to this particular case, the RD considers as provisional proof certifying the existence of domestic violence a protection order or a report from the Prosecutor indicating that evidence of domestic violence exits. The situation will be considered definitive when a court order declaring the facts as domestic violence.

It could be argued that this is not required by the Directive and that the person could actually denounced the circumstances after the divorce or cancellation took place. Also it could be argued that medical examinations could also be considered as a proof of such domestic violence. However, these means of proof are those accepted under Organic Law 1/1994 of 28 December, on measures to ensure total protection in cases of gender violence[67] to certify the existence of such situation. For this reasons the transposition has been considered correct. A protective order is not very difficult to obtain in Spain given the specific legislation against domestic violence and awareness about domestic violence.

2.4.3 Retention of the right of residence (Article 14)

Article 14 provides for the circumstances in which persons retain the rights of residence granted by Article 6 and Article 7 respectively.

Article 14 regulates the situations that lead to the end of the right of residence for not meeting the conditions. For this reason, this provision has not been transposed by RD 240/2007 and for this reason the Spanish legislation is considered correct, although incomplete because Article 14(3) of the Directive has not been expressly transposed.

(a) Being an unreasonable burden and not meeting the conditions (Articles 14(1) and (2))

With regard to residence for up to 3 months (Article 14(1)): The concept of being an unreasonable burden is not part of the Spanish legal order, neither under the specific regime of RD 240/2007 nor under the general Aliens Regime. Social assistances and social benefits are fundamental rights recognised to all residents.[68]

In addition, under RD 240/2007 the only condition to entry and reside in Spain is to have the nationality of Member States. Union citizens and their family members could never be expelled for being an unreasonable burden. The only possibility to deny entry, refuse registration or expel Union citizens and their family members are reasons based on grounds of public policy, public security and public health. These measures cannot be applied to serve economic ends.

Regarding residence for more than 3 months (Article 14(2)): the transposition is considered incomplete.

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[67] See also explanations from the Council of State. Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género, BOE n. 313 of 29/12/2004, p. 42166, available at: http://www.boe.es/g/es/bases_datos/doc.php?coleccion=iberlex&id=2004/21760.

[68] Under the general aliens regime, the person has to show sufficient resources. If the person does not have sufficient resources the authorisation to reside will not be given (this condition does not apply to workers, self-employed or students). If the person requests the renewal of the authorisation, he/she will have to show that the person still have sufficient resources (if the person is not economically active). The authorisation may be refused but the person could never lose the right of residence for becoming an unreasonable burden. Social assistance is a fundamental right for residents in Spain and will always be taken into account when evaluating if the person has sufficient resources. Social benefits and social assistance therefore could never be a reason to expel an alien.

Article 14(2) of the RD states:

> In any case, the validity of the registrations certificate and the residence cards foreseen in the present RD, and the replacement of these by a document attesting the permanent residence or a card of permanent residence shall be conditioned to the holder falling under any of the situations that give right to obtaining these documents. The persons concerned shall communicate any change in the circumstances referred to nationality, civil status or address to the Aliens Bureau of the province in which they are residing or, if there is none, to the Commissariat of Police.

Article 14(2) of RD 240/2007 prefers to refer to validity of the card rather than losing the right of residence. On this point the transposition in Spain is considered correct. Two different remarks need to be done on this aspect.

- For Union citizens, there are no conditions for residence except to be a national of a Member State. For this reason, they cannot lose the right of residence for not meeting Article 7, and Article 12(1) or 13(1) of the Directive conditions since these are not required under the RD. The right of residence may be affected by a change in the nationality though. For this reason, the only obligation is for the Union citizen to notify a change in the nationality. However, this does not mean that they lose the right of residence since it may well be that they have a right of residence for other reasons (under the general Aliens Act conditions).

- In the case of family members, the Spanish legislation again prefers not to refer to losing the right of residence but rather to the validity of the card. The fact that they are no longer family members does not imply that they lose the right of residence immediately since the person may have a right of residence under the Aliens Act and a different card is then issued. The family member is required to notify changes in the civil status.

- Regarding retention of the right of residence under Article 12 and 13, if they do not meet the conditions under Article 12(2) and 13(2) then they might obtain the right of residence for other reasons under the Aliens Act. They can also acquire the right of permanent residence under the general provisions of the Aliens Act which also includes 5 years of residence. Under Article 75(2)(e) of the Aliens Regulation when the conditions that led to the issuance of a residence authorisation for up to five years are no longer met, the right of residence may be lost. This includes no longer being a worker or self employed; or not having sufficient resources (Article 75(2)(a)). This provision may apply to third country family members who retained the right of residence since they will be covered by the Aliens Act. The provision, therefore, would also be in line with Article 14(2) of the Directive.

However, the transposition has been considered incomplete because there is no specific provision in the RD nor in the LO 4/2000 or its Regulation ensuring that only when there is a "reasonable doubt" may checks be carried out. Notice, however, that the way the RD and the LO 4/2000 are drafted the basic principle is that there is an obligation on the person concerned to notify a change in circumstances. The only checks allowed are control checks carried out in the street requiring the person to identify themselves (see transposition of Article 26 below) or, at the time of application, the verification of the conditions for a registration certificate/residence card.

In case of renewal of the cards, the conditions regarding the family link will be checked again, which implies that it is at that moment when the authorities will consider whether the persons meets the conditions. Again, it should be highlighted that because Union citizens do not have to meet any conditions, this provision will mainly affect third country family members. In any case, the approach adopted under the RD does not seem to grant the same level of protection than the Directive on this point. For this reason, the transposition is considered incomplete.

(b) Protection against expulsion (Article 14(3)-(4))

- **General protection (Article 14(3))**

Article 14(3) provides that an expulsion measure shall not be the automatic consequence of a Union citizen's or her family member's recourse to the social assistance system of the host Member State. This provision has not been transposed. However as mentioned before, the concept of unreasonable burden does not exit in Spain and can lead to expulsion neither under the RD nor under the Aliens Regime. Recourse to Social Assistance is a fundamental right recognised to residents when they meet the conditions provided for by the law. The same arguments above regarding the unconditional right to stay can be reproduced here.

- **Workers and self-employed persons, and job seekers (Article 14(4))**

Article 14(4) provides that an expulsion order may not be adopted against Union citizens or their family members if the Union citizens are workers or self-employed persons, or if the Union citizens entered the territory of the host Member State in order to seek employment. In this case, the Union citizens and their family members may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.

Article 14(4) has not been transposed, since the only condition to enter and reside in Spain is to have the nationality of a Member State. Union citizens and their family members could never be expelled for being an unreasonable burden or making recourse to the social assistance system. The only grounds for denying entry, refusing registration or expelling Union citizens and their family members are public policy, public security and public health. These measures cannot be applied to serve economic ends. So the special protection is granted to all Union citizens and their family members.

In addition, Union citizens who entered to seek jobs do not need to register in the Public Employment Services (INEM), and as the Spanish authorities indicate, there is no way of knowing or checking for how long the person has been seeking job. In any case, this argument is superfluous, since the right of residence is given simply because the person is a Union citizen. The only obligation for a Union citizen who entered Spain seeking a job, is that he/she will also have the obligation to register and obtain a registration certificate within 3 months from entry (which is against the Directive). If this failure is discovered by the authorities, then a fine of up to EUR300 may be imposed.

(c) Article 15(2) – expiry of document not a ground for expulsion, and ban on entry – Article 15(3)

Article 15(2) provides that the expiry of the identity card or passport on the basis of which the person concerned entered the host Member State and was issued with a registration certificate or residence card shall not constitute a ground for expulsion. This obligation has been correctly transposed by Article 15(7) of RD 240/2007. The RD also includes expiration of the residence card. This is simply to clarify, since it is simply declaratory and does not grant any right (ECJ in *Martinez Sala*)[69].

Article 15(3) prevents Member States from adopting an entry ban when the removal from territory is due to restrictions of free movement not due to public policy, public health or public security.

The only expulsion decisions that can be taken under RD 240/2007 are those in relation to public security, public policy and public health. Only in these cases a ban on entry will be imposed.

There are four figures in Spain regulating aliens' exit:

[69] C-85/96, *Martínez Sala* v. *Freistaat Bayern* [2001] ECR II-2823.

1) Return (Article 156 Aliens Regulation): this is the case of a person arriving to an official exit point and where the authorities refuse entry because the person does not meet the necessary conditions (*e.g.* does not have the necessary documents) for entry. In this case a different regulation applies to persons within the scope of RD 240/2007 (Article 4(6))– see below procedural guarantees).

2) Devolution (Article 157 Aliens Regulation): this is the measure taken on persons who try to enter illegally (not through official entry points when so required and without the necessary documents) and are intercepted in the borders or around.

3) Compulsory exit (Article 158 Aliens Regulation): the measure adopted in the case of lack of authorisation for being in Spain, especially because the person did not meet or no longer meets the requirements for entry and residence in Spain, or the cases of administrative refusal of prolongations, of residence authorisations or any other document needed to be resident in Spain (persons irregularly in Spain).

4) Expulsion (administrative or judicial) based on public order and public security (including serious and very serious breaches of the legislation) (Article 57 of LO 4/2000 and Article 138). Aliens Regulation). For persons subject to RD 240/2007 there is the specific regime in Articles 15-18 of RD 240/2007.

Only when there is an expulsion decision can a ban on entry been imposed for between three and ten years (Article 58 LO 4/2000). A devolution will also be accompanied by a ban on entry when the person tried to entered the country illegally (Article 157(5) Aliens Regulation).

The return and the compulsory exit, which are the only measures restricting free movement that may be imposed for reasons other that public security and public order regulated under Article 15(1) of Directive 2004/38, are not accompanied by an entry ban. In the case of the compulsory exit this is expressly stated by Article 158(3) Aliens Regulation:

> If the aliens referred to in this Article effectively exits Spain according to the provisions of previous paragraphs, an entry ban may not be imposed and they could return to Spain according to the rules on entry into the Spanish territory.

For this reason, the transposition is considered correct.

2.5 Right of permanent residence

2.5.1 General rule for Union citizens and their family members (Article 16: Eligibility)

Article 16 of the Directive recognises the right of permanent residence to Union citizens and their family members who have resided legally for a continuous period of five years. The right is no longer subject to the conditions of Chapter III.

Article 10(1) of RD 240/2007 effectively transposes this provision, including the fact that the right shall not be subject to the conditions of Chapter III, which regulates the conditions for residence of up to three months and residence for more than three months (including the retention of the right of residence).

Article 10(7) also transposes correctly Article 16(4) so that the right of permanent residence is lost after absences of more than two consecutive years.

The only ambiguity is on the transposition of Article 16(3) of Directive 2004/38/EC. Under Article 16(3) “Continuity of residence shall not be affected by temporary absences not exceeding a total of six months a year, or by absences of a longer duration for compulsory military service, or by one absence

of a maximum of 12 consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country".

Article 10(6) of RD 240/2007 simply states "[f]or the purposes of this Article [permanent residence], the continuity of residence shall be evaluated in accordance with the present royal decree." However, no provision of the RD defines continuity. It seems that the RD is trying to differentiate the continuity regime under RD 240/2007 from that of the Aliens Act (since the latter it less favourable). Therefore, one should look at other provisions of the RD regulating continuity which are: interruption of continuity due to expulsion (Article 15(3) of the RD); and Article 14(3) for the evaluation of continuity. This provision seems to be the most adequate to evaluate continuity "in accordance with the RD" as requested by Article 10(6) of RD 240/2007. However, as mentioned under Article 6 of the Directive, the first three months are not taken into account to derived rights, which affects the correctness of the calculation of the length of residence and therefore the transposition is considered incorrect.

Article 14(3) transposes Article 11 of the Directive; therefore it only refers to the validity of the residence card. Article 14(3) includes the requirements listed in Article 16(3) of the Directive and it is even more flexible since it covers cooperation work in third countries and study programmes beyond 12 months of absence. Although, a clear provision would have been better, it seems that the *effet utile* of Article 16(3) of the Directive would be ensured through a combination of Article 10(7) and 14(3) of RD 240/2007.

No specific regime applies to new Member States (neither EU10 nor Bulgaria and Romania). However, in one point the Spanish transposition is not correct: the first three months of residence are not taken into account in the 5 years calculation as per Article 6 of RD 240/2007. This is against the Directive. See comments on Article 6 of the Directive.

2.5.2 Acquisition of the right of permanent residence for workers/self employed person and their family members (Article 17)

Article 17 regulates the conditions under which workers/self-employed persons and their family members will acquire the right of permanent residence before the completion of 5 years of residence.

This provision has been correctly transposed by Article 10(2)-10(5). The Application form EX-16 also includes details of the evidence required to prove these situations for the issuance of the permanent residence card. These requirements will be commented upon here in order to ease the analysis, instead of under Article 19 of the Directive.

- **Workers' and self-employed persons' right to permanent residence (Article 17(1)-(2))**

Articles 17(1)-(2) are transposed by Article 10(2) and (3). The construction of the Spanish provision is different.

Article 17(1) describes the situations under which workers and self employed person can acquire the right of permanent residence. Under Article 17(2) the Directive establishes exceptions on the length of residence and employment for some of the situations described when the worker's or self-employed person's spouse is a national of the host Member State or has lost nationality of that Member State upon marriage to that worker or self-employed person.

The Spanish provision describes the situations in different provisions as the Directive but it includes the exception in the same provision, which actually ease the reading and comprehension of the provision.

- <u>The worker or self employed stopped working and had reached the old age pension, and cases of early retirement (Article 17(1)(a))</u>

Article 17(1)(a) grants the right of permanent residence to workers or self-employed persons who, at the time they stop working, have reached the age laid down by the law of that Member State for entitlement to an old age pension or workers who cease paid employment to take early retirement, provided that they have been working in that Member State for at least the preceding twelve months and have resided there continuously for more than three years.

Article 10(2)(a) transposes this situation literally and adds, according to Article 17(2) of the Directive that the condition of duration of residence shall not apply if the worker's or self-employed person's spouse or registered partner is a national of Spain or has lost his/her Spanish nationality by marriage or registration as registered partner of the worker.

Spain grants old age pension to self-employed persons, therefore, the second subparagraph of Article 17(2)(a) requiring that "[i]f the law of the host Member State does not grant the right to an old age pension to certain categories of self-employed persons, the age condition shall be deemed to have been met once the person concerned has reached the age of 60" does not need to be transposed in Spain.

Regarding the evidence of being in this situation when applying for the registration certificate, EX-16 includes:

> *The worker or self-employed person who has ceased his/her activity having attained the age foreseen in the Spanish legislation for retirement with a right to pension and having resided continuously in Spain for more than 3 years and exercised his/her activity for the last 12 months in Spain.*
>
> - Document certifying the access to retirement
>
> - Certificate of employment life issued by the Social Security in which is shown that the last 12 months the person has been working in Spain (except if the spouse or registered partner of the Union citizen is a Spanish national or lost that nationality upon marriage or partnership with the Union citizen.)
>
> - Registration certificate of the Union citizen in which is shown that he/she continuously resided in Spain for at least 3 years (except if the spouse or registered partner of the Union citizen is a Spanish national or lost that nationality upon marriage or partnership with the Union citizen. In this case, a document certifying this circumstance shall be submitted)
>
> <u>The self-employed person who ceased work based on early retirement</u>:
>
> - Document certifying the access to early retirement.
>
> - Certificate of employment life issued by the Social Security showing that in the last 12 months he/she carried out his/her activity in Spain (except if the spouse or registered partner of the Union citizen is a Spanish national or lost that nationality upon marriage or partnership with the Union citizen.
>
> - Registration certificate of Union citizen showing at least 3 years of continuous residence in Spain (except if the spouse or registered partner of the Union citizen is a Spanish national or lost that nationality upon marriage or partnership with the Union citizen. In this case, a document certifying this circumstance shall be submitted)

As seen above, the proof requested when applying for the certificate is any document providing evidence of retirement and a certificate of economic activity (*certificado de vida laboral*) issued by the Social Security showing that the person has been working in Spain the previous 12 months. This document is not required when the worker's or self-employed person's spouse or registered partner is a national of Spain or has lost his/her Spanish nationality by marriage or registration as registered partner of the worker. In this case, the person concerned should submit a document showing this circumstance.

Regarding early retirement, the applicant must submit document evidencing early retirement, which is the same certificate issued by the Social Security showing that he/she has work in Spain the previous

12 months. This document is not required when the worker's or self-employed person's spouse or registered partner is a national of Spain or has lost his/her Spanish nationality by marriage or registration as registered partner of the worker.

These documents seem to be in line with the Directive. The Certificate issued by the Social Security is easy to obtain and is the document requested to Spanish nationals to obtain benefits derived from employment life.

The problem is that it seems that the only document admitted as a proof of length of residence (in this case three years) is the registration certificate as a Union citizen. This would be contrary to the Directive which allows for the continuity of residence to be proven by other means. If the person can prove by other means that he/she has been living in the country for three years, the right should be considered as proven and the only thing the administration could do is to impose a fine for not having requested the registration certificate at the outset. The legislation transposing the provision is correct but this practice would be a serious breach of the Directive.

- Permanent incapacity to work (Article 17(1)(b))

Article 17(1)(b) grants the right of permanent residence to workers or self-employed persons who have resided continuously in the host Member State for more than two years and stop working there as a result of permanent incapacity to work. If such incapacity is the result of an accident at work or an occupational disease entitling the person concerned to a benefit payable in full or in part by an institution in the host Member State, no condition shall be imposed as to length of residence.

Article 10(2)(b) transposes this provision almost literally and adds, according to Article 17(2) of the Directive, that the condition of duration of residence shall not apply if the worker's or self-employed person's spouse or registered partner is a national of Spain or has lost his/her Spanish nationality by marriage or registration as registered partner of the worker.

As to the proof of being under this condition EX-16 establishes:

> *The worker or self-employed who ceased work as a consequence of permanent incapacity*:
>
> - Document certifying the permanent incapacity
>
> - Registration certificate of Union citizen showing at least 2 years of continuous residence in Spain (except if the incapacity is the result of an accident at work or occupational disease entitling the person to a pension payable in full or in part by an institution of Spain or if the spouse or registered partner of the Union citizen is a Spanish national or lost that nationality upon marriage or partnership with the Union citizen. In this case, a document certifying this circumstance shall be submitted)

No specific document is requested as proof of the incapacity. This is in line with the Directive. The comment made above regarding the fact that the only document admitted to show two years of continuous residence is the registration certificate can be reproduced here.

- Frontiers workers (Article 17(1)(c))

Article 17(1)(c) grants the right of permanent residence to workers or self-employed persons who, after three years of continuous employment and residence in the host Member State, work in an employed or self-employed capacity in another Member State, while retaining their place of residence in the host Member State, to which they return, as a rule, each day or at least once a week. For the purposes of entitlement to the rights referred to in points (a) and (b), periods of employment spent in the Member State in which the person concerned is working shall be regarded as having been spent in the host Member State.

Article 10(2)(c) transposes this provision literally but regarding the second subparagraph, it adopts a more general drafting. References to (a) and (b) are replaced with right of residence, meaning

permanent residence as understood in this context, since the provision is a subdivision of the right of permanent residence which is the same as implied by Article 17(1)(c) second subparagraph.

As to the documents, EX-16 states:

> *The worker or self-employed who after 3 consecutive years of activity and residence in Spain, carries out his/her professional activity in another MS while keeping his/her residence in Spain and returning at least once a week:*
>
> - Registration certificate of Union citizen showing at least 3 years of continuous residence in Spain
>
> - Certificate of employment life issued by the Social Security, showing that in the last 3 years he/she has been working in Spain
>
> - Document certifying that the person carries out his/her activity in another MS
>
> - Proof that the person returns to the Spanish territory at least once a week

With the exception of the certificate from the Social Security, which is the document also requested from Spanish citizens as a proof of employment life, the form does not require for specific document, leaving the means of proof open. This is in line with the Directive (same comment as above regarding the registration certificate).

- <u>Evaluating periods of employment (Article 17(1) last subparagraph)</u>

Article 17(1) last subparagraph states that periods of involuntary unemployment duly recorded by the relevant employment office, periods not worked for reasons not of the person's own making and absences from work or cessation of work due to illness or accident shall be regarded as periods of employment

This provision has been almost literally transposed by Article 10(4) RD 240/2007. Article 10(4) refers to the situation described in Article 10(2) which transposes Article 17(1)(a)-(d); therefore, transposition is correct.

- **Acquisition of the right of permanent residence by family members (Article 17(3))**

Under Article 17(3) of the Directive, irrespective of nationality, the family members of a worker or a self-employed person who are residing with him in the territory of the host Member State shall have the right of permanent residence in that Member State, if the worker or self-employed person has acquired himself the right of permanent residence in that Member State before the completion of the five years of residence.

Article 10(3) of RD 240/2007 transposes this obligation literally. Regarding proof, although this will be discussed more in detail under Article 20, enough is to say that the family member will have to bring the registration certificate of permanent residence of the Union citizen.

- **Acquisition of the right of permanent residence by family members in the case of death (Article 17(4)**

Article 17(4) allows the family member of a Union citizen, irrespective of nationality and who are residing with the Union citizen in the host Member State, to acquire the right of permanent residence if the worker or self-employed person dies while still working but before acquiring permanent residence status in the host Member State, provided certain conditions are met.

Article 17(5) transposes correctly Article 17(4) and the conditions laid down therein. Application form EX-16 reproduces the conditions for a family member to acquire the right. The conditions are:

(a) the worker or self-employed person had, at the time of death, resided continuously on the territory of that Member State for two years: Transposed literally by Article 10(5)(a) of RD 240/2007.

(b) the death resulted from an accident at work or an occupational disease: Transposed literally by Article 10(5)(b) of RD 240/2007.

(c) the surviving spouse lost the nationality of that Member State following marriage to the worker or self-employed person: Transposed literally by Article 10(5)(c) of RD 240/2007

Regarding proof, EX-16 states:

> **Residence card of permanent residence of family member of a Union citizen**
>
> 5. According to the specific case, the family member shall also submit:
>
> *- Family member of a Union citizen deceased during his/her active life before acquisition of the right of permanent residence:*
>
> a. Residence card of family member of Union citizen derived from having resided with the deceased Union citizen
> b. Depending on the specific case, it shall also be submitted:
> - registration certificate as Union citizen of the deceased family member, showing a minimum of at least 2 years of continuous residence in Spain;
> - document certifying that the death was due to accident at work or occupational disease;
> - document certifying that the surviving spouse was a Spanish citizen and lost this nationality as a consequence of the marrying the deceased Union citizen.

No specific documents are required to certify that the death was due to occupational diseases or accident at work, or to certify that the nationality loss. However, as in the previous cases the registration certificate of the Union citizen and the residence card of the family member is the only document admitted to prove residence of the family member and of the deceased Union citizen. This is against the Directive.

2.5.3 Acquisition of the right of permanent residence by family members who are not nationals of a MS and retained their right of residence (Article 18)

Article 18 grants the right of permanent residence to family members who retained the right of residence under Article 12 and 13 of the Directive after a legal and continuous residence of five years.

There is no specific provision in the RD regarding the acquisition of the right of permanent residence by those who have retained the right of permanent residence under Article 12(2) or 13(2) of the Directive. This is the consequence of the total exclusion of these family members from RD 24/2007. As shown above, these family members will be subject to the Aliens Act. The condition to obtain the right of permanent residence under the Aliens Act is legal residence for five consecutive years (Article 32 LO 4/2000 and 72(1) Aliens Regulation). The evaluation of continuity will follow partially the specific regime under the RD and partially the general regime for aliens under the Alien Regulation, which is less favourable[70]. The transposition is incorrect.

[70] Absences for less than 6 months (unless justified) and provided the total absences do not amount for more than one year within the five years (see *Extranjería*, cfr supra note 60 p. 188). The interpretation from the Supreme court is very flexible and indicates that the importance is that the person has not moved is usual residence outside Spain (STS 23 May 2001, RJ 2001, 4185, cited at *Tratado de Extranjería*, cfr supra note 5, p. 241)

2.5.4 Documents certifying permanent residence for Union citizens (Article 19)

Article 19 establishes that upon application and after having verified duration the Member State shall issue the Union citizen entitled to permanent residence with a document certifying permanent residence. The document shall be issued as soon as possible.

Article 10(1) second subparagraph of RD 240/2007 transposes correctly this requirement. The certificate is issued upon application. The concerned person shall go personally to the Aliens Office of the province in which he/she is residing or, if there is none, the Commissariat of Police, to request a certificate of the right of permanent residence. The competent authority is obliged to issue the certificate as soon as possible, after having verified duration of residence.

Article 12 of RD 240/2007 provides that the issuance of certificates and residence cards has to be treated through a preferential procedure. No information could be obtained about the practice, but probably it would depend on the cases and whether all the documents are submitted. In the visit to an Aliens Bureau, a Spanish national renewing the residence card for her daughter and father-in-law who were third country nationals informed the expert that an appointment was needed and that it normally took between one and three months. For Union citizens this is probably shorter, although it would depend on whether the person acquires the right under Article 16 or under Article 17, since in the latter case more documents are needed.

The transposition is correct but administrative practice could be considered against the Directive. EX-16 establishes:

Registration certificate of permanent residence of a Union citizen

1. Valid and in force passport or ID. If expired, copy of the document and of the application for renewal
2. Document certifying the payment of the fee for issuing the certificate
3. Depending on the case, he/she shall also submit:

- registration certificate as Union citizen showing 5 years of continuous residence

The obligation to submit an ID card or passport to prove identity and the payment of the tax are in line with the Directive. However, the limitation of the means of proof of durability to the registration certificate is against the Directive. It is not clear whether these documents are compulsory or recommended documents. If this is the only documents admitted, the practice should be considered against the Directive. The right of residence derives from meeting the conditions and not from the documents attesting that condition. Admitting only the registration certificate as proof, would imply that the legality of the residence derived from holding the document, which would be against the Directive and RD 240/2007, where no conditions are imposed to have the right of residence.

The Union citizen should be able to prove the continuity and legality of residence by any means admitted in law (see Article 21 of the Directive), in this case according to Spanish procedural and administrative law. Therefore, although the transposition is correct, the implementation via the EX-16 is against the Directive on this point, unless other means of proof are admitted. The Spanish responses to the questionnaire indicate that only these documents are admitted.

2.5.5 Permanent residence card for family members who are not nationals of a MS (Article 20)

Similarly, Article 20 of the Directive requires Member States to issue family members of Union citizen with a permanent residence card, which will be automatically renewed every 10 years. The application is to be submitted before the residence card expires. Interruption in residence not exceeding two years will not affect the validity of the card. Member States can impose sanctions for failure to comply with this requirement.

Article 11 transposes effectively the requirements of this provision of the Directive. The person shall go to the Aliens Bureau or Commissariat of Police and request the card. The authorities have to issue the card within three months from the date in which the application has been registered. Interruption in residence not exceeding two years will not affect the validity of the card.

No information could be obtained on whether registration of the entry of an application form will be considered filed when the person submits the application form even with no documents, or whether some of all documents must accompany the application form for the application to be registered. Article 11(1) second subparagraph states that the application shall be submitted during the month before the residence card expires although it can also be requested three months after expiration of the residence card without prejudice to the administrative sanction applicable. Therefore, probably, to avoid the sanction especially if the person submits the application very close to the deadline, the entry of the application will be registered even if no documents accompany the form.

As see in the previous paragraph, Article 11(1) second subparagraph states that "the application shall be submitted during the month before the residence card expires although <u>it can also be requested three months after expiration of the residence card without prejudice to the administrative sanction applicable</u>" [emphasis added]. If submitted within thee months after expiration of the card and administrative sanction will be imposed. But what happens if submitted after those three months? It is as if Article 11(1) would be refusing the family members' right to be issued with a residence card if the application is submitted three months after expiration of the card. This could be considered as a disproportionate and discriminatory sanction. No similar measure exists for Spanish nationals who do not renew their ID cards (even if expired years ago). The expert believes this is a legislative flaw; [71]otherwise, this provision is a serious breach of the Directive.

Article 11(2) lists the documents to be submitted with the application form:

(a) valid passport. If the passport has expired, a copy of the passport and a request for renewal
(b) Document evidence of the circumstances entitling to the right
(c) three recent photographs in colour and ID size

Since the card is not used as an identification document, the identity and nationality is again checked as well as the existence of the conditions that grant the right of residence. Three photographs are also included.

These requirements are in line with the Directive. Therefore the transposition is considered correct.

Obviously, the most complicated aspect will be to prove that the person falls under one of the situations given the right of permanent residence. Form EX-16 provides more details:

> **Residence card of permanent residence of a family member of a Union citizen:**
>
> 1. Valid and in force passport or ID. If expired, copy of the document and of the application for renewal
> 2. Document, when appropriate duly translated and certified or legalised, certifying the family link, marriage or registered partnership.
> 3. three photographs in colour with white background ID size

[71] Under the Aliens Act if a person does not renew the card after three months of the validity period, the failure to renew is considered a serious offence instead of a petty offence (see *Tratado de Exntrajería*, cfr supra note 5, p. 444). Maybe RD 240/2007 has this in mind but it is meaningless for the Union citizens' regime because the only refusals are for public order and public security reasons. If the failure to requests were to be considered a serious offence in this case, it would mean that failure to request the permanent residence document would be a violation of public order and public security which is never the case in Spain, not even under the Aliens Act (under the Aliens Act the Supreme Court has been very clear on this aspect: if the person does not request the card or the renewal, the only sanction possible is a fine; only when the person represents a threat can the expulsion measure be imposed replacing the fine- see below for more details).

4. document certifying the payment of the fee to issue the card
5. Depending on the concrete situation, he/she shall also submit:
   - *Family member of a Union citizen with right to permanent residence:* registration certificate of permanent residence of the Union citizen.

The Application form includes, as in the case of residence cards, the documents certifying the family link. Regarding the documents required to proving the acquisition of the right of permanent residence under Article 17, these have already been commented upon. As to the documents for the ordinary situation of a family member who has acquired the right for residing as family member for five years, the Application form requires the registration certificate of the permanent residence of the Union citizen. However, the family member does not have to submit, as in the case of death, his/her residence card. In addition, the person has to show the receipt for payment of the fee.

Failure to request the certificate does not lead to any specific sanction in the RD.[72] A possibility is that the wording of Article 15(8) of RD 240/2007 is understood in a generic way so that it includes all types of registration certificates and residence cards regulated under the RD. In any case, it is an administrative fine of up to 300EUR. This is a proportionate sanction. According to LO 1/1992 of citizens security, not obtaining the ID is sanctioned with a fine of up to 300,51 EUR (Article 26(a) and Article 28(1)(a)).

The permanent residence card is renewed automatically every 10 years (which is a difference with the renewal of the residence card).

2.5.6 Continuity of residence (Article 21)

Article 21 states that for the purpose of the Directive, continuity of residence may be attested by any means of proof in use in the host member State. Continuity of residence is broken by any expulsion decision duly enforced against the person concerned.

Article 15(3) RD 240/2007 transposes literally the second part of Article 21, *i.e.,* continuity of residence is broken by duly enforced expulsion.

Regarding the first part, the only general provision is that in Article 10(2) "for the purposes of this Article, the continuity of residence shall be evaluated in accordance with the present royal decree". The Instruction from the Ministry of Labour indicates that documents were only indicative in the case of dependency. In many other cases, the possibility of means of proof is left open so that any means of proof will be admitted. However, regarding the means of proof to certify the length of residence as shown in the previous Articles, it would seem that the only document accepted is the registration certificate or residence card. This would be against the Directive and arguably against Spanish administrative law.

The means of proof in use in Spain are regulated in Article 80 of Law 30/92 of Administrative procedure which states that "the relevant facts for adopting a decision under an administrative procedure may be certified by any means of proof". The means that proof submitted by the person concerned may only be refused (non-admitted) if manifestly inadequate or unnecessary and with a reasoned decision (Article 80(2) Law 30/92). This law is applicable on a subsidiary basis to RD 240/2007 in procedural aspects according to Second Additional Provision. Therefore this provision should apply when the authorities take a decision on issuance of registration certificates and residence cards.

On the basis of the Spanish legislation, no provision prevents the admission from accepting any means of proof provided the means submitted really prove the situations described. However, the administrative practice may be against EC law.

[72] Reference to the sanctions imposed for failures on the ID for Spanish nationals, as done for residence cards and registration certificate (Article 15(8) RD 240/2007) but nothing is said of permanent residence cards.

2.6 Common provisions (Articles 22-26)

2.6.1 Territorial scope (Article 22)

The RD applies to the whole territory of Spain, including Ceuta and Melilla and the Canary Islands.

Regarding the territorial restrictions, those are only based on Criminal law and apply to both Spanish citizens and all aliens. Article 13 of the Spanish Constitution states that aliens shall have in Spain the public freedoms guaranteed in the Constitution according to international treaties to which Spain is a party, and to the law. Therefore they benefit *inter alia* from the right recognised in Article 19 of the Constitution: freedom to freely move within Spain and to cross the borders as well as to choose residence and reside in Spain.[73]

Article 5 of LO 4/2000 specifically states that "Aliens staying in Spain and in accordance with what is established in Title II of this law, shall have the right to circulate freely within the territory of Spain and choose residence with no limitations other that those established with general character by the Treaties and laws, or decided by the judicial authorities with a precautionary character or in the criminal proceeding or procedure of extradition in which the alien has the condition of defendant, victim or witness, or as a consequence of *res judicata*".

Although the legislature can establish additional conditions for the exercise of these rights (see below discussion on Article 24 of the Directive), they have to respect the Constitutional provisions.[74]

There are three restrictions regarding the right of free choice of residence applicable to Aliens (See also comments to Article 4 on restrictions to leave the country):[75]

1. obligation of personal presence before the judge periodically

This includes the specific cases regulated under Article 5(2) LO 4/2000[76], which establishes that the Ministry of Interior can adopt measures on aliens (*e.g.* in particular not to get close to borders) that do not apply to Community citizens, as well as provisions regulated under Criminal law that apply equally to all persons (Spanish citizens, Unions citizens and third country nationals). These measures can be adopted when the person is a witness in a criminal procedure, or is prosecuted to avoid that the person can escape the country, and are regulated under Article 410 and 530 of Law on criminal procedure.[77]

2. ban to reside in a given territory (different from the expulsion and ban on entry)

These are the cases where a security measure or a criminal penalty imposes a ban to reside in a given territory, also applicable to any person. This is regulated in Article 39(f)-(g) Criminal Code as a penalty for the commission of a crime, which includes ban of residence in a given territory and the interdiction to get close to the victim, or as a security measure (Article 96(3) points 4 and 5), which includes interdiction to reside in a place or territory. The person is required to declare the residence

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73 This interpretation of the Constitution was established by SSTC 94/1993, paragraphs 2 and 3, 116/1993, ff 2, 242/1994, f 4, 24/2000, f, 4 and 72/2005 ff 4 et al.

74 *Tratado de extranjería*, Crf supra note 5, p.149.

75 Goizcueta, cfr supra note 40, p. 6.

76 2. However, it will be possible to established limitative measures in case the state of emergency or exception or siege is established in the terms established in the Constitution and exceptionally for reasons of public security in an individualised way, motivated and proportional to the circumstances that are at stake by resolution of the Minister of Home Affairs and adopted according to the procedural guarantees of the procedure to impose a sanction established in the law. These limitative measures, which duration shall not exceed the minimum necessary and proportional to the circumstances that justified their adoption, can consist of periodical presentation before the competent authorities and the removal from specific border or specific populations.

77 Goizcueta, cfr supra note 40.

chosen and notify any change, and the interdiction to go to certain places or territories or attend certain events (sportive, cultural) or visit certain establishments (gambling places or places where alcohols is given).

These measures therefore apply equally to all persons (Spanish citizens, Union citizens and third country nationals).[78]

There are also the specific cases regulated under Article 5(2) LO 4/2000 establishes that the Ministry of Interior can adopt these measures on aliens, (*e.g.* in particular not to get close to borders) which do not apply to Community citizens

3. obligation to reside in a given territory

This is a security measure regulated in Article 96(3) point 3 and 5). This measure also applies equally to all persons.[79]

Therefore, the Spanish legislation is in compliance with the Directive.

2.6.2 Right to take up employment by family members (Article 23)

Article 23 of the Directive states that irrespective of nationality, the family members of a Union citizen who have the right of residence or the right of permanent residence in a Member State shall be entitled to take up employment or self employment there.

Article 3(2) RD 240/2007 recognises this right (it is also included under general Aliens law for family members of residence card holders).

According to Article 3(2) RD 240/2007:

> Similarly, the persons included in the scope of application of the present RD, with the exception of descendants of more than 21 years old who are dependants and ascendants who are dependants regulated in Article 2.d of the present RD shall have the right to take up employment or self-employment and provide services **in the same conditions as Spanish citizens** without prejudice of the limitations established under Article 39(4) of the EC Treaty.
>
> The situation of dependency shall not be affected if the dependent carries out a professional activity provided it is attested that the income obtained from such activity is not basic for living, and for full time contracts that their duration is no more than three months in the year and does not have continuity in the market, or for part time contracts, when retribution is not intended for living. If the situation of dependency ends, the family member of the Union citizen shall be subject to Article 96.5 of the Regulation of LO 4/2000

All Unions citizens have the right to take up employment in Spain with the only limits established by the EC Treaty, regardless of whether they are family members or not (since they received the registration certificate on a personal basis for being Union citizens. Regarding third country family members, Article 3(2) ensures that the same rights apply to them.

The only limitation in principle to the right to take up employment are those of Article 39(4) of the EC treaty[80] (public service exception).

The problem is the second exception included in the Spanish legislation for dependants. Article 3(2) second subparagraph, does not allow dependant family members to take up employment at risk of

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[78] Idem.

[79] Idem.

[80] The access to public service by Union citizens is regulated by Law 7/2007 of 12 April and RD 543/2001 of 18 May.

losing the status of dependant family members and being subject to the Aliens Act. The provision requires that in order to retain the status of dependency, activities cannot be carried out to obtain resources basic for living (considering that part-time jobs do not provide enough resources). The fact that the dependant works in a full time contract of no more than three months of duration and with no continuity in the labour market will not alter the situation of dependency.

The RD is probably having in mind the situation of children or other dependent family members carrying out summer jobs or working during the year to obtain pocket money. If the person earns sufficient resources, then the status of dependency will end.

This interpretation is against the Directive. The conditions of dependency could only be requested at the moment of entry. In *Jia* the ECJ indicates that "the need for material support must exist in the State of origin of those relatives or the State whence they came at the time when they apply to join the Community national." Directive 2004/38/EC has not established any specific exception to the right to take up employment as was the case in the previous legislation. The transposition is therefore considered incorrect.

Regarding "**other family members**",[81] and family members who retained the right of residence, these individuals are subject to the general regime of the Aliens Act. The transposition is also in compliance with the Directive.

According to Article 10 of LO 4/2000, all aliens residing in Spain and meeting the conditions have the right to work and access to the Social Security system. In addition, they can access the public service under the same conditions as Spanish citizens according to the constitutional principles of equality, merit and capacity.

Article 96(3) Aliens regulation allows family members who already held a residence card as family members to carry out a professional activity as Spanish citizens (with no need for another authorisation). Article 98(3) gives the same right to persons who have received residence card for exceptional circumstances. These are the two types of cards that "other family members" who are third country nationals can received.

These provisions are developed through Order/TAS/3698/2006, of 22 November on Inscription of workers who are non-Union nationals in the Public Services of Employment and Agencies (Article 5 and 6 respectively).

2.6.3 Equal treatment (Article 24)

Article 24(1) of the Directive grants the right of equal treatment to Union citizens and their family members (including third country family)

The transposition carried out by Article 3(4) of the RD is not completely correct. Article 3(4) states that "All citizens of the Union who reside in Spain on the basis of this RD shall enjoy equal treatment with the nationals of Spain within the scope of application of the EC Treaty. This right shall be extended to family members who are not nationals of a Member State of the EU or a State party to the EEA and who have the right of residence or the right of permanent residence".

The problem is that Article 3(4) refers to "residence on the basis of the RD" which is not in line with the Directive.

[81] It should be noticed that other family members coming from one of the States with which Spain has Bilateral agreements of Peace and Friendship (*e.g.* Uruguay) or of double nationality (*e.g.* Chile or Peru) they have a right to take up employment in the same conditions as Spanish citizens and right of residence.

Spain has not made use of the option provided in **Article 24(2)**, to ensure that social rights are granted to all persons legally residing in Spain. This is confirmed by the Spanish authorities' responses. In addition there are basic social assistance benefits that are enjoyed regardless of whether the person is a resident in Spain or not, or regardless whether the person is legally staying in Spain or not, for example emergency medical services.

Apart from the general principle of equal treatment and non discrimination (and other constitutional rights) the Aliens Act specifically recognised the following rights:[82]

- all aliens residing in Spain have the **right to education** in the same conditions as Spaniards, including access to scholarships (Article 9) and access to education should be promoted by the public authorities to promote their integration while respecting their cultural diversity. All aliens residing in Spain have also the right to become professors or researchers as well as create educational centres in Spain.

- All aliens have the right to **medical assistance** in the same conditions as Spaniards if they are registered in the municipality (in which they usually reside- therefore it is not necessary residence in Spain), or they are minors (less than 18 years old). Any alien, regardless on whether resident or not, regardless of whether they are legal residents or not, shall have the right to emergency medical assistance and pregnant women shall have the right to medical assistance as any other Spaniards during pregnancy, birth and post-birth.

- All aliens residing in Spain have the right to **housing** aids in the same conditions as Spaniards

All aliens residing in Spain have the right to access **social security benefits and social assistance** under the same conditions as Spaniards. Furthermore, basic benefits and assistances shall be granted to all aliens in Spain, regardless of whether they are resident or not, or whether they are in a legal situation or not (Article 9 LO 4/2000).

2.6.4 General provisions concerning residence documents (Article 25)

Under **Article 25(1)** of the Directive, possession of a registration certificate, of a document certifying permanent residence, of a certificate attesting submission of an application for a family member residence card, of a residence card, or of a permanent residence card, may under no circumstances be made a precondition for the exercise of a right or the completion of an administrative formality, as entitlement to rights may be attested by any other means of proof.

This provision has been incorrectly and incompletely transposed by Spain. In addition, the administrative practice may be considered not in compliance with the Directive.

Article 12(2) of RD 240/2007 establishes that "the application and procedure of the registration certificate or of the residence card shall not be an obstacle for the provisional stay in Spain or carrying out activities." In addition, Article 8(2) on residence card of Union citizens states that "possession of the receipt of application shall not be made as a precondition for the exercise of a right or the completion of an administrative formality provided the entitlement of rights may be attested by other means of proof."

The legislation only specifies clearly that for family members the possession of the receipt of submission of an application cannot be made a precondition for the exercise of rights or completion of administrative formalities. However, nothing is said regarding the possession of the card although this

[82] This is the list of rights and conditions after STC 7 November 2007 which has extended the scope of the rights and limited the conditions established by the original text of LO 4/2000 as modified by LO 8/2000. Several conditions included therein were considered unconstitutional.

might be implicit using an argument *de minor ad maius*. In any case, the legislation is not clear, especially if read in connection with Article 12(2). Although the possession of the card is not obstacle for staying in Spain or the exercise of an activity, the law also says “provisional stay”, which may imply that for residence the person shall have the card or certificate and this would seem contrary to the Directive since the card or certificate is only declaratory. This approach would also be against the RD which clearly recognises the rights regardless of the possession of the card.

In addition, the only mean of proof admitted to obtain the permanent registration certificate or permanent residence card is the registration certificate and the residence card, which would be against Article 21 and Article 25 of the Directive.

Finally, notice that to carry out business in a more regular way, aliens are giving a NIE (*número de identidad de extrajero*) or Alien Identity Number. This number is given *ex officio* by the authorities. So it might be that the requirement for administrative formalities or exercising rights is to have a NIE.

Finally, as mentioned before, under the previous regime (according to which certain Union citizens did not need a card), certain administrations requested the card to prove residence and obtain certain benefits. Without a clear provision as Article 25 of the Directive, this practice may continue. For these reasons, the transposition is considered incorrect and incomplete.

Regarding **Article 25(2) on fees for issuance the documents** regulated in the Directive, Article 14(1) of RD 240/2007 states that the fee for issuing the registration certificate or the residence card shall be the same as the fee required for Spanish nationals to obtain and renew the ID. The transposition is therefore correct.

The fee is currently 6,80 EUR according to point 4.5 of Order of the Ministry of the Prime Minister ORDEN/PRE/3654 of 14 December establishing the fees for the issuance of administrative authorisations and issuance of documents in the area of immigration and aliens as well as issuance of visa at the borders. The Spanish ID is 6,80 EUR.

2.6.5 Checks (Article 26)

Article 26 provides that Member States may have checks to ensure that beneficiaries of the Directive carry their residence cards in the same way as nationals carry their identity card.

This provision has not been explicit transposed, but this obligation is already included in Law 1/92 on Citizens’ Security in similar terms for Spanish nationals and aliens, and LO 4/2000. Under Article 9 Law 1/92 already commented, all Spanish nationals have the obligation to obtain an ID. The same applies to aliens in Spain (Article 11). There is a general obligation in Spain to identify him/herself if so required by the police when carry out checks on the street. Although there is no specific obligation to carry out the ID, all people that are obliged to have an ID are also required to exhibit the ID when so required and therefore, there is an implicit obligation to carry the ID or at least an equivalent document that serves identification purposes. The same applies to aliens who have the right and the obligation to obtain the documentation proving their identity and also their situation in Spain (*e.g.* residence card, registration certificate). These documents cannot be taken from them except for public security/public order reasons (the same applies for Spanish nationals and their IDs). Whereas for Union citizens most probably any identification form will be enough, for third country family members it may be that the agent also requests the residence card.

In both cases, if the person does not have the ID and cannot prove his/her identity and the situation in Spain by other means, the person may be requested to accompany the agent to a commissariat of police to allow the identification. The behaviour may be sanctioned by administrative fines but not for the failure to carry the ID but for failure to obey an order to the agent, in this case identification or for

not obtaining the necessary documents. The sanction is the same for both Spanish nationals and foreigners, and for both behaviours: fine of up to 300€

2.7 Restrictions on the right of entry and residence on grounds of public policy, public security and public health

2.7.1 General principles (Article 27)

Article 27 of the Directive laid down the general principles to be respected in the adoption of measures based on public order, public security and public health. With the exception of Article 27(4) and 27(5) this provision has been correctly transposed.

Article 1 of RD 240/2007 states that it regulates the conditions for the exercise of rights of entry and exit, free movement, residence, permanent residence and working in Spain by Union or EEA citizens as well as the limitations for reasons of public policy, public security and public health. This provision implies that restrictions of the right of residence and free movement of a Union citizen and their family members can only be based on grounds of public security, public order and public health. This may have consequences in the procedural guarantees as will be shown below.

(a) The transposition of the provision

- **Restrictions on the basis of the public order public security and public health and the interdiction to serve economic ends (Article 27(1))**

Article 27(1) allows Member State to restrict the right of free movement and residence of Union citizens and their family members on grounds of public policy, public security and public health. These grounds cannot be invoked to serve economic ends. These grounds, therefore, can serve to refuse entry or to refuse the issuance of a registration certificate/residence card, and permanent residence documents, and possible renewal of residence cards, or cancellation of residence documents already issued.

The restrictions to the right of exit and freedom to choose a residence have already been commented upon in Article 4 and 23.

Apart from Article 1 of RD 240.2007 mentioned above, Article 15, which transposes Article 27:

> *Measures for reasons of public order, public health and public security.*
>
> 1. When so required by reasons of public policy, public security or public health, any of the following measures can be adopted against a Union or EEA citizen or their family members:
>
> a) prevent entry in Spain, even if the people concerned have submitted the documentation foreseen on Article 4 of the present Royal Decree.
> b) deny the registration in the Aliens Central Register, or the issuance or renovation of the residence cards foreseen in this Royal Decree.
> c) Order the expulsion or devolution from the territory of Spain. […]
>
> 5. The adoption of any of the measures foreseen in subparagraphs 1-4 shall comply with the following criteria:
>
> a) Shall be adopted according to the legislation regulating public order and public security and the secondary legislation applicable in this area.
> […]
> c) they shall not be adopted to serve economic ends.

The transposition is correct. Article 15(1) transposes the grounds and the possible measures to be adopted (restriction of entry and residence) and the possible consequence: expulsion or devolution. As mentioned before, "devolution" (Article 58(2)-(5) of LO 4/2000 and Article 157 of Aliens Regulation) applies when a person has already been expelled from Spain and they try to re-enter Spain, or those

persons entering illegally in violation of immigration rules (including those intercepted in the borders). This reference to devolution[83] in Article 15 of RD 240/2007 ensures that it will not have an automatic character and that will be subject to the public order and public security test. Devolution requires an expulsion procedure in cases where the person entered illegally and was not intercepted and resided in Spain for less than 90 days, the TS[84] requires the devolution takes place with application of the expulsion procedure. Article 15 of RD 240/2007 will ensure that devolution is also subject to the procedural guarantees of the Directive.[85] Spain was condemned by the ECJ[86] for the automatically refusal of entry of persons included in the SIS.[87] With the new legislation automatic refusals are therefore excluded.

The devolution and expulsion are only possible when they are based on public policy and public security grounds, and never for not having the necessary documents. If the person tries to entered "illegally" and succeeds (in this case for third country family members), the only penalty that can be imposed is a fine for not requesting a residence card (unless there are public order and public security grounds to refuse the issuance of the card). If intercepted, the authorities have to give the person every reasonable opportunity to obtain them.

The general reference under Article 15 will cover any expulsion measure taken against a Union citizen or a family member based on public order and public security. This therefore imply any possible expulsion measure that could be taken under the Criminal Code (see below Article 33)[88.]

Article 15(5) lays down general principles for the application of the measures based on public policy, public security and public health. Article 15(5) makes a general reference to public policy and public security legislation. As explained in the introductory section to this analysis, it refers to LO 4/2000 (and the Aliens Regulation), Law 1/92 on citizens security (also referred to LO 4/2000) and the Criminal Code. Regarding the reference to LO 4/2000 this will only apply when its application is not against EC law.

- **Proportionality and personal conduct of the individual concerned (Article 27(2))**

    - The principle of proportionality under Spanish law to the administrative punitive procedure.

Article 27(2) requires that the measures taken on grounds of public policy, public security and public health comply with the principle of proportionality.

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83 An important remark is that the devolution is not a sanction but a police measure (mesure de police) aimed at re-establishing the legal order (Article 157(1) Aliens Regulation).

84 STS (section 5) of 6 October 2006 (RJ 2006, 8697) "in the cases in which a person entered the Spanish territory and stayed for less than 90 days, it is needed to follow the administrative [expulsion] procedures to adopt such a measure, since only when the aliens is returned trying to enter Spain, -expulsion procedure is needed, situation which cannot be considered the same as the described above since restrictive rules cannot be extended to situations not foreseen in the law, and the adoption of the devolution without an expulsion decision implies a limitation of the guarantees".

85 The inclusion of "devolution" here implies that the conditions for its application are those laid down in RD 240/2007 and not those of the Aliens Act, which includes provisions (devolution can be executed within 72 hours) which may be considered against EC law. Other provisions of the Aliens Act may be applicable for being more favourable (non devolution of pregnant women).

86 C-503/2003 Commisssion v. Spain.

87 Although this infringement has been solved, the automatic refusal of entry in application of SIS still applies for third country nationals joining a third country national residing in Spain. See STS 3 January 2007 where a Georgian woman was refused entry for being included in the SIS by Germany although she was joining a Georgian citizen legal resident in Spain.

88 The Council of State also made this remark in its Opinion to the draft RD.

This provision has not been expressly transposed. However, on this point the Aliens Act and Law 30/92 on Administrative procedure apply since the principle of proportionality is a general principle of law and specifically regulated in the administrative punitive procedure.

The principle of proportionality is included in Article 131 of Law 30/92 of administrative procedure. According to this provision the principle implies that:

1. administrative sanctions, pecuniary or not, cannot imply directly or indirectly, privation of liberty;
2. if pecuniary sanctions, they cannot be more beneficial for the infringer than the non compliance;
3. to determine the application of the sanction, the administration shall consider the necessary adequacy between the seriousness of the facts (and offence) and the sanction. The law establishes three criteria to modulate the sanction:
    a. the existence of intentionality or reiteration
    b. the nature of the prejudice caused
    c. recidivism, for the commission within one year of more than one offence of the same nature, when so declare by non-appealable decision.

Article 55(3) of LO 4/2000 also establishes the application of the principle of proportionality by imposing the assessment of "the degree of culpability, and when applicable, the damage or prejudice caused, or the risk derived from the offence and its significance (transcendence)." For the adoption of economic sanctions, the administration shall take into account the economic capacity of the offender (Article 55(4) of LO 4/2000).

The question of proportionality has been especially discussed within general aliens law, since the Aliens Act gives the competence to the administration, and eventually the courts, to choose between a fine and an expulsion measure. The application of the principle in relation to public order and public security will be analysed more in detail below. However, it is useful to show how the Supreme Courts and also Superior Tribunals of Justice apply the principle within the context of choosing between fines and expulsions.

The Ruling of the Supreme Court (section 5) of 25 January 2007 lays down the following doctrine:

> As more serious and secondary sanction, the expulsion requires a specific motivation, and different from or complementary to the pure illegal presence in the country, since this conduct is simply punished, as showed, with a fine. According to Article 55-3 (which regulates the gradation of sanctions, but which should be understood as also applicable to the choice between fines and expulsion), the administration has to specify, if it decides on expulsion, the reasons of proportionality, the degree of subjectivity, the damage and risk derived from the offence, and in general, we add, the legal circumstances or facts present to justify the expulsion and the entry ban, which is a more serious sanction than a fine"

The same doctrine is confirmed by STS (section 5) 28 February 2007 (RJ 2007, 882).[89]

The Supreme Court has established strict criteria and procedural guarantees for the application of the principle of proportionality to expulsions based on the under general Aliens law. This has been a

[89] As example, the ruling from the Superior Court of Justice of Madrid of 20 July 2006 (RJCA 2007, 155), in a case of an alien working without a work permit, "we should analyse the sanction of expulsion […] starting by the culpability, according to which, the sanction of expulsion from the Spanish territory shall be reserved in the cases under Article 53(a) of LO 4/2000 [work without permit] to those cases where the anti-legal position of the aliens shows a special violation of the law, meaning, to those cases where the culpability is manifest with a special degree of intensity, either because of the clear and manifest willingness of the individual concerned to violate the law or protected good, or because is a negligent conduct with a degree of anti-legality superior to the mere non-observance of the law."

reaction to certain automatism in the administration in the application of the expulsion decision because in many cases, and given the economic situation of aliens (in the context of the general Aliens law), the expulsion appeared as the only real penalty.[90] The Supreme Court did not admit the automatism and required a thorough assessment of the specific circumstances of the seriousness of the case, taking into account the personal conduct and the irreparable damage that could be inflicted in case of expulsion.

Article 15(5)(d) which transposes Article 27(2) also includes a reference to proportionality in the evaluation of the conduct of the person concerned and the adoption of a expulsion decision. The competent authorities shall waiver the different elements based on the reports from police authorities (this includes INTERPOL since in some cases these reports have been used), the prosecutor and the judge participating in the dossier.

- The personal conduct of the individual concerned

Article 15(5)(d) transposes Article 27(2) on this point:

> d) When taken on grounds of public order or public security, they shall exclusively be based on the personal conduct of the individual concerned who in any case must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, situation that shall be waived by the competent authorities based on the reports from police authorities, the prosecutor and the judge participating in the dossier. The existence of previous criminal convictions shall not in themselves constitute grounds for taking such measures.

Article 15 includes a reference to proportionality in the evaluation of the conduct of the person concerned and the adoption of a expulsion decision: the competent authorities shall waiver the different elements based on the reports from police authorities (this includes INTERPOL since in some cases these reports have been used when the person has been condemned in other Member State),[91] the prosecutor and the judge participating in the dossier.

The Ruling of the National Audience (section 3) of 11 April 2000 discusses the possible effects that police reports (in this case indicating that the facts did not constitute a crime) may deploy in a case of attributing Spanish nationality:

> "In the present case, from the date in the administrative procedure, it is clear that a Police report of 18 February 1996, the applicant was suspect in Bilbao in […] 1985 of fraud, in […] of threat and in […] 1997 of racket and damages. All these documents were transferred to the Court without any subsequent procedure or criminal conviction as evidenced by the good conduct certificate provided; these data for its inoperability as well as antiquity of the practice cannot contradict the evidence of his integration in the Spanish society, showed not only by the long residence in the country but also for the marriage concluded in Spain and the final adoption, as well as his current activity as entrepreneur in the building sector […]"

Although Article 15(5)(d) transposes almost all the requirements under Article 27(2) of the Directive, the last sentence (justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted) has not been transposed.

Article 119(2) LO 4/2000 states that "The decision shall not take into account different facts from those that have been determined in the instruction phase of the procedure, without prejudice of their legal assessment" could be considered as partially covering that flaw in the transposition. In addition the Constitutional Court (STC 46/2001 of 15 February) has declared that "the public order cannot be interpreted as a preventive clause face eventual risks, since in that case, it becomes in itself the highest certain risk for the enjoyment of freedom".

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[90] *Tratado de Entrajería*, cfr supra note 5 p. 464.

[91] Auto from the Constitutional Court 2/1992 of 13 January.

However, it does not seem to ensure the same degree of protection as the Directive. The other principles, which were also already taken into account by the courts, have been transposed and this one should also been transposed. For this reason the transposition has been considered incomplete on this point.

However, the expert considers that this will not have any practical effect since the only justifications admissible are those listed in the law and derived from the facts of the particular case and therefore this will ensure the *effet utile* of the provision. Nevertheless, since this provision offers a guarantee for the citizen that can be put forward in court, a clearer and more express transposition would have been better.

- **Contacts with other Member States (Article 27(3))**

Article 12(2) of RD 240/2007 states that "The competent authorities may exceptionally before issuing a registration certificate or residence card regulated in this RD obtain information about possible past criminal convictions from the State of origin or other Member States". This provision transposes Article 27(3) but incompletely. The reference to "exceptionally" implies that the enquiries will not be made as a matter of routine, as required by Article 27(3). The obligation of two months has not been transposed.

- **Obligation to accept a Spanish citizen expelled from other Member State (Article 27(4))**

This provision has not been transposed. In addition, the expert could not find any similar provision in the Constitution, Aliens Act or the Civil Code. Spain has signed but never ratified Protocol 4 to the ECtHR. Article 19 of the Constitution recognises the fundamental right of every Spanish national to entry and exit Spain. No specific provision was found recognising the obligation to accept Spanish nationals or those of disputed nationality expelled from other Member State. However, this is a principle of *ius cogens*.

(b) The circumstances that may be considered as public order and public security and the application by the Spanish courts

- **Circumstances**

As mentioned before, Article 15(5)(d) refers back to the legislation regulating public order and public security as well as the regulation developing it. This provision is an implicit reference to LO 4/2000 (and the Aliens Regulation) and Law 1/92. However, these provisions would only be applicable when they are not against to EC Law and more favourable.[92] The Supreme Court has been indicating on a case by case basis provisions of the Aliens Act that do not apply to the persons within the scope of RD 240/2007.[93] In other cases, the provisions of the Aliens Act are not applicable because they are clearly against EC law.

These two principles (more favourable and conformity with EC law) are important elements that will be taken into account by the authorities and the courts when applying any expulsion measure on public order and public security. The implicit reference to the Aliens Act and Law 1/92 is thus a tool to specify conducts that may be considered as against public order and public security. In fact, as will be seen below, expulsion of Union citizens is applied only in very exceptional cases. Moreover, the

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[92] It should be reminded that LO 4/2000 will apply at full to "other family members" and family members who retained the right of free movement.

[93] See for all STS (section 5) of 12 February 2008 "justly because citizens of Romania and Bulgaria have the consideration of Union citizens, LO 4/2000 is not applicable, at least regarding the sanction regime concerned according to its Article 1(3) […] (being evident that the sanction regime of LO 4/2000 is not more favourable for this purpose).

Courts have cite the ECJ and ECtHR jurisprudence and applying the same strict interpretation on public policy and public security to cases based on the general Aliens law (therefore to third country nationals not within the scope of RD 240/2007), extending many guarantees applicable to Union citizens to all aliens.

In this section only administrative expulsion will be analysed. Public health is analysed under Article 29 of the Directive but in general no expulsion measure is possible under health reasons. Regarding Judicial expulsion, it applies only for cases of criminal convictions and this does not apply to Union citizens and their family members. This type of measure will be analysed under Article 33 of the Directive.

The cases listed in the Aliens Act and LO 1/92 as tools to identify conducts that may be against public order and public security will be referred here and commented upon to determine those that could not apply to Union citizens. More detailed analysis of how the clause of public order and public security is applied for Union citizens and family members is presented in the next bullet points, although some considerations are also give here.

Article 57 of LO 4/2000 indicates the situations that may lead to an administrative expulsion. These are: (1) Expulsion as substitute for a fine; (2) expulsion as accessory for foreigners convicted of certain crimes.

As mentioned by all scholars, the consequences are very different when applied to Union citizens and their family members since only in very exceptional circumstances and following the principles under RD 240/2007 may an expulsion take place. Such circumstances include personal conduct against public order and public security, which must represent a serious and genuine threat affecting one of the fundamental interest of society. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.

This is a general remark that needs to be taken into account when looking at all these circumstances since not all will apply to Union citizens, because the material circumstances are not applicable to them, or because they cannot be considered as public order, or because the application would be against EC law.

(1) Expulsion as a substitution for a fine

> ***Expulsion from the territory***
>
> 1. When the infringers are alien who have carried out behaviours considered as very serious or serious behaviours included in points a, b, c, d and f of Article 53 of the LO, an expulsion measures may be adopted instead of the fine, previous administrative procedure for expulsion.

As already commented, the penalty of expulsion is only considered as a substitute to the fine. Therefore, the authorities are required to make an assessment indicating the plus in the alien conduct that justifies an expulsion. This analysis is based on the principle of proportionality, and in the case of Union citizens and their family members, also on the principles listed in Article 15 of RD 240/2007. The cases that are considered serious breaches are those listed in Article 53 and 54 of LO 4/2000.

> ***Article 53: Serious Breaches***.
> Are considered serious breaches:
> a. to be irregularly in the territory of Spain because the alien did not obtain the prolongation of the stay, not having a residence card or have it expired for more than 3 years, provided the concerned person has not applied for renewal in the time period established through Regulation.

This provision is not applicable to Union citizens and their family members since RD 240/2007 clearly establish that the only penalty in case of not requesting the registration certificate, residence cards, renewal and so on, is a fine similar to the one imposed on Spanish nationals for offences related to the ID. In addition, the Spanish Courts have clearly recognised, even before the entry into force of

Directive 2004/38/EC and in line with the ECJ jurisprudence, that the right of residence derived directly from the Treaty.

> b. Being working in Spain without having obtained an authorisation to work or previous administrative authorisation to work when the person does not hold a valid residence card.

This provision does not apply to Union citizens and their family members, since they are not required to have working authorisations. It does not apply to Romanian and Bulgarians either since RD 240/20007 does not impose any requirement on Union citizens to reside in Spain (STS 12 February 2008 already mentioned).

> c. Hide willingly or serious fraud in the obligation to communicate to the Ministry of Interior of changes affecting the nationality, civil status or domicile.

This provision only covers "dolo" (serious willingness) or serious fraud. This conduct could be considered as part of Article 35 on fraud. However, although there is an obligation under RD 240/2007 to communicate any change in civil status and the conditions that give the right of residence, this offence may not lead in the case of Union citizens and family members to an expulsion. Some practitioners even consider that applied within the context of Union citizens and family members, non-compliance with the obligation to communicate will not be punished with any sanction.[94] In any case, the provisions of LO 4/2000 is not more favourable and will always have to be applied on the basis of the principles listed in Article 15 of the RD. Most probably, it will not apply to persons within the scope of RD 240/2007 because this provision may not be considered as part of the definition of public order under the Spanish legal order as will be seen below.

> d. The non compliance with the measure imposed on public security grounds of periodic presentation or to be away from borders or agglomerations singularly established, according to the LO.

This provision will not apply to persons within the scope of RD 240/2007 because no such security measure can be imposed on Union citizens and their family members. These measures are applied where there are indications of the commission of activities that may lead to an expulsion. This issue has already been discussed. Only security measures within the context of the Criminal Code can be imposed on Union citizens and their family members.

> f. Participation of the alien in the realisation of activities against public order considered as serious in LO 1/1992 of 21 February of Citizens Security and Protection.

This general reference to Law 1/92 on Citizens' Security has been criticised by many scholars as too general and disproportionate under the Aliens Act.[95] However, the Spanish courts, as will be seen below, have always applied this provision (for Union citizens as well as for all aliens) with a careful examination of the principle of proportionality.

The situations listed under Law 1/92 are the only ones that could be considered as "public order" but not all the cases listed therein will fall under the definition of public order given by the courts and will not justify a refusal or an expulsion.[96]

The situations considered as serious offences are listed in Articles 23-25 of Law 1/92 and are:

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[94] Tratado de Extranjería cfr supra note 5.

[95] Quintana Carretero J.P, "Régimen sancionador en matería de extranjería. Procedimiento y garantías", p.293 in Cadenas Cortina et al. *Posición del extranjero en el proceso contencisoso-administrativo*, Madrid 2006 cited by Palomar Olmeda, "La Potestad sancionadora públic en materia de extranjería", p. 443 in *Tratado de Extranjería*, cfr supra note. 5

[96] Elvira, A. *Libertad de circulación y orden público en España*, in InDRET, Revista para el análisis del derecho, Barcelona, April 2008.

Article 23.

a) The manufacture, reparation, storage, trade, acquisition or sell, holding or use of forbidden weapons or listed explosives; of legal weapons or listed explosives without the necessary documents and authorisation, or exceeding the allowed limits when those conducts are not considered as crimes.
b) The omission or not adopting sufficient or efficient measures or compulsory precautions to guarantee the security of weapons and explosives.
c) The celebration of meetings in public transit places or demonstrations, not complying with Articles 4.2, 8, 9, 10 and 11 of LO 9/1983 regulating the right of manifestation, whose responsibility correspond to the organisers or promoters, provided the conducts are not considered crimes.
In the case of meetings in public transit places and demonstrations whose celebration has been notified to the authority, the legal or physical persons who signed the notification shall be considered as the organisers or promoters.
Those de facto presiding, directing or exercising similar activities shall be considered as organisers or promoters even if they did not sign the notification as well as those who due to publications or declarations convoking to the meetings manifestations or due to speeches or brochures distributed during these meetings or demonstrations, motto, flags or other sign wore by them or by any other facts, could reasonably be determined that they have inspired the meeting or demonstration.
d) Refusing to dissolve demonstrations and meetings in public transit places ordered by the competent authority when the conditions laid down in Article 5 of LO 9/1983 are met.
e) Opening establishment and celebrations of public shows or entertainment activities without authorisation or exceeding the conditions laid down therein.
f) Admission in places or establishments of more people (audience or users) than allowed.
g) Celebration of public shows or entertainment activities in violation of the order prohibiting or suspending the show issued by the competent authority.
h) Provoking reactions in the public that alter or may alter public security.
i) Tolerance or illegal consumption or trade on toxic drugs, stupefacient or psychotropic substances in public places or establishments or lack of diligent by the owners, managers or responsible persons for preventing these activities.
j) Non compliance with the restrictions imposed by regulation on navegation of high speed vessels.
k) Giving false data or circumstances for obtaining of the documents foreseen by the law, provided these do not constitute a crime.
l) Not having the registers foreseen in Chapter II of the law to carry out the activities of transcendence for public security.
m) Refusing access or preventing the exercise of inspection activities and regulatory controls established by this law on industries, facilities, establishments, premises, venues, and vessels.
n) Provoking serious disorders in the public streets, spaces and establishments or causing serious damage to public use goods, provided these activities are not crimes.
ñ) Opening an establishment, initiating its activities or its functioning without authorisation or without adopting part or all the security measures imposed by the law or regulation or when those do not function or are default, or before the competent authority has given his approval.
o) Committing a third petty offence within a year.

Article 24.
The offences under a), b), c), d), e), f), h), i), l) and n) of the previous Articles may be considered as very serious given the risk produced, the prejudice caused, or when they are against public health or have altered the functioning of public services or collective transports or the regularity of furnishinig, or they were carried out with violence or collective threats..

Article 25.
1. The consumption public venues, streets, establishments or transport of toxic drugs, stupefacient, psychotropic substances as well as illicit holding, even if not aimed at trading and provided these activities are not a crime, as well as abandoning in the abovementioned places of the tools or instruments used for consumption shall also be considered as serious offences of citizen's security.
2. The sanctions may be suspended if the responsible follows rehabilitation treatment in a certified centre or service in the time and form established by regulation.

As can be inferred, the situations covered in Articles 23-25 are a very diverse. In addition, the Aliens Act also covers the mere participation. However, when applied to Union citizens and their family members, the consequence of this provision are very limited. As will be seen below, the application of by the Spanish courts for aliens requires that the behaviour of the person shows something more, a specific degree of danger. If the person is a Union citizen, this requirement is even stricter since the

principles of EC law apply. For example, a criminal conviction is not enough to consider the person a serious threat.[97]

> ***Article 54 Very serious breaches.***
> 1. Are very serious breaches
>
> a. Participate in activities against the security of the State or that may cause prejudice to the relations of Spain with other countries or being implicated in activities against the public order considered as very serious in LO 1/1992 of 21 February of Citizens Security and Protection.

These activities are linked to State Security. This may probably include activities that could be considered as serious or even imperative reasons of public security under Article 28(1) and (2) of the Directive. However, two considerations:

1) It is very difficult that the conducts that may be embedded here are not considered crimes. In which case, administrative expulsion is not possible and a criminal proceeding will start. The judicial expulsion would be unlikely to take place, since Article 89 of the Criminal Code establishing the penalty of expulsion (as a substitution to prison) only applies to illegal residents and Union citizens, and family members cannot be considered as illegal residents (see below). Furthermore, even if applicable, it is unlikely that persons involved in the type of activities that may be included here (*e.g.* terrorism, spy activities and so on) are going to be left free. In most cases these persons are convicted for penalties above 6 years of prison, in which case, no expulsion is possible.

2) This provision would probably apply when the person has already been to prison and request the registration certificate or residence card. The provisions under RD 240/2007 requiring an examination of whether the person is an actual and genuine threat and stating that the previous criminal convictions do not constitute in itself grounds for taken such measures will apply, and the competent authority will have to re-examine the circumstances to decide whether or not the registration certificate or the residence card may be refuse on public policy and public security grounds.

Regarding the reference to LO 1/1992, see comments above

> b. Instigate, promote, favour or facilitate with lucrative intention, individually or as part of an organisation, clandestine immigration of persons in transit or with destination into the Spanish territory or their stay if the facts are not considered as a crime.

This situation of illegal traffic is regulated by Article 312 of Criminal Code, although Articles 318, 517 and 518 are also related. As in the case described above, it is very difficult that such behaviour does not constitute a crime[98] and the same considerations expressed there are also applicable here.

An important element is that since Romanians and Bulgarians are members of the European Union, "behaviours favouring or promoting the entry of Romanian citizens in Spain, even for the exercise of prostitution, are no longer sanctioned with Article 318 of the Criminal Code" since these persons are Union citizens and therefore these conducts cannot be considered as illegal traffic.[99] This provision as well as (c) and (d) are aimed at protecting immigrants in Spain although they may also be committed

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[97] STSJ Madrid, of 10/07/1998 and 21/04/1999 revoking the order of expulsion of Italian citizens Greenpeace activist for the participation in a violent demonstration in the inauguration day of the General Assembly of the World Bank celebrated in Madrid, which ended with a criminal conviction of 1 day arrest. The Court considers the expulsion and the entry ban for 3 years disproportionate. The Court refers to the ECJ in *Buchereau* and *Duyn* and considers that the activity does not have enough intensity as to justify an expulsion. The Court states that the use of the "public order clause implies, in any case, the existence not only of an alteration of the social order, which any violation of the law implies, but also the existence of a real and sufficiently serious threat against one of the fundamental interest of society". The Court considers that it is not proven that the person has a personal conduct that make advisable the expulsion on public order, public security grounds.

[98] Palomar, p. 447, cfr supra note 5.

[99] SSTS of 28 February 2008, 15 October 2007 (RC 10132/2007) and 3 December 2007 (RC 1084/2007).

by Union citizens. These apply to Spanish nationals promoting the entry of Romanians and Bulgarians as well as any other Union citizen or other Romanians and Bulgarians.

> c. The realisation of discriminatory behaviours for racial, ethnic, national or religious reasons as established in Article 23 of the law provided the behaviours are not considered as a crime.

As in the previous case, it will be difficult that this behaviour does not constitute a crime.

Article 23 includes any type of discrimination or exclusion, restriction or preference based on race, colour, ascendance, national or ethnic origin, religious convictions or practices, with the aim of destroying or limiting the recognition or exercise in equal conditions of human rights and fundamental freedoms in the area of political, economic, social and cultural activities (Article 23(1)). Article 23(2) specifically lists example of behaviours that will always be considered discriminatory and specifically refers to discriminatory activities that may be carried out by the administration (Article 23(2(a)). It also includes discrimination in public services and goods (Article 23(2(b)), discrimination in access to job, housing, education, vocational training, social services, and any other right recognised to aliens by law (Article 23(2(c)), preventing aliens from carrying out economic activities and self-employment (Article 23(2(d)), adoption of criteria that may cause prejudice to workers for being aliens or for reasons of race, religion, ethos or nationality.

> d. Contracting foreigner workers without having obtained previously the work authorisation, considering that one infraction is committed for each worker contracted.

This offence may only apply when the person contracting is a Union citizen or family member carrying out economic activities and he/she engage third country nationals not covered by the Directive. This offence will not apply when the Union citizen or family members is contracted since they do not need a work authorisation. It may apply when the person contracted is a alien with no family link.

> e. The commission of a third serious breach that within the previous year had been sanction with two serious breaches of the same nature.
>
> 2. The following are also very serious breaches
> a. Non compliance with the obligation of the transporters included in Article 66(1) and (2)
>
> b. transporting foreigners via air, sea or land, into the Spanish territory, by the person responsible for the transport, provided they had not checked the validity and in force of the travel documents or the ID needed, as well, as they visa who should be hold by the alien.
>
> c. Non compliance with the obligation of the transporters to take care of the transported alien who, due to deficiencies in the documentation, has not been authorised to enter Spain, as well as the foreigner who transported in transit has not been returned to his/her country of destination or who has been returned by the authorities of destination because the entry was refused.

All these provisions do not apply within the context here analysed since they are aimed at preventing illegal traffic. They are in line with the Schengen Convention and are directed to air carrier and so on.

(2) Expulsion as accessory to foreigners convicted of a crime

Article 57(2) includes a second case that may lead to an administrative expulsion:

> 2. It shall be considered as a cause of expulsion, provided the administrative procedure is initiated, that the aliens has been found guilty in Spain or abroad, for a wilful conduct which constitute a crime punished in Spain with imprisonment of more than one year, except when the conviction has been cancelled.

This provision is not automatic and will not apply to Union citizens as such since previous criminal convictions may not lead to an expulsion decision. Therefore, the administrative authority who discovers that the Union citizen or family member has previous convictions for crimes punished in Spain with prison of more than one year will have to determine whether the behaviour is against

public order and public security and apply the test and principles included in RD 240/2007. In addition, notice that only in exceptional cases may the competent authorities obtain information regarding past convictions, which differs from other aliens (those have to submit a criminal record certificate). This provision only serves to identify conducts that may be considered against public order and public security.

RD 240/2007 only foresees two types of sanctions: fines and expulsion. Fines are applicable for violation of the obligation to register and request residence cards. Expulsion is only foreseen for cases of public order and public security. Violation of other obligations listed in RD 240/2008 does not lead to any sanction since no specific legal provision so provides. This conclusion is based on the Spanish principle of strict interpretation of offences, so that their scope cannot be extended to cases not foreseen by them. LO 4/2000 cannot be applied here on a subsidiary basis since its application is limited by RD 240/2007 to cases where the LO is more favourable to Union citizens and their family members. Offences and sanctions are not more favourable and thus this excludes the application of the Law. Although the general reference to public order legislation is a reference to LO 4/2000 and Law 1/92 on citizens security, this reference is within the context of public order and public security and thus not cover other type of offences.

The implicit reference to LO 4/2000 and Law 1/92 is thus a tool to specify conducts that may be considered as against public order and public security. However, this reference implies that the application of LO 4/2000 and Law 1/92 has certain limitations: (1) this application cannot be against EC law; (2) only behaviours that could be considered as violation of public order and public security may be applied to Union citizens and family members. As a consequence, only some of the offences listed in LO 4/2000 may be applicable to Union citizens and their family members, those under Article 54(a) being the only one that could be considered as a violation of public order and public security. But in any case, and as shown above, committing a serious offences listed in Law 1/92 will not necessarily mean a violation of the public order and lead to an expulsion, given the strict application by Spanish Courts.

- **The application by the Spanish Courts**

The Constitutional Court has defined the concept of "public order" as "acts which are contrary to the normal exercise of fundamental rights and public freedoms".[100] Therefore, the "respect to fundamental rights and public freedoms guaranteed by the Constitution are the essential component of the public order".[101] The concept of public order is subject to the Constitutional limits to avoid misuse of power by the Administration and arbitrariness. The most important limit is Article 10(2) of the Spanish Constitution, which establishes the obligation to interpret the rights at the light of the international conventions.[102] The interpretation given by the Supreme Court and the Constitutional Court as well as other courts evolves to adapt to the historic moment and the sensitivity of society. The highest courts not only look at Spanish society but also look at the jurisprudence in other Member States (in many cases the Supreme and Constitutional Courts refer to the jurisprudence of the German Constitutional Court) and above all and regularly they refer to the jurisprudence of the ECJ and the ECtHR.

As mentioned above, the Constitutional Court does not allow an interpretation of the public order concept as a preventive clause; "only when the judge certified the existence of a real risk for security, heath and public morality, as they may be understood in a democratic society, it is possible to invoke the public order clause".[103]

[100] SSTC 6/1983 (RTC, 1983, 6), 19/1985 (RTC 1985, 19), 59/1990 (RTC 1990, 59).

[101] STC 19/1985 of 13 February (RTC 1985, 19).

[102] Bartolomé Cenzano, "Los límites de los derechos y libertades. Evolución jurisprudencial del límite de orden público en España (I)" in *Boletín de Información del Ministerio de Justicia*, n. 1870, 2000, pp.13 et al., cited in Elvira, "Libertad de circulación y orden público en España", cfr supra note 96, p.4.

[103] STC 46/2001, of February (RTC 2001, 46).

Public security has received less attention. López Nieto considers that public security is a broader concept which includes public order and citizens' security.[104] The Supreme Court has considered that Law 1/92 on Citizens' Security "is not the only representation of public order but it provides an hermeneutic argument to interpret the sense of Article 26.1(c) of the Aliens Law, facilitating the exclusion of conducts that do not represent a real and present threat for the tranquillity and the public order that the prevision tries to preserve".[105]

The ruling from the Supreme Court of 17 December 1993 establishes the basis of the new line to be followed regarding restrictions of the right of free movement of Union citizens after the entry into force of the Treaty of Maastricht, stating that "the Treaty of the European Union […] incorporates the Union citizenship […] which grants to Union citizens in Article 8(a) the right of free movement and residence within the territory of the Member States, inferring from its regulation the essential content of free movement which comprises the interdiction for the host Member State to require requirements and establish obstacles or impediments going beyond what is needed to guarantee public order and public security, as well as the control of identity and nationality of the person crossing the borders".

Therefore, the restrictions are to be minimum, since it is a right granted directly by the EC Treaty. As a consequence, the Supreme Court and also the Superior Tribunals of Justice continuously refer to the jurisprudence of the ECJ quoting *Calfa*, *Buchereau*, or *Van Duyn* when evaluating whether the situations complies with the Community requirements to restrict the right of free movement and residence on the public order and public security grounds.

In a ruling from 19 February 2000, the Supreme Court provide a good example of the reasoning adopted in these cases. The ruling considered against the law an expulsion decision taken by Civil Governor of Santa Cruz de Tenerife ordering the expulsion of a German citizen because a criminal proceeding have been initiated against the German national for fraud and forgery that did not lead to a condemnation. In that case, the Supreme Court indicated that the existence of criminal convictions could not be considered as proving the existence of conducts against the public order and even less in the case where not even criminal convictions existed.

> The Supreme Court considered that the Spanish legislations does "not allow the expulsion from the Spanish territory of a citizen of a State member to the European Union simply based on the fact that the person has been convicted in a criminal procedure, but it is required a conduct that is against public order, and cannot be considered as against the public order the lack of social integration or the conflictive character of the person, since, as has been expressed by the European Court of Justice in its ruling of 19 Mars 1999 (affaire C-348/96, Donatella Calfa), following its own doctrine (Ruling of 27 October 1977, Bouchereau 30/77), the concept of public order can be invoked to justify the expulsion of a Union citizen from the territory of a Member State when there is a real and sufficiently serious threat affecting one of the fundamental interests of society, the mere existence of criminal convictions not being enough to constitute in itself ground for the adoption of such a measure, because only when those convictions evidence the existence of a personal conduct constituting a present threat to the public order it is possible to restrict the stay of a Union citizen in other Member State (Article 1(1) and Article 3 of Directive 64/221), situation this that cannot be considered equivalent to a person's lack of social integration or an undefined conflictive personality."

The reasoning of the Supreme Court ruling of 20 July 2001[106] against the decision to expel a British citizen suspected from a crime of burglary is similar.

[104] López-Nieto y Mallo, "Seguridad ciudadana y orden público" in El consultor de los Ayuntamientos y Juzgados", Madrid 1992, p.19.

[105] STS 27 November 2002.

[106] STS (section 6) of 20 July 2001.

The Supreme Court and Superior Courts of Justice have declared that crimes against traffic security cannot be considered as conducts against public order and public security. It is not against public order and public security to participate in a demonstration, even if participation leads to a criminal conviction. [107] Contracting illegal workers, and favouring illegal activities such as prostitution, are not considered as justification for an expulsion (STS section 3, of 4 March 2000). In general as a minimum for a conduct against public order to be identified there must be at least a criminal conviction, but this is not enough and an additional threat is needed.

In exceptional cases, an expulsion measure has been considered legal even if there were no criminal convictions where the police reports showed a real and genuine threat to public order because the person concerned has been detained in several occasions for weapons traffic, drugs traffic, serious injuries, illicit holding weapons and racket.[108] In fact, the cases identified where a Union citizen has been expelled were due to serious drugs trafficking activities and constant recidivism. Even in those cases, the Courts apply Article 28(1)'s criteria to determine whether an expulsion measure is possible given the prejudice that may be cause to the person concerned. In one case, the person was condemned for 11 years of prison and, after release from prison, requested a residence card (see Article 33 of the Directive). The Court considered that such a conduct (commission of very serious crime) provided enough evidence of a conduct that may be considered against public order although other elements had to be taken into account. The Court appreciated the fact that the person was married to a Spanish woman and was father to a child and annulled the expulsion decision.

Therefore, even if the conduct may be considered as against public order, the personal circumstances and the criteria listed in Article 28(1) of the Directive are taken into account not only in cases where a Union citizen is involved, but also in all expulsion cases, as part of the analysis of proportionality and the prejudice that may be caused on the person.[109]

However, in some cases the Supreme Court has adopted other reasoning that may be considered against EC law. The Supreme Court ruling from 27 December 2000 considered proportionate and in compliance with EC law (even citing the ECJ case law) an expulsion decision declared by the Government delegate of Baleares against a Union citizen for the possession of 7,278 grams of cannabis for own consumption. One of the judges issued a particular vote to show his disagreement with the decision since he did not considered that such conduct could be considered against public order, which is a concept to be interpreted strictly.

Despite this somewhat bizarre and isolated case, the Supreme Court and the Superior Courts of Justice of the CAs have adopted what seems an appropriately balanced approach, so that only the most serious cases or regular recidivism in crimes will be considered as conducts that may be against public order and public security.

(c) Conclusions

No case law has been found on the application of RD 240/2007 relevant to define public order or public security (apart from the Romanian and Bulgarians case). The jurisprudence applicable to the old legislation nevertheless provides good examples of the way Spanish courts apply the public order clause.

Article 15(5)(d) refers back to the legislation regulating public order and public security as well as the secondary legislation developing it. This provision is an implicit reference to the Aliens Act (and the Aliens Regulation) and LO 1/92. The implicit reference to the Aliens Act and LO 1/92 is thus a tool to identify conducts that may be considered against public order and public security. However, these

[107] SSTJ Madrid of 10 July 1998 and 21 April 1999.
[108] STSJ Murcia, of 25 January 2001 and ATS of 29 January 1997.
[109] See for example STS 20 Mars 2001.

provisions would only be applicable when they are not against to EC Law and more favourable.[110] Therefore, there is additional test when applied to Union citizens and family members whereby only behaviours that could be considered as violation of public order and public security may be applied to Union citizens and family members. As a consequence, only some of the offences listed in the Aliens Act or LO 1/92 may be applicable to Union citizens and their family members, those under Article 54(a) being the only one that could be considered as a violation of public order and public security.

In any case, and as shown above, committing serious offences listed in LO 1/92 or crimes will not necessarily mean a violation of public order and lead to an expulsion, given the strict application by Spanish Courts. The Supreme Court has been indicating on a case by case basis provisions of LO 4/2000 that do not apply to the persons within the scope of RD 240/2007.[111] Although there are some isolated cases that could be considered as disproportionate, the Spanish Courts following the ECJ and the ECtHR jurisprudence have indicated that only in very exceptional circumstances may an expulsion take place (for most serious cases or regular recidivism in crimes). These include where personal conduct is against public order and public security, which must represent a serious and genuine threat affecting one of the fundamental interest of society, and previous criminal convictions shall not in themselves constitute grounds for taking such measures. These principles, already applied by the Spanish courts, are now embedded in RD 240/2007.

For all these reasons, and despite some minor omissions, it has been considered that overall the transposition and implementation of Article 27 is in line with the Directive.

2.7.2 Protection against expulsion (Article 28)

Article 28 of the Directive lays down specific measures for the protection against expulsion. This provision has been correctly transposed (almost literally) by Article 15 of RD 240/2007.

- **Criteria to evaluate the decisions (Article 28(1))**

Article 15(1) second sentence transposes Article 28(1) criteria: "[s]imilarly, before taking any decision, it shall be taken into account how long the individual concerned has resided in Spain and social and cultural integration, his/her age, state of health, family and economic situation, and the extent of his/her links with the country of origin." Although the provision is in the paragraph referred to expulsion decisions against person who have acquired the right of permanent residence, it should be understood as applying to all expulsion decisions for three reasons:

(1) it is in Article 15(1) generally referring to expulsion decisions;
(2) the family and personal circumstances always have to be taken into account under general aliens law (Article 119(3) Aliens regulation); and
(3) the jurisprudence have extended the scope of this provision under the general aliens law and refers to all type of circumstances (economic, social, familiar, working, and also health reasons).[112] A different interpretation would imply that a less favourable regime applies for Union citizens and their family members.

- **Expulsion of permanent residents (Article 28(2))**

[110] It should be reminded that LO 4/2000 will apply at full to "other family members" and family members who retained the right of free movement.

[111] See for all STS (section 5) of 12 February 2008 "justly because citizens of Romania and Bulgaria have the consideration of Union citizens, LO 4/2000 is not applicable, at least regarding the sanction regime concerned according to its Article 1(3) […] (being evident that the sanction regime of LO 4/2000 is not more favourable for this purpose).

[112] See for example STS of 7 November 1999 and STS of 21 April 2006.

Article 15(1) correctly transposes this provision so that an expulsion decision "may only be taken against a Union or EEA citizen or his/her family members, regardless of nationality, who have the right of permanent residence in Spain, on *serious grounds* of public order or public security" [emphasis added].

No information has been obtained regarding what will be considered serious grounds but Article 57(5) Aliens Act may provide some indication even if not applicable to EU citizens and family members automatically. Article 57(5) Aliens Act does not allow the expulsion, except when the infraction committed is that listed in Article 54(1)(e) or in case of recidivism within one year of a infraction of the same nature and which is sanctioned with expulsion of the following persons:

1. Aliens born in Spain and who have resided legally in the last 5 years
2. Those who have been recognised the permanent residence
3. Those who were originally Spanish or have lost their Spanish nationality.
4. The beneficiaries of a pension for permanent incapacity to work as a consequence of an accident at work or occupational disease that occurred in Spain, as well as those benefiting from a contributive benefit for unemployment or beneficiaries of a public assistance economic benefit aimed at ensuring the social or labour insertion or reinsertion.
5. Spouses of aliens, ascendants or minors children or handicapped dependant of the alien in one of the situations indicated above and who have legally resided in Spain for more than 2 years, and pregnant women shall not be expelled if the expulsion may pose risk to the pregnancy or the mother's health.

As seen, the list includes permanent residents. For this reason, most probably being in one of the situations of Article 54(1)(e) with the limitations already commented and with an additional plus of seriousness in the case of violations of Law 1/92 may be considered as serious cases.

- **Expulsion of persons living in Spain for 10 years and minors (Article 28(3))**

Article 15(6) correctly transposes this provision. A decision of expulsion or repatriation against Union or EEA citizens may not be taken except if the decision is based on imperative grounds of public security if they: a) have resided in Spain for the previous 10 years; or b) are a minor, except if the repatriation is necessary for the best interest of the minor, not being this repatriation in any case a sanction.

The provision does not transpose the reference to the Convention of the Child. However, under Article 3(2) of LO 4/2000 "the rules relating to fundamental principles of foreigners shall be interpreted according to the Universal declaration of Human Rights and the treaties and international agreements to which Spain is a Party, without it being possible to invoke religious beliefs or ideological or cultural convictions to justify the exercise of acts or conducts contrary to those agreements". In addition, the international covenant of the rights of the Child is also mentioned in the Spanish Constitution. Finally, Spain is a party to the Convention. For all these reasons, the transposition is considered correct.

No information could be obtained on what will be considered as imperative grounds. Elvira considers that only cases where the State security (interior or exterior) is in danger can an expulsion be invoked.[113] Probably some of the conducts falling under the first sentence of Article 54(1)(a) of LO 4/2000 commented upon above could fall under this paragraph.

2.7.3 Public health (Article 29)

Article 15(9) transposes Article 29 of the Directive almost literally

> The only diseases or sickness that may justify the adoption of any of the measures listed in paragraph 1 of this Article shall be the diseases with epidemic potential as defined by the WHO, as well as any other diseases or

[113] Cfr supra note 96, p.8.

> contagious parasitic diseases according to the national legislation in place. Diseases occurring after a three-month period from the date of arrival of the concerned person shall not be basis to justify an expulsion decision from the Spanish territory. In individual cases where there are serious indications that it is necessary, the persons covered by this RD may be required to, within three months of the date of arrival in Spain, undergo, free of charge, a medical examination to certify that they are not suffering from any of the conditions referred to in this paragraph. Such medical examinations may not be required as a matter of routine.

In addition, the RD includes the possibility to require a medical certificate when requesting the registration certificate or residence card if there are indications of risks for public health. Article 12(4) states "Similarly, when so required by reasons of public security in accordance with Article 15 of the RD, the applicant may be required to present a medical certificate certifying their health status". There is no guidance on how this provision will be applied and when those certificates may be requested. However, the provision seems to be in line with the Directive to avoid systematic inspections.

Regarding sickness, Spain has international commitments in relation to cholera, plague and yellow fever.[114]

2.7.4 Expulsion as a penalty or legal consequence (Article 33)

Article 33(1) of the Directive states that expulsion orders may not be issued by the host Member State as a penalty or legal consequence of a custodial penalty, unless they conform to the requirements of Articles 27, 28 and 29.

The provision is not expressly transposed. However the transposition has been considered in conformity. Article 15(1) of RD 240/2007 establishes that "When so required by reasons of public policy, public security or public health, any of the following measures can be adopted against a Union or EEA citizen or their family members:

> a) prevent entry in Spain, even if the concerned people have submitted the documentation foreseen on Article 4 of the present Royal Decree.
> b) deny the registration in the Aliens Central Register, or the issuance or renewal of the residence cards foreseen in this Royal Decree.
> c) Order the expulsion or devolution from the territory of Spain.

Article 15(1) of RD 240/2007 establishes that the only expulsion measures possible are those based on public policy and public security. This implies that a potential expulsion decision for the commission of a crime has to be based not on the commission of a crime as such, but on the person's conduct being against public order or public security. As shown above, the commission of a crime certainly provides evidence that a conduct against public order or public security might be present but does not justify in itself and expulsion decisions (see comments above on the application of public order and public security). The Council of State follows the same line.

This general provision of RD 240/2007 implies that whichever expulsion decision, also those that may be as penalty or legal consequence of the commission of a crime, have to respect the principles listed in Article 15 of RD 240/2007. This general provision thus ensures that Articles 27-29 are taken into account also for expulsion decisions as penalties or legal consequence of the commission of a crime. For this reasons the transposition is considered correct. Keeping this in mind, this section will analyse the two cases in which it is possible to have expulsion as a penalty under the Spanish regime, in order to determine whether they are applicable to Union citizens and their family members and if so, under which conditions. However, the current sociological environment where there is a increased mistrust of foreigners (especially when coming from specific countries), may lead to a more flexible application of expulsion.

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[114] Heredia Fernández, "La Entrada en España" in Moya Escudero (coord), *Comentario sistemático a la Ley de extranjería (LO 4/2000 y LO 8/2000)*, Granada, Ed. Comares, 2001, pp.35-51 cited in Goizueta Vértiz, "Los diferentes regímenes jurídídicos del derecho a la libre circulación y residencia" cfr supra note 40, p.13.

- **The expulsion under the Criminal Code: judicial expulsion**

Article 89 of the Criminal Code foresees the expulsion for the commission of certain crimes and Article 108 the substitution of security measures with an expulsion decision:

> **Article 89**
> 1. The penalties of imprisonment of less than 6 years imposed on a foreigner **not residing legally in Spain** shall be replaced by a sentence of expulsion from the Spanish territory, except when the judge or tribunal, having previously heard the Prosecutor, exceptionally and by a reasoned decision, considers that the nature of the crime justifies the execution of the penalty in a penitentiary centre in Spain.
>
> Similarly, the judges and tribunals, on request of the Prosecutor shall decide the expulsion from the national territory of the foreigner not residing legally in Spain and convicted with a penalty of prison equal or superior to 6 years, in those cases where the person has access to the third degree [conditional liberty] or once the ¾ of the penalty have been executed, except when in exceptional cases and by reasoned decision, they considered that the nature of the crime justify the execution of the penalty in a penitentiary centre in Spain.
>
> The expulsion shall be executed without applying Article 80, 87 and 88 of the Criminal Code.
>
> The expulsion so decided shall be accompanied by the abandoned of the administrative proceeding having as an object the authorisation for residence or work in Spain.
>
> If the substitution of the imprisonment with expulsion is decided, the imprisonment originally foreseen shall be executed or the remaining time of imprisonment.
>
> 2. The alien may only return to Spain within 10 years, from the date in which the expulsion was executed, and in any case, while the penalty has not prescribed.
>
> 3. The alien who tries to break the judicial decision of expulsion or entry ban referred to in the previous paragraphs shall be returned by the government, and the time period for the entry ban shall start again from the beginning.
>
> 4. The provisions of the previous paragraphs shall not apply to aliens convicted by crimes referred to in Articles 312,[115] 318 bis,[116] 515.6,[117] 517[118] and 518[119] of the Criminal Code.
>
> **Article 108**
>
> 1. **If the person is a non legally resident alien in Spain**, the judge or tribunal shall, previous audience of the alien, the expulsion of the Spanish territory as a replacement of the security measures applicable, except when the judge or tribunal, having previously heard to the prosecutor, exceptionally and via reasoned decision, considers that the nature of the crime justifies the execution in Spain.
>
> The expulsion so decided, shall be accompanied by the abandoned of any administrative procedure aiming at the authorisation of the residence or work in Spain.
>
> In the case that, decided the replacement of the security measure with the expulsion, this could not be executed, the security measure originally established shall be executed.
>
> 2. The alien shall not be able to return to Spain in 10 years, from the date of the execution of the expulsion.
>
> 3. The alien who tries to break the judicial decision of expulsion or entry ban referred to in the previous paragraphs shall be returned to the governmental authority and the time period shall start again from the beginning

The first thing to be mentioned is that the general rule is the expulsion according to the Supreme Court, ruling of 8 July 2004, to avoid that the commission of crimes are used to avoid expulsion.

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[115] Trafficking workers and offering or promoting jobs to foreigners in false working conditions and those employing foreigners without a work permit.
[116] Promoting trafficking workers and aggravated crimes of human trafficking for sexual exploitation, with lucrative intention, being in a position of authority.
[117] This provision has been derogated by LO 15/2003 of 25 November.
[118] Members and founders of illicit associations.
[119] This provision has been derogated by LO 15/2003 of 25 November.

However, in other cases the Court has considered that the expulsion is not appropriate because it would be a refusal to exercise the *ius puniendi* of the State and will risk the guarantee of the respect of legality (*e.g.* drug trafficking).

The second and most important thing is that Article 89 and 108 refers to persons not legally residing in Spain. This reference excludes Union citizens and their family members since they cannot be illegal residents[120] because if they meet the conditions (which are almost none in Spain) they are not illegal residents. The only possibility is that they do not meet the conditions, in which case they will not be covered by the Directive and the general aliens rules will apply. This provision will nevertheless apply to other family members and family members who retained the right of free movement under Article 12 and 13 of the Directive, since they are subject to general aliens legislation, of they reside illegally.

Therefore, it is not possible to expel Union citizens and their family members on the basis of Article 89 or 108 of the Criminal Code.

- **The expulsion under Article 57(7) LO 4/2000: judicial expulsion at the request of the administration**

As mentioned before, Article 57(7) foresees the possibility of expelling aliens as a legal consequence of a penalty:

> 7.
> a. When the alien is prosecuted or a defendant in a judicial criminal procedure for crime or fault for which the law foreseen a penalty of imprisonment of less than 6 years or a penalty of different nature, and the facts are certified in the administrative file for expulsion, the government authority shall request to the judge, having heard previously the prosecutor, the authorisation in the shortest time possible and in no case in more than three days, the expulsion, except when by reasoned decision it is considered that there are exceptional circumstances justifying the refusal of the expulsion.
>
> In case the alien is going through different criminal procedures in different courts, and the facts certified are included in the administrative file of expulsion, the governmental authority shall promote from all of them the authorisation referred to in the previous paragraph.
>
> b. Without prejudice of the previous paragraph, the judge may authorised, upon request of the concerned person or the Prosecutor, the exit of the alien according to the Criminal Procedure Law.
>
> c. The previous paragraphs shall not be applicable when the crimes are those of Article 312, 318 bus, 515.6.a, 517 and 518 of the Criminal Code.
>
> 8. When the alien, residents or not, have been convicted by behaviours considered as crimes listed in Articles 312, 318bis, 515.6, 517 and 518 of the Criminal Code, the expulsion shall be carried out once the imprisonment penalty has been executed.
>
> 9. The decision of expulsion shall be notified to the concerned person, indicating the appeals, body against which is possible to lodge the appeal and time frame to lodge it.

This provision thus describes the possibility to withdraw the criminal proceedings at the request of the administration. In this case, the person concerned is prosecuted and the facts for which the person may be convicted are punished with less than 6 years imprisonment.[121] These facts have to be certified and included in the administrative procedure for expulsion (the administrative expulsion procedure cannot refer to facts different from those object to the criminal procedure).

The administration can ask the Judge, after the audience of the Prosecutor, to order the expulsion.

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[120] This interpretation applies since the entry into force of the revision in 1995. In the same sense Carrascosa et al. *Curso de Nacionalidad y Extranjería*, cfr supra note 35 p.413, Rodríguez Candela, "La expulsión del extranjero en el nuevo Código Penal", p.63

[121] This provision is compatible with Article 89 of the Criminal Code mentioned above. For crimes punished with penalties of more than 6 years prison, no expulsion is possible at least until the person has complied with ¾ of the penalty.

The only possibility for the application of this provision to a Union citizen or his/her family members is when the administration is processing the registration certificate or residence card, or its renewal/replacement with a permanent residence document. Article 15(1) of LO 4/2000 does not foreseen the figure of cancellation, but only refusal to issue or renew the card. The reference to expulsion as a different option most probably includes the expulsion at any moment if there are public order or public security reasons with the subsequent invalidation of the card or certificate. This would be the situation where the administration is made aware of such circumstances and initiates the expulsion procedure, although those cases would be rarer.

It is not clear whether this provision can be applied to Union citizens and their family members. On the one hand, it is not more favourable since it provides for the expulsion in cases where most probably using the strict principles of RD 240/2007 will not lead to the expulsion from Spain. On the other hand, as other provisions of the Aliens Act, it may provide evidence of conducts that may be considered against public order and public security and lead to an expulsion procedure. In this case, the person is being prosecuted for facts that may be punished with a penalty of less than six years prison. In addition, it has a more favourable component since it aims to prevent the finalisation of the criminal procedure and the condemnation, which may be more favourable to the person. In fact, some scholars have considered this provision as "a renounce by the State of the exercise of the criminal action".[122]

Commenting on Article 57(7) of LO 4/2000, some academics have indicated that the "legal requirements vary significantly depending on whether the subject of the administrative expulsion procedure is a Union citizen or not. Aliens not nationals of a Member State of the European Union or EEA States are subject to the causes of expulsion under Article 57; on the contrary, when the expulsion measure affects a Union citizen or national of an EEA State it shall be subjected to the specific regime foreseen in RD 240/2007, of 16 February, which authorises the expulsion only when adopted on grounds of public order, public security and public health, and exclusively based on the personal conduct of the individual concerned".[123]

In both cases, where the person is going through a criminal proceedings for less than 6 years of prison, or when the person has already been through prison, it is clear that the administration cannot apply Article 57 directly but it will have to carry out the public policy/public security test under Article 125 of RD 240/2007 and thus apply the Directive's principles. The cases already discussed in the previous section confirm this approach even before the entry into force of RD 240/2007.

- **Article 33(2)**

The transposition carried out by Article 15(4) of RD 240/2007 Spain is literal and more favourable since it applies to all expulsion decisions.

2.8 Procedural safeguards against decisions restricting free movement (Article 15, and Articles 30-31)

Articles 30-31 of the Directive include a range of procedural guarantees that need to be respected in the application of expulsion measures, as well as in the adoption of decisions to restrict free movement not based on public order, public security and public health (Article 15 of the Directive).

In relation to **Article 15**, nothing is foreseen in RD 240/2007. The only limitations foreseen there are those based on public security, public order and public health. Nothing is said regarding the procedural guarantees in cases where, for example the residence card is refused for not meeting the conditions

[122] Quintana Carretero, cited in Palomar Olmedo, cfr supra note 5.

[123] Soler Cantalapiedra, S. *Legislación sobre extranjeros*, Coll. Civitas, Biblioteca de Legislación, 12th Edition, Ed. Thomson-Civitas, September 2007, p 241.

(basically not being a family member). It is as if the RD overlooks the fact that residence cards can be refused on grounds other than public order or public security. The previous legislation (RD 178/2003) included procedural guarantees for refusals of residence cards (maybe because RD 178//2003 established more conditions for residence) but the formulation under that RD has not been reproduced in RD 240/2007. In any case, the fact that a person does not meet the provisions of RD 240/2007 does not imply a restriction of the right of free movement. The administration will then analyse whether the person has a right of residence under the Aliens Act.

Judicial practice will determine whether the procedural guarantees laid down in RD 240/2007 for expulsion measures are applied to decisions that do not imply an expulsion measure, for example if a residence card is refused because the person does not meet the conditions (*e.g.* it is not necessarily proven that it is a dependant family member or a registered partner).

Until that moment, the First Additional Provision indicates that the rules on procedure included in the Aliens Act and Law 30/92 may be applied on a subsidiary basis, provided they are not against EC law. These procedural guarantees are the same applicable to decisions on "other family members" and family members who retained the right of residence, since they are not within the scope of RD 240/2007 but the Aliens Act, family members who retained the right of residence under Article 12 and 13, and refusal of entry for reasons other than public security and public health (the person did not manage to get the necessary documents). After examination, it is concluded that these provisions do not offer the same guarantees as Article 30(3) and 31(4) of the Directive.

Since judicial expulsion in criminal proceedings is not possible, the guarantees of the criminal procedure are not analysed here.

A general remark is that, according to the Aliens Act as modified by the ruling of the Constitutional Court of 7 November 2007, 19 and 20 December 2007,[124] all aliens in Spain have been recognised as having the following rights:

> ***Article 20 Right to fair trial***
>
> 1. All aliens have the right to fair trial
> 2. Administrative proceedings in this area shall respect in all cases the procedural guarantees established inn the procedural administrative legislation, especially regarding the publicity of the rules of contradiction, audience of the person concerned, and motivation of the resolution except in the case of Article 27 of this law.
> 3. Organisations legally constituted in Spain for the defence of the rights of immigrants, especially appointed by them, shall have legal standing as interested persons in administrative proceedings.
> 4. The entities affected according to Article 19(1)(b) of the Law regulating the administrative judicial procedure shall have legal standing in aliens law procedures.
>
> *Article 21 Right of appeal against administrative acts*
> 1. Administrative acts and resolutions adopted in relation to aliens shall be appealed according to the law.
> 2. The executive character of administrative acts in aliens law shall be regulated by the general regime, except for the cases where this law establishes a preferential procedure for expulsion.
>
> *Article 22.Right to legal aid*
> 1. Aliens in territory of Spain who do not have sufficient economic resources according to the rules established in the legislation regulating legal aid have the right to obtain it in administrative and judicial procedures that may lead to the refusal of entry, devolution or expulsion from the Spanish territory and in all asylum procedures. In addition they shall have the right to an interpreter if they do not comprehend or speak the language used in the procedure.

[124] The Constitutional Court considered a range of provisions of LO 4/2000 unconstitutional since they imposed requirements of legal residence in rights, such as education, meeting, demonstration or association and association in trade unions, right to legal aid. The Constitutional Court established that these rights are directly derived from the human dignity and thus cannot be limited by law. Human dignity is thus the invulnerable minimum that by constitutional imperative is imposed on all public powers.

> 2. Aliens in Spain certifying that they do not have sufficient economic resources for litigation shall have access to legal aid in the same conditions as the Spanish nationals in all procedures in which they are a party regardless of the jurisdiction.

The Constitutional Court has indicated that the right to legal aid has to be granted to all aliens in Spain, regardless of the regularity of their situation. The requirement of legal residence was declared unconstitutional for violation of the right of fair trial included in Article 24 of the Constitution.

2.8.1 Notifications of the decisions (Article 30)

Article 30 includes the obligation to notify in writing to the person concerned any measure taken restricting free movement, in such a way that they are able to comprehend its content and implications (Article 30(1)), and be informed precisely and in full of the grounds on which the decision is taken, unless contrary to the interest of the State security (Article 30(2)). Furthermore, the notification must specify the court or administrative authority competent through which appeal could be lodged, the time limit for appeal, and where applicable, the deadline for expulsion from the State (not less than a month save in duly substantiated cases or urgency).

- **Notification in writing and comprehension**

  a. *Public policy and public security decisions*

The expulsion procedure is a punitive procedure and therefore is subject to more procedural guarantees (which are very similar to the criminal procedure). This includes the separation between the person carrying out the instruction phase (investigations) and resolution, the obligation for an audience of the concerned person, the proof phase, a presumption of innocence, motivation and notification, etc.

The general provisions under Law 30/92 (and Royal Decree 1398/1993 on the administrative punitive procedure) as well as LO 4/2000 (and the Aliens Regulation, Articles 112-119) apply here. Regarding the specific procedure, practitioners consider that the ordinary procedure has to apply since it offers more guarantees.[125]

Notification in writing. Article 129(5) of Aliens Regulation imposes the obligation to notify the resolution of expulsion. Nothing is said regarding the manner of notifying. Article 55 of Law 30/92 establishing the form of administrative acts, indicates that Administrative acts shall be pronounced in writing, unless their nature require or allows other more adequate forms of expression. In the punitive procedure, an oral notification cannot be considered as more adequate and, as part of the right to fair trial, decisions will always be notified in writing. In addition, resolution affecting the rights and interest of persons are always notified in writing, it being possible to receive notifications via email when so requested by the person concerned (Article 59(3) regulating the practice of the notification). The notification normally takes place via registered mail sent to the domicile or address indicated by the person concerned. In some cases, the resolution is published (Article 59(6)).

In fact, the general rule (even outside the expulsion or punitive procedure) is that the administrative decisions are taken in writing with very limited exceptions. The administrative procedure is a procedure which is mainly carried out in writing. On the other hand, there is no specific provision that unequivocally states that the notification shall be in writing. In any case, Article 55(2) of Law 30/92 establishes that where the administrative bodies exercise their competence orally, they should transcribed the act in writing, ensure that it is signed by the body or civil servant who received the

[125] Torrubia David, F.J., "La extranjería desde el punto de vista de la administración periférica del Estado", p. 146 in *Extranjería*, cfr nota supra 60.

decision, and indicate which authority issued the decision. If the decision was a resolution, the competent authority shall authorise a dictation of those pronounced orally, with expression of their content.

Given the long Spanish tradition of administrative procedures in writing, the transposition was considered correct on this point. Notice as well that administrative silence (lack of resolution after 6 months of the initiation of the procedure) can only be favourable for the person concerned (Article 121 of Aliens Regulation and Article 43(1) Law 30/92).

An important aspect is that the proposal for resolution, which is the document ending the instruction phase (Article 127 Aliens Regulation), has to fix the motivation, the facts proven and the exact legal qualification (facts other than those included in this document are not admitted in the Resolution), as well as the sanction and the provisional measures that could be adopted. If this document is not notified, the Supreme Court (STS 11 April 2003) considers it as a violation of the right of defence. The proposal is notified together with all the documents that have been included in the administrative file, so that the persons concerned can have access to the materials, make allegations and present documents and other information. Regarding judicial decisions, these are always notified orally (during the audience) and in writing.

Regarding comprehension, LO 4/2000 (Article 22(1)) includes the right to be assisted by an interpreter when the person does not comprehend or speak the language of the procedure. The Spanish text does not use the verb “understand”, but “comprehend” and differentiates it from “speak”. This nuance in the Spanish text suggests that as part of the principles of fair trial and administrative procedure, the important thing is that the person comprehends the content of the resolution and the implications. Nothing is said regarding the notification as such, but since the rules of the Criminal Procedure apply to the punitive procedure, the specific provisions therein have to be taken into account (Article 520 LECr). For these reasons, and although a express transposition would have been better, it is considered that the Spanish legislation is in line with the Directive

b. *Restrictions of free movement base on other reasons (refusal of entry, issuance of certificate or card)*

Regarding refusals of entry, the notification is imposed by Article 13 of the Aliens Regulation, which also imposes the obligation to have an interpreter from the moment of border control, as well as the assistance of a lawyer (and legal aid). Nothing is said regarding notification in writing, but the provisions mentioned above also apply since they are administrative resolutions. In addition, Article 156 and 157 Aliens Regulation offer enough guarantees on notification and comprehension,

Regarding refusals of visas for family members for reasons other than public order and public security, Article 28(6) of the Aliens Regulation establishes that the notification shall be made according to the legislation developing the Schengen Convention at EC level. Nothing is said about notification in writing or comprehension. However, it seems that the general rules will apply which always include translation and notification.

Refusals of the issuance of cards and so on, the same comments regarding notifications can be made since the general rules described above apply (Article 42(4) of the Aliens Regulation and the provisions of Law 30/92). Therefore, the right of notification in writing is ensured. However, in this case it is not clear whether the person will have the right to an interpreter. LO 4/2000 refers to all type of administrative procedures. However in case a person does not submit the necessary documents, a notification will be sent regarding the missing documents (most probably in Spanish), which will not guarantee the same level of protection as required by the Directive regarding comprehension. If a person does not submit the necessary documents, tit is assumed that the person is no longer interested in obtaining residence (no further consequence such as invitation to leave exist in Spain within this context).

c. Refusals of entry and residence of other family members

The provisions described on refusals of visa and entry, as well as refusals of authorisation to reside/visa to reside apply and therefore notification in writing is needed. Regarding the interpreter and comprehension, same the comment as above applies. See also Articles 156 and 157 of the Aliens Regulation.

d. Public policy and public security decisions under the Aliens Act (other family members and family members who retained the right of free movement)

The same comments as in (a) apply. The transposition is considered in compliance with the Directive.

- **To be informed precisely and in full of the grounds**

a. Public policy and public security decisions

Regarding entry and visas, Article 4(3) simply states that the decisions must be justified. The person concerned shall be informed of the grounds on which the decision is taken, unless this is contrary to the interest of the State. Article 18(2) on the resolution for expulsion also requires a justification and no exception is foreseen. Therefore, the possibility for not informing the individual of the grounds for the decision does not apply in expulsion decisions based on public order, public security and public health. Article 20 of Aliens Act also imposes the requirement for justification as part of the right to fair trial. The resolution has to be adopted within 10 days from the reception of the proposal of resolution. This obligation is very important since under the Aliens Act, refusals of visa do not comply with the motivation of acts as under common administrative law.[126]

Article 58(2) Law 30/92 imposes the obligation for the notification to contain the full text of the resolution. Although Article 31(2) of the Directive is not transposed literally, all the resolutions have to be motivated. Article 89(2) and 138 of Law 30/92 as the basis of Administrative procedural law apply to these resolutions. This implies that the resolution will include a description of the facts and an analysis of the considerations one by one and all the grounds. The administration has to justify each of the reasons, and all aspects discussed shall be included in the resolution. This will guarantee that the text includes the full text and is very precise. In addition, Article 129(4) Aliens Regulation, which regulates the content of the resolution of expulsion, indicates that the resolution shall contain not only the elements listed in Article 89(2) Law 30/92, but also an assessment of the proof and specially of those which constitute the basic elements for the decisions, establishing those facts that are considered proven. The Supreme Court has also required that the justification includes the analysis of proportionality that justifies such decision (which includes the formula under Article 27 of the Directive – see comments above on this point).

This is also a consequence of one of the main guarantees which is included in the RD 240/2007, which is the participation of the State Attorney (*Abogado del Estado*) who will issue an opinion prior to the final resolution, except when there are duly substantiated reasons of urgency. The State Attorney opinion is a guarantee of the legality and of quality of the final resolution. His/her opinion has to be taken into account by the competent authority which will include the arguments by the State Attorney in the resolution (Article 16 of RD 240/2007). The negative element which has been criticised is the fact that this guarantee is only given to Union citizens and family members holding a residence card or a registration certificate.

Another guarantee is the possibility under Article 20 of LO 4/2000 for association defending immigrants' interests to participate in the procedure. This guarantee would be particularly relevant apply when the family member is a third country national.

[126] Palomar Olemda, *Tratado de Extranjería*, cfr supra note 5, p. 523.

For all the reasons above it is considered that the Spanish legislation is in compliance with the Directive on this point.

b. Restrictions of free movement base on other reasons (refusal of entry, issuance of certificate or card)

Regarding refusal of entry, Article 4(3) RD 240/2007 also include refusals of visas and refusal of entry. The comments above on the general rules apply here. The Spanish legislation is considered in compliance on this point. In Addition Article 156 of Aliens Regulation also offers procedural guarantees.

With regard refusals of registration certificates and residence cards for reasons other than public order and public security, the general rules on the administrative acts mentioned above apply, and therefore the Spanish legislation is considered in compliance on this point.

c. Refusals of entry and residence of other family members

The 19th Additional Provision to the Aliens Regulation imposed the obligation to justify all refusals of entry, visa and authorisation for residence. The general rules under Article 89(2) of law 30/92 and the specific rules on refusals of visas and residence cards regulated in the Aliens Act and Aliens Regulation (Article 156 Aliens Regulation) above will also apply here, and therefore the Spanish legislation is considered in compliance on this point (although there are some concerns regarding the level of motivation of visas).

d. Public policy and public security decisions under Aliens Act (other family members and family members who retained the right of free movement)

As seen before, the guarantees derived from general administrative procedural law and Aliens Act already apply to RD 2400/2007. Therefore, the Spanish legislation is considered in compliance. As the Supreme Court indicated, if the expulsion decision is decided instead of a fine, the Administration is required to justify the imposition of a stricter rule on the basis of proportionality.

- **Information on appeal procedures**

This is one of the general elements to be included in the administrative resolution. Article 89(3) Law 30/92 regulating the content of the resolution indicates that the resolution shall include the decision, which shall be justified when it affects the rights and legitimate interests of the person concerned, and shall express the appeals possible, the administrative body or judicial authority with which the person concerned may lodge the appeal, the time limit for the appeal without prejudice of the possibility for the person to lodge other optional appeals.

In addition to this general principle of administrative procedural law, RD 240/2007 as well as the Aliens Act and the Aliens Regulation refer expressly to this obligation.

The Spanish legislation is considered in compliance on this point.

a. Public policy and public security decisions

Article 18(2) RD 240/2007 imposes the obligation for the resolutions to be motivated with information regarding appeals, time to lodge the appeal and the authority with which the person may lodge the appeal. Nothing is expressly said on refusals of entry or visas for these reasons, but the general provisions apply. Article 13 of Aliens Regulation includes the requirement to inform about possible appeals, authorities and time-limit.

b. *Restrictions of free movement base on other reasons (refusal of entry, issuance of certificate or card)*

Article 89(2) of Law 30/92 already mentioned applies which ensures the information on appeals according to the Directive. The Spanish legislation is therefore in compliance.

c. *Refusals of entry and residence of other family members*

Article 13 of Aliens Regulation includes the requirement to inform about possible appeals, authorities and time-limit. The Spanish legislation is therefore in compliance.

d. *Public policy and public security decisions under Aliens Act (other family members and family members who retained the right of free movement)*

All resolutions for expulsions decisions must include information on possible appeals, time to lodge the appeal and the authority/body with which the person may lodge the appeal (Article 141 Aliens Regulation). The Spanish legislation is therefore in compliance.

- **Time-limit to leave the country**

a. *Public policy and public security decisions*

Article 18(2) transposes this provision almost literally "Resolutions declaring the expulsion shall establish the time allowed for the person to leave the Spanish territory. Save in duly substantiated cases of urgency, in which case the resolution shall be enforced immediately, the resolution will indicate the time allowed to leave the country which shall not be less than one month from the date of notification of the resolution. These resolutions shall be motivated with information regarding appeals, time to lodge the appeal and the authority with which the person may lodge the appeal."

The transposition has been considered correct, although it could be argued that the reference to immediately does not respect the spirit of the Directive.

b. *Restrictions of free movement base on other reasons (refusal of entry, issuance of certificate or card)*

Regarding refusals of issuance of registration certificate or residence card, nothing is said in RD 240/2007, as mentioned before. It is not clear whether Article 18(2) would apply by analogy, in which case the transposition is correct. Another possibility in the application of the Aliens Regulation relates to the decision of "compulsory exit" including the time to leave the country, which will be 15 days from the date of notification or in exceptional cases within 90 days. The application of 15 days would be contrary to EC law and thus will lead to the obligation to apply 90 days. In any case, the transposition of this point (Article 15 of the Directive) is considered as ambiguous.

c. *Refusals of entry and residence of other family members*

In this case the provisions of Aliens Act seem to apply which implies that in the case of interception at borders, the person will be retained within the specific facilities until the return is possible (Article 13(2) Aliens Regulation) within 72 hours, if this in not feasible then the person may be placed in a centre for foreigners (Article 156 Aliens Regulation). If the person tries to enter illegally, the return may be immediate or within 72 hours (Article 157 Aliens Regulation). In cases where the person was already in the country, a decision of "compulsory exit" includes the time to leave the country - which will be 15 days from the date of notification or in exceptional cases within 90 days (Article 158 Aliens

Regulation). The application of 15 days would be contrary to EC law and thus will lead to the obligation to apply 90 days.

d. *Public policy and public security decisions under Aliens Act (other family members and family members who retained the right of free movement)*

All resolutions under the Aliens Act include the time-limit for the person concerned to leave the country, but they do not grant the same level of protection that the Directive. In particular, if the decision is taken through the preferential procedure then the person concerned must leave the country immediately (Article 64 Aliens Act and Article 141(6) Aliens Regulation. In other cases, the exit has to take place within the time-limit included in the provision, which cannot be less than 72 hours (Article 64 Aliens Act 141(7) Aliens Regulation. Under certain conditions the decision may be transformed into a compulsory exit, implying that it will be 15 days from the date of notification or in exceptional cases within 90 days. This regime is not in line with the Directive.

2.8.2 Procedural safeguards under Article 31

Article 31 includes different procedural guarantees. This provision has been correctly transposed for decisions taken on the grounds of public order and public security, but is not in compliance with respect to Article 15 of the Directive, in particular the application of Article 31(2) of the Directive to these decisions.

- **Access to judicial and administrative appeal (Article 31(1))**

Against all these decisions (including refusals of entry, and residence cards/registration certificate), it is possible to appeal before the hierarchical superior (if the resolution was taken by the sub-delegate of the State then before the delegate of State) or if there is none, before the same authority that issued the decision (recourse on reposition- *recurso potestativo de reposición).* In addition there is the possibility to request the opinion of the Legal Service of the State or the State Attorney, the competent authority being obliged to modify the resolution accordingly when needed, and thus serving as a review procedure too.

Finally, in any case there is the possibility to lodge a judicial administrative appeal before the Provincial administrative courts and appeal to Superior Tribunals of Justice of the CA. Against the ruling of this court it is still possible to go the Supreme Court and under certain circumstances (*e.g.* for violation of the right to fair trial) to the Constitutional Court. In addition there are specific judicial procedures for the violation of fundamental rights.

1. Refusal of visas: appeal before the Superior Tribunals of Justice
2. Refusal of certificates and cards: Superior Tribunals of Justice
3. Sanctions: Administrative Courts

The 10th Additional Provision of Aliens Regulation includes reference to the appeal possible. Article 107 et al of Law 30/92 regulates the administrative appeal procedures, and Articles 93-100 of the Law on Administrative Judicial Procedure, the appeals before the administrative courts.

- **Suspension of the order of expulsion (Article 31(2))**

Article 17(1) transposes almost literally Article 31(2) of the Directive, according to which application for appeal against or judicial review of the expulsion decision is accompanied by an application for an interim order to suspend enforcement. Actual removal may not take place until such decision on the interim order is taken.

In Spain, appeal does not have suspensory effect, therefore this provision grants more rights to EU citizens and their family members. Article 17(1) estates:

> Where the application for administrative appeal or judicial review against an expulsion decision is accompanied by an application for an interim order to suspend enforcement of that decision, actual removal from the territory may not take place until such time as the decision on the interim order has been taken, except:
>
> — where the expulsion decision is based on a previous judicial decision; or
> — where the persons concerned have had previous access to judicial review; or
> — where the expulsion decision is based on imperative grounds of public security under Article 15(5)(a) and (d).

The courts have generally granted the suspension of the expulsion. A request for interim orders is an incident that may be appealed before the administrative or judicial procedure arrives at the Supreme Court.[127] The introduction of this provision is being contested before the Supreme Court as against Spanish legislation (and the tradition that an application of interim orders have suspensive effect until the resolution on the interim order is taken).

No such measure is provided for cases covered under Article 15(1) of the Directive and decisions covered under Aliens Act (decision on other family members and third country nationals who retained the right of residence). The application of the general rules under Law 30/92 and LO 4/2000 may not ensure the same level of protection. Therefore on this point the transposition is incomplete, although in other aspects may be more favourable.

In particular, automatic suspension of the enforcement of an expulsion or devolution decision applies when the person concerned request asylum or is a pregnant woman (See Article 141(9) and 157(6) of Aliens Regulation). For other cases it is not clear.

- **Revision of facts and law (Article 31(3))**

Article 31(3) of the Directive requires that the redress procedures allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based. They shall ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28.

As a principle, the appeal procedures allows for the examination of the facts and the law, either before the administration or before the judge. New facts and new provisions can be examined during the appeal procedure, although this is exceptional and normally the appeal procedure will examine the facts included in the proposal for resolution. The principle of proportionality and the criteria of Article 28 are part of the assessment of the legality of the action, and normally the most important aspect discussed (see discussion under Article 27 of the Directive). The examination of the facts is even possible under the final appeal before the Supreme Court but in that case the facts considered will only be those considered as proven by the inferior court, or even other facts that, although omitted by the inferior court, are sufficiently justified and are needed to assess the violation of the law or the jurisprudence (Article 88 of the law on administrative judicial procedure).

The provisions of Law 30/92 and Law on Administrative Judicial Procedure apply to all decisions. Thus including those covered by Article 15 of the Directive. The Spanish legislation is therefore in compliance with the Directive.

- **Exclusion of the individual concerned (Article 31(4))**

Article 31(4) of the Directive allows Member States to exclude the individual concerned from their territory pending the redress procedure. However, Member States cannot prevent the individual from submitting his/her defence in person, except when his/ her appearance may cause serious troubles to

[127] The Courts take into account the irreparable prejudice of the execution because of family ties (STS 13 November 2000 –RJ 2000, 10033), family reunification cases (STS 23 January 1999 RD 1999, 1330), excessive costs (STS 13 July 2000 RJ 2000, 7422), humanitarian reasons (STS 11 May 2000, RJ 2000, 6268).

public policy or public security or when the appeal or judicial review concerns a denial of entry to the territory.

Article 17(2) of RD 240/2007 transposes this provision literally. Therefore, the transposition is correct. With regard to Article 15 and decisions under the Aliens Act, it is not clear whether this is possible. The administration may have already expelled the person before he/she appeals the decision. It would seem that under compulsory exit (which are the decision under Article 15) the person will remain in the territory. However it is clear under Article 65(2) of Aliens Act and Article 120(4) and 156(6) of Aliens Regulation that in the case of expulsion decisions based on public order and public security, the foreigner is excluded from the territory and will lodge the administrative or judicial appeal from abroad, although it is not clear whether the person can present the defence in person. For this reason the transposition is not considered effective for decisions under Article 15 of the Directive and decisions affecting third country family members who retained the right of residence.

2.8.3 Exclusion orders (Article 32)

Article 32(1) of the Directive provides that the persons excluded on grounds of public policy or public security may submit an application for lifting of the exclusion order after a reasonable period, depending on the circumstances. Applications may be submitted three years from enforcement of a final exclusion order adopted in accordance with Community law, by putting forward arguments to establish that there has been a material change in the circumstances which justified the decision ordering their exclusion.

Two provisions of RD 240/007 are relevant here: Article 15(2) and Article 15(5)(b).

> Persons subject to a ban on entry may submit an application for lifting of the ban order not before two years from the adoption of the ban, by putting forward arguments to establish that there has been a material change in the circumstances which justified the decision of banning the person from Spain.
> 5. The adoption of one of the measures listed in paragraphs 1 to 4 shall be adopted according to the following criteria: […]
> b) They may be revoked ex officio or at the request of the person concerned when the reasons that justified its adoption no longer exist.

The provision is broader and not only include the case of expulsion but also a ban on entry, basically because it is possible that decisions on grounds of public order may result in the person not be in Spain. Expulsion orders always include a ban on entry for a period of three years as a minimum and 10 as a maximum (Article 58(1) of LO 4/200- Aliens Act).

Article 15(2) only allows applying for lifting the ban order after two years from the date on which it was taken. Therefore, it restricts the possibility given by the Directive of allowing this application after a reasonable period, depending on the circumstances, which may be less than two years in certain cases.

Article 15(5)(b) indicates that the decision adopted on the basis of public order and public security, which includes the ban in entry, can be revoked *ex officio* and at the request of the person concerned, when the circumstances which justified the adoption of the measures no longer exist. This implies that the public authorities are requested to respond actively to changes and periodically review the decision. It may be that the circumstances change before the two years have elapsed. In this case, the transposition would be correct. Since Article 15(5(b) apply to all decisions based on public order and public security, it should also apply to ban in entry. Most scholars give this interpretation. The practice and the tribunal will probably clarify whether Article 15(5)(b) would allow for revisions before the two years have elapsed. At this point the transposition is considered ambiguous.

Article 15(2) requires the competent authority to adopt the decision within three months instead of six months as required by the Directive. On this point the Spanish provision is more favourable.

Article 32(2) of the Directive indicates that the person concerned shall have no right of entry to the host Member State while their application is being considered. Article 15(2) transposes correctly this provision.

2.9 Final provisions (Chapter VII)

2.9.1 Publicity (Article 34)

Article 34 of the Directive imposes on Member States the obligation to disseminate information concerning the rights and obligations of Union citizens and their family members on the subjects covered by this Directive, particularly by means of awareness-raising campaigns conducted through national and local media and other means of communication.

No information could be obtained regarding awareness campaigns in national or local media but there are brochures on Spanish, French, English and German as well as Bulgarian and Romanian (for workers). The information is also available on the following websites.
http://www.map.es/servicios/servicios_on_line/extranjeria.html
http://extranjeros.mtas.es/es/general/Folletos_informativos.html
http://www.mir.es/SGACAVT/extranje/

The Ministry of Labour together with the Ministry of Foreign Affaire and the Ministry of Interior have issued an Instruction (DGI/SGRJ/03/2007) which is also available on internet.

There are also informative documents in all the Aliens Offices and the Commissariat of Police as well as in Youth Centres.

Finally, the ToC provided by Spain indicates that they have held meetings with the Consulates of the other 26 MS.

2.9.2 Abuse of rights (Article 35)

Article 35 allows Member States to adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31.

This provision has not been explicitly transposed but the provisions of LO 4/2000 and Law 30/92 apply (as a consequence of the Additional and Final provision of RD 240/2007).

From the perspective of the Aliens' fraud:

- Marriage of convenience is considered as fraud under civil law and can also lead to prosecution. The instruction of 31 January 2006 of the General Direction of the Registries and Notaries regulates this institution. The rights granted by nationality, obtaining residence and the family reunification of the family members of the spouse third country national.
- There is nothing in RD 240/2007 regarding false documents, but it is a general offence under criminal law.

Any provision adopted under this provision may be based on public policy and thus subject to the same procedural guarantees. However, if the decisions are considered restrictions of the right of residence on ground other than public order and public security, it follows that the not all the guarantees of Article 30 and 31 apply. For this reason the transposition is considered ambiguous. A more express provision would have been better.

From the perspective of the Administration (abuse of rights), under Article 62(1)(d) Law 30/92 allows for the declaration of nullity of all acts that have been adopted abuse of power or by an activity that could be considered as a crime of abuse of power.

2.9.3 Sanctions (Article 36)

RD 240/2007 only foresees sanctions for the failure to request the registration certificate and residence card. The fine imposed is 300EUR. No other sanctions have been identified apart for general behaviours described in previous sections (public order, public security) which apply to both Spanish nationals, Union citizens and third country nationals.

2.9.4 More favourable provisions (Article 37)

Fourth final provision of RD 240/2007 indicates that the rules of general character included in LO 4/2000, as well as the regulation developing, it shall be applicable to the persons covered by the RD on a complementary basis and provided they are more favourable and not contrary to EC Treaty or its secondary legislation.

In addition, as shown in this conformity study, many provisions are more favourable for Union citizens and their family members.

2.9.5 Transposition (Article 40)

As mentioned before, Spain was late in the transposition of the Directive.

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- Rodríguez Candela, "La expulsión del extranjero en el nuevo Código Penal"

ANNEX I: Table of concordance for Directive 2004/38/EC

See document attached

ANNEX II: List of relevant national legislation and administrative acts

All legislation is available at www.boe.es and consolidated versions can be found at www.noticias.juridicas.com

- **RD 240/2007**: Real Decreto 240/2007 de 16 de febrero, sobre entrada, libre circulación y residencia en España de ciudadanos de los Estados miembros de la Unión Europea y de otros Estados parte en el Acuerdo sobre el Espacio Económico Europeo (BOE núm 51, del 28 febrereo 2007) [Royal Decree 240/2007 on entry, free movement and residence in Spain of citizens of the Unioin and their family members]
  - **Instruction of the Ministry of Labour: Instrucciones DGI/SGRJ/03/2007**, relativas al Real Decreto 240/2007, de 16 de febrero, sobre entrada, libre circulación y residencia en España de ciudadanos de los estados miembros de la unión europea y de otros estados parte en el acuerdo sobre el espacio económico europeo http://extranjeros.mtas.es/es/normativa_jurisprudencia/Nacional/Instruccion03-2007.pdf

Aliens legislation

- **LO 4/2000 (Aliens Act):** Ley Orgánica 4/2000, de 11 de enero, Sobre Derechos Y Libertades De Los Extranjeros En España Y Su Integración Social (*BOE núm. 10, de 12 de enero)*, en su redacción dada por la ley orgánica 8/2000, de 22 de diciembre (BOE *núm. 307, de 23 de diciembre*), por la ley orgánica 11/2003, de 29 de septiembre (*BOE núm. 234, de 30 de septiembre*) y por la ley orgánica 14/2003, de 20 de noviembre (BOE *núm. 279, de 21 de noviembre*). Modificada por la sentencia 236/2007, de 7 de noviembre, del Tribunal Constitucional (BOE *núm. 295 -suplemento-, de 10 de diciembre*).
- **Aliens Regulation:** Real Decreto 2393/2004, de 30 de diciembre, por el que se aprueba el reglamento de la Ley Orgánica 4/200, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social (BOE *Núm. 6, De 7 De Enero)*, en su redacción dada por el Real Decreto 1019/2006, de 8 de septiembre (*BOE Núm. 228, De 23 De Septiembre*) y por el Real Decreto 240/2007, de 16 de Febrero (*BOE Núm. 51, De 28 De Febrero*).

Citizen's Security (passports and IDs)
- **LO 1/1992:** Ley Orgánica 1/1992, de 21 de febrero, sobre protección de la seguridad ciudadana (*BOE núm. 46, de 22 de febrero*), en su redacción dada por la Sentencia 341/1993, de 18 de noviembre, del Tribunal Constitucional, por la que se declaran nulos determinados preceptos *(BOE núm. 295, de 10 de diciembre),* por la Disposición Adicional Cuarta de la Ley Orgánica 4/1997, de 4 de agosto (*BOE núm. 186, de 5 de agosto*) y por la Ley 10/1999, de 21 de abril (*BOE núm. 96, de 22 de abril*). [Oragnic Law on citizens' protection and security]
- **RD Passport:** Real Decreto 896/2003, de 11 de Julio, por el que se regula la Expedición del Pasaporte Ordinario y se determinan sus características (*BOE núm. 166, de 12 de julio de 2003*)

Procedural Legislation
- **Law 30/92 (law on administrative procedure):** Ley 30/92 de 26 de noviembre de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común *BOE núm. 285 de 27 de noviembre de 1992*
- **Law on administrative judicial procedure:** Ley 29/1998, de 13 de julio, reguladora de la Jurisdicción Contencioso-Administrativa. *BOE de14 de julio de 1998*
- **RD on administrative punishment procedure:** Real Decreto 1398/1993, de 4 de agosto, por el que se aprueba el reglamento del procedimiento para el ejercicio de la potestad sancionadora (*BOE núm. 189, de 9 de agosto de 1993*)

Fees
- Orden PRE/3654/2007, de 14 de diciembre, por la que se establece el importe de las tasas por concesión de autorizaciones administrativas, expedición de documentos en materia de inmigración y extranjería, o tramitación de visados en frontera

Others
- RESOLUCIÓN-CIRCULAR de 29 de julio de 2005, de la Dirección General de los Registros y del Notariado, sobre matrimonios civiles entre personas del mismo sexo. http://www.boe.es/boe/dias/2005/08/08/pdfs/A27817-27822.pdf

- Instrucción medios de prueba : http://extranjeros.mtas.es/es/normativa_jurisprudencia/Nacional/Instruccion_DGI_%2005-2007.pdf

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ANNEX III: Selected national case law

Constitutional Court (www.boe.es)

- STC 6/1983 (RTC, 1983, 6)
- STC 19/1985 (RTC 1985, 19)
- STC 59/1990 (RTC 1990, 59)
- STC 94/1993 (RTC, 1993, 94)
- STC 116/1993 (RTC, 1993, 116)
- STC 242/1994 (RTC, 1994, 242)
- STC 222/1992 of 11 December 1992, BOE n. 16
http://www.boe.es/g/es/bases_datos_tc/doc.php?coleccion=tc&id=SENTENCIA-1992-0222
- STC 24/2000 (RTC, 2000, 6)
- STC 169/2001 (RTC, 200, 169)
- STC 46/2001, of February (RTC 2001, 46).
- STC72/2005 (RTC, 2005, 72)
- STC 236/2007, of 7 November 2007, BOE n. 295 of 10/12/2007, pp.59-83
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- STC 259/2007, of 19 December 2007, BOE n. 19 of 22/01/2008, pp. 50-58
http://www.boe.es/g/es/bases_datos/doc.php?coleccion=iberlex&id=2008/01083
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- STC 261/2007, of 20 December 2007, BOE n. 19 of 22/01/2008, pp. 65-69
http://www.boe.es/boe/dias/2008/01/22/pdfs/T00065-00069.pdf
- STC 262/2007, of 20 December 2007, BOE n. 19 of 22/01/2008, pp. 69-74
http://www.boe.es/boe/dias/2008/01/22/pdfs/T00069-00074.pdf
- STC 263/2007, of 20 December 2007, BOE n. 19 of 22/01/2008, pp. 74-78
http://www.boe.es/boe/dias/2008/01/22/pdfs/T00074-00078.pdf
- STC 264/2007, of 20 December 2007, BOE n. 19 of 22/01/2008, pp. 78-81
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ANNEX IV: Application forms