



# INSECURE JUSTICE? RESIDENCE PERMITS FOR VICTIMS OF CRIME IN EUROPE



PLATFORM FOR INTERNATIONAL COOPERATION ON  
UNDOCUMENTED MIGRANTS

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# EXECUTIVE SUMMARY

The current approach to irregular migration, both at the EU- and member state-level, is defined by a criminal justice model that treats a person in an irregular situation first and foremost as an offender. Rather than seeing irregular migration as the result of complex systematic factors, the emphasis is instead on deterring irregular entry and stay by way of various sanctions, including the possibility of criminal penalties such as fines and imprisonment in a number of member states, in addition to immigration detention and return. This criminalisation framework has a direct impact on the safety of migrants, putting them at risk of exploitation and abuse.<sup>1</sup> At the same time, EU law recognises the vulnerability linked to irregular status, and the reluctance of victims of crime to seek help and to report abuse, and provides for special permits for some victims, which is reflected in the legislation of every member state.

This report considers the EU and international legal framework that creates residence permits for some victims of crime; and looks at national legislation in ten European countries (Belgium, France, Germany, Greece, Italy, the Netherlands, Poland, Spain, Switzerland and the UK) that implements such measures – and sometimes goes beyond. .

## Residence permits for victims of crime in EU directives and member state legislation

Several EU directives make provision for residence permits for certain victims of crime, namely the Citizens' Rights Directive<sup>2</sup> and Family Reunification Directive<sup>3</sup> (for survivors of conjugal violence with dependent status), the 2004 Anti-Trafficking Directive<sup>4</sup> (for victims of human trafficking), and the Employer Sanctions Directive<sup>5</sup> (for victims of labour exploitation). The Return Directive<sup>6</sup> leaves member states free to grant a residence permit "at any moment" to someone in an irregular situation for compassionate or humanitarian reasons.

In some cases, EU legislation is prescriptive, requiring that permits be available under certain circumstances, such as Art. 15(3) of the Family Reunification Directive and Art. 13(2)(c) of the Citizens' Rights Directive. Others are more permissive, such as Article 13(4) of the Employer Sanctions Directive, which requires member states to establish under national law the rules under which they *may* grant on a *case-by-case basis* a permit for victims of certain crimes.

1 FRA (2015), *Criminalisation of migrants in an irregular situation and of persons engaging with them*.

2 Directive 2004/58/EC.

3 Directive 2003/86/EC.

4 Directive 2004/81/EC.

5 Directive 2009/52/EC.

6 Directive 2008/115/EC.

All ten countries featured in this report have also ratified the Council of Europe's Anti-Trafficking Convention<sup>7</sup> and, except the UK, are parties to the Council of Europe's Istanbul Convention.<sup>8</sup> Both treaties require state parties to make available permits to victims of human trafficking and gender-based violence, respectively, if this is necessary due to their "personal situation" (i.e., for protection-related reasons) and on the basis of cooperation with law enforcement.<sup>9</sup> All ten countries are also party to the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which includes guarantees regarding access to justice for all women regardless of residence status.<sup>10</sup> Some jurisdictions have gone further, creating special permits for victims of a broader set of crimes.

- All 10 countries considered in this report have legislation granting special permits for **victims of domestic violence** on spouse-dependent visas (pursuant to the Family Reunification Directive, Citizens' Rights Directive,<sup>11</sup> and consistent with the Istanbul Convention). In *five of these countries* (France, Greece, Italy, the Netherlands and Spain) these protections extend to undocumented survivors who did not enter the country on a spouse-dependent visa.
- All 10 countries have legislation on residence permits for **victims of human trafficking** (pursuant to EU legislation on human trafficking, and the Council of European Anti-Trafficking Convention). Except for France, the Netherlands and Switzerland, in the remaining countries there is also specific legislation making available residence permits for victims of **labour exploitation**. In some cases, this is treated as a component of national anti-trafficking legislation; elsewhere, it is part of separate legislation. Such legislation is consistent with Article 13.4 of the EU's Employer's Sanctions Directive, which requires states to put in place measures "comparable" to those of the EU Anti-Trafficking Directive (2004) for specific crimes, including, among others, employment of an undocumented person in "particularly exploitative labour conditions".
- In **Germany**, three federal states (Brandenburg, Berlin and Thuringia) have introduced decrees concerning residence permits for victims of **racist violence**, aimed at preventing a person who has been victimised from facing deportation because of the violence they suffered. The **Netherlands** has legislation granting permits to victims of **honour-related violence**.

- Three countries (Italy, Spain and Greece) stand out for having in place legislation that makes it possible to obtain a residence permit if one has been the victim of a wider set of crimes.
- In **Italy**, a special permit available under Art. 18 CLI has as its main scope victims of sexual exploitation and human trafficking – but also covers cases involving a variety of additional crimes (among the most serious covered in Italian criminal law), including modern slavery, labour exploitation, sexual abuse, gang rape, aggravated theft and robbery, crimes concerning weapons, domestic abuse and stalking. While in some respects it is a flexible scheme, and by far the most used among those available in Italy for victims of crime, a major limitation of the law is that the crime must be perpetrated by a criminal organisation, rather than a single individual.
- **Spain's** humanitarian residence permit, available under Art 126 Royal Decree, makes protection available on various grounds, including for different forms of labour exploitation including the denial of labour rights established through collective agreements; as well as discrimination in the provision of public services and the context of employment; crimes committed for racist or other bias-related reasons; and violence "in the home environment".
- In 2015, **Greece** passed Law 4332/2015 that provides for special permits for victims, and in some cases witnesses, of a wide range of "serious crimes" (against life, health, physical integrity, property, etc.).

The expansive scope of crimes covered by the above legislation is consistent with a protection-oriented agenda and moves away from the categorical approach where large numbers of victims fall through the resulting gaps. Existing "traditional" categories generally neglect the forms of mistreatment and exploitation that are much more commonly experienced by people with irregular status, such as theft, domestic violence (as noted above, only France, Greece, Italy, the Netherlands and Spain have provisions for *undocumented* survivors of domestic violence), and other abuses of varying severity endured by people whose lives are defined by economic and social precarity.

7 Council of Europe (16 May 2005), *Council of Europe Convention on Action Against Trafficking in Human Beings*, CETS 197.

8 Council of Europe, *The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence*, November 2014, ISBN 978-92-871-7990-6.

9 Germany and Switzerland have reservations on Article 59 of the Istanbul Convention; and Poland has stated that it will apply the Convention in conformity with its national constitution.

10 Committee on the Elimination of Discrimination against Women (23 July 2015), *General Recommendation on women's access to justice*, CEDAW/C/CG/33.

11 This includes Switzerland, which is a party to the Istanbul Convention, but as a non-EU state is not bound by EU legislation.

## Existing approaches to special permits for victims

Despite their basis in a protection logic, there are important flaws in both the design and implementation of the legislative schemes considered in this report:

- Obtaining a special residence permit often depends on the police, either to provide key documents or to initiate the process itself. The absence of a “firewall” – i.e., the existence of safeguards ensuring that approaching police as a victim or witness will not lead to immigration control – puts victims who come forward at risk of prosecution themselves.
- There is often insufficient awareness of existing schemes by the people who could benefit from them most, and among criminal justice actors themselves, as well as hospitals, social support persons, victims’ rights advocates and other actors who are often instrumental in obtaining them.
- Victims are typically granted short-term residence permits initially. Even where they may also have a right to work, the duration of the permit is often too short to realistically find employment; and in cases where a permit hinges on the criminal proceedings (as is generally the case for human trafficking and, in Spain, for victims of domestic violence), the possibility of converting temporary status to a longer-term or permanent status is extremely limited. So, while a victim may be temporarily shielded from deportation, there is no guarantee of a permanent resolution of their status, which ultimately may not incentivise victims to come forward.
- Special permits for victims of domestic violence and on humanitarian grounds are often decided based on a high degree of discretion by authorities, leading to arbitrariness and regional differences, which creates great uncertainty for victims.
- Organisations who work with victims with precarious status say that the existence of special permits can have the perverse effect of *reducing a victim’s credibility*, because law enforcement assumes they are making a complaint to obtain the permit rather than because of genuine mistreatment. For undocumented women, this coincides in some cases with gendered assumptions questioning the veracity about women’s claims to have been assaulted.

These problems create layers of uncertainty at every phase of the process for people who are already coping with having been victimised, and who are preoccupied with surviving the best they can, often with limited help in navigating the system. This alone creates a disincentive to engage and indicates a need to re-think existing approaches.

## Towards a more effective and comprehensive approach to victims’ support and protection

The provision of residence permits for some victims of crime needs to be part of a broader framework of protection, support and empowerment for victims as well as communities. While the granting of permits for victims of crime supports the work of law enforcement in investigating crimes (which itself supports prevention and addresses impunity), it is important that the focus of these schemes is on remedying the harm experienced by the victim.

Although it does not provide for residence permits, the Victims’ Directive is the appropriate starting point for understanding the elements of a victim-centered response, including among others:

- the right to be treated with respect, sensitivity and dignity by the authorities, regardless of residence status (Article 1);
- the right to be informed of one’s rights in a way that’s understandable and to make a complaint with assistance (Articles 3, 4, 5, 6, & 7);
- the right to an individual needs assessment and protection measures as vulnerable victims (Articles 22-24); and
- the right to support services (Article 8).

All these elements are important to ensure a response that addresses the needs of the person who has been victimised. Where does the residence permit fit within this framework?

The residence permit provides a tool for overcoming the reluctance that a victim with precarious status might have about coming forward – reluctance linked to the risk they face of immigration consequences. This tool could be effective because it promotes trust in the authorities and because it provides an incentive to report by offering a remedy to their victimisation: a residence permit, to mitigate the balance of power that the perpetrator exploited to exert control and dominance. A residence permit in this case is not only remedy for prior victimisation but also a tool for the prevention of future victimisation.

Residence permits can be an important measure then to promote safety, and to strengthen the hand of law enforcement in the investigation and prosecution of crimes, but they must be administered fairly and transparently, and be part of a more comprehensive strategy to ensure both responsiveness to the needs of victims, as well as an approach to prevention that includes the essential role of law enforcement as partners with communities that prioritises their

safety. Prioritising safety over status is the essence of the “firewall”. For the rights of the Victims’ Directive to be meaningful, member states should put in place measures that ensure that victims who are undocumented or have dependent residence status do not face immigration consequences for seeking to exercise their rights under the Directive.

The United States provides a useful case study<sup>12</sup> that offers lessons for European countries both in terms of its federal legislation granting special permits for victims

of crime, and the practice of local law enforcement in cities like New York that have taken a proactive, long-term approach to working with migrant communities as a way to encourage reporting of crime and to improve public safety. (See Box 1, below.) The EU should support member states’ efforts to improve existing legislation and practice, in line with its own commitments to victims’ rights and gender equality, including through initiatives that facilitate learning from other jurisdictions that have a positive history of promoting the safety and welfare of their immigration communities.

### **BOX 1** Case study: U-Visa and T-Visa in the United States and law enforcement’s role in supporting access to protection and justice for undocumented victims of crime

In the United States, measures have been adopted by both federal authorities and local governments to promote the reporting of crime by people in an irregular situation. These include federal legislation creating special visas for certain victims of crime; and practices at the local level in cities like New York, which have adopted a proactive strategy of engagement with migrant communities that prioritises public safety over immigration enforcement.

The **U-visa** is available to victims of a long list of crimes who cooperate with law enforcement authorities. Victims can obtain status for four years and authorisation to work and apply for permanent residence after three years of regular residence. Unlike many European models, this process is initiated by the victim through an application, and not by law enforcement. Between 2009 and March 2019, 85,000 U visas were granted. Approval rates have been consistently above 80% for the past five years. The **T-visa** is specifically for victims of human trafficking and provides a temporary 4-year status, work authorization with the possibility to obtain permanent status after three years of regular stay in the U.S., or the completion of the investigation or prosecution, whichever comes first. Law enforcement agencies may attest that the applicant is a victim, but compliance with requirements of the legislation can be proven with other evidence, including personal statements.

The **City of New York** is among many U.S. cities that have adopted formal policies to ensure that local police officers and sheriffs do not enforce federal rules on immigration, consistent with a “community policing” approach to law enforcement. It focuses on building bonds of trust with local communities to promote cooperation of residents in crime prevention efforts by:

- Empowering government agencies through information and training so they can support victims in accessing their right to a special permit.
- Doing regular and proactive outreach to migrant communities to build trust and inform them of their rights.
- Building coalitions with community-based organisations and working with them to raise awareness and to connect victims to relevant services.
- Codifying the “firewall” in official police policy.

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*Source: Oxford University COMPAS project on “safe reporting” of crime for victims and witnesses with irregular status in the USA and Europe (August 2018–October 2019). All reports available at: <https://www.compas.ox.ac.uk/project/safe-reporting-of-crime-for-victims-and-witnesses-with-irregular-migration-status-in-the-usa-and-europe/>*

12 N. Delvino, September 2019, [Safe reporting of crime for victims and witnesses with irregular migration status in the United States](#).



# RECOMMENDATIONS

We recommend five ways to promote the safety and protection of victims of crime, with residence permits as part of a broader framework of support and engagement.

## 1 **Special permits for victims of crime must be grounded first and foremost in a protection rationale, built on a professional, respectful and responsive approach to all victims, regardless of residence status.**

### **The European Commission should:**

- Evaluate Member States' implementation of the Victims' Directive with respect to their explicit obligation to ensure application *without discrimination of any kind, including based on residence status*, taking into account the existence of specific measures including, but not limited to, special permits for victims of crime and whether implementation of these measures makes effective the rights of the directive for victims with irregular or dependent status.
- As part of a broader longer-term strategy to promote the rights of victims, and to promote gender equality, either through new legislation that complements or goes into more depth on aspects of the Victims' Directive or revised guidelines to the directive, make it clear that achieving the goals of victim protection is incompatible with victims and witnesses of crime facing the possibility of immigration consequences for seeking assistance or justice.

## 2 **Special permits for victims of crime should promote cooperation and engagement between law enforcement and immigrant communities, supported by an outreach strategy involving partnerships with community-based organisations.**

### **The European Commission should:**

- Promote analysis and exchange of good practices among Member States, at the national, regional and local levels, on the implementation of measures promoting the rights of victims with irregular or dependent status under the Victims' Directive.
- Promote and financially support local and regional multi-sectoral initiatives involving law enforcement actors and community-based organisations that make effective the rights of the Victims' Directive for people in an irregular situation.
- Foster exchange between authorities in EU Member States (at the national, regional and city levels) and those from other jurisdictions with a history of effective and positive engagement between law enforcement and immigrant communities.

**The European Parliament should:**

- Ensure that the European Commission is reporting, in a timely way, on Member States' implementation of the Victims' Directive, and that this reporting addresses meaningful implementation of measures safeguarding and promoting the rights of victims with irregular status.
- Consider supporting pilot projects implementing measures that specifically focus on promoting the rights and safety of victims who are undocumented or who have dependent status.

**National and local law enforcement should:**

- Adopt explicit policies, enforceable through disciplinary action, whereby people who come forward to report crime (witnesses and victims) or to seek protection or support:
  - Do not face immigration penalties, including the risk of deportation or return, either directly by the police or as a result of information transferred from the police to immigration authorities other than for exclusively protection reasons (i.e., creation of a "firewall")
  - Are systematically informed of the possibility of applying for a special permit, if they have been victimised
  - Are referred to relevant services (social, health, protection, shelter, legal, etc.) based on their needs, and with their consent
- In partnership with community-based organisations, take a proactive approach to reaching out to immigrant communities to:
  - Inform them about their policies on safe reporting and support to victims
  - Inform them about available special permits for victims of crime

### **3 Officials (law enforcement, judges, prosecutors) should receive training on the relevant legislation granting special permits to victims of crime, under EU and national law, and establish protocols that prioritise the role of the police in referring undocumented victims into protective frameworks, rather than prioritising implementation of immigration rules.**

**European Commission should:**

- Provide guidance and support on the training of officials in the criminal justice system to inform them about available special permits for victims, and to ensure an appropriate response to the situation and needs of undocumented victims, as required under the Victims' Directive.

**Member States should:**

- Ensure that training of police recruits includes training on respectful and professional engagement with diverse and immigrant communities, and on relevant procedures granting special permits for victims of crime under national law.

## 4 If they are initially issued on a temporary basis, special permits for victims of crime should have clear pathways to more stable status after a reasonable period of regular residence. In addition, they should not be contingent on participation in criminal proceedings or conviction and provide access to the labour market. These measures are essential to reduce uncertainty and to achieve the goals of community safety, individual protection and effective remedy for victims.

### European Commission should:

- As part of a broader longer-term strategy to promote the rights of victims, as well as its strategy to promote gender equality and to end violence against women, either through new legislation that complements or goes into more depth on aspects of the Victims' Directive or revised guidelines to the directive, clarify the rights of victims who are undocumented, and that their ability to access protection and services should not be made contingent on the outcome of a criminal procedure.

### Member States should:

- Reform national legislation on special residence permits for victims of crime to reduce uncertainty and promote protection, including by ensuring that special permits for victims of crime:
  - May be obtained not only on the initiative of law enforcement or social actors, but also upon direct petition by a victim by way of non-burdensome and clear procedure.
  - Provide access to services and the labour market and may be counted as regular residence towards statuses based on accrued residence and be convertible to a more stable status based on clear criteria, as a remedial measure and to prevent repeat victimisation, if a long-term status has not already been provided.
- Encourage the prosecution of crimes committed against people made vulnerable by their irregular or dependent status but *are not made dependent on the conviction of the offender*.
- Prohibit under law any immigration enforcement action against any person who has come forward (witness or victim) to report a crime or to seek protection for having been victimised ("firewall"), and create safeguards to ensure that personal data obtained as a result of their engagement with the criminal justice system as victims or witnesses cannot be repurposed to pursue immigration control.
- Prohibit the issuing of a return decision to any person who has filed a complaint, when they file the complaint or at any time during or upon resolution of the criminal proceeding. This is essential to enable accountability and access to justice, and to disempower perpetrators who would threaten victims with deportation.
- Ensure that people who file criminal complaints are, regardless of status, eligible to apply for residence permits provided for by national law, beyond special permits for victims (e.g. on grounds of work, family, study, protection).

## 5 To promote protection, special permits for victims of crime should be available for a broad number of crimes to reflect a genuine protection-centred approach.

### Member States should:

- Reform national legislation on special residence permits for victims of crime to address existing gaps in protection and avoid a piecemeal approach based on narrowly defined forms of victimisation.
- Ensure that legislation on special permits for victims of crime is not implemented in a way that further victimises victims by imposing onerous and impractical conditions or procedures.

# INTRODUCTION

## BOX 2 Case Studies

### Maria (Spain)

Maria\* had been living in Spain just a few months when she was physically and verbally assaulted by her landlord. She went with a friend to the police station to report the incident, but they refused to register her complaint and instead notified the immigration authorities because of her irregular status. She was issued an expulsion order. This occurred even though the Spanish Ombudsman recommended fifteen years earlier that the national police authorities issue guidelines instructing officers not to sanction people for immigration offences when they come forward to report having been the victim of a crime.

Defensor del Pueblo, 29 July 2019, ["El Defensor del Pueblo reclama que los extranjeros en situación irregular víctimas de delito puedan denunciar sin temor a ser expulsados"](#); Defensor del Pueblo, [Informe anual 2004 y debates en las Cortes Generales](#), at pp. 287-289

Patricia Simón, 19 June 2019, "Las personas extranjeras que denuncian agresiones siguen exponiéndose a ser expulsadas", *La Marea*

### Aisha (UK)

Aisha\* was 21 when she moved to the UK in 2013 to join her fiancé, a British citizen, who she had met in her native country, Pakistan, a few years earlier. Not long after they were married, her husband's behaviour became abusive. She was also mistreated by his family. Aisha reported the abuse to the police, and eventually left her husband. She applied for independent residence status, under the UK's Domestic Violence Concession, but was denied based on claims made by her husband to the Home Office, without her knowledge, that she had used him to come to the UK and was solely responsible for the breakdown of their marriage. She successfully challenged this decision in court.

- *R (AT) v Secretary of State for the Home Department* [2017] EWHC 2589 (Admin)
- Niamh McIntyre, Alexandra Topping, 16 August 2018, "Denied visa after abuse: 'They told me I was going in two hours'", *The Guardian*
- Niamh McIntyre, Alexandra Topping, 16 August 2018, "Abuse victims increasingly denied right to stay in UK", *The Guardian*

\*Fictitious name



People who are undocumented, or whose residence permit is tied to their spouse or employer, face a high risk of being victimised because authorities tend to see them mainly through the lens of their status – and therefore as targets of law enforcement – and not their needs or rights as victims of crime. The people who mistreat them exploit this fact to commit acts of abuse, with little or no risk of consequences.

The result is massive under-reporting of mistreatment by individuals who are already living in situations of social and economic precarity. This perpetuates cycles of abuse and discrimination and weakens the ability of the authorities to investigate crimes. More generally, the belief that law enforcement is more likely to prioritise someone's immigration status before their safety undermines trust in the authorities in communities that feel heavily policed, but not equally protected.

One strategy for overcoming people's reluctance to come forward to report crime because of their irregular or insecure status is to make available residence permits for victims of victims.

This report considers legislation in ten European countries – **Belgium, France, Germany, Greece, Italy, the Netherlands, Poland, Spain, Switzerland** and the **United Kingdom** – that makes it possible for victims of some crimes to obtain a residence permit. In addition to looking at what the law says, we also consider evidence of how these schemes work in practice, and whether they are effective in empowering victims to come forward, and in promoting prosecution of crimes committed against people with insecure status.

Some schemes exist pursuant to EU legislation that either mandates or authorises the granting of permits to some victims of crime. This is the case for nationals of non-EU countries who are in the EU due to family reunification, as well as for people who have experienced trafficking, and some forms of labour exploitation. In some cases, national legislation goes further than EU law – such as in Spain, where permits are available for victims of hate crime; and in Greece, where the law makes available permits for victims of various “serious crimes”.

### BOX 3 The use of the term “victim” in this report

This report looks at residence permits available for victims of certain crimes, so the term “victim” is used throughout. The unfortunate result may be an association in some readers' minds between victimhood and one's status as undocumented.

Undocumented migrants show significant resourcefulness, resilience and courage in leaving their countries of origin and coming to Europe. It is their relative social and economic precarity or marginalization – and the obstacles they often face in accessing justice – that make them susceptible to certain forms of discrimination and mistreatment. The aim of this report is not to feed into a narrative of powerlessness, but instead to call attention to the circumstances of people who are undocumented as well as their status as rights holders and opportunities to promote their safety and empowerment.

While the existence of these measures is positive in so far as it reflects an understanding of the obstacles people with insecure or irregular status face in accessing justice, these schemes vary significantly from each other, and there are mixed results when it comes to their implementation.

Part 1 of this report sets out relevant law from the EU and Council of Europe with provisions concerning residence permits for victims of crime. Part 2 examines the legal frameworks in each of the ten countries, as well as available evidence of their effectiveness in practice, and Part 3 provides some concluding reflections. A spotlight featured at the end of the report considers lessons from the United States, some of which are reflected in the report's recommendations towards EU institutions (Parliament and Commission) and various bodies at the national level.

# 1. RESIDENCE PERMITS FOR VICTIMS OF CRIME UNDER INTERNATIONAL AND EU LAW

Several legal instruments contain provisions permitting or requiring states to implement measures that make available residence permits for victims of certain crimes. This section focuses on two instruments under the Council of Europe that have been widely ratified by European countries (including EU member states):

- The Convention on Preventing and Combating Violence against Women and Domestic Violence (known as the “Istanbul Convention”)
- The Convention on Action against Trafficking in Human Beings (or the “Anti-Trafficking Convention”).<sup>13</sup>

A number of directives of the European Union are also considered.

## **BOX 4** CEDAW and access to justice for undocumented women

Access to justice is an important pillar of the UN Convention to End All Forms of Discrimination against Women (CEDAW), which came into force on 3 September 1981 and has been ratified by nearly every country in the world, including the ten countries examined in this report.

In its General Recommendation no. 33, the CEDAW Committee emphasised that the “right of access to justice for women is essential to the realization of all the rights protected under the Convention” (para. 1) and noted that women “often do not report violations of their rights to the authorities for fear that they will be humiliated, stigmatised, arrested, deported, tortured or have other forms of violence inflicted upon them, including by law enforcement officials” (para. 10). More recently, in General Recommendation 35 (para. 29), it has urged states to reform laws that “prevent or deter women from reporting gender-based violence”, including “restrictive immigration laws”.

While CEDAW does not itself contain provisions on residence permits, the Committee has addressed this issue in its concluding observations towards member states, calling for measures to improve access to justice for migrant and minority women, and noting obstacles to victims of gender-based violence securing an autonomous permit (see e.g., UN Committee on the Elimination of Discrimination against Women: Concluding Comments, Netherlands, 2 February 2007, CEDAW/C/NLD/CO/4).

<sup>13</sup> As of 6 January 2020, 22 EU member states have ratified the Istanbul Convention, and all 28 EU member states have ratified the Anti-Trafficking Convention.

## Council of Europe

### Istanbul Convention

The Istanbul Convention, which came into force on 1 August 2014, is the first legally binding instrument that provides a comprehensive framework to prevent violence against women, to protect victims and to end the impunity of perpetrators.<sup>14</sup> The Convention applies to all women regardless of migration status (Article 4) and takes into account the situation of women on spouse-dependent visas by requiring states parties to make available independent residence permits to victims (Article 59).

.....  
Article 59 requires states to “take the necessary legislative or other measures” to ensure that women whose residence status depends on that of their spouse or partner can apply for an autonomous permit regardless of the duration or the marriage or relationship, “in the event of the dissolution of the marriage or relationship” or “particularly difficult circumstances.” Article 59 also requires the issuing of a renewable permit to victims where it is considered necessary due to their “personal situation” or for the “purpose of their cooperation with competent authorities in investigation or criminal proceedings.”  
.....

The Convention’s explanatory report makes specific reference to women in an irregular situation and to the increased risk of violence they face, as well as to the difficulties and structural barriers they confront in overcoming violence.<sup>15</sup> The report also specifically calls on states to provide safe accommodation in specialized women’s shelters. In May 2015, an international group of independent experts, the GREVIO Committee, was established to monitor the Convention’s implementation at the national level.

States that choose to join the Convention must bring their national laws in line with its provisions, and make sure that it is applied in their countries in way that benefits all women. By joining the Istanbul Convention, states are agreeing to binding standards on preventing violence against women, protecting survivors and punishing perpetrators, and to guaranteeing the availability of services like emergency hotlines, shelters, medical assistance, counselling, and legal aid. As of January 2020, 34 states have ratified the Convention, and an additional 12 have signed it. Several countries have submitted reservations opting out of certain provisions of the Convention including Article 59.<sup>16</sup>

On 4 March 2016, the European Commission proposed that the European Union become a party to the Istanbul Convention to provide a mandate for better data collection at the EU level on the extent and nature of violence against women, and to bring greater accountability for the EU on this issue at the international level. On 13 June 2017, the European Union signed the Istanbul Convention, based on decisions by the Council of the EU adopted on 11 May 2017 on articles related to asylum, refugees and refoulement, and cooperation in criminal matters. The process of accession has, however, been stalled due to political disagreements among member states, despite widespread ratification of the Convention by states across the Union.

### Anti-Trafficking Convention

The Council of Europe Convention on Action against Trafficking in Human Beings entered into force on 1 February 2008, providing a broad scope of application covering various forms of trafficking (national or international, linked or not to organised crime), encompassing different types exploitation (minimally,

14 Council of Europe (November 2014), Convention on preventing and combating violence against women and domestic violence, ISBN 978-92-871-7990-6.

15 The explanatory note also reiterates the Council of Europe’s Task Force to Combat Violence Against Women’s recommendation that one “family place” be available per population of 10,000. See Council of Europe, Task Force to Combat Violence Against Women, Including Domestic Violence (EG-TFV), Final Activity Report: Proposals for Future Action of the Council of Europe and its Member States to Prevent and Combat Violence Against Women, 27 May 2008.

16 Armenia, Cyprus, Monaco, Romania, Slovenia and North Macedonia have reserved the right not to apply Article 59, and Germany has reserved the right not to apply Article 59 paragraphs 2 (suspension of expulsion proceedings) and 3 (renewable residence permits owing to a victim’s personal situation or where necessary for cooperation in an investigation). Malta has reserved the right not to apply Article 59, and to continue to apply its own law regarding victims of violence with dependent status. Switzerland has reserved the right not to apply Article 59 or to apply it only in specific cases or conditions. Poland, Latvia and Lithuania have indicated that they will apply the Convention in conformity with their own national constitutions. Ireland has reserved the right not to apply the provisions outlined in Article 30, paragraph 2 and Article 44, paragraph 3 (pertaining to state compensation for victims of violent crime and criminal jurisdiction).

sexual exploitation, forced labour or services, slavery, servitude and removal of organs) and all victims (children, women and men). The Convention brings a human rights perspective and focus on victim protection, defining human trafficking as a violation of human rights. It also establishes a system of monitoring implementation by states parties through the Committee of Parties and the Group of Experts on Action against Trafficking in Human Beings (GRETA).

Article 14 requires states to issue a “renewable residence permit to victims” where it is deemed necessary due to the victim’s “personal situation” or for their cooperation with the investigation or criminal proceeding. In the case of child victims, a residence permit should be issued (and renewed) based on the best interests of the children. All EU member states are parties to the Anti-Trafficking Convention.

**TABLE 1. Overview of Council of Europe treaties and EU directives with provisions on residence permits for victims of crime.**

DIRECTIVE	PROVISION
<b>FAMILY AND CITIZENS’ RIGHTS</b>	
<b>Family Reunification Directive (2003/86/EC)</b>	<p><b>Article 15(3):</b> Member States shall lay down provisions ensuring the granting of an autonomous residence permit in the event of particularly difficult circumstances.<sup>17</sup></p> <p><i>[Applies to third country nationals who have experienced domestic violence or other hardships and are family members of a third country national holding a residence permit issued by a Member State valid for at least one year, who have reasonable prospects of obtaining the right of permanent residence].</i></p>
<b>Citizens’ Rights Directive (2004/38/EC)</b>	<p><b>Recital 15:</b> Family members should be legally safeguarded in the event of the death of the Union citizen, divorce, annulment of marriage or termination of a registered partnership. With due regard for family life and human dignity, and in certain conditions to guard against abuse, measures should therefore be taken to ensure that in such circumstances family members already residing within the territory of the host Member State retain their right of residence exclusively on a personal basis.</p> <p><b>Article 13(2)(c)18:</b> ...divorce, annulment of marriage or termination of the registered partnership referred to in point 2(b) of Article 2 shall not entail loss of the right of residence of a Union citizen’s family members who are not nationals of a Member State where: [...] this is warranted by particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting.</p> <p><i>[Applies to third country nationals who are family members of EU citizens exercising their right to free movement and residence, who wish to terminate their marriage or registered partnership due to domestic violence.]</i></p>
<b>DISCRIMINATION AND VIOLENCE AGAINST WOMEN</b>	
<b>Council of Europe Convention on preventing and combating violence against women and domestic violence (“Istanbul Convention” - 2014)</b>	<p>Article 4:</p> <p>3. The implementation of the provisions of this Convention by the Parties, in particular measures to protect the rights of victims, shall be secured without discrimination on any ground such as sex, gender, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, sexual orientation, gender identity, age, state of health, disability, marital status, migrant or refugee status, or other status.</p>

17 See C and A (C-257/17), K (C-484/17), Parliament v Council (C-540/03), Chakroun (C-578/08), Baden-Württemberg v Metin Bozkurt (C-303/08).

18 See NA (C-115/15); and Diatta (C-267/83), Singh (C-218/14).



DIRECTIVE	PROVISION
<b>Council of Europe Convention on preventing and combating violence against women and domestic violence ("Istanbul Convention" - 2014)</b>	<p>Article 59:</p> <ol style="list-style-type: none"> <li>1. Parties shall take the necessary legislative or other measures to ensure that victims whose residence status depends on that of the spouse or partner as recognised by internal law, in the event of the dissolution of the marriage or the relationship, are granted in the event of particularly difficult circumstances, upon application, an autonomous residence permit irrespective of the duration of the marriage or the relationship. The conditions relating to the granting and duration of the autonomous residence permit are established by internal law.</li> <li>2. Parties shall take the necessary legislative or other measures to ensure that victims may obtain the suspension of expulsion proceedings initiated in relation to a residence status dependent on that of the spouse or partner as recognised by internal law to enable them to apply for an autonomous residence permit.</li> <li>3. Parties shall issue a renewable residence permit to victims in one of the two following situations, or in both: <ol style="list-style-type: none"> <li>a. where the competent authority considers that their stay is necessary owing to their personal situation;</li> <li>b. where the competent authority considers that their stay is necessary for the purpose of their co-operation with the competent authorities in investigation or criminal proceedings.</li> </ol> </li> <li>4. Parties shall take the necessary legislative or other measures to ensure that victims of forced marriage brought into another country for the purpose of the marriage and who, as a result, have lost their residence status in the country where they habitually reside, may regain this status.</li> </ol>
<b>ANTI-TRAFFICKING</b>	
<b>Anti-Trafficking Directive – on residence permits (2004/81/EC)</b>	<p><b>Article 8:</b></p> <ol style="list-style-type: none"> <li>1. Member States shall consider: <ol style="list-style-type: none"> <li>(a) the opportunity presented by prolonging his/her stay on its territory for the investigations or the judicial proceedings, and</li> <li>(b) whether he/she has shown a clear intention to cooperate and</li> <li>(c) whether he/she has severed all relations with those suspected of acts that might be included among the offences referred to in Article 2(b) and (c).</li> </ol> </li> <li>2. For the issue of the residence permit and without prejudice to the reasons relating to public policy and to the protection of national security, the fulfilment of the conditions referred to in paragraph 1 shall be required.</li> </ol> <p><i>[Applies to adult third country nationals who are, or have been, victims of offences related to the trafficking in human beings, even if they have irregularly entered the territory of the Member States.]</i></p>
<b>Council of Europe Convention on Action against Trafficking in Human Beings ("Anti-Trafficking Convention" – 2008)</b>	<p>Article 14:</p> <ol style="list-style-type: none"> <li>1. Each Party shall issue a renewable residence permit to victims in one or other of the two following situations: <ol style="list-style-type: none"> <li>c. The competent authority considers that their stay is necessary owing to their personal situation;</li> <li>d. The competent authority considers that their stay is necessary for the purpose of their cooperation with the competent authorities in investigation or criminal proceedings.</li> </ol> </li> <li>2. The residence permit for child victims, when legally necessary, shall be issued in accordance with the best interests of the child and, where appropriate, renewed under the same conditions.</li> </ol>

DIRECTIVE	PROVISION
Anti-trafficking Directive – on preventing and combating trafficking (2011/36/EU)	<p><b>Introduction</b></p> <p><b>Recital 18:</b> [...] Where the victim does not reside lawfully in the Member States concerned, assistance and support should be provided unconditionally at least during the reflection period. If, after completion of the identification process or expiry of the reflection period, the victim is not considered eligible for a residence permit or does not otherwise have lawful residence in that Member State or if the victim has left the territory of that Member State, the Member State concerned is not obliged to continue providing assistance and support to that person on the basis of the directive. Where necessary, assistance and support should continue for an appropriate period after the criminal proceedings have ended, for example, if medical treatment is ongoing due to the severe physical or psychological consequences of the crime, or if the victim's safety is at risk due to the victim's statement in those criminal proceedings.</p> <p><b>Article 11</b></p> <p>1. Member States shall take the necessary measures to ensure that assistance and support are provided to victims before, during and for an appropriate period of time after the conclusion of criminal proceedings in order to enable them to exercise the rights set out in Framework Decision 2001/220/JHA, and in this Directive.</p> <p>5. The assistance and support measures referred to in paragraphs 1 and 2 shall be provided on a consensual and informed basis, and shall include at least standards of living capable of ensuring victims' subsistence through measures such as the provision of appropriate and safe accommodation and material assistance, as well as necessary medical treatment including psychological assistance, counselling and information, and translation and interpretation services where appropriate.</p> <p><i>[Does not with the residence conditions of the victims; however, strengthens the protection of all victims of trafficking, including irregularly-residing third country nationals, at least during a "reflection period" (as defined in directive 2004/81/CE19).]</i></p>
<b>MIGRATION MANAGEMENT</b>	
Return Directive (2008/115/EC)	<p><b>Article 6</b></p> <p>4. Member States may at any moment decide to grant an autonomous residence permit or other authorization offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory. In that event no return decision shall be issued. Where a return decision has already been issued, it shall be withdrawn or suspended for the duration of validity of the residence permit or other authorization offering a right to stay.</p> <p>5. If a third-country national staying illegally on the territory of a Member State is the subject of a pending procedure for renewing his or her residence permit or other authorization offering a right to stay, that Member State shall consider refraining from issuing a return decision, until the pending procedure is finished, without prejudice to paragraph 6.</p> <p><i>[Applies to third-country nationals staying irregularly on the territory of a Member State.]</i></p>

19 According to article 6(1) of [Directive 2004/81/CE](#) Member States shall ensure that the third-country nationals concerned are granted a reflection period allowing them to recover and escape the influence of the perpetrators of the offences so that they can take an informed decision as to whether to cooperate with the competent authorities. This reflection period is set by Member States. Furthermore, article 6(3) specifically provides that the reflection period shall not create any entitlement to residence under this Directive. However, even if there is no automatic residence permit granted to illegal migrants, [Directive 2011/36/UE](#) at least provides for unconditional support and assistance during the said reflection period.

DIRECTIVE	PROVISION
<b>Employer Sanctions Directive (2009/52/CE)</b>	<p><b>Article 13:</b></p> <p>1. Member States shall ensure that there are effective mechanisms through which third-country nationals in illegal employment may lodge complaints against their employers, directly or through third parties designated by Member States such as trade unions or other associations or a competent authority of the Member State when provided for by national</p> <p>Legislation</p> <p>3. Providing assistance to third-country nationals to lodge complaints shall not be considered as facilitation of unauthorized residence under Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorized entry, transit and residence</p> <p>4. In respect of criminal offences covered by Article 9(1)(c) or (e), Member States shall define in national law the conditions under which they may grant, on a case-by-case basis, permits of limited duration, linked to the length of the relevant national proceedings, to the third-country nationals involved, under arrangements comparable to those applicable to third-country nationals who fall within the scope of Directive 2004/81/EC.</p> <p><i>[Applies to people working irregularly, and those who employ them.]</i></p>
VICTIMS' RIGHTS	
<b>Victims' Directive *</b> <b>(2012/29/EU)</b>	<p><b>Recital 10:</b> This Directive does not address the conditions of the residence of victims of crime in the territory of the Member States. Member States should take the necessary measures to ensure that the rights set out in this Directive are not made conditional on the victim's residence status in their territory or on the victim's citizenship or nationality. Reporting a crime and participating in criminal proceedings do not create any rights regarding the residence status of the victim.</p> <p><b>Article 1:</b> ... Member States shall ensure that victims are recognised and treated in a respectful, sensitive, tailored, professional and non-discriminatory manner, in all contacts with victim support or restorative justice services or a competent authority, operating within the context of criminal proceedings. The rights set out in this Directive shall apply to victims in a non-discriminatory manner, including with respect to their residence status.</p> <p><i>[Applies to all victims of crimes committed in the EU (or extra-territorially, where provided for by national law), regardless of residence status.]</i></p>

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\* As noted below, the Victims' Directive does not provide for residence permits, but is included nonetheless in this table because it is the cornerstone of the EU's legislation on the rights of victims and is critical as a framework within which to situate the existence of residence permits for victims of crime.

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## European Union

Several EU directives include provisions that require, or authorise, member states to make provision for residence permits for some victims of crime, or that are otherwise relevant to understanding the rights of victims of crime.

### Victims Directive

The EU Directive establishing minimum standards on the rights, support and protection of victims of crime (2012/29/ EU) (Victims' Directive) was adopted on 25 October 2012. Under the Directive, all EU countries (except Denmark, which opted out) must ensure certain basic rights to all victims of crime and prioritise an individual's protection and safety above their migration status (Article 1). Non-discrimination is at the heart of the Directive (Article 1), which requires that all victims of crime be treated with respect, be offered support services, have access to protection, and be given the opportunity to participate in the criminal proceeding linked to their case.

The Directive underscores the needs of victims of gender-based violence, which it recognises as a form of discrimination, and notes that women who are victims of such violence and their children often need special support and protection "because of the high risk of secondary and repeat victimisation, of intimidation and of retaliation connected with such violence" (Recital 17).

Under the Directive, a victim (Article 2) is anyone who has suffered physical, mental or emotional or economic harm caused by a criminal offence, as well as family members of someone whose death was caused by a criminal act.

The Directive does not include specific provisions on residence permits, and indeed Recital 10 is clear that reporting a crime and participating in criminal proceedings do not create any rights as far as residence. Nonetheless, the same provision states that member states must "take necessary measures to ensure that the rights set out in this Directive are not made conditional on the victim's residence status". The European Commission has also recommended in its guidance to member states on the implementation of the Victims' Directive that they implement "appropriate immigration rules, for example, by suspending

deportation orders and/or issuing temporary residence permits in relation to on-going criminal proceedings" where the victim has a precarious residence status.<sup>20</sup>

The Victims' Directive therefore remains the essential reference point in the EU for the rights of victims, including measures to address barriers created by irregular or precarious residence status, such as residence permits.

### Family Reunification Directive

An important reason people migrate to Europe is to join family members. A set of common EU rules on family reunification are established in the Family Reunification Directive 2003/86/EC, which applies to all member states except the UK, Ireland and Denmark.

Under the Directive, children and spouses can be sponsored to join family already in the EU and are entitled to a residence permit, access to education and employment. After a maximum of five years, they may apply for an autonomous permit – that is, one that is not tied to their sponsor.

.....  
Under Article 15(3) of the Family Reunification Directive, "Member States shall lay down provisions ensuring the granting of an autonomous residence permit in the event of particularly difficult circumstances".  
.....

Article 15(3) applies to foreign nationals who are family members of a sponsor (also a foreign national) who have experienced domestic violence<sup>21</sup> or other hardships. It has been transposed by all member states<sup>22</sup> and represents an exception to the main rule, permitting a family member who has experienced violence to obtain an autonomous residence permit before the minimum period of marriage has expired.

### Citizens' Rights Directive

The Citizens' Rights Directive (or the "Free Movement Directive") establishes the right to freedom of movement for citizens of the EU, as well Iceland, Norway and Liechtenstein. It also grants a right to freedom of movement to non-citizen family members (spouse, registered partner, minor child), as dependents of citizens.

20 European Commission (2013), DG Justice Guidance Document related to the transposition and implementation of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, at p. 9.

21 European Commission (3 April 2014), Communication from the Commission to the European Parliament and the Council on guidance for application of Directive 2003/86/EC on the right to family reunification, para 5.3.

22 European Commission (2019), Report from the Commission to the European Parliament and the Council on the implementation of Directive 2003/86/EC on the right to family reunification, p. 13.



According to Recital 15:

Family members should be legally safeguarded in the event of the death of the Union citizen, divorce, annulment of marriage or termination of a registered partnership. With due regard for family life and human dignity, and in certain conditions to guard against abuse, measures should therefore be taken to ensure that in such circumstances family members already residing within the territory of the host Member State retain their right of residence exclusively on a personal basis.

Article 13(2)(c) establishes that "...divorce, annulment of marriage or termination of the registered partnership referred to in point 2(b) of Article 2 shall not entail loss of the right of residence of a Union citizen's family members who are not nationals of a Member State where: [...] this is warranted by particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting".

In other words, like the Family Reunification Directive, the Citizens' Rights Directive includes an exception to the main rule requiring marriage to the sponsor for a minimum period, granting a right of residence on a "personal basis" where the marriage or registered partnership is terminated due to domestic violence.

## Anti-Trafficking Directives

**Directive 2004/81/EC** specifically concerns residence permits issued to third-country nationals who are victims of trafficking in human being or human smuggling, who cooperate with the authorities in the investigation and prosecution.

Under Article 8, a victim of trafficking may be issued a residence permit, based certain preconditions (beyond having been victimised), including their intention to cooperate with the authorities and whether all relations with suspected traffickers or smugglers have been severed. It is also optional for member states whether or not to renew the residence permit once a victim's assistance is no longer needed for the criminal procedure.

**Directive 2011/36/EU** provides a common legal framework for preventing and prosecuting human trafficking and protecting victims, according to which (Recital 18) undocumented victims have a right to assistance and support unconditionally at least during a reflection period. This directive is complementary to the anti-trafficking directive 2004/81/EC.

Under Article 11, member states must "take the necessary measures to ensure that assistance and support are provided to victims before, during and for an appropriate period of time after the conclusion of criminal proceedings"; and this assistance and support must include at least standards of living capable of ensuring victims' subsistence through measures such as the provision of appropriate and safe accommodation and material assistance, as well as necessary medical treatment including psychological assistance, counselling and information, and translation and interpretation services where appropriate".

Conditions of residence are addressed in Directive 2004/81/EC; however, Directive 2011/36/EU strengthens the protection of victims of trafficking crimes at least during a "reflection period".<sup>23</sup>

## Employers' Sanctions Directive

The Employers' Sanctions Directive 2009/52/CE, which creates rules governing the sanctioning of employers who employ undocumented workers, includes provisions granting those workers certain protection.

In addition to its guarantees of effective mechanisms for undocumented workers to file complaints for violations of their labour rights, Article 13 states that, for certain criminal offenses, "Member States shall define in national law the conditions under which they may grant, on a case-by-case basis, permits of limited duration, linked to the length of the relevant national proceedings, to the third-country nationals involved, under arrangements comparable to those applicable to third-country nationals who fall within the scope of Directive 2004/81/EC [Anti-Trafficking Directive 2004]."

<sup>23</sup> According to article 6(1) of Directive 2004/81/CE Member States shall ensure that the third-country nationals concerned are granted a reflection period allowing them to recover and escape the influence of the perpetrators of the offences so that they can take an informed decision as to whether to cooperate with the competent authorities. This reflection period is set by Member States. Furthermore, article 6(3) specifically provides that the reflection period shall not create any entitlement to residence under this Directive. However, even if there is no automatic residence permit granted to illegal migrants, Directive 2011/36/UE at least provides for unconditional support and assistance during the said reflection period.

## Return Directive

The Return Directive 2008/115/EC sets out common rules on the return, or deportation, of people irregularly present in the EU and has binding force in all member states except the UK and Ireland. Among other things, it establishes procedural rights and creates an obligation on member states to avoid “legal limbo” by either returning an irregularly-residing migrant or granting them a residence permit.

.....  
Under Article 6(4) of the Return Directive, member states have the discretion to grant “at any time” a residence permit to an undocumented person for humanitarian or compassionate reasons. Member states are also, under Article 6(5), encouraged to refrain from issuing a return decision in the event of a pending procedure that would grant or renew a permit.  
.....

Article 6(4) is not specifically concerned with victims of crime. However, the rights of victims of crime are relevant to apprehensions and the issuing of a return decision – the subject matter of Article 6. The *Return Handbook*<sup>24</sup>, published by the European Commission to provide member states with a common set of guidelines, best practices and recommendations in implementing the Return Directive, is clear that the aims of the directive should be balanced against other legitimate interests, including the “interests of the State to fight crime”. The handbook makes express reference to the EU Agency for Fundamental Rights’ document “Apprehension of migrants in an irregular situation – fundamental rights considerations”, which recommends that states introduce “possibilities for victims and witnesses to report crime without fear of being apprehended.”<sup>25</sup>

24 European Commission (December 2017), *Return Handbook*.

25 FRA (2013), *Apprehension of migrants in an irregular situation – fundamental rights considerations*.

## 2. NATIONAL LEGISLATION GRANTING RESIDENCE PERMITS TO VICTIMS OF CRIME



# Belgium



## Domestic Violence

Migrants who have come to Belgium for family reunification purposes cannot in principle claim an autonomous right of residence until they have cohabited with their partner for five years. Therefore, the permit of the dependent partner will, as a general rule, be withdrawn in case of separation during this period. However, in case of intimate partner or family violence, the law provides an exception to the rule in some circumstances.

*Intimate partner violence* is defined by law as “any form of physical, sexual, mental or economic violence between spouses or people who cohabit or have cohabited (even occasionally) and have or have maintained a lasting emotional and sexual relationship”,<sup>26</sup> whereas *family violence* is defined as “any form of physical, sexual, psychological or economic violence between members of the same family, whatever their age”.<sup>27</sup>

When assessing the victim’s claim for a residence permit, the Belgian authorities are required by law to also consider the nature and solidity of the person’s family ties, the duration of their stay in Belgium, their social, cultural or family ties to the country of origin, as well as their age and state of health.<sup>28</sup> In this procedure, a wide margin of discretion is left to the Immigration Office.<sup>29</sup>

## Differences Depending on the Sponsor

In case the sponsor is a third country national, there must be an actual partner or family life for five years for the victim to receive an independent residence permit. In case the sponsor is an EU national (including Belgian nationals) there needs to be marriage, civil partnership or other “communal life” (“*installation commune*”) for five years.<sup>30</sup>

Whether the sponsor is an EU citizen or not is highly relevant to the victim’s prospects of keeping their residence status. If the migrant has joined a Belgian or other EU citizen, the law provides that the Immigration Office *cannot* withdraw their residence permit if they provide evidence that they are victims of family violence, intimate partner violence, or of one of the crimes contemplated in Arts 375, 398 à 400, 402, 403 or 405 of the Belgian Criminal Code (viz., rape, attempted homicide or bodily harm).<sup>31</sup> If the sponsor is not an EU citizen, the residence permit of the victim will *not* be withdrawn when the separation between the spouses or registered partners is the result of rape, attempted murder or bodily harm. In such cases, if the family member is able to prove these facts, the Immigration Office *cannot* withdraw the residence permit. In other cases of violence, however, the authority must just *take into account* the situation of violence when deciding on granting the permit.

In case the victim is a third country national joining a Belgian or an EU citizen, they must also prove that they have “sufficient means of subsistence” and that they are covered by medical insurance.<sup>32</sup> If the sponsor is also a third country national, this requirement does not apply.<sup>33</sup>

## Procedure

When the Immigration Office becomes aware that a migrant no longer fulfils the condition of family life or *installation commune*, the migrant is summoned by the municipality where they reside. At the meeting, the migrant is informed that they need to submit evidence proving that they fall within the scope of an exception to avoid deportation. This evidence should be submitted within a timeframe of one to three months. However, there is no guidance in the law, or elsewhere, as to what constitutes sufficient evidence to meet the requirements of the law.<sup>34</sup> As examples, Belgian civil

26 Collège des Procureurs Généraux près les Cours d’Appel (2006), « Violence Conjugale », COL 4.

27 Members of the same family includes: “toutes les personnes unies par un lien de parenté en ligne ascendante et descendante ou collatérale au deuxième degré” as well as “les époux ou personnes cohabitant ou ayant cohabité et entretenant ou ayant entretenu une relation affective et sexuelle durable ainsi que les descendants et ascendants des partenaires ou de l’un d’eux, habitant ou ayant habité avec eux”. See Circulaire n. COL 3/2006 du collège des procureurs généraux près les cours d’appel, p. 4.

28 See Art 11(2)(5) and Art 42quater, §1, paragraph 3 Loi sur l’accès au territoire, le séjour, l’établissement et l’éloignement des étrangers; GREVIO (2019) Report on Belgium.

29 “Si l’étranger prouve avoir été victime au cours du mariage ou du partenariat d’un fait visé aux articles 375, 398 à 400, 402, 403 ou 405 du Code pénal. Dans les autres cas, le ministre ou son délégué prend particulièrement en considération la situation des personnes victimes de violences dans leur famille” (Art. 11 *Loi sur l’accès au territoire, le séjour, l’établissement et l’éloignement des étrangers*).

30 Council of Europe: GREVIO (2019), *Rapport soumis par la Belgique donnant effet aux dispositions de la Convention du Conseil de l’Europe sur la prévention et la lutte contre la violence à l’égard des femmes et la violence domestique*, conformément à l’article 1, paragraphe 68, p. 61.

31 Under Art. 42quater of *Loi sur l’accès au territoire, le séjour, l’établissement et l’éloignement des étrangers*: “lorsque le membre de famille démontre avoir été victime de violences dans la famille ainsi que de faits de violences visés aux articles 375, 398 à 400, 402, 403 ou 405 du Code pénal, dans le cadre du mariage ou du partenariat enregistré”.

32 Art. 42 quater *Loi sur l’accès au territoire, le séjour, l’établissement et l’éloignement des étrangers*.

33 Ensemble contre les violences (2019), Belgian Constitutional Court has ruled that this separation is not discriminatory since a general assessment should always be carried out, see CC 17 septembre 2015, n° 121/2015.

34 Human Rights Watch (2012), *The law was against me. Migrant Women’s Access to Protection for Family Violence in Belgium*, p. 33.



society organizations mention police reports, medical reports, statements from the public prosecutor or proofs of residence at a women's shelter.<sup>35</sup>

In 2010, the Council for Alien Law Litigation (CALL) rejected an appeal by a Moroccan woman against her expulsion due to lack of evidence of domestic violence. She had submitted reports from the police and shelter to the Immigration Office, but as the public prosecutor had decided to drop the charges against her spouse, the Immigration Office concluded that the woman had failed to provide sufficient evidence.<sup>36</sup> Victims who need to prove their financial subsistence can do this by submitting pay slips, work contracts, statements from social services and insurance certificates.<sup>37</sup>

## Concerns

One of the main problems with the legislative scheme in Belgium is that the protection clauses do not protect all victims of domestic violence. Migrants awaiting a decision on their residence permits, undocumented victims and victims who have reunited with a third country national who only have a temporary residence permit all fall outside the scope of the law's provisions. Moreover, victims who have a residence permit valid for a shorter period than three months cannot be eligible for protection under this provision. This is also the case for victims who themselves are nationals of an EU country, who therefore risk losing their right to stay in case they can't sustain themselves economically.<sup>38</sup>

The requirement of financial stability for third country national joining an EU national constitutes a significant barrier for victims of abuse who are rarely economically independent, meaning that a victim who might still be recovering from violence or living in hiding needs to find a regular job within a short timeframe. This requirement disproportionately affects victims in particular situations of vulnerability, such as those who are suffering from a disability or from health issues, those who lack language skills, are illiterate, pregnant or have small children.<sup>39</sup>

Other concerns raised by civil society organizations include the broad discretion left to the administration, and the general lack of awareness about this protection mechanism.<sup>40</sup> Several NGOs note that the law does not explain how the procedure should be conducted and what documents are required. Lack of transparency and information are recognized as major problems with the procedure, as neither victims nor supporting services know what is expected from the authorities.<sup>41</sup> Moreover, while the victims might be granted residence permits, the procedure takes time and they still run a risk of being arrested and detained at the time of reporting.<sup>42</sup> Finally, while the formal definition of family or intimate partner violence is very broad, according to a Belgian NGO which provides legal counselling to migrants, the definition is often presumed to be limited to physical abuse in its practical implementation.<sup>43</sup>

The Belgian state does not collect any data on the number of people who apply for autonomous permits under the law, or the success rate of the applications.

## Human Trafficking, Smuggling and Exploitation

A special type of residence permit can be granted to victims of human trafficking or of smuggling with aggravating circumstances. This system has been in place since the early 1990s.<sup>44</sup> *Human trafficking* is defined under Belgian law as including sexual exploitation or prostitution, physical exploitation by removing organs or other human bodily material, and situations where the victim is forced to commit a crime against their own will. Extreme cases of economic exploitation can also qualify as human trafficking, namely, when they are connected to begging or take place in circumstances conflicting with human dignity.<sup>45</sup> However, most cases of economic exploitation do not qualify as human trafficking.<sup>46</sup> *Smuggling with aggravated circumstances* refers to the smuggling of a third-country national against whom violence was committed, or whose life was endangered, or who is a minor.<sup>47</sup>

35 Ensemble contre les violences (2019), Évaluation de la mise en œuvre de la Convention du Conseil de l'Europe sur la prévention et la lutte contre la violence à l'égard des femmes et la violence domestique par la Belgique, pp. 98-99.

36 See note 34, p. 34.

37 See note 33, pp 98-99.

38 CAW Brussels (2019), Assessment of the implementation in Belgium of Article 59 of the Istanbul Convention at p 3.

39 See note 33, p. 101.

40 CIRÉ (2015), Migrant(e) et victime de violences conjugales. Quels sont mes droits?

41 See note 33, p. 100; note 38), pp 6-7.

42 The legal obligations of police officers to follow up cases of irregular status is regulated in Article 29a1, Belgian Code of Criminal Procedure and Article 21, Belgian Police Administration Act.

43 See note 38, p 7.

44 Regulated through the Law of 13 April 1995 on provisions to combat trafficking in human beings and child pornography only included trafficking in human beings for the purposes of sexual exploitation. For additional information, see [www.myria.be/fr/traite/legislation](http://www.myria.be/fr/traite/legislation).

45 Belgian Criminal Code, Art 433quinquies.

46 PICUM (2015), Employers' Sanctions: Impacts on Undocumented Migrant Worker's Rights in Four EU Countries, p. 10.

47 Belgian Criminal Code, Art 77quater.



## Legislation

The victim procedure for victims of human trafficking is regulated in Arts 61/2-61/5 of the Belgian Aliens Act and is clarified in detail in the Circular Letter of 23 December 2016.<sup>48</sup> A victim of one of the abovementioned crimes can enter the victim procedure, and thereby be granted residence permits, if they fulfil the three following conditions:

1. Break all contact with the suspected perpetrator
2. Accept support provided by specialized guidance centres
3. Cooperate with the judicial authorities

Children who have experienced trafficking are also entitled to a three-month residence permit. Like adults, children need to fulfil the criteria to cooperate with the authorities, break all ties with the perpetrator and accept support from a specialized support center. If the statements result in a conviction or if the prosecutor continues to press charges, the child may be granted a permanent residence permit.<sup>49</sup>

## Procedure

When authorities identify a victim of one of these crimes, they have an obligation to inform them about their rights, put them in contact with the specialized guidance centres and report the victim to the Immigration Office. If the victim has an irregular status, a residence permit can be issued by the specialized guidance center. This permit is valid for 45 days, in order to offer the victim a reflection and recovery period.

If the victim lodges a complaint or makes a statement against their perpetrator, they are first granted a residence permit that is valid for three months. Depending on whether their information is needed in the criminal investigation or judicial procedure, they can later be issued a six months residence permit, which can be renewed until the end of the judicial procedure. The residence permit can be cancelled if the victim no longer fulfils the three criteria outlined above. But if the victim has provided information of significance to the proceedings, they can be granted a permanent residence permit, regardless of whether or not the perpetrator was convicted.<sup>50</sup>

## Concerns

**TABLE 2. Residence Permits Issued to Victims of Trafficking in Belgium 2013-2015<sup>51</sup>**

	2013	2014	2015
<b>Three-Month Residence Permit Issued</b>	117	135	115
<b>Six-Month Residence Permit Issued</b>	98	84	90
<b>Six-Months Residence Permit Renewed</b>	456	447	426
<b>Permanent Residence Permit Issued</b>	45	33	36

Criminal proceedings often continue for a long time and only about one third of those who enter the victim procedure are granted a permanent residence permit (see Table 2). The percentage is even lower relative to the number of crimes reported, as Table 3 shows.

**TABLE 3. Figures of Human Trafficking and Smuggling in Belgium in 2017<sup>52</sup>**

	Human Smuggling	Human Trafficking	Total
Total Number of Reports	467	368	835
Number of Cases Transferred to Public Prosecutor	467	328	795
Number of Cases Dismissed by Public Prosecutor	188	81	269
Number of Persons who Entered the Victim Procedure	19	121	140

48 Circular Letter of 23 December 2016 on the introduction of multidisciplinary cooperation with regard to the victims of trafficking and/or heavier forms of smuggling with human beings.

49 *Ibid*, para 146.

50 Council of Europe: GRETA (2017), Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Belgium, para 142.

51 Information provided by Belgian Authorities, see *ibid*, para 144.

52 Myria (2018), *Annual report Trafficking and smuggling of human beings 2017*.

Cases of *severe* labour exploitation fall under Belgium's legislation on human trafficking. Indeed, the majority of recognised cases of human trafficking in Belgium involve victims of severe labour exploitation. However, according to the labour inspectorate and several migrants' rights organizations, for forms of exploitation that do not meet the strict definition of human trafficking, there is no possibility of a residence permit, despite the requirement of Article 13 of the Employer Sanctions Directive.<sup>53</sup>

The ReAct Project has reported that many children are afraid to make statements against their trafficker or do not have enough evidence that is valuable for the judicial proceedings. They express concern that the requirements put children in an emotionally difficult situation as when their trafficker may be a family member.<sup>54</sup>

According to the Myria, Belgium's federal migration centre, the low numbers are also due to the fact that victims transiting through Belgium on their way to the UK are often unwilling to report the crime, as well as police officers' lack of knowledge and limited opportunities to offer victims an appropriate first reception and suitable victim support.<sup>55</sup>

According to the Belgian government, this provision has been applied to victims of trafficking who have not been formally identified as such. In such cases, specialized receptions centres apply for the residence permit at the Immigration Office, supporting their claim with a detailed social report about the person concerned. This residence permit can also be granted to other victims of violence in view of their personal situation.<sup>57</sup>

Regarding victims of domestic violence in need of an autonomous residence permit, a report from the social center CAW Brussels has noted that the application of this provision is possible but largely theoretical. There is no transparency surrounding the provision and there is no legal certainty that the residence permit will be granted. The decision is entirely dependent on the discretionary power of the Immigration Office.<sup>58</sup> The administrative practice of the legislation shows that domestic violence is not always accepted as a relevant criterion.<sup>59</sup>

In the period from 2013-2016, Belgian authorities issued 10 temporary residence permits, 111 extensions and 106 permanent residence permits on the basis of this provision.<sup>60</sup>

## Humanitarian Grounds

Under exceptional circumstances, Belgian authorities may also issue a residence permit on humanitarian grounds. In this assessment, the authorities take into account a range of factors that justify the grant of a residence permit. As a general rule, the applicant needs to provide the authorities with their identity documents. However, the applicant may be exempted from this rule if they can demonstrate that such documents are impossible to obtain.<sup>56</sup>

53 PICUM (2017), *Summary of findings in Belgium and the Czech Republic on the implementation of the Employers' Sanctions Directive*, p. 5.

54 ReACT (2016), Better support, better protection: Steps lawyers and guardians can take to better identify and protect trafficked children.

55 Myria, (2013), *Trafficking and smuggling of human beings: The money that matters*; Myria, (2017), *Annual Report trafficking and smuggling of human beings: Beggars in the hands of traffickers*.

56 Art 9bis *Loi sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers*.

57 See note 50, para. 145.

58 See note 38, p. 4.

59 Belgische Kamer van Volksvertegenwoordigers(2016),*Hoorzittingen over de wettelijke bepalingen over de gezinshereniging en de misbruiken waartoe zij aanleiding geven*. Verslag; Human Rights Watch, (2012), *De wet was tegen mij. Toegang van migrantenvrouwen tot bescherming tegen huiselijk geweld in België*.

60 See note 50, para 145.



France





## Domestic Violence

As a general rule, a residence permit that was granted to a third-country national spouse or partner may be withdrawn or not renewed in the event of a separation within 3 years after reunification in France. However, there is an exception in cases of domestic violence that allows victims to retain their status. In March 2016 and again in September 2018, the current legislation was modified to integrate the right to get a residence permit for victims of both domestic and family violence. Under French legislation, there is the possibility to grant a residence permit to women or men who are victims of domestic violence committed by their spouse or former spouse, former partner related by a contract of civil union or former cohabiting partner.

## Legislation

According to Art L.313-12 CESEDA, “if the foreign national has been subjected to domestic violence from her/his spouse and the couple’s married life has ceased, the administrative authority (*prefecture*) does not have the right to withdraw the foreign national’s residence permit and should authorise the permit to be renewed.” This provision protects spouses of French nationals. There is another legal provision (Art L.431-2 al 4 CESEDA) that protects people with residence permits who entered France to reunite with a third country national. For family members of EU nationals exercising their free movement rights, a similar provision can be found in Art R.121-8 CESEDA.

French law does not contain a statutory definition of domestic violence.<sup>61</sup> The Ministry of Justice, however, has published guidance clarifying that this violence can be physical, psychological or sexual, committed against a man or a woman, in the context of a marriage, civil union (*PACS*) or cohabitation (*union libre*).<sup>62</sup> It covers both migrant victims of violence who are in France on a dependent residence permit and those who are undocumented.

## Evidence

According to a circular of 9 September 2011, the *prefecture* must examine evidence of the violence, such as the filing of a complaint, a divorce decree, a conviction of the spouse or medical attestations.<sup>63</sup>

According to the circular, violence can also be proved through the granting of a protection order. Under Art L.316-3 CESEDA, “a residence permit held by a foreign national who has been granted a protection order for violence committed inside the marriage, or by a former spouse, a former partner related by a contract of civil union or a former cohabiting partner as provided for under Art 515-9 of the Civil Code, shall be renewed on expiring.” A protection order is an emergency precautionary mechanism that the Family Judge can issue when the victim is at risk of violence. The legislation also protects those who have been issued a protection order on grounds of forced marriage.<sup>64</sup> This provision is the only basis to grant a residence permit to victims of violence who are not married to their perpetrator.

## Undocumented Migrants

Every foreign national victim of domestic violence has the right to be granted a residence permit from the moment a protection order is issued, including undocumented migrants. Under Art L.316-3 CESEDA: “unless their presence constitutes a threat to law and order, the administrative authority shall issue without undue delay a temporary ‘*vie privée ou familiale*’ residence permit to a foreign national who has been granted a protection order under Art 515-9 of the Civil Code, on account of acts of violence committed by a spouse, partner related by a contract of civil union, or co-habiting partner. This temporary residence permit allows the holder to exercise a professional activity.” This permit is valid for one year and can be renewed. Dependent children under 18 years will also obtain a temporary residence permit.

## Concerns

Renewal of the residence permit is dependent on the situation continuing, and the existence of a protection order. This means that once a survivor is considered to be safe from violence, they lose their right to reside.<sup>65</sup> In addition, for undocumented victims, they still run a risk of being arrested and detained when they file the initial complaint of the violence.<sup>66</sup>

61 Ligue des droits de l’Homme (2018), Contribution LDH dans le cadre du premier rapport étatique de la France, p. 3, para 19.

62 Direction de l’Information Légale et Administrative (Prémier Ministre), Ministère Chargé de la Justice (2018), *Violence conjugale*.

63 Secrétariat Général à l’Immigration et à l’Intégration (2011), Instruction NOR IOCL1124524C relative au droit au séjour des personnes victimes de violences conjugales et à la mise en œuvre des articles L313-12, L 316-3 et L431-2 du CESEDA

64 See note 61, p. 3, para 21.

65 Amicale du Nid et al (2018), Évaluation de la mise en œuvre en France de la Convention d’Istanbul de lutte contre la violence à l’égard des femmes et la violence domestique, p. 61.

66 *Ibid*, p 59.

Those who do not have a protection order can still access an independent residence permit in case they are regularly residing in the country on the basis of their family relations and can prove the violence. However, civil society organisations have raised concerns, including with regard to regional variations in practice. In some parts of France, only physical violence is recognized as domestic violence. In others, very specific documents such as certain types of medical reports, criminal convictions or protection orders are required by the authorities. Some victims fall outside of this legislation due to their residence being regulated by special agreements. For example, the right to stay of Algerians is governed by the Franco-Algerian Agreement of 27 December 1968, which does not guarantee a right to stay in the event of domestic violence. Instead, the protection consists of a more general consideration of particular circumstances, at the discretion of the authorities.<sup>67</sup>

The main concern raised in connection with the French legislation has to do with the precariousness of the residence permits granted, leaving broad discretion to the prefect. In the words of the French Council of State:

*“[S]uch violence, suffered during the cohabitation, opens the possibility of obtaining, on the basis of this article, a residence permit, without it (the possibility) being limited to the first renewal of such a title. It falls to the prefectural authority, ‘receiving’ such a request to assess, under the full control of the judge of the excess/misuse of power, if the situation justifies the renewal of the title on the date where it takes a decision, taking into account, in particular, the time that has elapsed since the ending of the cohabitation and the consequences that may still result, at that date, from the violence suffered (emphasis added).”*<sup>68</sup>

According to the French Ministry of the Interior, 162 residence permits were issued to victims of domestic violence in 2015 and 295 in 2016. As of 31 December 2017, 361 foreign nationals were regularly staying in France under this legislation.<sup>69</sup> According to a report by coalition of French NGOs, 45 residence cards were issued on the grounds of protection orders in 2016 and 50 in 2017. There is no data available on the number of applications.<sup>70</sup>

## Victims of Human Trafficking

The same type of temporary residence permit, for “private and family life”, can also be issued to victims of human trafficking who cooperate with the police. This is regulated under Art L. 316-1 CESEDA. France grants victims of trafficking a reflection and recovery period of 30 days in order to decide on whether they wish to cooperate.<sup>71</sup> The first temporary residence permit should be issued automatically and gives the right to access the same social benefits as asylum seekers.<sup>72</sup> If the trafficker is convicted for the crime, the victim can be granted a regular residence permit, normally valid for ten years.<sup>73</sup> The legislation does not differentiate between men and women. In practice however, those granted a residence permit on this ground are almost exclusively women.<sup>74</sup>

Several concerns have been raised about this legislation. First, it requires the victim to come forward to the authorities, thereby risking threats as well as social stigma. Second, the application procedure requires the victim to have identity documents, such as a birth certificate or passport, something many victims of human trafficking lack. Finally, there are arbitrary differences in the implementation of this legislation throughout the country as the granting of the residence permit as well as the social benefits that accompany it are often dependent on the local gendarmerie or prosecutor.<sup>75</sup>

67 See note 65, p. 59.

68 Emphasis added. CE, 26 septembre 2014, n° 366041; Gisti (2016), “*Droit au séjour et violences familiales*”, p.12 (unofficial translation).

69 Council of Europe: GREVIO (2018), Report submitted by France pursuant to Article 68, paragraph 1 of the Council of Europe Convention on preventing and combating violence against women and domestic violence, at p. 57.

70 See note 65, p. 60.

71 Article R316-1 of the CESEDA.

72 CNCDH (2017), Évaluation de la mise en œuvre du plan d'action national contre la traite des êtres humains.

73 See note 69, p. 56.

74 See note, p. 57.

75 See note 72, p. 26.

**TABLE 4. Residence Permits and Residence Cards Issued to Victims of Human Trafficking in France 2012-2016<sup>76</sup>**

	2012		2013		2014		2015		2016	
	1 <sup>st</sup> Issue	Renewal	1 <sup>st</sup> Issue	Renewal	1 <sup>st</sup> Issue	Renewal	1 <sup>st</sup> Issue	Renewal	1 <sup>st</sup> Issue	Renewal
Residence Cards	5	13	2	12	2 <sup>77</sup>	11	1	29	4	32
Total Residence Cards	18		14		13 <sup>78</sup>		26		36	
Residence Permits based on family or private life	35	148	41	144	62 <sup>79</sup>	154	45	149	71	150
Total Residence Permits based on family or private life	183		185		216 <sup>80</sup>		194		221	
<b>Total</b>	<b>201</b>		<b>194</b>		<b>225</b>		<b>220</b>		<b>257</b>	

## Sex Workers

For migrants who engage in consensual sex work, there is another opportunity to receive a residence permit. Legislation that criminalises buyers of sexual services was incorporated into French legislation in 2016, through Law No. 2016-444 of 13 April 2016. This law aims “to strengthen the fight against the prostitution system and to support prostituted persons.”<sup>81</sup> Because sex workers are considered victims of crime under this legislation, they are offered a temporary (six-month) residence permit if they choose to participate in an exit programme. The permit can be renewed three times and includes a right to work.<sup>82</sup> As set out under Art 5-121-9-II of the Code on Social Action and Families.

According to a questionnaire carried out by researchers and NGOs in 2018, very few sex workers are aware of this legislation. While some migrant sex workers have

expressed interest in the residence permit, many remain sceptical due to the conditions of the connected exit programme.<sup>83</sup> The residence permit grants a right to work, but in practice it is very difficult to find employment with a residence permit which is only valid for six months.<sup>84</sup> Moreover, the residence permit is only available for a maximum of 24 months. After these 24 months they must either to leave France, remain in the country with irregular status or apply for asylum.<sup>85</sup>

In practice, this legal construction means that victims of human trafficking who have engaged in sex work can benefit from this type of residence permit regardless of their cooperation with the police. However, the permit is conditional on sex workers abandoning all types of sex work.

76 See note 72, p. 24. Note that numbers reported from the French Government to GRETA differs regarding 2014, see following footnotes.

77 This figure is 3, according to GRETA (2017), Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by France, para 191.

78 This figure is 14 according to *Ibid.*

79 This figure is 61 according to *Ibid.*

80 This figure is 215 according to *Ibid.*

81 See note 69.

82 Médecins du Monde et al (2018), What do Sex Workers Think of the French Prostitution Act?, at p. 21.

83 *Ibid.*, p. 55.

84 *Ibid.*, p. 62.

85 *Ibid.*, p. 61.





This aerial photograph captures a vibrant urban scene in Germany. The foreground is dominated by a large, light-colored building with a dark, tiled roof featuring several dormer windows. The building's facade is adorned with signs for 'CAFE-RESTAURANT-GLOCKENSPIEL-BAR', 'WORMLAND', and 'Jiffiland.hören.'. Below these, a large window display showcases mannequins in various outfits. To the right, a modern building with a green-tiled roof and a glass facade houses the 'GALERIA KAUFHOF'. The street below is a wide, paved pedestrian zone filled with people walking and shopping. In the background, a dense urban landscape unfolds, with numerous buildings of varying heights and colors, interspersed with green trees. A yellow construction crane is visible on the left side of the image. The overall atmosphere is one of a bustling, historic city center.

Germany



## Domestic Violence

To receive an autonomous one-year residence permit, a migrant who has come to Germany to join a family member needs to stay with their sponsor for at least three years.<sup>86</sup> The time that counts in this assessment is the time of the marital cohabitation, not the length of the marriage. As an exception, the three year-requirement can be waived if it is necessary to enable the spouse to continue his or her residence in order to avoid “particular hardship.”<sup>87</sup>

## Legislation

A situation of “particular hardship” can be caused by factors in the migrant’s country of origin as well as in Germany. In the past, one had to demonstrate hardship in both places, but this is no longer the case. This exception should apply in cases where the continuation of marital cohabitation is unreasonable due to the harm it would do to the foreign spouse’s legitimate interests, as assumed to be so when the migrant is a victim of domestic violence.<sup>88</sup>

Under German law, *domestic violence* is defined as violent acts between individuals in an ongoing relationship in the process of breaking down or that has already broken down. It also covers acts of violence between persons who are related to one another, insofar as the acts are not crimes against children.<sup>89</sup> The legislation is applicable to situations where the migrant or their child has been physically or psychologically abused by the sponsor; where the child has been seriously endangered in their mental or physical development, or; where the sponsor has committed other significant offenses against the spouse or the child. This is especially the case if, as a result of the mistreatment, they were forced to seek refuge at a shelter or obtained a police or judicial removal of the sponsor from the marital residence.<sup>90</sup> The legislation also protects victims of forced marriages, including when both parties were coerced into marrying.<sup>91</sup>

When assessing whether a situation amounts to particular hardship, many factors are taken into account. According to the local authorities in Lower Saxony, the longer the victim’s stay in Germany, the lower are the requirements for the particular hardship, and vice versa. If the migrant has just recently arrived in Germany, it is considered more reasonable to expect them to return.<sup>92</sup> If there is a child living in a family unit, the child’s well-being can also have a strong impact on the assessment.<sup>93</sup> However, there are also factors that may exclude a situation from qualifying as particular hardship, such as when the victim is deemed to have consented to or participated in creating the situation, for example by consensual alcohol misuse.<sup>94</sup>

Extension of the residence permit may be refused if the person is reliant on social benefits,<sup>95</sup> if they are considered to be “responsible” for this situation – for instance, they cannot show that they have applied for jobs and if they declined a “reasonable” job-offer.<sup>96</sup>

The current legislation only concerns extensions, which means that the applicant needs to already have a residence permit, in accordance with §§ 28, 29 or 30 of the German Residence Act, or a right to reside under Section 2 and 3 of the German Act on the General Freedom of Movement for EU Citizens. It is not possible for undocumented victims to access this protection.<sup>97</sup>

## Proof and Procedure

There is no requirement that the sponsor being convicted for the domestic violence for a victim to be granted an extension of their permit. Particular hardship can be proven by submitting other documents besides a conviction, for example:

- Medical evidence
- Police reports
- Proof of criminal proceedings
- Statements from counselling centres, women’s shelters and sanctuaries

86 For Turkish citizens, the main rule is three years. See § 13 Assoziationsratsbeschluss 1/80 (ARB 1/80).

87 “Besonderen Härte”, § 31 German Residency Act (Aufenthaltsgesetz). For family members joining EU citizens exercising their right to free movement, this is regulated in Section 3 German Act on the General Freedom of Movement for EU Citizens.

88 § 31(2) German Residency Act.

89 Senate Administration for Interior and Sport/Senate Administration for Justice, 10/2001.

90 Paras 31.2.2.2.2-3 Allgemeinen Verwaltungsvorschriften zum Aufenthaltsgesetz (General administrative regulation to the residence law).

91 Para 31.2.2.2.1 Allgemeinen Verwaltungsvorschriften zum Aufenthaltsgesetz (General administrative regulation to the residence law).

92 Niedersächsische Ministerium für Soziales, Gesundheit und Gleichstellung, *Migrantinnen und häusliche Gewalt*.

93 § 31(2) German Residency Act.

94 Allgemeinen Verwaltungsvorschriften zum Aufenthaltsgesetz (General administrative regulation to the residence law), para 31.2.5.

95 German Residency Act (Aufenthaltsgesetz), § 31(2).

96 Allgemeinen Verwaltungsvorschriften zum Aufenthaltsgesetz (General administrative regulation to the residence law), § 31(2).

97 BIG Koordinierung, Das eigenständige Aufenthaltsrecht § 31 Aufenthaltsgesetz: Hinweise für die Beratung von Migrantinnen, die von häuslicher Gewalt betroffen sind, p. 3.

- Statements by friends or relatives
- Statements from teachers on a child's development<sup>98</sup>

According to the Administrative Regulation on the German Residence Act, migration authorities should take into account linguistic, cultural or mental health considerations of the victim and be aware that such problems can lead to difficulties in submitting evidence that might prove particular hardship.<sup>99</sup>

While the integration level of the victim is not mentioned as a factor of importance in the legislation, NGOs recognize that submitting positive examples of the migrant or their child's integration can support the application. This may for example include evidence of economic independence, language courses, school grades or community involvement.<sup>100</sup>

## Victims of Trafficking and Labour Exploitation

A victim of trafficking can be granted a residence permit in Germany as long as their presence on the federal territory is required because of "pressing humanitarian or personal grounds or due to substantial public interest".<sup>101</sup> This wording refers to the need for them as witnesses in the criminal proceedings against their traffickers.

### Human Trafficking

If a victim of human trafficking is identified, they must first be granted at least three months leave to remain to reflect and recover.<sup>102</sup> The length of the reflection period differs from Länder to Länder. For example, in Berlin a minimum of 6 months is granted.<sup>103</sup> To receive this leave, the victim must show that it is "tangible" that they have experienced human trafficking. This can be done by giving a credible statement to the immigration authorities.<sup>104</sup> The possibility of submitting evidence through a counselling centre specialised in supporting trafficked persons is currently being discussed. The leave to remain can be revoked or shortened in case the victim's residence is a threat to public order or public security, or if the victim voluntarily contacts the accused trafficker again.<sup>105</sup>

For the residence permit to be granted, the victim needs to fulfil the following criteria:

1. Have severed all ties with the alleged trafficker;
2. Have expressed their willingness to testify during the criminal proceedings;
3. Their absence would make it difficult to investigate the offense.

These requirements also apply to trafficking victims below the age of 18.<sup>106</sup>

If the victim decides to testify and fulfils the three above criteria, they can be granted another type of residence permit issued by the Foreigners Registrations Office. According to Section 72 para 6 of the German Residence Act, the Office should consult the relevant public prosecutor or criminal court prior to making the decision. The residence permit is granted for six months but can be extended as many times as is required based on the duration of the criminal proceedings.<sup>107</sup> After the criminal proceedings, the stay can only be prolonged on some other basis, for example on humanitarian grounds.<sup>108</sup>

### Labour Exploitation

According to Section 25 para 4b of the German Residence Act, migrant workers employed without a valid work permit and under "strikingly different conditions" (*auffälligen Missverhältnis*) than German employees may also be eligible for a temporary residence permit. Similar to the corresponding provision on victims of human trafficking, the regulation requires that they be willing to testify in the criminal proceedings against the employer. However, they are not required to sever all ties to the employer and unlike for victims of trafficking, victims of labour exploitation can have their residence permit renewed after the judicial proceedings if "the remuneration owed to the foreigner by the employer has not yet been paid in full, and it would represent particular hardship for the foreigner to pursue his entitlement from abroad."

98 See note 97, p. 2.

99 See note 96, para 31.2.4.

100 See note 97, p. 4.

101 Section 25 para 4a German Residence Act.

102 Section 59 para 7 German Residence Act.

103 Information provided by Livia Valensise.

104 KOK e.V., "Reflection Period".

105 Section 59 para 7(1)-(2) German Residence Act.

106 KOK e.V., "Implications of the Residence Act for trafficked persons".

107 Council of Europe: GRETA (2015), Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Germany, para 161.

108 Information provided by Livia Valensise.

As the conditions under this provision are more advantageous, many victims of human trafficking may be able to receive a residence permit as victims of labour exploitation instead. For victims of human trafficking with a work permit, this is however not an option. Moreover, family reunification is only possible for holders of a residence permit on grounds of human trafficking, but not on grounds of labour exploitation.<sup>109</sup>

### Employment and Benefits

Both victims of human trafficking and labour exploitation with residence permits can take up employment and claim benefits in under the German Social Code, Part II or XII if they require financial support. Victims are not required to participate in an integration course but can access education or vocational training.<sup>110</sup>

During the reflection period, benefits can instead be claimed under the German Asylum-Seekers Benefits Act. However, as noted by K.O.K e.V., a German organisation specialised in cases of trafficking, the Asylum-Seekers Benefits Act does not always cover health-related costs, which is of great importance during the reflection period.<sup>111</sup>

### Concerns

As pointed out by several German NGOs, victims of trafficking who are issued a residence permit often must remain in Germany for years until the criminal proceedings end. And because the residence permit is only valid for six months at the time, it is often difficult for them to find employment and accommodation.<sup>112</sup>

When the judicial proceedings are over, the residence permit will no longer be renewed. However, according to the German Government, very few victims of trafficking are in practice deported after the criminal proceedings end. Often, residence permits are granted on other grounds, such as work, family relations or on humanitarian grounds.<sup>113</sup> From the beginning of 2008 to 30 April 2014, 419 residence permits were issued to 213 victims of human trafficking. Of these, 35 were later issued an expulsion order. Only one person was registered as having actually left the country in 2013.<sup>114</sup>

The Council of Europe's expert group on human trafficking, GRETA, has noted that victims of human trafficking take a high risk when reporting to the police in Germany. Since the issuing of the permit depends on whether prosecution will take place, uncertainty for the victim is very high. In some cases, the victim's information is already known to the police, making it unnecessary to issue a residence permit.<sup>115</sup> According to a survey conducted among counselling centres for victims of trafficking in Germany, just 14% of third country national victims chose to report the crimes to the police. The main reasons were legal uncertainty and fear of the perpetrators.<sup>116</sup>

### Victims of Racist Violence

Three Federal States of Germany (Brandenburg, Berlin and Thuringia) have introduced residence regulations for victims of racist violence in the form of decrees. The aim of this legislation is to prevent a situation where the victim faces deportation because of the violence they experienced. As many migrants must prove their financial stability to remain in Germany, deporting migrants who are suffering from disabilities or permanent damage following violence risks encouraging further violence from racist groups.

However, this legislation has been criticized by various counselling centres for their high threshold and practical difficulties.<sup>117</sup> As an example, in the state of Berlin the decree requires a confirmation from the police and public prosecutor about the substantial consequences of the criminal act. Often, these officials lack the required skills to make this assessment, in particular with regard to psychological and long-term consequences. The implementation is also held back by lack among victims as well as among state officials. As a consequence, the legislation is hardly used.

There are ongoing discussions on whether to introduce this practice on the national level.<sup>118</sup>

109 See note 106.

110 Council of Europe: GRETA (2015), para 162.

111 KOK e.V., "The Asylum-Seekers' Benefits Act", <https://www.kok-gegen-menschenhandel.de/en>.

112 Ibid, para 167.

113 Ibid, para 163.

114 See note 107, para 164.

115 Ibid, para 165.

116 Ibid, para 166.

117 TAZ (2018), Niemand bleibt wegen Bleiberecht; EZRA (2018), Flüchtlingsrat Thüringen und Opferberatung ezra: „Erlass für Opfer rassistischer und rechter Gewalt hat eine wichtige Signalwirkung, ist aber für den Schutz von Betroffenen unzureichend.

118 Deutscher Bundestag (2019), Linke will Aufenthaltsrecht für Opfer rechter Gewalt.

# Greece





## Domestic Violence

### Legislation

#### *Victims of domestic violence on spouse-dependent visas*

The issuance of residence permits to third country nationals is regulated under the Immigration and Social Integration Code (Law 4251/2014). Article 76(2)(ii) provides for independent residence permits for spouses of third country nationals facing “circumstances that are particularly difficult”, including domestic violence. Similarly, Article 84(1)(c) provides that family members of a Greek national may retain their right to reside in the event of domestic violence.

Domestic violence is considered a crime under Law 3500/2006 and is defined as any form of physical, sexual or psychological violence against the victim by the former or current spouse or partner or by another family member.

#### *Undocumented victims of domestic violence*

In July 2015, Greece passed a law (Law 4332/2015) amending Law 4251/2014 to allow victims (and, in some cases witnesses) of a wide range of crimes to obtain a residence permit on humanitarian grounds. Under Article 19A(1)(c) of the revised Law 4251/2014, undocumented victims of domestic violence are entitled to a residence permit on humanitarian grounds, which is granted upon a decision of the Minister of Migration Policy.

The residence permit is initially valid for one year and can be renewed thereafter every two years for the duration of the criminal proceeding. Renewal conditions vary for each category of crime, where no criminal proceedings are pending.

To be granted a residence permit on humanitarian grounds, the applicant must provide a copy of a filed complaint on domestic violence to the competent Greek authorities. The initial validity of the residence permit is one year; it can be renewed thereafter for a period of two years provided that the grounds for the issuance continue to exist, based on reports by relevant social services. A residence permit of the same duration is also available to children who are victims of domestic violence or to an adult who has custody of a child victim, on condition that this adult is not the perpetrator. The residence permit grants adult holders the right to employment.<sup>119</sup>

### Protection from deportation

Article 41 of Law 3907/2011 on the establishment of an Asylum Service and a First Reception Service<sup>120</sup> addresses the issue of suspension of deportation of third-country nationals. This law was amended to include any individual who is “... a victim of domestic violence under the provisions of Law 3500/2006 and submits the complaint or the report of the incident to the competent police authorities.”<sup>121</sup> This amendment was intended to prohibit police officers from arresting survivors of gender-based violence who report their abuse to the police but do not possess a valid residence permit.

The competent authority responsible for deciding whether to stay the deportation decision is not the law enforcement authority that receives the report of an incident, but rather the Ministry of Citizen Protection and, more specifically, the Local Offices of the Directorate of Immigration and Emigration. This means that police stations are obliged to detain the survivor if they are found with no valid residence permit in the country and to transfer their physical file to the Directorate of Immigration and Emigration so that they can issue the decision that will lift an existing detention order. This process can take a matter of hours or days, which can pose challenges for the complainant.

In April 2019, the Ministry of Citizen Protection announced a new strategy for the prevention of domestic violence. In this context, Specialised Domestic Violence Response Services will be set up nationwide with a primary aim, among others, to improve the protection of victims and management of complaints made to the police by the victims. It involves 73 services nationwide, and specialized Offices will be set up within Police Directorates.

## Human Trafficking and Smuggling

### Legislation

According to the Greek Immigration and Social Integration Code (Law 4251/2014), a victim of human trafficking is a victim of any of the following crimes described in the Greek Penal Code: slave trade, human trafficking, sex tourism, seduction of minors, abuse of minors, child pornography, recruitment of children for sexual purposes, human trafficking for sexual exploitation, exploitation of minors for payment, as well as in cases of forced marriages. The status ‘victim of trafficking’ can be granted irrespective of whether the person has entered the country regularly or irregularly.

119 IOM (2017), *Ministry of Migration Policy of Hellenic Republic, Migration - Legal Guide for Practitioners in Greece*.

120 Law 3907/2011 “on the establishment of an Asylum Service and a First Reception Service, transposition into Greek legislation of Directive 2008/115/EC “on common standards and procedures in Member States for returning illegally staying third country nationals” and other provisions, Gazette 7/A/26-01.

121 The above provision was added in the Migration Code with Article 4 par. 5 of Law 4531/2018. With the enactment of Law 4531/2018, Greece ratified the Convention of the Council of Europe on Preventing and Combating Violence against Women.

According to Art 1(1) of Law 4251/2014, the status of “victim of trafficking” is granted by an act of the First-Instance Public Prosecutor, who decides whether to initiate any kind of proceedings or criminal prosecution.<sup>122</sup> There is no provision regarding appeals against the prosecutor’s decision for granting the status of “victim”. Third-country nationals with irregular status can also be identified as victims by the Public Prosecutor and apply for a residence permit.

National legislation recognizes two types of residence permits for victims of trafficking depending on their cooperation with the national authorities. The relevant conditions are set out in Articles 49 – 56 Law 4251/2014 and Article 19A (1a) Law 4251/2014.

## Proof and Procedure

### *Victims who cooperate with the prosecuting authorities*

The Migration Code (specifically Art 49-56 of the Law 4251/2014) which implements the EU Directive 2004/81/EU provides for the issuance of a residence permit for victims of trafficking or smuggling who cooperate with the competent authorities. The residence permit is granted to victims of trafficking upon decision of the Minister of Interior, provided an Act has been issued by the Public Prosecutor of First Instance. The identified victims of trafficking or smuggling are granted a 3-month reflection period to allow them to recover and escape from the influence of the perpetrator so that they can decide about their cooperation with prosecuting authorities. In special cases, such as for victims who are children, the period might be extended by two months, by decision of the public prosecutor, based on the best interest of the child. During the reflection period, a person cannot be expelled from the country and any existing return decision is suspended. The competent authorities (first-instance Prosecutor, police, social support organisations) must inform the victim about their right to apply for a residence permit and provide them with relevant information. After the expiration of the reflection period, the Prosecutor examines the following conditions to decide on the issuance or renewal of the residence permit:

- Whether the prolonged stay of the victim in the Greek territory would facilitate the investigations or criminal proceedings;
- Whether the victim has shown a clear intention to cooperate; and
- Whether the victim has severed all relations with the purported perpetrators of the offences of trafficking according to the law.

The residence permit of a recognized victim of trafficking is issued solely by the Ministry of Interior. The permit is issued for a period of twelve months and can be renewed for an equal period of time, if the same conditions continue to be met. This permit entitles the victim to free access to medical services and health care and allows access to the labour market, for the period of its duration.<sup>123</sup>

### *Victims who don't cooperate with competent authorities*

Since 2010, national legislation<sup>124</sup> provides for a residence permit on humanitarian grounds covering cases such as victims of trafficking, who do not fall under the scope of Directive 2004/81/EU (e.g., in the case of victims who do not cooperate with the competent authorities), upon decision of the Minister of Interior. The permit is of one-year duration and renewable every two years until the criminal proceeding is completed. The residence permit holders are entitled to free medical services and health care.<sup>125</sup>

If the prosecutors deem it appropriate, the status of ‘victim of trafficking’ is issued on humanitarian grounds and regardless of the cooperation of the victim with police authorities (Article 19A of Law 4251/2014). This depends on the Prosecutor of Appeals’ consent that the victim is not cooperating with the authorities because of threats against members of their family, lack of protection, removal from the country or imminent danger, as indicated in Art 1 (2) of Presidential Decree 233/2003. The same process applies to granting the status of victims of migrant smuggling. In case a victim is unwilling to cooperate with law enforcement authorities, a written opinion drafted by two psychiatrists, psychologists or social workers who serve in Units of Social Protection and Care in the context of recognizing a third-country national as a victim of human trafficking.<sup>126</sup>

<sup>122</sup> See note 119, p. 16.

<sup>123</sup> Council of Europe, GRETA (2016), *Reply to the Questionnaire from Greece* Reply submitted 16 June 2016, September 2016.

<sup>124</sup> Law 3907/2011, Min. Decision 30651/2014, Law 4251/2014, Law 4332/2015.

<sup>125</sup> *Ibid.*

<sup>126</sup> *Ibid.*

**TABLE 5. Residence Permits Issued to Victims of Trafficking in Greece 2013-2015**<sup>127</sup>

	2013		2014		2015		2016 <sup>128</sup>	Total	
<b>Residence Permits Issued</b>	11		29		3		1	44	
Whereof women/men:	10	1	5	24	3	0	?	18	25
<b>Residence Permits Reissued</b>	3		3		2		?	8	
Whereof women/men:	3	0	3	0	2	0	?	8	0
<b>Residence Permits Renewed</b>	48		31		23		22	124	
Whereof women/men:	47	1	31	0	22	1	?	100	2
<b>Total</b>	<b>62</b>		<b>63</b>		<b>28</b>		<b>23</b>	<b>176</b>	
Whereof women/men:	60	2	39	24	27	1	?	116	27

## Victims and Witnesses of Serious Crimes

Under Article 19A(1b) of Law 4251/2014 (amended by Law 4332/2015), third-country nationals, victims and material witnesses of crimes punishable as serious crimes against life, health, physical integrity, property, ownerships, personal and sexual freedom, can be granted a residence permit by the Ministry of Migration Policy. The victim can be granted a permit provided that a preliminary examination<sup>129</sup> has been ordered or criminal proceedings have been initiated against perpetrators and until the case is closed and an irrevocable decision is issued by the court. The Public Prosecutor of First Instance establishes whether the required conditions exist and issues a relevant decision.<sup>130</sup> The permit can be renewed for the same period in the context of an ongoing criminal procedure.

In cases where the victim takes part in a treatment program, the residence permit will be issued for the duration of the treatment. It is necessary to provide a recent certificate showing that an individual is receiving treatment by a Greek hospital, social security institution or private physician. The permit is issued for a period of one year and can be renewed for up to two years at a time provided that the same conditions apply.<sup>131</sup>

Official statistics on all categories of residence permits issued by competent authorities are published on a monthly basis.<sup>132</sup>

## Labour Exploitation

Like victims and witnesses of serious crimes, third country nationals who have been employed under particularly exploitive working conditions or as minors and who cooperate in criminal proceedings against their employers are entitled to a residence permit on humanitarian grounds.<sup>133</sup>

The permit can also be granted to people employed without a valid contract who do not cooperate with the authorities, upon the decision of a competent First Instance Prosecutor with the consent of the Appeals Prosecutor. The Prosecutor determines whether the individual does not cooperate with authorities because of threats against their family members living in Greece, country of origin or elsewhere or whether they are facing imminent danger. According to Law 4198/13, the Public prosecutor has the right to suspend a deportation procedure pending the trial proceedings and to confer the status of victim.<sup>134</sup>

<sup>127</sup> *Ibid.*

<sup>128</sup> Council of Europe: GRETA (October 2017), Report concerning the implementation of the Council of Europe Convention on action against Trafficking in Human Beings by Greece, GRETA(2017)27, p. 41.

<sup>129</sup> An official procedure initiated by judicial authorities to establish whether a criminal offence has been committed.

<sup>130</sup> See note 119, p. 27.

<sup>131</sup> *Ibid.*

<sup>132</sup> See statistical data available on the website of the General Secretariat for Immigration Policy, Reception and Asylum, <http://www.immigration.gov.gr/miniaia-statistika-stoixeia>.

<sup>133</sup> Article 19A (1d) Law 4251/2014.

<sup>134</sup> Social Fieldwork Research (FRANET) Severe forms of Labour Exploitation, Supporting victims of severe forms of labour exploitation in having access to justice in EU Member States, Greece, 2014, pp.62.



Individuals who have been found to be working under particularly exploitive conditions must be informed by the authorities about their right to apply for a residence permit. Applicants should be provided necessary translation or interpretation services, information about their rights and available services as well as legal assistance. In the case of unaccompanied or separated children, authorities must take all possible measures to establish their identity and ensure the child's legal representation.

The following documents are required for a permit to be granted:

- Certificate issued by the Labour Inspectorate or a court order describing the incident, revealing the circumstances under which the third-country national was employed under exploitative terms

- Solemn declaration by the interested person, stating that they intend to exercise administrative or legal remedies to assert their rights
- Recent certificate issued by a Greek state hospital or a social security institution or a private physician, showing the severity of the injury or harm and the planned treatment

The permit is granted upon a decision of the Minister of Migration Policy for initial period of one year. The examination of the application is considered a priority owing to public order and security concerns. If the presence of the victim is deemed necessary by competent authorities for the ongoing investigation and criminal proceedings the residence permit is renewed each time for an equivalent period.<sup>135</sup>

<sup>135</sup> See note 119, p. 30.



Italy





## Domestic Violence

### Legislation

Art 18 bis of the Italian Consolidated Law on Immigration (Legislative Decree No. 286/1998, or “CLI”) contemplates a permit for migrant women and men who are victims of domestic violence. Under Italian law, the term *domestic violence* means “one or more acts, serious or non-episodic, of physical, sexual, psychological or economic abuse that occur within the family or among people connected, currently or in the past, by marriage or emotional relationship, regardless of the fact that the author of those acts shares or used to share the same residence with the victim”.<sup>136</sup> The legislation covers both people on a dependent residence permit and those who are undocumented.

When, in the course of police investigations related to a limited number of crimes<sup>137</sup> committed in Italy within the ambit of domestic violence<sup>138</sup> there is evidence of abuse against a foreign national, the police commissioner, with the favourable opinion (*parere favorevole*) of the Public Prosecutor, will issue a residence permit to enable the victim to escape this violence. This permit is issued if there is a *concrete and current danger* for the victim's safety as a result of their choice to escape the violence or their statements during the proceedings.

This permit lasts for one year and it can be renewed “as long as the humanitarian needs that justified its granting persist”. A permit will also be issued to the children (under 18) of the victim.<sup>139</sup>

The same permit can also be issued if the situation of violence emerges over the course of specialised social services interventions to assist victims of violence. In such a case, it is the social services that submit a recommendation to the police for the issuance of an autonomous permit. However, as pointed out by NGOs, there is in practice a lack of such specialized social services able to handle this function.<sup>140</sup>

The favorable opinion of the public prosecutor remains a prerequisite for accessing the protection measure, and therefore it is necessary to report the crime to avail oneself of the law's protection. This is problematic because migrant women with insecure residence status often are very afraid to turn to the authorities due to the risk of deportation.<sup>141</sup>

### Concerns

Permits to victims of domestic violence were initially regulated as a “humanitarian permit”. However, as the 2018 Salvini Decree (*Decreto Sicurezza*)<sup>142</sup> abolished humanitarian protection, leave to remain on domestic violence grounds was converted into a permit “on special grounds” (*casi speciali*).<sup>143</sup> It remains to be seen how this change will affect the granting of these permits in practice.

NGOs and shelters that support migrant women express concern that, in practice, when undocumented migrants report abuse directly to the police, the police automatically send them to detention centers, ignoring their protection needs. In contrast, if women go to a shelter that has experience supporting migrants, they can be supported in bringing a complaint with less risk of being detained, with the shelter acting as an intermediary and, where possible, providing legal and social supports throughout the duration of the application process. People who experience abuse by an intimate partner are often unable to report without first having the possibility of leaving the shared residence. For migrant women with insecure status, the only option is often a women's shelter.

Obtaining a permit is complicated by the widespread prejudice about the instrumentality of the complaint presented by women without a residence permit; that is, they are often immediately suspected of alleging violence to obtain a residence permit, which reduces the credibility of their claim in the eyes of the authorities.<sup>144</sup>

136 Art 18bis(1) Legislative Decree No 286/1998. For victims of domestic violence who are spouses of EU nationals, regulation of residence permits is under Art 12(2)(c) Legislative Decree of 6 February 2007, which implements the EU Citizens' Rights Directive.

137 Namely, any of the crimes provided for by articles 572, 582, 583, 583-bis, 605, 609-bis and 612bis of the Italian Criminal Code (mistreatment of family members, bodily harm, genital mutilation, kidnapping or sexual violence).

138 “Within the family or among people connected, currently or in the past, by marriage or emotional relationship, regardless of the fact that the author of those acts shares or used to share the same residence with the victim”.

139 Elena Biaggioni et al (2018), “Implementation of the Istanbul Convention in Italy. Shadow Report of women's NGOs”, p. 56.

140 *Ibid.*

141 Teresa Manente (2015), *Problematiche di applicazione dell'art 18 bis sul permesso di soggiorno per donne straniere vittime di violenza domestica*; Differenza Donna NGO (2019), *Written observations for the General discussion on the Technical Working Group on General Recommendations on Trafficking in Women and Girls in the Context of Global Migration*; Ilaria Boiano (2014), “Trafficking in human beings in Italy, in *Trafficking in Human Beings - Learning from Asian and European Experiences*, Konrad Adenauer Stiftung and European Union”, pp. 123-134.

142 *Legge 1° dicembre 2018, n. 132. Conversione in legge, con modificazioni, del decreto legge 4 ottobre 2018, n. 113, recante disposizioni urgenti in materia di protezione internazionale e immigrazione, sicurezza pubblica (...)*

143 ASGI (2018), “*Le principali novità sui permessi di soggiorno introdotte dal decreto legge n 113/18*” pp. 7-8.

144 See note 139, p. 57.

While the formally applicable definition of domestic violence is broad, and includes psychological and economic violence, these types are often difficult to recognize and rarely qualifies as causing a “concrete and current danger to the victim’s safety”. Moreover, the requirement that the violence be “non-episodic” excludes individual cases of particularly serious violence, such as attempted murder or very serious injuries.<sup>145</sup>

Provision 18bis on residence permits for victims of domestic violence was introduced in 2013. According to the Italian National Institute of Statistics, between the legislation’s implementation and until 2018, about 30 permits were granted per year. This can be put in comparison to the total numbers of criminal reports of beatings, stalking and sexual violence against foreign women in Italy in 2013 alone, which was 4,515.<sup>146</sup>

## Serious Crimes including Human Trafficking

Permits are available, under Art. 18 CLI, for reasons of social protection to people who have suffered a “serious crime” committed by a criminal organisation. The rationale for this permit is to facilitate victims’ participation in the criminal proceeding as well as in special programs of assistance and social integration to prevent further victimisation and foster inclusion.<sup>147</sup>

Art. 18 CLI mainly applies to victims of sexual exploitation and human trafficking. However, victims of a much long list of crimes are also eligible for a permit, such as modern slavery, labour exploitation, sexual abuse, gang rape, child sexual abuse, crimes concerning weapons or narcotics, domestic abuse, and stalking.

To qualify for a permit under this provision:

- A person must have been the victim of one of the enumerated crimes in Art. 18 CLI.
- The violence against them must have been discovered by law enforcement in the course of police operations, investigations or proceedings related to one of the enumerated crimes, or by way of an intervention carried out by social services.
- There must be a threat to the victim’s safety following any attempt to escape from the criminal organisation or a risk of retaliation for their involvement in the criminal investigation or trial.

Victims who meet these criteria may obtain a residence permit valid for 6 months that can be renewed for one year. They also have the right to access social services, to study and to work for the duration of the permit. If they are employed when the permit expires, the permit can be extended or renewed for the duration of the employment or, if the work contract is of indefinite duration, it can be converted to a 2-year permit. If the victim is enrolled in a course of study at the time the initial permit expires, it can be converted to a student visa.<sup>148</sup>

Article 18 CLI offers two different ways for victims to access residence permits. It can either be granted based on their personal situation (known as the “social path”) or following cooperation with the authorities (the “judicial path”). Child victims of human trafficking are automatically issued a residence permit until they reach the age of majority.<sup>149</sup>

## Social Path

The social path does not require any cooperation with the police, or that the crime be reported. When an NGO or a public social service identifies a victim of one of the covered crimes, they can request a residence permit on behalf of the victim. The residence permit is issued by the *Questore*, i.e., the bureaucratic office of the Police. If the underlying crime is slavery or human trafficking, the victim is included in a special program to promote social integration and access to shelter, food and health care, under Legislative Decree No. 24/2014. The issuing of the permit is conditional on the person’s participation in an assistance and social integration program;<sup>150</sup> the permit can be revoked for different reasons, including if the victim withdraws from the program or behaves in a way deemed incompatible with the program – such as renewing contact with the alleged perpetrator.

Several NGOs have expressed concern about the practical implementation of the social path, in particular in relation to large regional differences as well as arbitrarily narrow definitions of the level of danger required.<sup>151</sup>

## Judicial Path

If a victim of human trafficking or other enumerated crime decides to cooperate with the judicial authorities, they can be issued a residence permit under the judicial path. There is no requirement that the victim

<sup>145</sup> *Ibid*, p. 56.

<sup>146</sup> Istituto nazionale di statistica, *Complaints - Police Forces, Tables 2009-2013*.

<sup>147</sup> S.B. Taverri (2019), “Safe reporting of crime for victims and witnesses with irregular migration status in Italy”.

<sup>148</sup> *Ibid*.

<sup>149</sup> Council of Europe: GRETA (2018), Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Italy, para 197.

<sup>150</sup> *Ibid*.

<sup>151</sup> *Ibid*, para 198. See also note 141.

submit a complaint or report the crime; a request for a residence permit may be made by the Public Prosecutor to the *Questore*. The Public Prosecutor provides (non-binding) advice to the *Questore* on whether to issue the permit, based on the seriousness of the crime, danger to the victim, and the importance of their testimony to the investigation or prosecution of the criminal organisation.<sup>152</sup> These residence permits are issued for six months and can be renewed for one year or longer, depending on the time necessary to complete the criminal proceedings.<sup>153</sup>

## Concerns

As noted above, these residence permits can be converted into a residence permit for education or work. However, as recognized by NGOs, there are several difficulties in this conversion procedure, and waiting periods are usually long.<sup>154</sup>

## Labour Exploitation

### Legislation

According to Art 22, paragraph 12-quarter, of the CLI, which was introduced through Legislative Decree No. 109/2012 (also known as the "Rosarno Law"), a residence permit may be granted to a person who has experienced aggravated forms of labour exploitation. This type of labour exploitation (*condizioni lavorative di particolare sfruttamento*) is regulated by Art 603bis of the Italian Criminal Code and should meet one of the following criteria:

1. At least three irregular migrants were employed
2. At least one of the employees was less than 16 years old
3. One of the employees was exposed to serious dangers related to the characteristics of work or the working conditions.

The residence permit is granted by the *Questore*, following a request by the Public Prosecutor, in cases where the person concerned submits a complaint and cooperates with the criminal proceedings against the employer. The residence permit has a duration of six months but can be renewed for the duration of the ongoing criminal proceedings.<sup>155</sup>

## Concerns

The Rosarno Law has been criticized for several shortcomings. First, the law applies a narrower definition of the required level of exploitation than what is defined in the Employers' Sanctions Directive, laying a heavy burden of proof on the victim, who needs to show that workers were exposed to serious dangers. While labour inspections could help substantiate a claim, in practice inspections are often few and ineffective.

Second, the law does not consider the precariousness of the work conditions of migrant workers. Irregular migrants working in agriculture, which is common in Italy, often must move with the harvest season, making it difficult to participate in criminal proceedings carried out in one specific place. The lack of a complaint mechanism establishing a firewall between the authorities' support to the migrant as a victim and their sanctioning of the migrant for irregular stay strongly discourages reporting. As irregular stay is a crime in Italy, prosecutors have pointed out that this puts them in opposed positions: hearing the irregular migrant as a victim while simultaneously prosecuting him or her for irregular migration.<sup>156</sup> As recognized by Italian NGOs, the knowledge among public prosecutors of this provision is also very limited. As a consequence, it is rarely used, as shown by the table below.<sup>157</sup>

**TABLE 6. Humanitarian Residence Permits Issued in Italy 2013-2017.<sup>158</sup>**

	2013	2014	2015	2016	2017
<b>Residence permits issued for humanitarian reasons</b>					
	381	265	228	316	419
Whereof on the basis of labour exploitation	20	4	n/a	n/a	1

The humanitarian residence permits include residence permits to victims of domestic violence, victims of human trafficking and victims of labour exploitation. For comparison, the number of victims of trafficking assisted in Italy in 2016 was 1172.<sup>159</sup>

152 See note 147 above.

153 See note 149, para 197.

154 *Ibid*, para 198.

155 *Ibid*, para 200.

156 Amnesty International (2014), *Exploited Labour Two Years On: The 'Rosarno Law' Fails to Protect Migrants Exploited in the Agricultural Sector in Italy*, pp 14-15.

157 See note 149, para 200.

158 *Ibid*, para 199.

159 *Ibid*, para 155.



# The Netherlands





## Domestic Violence

In the Netherlands, someone with a spouse-dependent residence permit can normally receive an autonomous residence permit after having resided in the country regularly together with their partner for five years. They are also required to have passed a compulsory civic integration exam. However, these conditions do not apply where the relationship came to an end as a result of domestic violence.

## Legislation

Children and adolescents under 18 years with a residence permit that is dependent on one of their parents become eligible for an independent residence permit one year after they received their first residence permit, or at any time if they experience domestic violence. Children who were older than 18 when they received a residence permit dependent on their parents have to wait five years and also pass a civic integration test, unless they can prove that their relationship to their parents came to an end due to domestic violence.<sup>160</sup> For family members of EU citizens, this is regulated under Art 8.15(4)(d) of the Dutch Aliens Decree. For family members of third country nationals (citizens of non-EU countries), this is regulated in Art 3.90 of the Dutch Aliens Decree.

In case the relationship between the migrant and their partner or parent ended because of domestic violence, and they still have a valid residence permit at the time of application, they are eligible for a humanitarian residence permit (*humanitair niet-tijdelijk*), which after 5 years may be converted to a permanent status (*regulier onbepaalde tijd*). This initial permit may be granted irrespective of the duration of the marriage or relationship. The definition of domestic violence also covers psychological violence and forced marriages.<sup>161</sup>

## Procedure

The violence has to be proven by documents from care services and from the police or the Public Prosecution Service (*Openbaar Ministerie*). Documentation from the police or Public Prosecution Service that can help prove domestic violence include:

- a report of domestic violence made to the police;
- a statement of domestic violence made to the police;

- a statement from the regional public prosecutor or the police that formal proceedings have been initiated against the perpetrator;
- a dissolution of the marriage on grounds of the marriage being “forcibly entered into” in the meaning of Art 1:71, paragraph 1 of the Dutch Civil Code.

Documentation from the care services that can help prove domestic violence include:

- a statement from employees at the refuge where the victim is staying or other carers, and/or;
- an appendix containing medical details from a hospital or a general physician, and/or;
- a statement from the Advice and Support point for domestic violence.<sup>162</sup>

Undocumented migrants, including migrants whose residence permit has expired, may apply for a humanitarian residence permit (*humanitair tijdelijk*) (Art 3.48.1(f) Aliens Decree 2000). Apart from proving that they are suffering from domestic violence in the Netherlands, undocumented migrants also need to show that they cannot escape the violence in their country of origin. Undocumented migrants are initially granted just a one-year temporary residence permit but can apply for a humanitarian permit (*humanitair niet-tijdelijk*) in case the threat persists.<sup>163</sup> Everybody with a humanitarian permit (*humanitair niet-tijdelijk*) must take and pass a civic integration exam within 3 years, or else face a fine and the possibility that their permit is withdrawn. Without the civic integration test, it is also not possible to convert one's humanitarian permit to permanent regular status (*regulier onbepaalde tijd*).

A migrant who has obtained or applied for a humanitarian permit is eligible for social assistance under the Dutch Work and Social Assistance Act. Those who are nationals of an EU country may also receive this type of payment in case they have a right to reside in the Netherlands for more than three months (before that period, another scheme is available for victims in shelters). While an EU national normally risks losing their right to residence if they apply for social welfare, this is not the case if they can prove that they are a victim of domestic violence.

<sup>160</sup> Ministry of Justice and Security (2018), Immigration services, *Domestic violence, honour-related violence, human trafficking, abandonment and your residence permit*, The Hague: IND, at p. 3.

<sup>161</sup> Council of Europe: GREVIO (2018), Report submitted by the Netherlands pursuant to Article 68, paragraph 1 of the Council of Europe Convention on preventing and combating violence against women and domestic violence, atp. 61; Dutch CEDAW Network (2018), *Joining Forces to Break the Circle of Violence Against Women*, at p. 31.

<sup>162</sup> Ministry of Justice and Security, Immigration services (2018), *Domestic violence, honour-related violence, human trafficking, abandonment and your residence permit*, The Hague: IND, p. 3.

<sup>163</sup> *Ibid.*



## Data and Concerns

**TABLE 7. Figures on Autonomous Residence Permits in the Netherlands 2016-2017**

Victims of domestic violence who previously had a permit depending on a spouse or partner	2016	2017	Total
Number of applications	220	220	430
Granted applications	160	190	350
Denied applications	20	20	40
Other decisions	20	20	30

**TABLE 8. Figures on Residence Permits to Undocumented Migrants in the Netherlands 2016-2017**

Victims of domestic violence who previously had no permit	2016	2017	Total
Number of applications	40	40	80
Granted applications	10	10	20
Denied applications	20	20	40
Other decisions	< 10	10	10

As shown by the figures presented above, the humanitarian residence permit (*humanitair niet-tijdelijk*) is granted to 4 out of 5 applicants with a spouse-dependant residence permit. However, for undocumented migrants, the number of humanitarian permits issued is only 1 out of 4.<sup>164</sup> The undocumented migrant who approaches the migration authorities to

apply for a residence permit, or the police or Public Prosecution Service therefore often is afraid of being deported.<sup>165</sup>

Under-reporting has been raised as a concern by the Dutch CEDAW Network, a group of NGOs and independent women's rights experts in the Netherlands, which notes that "In the NGOs experience, there are many more women who are victims of domestic violence, but they are afraid to come forward out of fear of losing their right to stay."<sup>166</sup> Since 2016, a national police policy ("free in, free out") has been in place to foster the reporting of crime by victims of crime with precarious residence status without risking detention and deportation. This model was first created in Amsterdam but has now been rolled out across the country as official policy,<sup>167</sup> although implementation is ongoing and inconsistent across the country.

Another issue for undocumented migrants is that they are not officially included in the law that provides victims of domestic violence with a right to shelter. As a consequence, women's shelters cannot receive financial support for hosting undocumented survivors. Currently, this is addressed through an informal agreement, and a new bill that was put before the Dutch parliament in November 2019 that seeks to clarify the basis for access to shelters for survivors of domestic violence and honour-related violence, regardless of status.<sup>168</sup>

Another concern is the heavy burden of proof that is required to obtain the humanitarian residence permit. This threshold became even higher in 2012 when the migration authorities began requiring a declaration both the police or the prosecutor *and* from the shelter or support service. Before 2012, only one of these was required. This poses a particular obstacle for victims of psychological and other types of non-visible abuse, despite this type of violence being formally included in the Dutch definition of domestic violence.

<sup>164</sup> See note 161, p. 62.

<sup>165</sup> EUP Report (2013), Access to shelters of undocumented migrant women fleeing domestic violence: the legal and practical situation in the Member States, at p. 53.

<sup>166</sup> Dutch CEDAW Network (2018), *Joining Forces to Break the Circle of Violence Against Women*, p. 31; W. Jongebreur et al (2017), "Toegang tot de opvang van slachtoffers zonder eerdere verblijfsvergunning" Barneveld: Significant.

<sup>167</sup> PICUM (2017), *Guide to the EU Victim's Directive: Advancing Access to Protection, Services and Justice for Undocumented Migrants*, p. 20.

<sup>168</sup> See Staatscourant van het Koninkrijk der Nederland, Advies Raad van State inzake het ontwerp van een algemene maatregel van bestuur, houdende wijziging van het Besluit langdurige zorg en het Uitvoeringsbesluit Wmo 2015 aangaande de opvang van slachtoffers van eergeerelateerd en huiselijk geweld zonder verblijfsvergunning en wijziging van enkele besluiten in verband met technische aanpassingen eigen bijdrage zorg en maatschappelijke ondersteuning ("Nader Rapport"), 5 November 2019, 1541434-191909-WJZ, Directie Wetgeving en Juridische Zaken [Government Gazette of the Kingdom of the Netherlands, Council of State advice on the draft of an order in council, amending the Decree on long-term care and the Implementation Decree on Social Support Act 2015 with regard to the relief of victims of honour-related and domestic violence without a residence permit and amending some decisions in connection with technical adjustments of personal contribution care and social support].

Taken together with the uncertainty of the procedure, these obstacles often cause women to try to endure the violence as long as possible, despite the risk of escalation.<sup>169</sup>

## Human Trafficking and Labour Exploitation

Victims of human trafficking with irregular or insecure residence status can apply for a residence permit in exchange for cooperation in police proceedings.

### Procedure

When a victim of human trafficking reports their situation to the police, they are initially given three months to recover, reflect on their situation, and decide whether they wish to cooperate with the authorities. During this time, a sticker is put in their passports by the police that indicates that they have a right to remain in the country. If they do not have a passport, they can ask for a replacement identity document instead.<sup>170</sup>

When the three months have passed, the reflection period ends. If the victim of human trafficking chooses to cooperate in the prosecution of their trafficker and makes a formal report to the Dutch police or the *Royal Netherlands Marechaussee* (KMar), they can receive a temporary residence permit (Art 3.48.1(a)-(c) Aliens Decree 2000). The application for the permit is sent to the migration authorities directly by the police or the KMar. If the Public Prosecutor decides not to prosecute the trafficker, or if the judge issues a definite ruling, this residence permit will be withdrawn, or at least not extended.<sup>171</sup>

### Exceptional Reasons

In some situations, there may be exceptional reasons to why the victim cannot cooperate with the police. If that is the case, the person can still receive a temporary residence permit (Art 3.48.1 (d) Aliens Decree 2000) if they submit the following evidence of their situation:

A report from the police stating that there are indications that they have been a victim of human trafficking;<sup>172</sup>

- a statement from the police that they are being threatened by human traffickers and, as a result, cannot be expected to cooperate with the criminal process;
- medical information that illustrates that a physical or psychological disorder is preventing them from cooperating with the criminal process. The medical information must come from a practitioner listed in the register of Professionals in Individual Healthcare or the Dutch Institute of Psychologists' register;
- or (for children) a statement from the police or the KMar that the victim, due to being a child, cannot be expected to cooperate with the criminal proceedings.

The temporary residence permit is valid for one year. After this year has passed, it can be extended if the investigation is still ongoing. The victim may also be eligible for a humanitarian residence permit (*humanitair niet-tijdelijk*). This may be the case if the perpetrator is prosecuted for human trafficking and the case ends with a conviction, or if the victim has had a residence permit for at least 3 years without interruption and the criminal investigation is still ongoing.<sup>173</sup>

Victims of labour exploitation may be eligible for a residence permit under Art 3.48(g) Aliens Decree 2000, which transposes the EU Employers Sanctions Directive.

### Data and Concerns

Civil society organisations have raised a number of problems with the practical implementation of this scheme. Due to the very long waiting list for police appointments, many victims cannot report and therefore lose their access to a residence permit. This is especially an issue for women who risk being transferred under the Dublin Regulation. Even when cases are reported, they are often suspended due to lack of evidence. The victim then loses their right to stay within three months.<sup>174</sup> Since July 2019, victims of trafficking who are Dublin claimants receive a rapid assessment as to whether in the Netherlands prosecution of the perpetrator could take place. If not, the victim cannot use the reporting system and subsequent right to residence.

169 Dutch CEDAW Network (2018), *Joining Forces to Break the Circle of Violence Against Women*, at p. 31; Netherlands Institute for Human Rights (2018), *Written Contribution to the Group of Experts on Action against Violence against Women and Domestic Violence*, p. 29.

170 Ministry of Justice and Security, *Immigration services* (2018), *Domestic violence, honour-related violence, human trafficking, abandonment and your residence permit*, The Hague: IND, p 5.

171 *Ibid*, p 4.

172 Last year, a pilot was launched for cases where the investigation is cancelled where a statement on likelihood of being a victim could be requested. The pilot is currently under evaluation. For more information, see <https://www.schadefonds.nl/pilot-aanmeldijkheid-slachtofferschap-mensenhandel/>.

173 See note 170.

174 Information provided by Rian Ederveen.

**TABLE 9. Residence Permits for Victims of Trafficking in the Netherlands 2014-2016.**<sup>175</sup>

	2014	2015	2016
Temporary Residence Permits Issued	245	173	156
Permanent Residence Permits Issued	n/a	54	54

## Victims of Honour-Related Violence

People who are threatened with or have experienced honour-related violence but do not fulfil the other criteria set out above can apply for a different type of residence permit. On their website, the Dutch police's National Expertise Centre for Honour-related Violence defines *honour-related violence* as:

...coercion, psychological and physical violence with an honour motive. By this we mean that the violence is applied to prevent a family member from exhibiting behaviour that could harm family honour. If the honour has already been damaged, a perpetrator can use force to restore the honour.<sup>176</sup>

This residence permit is temporary and valid for one year (*humanitair tijdelijk*). If the threat persists longer than one year, it is possible to receive a residence permit on humanitarian grounds (*humanitair niet-tijdelijk*).<sup>177</sup> The threat or violence has to be "sufficiently serious" and not possible to remove within the near future.<sup>178</sup> The following non-exhaustive list of actions are always considered to be sufficiently serious in the meaning of the law:

- life-threatening offenses against the victim or their children, including incitement to suicide;
- other criminal offenses against the victim or their children, such as mutilation, abuse or illegal deprivation of liberty;
- rejection, with the result that the victim cannot sustain themselves independently in the country of origin;
- child abduction;
- if the violence leads to dire circumstances, such as forced separation between parent and child or forced marriage.

In this procedure, the Dutch Migration Service will request advice from the Dutch police's National Expertise Centre for Honour-related Violence to determine whether the case concerns this particular kind of violence and renders their decision based on this advice. The threat must be present in the country of origin as well. If it is safe to return to the country of origin, the residence permit will not be granted. In this context, the applicant will therefore need to demonstrate to the migration authorities that there are family members in the country of origin, where these family members live, and who they are. Accepted means of proof include family records, extracts from the civil register or notarial deeds showing the family composition and place of residence.<sup>179</sup>

Victims of honour-related violence can also be granted a humanitarian residence permit (*humanitair niet-tijdelijk*). To regularise their status (i.e., obtain a *regulier onbepaalde tijd*), they must pass a civic integration test, with the prospect of a fine if they fail to do so within three years.

<sup>175</sup> Council of Europe, GRETA (2018), Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the Netherlands, para 169.

<sup>176</sup> LEC Eergerelateerd geweld, *Vormen, van eengerelateerd geweld*.

<sup>177</sup> See note 170.

<sup>178</sup> Article 3.48 Vreemdelingenbesluit 2000; Ch B9, para 2.1 Vreemdelingencirculaire 2000.

<sup>179</sup> Ch B9, para 2.2 Vreemdelingencirculaire 2000.



# Poland





The law regulating matters concerning to foreigners in Poland is the Act on Foreigners from 2013.<sup>180</sup> The Act implements EU law related to migration and asylum and has been amended on numerous occasions. The Act equally regulates the issue of residence permits for spouses when the sponsor is a third country national, where a person is a victim of trafficking or a victim of violence. In situations where the sponsor is an EU national, the applicable law is the Act on entry, stay and departure of EU nationals and their families.<sup>181</sup>

## Domestic Violence

As far as the legal and policy contexts regarding domestic violence are concerned, Poland ratified CEDAW in 1980 and the Optional Protocol in 2003. In 2015 Poland ratified the Istanbul Convention but lodged a reservation with respect to Article 30 restricting the possibility for women (including migrant women, who are covered by the Convention) to access compensation as victims of crimes.<sup>182</sup>

Regulations protecting women, regardless of their nationality, from any kind of violence can be found in the Penal Code and the Code of Penal Procedure. Poland also has in place a domestic violence law enacted in 2005.<sup>183</sup> This law provides for help and support for victims of domestic violence in the form of medical, psychological, legal and counselling and crisis intervention and support. It also sets up the obligations and responsibilities of public authorities in prevention and monitoring the scale and characteristics of the phenomenon of domestic violence in Poland. The Act implements the *Blue Card* procedure – a special procedure for cases of domestic violence. The laws do not mention migrant women or undocumented women as a separate category of victims.<sup>184</sup>

In 2014 Poland adopted the Act on the Protection and Assistance for Victims and Witnesses. The Act

regulates issues related to the protection of victims and witnesses from life- and health-related risks. The law aims to protect individuals from intimidation, retaliation and secondary victimization and at the same time ensure their ability to participate in investigation and court proceedings. To this end, the law introduced new measures of protection and assistance for the duration of legal proceedings, help with relocation and personal protection.<sup>185</sup>

Nevertheless, the practical implementation of many of the measures required by the EU Victims Directive is almost non-existent. For instance, according to the Association for Legal Intervention, victims of crime cannot access information in their language, and access to support services, mainly shelters, is significantly restricted. The situation is especially difficult for victims with irregular status. The general rule is that Centres for Victims Support should provide services to everyone, regardless their residence status; yet, due to lack of spaces, victims are directed to Crisis Intervention Centres, which are not accessible for all groups of foreigners.<sup>186</sup>

The Act on Foreigners does not provide explicitly for opportunities to obtain a separate residence permit due to domestic violence for a foreigner who has derived the right to stay from a marriage with a Polish citizen or a foreigner residing in Poland.<sup>187</sup> The Act on Foreigners in Article 195 sets a general rule stating that an independent, permanent residence status is granted to a person married to a Polish national for at least three years and staying in the territory of Poland for two years continuously. The law allows the possibility of issuing a one-time, temporary residence permit in case of divorce or legal separation due to an exceptional personal situation of the applicant. Thus, a permit can only be issued if there is an official court decision on divorce or separation. The residence permit is granted for a period not exceeding three years. The 'exceptional

180 Act of 12 December 2013 on Foreigners

181 Act of 14 July 2006 on entry, stay and departure of EU nationals and their families.

182 The Article 30 stipulates that in case when a victim of violence has sustained serious bodily injury or impairment of health and damages are not covered by the perpetrator, health-insurance or other source, the State is responsible for awarding an adequate compensation. Another reservation was made to the provision (Article 44) regulating the issue of crimes listed in the Convention; Poland did not accept its personal jurisdiction over foreign nationals residing in the country. The Polish reservation means that Polish authorities will not investigate crimes committed by non-Polish individuals who hold a residence permit allowing them to stay in Poland, provided that crimes are committed outside the territory of Poland; K, Słubik (2015), *Zastrzeżenia głoszone przez Polskę przy podpisywaniu Konwencji stambulskiej*, Stowarzyszenie Interwencji Prawnej.

183 Act of 29 July 2005 on preventing domestic violence.

184 K, Słubik (2015), *Zastrzeżenia głoszone przez Polskę przy podpisywaniu Konwencji stambulskiej*, Stowarzyszenie Interwencji Prawnej.

185 Council of Europe, GRETA (2016), *Reply from Poland to the Questionnaire for the evaluation of the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the Parties. Second evaluation round (Reply submitted on 8 February 2016)*.

186 Crisis Intervention Centres function on the basis of the Act on Social Support, which in Art. 5 lists different groups of individuals eligible for support – foreign spouses of Polish nationals are not included.

187 K Słubik (2013), *Ochrona migrantek przed przemocą w Polsce i wybranych krajach Unii Europejskiej. Analiza prawnoporównawcza*.



personal situation' can be interpreted as referring to such circumstances as domestic violence.<sup>188</sup> We have found limited evidence of the effectiveness of this provision or its use by women who have experienced domestic violence.

The situation of spouses of EU nationals is governed by the Act on Entry, Stay and Departure of EU nationals and their Families. Article 19 of the Act specifies that a member of the family of an EU national retains the right to remain in the country in case of divorce or annulment of marriage when this is justified by particularly important circumstances, including those related to being subject to domestic violence during the marriage.

## Human Trafficking and Smuggling

Poland's Penal Code introduced in 2010 provisions addressing slavery and human trafficking. According to Article 176 of the Act on Foreigners, a temporary residence permit is granted to victims of human trafficking if they fulfil the following cumulative requirements:

- Reside on the territory of Poland
- Cooperate with law enforcement authorities competent to conduct the proceedings in relation to the crime of human trafficking

- Have severed all relations with the purported perpetrators of the offences of trafficking according to the law

This temporary residence permit is granted to a foreigner on request of the competent administrative authority for the place of residence of the foreigner. The residence permit is valid for at least six months and can be further prolonged up to three years if a victim cooperates with the law enforcement authorities.<sup>189</sup> The cooperation with law enforcement authorities is the crucial condition required for the issuance permit. In practice, it means that an investigation has been already opened and the victim has agreed to testify or already testified in the proceedings.

The Act on Foreigners adopted in 2013 introduced important amendments to the regularisation of the stay of victims of trafficking. The law instituted a 'reflection period' granted to the victim with a certificate confirming the presumption that they are a victim of human trafficking.<sup>190</sup> The certificate is valid for a period of three months (in case of minor children, for four months) and is issued by a law enforcement authority responsible for the investigation of the crime (Police, Border Guard or the Prosecutor).<sup>191</sup> The authority is obliged to inform the Ministry of Interior about the issuance of the certificate.<sup>192</sup>

**TABLE 10. Number of victims granted a reflection period between 2014 and 2015<sup>193</sup>**

	Reflection period granted	Sex	Age	Nationality	Form of exploitation
<b>2010</b>	–				
<b>2011</b>	–				
<b>2012</b>	–				
<b>2013</b>	–				
<b>2014</b>	22	females - 18 males - 4	underaged - 2	Philippines - 7 Vietnam - 4 Ukraine - 4 Sri Lanka - 6 Kenya - 1	forced labour - 17 sexual exploitation - 4 other - 1
<b>2015</b>	33	females - 18 males - 15	underaged - 7	Vietnam - 23 Ukraine - 4 Sri Lanka - 4 Morocco - 2	forced labour - 24 sexual exploitation - 6 other - 1 sexual exploitation and slavery - 1

188 Art. 158 par. 2 (1) Act on Foreigners.

189 Art. 98 Act on Foreigners.

190 Art. 170 Act on foreigners.

191 Art. 172 Act on foreigners.

192 Art. 174 Act on Foreigners.

193 "Council of Europe, GRETA (2016), *Reply from Poland to the Questionnaire for the evaluation of the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the Parties. Second evaluation round (Reply submitted on 8 February 2016)*" at pag 135.

The certificate enables the victim to stay in Poland and entitles them to be exempted from a guarded centre or detention and receive assistance benefits and support from the National Consulting and Intervention Centre among others.<sup>194</sup> A holder of a temporary residence permit for victims of trafficking cannot be subjected to compulsory return and in case a return decision was issued before issuance of the permit, it expires

by law and the ongoing proceedings are ceased.<sup>195</sup> People granted the permit are exempted from the need to obtain a work permit, in accordance to the Law on Employment Promotion and Labour Market Institutions.<sup>196</sup> The law provides a possibility for the victim to apply for Polish identity documents if they are not in the possession of a travel document and cannot in any other way confirm their identity.<sup>197</sup>

**TABLE 11. The number of victims granted a residence permit, with an indication of the type of the permit and its duration (where possible, disaggregated by sex, age, nationality, form of exploitation)<sup>198</sup>**

	Residence permit	Types of residence permit	Sex	Age	Nationality	Form of exploitation
<b>2010</b>	0					
<b>2011</b>	1	1 - temporary residence permit for victims of THB who cooperated	1 - F	1 - adult	Sri Lanka	1 - domestic servitude
<b>2012</b>	12	12 - temporary residence permit for victims of THB who cooperated	9 - F 2 - M	12 - adults	10 Vietnam 1 Ukraine 1 Sri Lanka	10 - forced labour 1 - domestic servitude 1 - sexual
<b>2013</b>	1	1 - temporary residence permit for victims of THB who cooperated	1 - F	1 adult	1 Vietnam	1 - forced labour
<b>2014</b>	25	19 - temporary residence permit for victims of THB who cooperated 6 - temp. Residence permit for purpose of work 1 - temp. Residence permit for purpose of education	25 - F	24 - adults 1 - underage	20 Philippines 4 Vietnam 1 Ukraine	21 forced labour 2 domestic servitude 1 sexual 1 forced labour and sexual
<b>2015</b>	18	15 - temporary residence permit for victims of TH who cooperated 3 - temp. Residence permit for purpose of work	16 - F 2 - M	18 - adults	8 Sri Lanka 3 Philippines 3 Vietnam 2 Kenya 1 Morocco 1 Ukraine	16 forced labour 2 domestic servitude

194 See note 185.

195 Art. 303 par. 1 (5), 306 par. 2, 305 par. 1 Act on foreigners.

196 Art. 87, par. 2 (1) of the Law of 20 April 2004 on Employment Promotion and Labour Market Institutions.

197 Art. 260 Act on Foreigners.

198 See note 185, p. 5. Applies only to foreign victims assisted within the Programme of Assistance

Pursuant to the Art. 195 par. 1(5), a victim of human trafficking is entitled to apply for a permanent residence permit if they:

- have resided at least one year on the territory of Poland on the basis of a temporary residence permit for victims of trafficking
- have cooperated with law enforcement authorities during criminal proceedings
- have a well-founded fear of return to their country of origin.

Additionally, Article 181 of the Law on Foreigners provides a possibility for foreigners residing on Polish territory to be granted a short-term stay if their presence is justified by their personal situation.<sup>199</sup> The authorization is guaranteed for a period required to attain the 'pursued objective' – that is, the period necessary for foreigner's medical recovery, for instance, or for the interests of the state, for example when a person needs to testify in court – but it cannot exceed six months. This temporary permit is granted upon request of the regional authority competent for the place of residence of the foreigner. According to the GRETA Report from 2015 no victim of human trafficking has applied for this type of permit, likely because temporary permits granted to victims who cooperate with the law enforcement authorities are more beneficial for their holders.<sup>200</sup>

The GRETA Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings welcomed the introduced changes allowing victims to be issued a residence permit on the basis of their cooperation with law enforcement authorities or their personal situation. Nevertheless, the report underlined that the Polish authorities should take the necessary steps to ensure victims can avail themselves of these permits by informing them of their rights and of the procedure in a language they understand.<sup>201</sup>

## Forced Labour

Victims of labour exploitation (and in particular forced labour) are covered by the provisions concerning victims of human trafficking, but only as a sub-class of victims of human trafficking provided for in the Penal Code.

The Penal Code treats forced labour as falling within the definition of human trafficking. Forced labour therefore is not separately defined in either the Penal Code or in any other legal instrument in Poland. An interdisciplinary team of specialists within the Ministry of Investment and Development is currently working on the definition of 'forced labour' and there is political will to include it in Penal Code.<sup>202</sup> Because forced labour is penalised solely in the context of human trafficking, if elements of human trafficking cannot be proved, there is no protection for a victim.<sup>203</sup>

199 This type of permit can also be granted to undocumented migrant.

200 Council of Europe, GRETA (2017), Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Poland. Second evaluation round.

201 *Ibid.*

202 Information provided by Katarzyna Ślubik from Association for Legal Intervention (Stowarzyszenie Interwencji Prawnej).

203 Social Fieldwork Research (FRANET) (2014), Severe forms of Labour Exploitation. Supporting victims of severe forms of labour exploitation in having access to justice in EU Member States.



# Spain





## Domestic Violence

Spanish legislation offers relatively comprehensive protection for women victims of violence with an insecure residence status. Children under 18 and children with disabilities who are “objectively unable to provide for their own needs” and who are staying in Spain with the victim are also entitled to an interim (and eventually a temporary) residence permit, or a residence permit and a work permit in case they are above 16. The law contemplates the possibility of granting a residence permit both to victims with a dependent status and those who are undocumented.<sup>204</sup> For victims with a dependent status, the regulation looks different depending on the nationality of the sponsor. All three situations are presented below.

## Legislation

### *Residence permit dependent on an EU citizen*

If a migrant whose residence permit is dependent on an EU citizen divorces their partner, they would normally need to show that they have resided in the country for three years to qualify for autonomous status. However, if they have experienced domestic violence, they have a right to retain their right to residence in case of divorce. To be eligible under this rule, the victim must prove the domestic violence by submitting a protection order or a report by the Public Prosecutor to the migration authorities.<sup>205</sup> The same rule apply in cases where the migrant has been a victim of human trafficking on the part of her spouse or partner during the marriage or registered relationship as partners.<sup>206</sup> Examples of evidence include verdicts, restraining orders or a report by the Public Prosecutor.<sup>207</sup>

### *Residence permit dependent on a third country national*

As a general rule, migrants who have a residence permit dependent on their third country national-partner need to prove that they have the necessary economic means at their disposal to obtain an independent status.<sup>208</sup> However, the same provision establishes an exception in cases of gender-based violence. From the moment a judicial protection order or a report

by the Public Prosecutor has been issued,<sup>209</sup> a victim of gender-based violence has the right to be granted an autonomous residence and work permit, without the need to comply with the requirement of sufficient economic means.

It is important to highlight that this only applies in cases of gender-based violence, which is narrowly defined by law as abuse committed by a man against a woman, and in the context of a “relationship of affectivity”, either current or past. According to article 1 of LO 1/2004 on comprehensive protection measures against gender-based violence, gender-based violence is “every act of physical or psychological violence, including the attacks to sexual freedom, threats, coercion or arbitrary deprivation of liberty committed by a man against a woman who is or has been his spouse or is or has been with him in an analogous relationship of affectivity, without the need of having cohabited”.<sup>210</sup>

### *Survivor of gender-based violence with irregular status*

LO 2/2009 modified LO 4/2000 on the rights and freedoms of foreigners in Spain and their social integration and introduced Art 31bis. This article contemplates the granting of a residence and work permit to victims of gender-based violence who are undocumented. The protection of women and their children is further clarified in Arts 131-134 of the Royal Decree 557/2011 of 20 April, passing the Regulation of Organic Law 4/2000 on the Rights and Freedoms of Foreigners in Spain and their social integration.

## Procedure

To obtain a residence permit because of gender-based violence, the perpetrator of the violence must be convicted. However, until a final decision is made by the court, and while the judicial proceeding is ongoing, the victim is provided with an interim residence and work permit to be able to achieve financial independence from her spouse or partner, from the moment when a protection order (precautionary judicial measure) or a report by the Public Prosecutor has been issued. This residence permit also excludes the victim from being

204 Ministerio de Igualdad, Gobierno de España, Derechos de las Mujeres Inmigrantes’ Delegación del Gobierno para la Violencia de Género.

205 Art 9(4)(c)(1) Real Decreto 240/2007.

206 Council of Europe, GREVIO (2019), Report submitted by Spain pursuant to Article 68, paragraph 1 of the Council of Europe Convention on preventing and combating violence against women and domestic violence, at p. 65.

207 Spanish Istanbul Shadow Report Platform (2018), Convenio Estambul contra la violencia de género: Informe sombra al GREVIO 2018, p. 31.

208 Art 19.2 LO 4/2000, on the rights and freedoms of foreigners in Spain and their social integration.

209 A protection order is a precautionary measure issued by a judge to protect the woman when there are founded indications that she is a victim of violence. An interim report by the Public Prosecutor (until the judge issues the protection order) stating the evidence of violence is also a means of getting the autonomous residence permit. See J. Muñoz Ruiz (2015), La acreditación de la condición de víctima de violencia de género en el ordenamiento jurídico español.

210 Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género.



prosecuted on grounds of their irregular stay. If such proceedings have already begun or if a deportation order has been issued, they should be suspended.<sup>211</sup>

A temporary residence permit “on exceptional grounds” is granted after a court has issued a final decision convicting the aggressor, to replace the interim status. However, if he is eventually acquitted, the woman’s interim residence permit is withdrawn, and she is subject to sanctions for irregular stay which could lead to her deportation.

The temporary residence permit is granted for a period of 5 years. After these 5 years, the victim and her children can apply for long-term residence permits, which will allow them to live and work in Spain indefinitely.<sup>212</sup>

### Data and Concerns

Being a victim of violence may only be proved through a protection order (precautionary measure issued by a judge) or an interim report by a Public Prosecutor, and

ultimately, through a final judicial decision convicting the aggressor. This means that women need to go through a judicial proceeding to have access to a residence permit. This may constitute an excessively high threshold for many victims of gender-based violence, especially for those with an insecure residence status, who tend to be afraid to report crimes to the police. Moreover, if the perpetrator is eventually acquitted, the victim risks deportation. Unlike in other countries, reports by social services or women shelters cannot by themselves constitute sufficient evidence for the administration to grant a residence permit.

Undocumented women face additional difficulties proving they qualify as victims under the law: there is a widespread belief that they take advantage of the legislative framework to regularize their status. A report by Amnesty Spain gathered the experiences of women who have been accused of exploiting the system in this way, describing the typical case of one undocumented woman who was told by her lawyer when meeting her for the first time: “You don’t look like a victim of violence, you are doing this to get the papers, right?”<sup>213</sup>

**TABLE 12. Authorisations for Victims of Gender-Based Violence under the Regulation of Organic Law 4/2000 on the Rights and Freedoms of Foreigners in Spain and their social integration (RELOEX) 2016-2017.<sup>214</sup>**

TYPE OF PERMIT	YEAR	
	2016	2017
<b>Provisional temporary residence for gender-based violence granted pending grant or denial of application for independent residence</b>		
Children of victim of gender violence <16 years old in Spain (Art 133.1)	114	78
Presumed victim of gender violence (Art 133.1)	410	468
Minor children of victim of gender violence in Spain > 16 years old in Spain	39	38
<b>Initial temporary residence for exceptional circumstances granted after the provisional permit when final authorization has been granted (e.g., following conviction)</b>		
Children of victim of gender violence <16 in Spain (Art 134.1)	134	124
Victim of gender violence (Art 134.1)	514	534
Minor children of victim of gender violence in Spain > 16 in Spain (Art 134.1)	26	29

The Spanish statistics website of the Government Delegation Against Gender Violence provides the figures for Table 13, below, showing how the numbers of victims granted residence permits has decreased

since 2012. However, the numbers have been criticized by NGOs for including all women who are granted asylum as well, regardless of the grounds for their claim.<sup>215</sup>

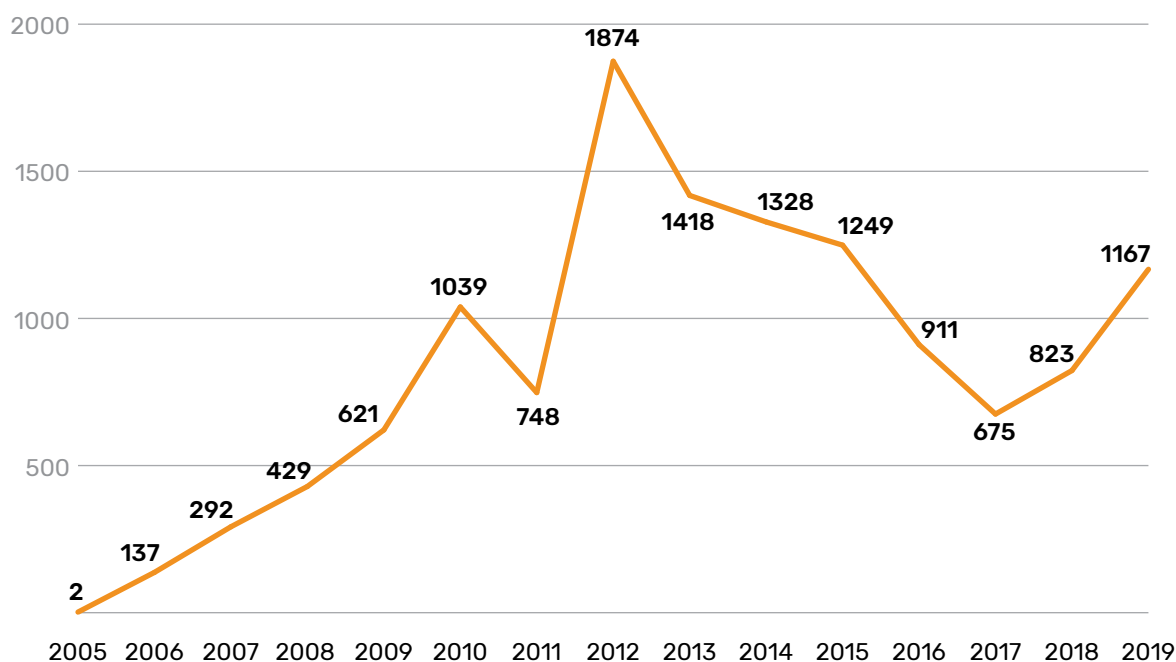
211 See note 206, at p. 63.

212 Secretaría de Estado de Migraciones, Gobierno de España, *Residencia de larga duración*.

213 Amnistía Internacional España (2012), *¿Qué justicia especializada? A siete años de la Ley Integral contra la Violencia de Género: Obstáculos al acceso y obtención de justicia y protección*.

214 Adapted from Report submitted by Spain pursuant to Article 68, paragraph 1 of the Council of European Convention on preventing and combating violence against women and domestic violence (18 February 2019), p. 65.

215 See note 207

**TABLE 13. Number of Residence and Work Permits Granted to Foreign Women Victims of Gender Violence 2005-2018<sup>216</sup>**

## Victims of Trafficking

Access to residence permits for victims of human trafficking is regulated by Art 59bis of the LO 4/2000 and Arts 140-146 of the Royal Decree 557/2011 of 20 April. The Spanish definition of human trafficking refers to the one used by the Council of Europe, and also includes for example forced marriages.<sup>217</sup>

### Procedure

If a migrant is identified as a victim of human trafficking, they should initially be granted a reflection and recovery period of 90 days. During this time, no proceedings should be initiated against the victim and in case any such proceedings are ongoing, they should be suspended. The victims as well as their children are granted temporary residence permits as well as provision of their sustenance.<sup>218</sup>

When this period comes to an end, authorities grant the victim a residence permit if it is considered necessary due to their cooperation in investigation or with criminal charges, or in view of the victim's personal situation and possibilities for social integration. The residence permit on grounds of personal situation is granted by

the Ministry of Labour and Social Security by taking into account information from organisations working with victims of human trafficking. The other type of residence permit, based on the collaboration in an investigation or criminal process, is granted by the State Secretary of Security. The Immigration Department of the Prosecution Service has emphasized that the requirement of "collaboration" has a very low threshold and involves providing information potentially useful for the investigation or prosecution of a crime.<sup>219</sup> In case granted, these residence permits are valid for five years and include a right to work in any sector or region of Spain.<sup>220</sup> They also grant the victim exemption from administrative liability for their irregular stay in the country.<sup>221</sup>

### Concerns

According to a coalition of NGOs working on these matters, there are problems with the implementation of this law, leaving many victims of human trafficking without protection despite their cooperation with the police. Many victims of trafficking have trouble getting identity documents from their country of origin, which they must produce to receive their residence permit.<sup>222</sup>

<sup>216</sup> *Ibid.*, p. 32.

<sup>217</sup> Art 177a Spanish Criminal Code.

<sup>218</sup> See note 206, p. 64.

<sup>219</sup> Council of Europe: GRETA (2018), Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Spain, para 198.

<sup>220</sup> *Ibid.*

<sup>221</sup> *Ibid.*, para 197.

<sup>222</sup> *Ibid.*, para 201.

According to Spanish authorities, an exemption can be made from the requirement to provide identity documents for residence permits to victims of human trafficking.<sup>223</sup>

In recent years, there has been a gradual increase in the numbers of residence permits granted to victims due to their personal situation.

**TABLE 14. Residence Permits for Victims of Human Trafficking in Spain 2013-2016<sup>224</sup>**

TYPE OF PERMIT	YEAR			
	2013	2014	2015	2016
<b>Temporary Residence Permit on the Basis of Cooperation with Judicial Authorities</b>				
Total	19	25	38	127
<b>Temporary Residence Permit on the Basis of Personal Situation</b>				
Adults	2	4	16	24
Children	2	8	3	6
Total	4	12	19	30

Of the 24 residence permits granted to adults on the basis of the victim's personal situation in 2016, 22 were issued to women and 2 to men.<sup>225</sup>

## Humanitarian Residence Permit

Spanish legislation also contemplates a humanitarian residence permit, under Art 126 Royal Decree. This humanitarian residence permit provides protection on several different grounds, including for victims of labour exploitation, hate crimes and domestic violence.

The provision is only applicable to third country nationals, i.e., individuals who are not citizens of the EU, the EEA, Switzerland, or are family members of such a citizen. To be eligible for the residence permit, the applicant must not have a criminal record, either in Spain or in any of their previous countries of residence during the last five years, and not have an entry ban. The procedure requires the applicant to submit a final judicial decision that establishes that they have been the victim of one of the above-mentioned crimes. The applicant also needs to submit a copy of their passport, ID or travel document with a validity of at least four months. The documents should be submitted to the local Immigration Office.<sup>226</sup>

## Labour Exploitation

Regarding labour exploitation, the Article refers explicitly to Arts 311-315 of the Spanish Penal Code. A victim who has experienced one of the crimes regulated therein is therefore eligible for humanitarian protection. These Articles cover different forms of labour exploitation, from trafficking to the denial of labour rights established through collective agreements, to preventing an individual from exercising their freedom of association in relation to trade unions, and failure to register an employee in the Spanish social security system.

## Discrimination

Art 314 concerns discrimination, which is also regulated under Arts 511.1 and 512 of the Spanish Penal Code. Individuals who have suffered discrimination under any of these articles are also eligible for a humanitarian residence permit. Art 511.1 of the Spanish Penal Code is triggered when an individual is in charge of a public service refuses this service to another individual, on grounds of the latter's ideology, religion, belief, ethnicity, race, nationality, gender, sexual orientation, family situation, illness or disability. Art 512 of the Spanish Penal Code concerns the same behaviour but from a person working in the private sector or running their own business instead. Art 314 of the Spanish Penal Code regulates when the discrimination concerns employment and covers discrimination due to involvement in trade unions, to relationship to other workers in the company, or to language.

## Hate Crime

The humanitarian residence permit is also available for victims of hate crime, or more specifically, the type of crime that is regulated by Art 22.4 of the Spanish Penal Code. This article outlines that other crimes should be considered particularly aggravating if they were committed for racist or anti-Semitic reasons, or another kind of discrimination related to the ideology, religion or belief of the victim, or to the victim's ethnicity, race, nationality, gender, sexual orientation, gender identity, suffered illness or disability.

## (Non-Gendered) Domestic Violence

This provision protects victims of "violent conducts in the home environment". Unlike the legislation explained in detail above, there is no requirement that the victim be a woman and the perpetrator need not be a man. However, the burden of proof is higher, as the victim must submit a final judicial decision establishing that they are the victim of such a crime.

<sup>223</sup> *Ibid*, para 200.

<sup>224</sup> *Ibid*, para 199.

<sup>225</sup> *Ibid*.

<sup>226</sup> Spanish Immigration Office, [Autorización residencia temporal por circunstancias excepcionales por razones humanitarias](#).



# Switzerland





## Domestic Violence

Switzerland is not part of the EU and therefore is not bound by the EU Victims' Directive, the Anti-Trafficking Directive, the Family Reunification Directive or the Citizen's Directive. Switzerland did, however, ratify the Istanbul Convention in 2018 but with reservations to the article that concerns residence permits for migrant victims of violence. Accordingly, the country decided "not to apply or to apply only in specific cases or conditions, the provisions laid down in Article 59." Despite this, Switzerland's national legislation does grant some limited access to permits for victims of violence with an insecure residence status.

## Legislation

Leave to remain in Switzerland can be given to women or men who are victims of marital violence. That is, the legislation only protects victims who are married to the perpetrator. Undocumented migrants are not protected by this provision. Moreover, social reintegration in the country of origin must be highly compromised in case of return, for the victim of marital violence to qualify for an autonomous status. When the permit is granted to the spouse, it also extends to the children (under 18), who also obtain autonomous status.

Article 50 of the Federal Act on Foreign Nationals describes the requirements as follows:

1. After the dissolution of the marriage or of the family household, the right of a spouse and the children to be granted a residence permit and to have their residence permit extended in accordance with Articles 42 and 43 subsists if:

the marriage lasted a minimum of three years and integration has been successful; or *b. major personal reasons make an extended residency in Switzerland necessary.*

2. There are important personal reasons in terms of paragraph 1 letter b in particular if a spouse has been the victim of marital violence or did not marry of his or her own free will *and social reintegration in the country of origin appears to be highly compromised* (emphasis added).

The jurisprudence of the Federal Tribunal sets out some additional conditions according to which the violence suffered must reach a "certain degree of severity" so to constitute a "major personal reason" under Art 50.<sup>227</sup> To invoke a right to an autonomous residence permit, the violence must be so intense that remaining in the marriage would severely compromise the victim's physical or mental integrity, and "may no longer reasonably be expected".<sup>228</sup>

## Concerns

Organizations supporting migrants in Switzerland report that, in practice, expert opinions are often discarded by the authorities, who challenge not only the credibility of the victims' statements, but also the professional skills of doctors, psychologists and specialized associations.<sup>229</sup> The interpretation of the "highly compromised" nature of reintegration in the country of origin is also problematic. In practice, authorities tend to view reintegration situations as highly compromised only in cases of threats of serious bodily injury. In general, the administrative and judicial authorities have a very broad discretion (*Ermessensspielraum*) in this area and often the public interest (such as immigration control) weighs more heavily than the interests of the individual.<sup>230</sup> There are also large differences between different cantons, creating legal uncertainty.<sup>231</sup>

In this procedure, the onus is on the victim to prove the violence they experienced its intensity and systematic nature, as well as the fact that reintegration would be compromised in case of removal. This constitutes an unreasonably high bar and makes the already challenging process of reporting violence even more difficult.<sup>232</sup>

According to the Swiss Immigration Office, only 6 residence permits were granted on domestic violence grounds in 2017, 15 in 2016, 5 in 2015 and 11 in 2014.<sup>233</sup>

227 Swiss Federal Tribunal, Decision of 12 March 2010 (BGE 2C\_554/2009 E. 2.1)

228 Federal Office for Gender Equality (FOGE) (2012), Assessing the severity of domestic violence Sociological background report, p. 5.

229 Observatoire romand du droit d'asile et des étrangers (2016). Femmes étrangères victimes de violences conjugales obstacles au renouvellement du titre de séjour en cas de séparation.

230 *Ibid*; Lucia Tozza (2018), Verlängerung der Aufenthaltsbewilligung nach Auflösung der Familiengemeinschaft – Fokus häusliche Gewalt Universität Freiburg.

231 Lucia Tozza (2018), Verlängerung der Aufenthaltsbewilligung nach Auflösung der Familiengemeinschaft – Fokus häusliche Gewalt Universität Freiburg.

232 Groupe de Travail Femmes Migrantes & Violences Conjugales (2017), Mise en œuvre de la Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants par la Suisse. Note d'information concernant les violences conjugales à l'égard des femmes étrangères ayant un statut précaire en Suisse.

233 Secrétariat d'État aux Migrations SEM, *Statistiques sur l'immigration. Les étrangers en Suisse*

## Victims of Trafficking

As a party to the Anti-Trafficking Convention, Switzerland has undertaken to provide a minimum level of protection to victims of trafficking, regardless of their residence status.

### Procedure

When the competent authorities find reason to believe that an irregular migrant is a victim of human trafficking, they must issue them a residence permit for a reflection and recovery period. This period should be at least 30 days and aims to give the victim time to recover and decide whether they wish to assist the police in the investigation of the trafficker.<sup>234</sup>

If the victim chooses to cooperate with the judicial authorities, a short-term residence permit must be issued by the competent cantonal authorities.<sup>235</sup> This is normally valid for the duration of the criminal proceedings but can be extended if the prosecutor considers that the victim is needed for a longer period.<sup>236</sup> If the residence permit is still valid after the trial, it can be revoked if the victim is dependent on social welfare. When making this assessment, the competent authorities must consider whether the dependency is due to the victim's trafficking-related trauma.<sup>237</sup>

After the proceedings, the temporary residence permit ends without any specific path for extension. Nevertheless, victims of trafficking have the possibility to apply for a residence permit based on humanitarian grounds, regardless of whether they chose to cooperate with the judicial authorities. This is regulated under Art 30 para 1 indent b of the Swiss Federal Law on Foreigners in conjunction with Art 31 of the Federal Council Order on Admission, Stay and Exercise

of Gainful Activity, which states that a person may be granted a residence permit in an individual case of extreme seriousness. When making this assessment, several factors are taken into account. The migration authorities may consider, for instance if the victims cannot receive adequate treatment in their country of origin, if reintegration in the country of origin is impossible or if there are risks of re-trafficking. The level of integration into the Swiss society and the financial stability of the person are also considered.

### Concerns

As recognized by several NGOs, the requirements for receiving a residence permit on humanitarian grounds are particularly difficult for victims of trafficking as they rarely have had an opportunity to integrate or become financially stable.<sup>238</sup> Moreover, when applying for a residence permit on humanitarian grounds, a range of documents need to be submitted. Besides reports on the criminal proceedings and the situation in the home country, the applicant must also submit a valid travel document, something many victims of trafficking lack.<sup>239</sup>

There appear to be large regional differences among the 26 Swiss cantons on the issuing of residence permit for victims of human trafficking. In 2013, 29 of the total 44 residence permits for co-operation and 8 of the total 12 residence permits based on the victim's serious situation were issued in the Zurich canton alone. Advocates have criticised the fact that provisions regulating the grant of permits are non-binding thus leaving broad scope for discretion by authorities, particularly for cases where the permit is needed to "personal reasons" where there is no cooperation with competent authorities, despite this being one of the stipulated grounds under the Council of Europe Anti-Trafficking Convention.<sup>240</sup>

234 Article 35 (1) of the Order on Admission, Stay and Exercise of Gainful Activities (OASA); Council of Europe, GRETA (2018), Reply from Switzerland to the Questionnaire for the evaluation of the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the Parties, at p 39.

235 Article 36 OASA.

236 Council of Europe, GRETA (2018), Reply from Switzerland to the Questionnaire for the evaluation of the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the Parties, at pp. 35-36.

237 Council of Europe: GRETA (2015), Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Switzerland, para 157.

238 Council of Europe: GRETA (2015), para 155.

239 *Ibid*, pp. 34-35.

240 *Ibid*, p. 34.



# United Kingdom





## Domestic Violence

The UK signed the Istanbul Convention in 2012 but (as of January 2020) has not ratified. However, the Council of Europe Anti-Trafficking Convention was ratified in 2008 and came into force in 2009. Regarding EU legislation, the UK have opted out of the Family Reunification Directive, the Employers' Sanctions Directive as well as the Anti-Trafficking Directive.<sup>241</sup> Still, its legislation contemplates some protection for women and men who are victims of domestic violence and have insecure residence status, although the possibility of getting a residence permit applies only to those who are on a dependent spouse/partner visa, but not to undocumented migrants.

## Legislation

According to paras 289A to 289D UK Immigration Rules, a migrant who is on a spouse/partner visa (spouse, civil or unmarried partner or same-sex partner of a British citizen or person settled in the UK) and is experiencing domestic violence is entitled to indefinite leave to remain, independent from their sponsor.

The following requirements need to be met:

- The definition of *domestic violence* must be met. Domestic violence and abuse are defined as “any incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners or family members regardless of gender or sexuality.”<sup>242</sup> This definition is currently being redrafted as a part of the upcoming Domestic Abuse Bill.<sup>243</sup>
- The relationship needs to break down during the probationary period (within the first 2 years since reunification in the UK). The victim can apply during this timeframe for independent status, by providing evidence that the relationship with the sponsor ended due to domestic violence. It may be that the violence is not committed by the sponsor but by the sponsor's relatives, for example, parents-in-law. If this is the case and the sponsor does not protect the victim from violence, and the relationship breaks down permanently as a consequence, the victim can also apply for indefinite leave to remain under the domestic violence rule.

Migrants who come to the UK to reunite with an EU citizen normally receive their independent residence permit after three years. However, according to Art 10(5)(c) of the UK Immigration EEA Regulations, an autonomous residence permit can be given at any time in case the migrant or a family member were subjected to domestic violence.

## Procedure

The legislation does not state specifically which documents should be submitted to support the application. However, the evidence that appears to be the most persuasive is a court conviction or a police caution for domestic violence. Other evidence to support the application could include medical reports, a letter from social services or a report from a domestic violence support organization.<sup>244</sup>

Victims of violence who want to obtain indefinite leave to remain need to pay an application fee. These fees are extremely high, prohibitively so for some victims, who are rarely economically independent. Although there is an exception if the applicant is destitute, in many cases a person who fails to meet the standard of destitution is unable to pay such an amount (minimum £2389 per person, meaning that a mother applying with one child would have to pay close to £5000).<sup>245</sup>

## Undocumented Migrants

Only some undocumented migrants may be considered eligible for this type of residence permit, namely those who previously held a leave to remain as a spouse, civil partner, un-married partner or same-sex partner. The victim of domestic violence may then be granted a prolonged residence permit even though the residence permit expired. If the applicant was granted leave to remain on any other ground, for example work, between receiving the initial leave on grounds of family relations and the time of application on grounds of domestic violence, the application will be rejected.

The aim of this rule is to recognize that preventing a partner from applying for renewal of leave may be part of the abusive behaviour. Therefore, the officer considering the application will assess whether this is the reason for the application being out of time. They may for example take into account for how long the applicant has lived apart from their abusive partner or

241 Recital 17 Family Reunification Directive; Recital 38 Employers' Sanctions Directive; Recital 21 Anti-Trafficking Directive.

242 Home Office definition, since there is no statutory definition yet.

243 See UK Home Office, “Domestic abuse consultation response and draft bill”; EVAW and LAWRS (31 May 2019), “Update on the draft Domestic Abuse Bill – EVAW”.

244 Rights of Women (2014), Domestic violence and immigration law: the domestic violence rule.

245 *Ibid*, p 9.

when the relationship broke down or check for police reports supporting that passports were withheld by the abusive partner.<sup>246</sup>

## Concerns

According to reports, many applications under the domestic violence rule are being rejected as part of the UK's strategy of creating a "hostile environment" for irregular migrants. A freedom of information request by the Guardian to the UK Government revealed that the refusal rate for applications under the domestic violence rule rose from 12% in 2012 to 30% in 2016. Between 2012 and 2016, 1325 people were refused out of a total of 5,820 applications.<sup>247</sup>

## Victims of Modern Slavery

A person who has experienced modern slavery, but who is not eligible for asylum or international protection, may qualify for discretionary leave. The term "modern slavery" encompasses human trafficking as well as slavery, servitude and forced or compulsory labour.<sup>248</sup> Whether a person has experienced modern slavery is assessed by the Single Competent Authority (SCA), within the Home Office.

## Procedure

In the UK, certain NGOs as well as certain government departments, referred to as "first responders", may refer a victim of modern slavery to the SCA. Within 5 days of this referral, the SCA decides whether there are reasonable grounds to believe that the person is a victim of modern slavery. If that is the case, the victim is given a 45-day reflection period, when they are granted leave to remain and provided safe accommodation as well as medical care. It is not necessary to report the trafficker to the police to be granted the recovery period. The SCA then issues its second-stage decision about whether there are conclusive grounds to believe that the person is a victim of modern slavery. However, the target period of 45 days for this decision is often exceeded. If the decision is positive, the victim may be eligible for a temporary residence permit.<sup>249</sup>

## Requirements

However, not all victims of modern slavery qualify for discretionary leave. There are also additional requirements. In case a child is involved, the child's best interests should also influence the assessment. A victim of modern slavery can be granted leave in case of any of the following:

1. Leave is necessary owing to personal circumstances
2. Leave is necessary to pursue compensation
3. The victim is helping the police with their enquiries

Whether leave is considered necessary due to *personal circumstances* is assessed on a case by case basis. A number of factors can be taken into account in this assessment, including whether there is a risk that the person may be re-trafficked or become a victim of modern slavery again; whether, if returned, the person would face harm or ill-treatment from those who first brought them to the UK, or exploited them in their country of origin, or; whether the receiving state has the willingness and ability to provide a reasonable level of protection to the person. In addition, it may be considered whether the person has a need for medical assistance that cannot be provided in their country of origin.<sup>250</sup>

Leave is considered *necessary to pursue compensation* when it would be unreasonable for the victim to pursue their claim from outside of the UK, for example because they need to be attending a civil hearing in person. In case the victim for example has been deported for a separate crime, the hearing should normally be carried out virtually.<sup>251</sup>

Victims may also be granted discretionary leave if they are *assisting the police with their enquiries*. In this case, they need to provide the Home Office with all information about the police officers involved in the investigation, for them to make an assessment.<sup>252</sup> This information can also be forwarded by police officers on behalf of the victim.

246 Home Office (2018), *Victims of domestic violence and abuse*, p. 19.

247 The Guardian, N, McIntyre and A, Topping (2018), "[Abuse victims increasingly denied right to stay in UK](#)".

248 UK Home Office (2019), *Victims of modern slavery – Competent Authority Guidance*, at p. 24.

249 *Ibid.*, at pp. 14-15; Rights of Women (2010), *Seeking Refuge? Trafficking, sexual exploitation and the law*, pp. 4-5.

250 UK Home Office (2018), *Discretionary leave considerations for victims of modern slavery*, at p. 7.

251 *Ibid.*, p. 8.

252 *Ibid.*, p. 9.



If there are conclusive grounds to believe that a person is a victim of modern slavery, no fee is required to submit an application for discretionary leave.<sup>253</sup>

The leave is normally granted for a maximum of 30 months. The discretionary leave gives its holder a right to work and a right to access public funds and higher education (but not student finance).<sup>254</sup> There are no particular routes for a holder of this type of leave to be granted indefinite leave to remain, but it is possible if the person is eligible under some other legislation. However, this type of leave is not aimed at becoming permanent.

### Concerns

One of the main concerns recognized by NGOs is the long waiting times. Very often, the SCA takes longer than 45 days to issue their second decision. Delays mean that victims – the majority of whom do not have

permission to work while waiting for a second stage decision – can wait years before resolution of their case. This also follows from the table below, where the number of pending cases keeps increasing. Victims are provided with support and accommodation until a conclusive decision is made in second stage. No support, however, is available during the initial stage, which often takes longer than the five-day target period. Another issue is that police officers rarely are aware of this framework, or that they have the power to act on behalf of the victim. Moreover, numerous victims of trafficking are detained while awaiting their decisions, despite a legal presumption not to detain vulnerable groups, including victims of trafficking.<sup>255</sup> Finally, only a minority of recognised victims obtain discretionary leave to remain (i.e., a residence permit). This figure was just 12% of all recognised victims of modern slavery in 2015.<sup>256</sup>

**TABLE 15. Referrals and decisions of victims of modern slavery 2012-2018<sup>257</sup>**

Year	Referrals	Positive Conclusive Decisions	Negative Decisions	Pending Decision	Suspended Cases	Withdrawn	Other non-decisions
2013	1746	836	779	4	57	70	0
2014	2339	1023	1118	69	52	77	0
2015	3262	1353	1477	208	116	107	1
2016	3804	1609	1549	398	100	148	0
2017	5142	1645	1505	1613	155	224	0
2018	6993	1151	1617	3867	109	248	1

253 *Ibid*, p. 10.

254 *Ibid*, p. 11.

255 FLEX (2019), *Detaining Victims: Human Trafficking and the UK Immigration Detention System*.

256 Letter of Sarah Newton, Member of UK Parliament (17 February 2017), see [Annex B](#).

257 UK National Crime Agency (2019), *National Referral Mechanism Statistics – End of Year Summary 2018* EOY18-MSHT, p. 5.

# SPOTLIGHT: LESSONS FROM NATIONAL LAW AND PRACTICE IN THE UNITED STATES

A recent study by Oxford University<sup>258</sup> describes measures – adopted by both federal authorities and local governments – to promote the reporting of crime by people in an irregular situation in the United States. This study was conducted in the framework of a project by the University of Oxford's Centre on Migration, Policy and Society (COMPAS) exploring law, policy and practice surrounding “safe reporting” of crime for victims and witnesses with irregular status in the United States and Europe. In parallel with this report, studies on safe reporting of crime for irregular migrants were conducted in four European countries (Belgium, Italy, Spain and the Netherlands). The project aims to provide authoritative evidence and analysis of policies and best practices enabling and encouraging “safe reporting in Europe and the USA; and assess the legal and political replicability of practices and policies across different countries; and facilitate knowledge-exchange between European and US policymakers regarding the opportunities for replicating best practices across different national and local settings.<sup>259</sup>

The Oxford/COMPAS study examined *federal legislation* creating special visas for certain victims of crime, including the T and U visas, which were introduced in 2000 with the Victims of Trafficking and Violence Prevention Act (VTVPA). Much like the special permits that exist in Europe, they are intended to achieve the twin goals of strengthening law enforcement agencies' ability to investigate and prosecute serious crimes, with the aim of improving public safety; and offering protection and humanitarian relief from deportation to migrant victims. Significantly, despite many amendments of the VTVPA under different administrations over its lifetime, the rules governing these visas have received consistent *bipartisan* support from the country's two main political parties.<sup>260</sup>

The study also looked at *practices at the local level* in cities like New York and San Francisco, which have adopted a proactive strategy in their engagement with migrant communities that prioritize public safety over immigration enforcement. This section distills some of the findings of this research, which presents some important lessons for the European context.

258 N. Delvino, September 2019, Safe reporting of crime for victims and witnesses with irregular migration status in the United States.

259 The project Safe reporting of crime for victims and witnesses with irregular migration status in the USA and Europe.

260 *Ibid*.

In the U.S., immigration law and its enforcement are centralized within the federal government. By contrast, law enforcement is decentralized across the federal, state, county and municipal authorities; and indeed, it is at the state and local levels of government where most criminal prosecutions occur.<sup>261</sup> Municipal and county governments in practice have the most control over police departments, appointing police officials and regulating and financing local police departments; and under the U.S. constitution, are under no obligation to cooperate with federal immigration authorities.

## Federal legislation granting special permits to victims of crime

### *U-visa for victims of certain crimes*

The U-visa is a status available to victims of a long list of crimes (see Table A, below) who are cooperating with, or are likely to cooperate with, law enforcement authorities. It was introduced with particular consideration of victims of domestic violence who are not partners of US citizens (victims of domestic violence, sexual assault and human trafficking constitute about 75% of U visa holders).<sup>262</sup>

The U-visa provides a victim non-permanent status for four years, and authorisation to work, with the possibility of obtaining derivative status for certain immediate family members of the victim. After three years of lawful residence, U visa holders can apply for permanent residence.

In addition to being a victim of a qualifying crime, to be eligible for a U-visa victims must (i) have suffered substantial physical or mental abuse as a result of being victimised, (ii) have information about the criminal activity, and (iii) have been helpful, are being helpful or are likely to be helpful to officials in the detection, investigation, prosecution, conviction or sentencing of the criminal activity. To satisfy the last component, the victim must get a certification from a law enforcement authority attesting to their willingness to help. The relevant authority can include a prosecutor, judge, police, as well as department of labour, child protection services, among others. In contrast to many European models, this certification process is initiated

by the victim through an application, and not by law enforcement. Between 2009 and March 2019, 85,000 U visas were granted. Approval rates of consistently above 80% for the past five years.<sup>263</sup>

The main obstacle to the success of the program is the cap of 10,000 imposed on the number of U-visas that can be issued annually, which is vastly inadequate for the number of victims, with a backlog of 135,000 applications pending as of March 2019.

**TABLE A. List of qualifying crimes for a U visa under 8 CFR § 214.14\***

- Rape
- Torture
- Trafficking
- Incest
- Domestic violence
- Sexual assault
- Abusive sexual contact
- Prostitution
- Sexual exploitation
- Involuntary servitude
- Peonage
- Being held hostage
- Female genital mutilation
- Slave trade
- Kidnapping
- Abduction
- Unlawful criminal restraint
- False imprisonment
- Blackmail
- Extortion
- Manslaughter
- Murder
- Felonious assault
- Witness tampering
- Obstruction of justice
- Perjury

\* As set out in Delvino (2019)

261 Gardner T. (2019), Immigrant Sanctuary as the Old Normal: A Brief History of Police Federalism, in Columbia Law Review, Vol. 119:1, pp. 1-84; note 1.

262 L. E., Orloff & P. E., Feldman (2011), for The National Immigrant Women's Advocacy Project and Legal Momentum, The Women's Legal Defense and Educational Fund (2011), National Survey on Types of Criminal Activities Experienced by U-Visa Recipients.

263 See note 263 p. 22 (fn 111).



### ***T-visa for victims of human trafficking***

The T-visa is specifically for victims of human trafficking and, like the U-visa, is grounded in the same rationale of overcoming barriers to report, provide relief to victims and strengthen the relationship between law enforcement and immigrant communities.

The T-visa provides a temporary 4-year status, work authorization, and possibility for derivative status for family members, and to obtain permanent status after three years of regular stay in the U.S., or the completion of the investigation or prosecution, whichever comes first.

To be eligible, a victim must (among others) (i) be or have been the victim of a severe form of human trafficking, (ii) comply with reasonable requests from law enforcement for assistance in the investigation or prosecution of human trafficking, (iii) show they would suffer extreme hardship if removed from the U.S.<sup>264</sup>

Law enforcement agencies may attest, via declaration, that the applicant is or was the victim of a severe form of trafficking and comply with the reasonable requests for assistance in the investigation or prosecution. However, such declarations are not necessary; compliance with these requirements can be provided with other forms of evidence, including personal statements.

### ***Other forms of status available to victims***

Under U.S. law, there are two additional forms of status available to certain victims of crime:

- **Special Immigrant Juvenile Status (SIJS):** This is a form of status and humanitarian relief granted to children (under 21) in the U.S. who have been the victim of abuse or been abandoned or neglected by a parent. Children who receive SIJS status may immediately apply for permanent residence.

- **Violence Against Women Act (VAWA) self-petitions:** VAWA was passed in 1994, introducing a mechanism to protect victims of domestic violence whose status is tied to their relationship with an abusive spouse, parent or child who is a U.S. citizen or permanent resident by allowing them to obtain *independent* permanent residence status. Petitioners must meet a range of eligibility requirements and submit an application form. There is no annual limit imposed on VAWA petitions that may be granted, and no law enforcement certification is needed. Between 2010 and 2018, an average of 5,700 VAWA self-petitions were approved annually.<sup>265</sup>

### **Measures at the city level to promote safe reporting: the example of New York City**

The City of New York is one among many U.S. cities that have adopted formal policies to ensure that local police officers and sheriffs do not enforce federal rules on immigration. These policies often align with an approach to law enforcement referred to as “community policing”, which is based on building bonds of trust with local communities as a way to promote cooperation of residents in crime prevention efforts.<sup>266</sup> Apart from encouraging cooperation with local police, these policies include additional aims:

- Reducing the reliance of police, who are not trained in immigration matters, on racial profiling
- Taking a political stance of disapproval towards federal immigration policies
- Maintaining local control over local social policies and local police
- Avoiding the diversion of limited resources and time of local police from their core mandate of ensuring public safety and enforcing criminal law

<sup>264</sup> See note 263.

<sup>265</sup> See note 263, 26 (fn 136).

<sup>266</sup> See note 263, 31.

Some features of New York's "sanctuary" approach are notable in showing the relationship between the special visa scheme and the proactive role of local law enforcement authorities, working in concert with other partners, in doing outreach to communities:

- **Empowering government agencies through information and training so they can support victims in accessing their right to a special permit.** New York adopted measures to support the issuance of visas to ensure that as many local agencies with law enforcement duties as possible (i.e., Administration for Children's Services, City Commission of Human Rights, New York City Law Department, Depart of Consumer Affairs, NYPD, NY District Attorneys) are empowered to issue law enforcement certifications for declarations in support of U- and T-visa applications. The NYPD, of its own initiative, adopted a formal procedure to allow a victim to appeal the denial of a law enforcement certification or declaration.
- **Doing regular and proactive outreach to migrant communities to build trust and inform them of their rights.** In 2018, the New York Mayor's Office of Immigrant Affairs (NYC-MOIA) and its community partners did about 681 'Know Your Rights' forums and shared information on immigration matters at approximately 1,575 events regularly attended by migrant communities. As part of its neighbourhood policing policy, the NYPD partners with NYC-MOIA and others to do outreach events to communicate its non-cooperation policy on immigration matters and the U and T visa programs; and addresses these issues at its monthly 'community countries' with local residents and members of the public. The Manhattan District Attorney's Office established a legal outreach team within its Special Victims Bureau and Immigrant Affairs Unit, which does continuous outreach to immigrant populations about the possibility to report crime and to reassure fears about deportation.
- **Building coalitions with community-based organisations and working with them to raise awareness and to connect victims to relevant services.** Through its initiative ActionNYC, New York operates a citywide network of non-profit organisations providing access to immigration legal services, including full representation in some complex case (e.g., SIJS and U visas). ActionNYC is a partnership among NYC-MOIA, the City University of New York, and the Human Resources Administration that offers comprehensive training and technical assistance to small and medium-sized community-based organisations so that they can provide immigration legal services. ActionNYC also does outreach to immigration communities, supporting their access to these organisations and referrals to immigration legal services where needed.
- **Codifying the "firewall" in official police policy.** The non-cooperation policies are included in the NYPD patrol guide, which every police officer is responsible for knowing, and where there is the possibility of officers facing disciplinary measures if they don't comply with the policy.

# CONCLUSION

Being undocumented, or having dependent status, increases the likelihood of victimisation and reduces the likelihood that victims will seek help or report abuse because of fear of immigration consequences. Special residence permits for victims of crimes therefore exist for the dual purpose of encouraging victims to come forward and assisting law enforcement in its efforts to prosecute crime. This contributes to protection and support for the person who has been victimised *and* benefits the efforts of law enforcement to keep communities safe by reducing impunity.

As described in this report, special residence permits for victims of crime are provided for under several pieces of EU legislation and are available for victims of crime in every EU member state. Among the ten countries covered in this report (Belgium, France, Germany, Greece, Italy, the Netherlands, Poland, Spain, Switzerland and the UK), permits are available

for victims of domestic violence on spouse-dependent visas (in five countries, undocumented survivors are included), trafficking, labour exploitation (in most cases), and occasionally for additional crimes.

There are challenges in evaluating the reach and impact of these schemes based on the limited reliable data that exists about the number of people who are undocumented residing in a given member state, and the difficulty in estimating the proportion of them who are victimised. Based on the evidence reviewed for this report, permits granted to victims under the different categories that exist under national legislation generally number from a few dozen to a few hundred annually. A notable exception is the number of permits granted in Italy to victims of serious crime:<sup>267</sup> 1,595 such permits were granted in 2017 – ten times greater than the number of permits issued to victims of domestic violence that year.

**TABLE 16. The total number of residence permits granted in Italy for the period 2013–2017, as summarised in S.B. Taveriti (2019)**

	2013	2014	2015	2016	2017
Permits for social protection reasons (art. 18 of CLI)	898	732	771	1246	1595
Permits for victims of domestic violence (art. 18-bis of CLI)	4	55	85	100	102
Permits for victims of particular labour exploitation (art. 22, par. 12-quater of CLI)	11	3	3	10	4
Permits for cooperation against Terrorism (L. n. 155/2005)	89	84	66	135	92
<b>Total</b>	<b>1002</b>	<b>874</b>	<b>925</b>	<b>1491</b>	<b>1793</b>

<sup>267</sup> S.B. Taveriti (2019), *Safe reporting of crime for victims and witnesses with irregular migration status in Italy*, COMPAS: Oxford, p. 23.



Given what is already known about the levels of abuse and exploitation that exist in the context of labour,<sup>268</sup> and the dismally consistent levels of violence against women in the EU and globally,<sup>269</sup> it is very likely that the incidence of mistreatment far outstrips what is reflected in the number of people who benefit from a special permit across member states. This is also, of course, because many people who are victimised choose not to report for reasons that have nothing to do with their migration status – such as the stigma may face, reluctance to relive the trauma experience file a complaint and bring evidence in a criminal proceeding, fear that they may not be taken seriously or that any prosecution may be ineffective, and so on. Very often, someone who is victimised is concerned first and foremost with securing their safety and the safety of any affected loved ones and getting themselves back on their feet.

Under EU law, they have the right to whatever support and services they need – and, if and when they feel ready, to approach the justice system with confidence that they will be treated with dignity, professionalism and respect. This is true regardless of their residence status.

For people with irregular status, the availability of residence permits can promote their ability to come forward with confidence. But such schemes must be accompanied by a broader protection-centred approach that includes proactive outreach to immigration communities to make them aware of their rights and to reassure them that law enforcement is committed to their safety and protection; and measures that shield them from immigration consequences if they reach out for help or to report crime.

Moreover, existing schemes must be reformed with a view to achieving their protection aims. Efforts are needed to address the layers of uncertainty present at every phase of the process – including whether they can meet the burden of proof, whether discretionary powers will be exercised in their favour, whether their short-term status will be renewed (depending on the result of a criminal proceeding, or other factors defined by national law). And this on top of doubts that they will be taken seriously, concerns they may face prejudice or discrimination or victim-shaming or stigma. All of which create profound disincentives to engage – to the benefit of offenders.

What's more, the piecemeal approach reflected in current legislation excludes from existing protection schemes many people who have been victimised in ways that do not fit the categories of domestic violence, trafficking and labour exploitation. Italy, Spain and Greece are notable for having legislation that is more expansive in the crimes covered. As we saw above:

- In **Italy**, the special permit available under Art. 18 CLI has as its main scope victims of sexual exploitation and human trafficking, but also includes a variety of additional crimes (among the most serious covered in Italian criminal law), including modern slavery, labour exploitation, sexual abuse, gang rape, aggravated theft and robbery, crimes concerning weapons, domestic abuse and stalking. A major limitation of the law is that the crime must be perpetrated by an organisation, rather than a single individual.
- **Spain's** humanitarian residence permit, available under Art 126 Royal Decree, makes protection available on various grounds, including different forms of labour exploitation from trafficking to the denial of labour rights established through collective agreements; discrimination in the provision of public services and the context of employment; crimes committed for racist or other bias-related reasons; and violence “in the home environment”.
- In 2015, **Greece** passed Law 4332/2015 the provides for special permits for victims, and in some cases witnesses, of a wide range of “serious crimes” (against life, health, physical integrity, property, etc.).

This expansive scope is consistent with a protection-oriented agenda, and moves away from the categorical approach, where large numbers of victims falls through the resulting gaps.

Assessing the effectiveness of this legislation in supporting law enforcement efforts to investigate crimes and keep communities safe requires looking not only at the number of people directly benefiting from available permits, but also at the rate of investigation and prosecution of the reported crimes, and rates of abuse (and crime) themselves, which presumably should decrease through more reporting and reduced impunity.

268 FRA (2019), *Protecting Migrant Workers from Exploitation in the EU: Workers' Perspectives*; FRA (2018), *Out of Sight: Migrant Women Exploited in Domestic Work*.

269 FRA (2015), *Violence Against Women: an EU-wide Survey. Main Results Report*; World Health Organization (2002), *WHO Multi-country Study on Women's Health and Domestic Violence against Women*.

Such evidence is available in the United States where, in 2017, the first systematic analysis was published of the incidence of violent and property crime in counties across the United States where police do not prioritise immigration enforcement (often referred to as “sanctuary” cities). It found that crime is significantly lower in sanctuary counties than in non-sanctuary counties. In large metropolitan countries, those with a sanctuary approach had 65.4 fewer crimes per 10,000 people than their non-sanctuary counterparts.<sup>270</sup> The U.S. therefore provides a useful case study in how national laws granting special visas to victims of crime and local law enforcement initiatives can support victims’ protection and advance and communities’ safety.

The European Union can play an important role in clarifying and strengthening, as a matter of law and policy – including its strategies on victims and on gender, respectively – the rights of all victims, *regardless of status*, including the function and importance of residence permits. It can also facilitate exchange among member states, at all levels – municipal, regional, national – and between EU countries and other jurisdictions, such as the United States, to promote the development of good practices aligned with existing international and EU standards. Civil society is a key partner both in strengthening policy that is adapted for often marginalised groups, and for implementing measures that affect people’s safety and wellbeing in their communities.

270 Wong T. (2017), *“The Effects of Sanctuary Policies on Crime and the Economy”*, Washington DC: Center for American Progress.

# REFERENCES IN NATIONAL LEGISLATION TO RESIDENCE PERMITS

Table 17 presents the groups of crime victims that can be granted a residence permit across these countries. Table 18 outlines where to find the relevant legal provisions in the national legislation of each country.

**TABLE 17. Overview of Residence Permits Foreseen in Legislation for Different Categories of Victims**

Country	Domestic Violence		Labour Exploitation	Trafficking	
	Regular migrants	Undocumented migrants		Police cooperation	Humanitarian reasons
Belgium	Yes	No	Yes*	Yes	Yes
France	Yes	Yes	No	Yes	No
Germany	Yes	No	Yes	Yes	No
Greece	Yes	Yes	Yes	Yes	Yes
Italy	Yes	Yes	Yes	Yes	Yes
Netherlands	Yes	Yes	Yes	Yes	Yes
Poland	Yes	No	Yes*	Yes	No
Spain	Yes	Yes	Yes	Yes	Yes
Switzerland	Yes	No	No	Yes	Yes
United Kingdom	Yes	No**	Yes	Yes	Yes

\* Included in the definition of human trafficking.

\*\* Only if a previous residence permit on family grounds has expired because of the domestic violence.



TABLE 18. Relevant National Level Legislative Frameworks

			BELGIUM	FRANCE	GERMANY	GREECE
GROUNDS FOR RESIDENCE PERMIT	Victim of Domestic Violence	Sponsor is Third Country National	Art 11 Loi 15 Décembre 1980	Art L431-2 al 4 CESEDA	Section 31 para 2 Residence Act	Art 76(2)(ii) Law 4251/2014
		Sponsor is EU National	Art 42quater Loi 15 Décembre 1980	Art R.121-8 and Art L.313-12 CESEDA	Section 3 Act on General Freedom of Movement	Art 84(1)(c) Law 4251/2014 (amended under Law 4332/2015)
		Victim is Undocumented	–	Art L.316-3 CESEDA		Article 19A (1c) Law 4251/2014-
	Victim of Trafficking in Human Beings	Victim Cooperates	Arts 61/2-61/5 Aliens Act	Art L. 316-1 CESEDA	Sec 25 (4a) and Sec 59(7) Residence Act	Arts 49 – 56 Law 4251/2014
		Humanitarian Reasons	Art 9bis Aliens Act	–	–	Article 19A (1b) Law 4251/2014
	Victim of Labour Exploitation		Arts 9bis, 61/2-61/5 Aliens Act	–	Section 25 para 4b Residence Act	Article 19A (1d) Law 4251/2014

COUNTRY					
ITALY	NETHERLANDS	POLAND	SPAIN	SWITZERLAND	UNITED KINGDOM
Art 18bis Consolidated Law on Immigration No. 286/1998	Art 3.90 of the Dutch Aliens Decree	–	Art 19.2 LO 4/2000	Art 50 of the Federal Act on Foreign Nationals	Paras 289A-D Immigration Rules
Art 12(2)(c) Legislative Decree 6 February 2007	Art 8.15(4)(d) of the Aliens Decree	Art 19 Act on entry and stay of EU nationals	Art 9(4)(c)(1) Royal Decree 240/2007	–	Art 10(5)(c) of the UK Immigration EEA Regulations
Art 18bis Decree No 286/1998	Art 3.48.1(f) Aliens Decree 2000	–	Art 31bis LO 4/2000	–	–
Art 18 Decree No 286/1998	Art 3.48.1(a)-(c) Aliens Decree 2000	Arts. 176 and 195(1)(5) of the Act on Foreigners	Art 59bis LO 4/2000	Arts 35.1-36 Order on Admission, Stay and Exercise of Gainful Activities (OASA)	Residual discretion of the Secretary of State (following Home Office Guidelines)
Art 18 Decree No 286/1998.	Art 3.48.1 (d) Aliens Decree 2000	–	Art 59bis LO 4/2000	Art 30(1)(b) Federal Law on Foreigners	Residual discretion of the Secretary of State (following Home Office Guidelines)
Art 22, para 12-quarter Immigration Act	Art 3.48. (g) Aliens Decree 2000	Arts. 176 and 195(1)(5) Act on Foreigners	Art 126 RD 557/2011	–	Residual discretion of the Secretary of State (following Home Office Guidelines)









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