

Ways to Cease the Presence of Aliens on the Territory of a State

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Abstract: According to the Political Dictionary, the alien is regarded in the broad sense of the term (that of individual), being defined as: any individual who does not hold the nationality of the state in which they are found. This definition determines the person's alien nature depending on the territory in which they are located, as well as the criterion of the nationality held by such person. The legal status applicable to the natural person alien by Romanian law is a conglomerate of rights and obligations specific to the legal relationships of aliens, belonging to different branches of law and making up what doctrine calls the legal condition of the alien.

Keywords: alien; territory of a state; natural person; Romanian law

1. The Concept of Alien

According to the Political Dictionary (Tamaş, 1993), the alien is regarded in the broad sense of the term (that of individual), being defined as: any individual who does not hold the nationality of the state in which they are found. This definition determines the person's alien nature depending on the territory in which they are located, as well as the criterion of the nationality held by such person.

The legal status applicable to the natural person alien by Romanian law is a conglomerate of rights and obligations specific to the legal relationships of aliens, belonging to different branches of law and making up what doctrine calls the legal condition of the alien.

In one opinion, the legal condition is viewed as *lato sensu* – encompassing all the specific rules applicable to aliens and *stricto sensu* – used to delimit another institution, that of the conflict of laws, which governs the law by which the rights and obligations of the alien should be exercised. On the one hand, the legal condition of the alien is determined as a set of specific rights and obligations by the law of the state in which the alien is temporarily located (the law of the state of residence),

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which makes some authors acknowledge their unilateral character. The same authors, however, consider that in defining the legal status of the alien, the state of residence treats the alien in accordance with its or her own subjects.

The notion of alien refers to *persons who are on the territory of a state and who are nationals of another state or are deprived of their nationality*. Aliens are also assimilated to persons without nationality (stateless), like refugees. The status of aliens is, in principle, determined by each state, which determines by its legislation, as well as by acts of administration and justice, the rights and obligations of aliens, the conditions of entry in and exit from the country, etc.

Certainly, the legal status of aliens is not to be confused with that granted to nationals of that state. The state does not have the same authority over and the same obligations with respect to them. The persons in the two categories do not have the same rights and obligations towards the state whose nationals they are, or to the foreign state on whose territory they are at one time. The determination of the content of such rights and obligations is done in all cases by the internal laws of each state, in compliance with international rules and standards (Miga-Beșteliu, 2005, p. 131).

In determining the alien's legal status, the state of residence may pursue two coordinates: granting a legal status to the alien according to their own interests or a legal status that is as close as possible to that of its own citizens. For economic reasons, some states also make use of other factors in establishing the legal status of aliens; tourism is one of them and it may often be the most important (Macarovschi & Vișan, 2014, p. 100).

The doctrine highlights that there is no general rule of international law that binds a state to admit any alien to its territory. Under international law, unless bound by an international treaty, the state is under no obligation to admit any alien to its territory or not to expel them. Similarly, international law does not impose a fixed period of residence for aliens once admitted to the territory of a state.

However, each state treats these issues with great care: the prohibition of aliens' entry, as well as unjustified expulsions, may be viewed by other states as challenges or inimical acts against them and may result in retaliatory measures. The following guidelines have thus been dealt with in the matter:

1. a state has the duty to admit the entry of any alien into its territory, but it may condition such entry. Thus, a state may refuse admission to its territory in the case of categories of aliens deemed undesirable, such as people who systematically consume drugs, suffer from contagious or other diseases.
2. a state is entitled to expel any stranger, but for good reasons.

Individuals who are not nationals of the state of residence (domicile) and are not linked by nationality to any other state are persons without nationality (stateless persons).

In our legislation stateless persons are assimilated to aliens and enjoy the same rights. Article 18 of the Romanian Constitution provides that aliens and stateless persons living in Romania enjoy the general protection of persons and property, as guaranteed by the Constitution and other laws.

Therefore, the legal situation of aliens is regulated not only by national laws that are different from one country to another, but also by international conventions and customary norms of international law.

2. Ways to Cease the Presence of Aliens on the Territory of a State

a) The return of aliens is the measure taken against illegal aliens and former asylum seekers. This is done on the basis of a return decision notified to the alien, who may leave the country unaccompanied within 15 or 30 days, by fulfilling certain conditions (Leonescu et alli, 2013, p. 90). The return decision may be appealed within 10 days of the date of notification.

Decisions to remove aliens, third-country nationals, from the territory of the Member States of the EU are recognised by the Romanian State and are implemented by the General Inspectorate for Immigration in the following cases:

- the removal decision is made for reasons of public order and national security, as follows: when the alien was convicted for committing a crime longer than one year; and as a result of the carrying out by the alien or the existence of sound evidence that the alien is going to carry out activities that could endanger national order and safety.
- the removal decision is made as a result of the alien failing to comply with the conditions regarding the entry and residence of aliens in the territory of the Member State concerned.

b) Escort removal

Escort removal is carried out by the specialised staff of the General Inspectorate for Immigration, for the following categories of aliens:

- a) who have not voluntarily left the territory of Romania upon expiry of the return decision term;
- b) who have crossed or attempted to illegally cross the state border;
- c) who have been declared undesirable;
- d) against whom expulsion was ordered;
- e) who entered Romania during the period of prohibition previously ordered;
- f) who present a risk of absconding from the removal procedure, as defined by this emergency ordinance.

Escort removal can also be carried out for aliens who have physical or mental disabilities or are a public health hazard, taking into account their special needs.

The aliens mentioned above may be removed under escort and on the basis of readmission agreements concluded by the European Union or Romania with third countries, only to the extent that their provisions are more favourable than the provisions of this emergency ordinance.

- a) the alien is a minor and his or her parents have the right to stay in Romania;
- b) the alien is a parent of a child who is a Romanian national, if the minor is in their charge or if there is the obligation to pay alimony, and the alien complies with such obligation regularly;
- c) the alien is married to a Romanian citizen or an alien who has a long term right to stay in Romania, and the marriage is not a marriage of convenience;
- d) the alien has exceeded the age of 65.

Persons mentioned above may be granted or, as the case may be, extended their right of residence in Romania by the General Inspectorate for Immigration, for one of the purposes and under the conditions of the law, without the need to obtain a long-stay visa in advance.

At the request of one of the states that have concluded readmission agreements with Romania, it is possible to allow the transit of Romania's territory by the alien subject to a readmission procedure to a third State, provided the alien is escorted and guaranteed are presented that they can continue their journey and enter their destination state.

c) *Expulsion* is a measure taken on the basis of an act whereby a state compels one or more aliens who is or are on its territory to leave it as soon as possible. Generally, only aliens are expelled. Nevertheless, some countries have laws that admit the expulsion of nations. The expulsion measure is taken in order to protect the state's legal order or for economic, political, etc. reasons.

An alien can only return to the country from which they were expelled by cancellation of the expulsion order or by acquiring the nationality of the state that expelled them.

The institution of expulsion is governed by the domestic law of each state. Expulsion is not a criminal sanction, but a safety measure. Due to this nature, the patrimonial rights of the expelled person remain under the protection of the provisions governing the status of aliens.

In general, the expulsion measure is taken against those aliens who become undesirable for one reason or another, or through their activities that might endanger the security of the state and its internal order.

The state of danger that requires the application of this safety measure results from the combination of two factors: the act (the offence) committed by the foreign citizen and the socially dangerous personal condition of the offender (Stancu & Negruț, 2013, pp. 215-222).

Public international law regulates certain aspects of expulsion from the standpoint of avoiding possible abuses by states and in the spirit of human rights and fundamental freedoms. Thus, the Universal Declaration of Human Rights states that “no one shall be subjected to arbitrary (...) exile.”¹

The International Covenant on Civil and Political Rights of 1966 establishes that “an alien lawfully in the territory of a State (...) may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.”²

In addition, Protocol no. 4 to the Convention for the Protection of Human Rights stipulates that “no one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national” and that “no one shall be deprived of the right to enter the territory of the state of which he is a national.”³ Moreover, the Protocol prohibits collective expulsion of aliens.⁴ Protocol no. 7 to the same Convention, by developing the rules regarding expulsion, establishes that “An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed to submit reasons against his expulsion, to have his case reviewed, and to be represented for these purposes before the competent authority or a person or persons designated by that authority. An alien may be expelled before the exercise of his rights (above, our note) when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.”⁵

The expulsion measure may also be applied to aliens enjoying diplomatic immunity provided they are declared as *persona non grata* and they refuse to leave the territory of the state voluntarily within the prescribed time limit (Scăunaș, p. 226).

Although the state taking the expulsion measure is not bound to justify this attitude, in international practice, on the basis of international courtesy, it has become customary to notify the bodies of the alien’s state with respect to the reasons why

¹ Universal Declaration of Human Rights, Art. 9.

² International Covenant on Civil and Political Rights, Art. 13.

³ Art. 3. See Council of Europe. *Human Rights. Documents*, Universal Declaration of Human Rights, pp. 36-38.

⁴ *Ibidem*, Art. 4.

⁵ Art. 1, *ibidem*, pp. 42-47.

the alien is obliged to leave the country.

Expulsion will be done with a precise destination and with the consent of the state whose national is the convict, and it is not possible to extradite a person to a state where they would be subject to punishment or torture, or cruel, inhuman or degrading sanctions, an interdiction emerging from the New York Convention, to which Romania acceded in 1990. (Negruț, 2015, p. 116)

At the same time as issuing the return decision or implementing the expulsion measure, the authorities may also order, under the law, **prohibition of entry into the country that ordered the two measures** for a determined period of time.¹

d) Undesirable persons. Declaring a person as undesirable is a measure against a EU citizen or a member of their family who has carried out, is carrying out or there is sound evidence that they intend to carry out activities likely to endanger national security or public order. The period for which an alien may be declared undesirable is between 5 and 15 years (in the Romanian legislation), and such period may be extended for a new period between these limits, if it is found that the reasons that determined this measure have not ceased.

The data and information on the basis of which it is proposed that the alien should be declared undesirable for national security reasons shall be made available to the court under the conditions laid down by the legislative acts governing the regime of activities related to national security and the protection of classified information.²

In the Romanian legislation, after the completion of half of the period of interdiction or after 3 years from the date of its ordering, the person declared undesirable under GEO no. 194 of 12 December 2002 may request the lifting of the interdiction. The lifting of the interdiction may be ordered by taking into account any changes that have occurred in the circumstances that determined its ordering. (Leonescu et. alli, 2013, pp. 114-116)

e) Extradition is an act of inter-state legal assistance in criminal matters whose aim is transferring a person that is prosecuted or convicted of criminal offences from the scope of judicial sovereignty of a State to the scope of judicial sovereignty of another State. Such an act is the consequence of the territoriality of the criminal law and it is based on international cooperation with respect to legal assistance between states. (Popescu & Năstase, 1997, p. 147) Extradition takes place at the request of the state interested in the extradited person being investigated, tried or serving the sentence to which they were convicted. As extradition is a sovereign attribute of the state, it may allow or refuse surrender of the person whose extradition is requested.

¹ For details about the status applicable in Romania, see (Leonescu et. alli, 2013).

² Art. 30, Government's Emergency Ordinance 102/2005 updated/republished on the free movement on the Romanian territory of the citizens of Member States of the EU, European Economic Area and Swiss Confederation citizens, republished in Official Gazette no. 774 of 2.11.2011.

Extradition shall be granted or may be requested on the basis of an international convention, on the basis of reciprocity and, in the absence of these, by virtue of the law.¹ The main substantive conditions of extradition are: the act for which extradition is requested must be regarded as a criminal offence in the legislation of both states (the principle of dual criminality), the extradited person must not be tried for a crime other than that for which it was requested, the extradited person must not be subjected to the serving of another sentence than that for which it was obtained, the non-extradition of its own citizens, as well as persons who have committed political offences. Other conditions: the sentence is required to be more than one year of deprivation of liberty if extradition is requested for the serving of the sentence, and if extradition is requested for the purposes of prosecution or trial, the sentence must be at least 2 years.

If the act for which extradition is requested is prescribed or amnestied – or if there is another case that removes the criminal responsibility or the consequences of the conviction – the extradition cannot take place, and it shall be considered that the extradition request is devoid of purpose. Furthermore, extradition cannot take place if the person is removed from criminal prosecution by a final judgment or by an ordinance.

Two principles are required in international law: a. reciprocity; and b. specialisation, which requires that the act should be provided for in the legislation of both states, and the trial and punishment of that person should only take place for the acts for which extradition has been requested (Mazilu, p. 286).

If extradition was requested by several states, it is usually granted to the state in whose territory the act was committed, given that such state has suffered the consequences of the offence.

A rule that is recognised by almost all states is that they do not extradite or expel their own citizens. An exception to this rule, almost singular in the European area, is that of Romania.²

¹ The Romanian Criminal Code (1968) refers to extradition under Art. 9, and the detailed regulation is provided for in the Law of 18 March 1971 on extradition. Legal assistance treaties on civil, family and criminal matters concluded with numerous countries include extradition provisions.

² In its initial form of 1991, the Constitution of Romania established under Art. 19(1) that “No Romanian citizen shall be extradited or expelled from Romania.” Upon the Constitutional review of 2003, so as to comply with requirements of the Community *acquis*, the review of this provision was proposed, as follows: (1) No Romanian citizen shall be extradited or expelled from Romania. (2) By exemption from the provisions of paragraph (1), Romanian citizens can be extradited based on the international agreements Romania is a party to, according to the law and on a mutual basis. One of the first effects of this review was amending Law no. 80/1997 for the ratification of the European Convention of Extradition, in which, at the time, Romania declared that it cannot extradite its own citizens; such amendment came into force by Law no. 74/2005. Thus, “Romanian citizens may be extradited from Romania on the basis of international conventions to which it is party an on a mutual basis, only if one of the following conditions is fulfilled: a) the requesting State, with a view to

The rule of non-extradition of its own citizens has led to the introduction in the *Statute of the International Criminal Court*, adopted in Rome on 17 July 1998,¹ of an innovation in this respect, which enshrines the institution of the return of perpetrators of the crimes under the jurisdiction of the Court. *Surrender* is defined as the delivering up of perpetrators to the Court, as opposed to *extradition*, which is defined by the same document as the delivering up of perpetrators to another state.² This innovation attempts to avoid the provision enshrined in almost all the fundamental laws of states, according to which they cannot extradite their own citizens, thus the Court being unable to judge.

Designed in a new way, extradition contains modern regulations harmonised with the provisions of the Convention of 10 March 1995 on Simplified Extradition Procedures between the Member States of the European Union and the Extradition Convention between the Member States of the European Union of 27 September 1996. These two Community instruments (already replaced in the relationship between Member States by the Framework Decision on the European arrest warrant) complement the instruments adopted under the aegis of the Council of Europe – the European Convention on Extradition of 13 December 1957 and its Additional Protocols (Boroi & Negruț, 2017, p. 671).

f) Assisted humanitarian voluntary return (Leonescu et alli, 2013, p. 103)

Aliens in the territory of Romania may request the support of the General Inspectorate for Immigration, as well as that of international or non-governmental organisations with specific attributions in the field, for voluntary humanitarian repatriation if they do not have financial means.

The program is aimed at migrants who want to return home and are included in one of the following categories: (a) migrants staying unlawfully on the territory of Romania; (b) asylum-seekers who have received a negative answer, as well as those who have not yet received a final negative decision but want to quit the procedure and return home; (c) aliens who are granted international protection or temporary protection in Romania and who want to give up protection to return home.

People who fall into the categories above and want to return home can benefit from:

conducting the criminal prosecution and the trial, provides assurances that are considered sufficient that, in case of a conviction to a custodial sentence by a final court decision, the Romanian citizen will be transferred so as to serve the punishment in Romania; b) the Romanian citizen is domiciled in the territory of the requesting state at the date of the request for extradition; c) the Romanian citizen also has the citizenship of the requesting state; d) the Romanian citizen committed the act on the territory or against a citizen of a Member State of the European Union, if the requesting state is a member of the European Union". What is specific for all this "struggle" of Romania to allow extradition of its own citizens is its singularity in the European area. For details, see (Scaunas, 2007).

¹ Statut de Rome de la Cour Penale Internationale, Nations Unies, Doc. A/Conf.183/9, 17 July 1998.

² Doc. cit., Art. 102.

Plane ticket from Bucharest to their country of origin;

IOM assistance and advice before departure, in the airport, in transit and upon arrival in the country of origin;

Assistance in the relationship with the diplomatic missions of the countries of origin, if the migrant does not have a travel document and must be issued one;

The equivalent of approximately \$100 in cash before departure;

Persons enrolled in the project who are in a precarious financial situation may receive social benefits for a limited number of days prior to departure;

Migrants who wish to do so may take a vocational course before leaving Romania;

Support for reintegration in their country of origin.

The General Inspectorate for Immigration, together with international organisations with relevant attributions in the field, as well as with non-governmental organisations in the field, will develop joint programmes to identify concrete ways of supporting the aliens mentioned above in view of their assisted humanitarian voluntary return, as well as the financial resources required to this end.

Aliens included in the assisted humanitarian voluntary return programmes are issued return certificates by the General Inspectorate for Immigration.

Aliens can individually benefit from the support of the General Inspectorate for Immigration only once through the programmes provided for in paragraph (2) for their assisted humanitarian voluntary return.

For a person to be eligible for reintegration assistance, an IOM mission/office must exist in their country of destination.¹

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¹ www.oim.ro

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*** Council of Europe. Human Rights. Documents.

*** International Covenant on Civil and Political Rights.

*** Universal Declaration of Human Rights.

*** www.oim.ro.