

RÉPUBLIQUE FRANÇAISE

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THE

FUNDAMENTAL RIGHTS

OF FOREIGNERS

IN FRANCE

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The Defender of Rights takes the view that upholding the fundamental rights of foreigners is an essential marker of the degree of protection of rights and freedoms in a given country.

The legal analysis set out in this document only concerns those rights actually granted in practice by positive law and are intended to highlight the discernible difference between the theoretical proclamation of these rights and how they work in practice.

By way of a preliminary, it should be pointed out that:

- **Concerning entry, residence and expulsion, positive law authorises, *a priori*, differences in treatment** based specifically on the distinction between the legal categories of “national” and “foreigner”. In these areas the discretionary power of the State is considerable. It is not unlimited, however, and may not under any circumstances be discriminatory. It is the duty of the Defender of Rights to point out that even in such a sovereign area, the respect for fundamental rights must be guaranteed.
- **Conversely, in the majority of areas of daily life**, social welfare, child welfare, health, housing, etc., **the law in theory prohibits the establishment of any differential treatment**. However, in addition to those illegal practices that contravene this prohibition, such as the refusal of school registration, or of access to care, for example, the legal rules themselves, in sometimes appearing to establish neutral criteria, in fact limit full access by foreigners to their fundamental rights.

Far from being natural and immutable, legal rules specifically for foreigners or applying principally to them, be these foreigners who have not been in France very long or on the contrary those who have been in the country a long time, are choices made by the legislature and the regulatory authorities based on considerations that fluctuate over time. It is in this context that preconceived ideas develop, frequently fuelled by an irrational fear of foreigners.

No period in the history of immigration, no matter how intense it may have been, has altered the foundation of common republican values. Neither the million returnees and Harkis in the early 60s, nor the many Portuguese, Spanish, Italians, Algerians, Moroccans and Tunisians, who came - to work - in the 60s and 70s. Nor the sub-Saharan immigrants who were brought to Europe after the independence of African States. Nor the 200,000 “boat people” at the beginning of the 70s, when the economic situation in France was beginning to deteriorate when the government suspended immigration for workers and the “control of migratory flows” was already a factor in the political discourse.

The words used in this field are vehicles for ideas and stereotypes and are not neutral or without consequence. Migrants, refugees, illegals, undocumented workers, immigrants and exiles are all words that are rarely used casually. Although the purpose of this document is to name the category of individuals not having French nationality “foreigners”, the Defender may be inclined to use the term “migrant” to describe the situation of persons who are legal subjects in an emigration, immigration or displacement process. This has long been viewed as the most neutral term. Recently, however, it has tended to be used to disqualify individuals, denying them a right to protection by likening them to “economic” migrants whose migratory goal is deemed to be utilitarian and therefore less legitimate than that of an individual fleeing war or persecution, a refugee. So, despite the good intentions tending to highlight the context in which these individuals fled their country, the designation “refugee” is

a double-edged sword in that it can lead to a distinction being drawn once again between “good” refugees, those entitled to asylum protection, and “bad” so-called economic migrants, which makes no sense.

The distinction leads to discredit and suspicion being cast upon exiles in respect of whom one seeks to determine whether their decision to come to Europe is noble, or “moral” rather than simply utilitarian. This carries the risk, in turn, of depriving of protection individuals who are entitled to it. This logic of suspicion runs through all French law applicable to foreigners – whether they arrived recently or have been in the country for a long time - and has even spilled over into child protection and healthcare law. As this document will repeatedly demonstrate, the fact that the law views individuals as “foreigners” before seeing them as people, children, patients, workers or public service users, significantly impairs their access to fundamental rights.

Part One

Entry, residency and expulsion: sovereign State powers that must be exercised in compliance with the fundamental rights of foreigners

I. Control of entry of foreigners into the country

A. Visas: a discretionary power that is all too frequently exercised with a disregard for the legally established limits

Foreigners must, in theory, be able to show a valid travel document, and where applicable, a visa. Although the consular authorities have broad discretionary powers in the issuance of visas, these powers are nonetheless circumscribed by European Union (EU) law and are subordinate to compliance with fundamental rights. In its various studies and through numerous petitions, the Defender of Rights has noted **rights violations in the issuance of visas**.

The Defender of Rights wishes to make the following recommendations:

- ***Make the rules for the issuance of short-stay visas more specific***

Visas requested for family visits: Since the refusal of such visas may constitute an excessive violation of the right to private and family life, it is important that the consular authorities examine applications sympathetically where it appears that this right could be in jeopardy and that, in any case, applicants meet the conditions set down by the Community Code on visas. Cases in which a “migratory risk” may be held to exist ought therefore also to be specified to prevent systematic use of this ground for refusal.

Visas requested for professional reasons: Having been petitioned concerning difficulties encountered by poorly advised applicants, the Defender recommends that clear information be provided to individuals applying for visas for professional reasons, stating whether an application must be made to DIRECCTE to obtain a work permit.

Provision of proof of accommodation: When applying for a visa for a personal or family visit of less than three months, non-EU nationals must submit proof of accommodation provided by the person who undertakes to accommodate them. This document is issued by local councils. *The Defender of Rights has observed that certain councils have developed illegal practices, making issuance of this certification subject to the provision of certifications not required by law such as the obligation for the host to have a minimum income equivalent to the minimum wage or SMIC or to Eur 1000 after deductions, depending on the case in question, refusal to take social security benefits into account when calculating income, the obligation to provide a health insurance certificate covering the foreigner being accommodated, etc..* ([MLD-2015-310](#)) **More specific rules for the issuance of long-stay visas**

Visas requested by spouses of French nationals: Although strict rules govern the possibility of refusing these visas, instructions for applications submitted in this context are all too frequently guided by a logic of suspicion that is prejudicial to the right to family life. In this regard, the Defender submitted observations in a court case concerning the refusal of a visa for the spouse of a French national that had been denied even though the couple had provided a number of proofs attesting to the authenticity of their marital relationship ([MSP-2015-153](#)). These observations were endorsed by the Judge.

Visas applied for by the parents of French children: Although falling within categories having an automatic legal entitlement to a “private and family life” residence permit, the parents of French children sometimes encounter difficulty in obtaining a visa. To facilitate this process, the law must expressly provide that a visa may be requested by the foreign parent of a French child even when the child does not reside in France. The consular and administrative authorities must also be reminded that issuance of a visa for the “parent of a French child” may not be made subject to an examination of the financial means of the couple but only to proof that the foreign parent contributes to the upkeep of the child, stipulating that lack of means alone shall not suffice for the conclusion to be reached that this is not the case.

Visas requested within the context of a family unification or reunification procedure: The ECHR specified in three judgements dated 10 July 2014, the procedural obligations incumbent upon the French authorities in examining applications submitted within the context of family unification or the family reunification process open to refugees. For these procedures, recourse to standard forms referring to a list of pre-established grounds for refusal are to be prohibited. Where the consular authorities engage in procedures in order to verify the authenticity of civil status documents submitted to them, they must inform the applicant in due form of the progress of checks currently underway; demonstrate flexibility where the application concerns a refugee, a minor or a national of a country whose shortcomings in terms of its civil register are notorious; ensure that the applicant is enabled to make observations prior to taking a decision to refuse an application; provide, where applicable, supporting evidence for decisions finding that the documents submitted are not authentic, for example by providing a report of research undertaken by an approved consular agent.

- **Bring visa policy, particularly as regards Syrians, into compliance with the right to international protection**

The policy pursued by France tends to reduce legal immigration routes open to certain foreign nationals even where their need for international protection is evident. An example of this is the requirement for airport transit visas (ATV) instated in respect of Syrians in 2013. This policy obliges the individuals concerned to pass through illegal, risky routes. The Defender furthermore recommends removing the ATV requirement imposed on Syrians and calls upon the authorities to examine visa applications made by them in order to seek asylum in France in a kindly light.

Privatisation of visa application processing and access to law

European Union law authorises Member States to outsource visa application processing, subject to any interviews, decision-making, and printing and apposition of seals remaining the exclusive competence of the consulate. In view of its finding that in certain consulates, private service providers are refusing to register applications by users without their having been able to access consular services, the Defender recommends that public sector contracts be drafted in a way that complies with EU requirements and that consulate websites state that going through the service provider is merely optional, since consular services must, ultimately, remain accessible to users.

B. Borders: expulsions leading to violations of fundamental rights

The right to emigrate, which is a right guaranteed under international law, is afforded enhanced protection when it is exercised by persons fleeing persecution in their country of origin, to whom the principle of non-refoulement must apply. However, the effectiveness of this protective legal framework is compromised by border control policy conducted at the EU and national levels. Accordingly, the Defender of Rights has set out recommendations seeking to:

➤ ***Ensure that border control respects the rights of migrants***

Outsourcing the management of migratory flows: for a number of years, the EU has pursued a policy of “joint management” of migratory flows involving contribution by third countries resulting on one hand in the conclusion of readmission agreements with third countries, and on the other hand in the desire to outsource the processing of international protection applications to countries of origin or transit countries. Facilitating returns contrary to article 3 of the ECHR, this policy coincides in general with the creation, in cooperating countries, of laws criminalising emigration. Recently, policy has focussed on the negotiation of agreements with Turkey. In this context, the Defender recommends provision being made to ensure that no individual may be detained simply because they emigrated, whether readmitted to Turkey or to the individual’s own country. Furthermore, it asks that, more generally, the vulnerability of individuals likely to be readmitted be examined attentively, particularly in the case of women.

Securing national and EU borders: Faced with an unprecedented influx of migrants, many States in the Schengen Area have reinstated border controls. Alongside this, the EU has increased the budget allocated to the Frontex agency, which is tasked with controlling the EU's external borders. This increasing securing of borders is in no way dissuasive, but rather gives rise to violations of physical integrity and serves the goal of combating people smuggling, which can only be achieved by opening up legal immigration routes that make use of mechanisms already provided for by EU legislation, such as “humanitarian” visas ([*Exiles and fundamental rights: the situation in the territory of Calais*](#)).

➤ ***Stepping up the rights of migrants held in waiting areas***

Asylum at the border: At the border, a foreigner may be placed in a waiting area whilst a decision is taken as to his or her situation, particularly when applying for the right to asylum. In this case, that individual will only be allowed to enter France on condition that his or her application has not been ruled to be “*manifestly unfounded*”. Although the legislature recently specified the meaning of this concept, the margin of appreciation left to the competent authority remains too broad, authorising pre-examination on the merits of an asylum application that may however not benefit the preparation of a substantiated, coherent statement. Furthermore, the Defender recommends that the definition proposed by the UNHCR be retained: applications shall be unfounded where “*not related to the criteria for the*

granting of refugee status”. Furthermore, it recommends lengthening deadlines for appeal against a decision to refuse entry into the country ([Opinion No. 14-10 of 6 November 2014](#)).

The case of unaccompanied minors: Whilst limiting this to exceptional cases, the legislature has in principle legalised their being kept in waiting areas. In this case, the Public Prosecutor is to be informed immediately and must appoint an *ad hoc* administrator without delay who is tasked with assisting the minor. In view of the fact that such a deprivation of liberty is a violation of article 37 b) of the CRC, the Defender wishes to reiterate its recommendation for an end to deprivation of liberty at the border for all unaccompanied minors applying for asylum and for their admission into the country with a view to placement in order to clarify their individual circumstances. Failing this, it recommends that the following be drafted into law: a prohibition on making the appointment of an *ad hoc* administrator subject to the outcome of medical examinations to verify minor status; and the right of minors seeking asylum to have access to the child protection mechanism in its entirety ([Opinion No. 14-10 previously cited](#)).

II. The right of residence of foreigners

Although the authorities possess broad discretionary powers regarding the right of residence where it falls under the sovereign powers of the State, such as control over the entry of foreigners, it is, equally, required to respect fundamental rights. However, although the Code on the Entry and Residence of Foreigners and Asylum Law (the CESEDA Code) frames the right of residence in the light of these fundamental rights, for many years there has been a trend towards making the residence of foreigners less secure, whether through the direct provisions of the law or as a result of the failings and sometimes illegal practices of certain governmental authorities.

A. Insecure residence: an obstacle to integration and access to rights

Whereas, in 1984, the legislature created the resident card as an ordinary law permit intended for all foreigners intending to live permanently in France, it has now become an exceptional permit that is issued upon successful completion of the integration process. Correspondingly, there has been an increase in the issuance of “temporary” residence permits that are valid for one year. However, the possession of such permits may hinder access by their holders to certain rights (employment, housing, etc.) and consequently, integration. Furthermore, they entail more trips to the prefecture, where numerous shortcomings have a tendency to make the right of residence to which certain foreigners are entitled that bit more insecure. In view of this finding, the Defender of Rights recommends:

➤ **Creating access to more permanent residence permits**

The Defender of Rights was pleased to note the significant steps forward introduced by the law of 7 March 2016 pertaining to the law governing foreign nationals in France: standardisation of multi-year residence permits, a return to the automatic issuance of a residence card to the spouses and parents of French children; automatic issuance of a residence card to individuals able to demonstrate that they have lived legally in France for five years. However, it regrets that the legislature has kept in place certain restrictions running counter to the intended goal of making residence more simple and more secure ([Opinion No. 15-17 of 23 June 2015](#), [15-20 of 3 September 2015](#), and [16-02 of 15 January 2016](#)). Accordingly, it recommends: that the minimum wage (SMIC) no longer be used as the benchmark minimum income for automatic issuance with a residence card; that the possibility of applying for a multi-year permit to victims of trafficking; extending to four years

the duration of multi-year permits issued to individuals granted residence owing to their family and personal ties or to their state of health.

➤ **Improve how foreigners are dealt with in prefectures**

Submission of applications: Difficulties encountered by foreigners in accessing the counters of prefectures are notorious and have been strongly criticised in numerous reports by institutions and associations. The fact that public service users should be required, in order to have any chance of being able to access counters, to queue for hours, sometimes outside, without shelter, on foot, or at night, with the risk of violence inescapably posed by such circumstances, is a violation of human dignity. The “expulsions” that continue to occur at the entrance of certain prefectures are an unacceptable violation of the right of foreigners to have their application examined. Furthermore, the Defender of Rights will be examining with particular attention all petitions that it has received or will in the future receive concerning the reception conditions of foreigners in prefectures. Where needed, it will deploy its units on-site and may where necessary submit its observations to the courts petitioned.

Registration of applications: at the counter, certain foreigners have been given a verbal refusal to have their application registered. Whether as the result of unlawful practices or an ignorance of applicable law, (refusal to register a residence permit application on another ground when an asylum application is pending, the demanding of documents not required by law or impossible to provide, etc.), these “counter refusals” are unlawful, as prefects are under an obligation to carry out an individual examination of every residence permit application submitted to them. In order to prevent these, the Defender recommends: regular reminders on points of applicable law where there is a tendency for divergent or unlawful interpretations to arise; the systematic use of lists of documents set nationally by the Immigration Directorate, a reminder of their exhaustive nature, regular publication and updating; favourable examination of cases in which it is physically impossible for a foreigner to provide certain documents, namely where a refusal to grant residence could result in the loss of acquired rights; extension of application storage times so as to facilitate proof of prior possession of a residence permit. Furthermore, the decision to refuse registration at prefecture counters should be systematically notified in writing, in a document specifying the date, the grounds for refusal and the deadlines for and means of challenging such a decision.

Issuance of certifications of receipt (*récépissé*) for residence applications: Upon registration of his or her application, a foreigner applying for issuance or replacement of a residence permit must be provided with a certification of receipt (*récépissé*) that authorises the individual to work, where necessary. However, there have been cases of foreigners being denied a certification of receipt even though they have submitted a complete application, or being issued other provisional documents in their stead (acknowledgement of submission, etc.) which do not confer the same rights as a certification of receipt (for example: [MLD-2015-311](#)). The Defender recommends that measures be taken to bring an end to such practices, the consequences of which may gravely prejudice the applicant (loss of employment, etc.) and engage the liability of the government authorities.

Processing of applications: despite considerable efforts made by the government authorities, the delegates of the Defender working in the field are still observing excessive delays in the processing of applications and major lacunae in the information provided to users. Accordingly, the Defender recommends that particular attention be given to: the provision of as much relevant information as possible on prefectural websites (opening times for each application type, downloadable document lists and forms); the immediate registration of applications by a dedicated software application; the development of diagnostics to assess the merits of developing virtual appointment and/or reception procedures. The Defender recommends that where necessary, sufficient personnel be allocated to such procedures, which should be discontinued in the event that they result in

any unreasonable delays (more than two months) between issuance of the appointment letter and the appointment date set. It wishes to specify that these tools may not be used in place of physical reception which may have discriminatory consequences: alternatives must be guaranteed to persons not having Internet access or whose level of French is not high enough to be able to use the proposed tools.

B. Foreigners particularly affected by the insecure nature of the right to asylum

Having observed that certain persons are particularly affected in the exercising of their rights due to the insecure nature of their residence, the Defender wishes to set out recommendations to support the following persons:

➤ **Unaccompanied minors who have reached majority age**

Despite specific legislation, these individuals encounter difficulties in accessing the right to permanent residence upon reaching majority age. These difficulties compromise the inclusion pathway to which they are committed. Accordingly, the Defender recommends that the law be changed to stipulate that unaccompanied minors in the care of child welfare services (ASE) before or after the age of 16 shall, upon reaching majority age, automatically be entitled to a "private and family life" residence permit and that those who did not receive such care but who are on a university course or partaking in vocational training shall be granted a "student" residence permit.

➤ **Persons requiring medical treatment**

Entitlement to residence for medical treatment: Foreigners normally resident in France must automatically be entitled to a "private and family life" residence permit where their level of health requires treatment that, if withheld, would have exceptionally serious consequences and where they are unable to access treatment in their country of origin. The granting of residence for treatment is a two-stage process: the first is a medical stage, during which the chief medical officer for the Prefecture of Police for Paris (a regional health service (MARS) doctor) issues a non-binding opinion on the state of health of the foreigner and on the possibility of receiving treatment in the country of origin, and the second stage is administrative, during which the prefecture rules on entitlement to residence. However, the Defender has found that there is a confirmed tendency for prefectures to get involved in the medical stage of the procedure, making every effort, through various strategies, to identify the pathology of the person concerned, and even conducting administrative counter-investigations. In transferring to doctors of the French Immigration and Integration Office (OFII), the competence previously assigned to regional health service (MARS) doctors, the law of 7 March 2016 has upheld this tendency to give priority to considerations involving the control of immigration over those involving healthcare protection (*Opinions Nos. 15-17; 15-20* and *16-02*, previously cited). This has repercussions not only on the administrative stage of the procedure, with an increase in the number of refusals of residence issued despite a favourable opinion by the MARS doctor, but also on the medical stage, with unfavourable medical opinions issued despite instructions by the Health Ministry, namely regarding persons with HIV. Finally, foreigners requiring medical treatment encounter numerous difficulties at prefectures: reception is not suitable for hospitalised patients and patient confidentiality; refusal to register applications presented by foreigners who have resided in France for less than 12 months whereas they are entitled to issuance of a provisional residence permit (APS); the demanding of proofs not stipulated by law or of an excessive number of proofs to verify residence in France for more than 12 months, etc. The Defender recommends: that agreements be concluded between prefectures and hospitals and clinics to facilitate access to residence of hospitalised patients; that prefects remind staff that it is unlawful to refuse to register an application submitted by foreigners who have been resident in France for less than 12 months and envisage, where necessary, the use of disciplinary sanctions against staff members who do not comply with these instructions; publication of the

list of documents that may be requested for a residence permit for medical treatment; that prefects not be allowed to base their refusals on considerations falling under the competence of doctors (seriousness of the pathology, availability of treatment in the country of origin); that the Health Ministry reiterate its instructions concerning persons with HIV, particularly as regards OFII doctors tasked with carrying out medical assessments.

Access to a residence card: Having been petitioned concerning the verbal refusal to grant residence cards to foreigners lawfully residing in France for more than five years on the ground that, since they were granted residence on medical grounds, they are not supposed to reside permanently in France, the Defender submitted observations to the administrative court ([MLD-2012-77](#) and [MLD-2014-100](#)), taking the view that such refusals are unlawful and discriminatory. Since the judge struck down the refusals in each case, the Defender asks that the terms of these rulings should be pointed out to all prefectural departments responsible for the residence of foreigners.

Residence of the foreign parents of children requiring medical treatment: Although the law of 7 March 2016 improved their status by stipulating that a temporary residence permit (APS) with authorisation to work may be issued to both parents (no longer just one parent) their situation nonetheless remains insecure. Indeed, due to the insecure nature of the right to residence that it confers (six months maximum), possession of an APS can pose an obstacle to access by its holder to employment, housing and even social services, even where the best interests of a child requiring medical treatment ought to dictate that access would be facilitated. On the basis of this analysis, the Defender submitted observations to the Paris Administrative Court of Appeal (CAA) which struck down a decision to refuse a residence card to the parent of a child requiring medical treatment who had been granted a temporary residence permit (APS) for more than 3 years ([MLD-2015-220](#)). Backed by robust case law, the Defender wishes to reiterate its recommendations which seek to ensure that the law is changed in order to provide for the issuance of a “private and family life” card to a foreign parent of a child requiring medical treatment where it is found that, following the first renewal of the temporary permit (APS), the health status of the child requires long-term medical treatment in France ([Opinion No. 15-20](#) and [16-02](#) previously cited).

➤ **Victims of marital violence**

Where they have been the victim of marital violence after their arrival in France but prior to issuance of their first residence permit, the spouses of French nationals or persons eligible for family reunification must be granted a residence permit automatically. However, this right can be obstructed by unlawful practices, such as refusal to register applications, or a demand that OFII charge be paid even where an applicant is exempt. By contrast, the stipulations applicable to foreigners who have been victims of marital violence are less favourable, being subject to the discretionary assessment of prefects. The documents required in order to determine that violence has taken place vary considerably from one prefecture to another, some of which even demand that a protection order be submitted, which contravenes the instructions of the Ministry. The Defender also recommends that the law be changed to provide for the automatic renewal of the residence permit of foreign victims of marital violence and that instructions be issued to guide prefects in determining whether violence is taking place. Moreover, it recommends that the law be changed to provide for renewal of the residence permit of foreigners whose protection orders have expired so that they can effectively rebuild their lives.

➤ **Victims of trafficking**

The Defender takes the view that the mechanism currently in place to encourage foreign victims of trafficking to report or testify against the perpetrators of offences does not provide sufficient protection in that it fails to guarantee the right of residence of victims. It also wishes to reiterate its recommendation that the law be changed to stipulate that the prefect shall be

under an obligation, rather than merely having the option of issuing a “private and family life” residence permit to foreigners that apply for one (set out in its opinion [Exiles and Fundamental Rights: the Situation in the Territory of Calais](#)).

➤ **Detainees**

Because they are incarcerated, detainees encounter difficulties in accessing prefectural counters, so much so they very often leave prison without the right of residence even though in some cases they were in possession of an automatically renewable residence permit. To resolve these difficulties, the Interior and Justice Ministers have issued a Circular to encourage the conclusion of agreements between prefectures and prison establishments. However the Circular has not had the effect that had been hoped for. The Defender also recommends that measures be taken, at the regulatory level if necessary, to ensure that the recommended agreements are effectively and swiftly concluded. These agreements will specifically need to set up prefectural liaisons within prison establishments.

➤ **Migrant workers**

The rights of workers with and without work permits: Although in theory, foreigners have to provide a work permit to be able to work in France, they are in any event protected by employment law, due to their status as a worker: although the Labour Code makes specific provisions for compensation for dismissal due to not having a work permit, the Court of Cassation has developed case law that is protective of foreigners encountering difficulties in renewing their permits, encouraging employers to be flexible in such cases. However, these rights are little known about, not only by employers but also by labour tribunal members, which can lead to wrongful dismissals or discriminatory refusals of employment. The Defender also calls for action targeted towards employers to promote the rights of foreigners and for specific training modules to be created for labour tribunal members.

Vulnerability of workers stripped of their right of residence: Because of their unlawful situation, these workers face heightened exposure to exploitation and therefore to unacceptable violations of the rights granted them under the Labour Code, and also, in particular, of intangible rights such as the right not to be exposed to forced labour or trafficking. Accordingly, the Defender recommends that reflection be engaged in concerning how the offence of trafficking is constituted, so that employers can be more effectively sanctioned for subjecting workers without the right of residence or a work permit to undignified working conditions. To enable such workers to exercise their rights more effectively, it furthermore recommends broadening of the concept of unlawful questioning, where it occurs before a court that a foreigner has petitioned to exercise his or her rights, especially where he/she has been reported by the person with whom he or she is engaged in legal action (spouse or employer).

Insecure nature of “salaried worker” and “temporary worker” cards: The Defender has identified a tendency at the legislative level to consolidate the right of residence of certain highly-qualified workers whilst making the status of foreigners authorised to reside in France on the basis of “salaried worker” and “temporary worker” cards more insecure (*Opinions Nos. [15-20](#) and [16-02](#) previously cited*). The right of residence of such foreigners is particularly insecure, being dependent upon the uncertain renewal of their work permit. The Defender also recommends that regulatory stipulations within the Labour Code be changed to ensure that renewal of this permit may no longer be jeopardised due to faults committed by an employer. Furthermore, it recommends leniency in the examination of applications submitted to take up a position that is outside the geographical area authorised by the first work permit where a foreigner involuntarily loses the job for which the first permit was issued. Moreover, in a context in which, contrary to recommendations made by the Defender, the legislator has decided to restrict access to the “salaried worker” card to holders of a permanent contract of employment (CDI), the Defender recommends that a number of regulatory stipulations within

the Labour Code be changed to consolidate the rights of holders of a “temporary worker” card, who in a number of respects currently enjoy fewer rights (area for which work permit is valid, registration with the Employment Office, right to unemployment benefits), than those conferred by the “salaried worker” card. Finally, the Defender recommends that the following be added to the list of grounds for dismissal or for termination of a subsidised contract exempting the employer from repayment of subsidies received: the loss of a work permit, failure to take into account this ground that in fact exposes the holders of temporary residence cards to discriminatory refusals of employment and restricts their chances of finding work again.

Residence and non-discrimination

Although on the face of it, the right not to be discriminated against appears difficult to exercise as regards the right of residence, the Defender of Rights, and prior to that its predecessor the HALDE, have found that in this area, discrimination on the basis of criteria other than nationality exists. Accordingly, they have set out their views, through recommendations or observations made before the courts, concerning the discriminatory nature of refusing family reunification or refusing residence cards to persons in receipt of Disabled Adult’s Allowance (AAH) on the basis that their income is insufficient (see [MLD-2013-145](#) and [MLD-2014-168](#) for family reunification and [MLD-2012-77](#), [MLD-2014-100](#), [MLD-2014-164](#) for the residence card). Taking this stand has not been in vain since the law now stipulates that any foreigner falling under the CESEDA Code and in receipt of AAH – regardless of his or her degree of disability – shall be exempted from the means-testing imposed in order to exercise the right to family reunification. On the other hand, access to the residence card remains closed to certain persons with a disability. The Defender also wishes to reiterate its recommendation that all recipients of AAH be exempted from means-testing in order to access the residence card, whatever their degree of disability.

Moreover, within the context of complex right with multiple sources the Defender has found that discrimination on the basis of nationality was identifiable in the field of right of residence owing to differences in treatment created between foreigners. Accordingly, it set out recommendations to end reverse discrimination experienced by the spouses of French nationals, who, in a number of respects, found themselves in a less favourable situation than the spouses of EU nationals living in France ([MLD-2014-071](#), 9 April 2014). Moreover, since the Defender has also found that certain favourable provisions of the CESEDA Code, such as those that exempt persons in receipt of Disabled Adult’s Allowance from means-testing that is in place for access to family reunification or a residence card, or those that protect the residence of the victims of marital violence, are without effect for foreigners whose right of residence is exclusively governed by bilateral agreements, it asks that prefects be reminded that the existence of such agreements never means that they cannot exercise their exceptional power to grant residence, and that these agreements must be waived where their application would have the effect of breaching French public order or of violating fundamental rights protected by the ECHR and the CRC.

III. Expulsion of foreigners

Although falling under the discretionary power of the State in the area of controlling the entry and residence of foreigners within its territory, illegal immigration may only be sanctioned in a State of Law, both procedurally and on the merits, in compliance with the fundamental rights of foreigners.

A. Expulsion measures with questionable grounds

The ability to order measures with a view to expelling foreigners from France where they are not authorised (or are no longer authorised) to reside in the country, is legally circumscribed on a number of levels: domestic, EU and international. The Defender finds that these levels are not sufficiently complied with and sets out recommendations in order to:

➤ **Increase the effectiveness of protections against expulsion afforded by the law**

The law affords special protections to foreigners for whom an expulsion measure would infringe especially upon certain fundamental rights such as the right to the respect of one's private and family life, of the prohibition of inhuman or degrading treatment, of the best interests of the child. Certain of these protections, although formally drafted in absolute terms, continue in reality to be subject to the assessment of the prefect. This is the case for those protections guaranteed to the spouses of French nationals or to foreigners requiring medical treatment. Other protections, even though they are fully binding on an administrative authority, are circumvented through the implementation of expedited procedures. This is the case for the absolute protection against expulsion afforded to unaccompanied minors.

Unaccompanied minors: Although the law does not prohibit the expulsion of minors at the same time as parents, they do however exclude making them the object of an expulsion order. However, the Defender is frequently petitioned concerning the situations of young persons who are placed in detention following hasty evaluations as to their minor status, and has had occasion, with mixed results, to intervene before prefects to ensure that evaluations made comply with the recommendations of the Ministry of Justice or to submit observations to courts petitioned concerning the lawfulness of expulsion measures ([MDE-2013-66](#) and [MDE-2015-157](#)). It also recommends that law enforcement agencies who encounter a young foreigner who states that he/she is a minor verify with the Department Council that the status of that young person is not already known, and where this is not the case, that they orient the young person towards the services responsible for the evaluation of unaccompanied minors. Furthermore, it calls upon prefects to specify, in decisions they take concerning the expulsion of young persons whose minor status is contested, that the civil status documents presented have in fact been taken into account. Finally, it wishes to reiterate its recommendations seeking to ensure that a complete evaluation of the circumstances of unaccompanied minors is systematically carried out by social and educational services prior to any summons, hearing or presentation to the border police ([MDE-2012-179](#)).

The case of unaccompanied minors in Mayotte: On a number of occasions, the Defender has submitted observations to courts petitioned concerning a practice by the Mayotte authorities consisting in establishing an artificial link between the minor and an adult who entered the territory by the same means, to be able to carry out the expulsion of a minor who entered the territory unlawfully, (for example: [MDE-MSP-2015-02](#)). This practice, which results in the placement in detention and expulsion of minors who are sometimes very young and who can prove family ties in Mayotte, violates a number of stipulations of the ECHR and also fails to respect the best interests of the child. In a recent judgement by the *Conseil d'Etat*, the interim relief judge endorsed the observations of the Defender of Rights and stipulated the procedural obligations that must be followed in the expulsion of a minor, ordering the government authorities to examine the application for family reunion submitted on behalf of the minor who had been expelled in violation of the aforesaid procedural obligations. Concerning this favourable case law, the need to ensure the effectiveness of court oversight of expulsion measures taken by the Mayotte authorities is even more pressing (see below).

Foreigners posing or having posed a threat to public order: Certain expulsion measures, such as deportation, are intended not so much to punish the unlawful residence of a foreigner as to prevent the risk of a threat to public order. They are liable to be ordered against foreigners with strong ties to France and who have been unlawfully resident for a number of years and may violate the right to privacy and family life in a particularly marked

way. Furthermore, the legislature has not only made provision, in the case of certain foreigners, for protections on the merits, but also procedural guarantees designed to strike the right balance between the public order considerations and fundamental rights at stake. Among these guarantees is the obligation to conduct a five-yearly re-examination of the appropriateness of an expulsion measure. The Defender of Rights applauds the existence of such a guarantee, although it takes the view that in order for it to be fully effective, there must be provision for notification, abroad, in writing, of the decision to conduct a re-examination, with observations submitted in good time, and for consultation of the Departmental Commission on Expulsion. Furthermore, it recommends that re-examinations be conducted every three years, and not every five years.

➤ **Reconciling the expulsion of the parents of minor children with the right to respect for private and family life and for the best interest of the child**

Although the parents of minor children are not afforded any express protection, their expulsion may nonetheless pose difficulties in terms of respect for the right to private and family life or the best interests of the child. Since the administrative judge is sometimes led to strike down expulsions that contravene these fundamental rights, it is important that the authorities specifically take into account, where they are contemplating expulsion, the situation of the foreigner who may be the parent of a minor child. In this regard, the Defender has had cause to criticise the summary nature of certain expulsions carried out by the Mayotte authorities without having carried out these prior checks ([MDS-2013-235](#)). In any event, it recommends that the criteria to be taken into account for the exceptional granting of residence envisaged in the case of foreign parents of a minor child be specified in accordance with the established case law (schooling, state of health of the child, impossibility of reconstituting the family unit abroad, etc.).

➤ **Limit rulings prohibiting the return to France (IRTF) to the framework set down by EU law**

The IRTF was established by the Besson Law in 2011, and may be handed down along with an obligation to leave France (OQTF) to prohibit the expelled foreigner from returning to France for the period of time set by the measure. In providing for making this prohibition automatic in certain cases (e.g. refusal of voluntary deadline for departure or evasion of a prior expulsion measure), the law of 7 March 2016 appears to formally transpose EU law. However, it appears that it does not retain all of the guarantees, ultimately authorising far broader recourse to an IRTF than is provided for by EU law. Also, the Defender recommends that the concept of a “flight risk”, which allows the authorities to refuse to grant a deadline for voluntary departure, should be reviewed in line with EU law; that the concept of “humanitarian circumstances” in accordance with which the authorities may decide not to issue an IRTF, should be specified; that foreigners afforded legal safeguards against expulsion should be authorised to request abrogation of the IRTF to which they are subject, without the prior need to request house arrest. Moreover, in view of the fact that the possibility of issuing an OQTF against an EU national whose residence is deemed to constitute an “abuse of law” or a threat to public order, introduced by the Besson Law, overreaches what is permitted by EU law, the Defender wishes to reiterate its particular opposition to the option, introduced by the Law of 7 March 2016, of combining a OQTF with an IRTF. Furthermore, it calls for the concepts of “abuse of law” and “threat to public order” to be specified in a manner that is compliant with EU law (Opinions Nos. [15-17](#), [15-20](#) and [16-02](#), previously cited).

B. Expulsion measures executed with a disregard for certain fundamental rights

The execution of expulsion measures, even where there are legitimate grounds, must still be reconciled with respect for the fundamental rights at stake. In view of the fact that at this

stage, the objectives of efficacy too often prevail over the consideration of these rights, the Defender wishes to set out the following recommendations:

➤ **Ensure that arrests do not undermine the exercising of other rights**

Respect for the best interests of the child: Where the expulsion of parents accompanied by their minor children is envisaged, the best interests of those children must be a primary consideration ([MDS-2014-019](#)). In this regard, the Defender recommends that instructions issued by the Interior Minister be supplemented to make explicit the need to grant reasonable time for the preparation of one's affairs, where a family is being arrested, and to prohibit the execution of expulsion orders during the school year where they involve children being removed from school who have been in school for several months.

The right of victims to make a police report: The Defender has been made aware of cases of persons residing unlawfully in France being arrested when they had just made a police report ([MDS-2010-66](#)), and wishes to reiterate its recommendation that the extent of the case law built up by the ECHR and the Court of Cassation in the area of unlawful arrest be pointed out to law enforcement agencies and calls for provisions be made to ensure that at the time a police report is made, individuals are informed of the protective stipulations of the CESEDA Code that may apply to them.

➤ **Strengthen the rights of individuals held in administrative detention centres (CRA)**

Although it developed initially at the margins of the law, the practice of administrative detention now has a solid legal foundation in both domestic and EU law. Despite this legal framework, the Defender is regularly petitioned concerning detentions that contravene the following fundamental rights:

The right to security: Petitioned concerning the holding in detention of a foreigner despite a release order having been issued by a freedom and detention judge, the Defender concluded that this constituted an arbitrary detention of liberty and pointed out that the only legitimate avenue for challenging a court ruling was through an appeal ([MDS-2013-218](#)).

The best interest of the child: Despite instructions issued by the Interior Minister stipulating that families should only be detained as a last resort, the number of children placed in detention increases significantly every year. The Defender takes the view that the administrative detention of children, whether or not they are accompanied, contravenes the best interests of the child and articles 3, 5 and 8 of the ECHR, and wishes to reiterate its recommendation that the detention of minors, whether or not they are accompanied, be prohibited by law expressly and without exception (*see, in particular, Opinion No. 16-02, previously cited*). Furthermore it recommends better framing of the taking out from administrative detention centres (CRA) of young persons ultimately recognised as being minors: that they receive information and be oriented towards the competent services; that "information of concern" be passed on to the Departmental Council; that the Public Prosecutor be informed of the grounds for taking the minor out of detention; and that the minor be notified of the decision and that the grounds for his or her release be stated.

Right to health protection:

In detention centres: Although protected by law, the right to a doctor is poorly upheld in detention, in that only those foreigners with a manifest medical condition are informed of this right and also in terms of the quality of consultations. Furthermore, in the absence of any binding legislation in this regard, significant disparities exist between mechanisms that provide for access to a doctor in the various CRA. The Defender also recommends a binding mechanism setting out the terms governing exercising of the right to a doctor of detained persons.

Moreover, the Defender finds that, here too due to the absence of legislation, doctors have developed divergent practices as regards evaluating the compatibility of a person's level of health with detention. The Defender also recommends that there be binding legislation expressly stipulating that CRA doctors shall be competent to issue certificates of non-compatibility, excluding regional health service doctors - and in the future Immigration and Integration Office (OFII) doctors, who shall be competent to evaluate the compatibility of a persons' level of health with expulsion.

Provisions must also be made to compel the administrative and legal authorities requiring an opinion to appoint a public health doctor or expert, with CRA doctors approached in this regard being called upon to decline such duties.

Having also been alerted to the fact that, given that the law is silent in this area, regulations governing hospitalisation under constraint and detention can combined, with a risk of the person concerned being deprived of certain guarantees, particularly his or her right of appeal, the Defender recommends clarification of the legal regime applicable to persons hospitalised whilst in detention: in the case of being taken out for a medical consultation, the foreigner ought to remain under the responsibility of the CRA doctor and subject to the regulations governing detention, and the law must imperatively in this case continue to provide for the suspensive effect of such removals on deadlines for appeal; in the case of more long-term hospitalisation under restraint, the detention measure must be terminated.

Finally, the Defender recommends that measures be set in place to improve the level of information provided to persons released on medical grounds: being notified of a written decision setting out the grounds for release; provision of the complete patient record, including where applicable, a certificate of incompatibility with detention; information provided on the procedure for applying for residence for medical treatment.

Right of asylum: Although the asylum law reform adopted in July 2015 led to certain improvements in the regime governing asylum in detention, this would benefit from being further consolidated by: a reformulation of the law that is more in alignment with administrative case law as regards factors likely to justify the holding in detention of a foreigner seeking asylum; extension of the deadline by which an asylum application may be submitted in detention; legally enshrine the automatically suspensive nature of an appeal lodged with the CNDA ([Opinion No. 14-10](#), previously cited).

The right of victims to just satisfaction for harm occasioned: The Defender has been petitioned on a number of occasions concerning persons who are victims of theft whilst in detention. Although such situations could engage the liability of the State, victims see their right to just satisfaction undermined, either by being expelled before properly conducted inquiries in response to their report have taken place, or simply because they are not informed of their rights. The Defender also recommends that the law be changed to include, among those rights to be made known to foreigners prior to entering a CRA, the right to make a police report and the right, where applicable, to invoke the liability of the authorities.

Proposed plan to give priority to house arrest (AAR) over detention

In order to bring domestic law into compliance with EU requirements, the law of 7 March 2016 sought to establish the principle of use of AAR in the case of persons who are the object of an expulsion order, and for detention only to be used as a secondary alternative, where a foreigner fails to guarantee effective representation that would prevent the risk of flight. However, the transposition of the requirements set out under EU law is unsatisfactory in a number of respects: firstly because the legislature has ascribed a meaning to the concept of "flight risk" that is more flexible than the meaning conferred by EU law, such that ultimately there is nothing exceptional about the detention measure and secondly because the stipulations adopted authorise the transfer *ad infinitum* from detention to house arrest

and vice versa such that the two measures become combinable rather than alternatives as is envisaged by EU law. Also, the Defender wishes to reiterate its recommendations in favour of: eradicating the legal presumption of a flight risk, which may only be determined after an adversarial examination of the individual situation and behaviour of the person concerned; ruling out placement in detention of a foreigner whose non-compliance with house arrest stipulations is exceptional or involuntary; ruling out any possibility of a foreigner leaving detention being placed under house arrest. Moreover, the Defender wishes once more to express its concerns concerning the lack of any framework governing house arrest and recommends once again that following be enshrined in law: the need to take into account the vulnerability of persons placed under house arrest; the prohibit compelling parents to come to be monitored accompanied by their children; prohibit the execution of an expulsion measure when presenting for monitoring at a police station. Finally the Defender calls once more for prevention of the possibility of being arrested at home and of recourse to the use of force by the police provided for by the law of 7 March 2016 against foreigners who obstruct the execution of their expulsion, or who have refused to present themselves voluntarily to the consular authorities (*Opinions Nos. [15-20](#) and [16-02](#), previously cited*)

➤ **Prevent risks of violations of physical and psychic integrity during implementation of deportation by air**

The time when a foreigner is returned by air is a particularly tense time during which it appears difficult to strike the right balance between the use of force or restraint methods on one hand and respect for the dignity and physical and psychic integrity of the person expelled, on the other hand. A dedicated unit for international escorting, the UNESI (*Unité nationale d'escorte, de soutien et d'intervention*) (National Escorting, Support and Intervention Unit) has been created to address the specific characteristics of this expulsion process. A directive dated 17 June 2003 sets out its roles and the restraint methods that it is permitted to use. However, other non-specialist officers are also likely to play a role in expulsions. The directive dated 17 June 2003 would benefit from reform on a number of points: specification of the stipulations applicable to escorting missions by plane carried out by non-specialist units, which must, in any event, be placed under the supervision of a ranked escorting officer, in a manner that complies with the requirements set out by the Criminal Procedural Code and the Domestic Security Code, since the criteria in place authorising the use of restraint methods, and the concept of a “recalcitrant foreigner” currently used by the directive fail to meet these requirements ([MDS-2015-294](#)). Moreover, to allow government watchdogs to carry out their mission, the Defender calls for video recordings from administrative detention centres and premises to be kept for six months, as it has also recommended for the prison sector ([MDS-2014-118](#)).

➤ **Guaranteeing compliance with the required formal procedures for being sent to the destination country**

A foreigner made the object of an expulsion order may be sent to the country of which he or she is a national or sent to any other country that has issued him or her with a currently valid passport or travel document. Where the foreigner is not in possession of such documents, he or she may only be sent to the return country if the consular authorities of that country have issued a consular *laissez-passer* document unless a readmission agreement provides otherwise. However, on a number of occasions, the Defender has been petitioned concerning practices tending to circumvent these requirements. Firstly, it has observed the existence of a common practice in Guyana consisting in sending to neighbouring countries such as Suriname or Brazil, foreigners who are not legally admissible to those countries ([MSP-2015-073](#)). It recommends that these unlawful deportations be stopped. Secondly, the Defender has become aware of a practice consisting in expelling foreigners not having a valid passport or travel documents not by means of consular *laissez-passer* documents but

rather by means of documents unilaterally issued by the French authorities, which in the cases in question were “European *laissez-passer* documents” and so-called “prefectural *laissez-passer* documents”. The legal existence of such documents is, if not tenuous for the former, simply fictitious in the case of the latter. The Defender also recommends specifying the scenarios under which usage may be made of an EU *laissez-passer* document (this usage should be limited to cases in which it is expressly provided for by a readmission agreement or bilateral treaty); specify the issuance procedures for prefectural *laissez-passer* documents used by prefects in Guadeloupe, Saint-Barthélemy and Saint-Martin to send foreigners to the Abymes CRA in Guadeloupe; prohibit use of such a document for the purpose of deporting a foreigner to a neighbouring country such as Haiti, as has previously been observed.

Part Two

Fundamental rights of foreigners present in France: equal treatment with nationals put sorely to the test

Outside the sovereign domain of entry and residence, foreigners in theory enjoy equal treatment with nationals as regards access to rights, since nationality is a prohibited criterion for discrimination (other criteria, such as lawfulness of residence may nonetheless be accepted). However, the objectives of managing immigration and preventing illegal immigration and also the ubiquity of political discourse on the “immigration issue” result in this equal treatment being undermined, both by overtly unlawful practices and by the inventive wording of legislation which, by creating criteria other than the (prohibited) criterion of nationality, nonetheless end up curtailing access to rights by foreigners. The Defender also wishes to set out recommendations to boost the efficacy of the following rights for foreigners present in France:

I. Civil and political rights

A. Freedom of movement

- ***Sanction unlawful practices that restrict the freedom of movement of certain foreigners to keep them away from the place where they live their lives***

The Defender has criticised these unlawful restrictions that have been developed in the case of the Calais migrants ([MDS-2011-113](#); [Exiles and fundamental rights](#)), and also of Romanian and Bulgarian nationals, supposedly Roma, following the destruction of the camps in which they were living: control of exits from a sports hall in which they were being accommodated, insistent calls to leave voluntarily, intimidation by police ([MDS-2013-229](#) and [MDS-2015-288](#)). More recently, the Defender has become aware of an internal memo distributed within a Parisian police station asking officers to locate “Roma” families in the street and systematically drive them out. Taking the view that the fear of seeing illegal settlements appearing must not be allowed to prevail over the protection of vulnerable persons, the Defender wishes to point out that the illegal restriction of freedom of movement of population groups of Roma origin must be prohibited, even when only temporary, pending a rehousing solution or the implementation of humanitarian return.

- ***Step up the legal framework for ordinary law control procedures to limit the risk of discriminatory controls***

Whereas the CESEDA Code provides for special procedures to control the lawfulness of residence of foreigners (see below), the Defender finds that all too frequently, it is the ordinary law procedures set down in the Criminal Procedural Code that are misused in order to conduct a targeted and potentially discriminatory control of foreigners present in France.

Controls based on the commission or attempted commission of an offence: The Defender finds that abusive, and in fact discriminatory use is being made of these controls in places in which the presence of migrants is notorious, to sanction minor, fine-only offences, which, moreover, appear never to be listed (spitting or dropping litter on a public road, crossing the road outside the zebra-crossing, etc.). See, for example: [MDS-2011-113](#) concerning controls exercised on migrants living in Calais.

Stop and search operations ordered by the Public Prosecutor: These allow stop and search operations to be carried out, in a given location and for a limited time, in order to investigate and prosecute previously committed offences. Offences that could be investigated in this context include, in addition to those linked with procurement and drug trafficking, those connected with the entry and residence of foreigners. As has been stressed

by the CNDS and then by the Defender, the manner in which persons stopped and searched on this basis are selected lacks any legislative framework (see, for example: CNDS, [Report 2010](#)). In the so-called “stop-and-search profiling” (“*contrôles au faciès*”) case, for which the Defender submitted observations ([MSP-MDS-MLD 2015-021](#)) and which led to a conviction by the Paris Court of Appeal, eight of the thirteen plaintiffs had been stopped and searched using this procedure. To guarantee the effectiveness of court oversight that may be exercised over such potentially discriminatory stop and search operations, the Defender wishes to reiterate its recommendations seeking to ensure that stop and search operations are traceable (fine notices, receipts, recordings) and that the burden of proof required in order to challenge them be shifted. Furthermore, the Defender recommends that reflection be undertaken on whether it is appropriate to continue to include, among offences liable to be investigated using these stop and search operations, those relating to the entry and residence of foreigners.

- **Strike a better balance between on one hand, the objective of preventing unlawful immigration through procedures specifically targeting foreigners and, on the other hand, respect for their fundamental rights**

Other procedures, specifically targeting unlawful immigration, raise difficulties as regards freedom of movement and the right to security of the person:

Border stop and search operations: These controls, that permit the conducting, in zones designated as border zones, for a limited time, of random stop and search operations, suffer from the same shortfalls as stop and search operations ordered by the Public Prosecutor: their lack of any legal framework leads to controls being carried out on the basis of potentially discriminatory subjective criteria. Here, too, the Defender recommends ensuring better traceability for these stop and search operations and providing for a change in the burden of proof in the event of a challenge. Furthermore, the Defender has become aware of cross-border stop and search operations being carried out outside of border zones particularly in Mayotte ([MDS-2013-235](#)). Quite apart from the fact that these stop and search operations are illegal, it is astonishing to observe that the law authorises cross-border stop and search operations in territories that are located outside of the Schengen Area, since these were established specifically in order to replace State stop and search operations at the border when these were eradicated by the Schengen Agreement. The Defender also recommends that cross-border stop and search operations in territories located outside the Schengen Area be eradicated.

Stop and search operations and verification of validity of residence: These controls are provided for by the CESEDA Code, and in theory can only target persons displaying external and objective signs of being foreign, as specified by case law: foreign vehicle licence plates, carrying of a book or writing in a foreign language, participation in a demonstration for which banners show that it is composed of foreigners, etc. However, the Defender is concerned by recent case law providing for the possibility of conducting these controls on the basis of information provided by third parties (statements by ferry personnel in the case in question).

Detention in order to verify right of residence: Created to follow on from a ruling by the EU Court of Justice prohibiting the remanding in custody of a foreigner solely on the ground of his or her unlawful residence, this measure allows a foreigner to be detained in a police or gendarmerie facility for a maximum period of 16 hours in order to carry out verification of the right of residence. In [opinion No 12-03 dated 15 November 2012](#), Defender expressed its regret at the creation of this form of custody by another name that derogates from ordinary law, when an ordinary law procedure already exists, namely verification of identity, which may be used to verify the right of residence. The maximum period of 16 hours set for this *ad hoc* confinement measure is, moreover, excessive in light of EUCJ case law and the stipulations of article 5§1 (f) of the ECHR. The Defender also wishes to reiterate its recommendations mechanisms be sought to check within a shorter time frame whether

foreigners are lawfully resident (night phone lines at prefectures, for example) and therefore to set a maximum detention time that is less of an infringement upon individual liberty.

The increasing criminalisation of foreigners through the development of exceptional criminal law, and its corollary, the crime of solidarity

Development of exceptional criminal law: in its opinion No. [15-20](#), the Defender expressed its views concerning two amendments seeking to create or consolidate sanctions liable to specifically affect foreigners. The 1951 Geneva Convention requires States not to impose criminal sanctions upon refugees for unlawful entry or residence, where, having arrived directly from a country in which their life or liberty was under threat, they enter or are found in the territory of the State without authorisation. The Defender recommends abrogation of the new crime created by the law of 7 March 2016 (use of the identity or travel document of a third party to enter or remain within the territory of the Schengen Area) and the retraction of the stipulations of the Bill on the Blue Economy seeking to increase criminal sanctions that can be handed down to the perpetrators of an intrusion or attempted intrusion into a restricted access port area.

The resurgence of sanctions against the crime of solidarity: Although the CESEDA Code sanctions unlawful entry, movement and residence, in 2012 the legislature nonetheless created criminal immunity for individuals led to carry out such acts without direct or indirect payment, with the intention of finding decent living conditions abroad or preserving their dignity or physical integrity. In light of recent cases concerning the sanctioning of crimes of solidarity, the Defender wishes to reaffirm its reluctance in principle as regards any sentencing of the disinterested assistance of foreigners and to draw attention to the potential violations of fundamental rights that could in particular arise from such sentences, where these target individuals who have come to the aid of foreigners, living in notoriously undignified conditions, and even minors. Furthermore, it wishes to reiterate its recommendation that the French law crime of assisting unlawful entry, movement and residence be based on the EU law crime which includes the concept of intentionality and refers expressly to “financial gain”.

B. Access to justice

➤ *Guaranteeing access to a judge*

The Defender has been petitioned concerning recurrent difficulties encountered by foreigners in accessing legal aid (LA), particularly as regards means-testing by legal aid offices (LAO). Indeed, some offices require documents that are not mentioned by law. Furthermore, particular difficulty arises from the obligation, set down by the legal aid decree of 1991, to provide a certificate of taxation or tax exemption. Certain applicants, who are tax exempt in their countries of origin and have only been in France for a few months, are in fact unable to produce such a document. All too frequently, the financial hardship of these individuals arises from the very terms of the decisions that they wish to contest (expulsion from land on which they had been living in temporary shelters; have been issued with an obligation to leave French territory (OQTF) on the ground of a lack of resources). When questioned by the Defender concerning these practices, the Ministry of Justice stated that in an order dated 19 February 2015, it had ordered LAOs to stop asking for documents that cannot reasonably be provided due to the declared or manifest situation of the applicant, however the text makes no provision for derogation for applicants who find it impossible to provide a taxation certificate. Consequently, the Defender recommends that regulatory provisions be made to: make presentation of a taxation certificate optional, or, at least, waive such an obligation in the case of certain individuals. Furthermore, it recommends that an enabling Circular be issued to reiterate that the list of documents constituting proof set

out in the 1991 decree is an exhaustive list, and set out guidance for the assessment of resources.

➤ ***Guarantee the right of effective appeal in the Overseas Departments and Territories***

In several Overseas Territories (Mayotte, Guyana, Saint-Martin, Guadeloupe and Saint-Barthélemy) appealing an expulsion measure, in what is an exception from ordinary law provisions, fails to suspend expulsion. On a number of occasions, the Defender has been of the opinion that this derogatory law failed to comply with EU law requirements concerning effective appeal (for example: [MDE-MSP-2015-02](#)). In 2012, the ECHR endorsed this analysis when it convicted France for violating Article 13 of the Convention. In response to this judgement, the law of 7 March 2016 provides that, in territories falling under the derogatory regime, expulsion measures cannot be the object of automatic execution where summary proceedings for the protection of fundamental freedoms have been brought. In this regard, the Defender finds it regrettable that these provisions are only suspensive for summary proceedings themselves, since these proceedings only allow the judge to order provisional measures and not to strike down litigious decisions. A genuine difficulty exists in the Overseas Territories concerning this point due to the manner in which expulsion proceedings are conducted there (*Opinion No.* [15-17](#), [15-20](#) and [16-02](#) previously cited). Consequently, the Defender wishes to reiterate its recommendation that the rules applicable in the Overseas Territories be aligned with those of ordinary law OQTF administrative court actions.

An interpreter: guarantor of a foreigner's rights against the justice system

Beyond the criminal sphere, domestic legislation expressly protects the right to an interpreter of any foreigner made the object of a deprivation of liberty order, and he or she must imperatively be informed of this right when in a waiting zone, when placed in detention or when held in order to verify his or her right of residence. The Defender is currently dealing with petitions concerning situations in which the required interpreter was not a specialist in the language spoken by the foreigner deprived of liberty. The Defender is, furthermore, regularly petitioned concerning situations in which law enforcement agencies manifestly over-estimate the ability of the individual in expulsion proceedings to understand the French language ([MDS-2013-199](#) and [MDS-2010-137](#)). Furthermore, it calls for law enforcement agencies to be reminded that they are required to make every effort to ensure that a foreigner who has made a request for an interpreter for his or her language can indeed have an interpreter.

C. The right to marry

➤ ***Ensure that the prevention of sham marriages and marriages of convenience does not infringe upon the freedom to marry of foreigners***

Prevention of sham marriages and marriages of convenience leads to regular stepping up of *a priori* control procedures (postponement of marriage ceremonies; prior interview with both spouses), and appears to encourage the development of unlawful practices on the part of certain local councils. The Defender has also become aware of the demanding of documents that are not required by law, of intrusive and even discriminatory interviews, and even of refusals to execute rulings ordering the publication of bans. The Defender also recommends reminding mayors and civil register officers that any refusal to celebrate a marriage and any obstacles placed before a marriage merely on the ground that the residence of one of the

spouses is not valid is a violation of the freedom to marry that is protected by France's constitution and by conventions to which it is a signatory.

➤ ***Guarantee the right to marry of foreigners whose country of origin prohibits same-sex marriage***

Although the law extending marriage to same-sex couples overrides the law of the foreign spouse's country of origin where it prohibits same-sex marriage, a Circular dated 29 May 2013 stipulates that this exception to the rule concerning conflicts of jurisdiction shall not apply to the nationals of States that have concluded a convention with France expressly stipulating that the law of the spouses' country of origin shall apply. Morocco is one of these States. Having been petitioned concerning a Public Prosecutor's opposition to the celebration of a marriage between a French and a Moroccan national, the Defender decided to submit observations before the Court of Cassation. Drawing upon the public order clause contained in the French-Moroccan Convention, the Defender took the view that this clause ought to override the stipulations of the Convention mandating application of the national law of the spouses where the application of those stipulations would have the effect of violating a number of the principles constituting France's international public order ([MLD-2014-072](#)). In its judgement of 28 January 2015, the Court of Cassation endorsed these observations. The Defender takes the view that this decision must apply to all nationals of the country prohibiting same-sex marriage and bound by a convention with France, even where those conventions do not contain a public order clause. However, despite a number of letters having been sent to the Minister of Justice to determine what conclusions the Ministry intended to draw from the judgement by the Court of Cassation, the Defender finds that same-sex marriage remains out of reach for several nationalities. It also wishes to reiterate its recommendation that the Circular dated 29 May 2013 be modified to specify that same-sex marriage in France is open to all foreigners, regardless of their nationality.

II. Economic and social rights

A. The right to healthcare

➤ ***Putting an end to difficulties encountered by foreigners present unlawfully in the country due to the specific healthcare scheme available to them***

The general Social Security regime continues to exclude foreigners present unlawfully who fall under the separate medical system of State Medical Aid (AME). Their exclusion means in practice that unlawfully present foreigners are less entitled to having their healthcare costs met and gives rise to the development by funds of divergent and sometimes unlawful practices. Moreover, for healthcare professionals, it entails additional administrative and financial restrictions which have a tendency, ultimately, to obstruct access to treatment by unlawfully present foreigners. Accordingly, the Defender wishes to set out the following recommendations:

Processing of AME applications: Primary health insurance funds (CPAM) treat AME applications differently and sometimes impose excessively restrictive controls on conditions conferring entitlement and demand unjustified documents. Such practices hinder and even prevent access to rights by foreigners. The Defender also recommends that the obligation of swiftness be pointed out to the CPAM and that the list of documents that may be required in order to check eligibility conditions for AME should be specified.

Access to AME by EU nationals not possessing the right of residence: the Defender has observed that EU nationals are encountering specific difficulties in accessing AME: there have been instances where they have been required to meet the eligibility conditions for residence instead of the eligibility conditions for entitlement to AME, ([MSP-MLD-2013-130](#)), or where they are redirected to the European Health Insurance Card (CEAM) scheme even

though this is only intended to cover minor treatments that may be required during a temporary stay abroad. The Defender furthermore recommends that a reminder be issued concerning the rules applicable to admission to AME.

Healthcare provision for AME recipients: Keeping in place a healthcare mechanism specifically for unlawfully present foreigners results in healthcare professionals and establishments being overburdened administratively and also financially, linked to the fact that AME recipients do not possess a Carte Vitale ([Les refus de soins opposés aux bénéficiaires de la CMU-C, de l'ACS et de l'AME](#), [Refusal of medical treatment to recipients of CMU-C, ACS and AME], *Report by the Defender for the Prime Minister, March 2014*). Accordingly, the Defender wishes to reiterate its recommendation that the dual CMU/AME mechanisms (now PUMa/AME - see *below*) - be revisited in order to simplify CPAM treatment provision, and also the administrative tasks of healthcare professionals, and to facilitate access to GPs in private practice by AME recipients and is pleased to note the commitment of the Minister for Social Affairs and Health to increasing funding for the “financial hardship” general interest mission to establishments with a high rate of financial hardship. Furthermore, it recommends re-thinking eligibility criteria for payment of this funding, so that the establishments concerned are better targeted.

- **Ensure that PUMa reform does not undermine access by lawfully present foreigners to the Assurance Maladie health insurance fund**

Created by the recent reform of the *Assurance Maladie* system, Universal Sickness Prevention (PUMa), was intended to standardise the payment of healthcare costs, but still excludes unlawfully present foreigners. Moreover, the Defender is concerned about the potential consequences of this reform on access to *Assurance Maladie* of certain lawfully present foreigners:

Eradication of the concept of “retaining access to entitlement”: Prior to the reform, *Assurance Maladie* entitlement was retained for one year in the event of loss of one of the conditions for eligibility to entitlement, among which was the right of residence. However, in a context of insecure residence, the eradication of this mechanism exposes foreigners in possession of short-term residence permits to an increased risk of having their entitlement terminated. This risk could moreover be increased by the unlawful practices of certain prefectures that issue documents that do not confer the right of residence, rather than permit renewal confirmations. The Defender also asks that it be consulted on the drafting of regulations applying the reform to ensure that all measures are enacted to safeguard foreigners against the enhanced risk of termination of entitlement to which they may be exposed through the eradication of continued access to entitlement for one year.

Eradication of adult beneficiaries: Introduced by the PUMa reform, this has the effect of excluding persons who were previously directly covered from entitlement to *Assurance Maladie* for three months, namely the spouses and adult children of French nationals, refugees and EU nationals. The Defender also recommends exempting these individuals from the condition of prior residence of three months.

- **Preventing the risk of refusal of treatment to which foreigners are particularly exposed**

Discriminatory refusal of treatment on the basis of nationality: Having been petitioned concerning a foreigner with CMU-C cover being refused treatment due to not having a valid residence permit, the Defender took the view that such a refusal constituted discrimination based on nationality. The Defender wishes to reiterate its recommendation that all healthcare establishments, both private and public, be reminded that it is not for them to assume the role of the CPAM to check the right of residence of foreigners attending their facilities.

Refusal of treatment based on type of health cover: Such refusals continue to occur despite being prohibited by law (*for observations submitted before the medical practice board, see: MSP-2015-039*). Although a Circular dated 30 June 2008 has enabled quantitative and qualitative monitoring of instances of treatment being refused to individuals having CMU-C cover, no comparable mechanism exists for refusal to individuals having AME cover. However, the latter are particularly exposed to such refusals, due to the heavier administrative burden that treating them entails. The Defender also recommends the setting in place of quantitative and qualitative monitoring of refusal of treatment to individuals with AME cover and the organisation of awareness-raising campaigns for health professionals, particularly those practising independently, to make them aware of the issue of treatment being refused to AME beneficiaries. Furthermore, it calls upon hospital federations to exercise vigilance concerning the respect by their member establishments, of the law applicable to foreign nationals in the area of access to treatment.

Refusal of termination of pregnancy to foreign women with no resources and no practicable rights: Such refusals have primarily been made to persons unlawfully present but who cannot get AME cover since they have been resident in France for less than three months. However, such individuals do fall under the urgent and life-saving treatment mechanism (DSUV), under which termination of pregnancy is expressly listed. The Defender therefore recommends that all healthcare establishments be reminded of the scope of this mechanism. Secondly, in what is more problematic, individuals lawfully resident who do not have *Assurance Maladie* cover as they have resided in France for less than three months are also being refused terminations. Because they are lawfully resident, such individuals do not fall under DSUV. They are therefore asked to pay the costs of the procedure. The Defender will be examining these cases in depth before issuing a framework decision on these refusals. It already wishes to recommend that the law be modified to include, among individuals with entitlement to DSUV, foreigners without practicable rights, residing lawfully in France, and who intend to remain permanently in the country.

B. The right to housing and crisis accommodation

➤ Prevent the risk of discrimination based on nationality in the area of access to housing

Foreigners who are nationals of an EU third country are over-represented among individuals recognised as a priority under the enforceable right to housing procedure introduced in 2007. This situation attests to the greater difficulties that they face in accessing housing. They in fact appear to be a preferred target for discrimination. The Defender of Rights, and before it, the HALDE, have, furthermore, been petitioned on a number of occasions concerning situations constituting discrimination based directly on nationality or on origin and likely to have indirectly impacted foreigners: these have generally involved private or professional landlords who have selected rental candidates based on discriminatory criteria (*Halde: 2006-130; 2007-190; 2009-312*). Decree No. 2015-1437 of 5 November 2015 issued pursuant to the ALUR law sets out an exhaustive list of those documents that may be required of a rental candidate by a private landlord. The incidental effect of this decree could be to encourage private landlords to check the nationality and validity of residence of foreign rental candidates. Moreover, in providing that the proofs of identity to be provided must bear a signature, it could undermine access to housing for nationals of certain countries, namely Romanian nationals, whose identity cards do not bear the holder's signature.

➤ Reaffirm the unconditional nature of the right to crisis accommodation

Within the context of the restrictive administrative case law that has evolved namely concerning failed asylum-seekers, the Defender of Rights wishes to stress the unconditional nature of the right to crisis accommodation that is enshrined by law. The public authorities are required to make every effort to provide an adequate accommodation offer, and selection

of the individuals concerned may not, in any case, constitute the adjustment variable. Moreover, where they face situations of extreme insecurity, characterised by the presence of small children, elderly persons, or persons with a medical condition or with a disability, the public authorities are bound by an enhanced obligation of means. Accordingly, in two decisions, the Defender took the view that the refusal to grant crisis accommodation to families who had been unsuccessful in their asylum application, finding themselves in extremely insecure circumstances, was a violation of a number of international agreements, and specifically with respect for the best interests of the child ([MDE-MSP-MLD-2015-154](#) and [MDE-MSP-MLD-2015-156](#)).

➤ ***Guarantee the effectiveness of the right of asylum-seekers to access decent material reception conditions***

Under the terms of EU law, all asylum-seekers must have access to minimum decent reception conditions, including housing, food, clothing and a daily allowance. However, the Defender has, on a number of occasions, highlighted the difficulties encountered by asylum-seekers in accessing decent material reception conditions, namely in observations submitted before the ECHR ([MSP-2014-087](#) and [MLD-2015-221](#)). In pursuing the objective of bringing domestic law into compliance with EU requirements, the asylum reform that came into effect in July 2015, changed the modalities of access to material reception conditions in a number of respects, and even the content of those conditions. Although it is still too early to assess all of the repercussions of the reform, the Defender has nonetheless already become aware of difficulties concerning its implementation, namely the setting in place of an asylum-seeker's allowance (ADA) which on 1st November 2015 replaced the monthly subsistence allowance (AMS) and the temporary waiting allowance (ATA), which were previously paid to asylum-seekers depending on whether or not they were housed in reception centres for asylum-seekers (CADA).

Modalities of payment of ADA: In its [opinion No.14-10](#), the Defender called upon the regulatory authorities to take into account the requirements set down by EU law when calculating the amount of ADA. In this regard, the decree of 21 October 2015, which set down the scale and modalities of payment of the allowance, raises a number of difficulties: firstly because the stipulated increase provided for non-accommodated asylum-seekers fails to take into account the number of children making up the family; secondly because the amounts arrived at constitute, for many asylum-seekers, and particularly for asylum-seekers accommodated in ordinary law crisis accommodation, a considerable loss in comparison with what they would have received under the previous legislation; thirdly, because it grants the possibility of suspension of payments not provided for by law, particularly where the asylum seeker is deemed to have been absent from his or her place of accommodation for more than five days, without justification. The Defender also recommends: that asylum-seekers accommodated *via* the crisis watch (*veille sociale*) mechanism also receive the stipulated increase for non-accommodated asylum-seekers; that the amount of this increase be on a sliding scale according to the number of persons making up the family, including children; that the grounds for suspension of the ADA introduced by the decree that are not provided for by law be eradicated.

Processing of ADA applications: The transfer of competence for the allocation of material reception conditions to OFII has led to payment interruptions placing certain asylum-seekers in conditions of abject poverty. Also the Defender asks that all asylum-seekers receive payment as rapidly as possible, and with retroactive effect, of the allowances to which they have been entitled since 1st November 2015. In addition to these payment interruptions, there have been major lacunae in the information provided to asylum-seekers. Accordingly, the Defender recommends: that all applicants be provided with information at the one-stop counters in a language that they can understand, particularly as regards the medical treatment offer available to them and the consequences of any refusal to provide this offer; that a certificate confirming submission of an ADA application be issued to them; that

certificates of payment of ADA state the factors used to calculate the amount of the allowance so that these factors may be challenged where necessary.

Cases where individuals request re-examination of their asylum application: The Defender recommends that such individuals be guaranteed effective access to material reception conditions. It in fact appears that they encounter specific difficulties, since certain counters systematically and verbally refuse them ADA. The law provides that the right to ADA of individuals being re-examined should be assessed on a case-by-case basis taking into account specific situations of insecurity. Furthermore, when a refusal of services is contemplated, the decision must be notified in writing with supporting arguments.

Derogation for Mayotte asylum-seekers: The Defender wishes to reiterate its recommendation that material reception conditions offered to asylum-seekers in Mayotte be brought into line with those provided in mainland France. In actual fact, asylum-seekers in Mayotte do not have access to a CADA but rather only to an “entity receiving financing for the reception of asylum-seekers from the ministry holding the asylum portfolio” and they receive, instead of an ordinary law allowance, “material assistance payments” (“aides matérielles”).

C. The right to social protection

- **Remove legal discrimination against access to welfare benefits by legally present foreigners**

Although the condition of nationality was once regarded as legitimate for designating who was entitled to social services, it was nonetheless done away with in the 1990s, to be replaced by the criterion of residence in France. Alongside this, another criterion, specific to foreigners, was added: legality of residence. Although the Defender does not wish to set out its view on the legitimacy of these two criteria, on the other hand, it has, on a number of occasions, condemned discrimination resulting from other conditions which, under the pretext of checking that the criteria of being usually resident in France and legality of residence are met, in actual fact specifically target foreigners. This discrimination, which may be termed “legal” is likely to contravene certain international standards.

Access to family benefits: On a number of occasions, the Defender of Rights, and before it the Defender of Children, the HALDE and the Mediator of the Republic, have highlighted the discriminatory nature of stipulations of the Social Security Code requiring claimants of family benefits to prove not only that they are legally resident but also that their children entered France under the family reunification procedure. In an increasingly uncertain case law context, in which the discriminatory nature of the stipulations of the Social Security Code were only admitted for certain nationalities on the basis of various different international conventions (EU/third country agreements; bilateral social security conventions; ILO conventions), the defender has submitted observations before the ECHR ([MLD-MDE-MSP-2014-082](#)). By means of a judgement dated 1st October 2015, the Court held that the mechanism provided for by the Social Security Code did not contravene Articles 8 and 14 of the ECHR. Moreover, the Court of Cassation has already ruled as discriminatory the refusal of family benefits to Algerian, Turkish, Moroccan, Cameroonian and Bosnian nationals. This case law introduces differential treatment of foreign children, according to their nationality. Accordingly, the Defender wishes to reiterate its recommendation that the law be changed so that the payment of family benefits shall only be made subject to the sole condition of lawful residence of the parents. In the meantime, the Defender continues to submit observations before the courts petitioned by plaintiffs on the basis of the equal treatment clauses contained in the Association Agreements concluded by the EU, the bilateral social security agreements concluded by France, and ILO Conventions Nos. 118 and 97.

Access to minimum welfare benefits: On a number of occasions, the HALDE condemned the discriminatory condition of prior residence set for foreigners alone for access to certain minimum welfare benefits. Since France's *Conseil Constitutionnel* and *Conseil d'Etat* have adjudged, respectively, that this condition, where required for access to the low income benefit or *revenu de solidarité active* (RSA), conformed with the principle of equality and with Articles 14 and 1 of the 1st additional protocol of the ECHR, the Defender has resolved no longer to submit observations in this field and to concentrate its interventions on the condition of prior residence imposed upon elderly foreigners for the elderly person's benefit (*allocation de solidarité aux personnes âgées*) (ASPA). In this regard, it is pleased to note the instruction issued by the national elderly persons' insurance fund *Caisse nationale d'assurance vieillesse* (CNAV) stipulating that the prior residence condition is not enforceable for Algerian nationals, as such a condition contravenes the Evian Agreements. It recommends that this instruction be published. Furthermore, to permanently end the discrimination to which it gives rise, the Defender recommends, more broadly, that the prior residence condition set for access to ASPA and ASI be removed, or failing this, that it significantly reduce the duration of residence, which is set at 10 years, whereas such a length of time is disproportionate in view of the specific objective of these benefits which is to provide assistance to the poorest of elderly persons (*see, in particular: [MLD-2012-84](#)*). The Defender continues to submit observations before courts petitioned concerning the refusal of ASPA on the basis of several different international texts.

This is limited to foreigners holding certain residence permits that are exhaustively listed in the Labour Code. The following are excluded: "student" residence card, and the provisional residence permit (APS) issued to students holding a Master's degree and wishing to supplement studies with initial vocational experience. However, these residence permits authorise their holders to work. Taking the view that this exclusion gives rise to discrimination on the basis of nationality in accessing the Employment Office, the Defender recommends that both of the previously cited permits be included in the exhaustive list of residence permits that are permitted for registration with the Employment Office.

➤ **Take into account specific situations that have the effect of excluding foreigners from access to certain benefits**

Other ordinary law rules exclude foreigners from access to certain benefits not by setting conditions but by failing to take into account specific situations that are unique to foreigners.

The case of children falling under the Kafala system: After strict application of the stipulations of the Social Security Code, the parents of such children find themselves systematically excluded from access to adoption benefit and deferred payment of the basic benefit for fostering a young child (PAJE). In fact, family benefit funds or CAF require, for payment of these benefits, the production of documents proving adoption whereas, specifically, fostering under the *Kafala* system is an alternative to full adoption provided for in countries in which adoption is prohibited. The Defender takes the view that this constitutes indirect discrimination on the basis of nationality (*MSP-MDE-MLD-2015-206 and [MSP-MLD-MDE-2016-004](#)*), and recommends that the law be changed to bring an end to such exclusion.

The case of Moroccan widows who married before the age of 15: The Defender has been petitioned by the President of the *Caisse de la sécurité sociale des mines* (CANSSM) for an opinion concerning the payment of the deceased husband's pension to the widows of Moroccan minors who married before the age of 15. These marriages, which contravened the law in Morocco at the time, were deemed to be null and to provide justification for refusing the benefit. Finding that the CANSSM cannot dismiss marriage certificates provided without prior legal action, the Defender set out reservations concerning the appropriateness of such an action, since it was lacking in fairness with regard to the situation of the persons concerned (*Opinion No. [15-07](#) dated 22 April 2015*). Following this opinion, the CANSSM

decided to liquidate the pensions currently being applied for and those being challenged following a refusal of the benefit and to withdraw from current legal actions. The Defender recommends that applications be re-opened for years 2013 and 2014 for widows who have been refused the pension, whether or not they have brought an appeal.

D. The right to work

The prohibition of discrimination based on nationality with regard to the employment of foreigners is subject to a number of major exceptions that have been institutionalised by the law. In fact, excluding access to certain jobs by foreigners authorised to reside and work in France solely based on their nationality makes them vulnerable and in practice poses a number of problems. In this context, the Defender wishes to set out the following recommendations:

- ***Introduce a single list of “hard-to-fill” occupations that is correlated with changes in the economic outlook***

Where not already authorised to reside in France, a foreigner requesting a work permit to take up a post generally faces a restriction on the post: an employer wishing to recruit that foreigner must demonstrate that no other person who could fill the post exists on the employment market. However, this restriction on the post is not enforced where the work permit application is submitted for an occupation that is known to be difficult to recruit for. These “hard-to-fill” posts vary depending on the nationality of the foreigners applying for a work permit: alongside those lists established on a region-by-region basis to identify these “hard-to-fill” posts, a number of bilateral agreements actually have their own lists. Furthermore, Tunisian and Algerian nationals are not subject to these lists due to the special conventions governing their right to residence. The Defender takes the view that the coexistence of these different lists tends to make the concept of a “hard-to-fill” post meaningless and gives rise to unjustified differential treatment between foreigners. Furthermore, it recommends that these lists of occupations be harmonised. The harmonised lists ought to be revised regularly to take into account changes in the economic outlook. The possibility of availing themselves of such lists ought, moreover, to be extended to Algerian and Tunisian nationals.

- ***Open up jobs for which access is still subject to a nationality condition***

Despite particularly substantial changes with regard to EU nationals and also considerable changes for EU third country nationals, access to certain jobs is still subject to the condition of French nationality. These jobs are mostly but not exclusively in the public sector. Furthermore, other jobs, particularly among freelance professions, are reserved for EU nationals or for those of countries that have concluded a reciprocal agreement with France. In 2009, the HALDE took the view that these restrictions had no legitimate justification ([2009-139](#)). The Defender finds that the situation regarding restricted jobs has not significantly changed since 2009. Ten years ago, the previously cited report by the Commission on Legislation specified that of these 52 posts, just ten were open to foreigners. Since then, some other provisions have periodically been implemented to eradicate the nationality condition. Moreover, the legislature has relaxed the EU nationality condition set for access to the professions of doctor, dental surgeon and midwife, which are now open to non-EU foreigners where they qualified in France. Nonetheless, the number of restrictions identified in 1999 is still current. In line with this analysis, the Defender recommends: that a new survey be conducted of jobs closed to foreigners in the private sector, since the most recent exhaustive figures for this area are from 2009; eradication of the nationality condition set for access to three public sector areas, for jobs in public establishments and enterprises and for jobs in the private sector, apart from those related to national sovereignty and the exercising of state prerogatives.

➤ **Make it easier for non-EU qualified doctors to be registered with the Order of Medics**

Although access to the professions of doctor, dental surgeon, midwife and dentist are subject to the holding of a French or an EU qualification, derogations have been in place since 1972 to allow persons holding foreign diplomas to practice these professions. Recruitment of such persons has served to offset a structural lack of practitioners and has been undertaken using more insecure contract-based arrangements. To end this, in 1999 the legislature created a new authorisation-to-practice procedure (NPA) which should enable doctors practising under these insecure contract-based arrangements to register with the Order of Medics. Alongside this, the law prohibited any further recruitment under these arrangements. However, owing to a number of shortcomings highlighted by the HALDE, ([2005-57](#), [2005-56](#) and [2006-250](#)), the mechanism did not provide the hoped for results in this regard. Although, since then, the authorisation-to-practice procedure (PAE) has been improved upon, many non-EU qualified doctors nonetheless practice under different arrangements: they either refuse to be bound by the authorisation-to-practice procedure, which they hold to be illegitimate, or they refuse to give up their rights when applying for this procedure, or otherwise they practice after having failed the procedure three times. Furthermore, recruitment under other specific arrangements has continued, leading the legislature to make this lawful *retroactively*. In this context, the Defender has called upon the Minister for Social Affairs and Health to conduct a national survey to determine the number of doctors with non-EU qualifications practising in France and to assess national medical human resource requirements, by region and by discipline, and this survey should enable ways to be found to reclassify practitioners. In addition to potential reorientation towards other healthcare activities, reflection needs to be engaged in concerning how the actual responsibilities acquired by these doctors could be recognised by validation of skills procedures

➤ **Expand the right to work of asylum-seekers**

In providing that asylum-seekers may access the labour market after 9 months, the asylum law reform adopted in July 2015 transposes the requirements of EU law in the area. However, the Defender finds it regrettable that this transposition was carried out *a minima*. In fact, whereas EU law requires States to guarantee access by asylum-seekers to the labour market if they have not had a response to their application after 9 months, it does not prevent access at an earlier stage. Furthermore, EU law provides that States may authorise access by asylum-seekers to vocational training, whether or not they have access to the employment market. However, this option was not adopted by the French legislature. Nevertheless, it is important in terms of the specific protection afforded to asylum-seekers that they are able to have the best possible chances for integration. Accordingly, the Defender recommends that the law be changed to: allow asylum-seekers to request a provisional work permit under ordinary law conditions; provide for access to the labour market by asylum-seekers without being subject to job restrictions where, after 9 months, their application has still not been decided; from the beginning of the procedure, allow asylum-seekers access to the vocational training initiatives provided for under the Labour Code. Moreover, the Defender finds that whereas the former stipulations of the CESEDA Code provided, in accordance with EU requirements, access to the labour market throughout the procedure, the new law makes no mention of individuals who have brought an appeal before the National Asylum Court or CNDA. It also recommends that the law be changed to expressly provide access to the labour market by asylum-seekers who have brought a suspensive appeal before the CNDA.

Controlling of foreigners: fundamental rights tested under a mindset of increased suspicion

In a context in which the prevention of unlawful immigration has become a national priority, the suspicion of fraud weighing increasingly on foreigners has a negative impact on respect

for their fundamental rights, subjecting them to frequent, targeted and particularly intrusive controls, undermining respect for their dignity, freedom of movement and right to a normal private and family life. A number of examples serve to support this opinion:

Medical controls conducted on minor girls at risk of female circumcision: In providing that OFPRA may, “*where this risk exists*” require a medical certificate certifying that minor girls granted asylum due to the risk of female circumcision have not been subjected to the practice, the law of 29 July 2015 provided a legal basis for the hotly disputed practice of forcing minor girls to regularly undergo gynaecological or simply “visual” examinations that are not atraumatic. However, measures seeking to prevent the risk of female circumcision ought not to be restricted only to individuals granted asylum but rather should seek to protect all young girls who may be at risk ([Opinion No.14-10](#), previously cited). This is the objective of the standard protocol prepared by the Defender and intended for professionals in international vaccination centres, General Practitioners and School Doctors, to set out the approach to be taken where a suspected risk of female circumcision exists ([MDE-MSP-2014-185](#)).

Increased control of recipients of a multi-year residence card: Whilst standardising the issuance of multi-year residence permits, the law of 7 March 2016 grants prefects unprecedented prerogatives in the area of control of foreigners, and they are now authorised to request from certain government departments the issuance of any relevant documents or information, with no confidentiality other than patient confidentiality being taken into account. In addition to this, foreigners are under an obligation to prove at all times that they continue to meet the preconditions for issuance of their permit. In previously cited opinions Nos. [15-17](#) and [16-02](#), the Defender recommended that these provisions be eradicated. Although the legislature ultimately provided certain additional guarantees, the mechanism adopted remains wholly disproportionate in relation to the objectives sought by it, namely in that it fails to make professional confidentiality fully enforceable, and does not envisage any court oversight for the measures.

Targeted control of elderly migrants living at home: When it was heard by the Parliamentary fact-finding mission on elderly immigrants on 7 February 2013, the Deputy Defender of Rights tasked with discrimination prevention noted that in order to verify meeting the required residence condition for payment of welfare benefits, certain benefit funds carried out targeted controls principally targeting the homes of elderly migrants. On completion of these controls, certain migrants, who regularly visited their country of origin, found not only that their benefits had been suspended, but also that they were being prosecuted for fraud. Investigations conducted by the HALDE and thereafter by the Defender revealed that funds were interpreting the residence condition in a restrictive manner that failed to comply with the regulatory stipulations currently in effect. Furthermore, prosecutions for fraud appeared particularly inappropriate since these elderly migrants had not been informed, in the majority of cases, of the risks that they ran in leaving their homes for a period of several months. Moreover, the Deputy Defender condemned the methods of control used that showed little respect for the rights of the individual and appeared to give them the appearance of police controls. The Defender therefore recommended that a reminder be issued on the applicable law governing the control of residence and that methods be developed that were more respectful of the rights of the individual. Although following the parliamentary report published in 2013, these targeted controls appear to have decreased in number, the Defender is concerned by their current resurgence, as attested by certain recent articles in the press.

E. The right to an account

- **Ensure that implementation of bank control obligations does not undermine the right of foreigners to an account**

Prior to opening an account, lending establishments are required to verify the identity and domicile of the applicant. The HALDE and thereafter the Defender have been petitioned concerning the practices of certain banks, which, under the guise of conducting these verifications, actually control the lawful residence of applicants. Such practices contravene not only the right to an account provided for by the Monetary and Financial Code, but also constitute discrimination on the basis of nationality in accessing goods and services that is subject to criminal sanctions (*see, for example: [MLD-2015-302](#)*). Moreover, the Defender has been petitioned concerning the refusal by certain banks to accept as proof of identity, firstly acknowledgements of receipt of residence permit applications and secondly Romanian identity cards on the ground that they do not bear a signature. These practices were based on the stipulations of a ministerial order which, following the recommendations of the Defender, were changed to expressly include the two documents under dispute in the list of proofs of identity that may be required in order to open an account ([MLD-2015-098](#)).

➤ **Guarantee the right of foreigners to access their account**

Cases have arisen of foreigners being refused access to their own account (withdrawal of funds, requesting of a certificate of account particulars (RIB), etc.) on the ground that the residence permit or identity document used to open the account had expired (*for example: HALDE, [2006-245](#)*). Such refusals, which were adjudged to be a violation of domestic law by the Court of Cassation, may also contravene Article 1 of the first additional protocol and Article 14 of the ECHR. The Defender also recommends that banking establishments be reminded of applicable law.

III. Rights specific to minors

The number of unaccompanied minors present in France, although estimated to be between 8,000 and 10,000 (*sources: Eurostats 2014*), has not been officially established. The Defender of rights, and before it the Defender of Children, have regularly been petitioned concerning the reception, care and protection of unaccompanied minors in France.

Children are afforded special protection, and this was explicitly reiterated by the recent law of 14 March 2016 concerning child protection. In this regard, unaccompanied minors are entitled to care. The Defender of rights finds not only that the protection of unaccompanied minors has certain shortcomings, but also that being foreign constitutes, more broadly, a factor that undermines the protection of foreign minors, whether accompanied or unaccompanied, and wishes to set out recommendations to enhance the effectiveness of the following rights:

A. The right of unaccompanied minors to protection

➤ **Ensure compliance with the shelter, assessment and orientation procedure prior to the provision of care for unaccompanied minors**

The procedure, which was established by the Circular of 31 May 2013 and supplemented by the inter-ministerial Circular of 25 January 2016, seeks to harmonise practices developed in order to ascertain whether a young foreigner is a minor and unaccompanied, prior to being taken care of by child welfare services (ASE). By way of a preliminary, the Defender endorses the findings submitted by the Inspectorates General concerning the confusion that has arisen due to these Circulars between the concept of being unaccompanied and the concept of being at risk. Although it is the existence of a risk that forms the basis of the need for a protection measure, the Circulars are in fact silent concerning this concept and undertake only to verify whether a young person is unaccompanied. However, being unaccompanied does not necessarily coincide with being at risk. The Defender also asks

that: Department Councils and the legal authorities interpret the concept of being unaccompanied strictly in accordance with the law, i.e. as being the situation of any child that is “temporarily or permanently deprived of his/her family”, and not interpret it as one of a number of factors used to assess risk; the upcoming enabling decree for the law concerning child protection specifies this concept of danger.

Provisional reception: Although the law provides that a young person declaring him/herself to be a minor is entitled to emergency reception for five days, this reception is in fact all too often non-existent or ill-suited (inappropriate hotels, unsanitary accommodation, failure to take into account the particular vulnerability of certain minors, etc.). Moreover, despite legally stipulated deadlines, the evaluation phase sometimes goes on for several months. These are months during which the young person may be out of school, due to inadequate reception, with no educational and sometimes no medical oversight ([MDE-2014-127](#)). Also, the inter-ministerial Circular dated 25 January 2016 failed to set out the imperative nature of provisional reception and the Defender recommends that a reminder be issued in this regard.

Social and educational evaluation: The function of such an evaluation is not merely to play a role in determining the age of the minor but also to determine the extent to which he/she is unaccompanied and identify specific vulnerability factors requiring especial protection. It presupposes that interviews are conducted in a benevolent manner, by qualified and trained personnel, in the best interests of the child ([MDE-2012-179](#)). Moreover, finding that certain young persons are presented to the police services or placed in detention without any evaluation or solely on the basis of the results of a bone examination (see *above*), the Defender wishes to reiterate its recommendation that the police and gendarmerie forces be reminded through all channels, that a young person declaring him/herself to be a minor, must, prior to any other form of investigation, be evaluated by the Department Council's services ([MDE-2012-179](#); [MDE-2015-157](#)).

Verification of civil status documents: These documents, which, under Article 47 of the Civil Code, enjoy a presumption of authenticity, are among a range of indicators that are to be used in order to make a determination on the minor status of a young person. In this regard, the Circulars, and now the law, state that bone age examinations may only be used in the event of continued doubt, where the elements gathered through the social and educational assessment and an examination of civil status documents are not sufficient in order to determine minority status. The Defender in fact finds that readings of Article 47 of the Civil Code vary significantly between departments, leading to young persons being declared adults after undergoing bone age examinations without civil status documents being taken into account, or at least where their validity has not been challenged. In this regard, the Defender is concerned by a retrogressive step introduced by the Circular dated 25 January 2016: whereas the Circular of 31 May 2013 established a presumption that civil status documents belong to the young person where they are not challenged, the new Circular makes validity of a document conditional on being able incontestably to link it to the person concerned. In addition to not appearing to comply with Article 47 of the Civil Code, this formulation risks giving rise to major practical difficulties, since the majority of civil status documents do not bear photographs. Furthermore, the Circular of 25 January 2016 provides that departmental councils may request checks from the prefectural services and commits them to concluding protocols with these in order to make checking procedures run more smoothly. In this context, the Defender recommends that the authorities conducting checks of civil status documents request validation of civil status documents from the competent foreign authorities each time doubt persists as to the authenticity of such a document.

The use of bone examinations: Whilst legalising the method consisting in using a range of indicators that is recommended by Circulars in evaluating minority status, the law of 14 March 2016 legalises, admittedly with some reservations, the use of bone examinations. The Defender also reiterates its position that the use of these examinations is unsuitable, ineffective and a violation of the dignity of children. It recommends that their usage be

prohibited, or failing this, that the legal authority tasked with ordering these examinations and evaluating their conclusions comply scrupulously with the legal framework set down for the use of these examinations: the freely-given informed consent of the young person must be obtained beforehand and individuals must be given the benefit of the doubt.

➤ ***Guarantee access to rights and justice throughout the entire evaluation phase***

Decisions that there is no need for educational assistance taken by departments are not systematically issued formally, certain young persons evaluated as being of majority age find that access to their rights is undermined (right to directly petition a children's judge, right to access the crisis accommodation mechanism, etc.). Furthermore, the Defender recommends that provisions be made to ensure that all young persons evaluated as being of majority age are issued a copy of their evaluation, and of the decision to deny access to the ASE child welfare mechanism, setting out grounds, and the deadlines for an appeal, together with an explanatory note on access to rights. Furthermore, in the absence of any clear case law on the concept of capability to bring legal action, their access to a judge is sometimes undermined and the administrative judge and the children's judge both decline competence to hear refusals to grant access to child welfare. In this context, the Defender has pointed out the guarantees that a young person declaring him/herself to be a minor must be afforded, regardless of the age ultimately arrived at by the courts: summoning and hearing of a child who is capable of discernment; the right to be assisted by a lawyer; the possibility of being accompanied by representatives of associations or charities; notification of the ruling to be issued to the young person and his/her Counsel ([MDE 2016-052](#)).

➤ ***Improve quality of care and prepare for transition to adulthood***

By giving a legal basis to the principle of distribution of care provision among departments, the law of 14 March 2016 ought to enable them to better meet their obligations in the area of educational assistance. Nonetheless, certain difficulties are still likely to have an impact on the quality of that care. Firstly, there have been cases where a young person being oriented to another department has to undergo another evaluation, which is often to his/her detriment. Furthermore, the Defender recommends that the future enabling decree for the law of 14 March 2016 specifies the concept of "a manifestly insufficient evaluation", the only scenario under which subjecting a young person to a new evaluation would be justified. Secondly, quality of care varies between departments: in terms of accommodation, firstly, which can sometimes be in hotels that are unsuitable for certain fragile young persons; in terms of educational oversight, secondly, which is sometimes non-existent or undermined by difficulties in cooperating between specialist associations and child welfare services; in terms of legal and administrative support, thirdly, which, sometimes due to inadequate training of social workers, can prove insufficient. Also, the Defender recommends: that accommodation in hotels should only be used as a last resort and at any rate that it should be prohibited for vulnerable minors, namely those exposed to a risk of trafficking; inclusion in the basic and continuous training programmes of social workers where this is not already the case, modules addressing the legal and administrative status of unaccompanied children and the law concerning foreigners; ensure that the provisions of the law of 14 March are fully effective by preparing with the young person his or her transition to adulthood by working on a pathway for the child that takes into account his/her migration project and life goals.

➤ ***Step up the protection of children exploited by networks for the perpetration of crimes***

The Defender finds it regrettable that such children should be treated as criminals rather than as minors in need of protection, and recommends that the State equip itself with a mechanism for protecting minors against trafficking, namely through the collection of data to

better detect the phenomenon, and by developing an effective policy for prevention, identification of victims and punishment.

B. Being a minor and being foreign: two factors undermining fundamental rights

- ***Guarantee access to medical treatment tailored to the specific needs of unaccompanied minors***

The Defender recommends: that a health assessment be carried out systematically at the provisional care and evaluation phase; that, within this context, child welfare services ensure, firstly that the list of designated establishments for the carrying out of such assessments is disseminated and secondly, that there is smooth cooperation between these establishments and the Departmental Councils; that at the care provision stage, particular attention be given to mental healthcare requirements, which may be significant owing to possible trauma experienced during the migration journey.

- ***Ensure effectiveness of the right of unaccompanied minors to seek protection through asylum***

When wishing to seek protection through asylum, unaccompanied minors may encounter difficulties associated with the obligation to have an *ad hoc* administrator: excessively long delays in having one appointed; administrators who are not trained in procedures specific to asylum. These difficulties have the effect, particularly in Calais, of delaying family reunifications that could be proceeded with based on the Dublin III regulation. Also, the Defender recommends: guarantee that minors are fully informed of the different legal mechanisms afforded them, with a view to permanent residence in France but also departure to an EU State where a family member resides; ensure where necessary that there is legal support for the procedures undertaken; make provision for simplified, effective and swift procedures to enable family reunification once this is found to be possible and in the best interest of the minor; provide *ad hoc* administrators with training in the various different asylum procedures.

- ***Facilitate access by minors aged over 16 to employment and vocational training***

Despite several provisions favourable to the employment and vocational training of minors aged over 16, in practice, these individuals face difficulties in obtaining the documents to which they are entitled and which they require: a residence card conferring the right to work for minors placed in the care of child welfare services below the age of 16; a work permit for any minor who is about to sign an apprenticeship or vocational qualification contract (*Opinion No. 15-20, previously cited*). Although certain refusals arise from a failure to take into account applicable law, others are based on an interpretation of the regulatory stipulations of the CESEDA Code, supplemented by the inter-ministerial Circular of 25 March 2016 and which the Defender considers to be wrong. It also recommends that: the CESEDA Code expressly stipulate that the concept of vocational activity conferring entitlement to early issuance of a residence card to a minor placed in the care of child welfare services before the age of 16 years include apprenticeship and vocational qualification contracts; that the Labour Code expressly stipulate that a work permit be granted automatically to a foreign minor requesting one in order to sign an apprenticeship or vocational qualification contract; that the Circular of 25 March 2016 be modified in a manner that complies with the regulatory stipulations currently in effect.

- ***Guarantee the right of all minors to be schooled***

In France, the law protects the right of children of whatever nationality to be schooled from the age of 3 (*for discriminatory refusal or schooling in the lower infant year, see: [MLD-2012-33](#), observations of the Defender of rights endorsed by the judge*). Furthermore, the

Defender takes the view that the refusal of schooling due to the unlawful residence of parents constitutes prohibited discrimination that is punishable by criminal sanctions (*MDE-MLD-MSP-2014-163, may not be disseminated until the Public Prosecutor has issued its findings*). The same applies to the refusal of schooling due to the living conditions of parents within the commune, namely where they live in illegal camps ([assessment of application of inter-ministerial Circular dated 26 August 2012](#); [MDE-MLD-2015-174, observations not endorsed by the judge](#)). In this regard, it wishes to point out that a child's not having a legal and permanent address may not under any circumstances undermine his/her right to schooling, and residence in the commune must be seen as a "set-up" that may be proven by any means ([MDE-2013-92](#)). Having expressed its views on a number of occasions regarding the stigmatising nature of stipulations specifically providing for the schooling of children living in illegal camps, the Defender also wishes to state that these children must be schooled in schools, under ordinary law conditions ([MDE-2013-91](#); [MDE-2015-115](#)). Moreover, having been apprised of difficulties concerning schooling encountered specifically by unaccompanied minors aged over 16, since certain child welfare services refuse to enrol them, the Defender wishes to reiterate its recommendation that Departmental Councils must ensure that they guarantee effective access to schooling and vocational training ([MDE-2014-127](#)).

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