

THE RIGHT OF AN ALIEN
TO BE PROTECTED
AGAINST ARBITRARY
EXPULSION IN
INTERNATIONAL LAW

JULIA WOJNOWSKA-RADZIŃSKA

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The Right of an Alien to be Protected against Arbitrary Expulsion in International Law

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The Right of an Alien to be Protected against Arbitrary Expulsion in International Law

Preface

While no State may expel its nationals, it is the sovereign prerogative of States to regulate the presence of foreigners in their territory. This power is not unlimited and international human rights law places some restrictions on when and how to exercise it. The purpose of the book, therefore, is to identify those restrictions and provide an up-to-date overview and analysis of the generally accepted principles of current international law relating to the protection of aliens against arbitrary expulsion.

The problem of arbitrary expulsion has been sharply emphasized after 11 September 2001 as a reaction of States to combat terrorism which until then had been an remote threat for Western societies. In the aftermath of the attacks there has been a change in the way aliens are perceived. No longer are they treated with trust and impartiality. This has led to an increasing tendency to expel aliens without observing fundamental human rights norms.

The subject area presented has not yet been thoroughly analysed in international legal doctrine. There is no monograph regarding arbitrary expulsion that embraces the adopted international legal instruments, international case law and indicate up-to-date problems. Therefore, it is necessary to analyse that question from the perspective of human rights under international law.

This book describes the status of resident aliens, the international legal obligations of States for the protection of lawfully residing aliens against arbitrary expulsion and provides practical information on administrative proceedings, as well as legal remedies and guarantees aliens are entitled to. Lawyers, scholars, policymakers, government administrations, and non-governmental organizations involved in the development, practice and study of migration law should find this book useful.

The idea of writing this book emerged in 2009 while conducting research on "*Human rights of individuals who are not nationals of the country in which they live and asylum seekers*" in the institutional framework of the Ludwig Boltzmann Institute of Human Rights, Vienna. The *spiritus movens* of my work, however, was Professor Manfred Nowak by whom I was inspired to broaden my research. Therefore I am grateful to him and his research team for all their guidance and counsel.

This book could not have been completed if it had not been for the help of Dr. Aldona Chachlikowska (Head of Research Information and Knowledge Transfer Department, at Poznań University Library) and language assistance of Bernadeta Krysztofiak (senior lecturer at Adam Mickiewicz University in Poznań) and of Steve Lambley.

Special appreciation is also given to Brill Publishers for their forbearance and patience.

List of Abbreviations

ACHR	American Convention on Human Rights
ACHPR	African Charter of Human and Peoples' Rights
CAP	Code of Administrative Procedure
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CJEU	Court of Justice of the European Union
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter European Convention on Human Rights)
ECtHR	European Court of Human Rights
EU	European Union
FCN	Friendship, Commerce, and Navigation Treaties
HRC	Human Rights Committee
IACHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICJ	International Court of Justice
ILC	International Law Commission
ICPRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
RP	Republic of Poland
SAC	Supreme Administrative Court
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNHCR	The United Nations High Commissioner for Refugees
US	United States

Introduction

International human right norms and standards require states to provide non-nationals with the necessary forum to exercise their right to be heard before deporting them.¹

This book is a comprehensive legal study of the right of an alien lawfully in a State to be protected against arbitrary expulsion, which has been laid down *expressis verbis* both in Article 13 of the International Covenant on Civil and Political Rights (ICCPR) and Article 1 of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The questions the book deals with are of great significance not only because of ongoing migration issues but also due to actions carried out by different governments in their fight against terrorism.

Globalization and the growing disproportion of living conditions make many people take the decision to abandon their place of living to improve their life opportunities.² At the same time the world economy is becoming more and more dependent on the work of incoming workers who supplemented the shortage of personnel in some economy sectors such as: agriculture, construction industry, gastronomy, transport, manufacturing industry and individual services.³ However, the latest economic crisis has visibly contributed to the deterioration of their situation.⁴ Immigrants very often face hostility and suspicion on the part of the society they live and work in. Widespread xenophobia and its manifestations make them vulnerable and

1 *Kenneth Good v. Republic of Botswana*, Communication No. 313/05, decision of African Commission on Human and Peoples' Rights of 26 May 2010, para. 205.

2 Research shows that most immigrants perceive the change of their place of living as positive despite all necessary adjustments and obstacles they face upon migration. See: *Human Development Report – Overcoming barriers: Human mobility and development*, 2009, available on the UNDP website: <http://hdr.undp.org/en/reports/global/hdr2009/>.

3 A huge dependency can be observed in Spain, the UK and Germany.

4 A survey conducted by Harris for the *New York Times* shows that most citizens of the biggest EU Members States want unemployed immigrants to leave their country. 79% of Italians would support such decision, as well as 79% British, 71% Spanish, 67% German and 51% French. What is more, 54% of British nationals disapprove of citizens of other EU countries working in Great Britain. A similar attitude can be observed among German, 49% of whom is against granting EU citizens a work permit; T. Barber, "Jobless migrants should leave, say many in EU," *Financial Times*, 16.03.2009, article published on *Financial Times* website <http://www.ft.com/cms/s/0/8a8fbdd-11c9-11de-87b1-0000779fd2ac.html#axzz1to4M2rei>.

more susceptible to expulsion, which can then make it difficult to protect them when arbitrary expulsion is ostensibly the result.⁵

There is also the problem of the ongoing fight against terrorism. In consequence, aliens have become the first to arouse suspicion as a potential threat to the security of a State. Such conviction, as F. Sudre puts it, makes them even more exposed to legal abuse on the part of State authorities.⁶ It seems obvious that States have shown a tendency to make immigration rules more and more restrictive and the rights of individuals have been particularly affected. Thereby it can be said that terrorism, in some way, prompted States to violate human rights upon expulsion of aliens, often refusing basic procedural guarantees.

The key problem is, therefore, how to reconcile the right to expel an alien, which seems inherent to State sovereignty, with the need to observe fundamental human rights. Thus, it should be noted that the right of an alien to be protected against arbitrary expulsion from the country of his legal residence requires the protection of both the State's and the alien's interests. An alien who has resided and worked continuously in a State will have assets that require protection upon expulsion. While the idea of protecting aliens from

5 There are more and more voices in favour of implementing a more stringent immigration policy in Europe. To illustrate the tendency, let me quote an amendment, approved in a referendum, to Federal Constitution of the Swiss Confederation of 28 November 2010. The Constitution says that foreign nationals shall lose their right of residence and all other legal rights to remain in Switzerland if they are convicted of intentional homicide, rape or any other serious sexual offence, any other violent offence such as robbery, the offences of trafficking in human beings or in drugs, or a burglary offence. The amendment also refers to those who have improperly claimed social insurance or social assistance benefits. Convicted foreign nationals must be expelled right after having served a sentence. We also read that foreign nationals who have lost their right of residence and all other legal rights to remain in Switzerland must be deported from Switzerland and made subject to a ban on entry of from 5–15 years. In the event of reoffending, the ban on entry shall be fixed at 20 years. Under transitional provisions Swiss Parliament must prepare legislation within five years that clearly defines the mentioned offences and if necessary, may extend the list. See: Art. 121(3) and Art. 197(8) of the Constitution of the Swiss Confederation of 18 April 1999, available at: <http://www.admin.ch/ch/e/rs/1/101.en.pdf>.

6 F. Sudre, *Konwencja Europejska o Ochronie Praw Człowieka i Podstawowych Wolności*, Warszawa 1993, p. 67. As an example let me point to one of the methods applied by the USA after attacks of 11.09.2001 referred to as profiling security investigations which involved police detaining people whose looks might be indicative of their ethnic or racial minority origin, see: A.I. Schoenholz, "Anti-Terrorism Laws and the Legal Framework for International Migration," in R. Cholewinski, R. Perruchoud, E. MacDonald, *International Migration Law: Developing Paradigms and Key Challenges*, The Hague 2007, pp. 24–25; See also: W. Osiatyński, *Prawa człowieka i ich granice*, Kraków, 2011, p. 94.

being arbitrary expelled seems firmly accepted by States in international law, the content and the scope of such protection is far from clear. There have been demands for a precise definition of the right of an alien to be protected against arbitrary expulsion from the State of their legal residence but so far this approach has not been fully reflected in international conventions.

The main object of this book is to examine what legal protection for an alien against arbitrary expulsion is provided under international human rights law and understand the nature and the extent of this protection. This is achieved by defining the personal scope of those entitled to enjoy the right to be protected against arbitrary expulsion, analysing the content of the right to be protected against arbitrary expulsion under provisions of the investigated human right treaties and finally by presenting the character and the content of the obligations of a State. I believe that a comprehensive legal analysis of these issues will contribute to a better understanding of the right to be protected against arbitrary expulsion.

Since this study concerns individual expulsion in time of peace, mass expulsion will only be referred to if necessary as it has been thoroughly dealt with elsewhere and there is no current need to repeat the research.⁷ In analysing the leading issue reflected in this book, I will focus on international human rights law. My goal is to bring together the rules concerning the treaties concluded within the Council of Europe, namely the Convention for the Protection of Human Rights and Fundamental Freedoms and treaties concluded within the framework of the United Nations, such as the International Covenant on Civil and Political Rights, the Convention Relating to the Status of Refugees and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The research will be restricted to the aforementioned international conventions on human rights and their respective provisions concerning protection against arbitrary expulsion and, therefore, it will establish international regime on protection against arbitrary expulsion which is applicable to the territories of Member States of the European Union. Treaties regarding international humanitarian law are not the subject of this study.

The treaties investigated in this research will be referred to without a comprehensive and comparative analysis of national laws and practices of States they concern. Nevertheless, Poland has been chosen to illustrate how international law framework is implemented in domestic law as it is no longer a country of emigrants only, but immigrants as well. More and more aliens arrive in Poland in order to obtain international protection or to improve their

⁷ See: Jean-Marie Henckaerts, *Mass Expulsion in Modern International Law and Practice*, Martinus Nijhoff Publishers, The Hague/Boston/London, 1995.

living conditions. Although one may have an impression that immigration law in Poland is not given such an importance as it is in most European countries, this is far from true, so that some issues will be pointed out in this respect. First, along with accession to the European Union, the attractiveness of Poland has significantly increased not only as a transit country, but also as a place of education, employment and simply a country to settle.⁸ Secondly, it is estimated that Poland in the near future will become a destination for numerous immigrants from the former Soviet Union, and perhaps also from the Far East. Finally, downward demographic tendency should leave no illusion: there will soon be an urgent call for immigrants to supplement the labour shortage and a declining number of Polish students. It should also be emphasized that there are more and more cases of arbitrary expulsion dealt with by Polish courts, an uncommon phenomenon so far.

The situation described above requires an effective institutional and legal system in Poland prepared to face an increasing influx of immigrants, and, what is more important, a system that will comply with international standards. These demands were partially reflected in the new law on migration which entered into force on 1 May 2014.

Legislation adopted by the European Union, specifically Council Directive 2003/109/EC of 25 November 2003 on the status of third-country nationals who are long-term residents and Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, will also be of interest. Other regional systems, namely the American and African human rights systems, will be referred to occasionally, but the key sources will be the jurisprudence of the European Court of Human Rights – which has established a comprehensive and extensive judicature acknowledging various procedural and substantive rights as protection against arbitrary expulsion – and the views of relevant UN treaty bodies: the Human Rights Committee and the Committee Against Torture respectively. The cases described or quoted in this book have been chosen from a large number of

8 The statistics from 2011 indicate a further increase in the number of visas and work permits granted, and at the same time stabilization in the number of residence permits granted. Surveys from 31 December 2011 show that 100,298 foreigners had valid residence permit (about 3,218 more than in 2010 and 7,724 more than in 2009). Most non-EU immigrants (both legal and illegal) come to Poland from: Ukraine, Belarus, Vietnam, and Armenia. Migrants from the former Soviet Union, as well as Armenia, come to Poland because of co-ethnic communities that have existed in Poland for centuries. The number of Chinese citizens receiving temporary residence permits has grown in the past few years.

judgments and decisions made by the international jurisprudence. However, the practice of the Human Rights Committee is still not very developed in this field as it has had rather limited communications relating to arbitrary expulsion. Nevertheless, its practice is rich enough to be borne in mind when discussing some essential issues.

The analysis that has been carried out tackles the following aspects:

1. The scope and the content of the right of an alien to be protected against arbitrary expulsion from a State of their legal residence included in the International Covenant on Civil and Political Rights, the European Convention on Human Rights, based on the case law of the Human Rights Committee and the European Court of Human Rights as well as the extent to which standards appointed in both treaties have been accepted by Polish legislation;
2. The scope of protection against arbitrary expulsion from the State of their legal residence each alien is entitled to;
3. The scope and the content of the State's responsibility for arbitrary expulsion;
4. Reparation for arbitrary expulsion of an alien.

The analysis of the above-mentioned issues called for formulation of the following questions:

1. What is the right of an alien to be protected against arbitrary expulsion from a State of their legal residence ?
2. What are the protective measures against expulsion from a State of their legal residence an alien is entitled to?
3. Are "integrated aliens" entitled to special protection against expulsion?
4. What obligations for States derive from the discussed right of an alien?

The study carried out here is based on selected provisions of international conventions on human rights which regulate the right of an alien to be protected against arbitrary expulsion from the State of legal residence. When interpreting the regulations of conventions and other legal acts, international case law on the subject has been taken into account and the opinions of the Human Rights Committee and the jurisprudence of the European Court of Human Rights in Strasburg relating to the analysed right of an alien have been quoted. Polish law is presented rather as a comparative illustration of how international standards are implemented in every-day life. The four key questions will be answered throughout the whole book, which consists of six chapters.

The first chapter, *Categories of aliens and types of expulsion*, is of introductory nature and defines the term “alien” and introduces its different categories. It also covers the notion of “expulsion” and specifies what “lawful residence” is.

The second chapter, *The concept and the development of the right of an alien lawfully in the territory of a State to be protected against arbitrary expulsion*, focuses on the historical background of the right of an alien to be protected against arbitrary expulsion from his State of lawful residence and its general characteristics including the ideas put forward by both legal doctrine representatives and the jurisprudence within the international human rights law.

The third, *The scope of protection against arbitrary expulsion from a State of legal residence under international human rights law*, concentrates on analysis of the scope of protection against arbitrary expulsion from the State of lawful residence on the grounds of international human rights law. Special attention has been given to regulations which guarantee protection against arbitrary expulsion. These are the following:

- the right of an alien to have protection of private and family life,
- an individual's right not to be expelled from his own country,
- principle of non-discrimination,
- an alien's right not to be expelled to a country where he would face grave human rights violations (the *non-refoulement* principle).

Later in the chapter there are examples of international jurisprudence on implementing these rights and the main problems that emerged in the former case law of the Human Rights Committee and the European Court of Human Rights.

The fourth, *Procedural measures and guarantees to which an alien is entitled to*, catalogues the procedural guarantees an alien is granted against arbitrary expulsion on the grounds of international conventions. Following the analysis, several conclusions have been drawn on the positive and negative aspects of these rights and the former practice of the Human Rights Committee and the European Court of Human Rights in this regard.

The fifth, *Polish approach to protection against arbitrary expulsion*, gives an insight into the extent to which set standards in the discussed human rights treaties were accepted by Polish legislation. The law and practice of Poland, however, is presented in some detail because of the fundamental value of a discussion the topic may instigate. Therefore, procedural regulations and the course of proceedings in case of expulsion have been widely discussed. Polish judicature has been quoted to show the way the existing law concerning aliens is interpreted.

The last chapter, *Responsibility of a State for violating the right of an alien to be protected against arbitrary expulsion*, deals with the responsibility of a State and reparation for arbitrary expulsion of an alien. It shows a range of problems concerning an internationally wrongful act committed by a State in the form of arbitrary expulsion. It also discusses different forms of reparation for injuries suffered that an expelled alien is entitled to.

Hence, the book gives a complete and comprehensive overview of the problem of the protection of an alien against arbitrary expulsion. The work has not only theoretic implications but also, and most importantly, tackles practical issues present in international jurisprudence as well as domestic case law recently heard by Polish courts.

Nevertheless, the limited scope of the subject has impeded a thorough analysis of, *inter alia*, both American and African human rights systems as well as collective expulsion phenomenon which here had to be narrowed down due to the main subject of this book.

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Categories of Aliens and Types of Expulsion

1 Introduction

Immigration policy is one of the State's primary functions. All forms of immigration proceedings of a State Party to the International Covenant on Civil and Political Rights and the European Convention on Human Rights are subject to the human rights standards established in them. Being an alien does not take him¹ outside the international protection of human rights. However, concerning the right to be protected against arbitrary expulsion, immigration status has a decisive significance, since this right is guaranteed only to lawfully present aliens. Without a doubt, the possibility of expulsion creates a feeling of uncertainty for an individual living in a foreign State. For that reason, legal protection against expulsion measures turns out to be one of the key issues regarding the status of lawful aliens. For precise understanding of the notion of an alien, some basic classifications have to be made. Therefore, I will discuss: long-term immigrants, migrant workers, refugees, stateless persons and EU citizens.

2 The Notion of an Alien

In 1892, the Institute of International Law recognized "aliens as all those who do not have a current right of nationality in the State without distinguishing as to whether they are simply visitors, or are resident domiciled in it or whether they are refugees or have entered the country voluntarily."² Therefore, international law doctrine defines "an alien"³ as a natural person who is not a national of the State in which he is present.⁴ An alien, thus, could be a citizen of another country or one without any citizenship (a so-called stateless person).⁵

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- 1 Throughout this book use of the masculine pronouns and possessive adjectives (he, him, his) should in general be taken as representing both male and female.
 - 2 *International Rules on the Admission and Expulsion of Aliens* (*Règles internationales sur l'admission et l'expulsion des étrangers*), adopted by Institute of International Law in 1892, Art. 1.
 - 3 There are two coexisting terms, namely: "alien" and "non-national."
 - 4 A. Klafkowski, *Prawo międzynarodowe publiczne*, Warszawa, 1979, p. 270.
 - 5 R. Bierzanek, J. Symonides, *Prawo międzynarodowe publiczne*, Warszawa, 1999, p. 259.