CHAPTER 4

Procedural Measures and Guarantees to Which an Alien is Entitled To

1 Introduction

Theory and practice concerning the requirements for the expulsion of lawful aliens have evolved over the centuries. It is a common knowledge that expelling an alien who is lawfully in the territory of the host State must meet necessary procedural requirements. A list of requirements protecting against arbitrary expulsion may be found not only in the case law of treaty bodies (international jurisprudence) but also in the practice of States. The list encompasses: the guarantee that no lawful alien be expelled from the territory of a State except on reasonable grounds and pursuant to a decision made in accordance with law; the prohibition of discrimination; that the decision be communicated to the expelled person along with the grounds it is based on; that the alien be given an opportunity to question the legality and validity of the expulsion order in an appropriate legal procedure; and the order of expulsion shall be in writing.

Since expulsion proceedings are not criminal proceedings, the procedural guarantees are not as broad as those for criminal proceedings. The order to expel must be of an individual character and cannot lead to infringement of aliens' freedoms and rights protected under international human rights law. In this chapter I will identify what procedural guarantees are available to lawful aliens who are subject to an expulsion decision. I will first make reference to procedural requirements concerning the expulsion decision imposed on administrative bodies. Then, I will examine the alien's right to submit reasons

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against expulsion, the right to have his case reviewed, the right to an effective remedy against such decision, listing the main elements that are required for a remedy to be effective, and the right to counsel. Finally, I will discuss diplomatic protection.

2 Legal Requirements of the Expulsion Decision

The basic aim of the analysed right of an alien is to provide him with procedural guarantees against arbitrary expulsion. It should be noted that the regulation of Article 13 of the ICCPR, Article 1 of Protocol No. 7 to the ECHR, Article 22(6) of the ACHR and Article 12(4) of the ACHPR stipulate that an alien who is lawfully in the territory of a State may be expelled only in pursuance of a decision reached by a court or administrative authority in accordance with domestic law. These treaties impose an obligation on States Parties to have a law which regulates the matter of expulsion and expect them to follow it strictly. This then contributes to making the proceedings of expulsion predictable and helps to avoid abuse of power and precludes arbitrariness. As V.O. Orlu Nmehielle indicates “the phrase ‘a decision reached in accordance with law’ [under Article 12(4) of the Charter] seems to suggest that an expulsion must have a judicial or quasi-judicial character, where there can be guaranteed some measure of due process.”

It follows from the content of the aforementioned provisions that expulsion of an alien lawfully in the territory of a State – which is a party to these instruments – can only be compatible with the international obligations of that State if it is decided in accordance with “the law,” namely the domestic law. Compliance with international law is, to some extent, dependent here on compliance with internal law. In the view of the International Court of Justice:

it is clear that while ‘accordance with law’ as thus defined is a necessary condition for compliance with the above-mentioned provisions [i.e. Article 13 of the ICCPR and Article 12(4) of the ACHPR], it is not the sufficient condition. First, the applicable domestic law must itself be compatible with the other requirements of the Covenant and the African Charter; second, an expulsion must not be arbitrary in nature, since

5 S. Jagerskiold, op. cit., p. 184.