

AN OVERVIEW OF ARGENTINE IMMIGRATION LAW

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I. INTRODUCTION

Argentina, like the United States, is a country of immigrants. Juan Bautista Alberdi, the Argentine jurist and constitutionalist, coined the well-known phrase "to govern is to populate,"¹ which formed the basis of the country's immigration and population policies for many years. Indeed, the current and previous Argentine constitutions incorporate the right to immigrate and the protection of immigrants as basic constitutional principles. The preambles to both the Constitution of 1853 and the Constitution of 1994 extend the rights of liberty, general welfare, and justice to "all men in the world who wish to dwell on Argentine soil."² Specific constitutional provisions allow all foreigners to enter Argentina who will work the land, improve industry, or teach the arts and sciences,³ and also provide equal rights for all foreigners.⁴ Despite Argentina's historic tradition of liberal

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1. Juan Bautista Alberdi, *Bases y Puntos de Partida Para la Organización Política de la Republica Argentina*, in 3 OBRAS COMPLETAS DE JUAN BAUTISA ALBERDI 371, 527 (Buenos Aires, La Tribuna Nacional 1886).

2. CONSTITUTION DE LA NACION ARGENTINA [CONST. ARG.] preamble (1994), reprinted and translated in 1 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Gisbert H. Flanz ed., Marcia W. Coward trans., Oceana Publications 1995); CONST. ARG. preamble (1983), reprinted and translated in GENERAL SECRETARIAT, ORGANIZATION OF AMERICAN STATES PAN AMERICAN UNION (1963).

3. See CONST. ARG. art. 25 (1994). "The Federal Government shall encourage European immigration; and may not restrict, limit or burden with any tax whatsoever, the entrance into Argentine territory of foreigners who arrive for the purpose of tilling the soil, improving industries, and introducing and teaching the arts and sciences." *Id.* Article 25 of the Constitution of 1853 contained identical language. See CONST. ARG. art. 25 (1853).

4. See CONST. ARG. art. 20 (1994). The 1994 Argentine Constitution states the following:

Foreigners enjoy in the territory of the Nation all the civil rights of a citizen; they may engage in their industry, commerce or profession; own real property, purchase it and alienate it; navigate the rivers and coasts; freely practice their religion; make wills and marry in accordance with the laws. They are not obliged to assume citizenship nor to pay forced extraordinary

immigration, the Constitution also recognizes the government's right to regulate immigration.⁵ The government, in turn, has conferred extensive powers to the Argentine immigration agency. Thus, although the Argentine Constitution embraces immigration and immigrants' rights, broad agency discretion has resulted in shifting, and in some instances, more restrictive immigration laws and practices, according to changing political, social, and economic realities.

While Argentina, like the United States, considers itself a country of immigrants, from the outset Argentina has unabashedly promoted European immigration.⁶ Article 25 of the Constitution of 1853 states that "the Federal Government shall encourage European immigration."⁷ This article was adopted without change as part of the Constitution of 1994.⁸ Commentators postulate that article 25 should be interpreted as merely a preference toward European immigration because the second clause states that all foreigners coming to Argentina to carry out the goals listed in the Constitution have the right to enter the country.⁹ Nevertheless, the fact that the Constitution

taxes. They may obtain naturalization by residing two continuous years in the Nation; but the authorities may shorten this term in favor of anyone so requesting, on asserting and proving services to the Republic.

Id. See also CONST. ARG. art. 20 (1853).

5. See CONST. ARG. art. 75, para. 18 (1994). "Powers of Congress . . . [t]o provide whatever is conducive to the prosperity of the country, to the progress and welfare of all the Provinces and for the advancement of . . . immigration . . ." *Id.* See also CONST. ARG. art. 67, paras. 11, 16, 28 (1853). Law No. 22439, art. 20, Mar. 23, 1981 [1981-A] L.A. 273, the current Argentine Immigration Law, states in article 20 that the right of a foreigner to enter, reside and leave the country, a right guaranteed to all inhabitants under article 14 of the Argentine Constitution, is limited by the immigration laws. For an Argentine Supreme Court case recognizing the right of the government to regulate immigration, see "Lino Sosa," CSJN, 234 Fallos 203 (1956). One leading constitutional scholar has argued that article 20 of the Argentine Constitution, which provides equal rights for foreigners, renders deportation unconstitutional. See 2 GERMÁN J. BIDART CAMPOS, TRATADO ELEMENTAL DE DERECHO CONSTITUCIONAL ARGENTINO 212 (Ediar, Buenos Aires, 1989). He reasons that if citizens cannot be expelled, neither can foreigners. See *id.* See also Susana Albanese, *La Expulsion y el Amparo*, [1991-B] L.L. 456.

6. In the past, the United States has also passed restrictive legislation in order to maintain the European character of immigration. See, e.g., Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (1882) (repealed 1943) (restricting Chinese immigration to the United States); Immigration Act of 1917, ch. 29, § 3, 39 Stat. 874 (1917) (repealed 1952) (restricting all Asian immigration except Japanese); Immigration Act of 1924, ch. 190, 43 Stat. 153 (1924) (repealed 1952) (establishing country quotas to benefit Northern European immigrants). However in 1965, the United States established an equal quota system for all countries and allowed Asian immigration as well. See Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C.A. § 1101 (West 1999)).

7. CONST. ARG. art. 25 (1853).

8. See *supra* note 3 (stating text of article 25).

9. See OFELIA STAHRINGER DE CARAMUTI, LA POLÍTICA MIGRATORIA ARGENTINA 36 (1975).

specifically promotes European immigration affects the current immigration debate, given that the majority of recent immigrants are from neighboring Latin American countries.¹⁰

II. IMMIGRATION TRENDS

Argentina reached its highest levels of immigration during the latter half of the nineteenth century and the first decades of this century. Between 1857 and 1913, 2,711,648 persons immigrated to Argentina, of which 1,120,222 arrived between 1901 and 1910.¹¹ In 1914, 29.9% of the population was foreign born.¹² The immigrants came primarily from Spain and Italy.¹³

After a decrease in immigration during the two world wars, immigration again increased in Argentina after the close of the Second World War. While foreigners from Spain and Italy still comprised 61.2% of the immigrant population in 1960, 17.8% of the immigrants were from neighboring Latin American countries.¹⁴

By 1980, Argentina had experienced significant changes in the country of origin of its immigrants. European immigration declined and the number of immigrants from Latin American countries increased significantly. Thus, in a remarkable parallel to immigration trends in the United States,¹⁵ recent immigrants to Argentina are no longer predominantly European. According to the 1991 census, Argentina's population totaled 32,615,528, and 1,628,210 of the total population was foreign born.¹⁶ Of this foreign-born population, 817,144 came from Latin American countries — primarily

10. See generally Enrique Otieza et al., *Política Inmigratoria: Inmigración Real y Derechos Humanos en la Argentina*, in INFORME ANUAL SOBRE LA SITUACIÓN DE LOS DERECHOS HUMANOS EN LA ARGENTINA 147 (Centro de Estudios Legales y Sociales, Buenos Aires, 1996); Sebastian Rotella, *Argentina's Frontier of Promise*, L.A. TIMES, June 8, 1996, at A1; *Putting Out the Unwelcome Mat*, ECONOMIST, Mar. 18, 1995, at 42.

11. See Raúl C. Rey Balmaceda, *El Pasado la Inmigración en la Historia Argentina*, in 2 GEODOMOS 44 (Graciola M. de Marco et al. eds., 1994).

12. See *id.*

13. See *id.*

14. See *id.* at 52. According to the 1960 Argentine census, of the 2,604,447 foreigners in Argentina, 878,298 were Italian (33.7%) and 715,685 were Spanish (27.5%). See *id.* Latin American immigrants were recorded as follows: Paraguay, 155,269 (6%); Chile, 118,165 (4.5%); Bolivia, 89,115 (3.4%); Brazil, 48,737 (1.8%); and Uruguay, 55,934 (2.1%). See *id.* Demographers have criticized the 1960 census as underestimating the number of foreigners in the country. See *id.*

15. The majority of recent immigrants to the United States are Latin Americans and Asians. See MICHAEL FIX & JEFFREY S. PASSEL, IMMIGRATION AND IMMIGRANTS: SETTING THE RECORD STRAIGHT 27 (1994).

16. See Otieza et al., *supra* note 10, at 148.

Paraguay, Bolivia, Brazil, Chile, and Peru.¹⁷ Another sizable non-European immigrant population is Korean and, to a lesser degree, other Asians.¹⁸ These census figures do not take into account those Latin Americans who subsequently obtained residence through amnesty programs in the nineties.¹⁹

In addition to legal immigration to Argentina, there has also been an increase in undocumented immigration, primarily of Latin Americans from nearby countries. These immigrants initially enter the country legally as tourists without a visa for a determinate period of time²⁰ and simply stay. The exact number of undocumented immigrants in Argentina, like in the United States, is extremely difficult to calculate due to the irregular or underground status of the population. However, approximate figures range from 50,000 to 2,500,000.²¹

III. CURRENT IMMIGRATION STATUTE

The Argentine Congress has the general power to regulate immigration.²² Nevertheless, the current Argentine immigration law,²³ was enacted by the military dictatorship in 1981 replacing Law No. 817, the Avellaneda law of 1876, and subsequent decrees.²⁴ Despite the re-emergence of democracy in Argentina in 1984, the Argentine immigration law remains in effect. While the law provides the basic parameters of immigration, the executive branch has broad and virtually unfettered authority to issue decrees and administrative orders that substantively alter

17. *See id.*

18. There are approximately 35,000 Koreans residing in Argentina. *See* Calvin Sims, *Don't Cry, the Land is Rich in Kims and Lees*, N.Y. TIMES, Nov. 15, 1995, at A3.

19. From 1992 through 1994, 209,198 people received residency through amnesty programs. *See* Katie Fleet, *Situación de Los Inmigrantes y Derechos Humanos*, in INFORME ANUAL SOBRE LA SITUACIÓN DE LOS DERECHOS HUMANOS EN LA ARGENTINA 261-262 (Centro de Estudios Legales y Sociales 1997). *See also* Decree No. 1906, Oct. 9, 1993, H. Cámara de Diputados de la Nación, Secretaría Parlamentaria, fol. 58.

20. *See* Res. No. 189, Feb. 13, 1995, H. Cámara de Diputados de la Nación, Secretaría Parlamentaria, fol. 34.

21. *See Putting Out the Unwelcome Mat*, *supra* note 10, at 42 (estimating the number at 50,000 to 500,000). *Cf.* Fleet, *supra* note 19, at 262-63 (citing estimates of 2,500,000 according to data furnished by the immigrant communities); Otieza et al., *supra* note 10, at 157 (questioning *El Clarín's*, the national newspaper, calculation of 400,000 as inflated). The wide variation in the reported estimates of the undocumented community demonstrates the lack of reliable statistical data.

22. *See supra* note 5 and accompanying text.

23. Law No. 22439, Mar. 23, 1981, [1981-A] L.A. 273.

24. *See* Decree No. 4805, [1963] A.L.J.A. 66, *ratified* by Law No. 16478, [1964] A.L.J.A. 52. *See also* Decree No. 17294, [1967-B] A.L.J.A. 1516.

immigration laws and policy.²⁵ The Argentine immigration law has been modified and restricted by both the governments of former President Alfonsín, the first democratically elected president after the military dictatorship, and the current administration of President Menem.

The Argentine immigration law reiterates the governmental interest in promoting immigration based on the constitutional imperative of European immigration.²⁶ The law, framed in general terms, establishes three classes of admission into the country: transitory residents, temporary residents, and permanent residents, while delegating wide discretion to the Executive Branch to set the conditions for admission in each category.²⁷ In addition, the regulations authorize the Department of Immigration, in its discretion, to admit persons not encompassed by the stated categories.²⁸ The Argentine Supreme Court has upheld the right of the Department of Immigration to determine admissions and concomitantly expel foreigners who do not qualify for admission.²⁹

The *Dirección Nacional de Migraciones* (National Immigration Department) is part of the *Secretaría de Población y Relaciones con la Comunidad* (Secretary of Population and Community Relations) which in turn is part of the *Ministerio del Interior* (Ministry of Interior).

A. Admission Standards

Persons who may apply for permanent or temporary residence include: parents, spouses, and children of Argentine citizens; parents,

25. See Letter to the President of the Nation presenting the Argentine Immigration Law, March 16, 1981, [1981-A] L.A. 269, 270 (deferring to the administrative authority the establishment of the conditions, requirements and costs of admission).

26. See *id.* para. 4.

27. See Law No. 22439, art. 12, Mar. 23, 1981, [1981-A] L.A. 273.

Foreigners may be admitted to enter and remain in the Republic, in the following categories: permanent residents, temporary residents, or transitory residents. The National Executive Branch shall establish the conditions, requirements, and sureties which will apply to admission, entry, and stay of foreigners, as well as the subcategories and length of stay of temporary and transitory residents.

Id. Cf. Immigration and Nationality Act, 8 U.S.C.A. § 1151 (West 1999), in which the U.S. Congress, not the executive branch nor the Immigration and Naturalization Service, explicitly determines all categories of admission to the United States. The United States immigration law provides for similar categories of entrants. See, e.g., Immigration and Nationality Act, 8 U.S.C.A. § 1101(a)(15)(C) (West 1999) (providing for transit visas); *id.* § 1101(a)(15)(A), (B), (D)-(S) (providing numerous non-immigrant visas, including temporary employment visas); *id.* §§ 1151-1154 (providing permanent residence visas).

28. See Decree No. 1023, June 29, 1994, B.O. No. 27925.

29. See, e.g., "Scheimberg," CSJN, 164 Fallos 344 (1932); "Acosta," CSJN, 278 Fallos 147 (1970).

spouses, and unmarried children under the age of twenty-one; disabled children of permanent or temporary residents; and persons applying for temporary or permanent residence.³⁰ Those who are considered temporary residents within the definition of the law include: technicians, skilled workers, business persons or owners, scientists, educators, workers, artists, athletes, religious workers who are members of a recognized sect, students who enter to study in private or public institutions other than primary school, contract workers who have entered into a written employment contract, representatives of foreign companies, immigrants with sufficient capital to develop a productive commercial or service enterprise, retired persons or persons with independent income, and persons encompassed by other laws that establish special immigration categories.³¹ The definition also includes those persons whose special recognition in cultural, social, economic, scientific or political affairs serves, in the opinion of the Ministry of Interior, the national interest; and those persons from countries which merit special treatment based on geographic, historical and/or economic conditions, in the opinion of the Ministry of Interior in consultation with the Ministry of Foreign Relations, International Commerce, and Culture.³²

The immigration regulations which accompany the 1994 decree limit certain previously-mentioned categories to temporary status, such as: students, religious workers, contracted workers, and seasonal workers.³³ In addition, exemplifying the wide discretion of the Department of Immigration, the Department may authorize the temporary residence of any person not covered by the specific admission categories if, in the opinion of the agency,

30. See Decree No. 1023, art. 2, June 29, 1994, B.O. No. 27925 (amending Decree No. 1434, art. 15(a)-(k), Sept. 17, 1987, B.O. No. 26224, *modified by* Decree No. 669, 1990, [1990-A] L.A. 240, *and* Decree No. 1013, 1992, [1992-A] L.A. 1907). As discussed previously, the substantive immigration statute, Law No. 22439, does not specify the categories of persons who qualify for permanent or temporary residence. Likewise, Decree No. 1023, art. 2, lists persons in these categories as eligible for both temporary or permanent residence. However, the annexed regulations limit permanent residence to family members of Argentine citizens. All other categories of persons must enter as temporary residents. See Decree No. 1023, Annex, art. 27(a), June 29, 1994, B.O. No. 27925. The immigration categories set out by decree have been held to be constitutional. See, e.g., "Andrade," [1992-B] L.L. 244; "Leque," [1990-C] L.L. 495.

31. For example, Argentina has entered into bi-lateral agreements governing immigration with specific countries to facilitate immigration. See, e.g., Res. No. 4612, Dec. 28, 1993, H. Camara de Diputados de la Nación, Secretaria Parlamentaria, fol. 66 (establishing special immigration standards for Japanese nationals).

32. See, e.g., Res. No. 3384, Dec. 27, 1996, B.O. No. 28566 (extending immigration benefits to immigrants from Central and Eastern Europe, based on the constitutional imperative to promote European immigration).

33. See Decree No. 1023, Annex, art. 27(a), June 29, 1994, B.O. No. 27925.

there is justification to authorize the admission.³⁴ Temporary residents may only engage in authorized employment or commercial activities.³⁵ Those who enter to engage in the business, employment, and cultural activities described previously, including religious workers, may be admitted for renewable periods of three years; students may be admitted for renewable periods of one year; and seasonal workers may be admitted for a period of 180 days, renewable one time for ninety days.³⁶

Transitory residents include the following: persons in transit; border visitors; crewmen; tourists; persons seeking medical treatment; and persons who enter for fixed periods of time to engage in artistic, religious, or cultural activities. Professionals or technicians whose services are needed by established employers, regardless of remuneration, as well as persons who enter to engage in business, investment, or market studies, are also within the framework of those who are transitory residents.³⁷ The regulations also provide a catch-all category that allows the Ministry of the Interior to admit a person as a transitory resident for any other satisfactory reason.³⁸ Most transitory residents, depending upon their subcategory of transitory residence, are admitted for a period of time ranging from ten days to three months with limited renewals.³⁹ Persons in the discretionary category may be admitted for six months with a one-time, three-month extension.⁴⁰

Applicants may apply for admission at an Argentine consulate abroad, or if they have legal immigration status within the country, application is made at the Department of Immigration.⁴¹ The applicant must present proof of eligibility for the requested visa status, a sworn declaration regarding the applicant's criminal history, police certificates from places where the applicant has resided during the last five years, and a record of a medical examination.⁴² The Department of Immigration has the authority to waive the requirement of a police certificate for any applicant for temporary or permanent residence who has resided in Argentina for three years. The Department may also waive documentation for persons who have been forced to immigrate for religious, social, or political reasons.⁴³

An application for temporary or permanent residence on behalf of an

34. See Decree No. 1023, art. 2, June 29, 1994, B.O. No. 27925. See also *id.* Annex, art. 25.

35. See Law No. 22439, art. 27, Mar. 23, 1981 [1981-A] L.A. 273.

36. See Decree No. 1023, Annex, art. 30(a)-(d), June 29, 1994, B.O. No. 27925.

37. See *id.* art. 29. As is apparent, certain transitory categories overlap with temporary categories, although the admission period is shorter as a transitory resident.

38. See *id.* art. 2. See also *id.* Annex, art. 29(g).

39. See *id.* Annex, art. 31.

40. See *id.* art. 31(a)-(c).

41. See *id.* arts. 32-37.

42. See *id.* arts. 39, 44.

43. See *id.* art. 52 (a)-(b).

immigrant already in Argentina must be submitted by an *escribano*, the general equivalent of a notary public.⁴⁴ The purported aim of requiring notaries to prepare applications is to assure that applicants present authentic documents that can be verified by the *escribano*.⁴⁵

B. *Inadmissibility and Waivers*

Unlike U.S. immigration law, the Argentine statute does not provide for specific grounds of inadmissibility. Instead, broad categories of inadmissibility are determined by regulation.⁴⁶ The following groups are absolutely inadmissible: (1) persons with transmittable illnesses that pose a danger to community health, or psychopathic mental conditions that may cause social or family problems; (2) persons with physical or psychological disabilities that affect the ability to work, unless the foreigner has other means of support; (3) persons who are serving or being prosecuted for crimes that, under Argentine law, carry a sentence of two years imprisonment or more; (4) current and former drug traffickers, prostitutes, and persons who have obtained financial profits from prostitution or those suspected of such activities; (5) persons who are presumed to lack employment, a profession or other means of lawful lifestyle; (6) persons who tend to engage in criminal behavior, who offend public morality or custom, or for any other reason that, in the opinion of the Ministry of the Interior, indicates the applicant's inability to integrate into society; (7) persons who have a criminal record that may jeopardize public security, order, or social peace; (8) persons whose entry into the country has been previously denied by a competent authority; (9) persons who have entered the country without inspection by immigration officials, or persons who remain in the country illegally for more than thirty days; and (10) persons who work without express permission from the Department of Immigration.⁴⁷

In addition to the grounds of total inadmissibility, other groups are "relatively inadmissible."⁴⁸ These categories include persons who have a physical or psychological disability or chronic illness that diminishes their ability to support themselves; persons over the age of sixty-five; minors under the age of eighteen who are in the country without a parent or legal

44. See Res. No. 286, Aug. 2, 1996, B.O. No. 28339.

45. See *id.* In contrast, in the United States, bar associations have objected to, and courts have prohibited the use of, notaries to prepare immigration applications as an unauthorized practice of law. See *Unauthorized Practice Comm. v. Cortez*, 692 S.W.2d 47 (Tex. 1985). See also *Representations and Appearances*, 8 C.F.R. § 292.1(a)-(e) (1999).

46. Compare Immigration and Nationality Act, 8 U.S.C.A. § 1182(a) (West 1999), and Decree No. 1023, Annex, art. 21(a)-(l), June 29, 1994, B.O. No. 27925.

47. See Decree No. 1023, Annex, art. 21(a)-(l), June 29, 1994, B.O. No. 27925.

48. See *id.* art. 22(a)-(c).

representative; persons who have been convicted of crimes with a maximum punishment of less than two years and those who have completed their criminal sentence or whose cases have been dismissed; drug addicts; persons, who in the opinion of the government, are without adequate housing in the country; and persons who have remained in the country illegally for more than thirty days.⁴⁹

The grounds for relative and absolute inadmissibility relating to physical and psychological disabilities are waived for persons whose spouse, parent, child, or legal guardian is granted permanent residence. The waiver entitles disabled persons to enter Argentina in the same status as their qualifying relative.⁵⁰

The Argentine law also provides for a waiver of the absolute inadmissibility grounds of communicable diseases, psychopathic mental conditions, and physical and psychological disabilities for spouses, parents, and unmarried children of Argentine citizens or permanent residents who have resided in the country for five years.⁵¹ Factors to be considered in granting a waiver include the governmental interest in the activities or employment of the applicant; the applicant's ability to support himself; the physical, moral, economic, and employment abilities of the family; and any other objective considerations in support of the waiver. A waiver on any ground of relative inadmissibility is available to any permanent or temporary resident applicant. The same factors relevant to a waiver of absolute inadmissibility grounds are utilized to determine a waiver of relative inadmissibility.⁵² Transitory visa applicants who are relatively inadmissible because of drug addiction may apply for a waiver to enter the country to seek treatment for such addiction.⁵³

An affected party may request reconsideration within ten days of an unfavorable decision to deny admission or permanent residence, to cancel temporary or transitory residence, or to voluntarily depart the country.⁵⁴ If the Immigration Department denies the reconsideration, the party may appeal within ten days to the Ministry of Interior.⁵⁵ The law does not provide for

49. *See id.*

50. *See* Law No. 24393, art. 1, Nov. 18, 1994, [1994-C] L.A. 3228 (modifying Law No. 22439, art. 12, Mar. 23, 1981 [1981-A] L.A. 273).

51. *See* Decree No. 1023, Annex, arts. 23, 25, June 29, 1994, B.O. No. 27925.

52. *See id.* art. 25. The immigration authorities have broad discretion to determine what quantum and type of proof is needed for a waiver. *See* Interviews with Dr. Garrido, in Buenos Aires (July 1996), and Dr. Vergara, Legal Department, National Immigration Department, in Buenos Aires (Nov. 1996) [hereinafter Interviews].

53. *See* Decree No. 1023, Annex, art. 24, June 29, 1994, B.O. No. 27925.

54. *See* Law No. 22439, art. 73, Mar. 23, 1981, [1981-A] L.A. 273. *See also* Decree No. 1023, Annex, art. 126, June 29, 1994, B.O. No. 27925.

55. *See* Decree No. 22439, arts. 73-75, 80, Mar. 23, 1981, [1981-A] L.A. 273. *See also* Decree No. 1023, Annex, art. 128, June 29, 1994, B.O. No. 27925.

any direct judicial review.⁵⁶

IV. EXPULSIONS

The Immigration Department may expel any foreigner who enters the country illegally or who violates his or her immigration status while in the country.⁵⁷ The law provides for two means of removing a foreigner from the country: an official request to depart by a certain date or a deportation order.⁵⁸ Persons who enter the country without submitting to immigration inspection may be immediately expelled from the country.⁵⁹

In addition to illegal entry or exceeding an authorized stay, persons whose activities affect national security, social peace, or public order may be deported from the country, regardless of their immigration status.⁶⁰ Persons who are sentenced for a crime that carries a penalty of five years imprisonment may be expelled from the country.⁶¹

The law provides for detention pending deportation but also allows for release on bond.⁶² Persons who are deported from the country may not re-enter without the express permission of the Ministry of Interior. Those who enter after an order of expulsion may be imprisoned for three months to two years.⁶³ Decisions to terminate permanent residence, deport, detain, or release on bond must be appealed directly to the Ministry of Interior.⁶⁴

Relief from deportation, at least technically speaking, is available for persons convicted of criminal offenses or whose activities detrimentally

56. See *infra* Part V (discussing the practical application of immigration procedures).

57. See Law No. 22439, art. 38, Mar. 23, 1981, [1981-A] L.A. 273. During the first six months of 1996, the National Immigration Department deported 1387 foreigners, gave a fixed departure date to 2129 foreigners, and rejected 1803 foreigners at the border. See DIRECCIÓN NACIONAL DE MIGRACIONES, REPORT OF THE MINISTERIO DEL INTERIOR (June 1996) (on file with author).

58. See Law No. 22439, arts. 37-38, Mar. 23, 1981, [1981-A] L.A. 273. These provisions correspond to voluntary departure, Immigration and Nationality Act, U.S.C.A. 8 U.S.C. § 1229c (West 1999), and removal (deportation), *id.* § 1229a, under U.S. statutes.

59. See Law No. 22439 art. 39, Mar. 23, 1981, [1981-A] L.A. 273, which is the Argentine corollary of "expedited removal" under the Immigration and Nationality Act, 8 U.S.C.A. § 1225 (West 1999).

60. See Law No. 22439, art. 95(b), Mar. 23, 1981, [1981-A] L.A. 273. Deportation based upon national security and public order was also part of the prior immigration Law No. 4144, Nov. 23, 1902. During the early part of this century, many labor activists were deported from Argentina. See, e.g., "Scheimberg," CSJN, 164 Fallos 344 (1932); Gabriel B. Chaousky, *El Estado y La Expulsión de Extranjeros*, REVISTA DE CIENCIAS JURÍDICAS Y SOCIALES, Nov. 1997, at 169.

61. See Law No. 22439, art. 95(a), Mar. 23, 1981, [1981-A] L.A. 283.

62. See *id.* arts. 40-41.

63. See *id.* arts. 44-46.

64. See *id.* art. 78. See also Decree No. 1023, Annex, art. 134, June 29, 1994 B.O. No. 27925.

affect national security, social peace, or public order. A foreigner, who has an Argentine parent, spouse, or child prior to the commission of the criminal offense or prohibited activities, or who has resided for ten years in the country, may apply for permission to remain in the country, despite the deportable offense.⁶⁵

V. PRACTICAL APPLICATION OF THE IMMIGRATION PROCEDURES

A fundamental concern regarding residency, admissibility and expulsions is the lack of statutory and regulatory procedures, judicial review and institutional safeguards.⁶⁶ There are few regulations which govern the adjudication of immigration benefits, waivers, bonds or expulsion procedures. There is no formal procedure or application to request a waiver of inadmissibility or relief from deportation. Moreover, there is very little case law interpreting the grounds of inadmissibility, expulsion, discretionary relief, or procedural aspects of the immigration process.⁶⁷ Generally, grounds of inadmissibility and other problematic cases are resolved administratively, although long delays may ensue. In fact, the most common complaint of the few Argentine immigration practitioners and service providers relates to the unreasonable delays and arbitrary decisions of the Department of Immigration. More serious public accusations of corruption within the Department of Immigration have been made by a former government official and also reported by a leading human rights organization in Argentina.⁶⁸

Expulsion proceedings, as well, provide for few regulatory or procedural safeguards. There are no regulations which govern, among other things, the initiation of expulsion proceedings, bond, burden of proof, or the conduct of the hearing. Indeed there are no immigration courts or independent judges. Thus, the majority of cases are resolved without formal hearings, bond, or appeals.⁶⁹ Generally, immigrants are unrepresented before the Immigration Department. The summary nature of the process provides the foreigner with little opportunity to contest the grounds of

65. See Law No. 22439, art. 96, Mar. 23, 1981, [1981-A] L.A. 273.

66. The author bases her conclusions regarding the practical aspects of the deportation and residency processes and the availability of legal services on personal interviews. See Interviews with the following groups: *Comisión Argentina Para Refugiados* (CAREF), *Comisión Católica Argentina de Migraciones* (CCAM), *Iglesia Evangelica Bautista del Centro*, private attorneys, immigration officials, and immigrants at CAREF and CELS (*Centro de Estudios Legales y Sociales*), in Buenos Aires (June-Dec. 1996) [hereinafter Interviews in Argentina]. See also Fleet, *supra* note 19, at 266-68.

67. See Interviews, *supra* note 52.

68. See *Menem Descalificó a Cavallo por Hacer Acusaciones Sin Pruebas*, CLARIN, Nov. 13, 1996, at 2. See also Fleet, *supra* note 19, at 268-69.

69. See Interviews in Argentina, *supra* note 66. See also Interviews, *supra* note 52.

deportation.

Another serious shortcoming is the lack of direct judicial review of a negative decision. Instead, an affected party's only remedy is to proceed by means of a constitutional *amparo*,⁷⁰ or habeas corpus. The lack of a statutory judicial review has been criticized as a violation of article 20 of the Constitution of 1994, which guarantees foreigners' equal civil rights,⁷¹ article 14, which gives all inhabitants of Argentina the right to remain in the country,⁷² and the international treaties, which have been incorporated into the Argentine Constitution.⁷³

In addition to the paucity of formal procedures, immigrants have few legal resources to protect their interests.⁷⁴ There is no established immigration bar and very few attorneys practice in the field of immigration law. There are few pro-bono groups available to represent immigrants and no historical tradition of public interest law.⁷⁵ Three church-based groups, the *Comisión Argentina para Refugiados* (CAREF), the *Comisión Católica Argentina de Migraciones* (CCAM), and the *Iglesia Evangelica Bautista*, assist refugees and immigrants. One group has no attorneys, and the others are staffed by part-time attorneys. All offer more social services than legal representation. Recently, the *Centro de Estudios Legales y Sociales* (CELS) began to address immigrants' rights. Thus, while there may be statutory or constitutional rights which apply to immigration adjudication and expulsion proceedings, in practice, it is rare that an immigrant can exercise his or her rights.

70. Article 43 of the Argentine Constitution of 1994 provides for an *amparo* action based on a violation of the Constitution or law in situations where there is immediate danger of imminent harm. See CONST. ARG. art. 43 (1994). The *amparo* is similar to an action for injunctive relief under U.S. law.

71. See *supra* note 4 (stating the text of article 20 of the Argentine Constitution).

72. See *infra* text accompanying note 114 for the text of article 14 of the Argentine Constitution, which has been interpreted to protect the rights of foreigners. See also *infra* Part VIII (discussing the constitutional protections and jurisprudence).

73. See Chausovsky, *supra* note 60 (providing an excellent analysis and criticism of the lack of judicial review). Dr. Chausovsky argues that the Argentine Immigration Law violates the Argentine Constitution, the right to due process, and international law. See *id.* He further opines that the extraordinary remedies of *amparo* and habeas corpus do not cure the inherent unconstitutionality of expulsion proceedings without review by a federal court. See *id.* Ironically, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections at 8 U.S.C.), similarly limits direct judicial review in the United States of many immigration decisions, and it forces aliens to seek review only in habeas corpus proceedings. See 8 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 104.13 (1998).

74. See Interviews in Argentina, *supra* note 66.

75. See Martín F. Böhmer, *Sobre la Inexistencia del Derecho de Interés Público en Argentina*, REVISTA JURÍDICA DE LA UNIVERSIDAD DE PALERMO, April, 1998, at 131.

VI. AMNESTY PROVISIONS

The relative ease with which a person from a neighboring country may enter Argentina has contributed to the large undocumented population within the country. Bilateral treaties to promote tourism allow citizens of neighboring countries to enter Argentina without a visa upon presentation of an identity document.⁷⁶ Since 1948, the government has decreed amnesties six times, each time with the purpose of regularizing the status of undocumented immigrants,⁷⁷ primarily from bordering countries, and prohibiting the further entry of undocumented immigrants.⁷⁸

The first amnesty after the fall of the military dictatorship was promulgated in 1984 by President Alfonsín.⁷⁹ The decree recognized that many foreigners who had contributed to the Argentine community, even through the "worst moments that the Republic has experienced,"⁸⁰ should be allowed to regularize their illegal status. On the other hand, the decree also stated that, henceforth, Argentina would implement immigration policies that would deter the illegal entry and residence of foreigners in the future.⁸¹

The 1984 amnesty benefited persons who had resided in the country

76. See Decree No. 4418, art. 42, June 14, 1965, *reprinted in* 2 GEODEMOS 414 (Graciela M. de Marco et al. eds., 1994). See also Res. No. 189, Feb. 13, 1995, H. Cámara de Diputados de la Nación, Secretaría Parlamentaria, fol. 34.

77. The author uses the term "undocumented immigrant" for lack of a better term. However, many persons from border countries enter as tourists and overstay their authorized period of admission.

78. See Decree No. 15972, July 8, 1949, *reprinted in* 2 GEODEMOS 490 (Graciela M. de Marco et al. eds., 1994). See also Decree No. 24666, 1949, *reprinted in* 2 GEODEMOS 490 (Graciela M. de Marco et al. eds., 1994); Decree No. 3364, 1958, *reprinted in* 2 GEODEMOS 492 (Graciela M. de Marco et al. eds., 1994); Decree No. 49, Jan. 10, 1964, [1964] A.L.J.A. 96; Decree No. 11982, 1965, [1966] A.L.J.A. 56; Decree No. 87, 1974, *reprinted in* 2 GEODEMOS 498 (Graciela M. de Marco et al. eds., 1994); Decree No. 780, 1984, [1984-A] A.L.J.A. 40. The fact that Argentine amnesty programs have been implemented by decree illustrates the broad powers of the executive branch over immigration matters. In the United States, after long and heated debate, Congress, not the Immigration and Naturalization Service, passed the country's only amnesty program. See Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.); Immigration and Nationality Act, 8 U.S.C.A. § 1255a (West 1999). An analogous provision to the U.S. registry statutes, which provides permanent residence to long-time residents of the country, was also passed by decree in Argentina. Compare Decree No. 1835, 1977 (providing for permanent residence for persons over the age of 66 who have resided in Argentina for 30 years), and Immigration and Nationality Act, 8 U.S.C.A. § 1259 (West 1999).

79. See Decree No. 780, 1984, *reprinted in* 2 GEODEMOS 500 (Graciela M. de Marco et al. eds., 1994). See also Decree No. 3627, 1984, *reprinted in* 2 GEODEMOS 501 (Graciela M. de Marco et al. eds., 1994).

80. Decree No. 780, 1984, *pmbl.*, *reprinted in* 2 GEODEMOS 500 (Graciela M. de Marco et al. eds., 1994).

81. See *id.*

since November 30, 1983. The initial application period was 180 days from the effective date of the decree but was extended through March 29, 1985.⁸² Permanent residents, diplomats, students, temporary residents in the country for medical treatment, and asylees were ineligible under the decree.⁸³ Applicants were required to submit an application form with no fee required, an identity document, proof of residence, a sworn declaration of the lack of a criminal record which would render the applicant ineligible for residence under existing immigration norms,⁸⁴ and a record of medical examination for applicants who had resided in the country for less than three years.⁸⁵ Approximately 156,769 persons, of which 95% were from bordering countries, obtained residence under the 1984 amnesty program.⁸⁶

In 1987, the Immigration Department promulgated a resolution to implement yet another amnesty program. The stated purpose of the resolution was to provide relief for persons who would be penalized by stricter immigration regulations adopted simultaneously by the executive branch.⁸⁷ This resolution provided for legal residence for persons who had entered the country legally prior to September 1, 1987, persons who entered illegally but who were parents, spouses or unmarried children of Argentine citizens, or persons who had filed for residence under previous laws before September 1, 1987. The primary beneficiaries were Chileans, Paraguayans, Bolivians, and Uruguayans.⁸⁸

Despite the government's stated goals in the previous amnesty programs of ending illegal immigration, it was obliged to pass additional amnesty measures in 1992. The 1992 decree was limited to persons from

82. See *id.* arts. 1-2. See also Decree No. 3627, art. 1, 1984, reprinted in 2 GEODEMOS 501 (Graciela M. de Marco et al. eds., 1994).

83. See Decree No. 780, art. 5, 1984, reprinted in 2 GEODEMOS 500 (Graciela M. de Marco et al. eds., 1994).

84. Under the 1965 immigration decree, a person who had been convicted of, or who was being tried for, common crimes, which under Argentine law could be punished by incarceration, were ineligible for residence. When the criminal sentence had been served, or the prosecution completed, or if the maximum punishment was less than two years, the immigration authorities had the discretion to grant residence under certain circumstances. See Decree No. 4418, arts. 25, 27, June 14, 1965, reprinted in 2 GEODEMOS 414 (Graciela M. de Marco et al. eds., 1994).

85. See Decree No. 780, arts. 2-3, 11, 1984, reprinted in 2 GEODEMOS 500 (Graciela M. de Marco et al. eds., 1994).

86. See Susana M. Sassone, *Los Indocumentados y las Amnistías Migratorias*, reprinted in 2 GEODEMOS 355, 366 (Graciela M. de Marco et al. eds., 1994).

87. See Decree No. 1434, Aug. 31, 1987, reprinted in 2 GEODEMOS 464 (Graciela M. de Marco et al. eds., 1994). See also Res. No. 2364, Sept. 2, 1987, reprinted in 2 GEODEMOS 578 (Graciela M. de Marco et al. eds., 1994). As stated previously, the Department of Immigration in Argentina has the broad power to decree such amnesties.

88. See Res. No. 2364, 1987, arts. 1, 2, reprinted in 2 GEODEMOS 578 (Graciela M. de Marco et al. eds., 1994).

bordering countries — Chile, Paraguay, Brazil, Uruguay, and Bolivia — who had been in Argentina since December 31, 1996. The initial application period was from November 2, 1992, through April 3, 1993, but was then extended to January 3, 1994.⁸⁹ A total of 224,471 persons obtained temporary residence under this amnesty.⁹⁰ Bolivians, followed by Paraguayans, constituted the majority of those who regularized their status under the amnesty provisions.⁹¹

Like previous amnesties, the documentation needed to establish eligibility was minimal.⁹² An applicant was required to submit an application, a filing fee of approximately \$16.00, proof of identity, and proof of residence in the country prior to December 31, 1991. Proof of residence could be established by submission of one of the following documents: an entry stamp in a passport or other entry document; proof of temporary residence; or any other official document, such as school records, a birth certificate, or a marriage license issued in Argentina before the effective amnesty date.⁹³ In addition, the applicant had to sign a sworn declaration of admissibility.⁹⁴ A medical exam was not required for applicants with temporary residence or those who had resided in Argentina since November 1, 1990.⁹⁵

Although the 1992 amnesty decree speaks of “definite residence,” persons who qualified were issued temporary documents for a period of two years. At the end of this period, the applicant must present his or her *Documento Nacional de Identidad*, or D.N.I. (National Identity Document), in order to obtain permanent residence,⁹⁶ which is granted unless the Department of Immigration finds fraud in the application. Many amnesty residents still do not have permanent status. There have been many complaints regarding the implementation of the programs, including

89. See Decree No. 1033, June 24, 1992, [1992-B] L.A. 1909. See also Decree No. 864, June 5, 1993; Decree No. 2504, Oct. 12, 1993, H. Camara de Diputados de la Nación, Secretaria Parlamenataria, fol. 61.

90. See DIRECCIÓN NACIONAL DE MIGRACIONES, ESTADÍSTICAS POR DECRETO 1033/92, Oct. 23, 1995. See also Otieza et al., *supra* note 10, at 174.

91. See Otieza et al., *supra* note 10, at 174.

92. The author categorizes the documentation as “minimal” in comparison with the more onerous evidentiary requirements of the legalization provisions of the Immigration Reform and Control Act of 1986. See Immigration and Nationality Act, 8 U.S.C.A. § 1225a (West 1999). However, many Argentine amnesty applicants lack sufficient funds to obtain necessary documents or pay for the required notary services. See Interviews in Argentina, *supra* note 66; Fleet, *supra* note 19, at 266.

93. See Decree No. 1033, June 24, 1992, [1992-B] L.A. 1909.

94. See *id.*

95. See *id.* art. 4(a)-(f).

96. See DIRECCIÓN NACIONAL DE MIGRACIONES, RADICACIÓN-REQUISITOS MIGRATORIOS [Residence-Immigration Requirements, National Department of Immigration] (on file with author).

accusations of irregularities within the Department of Immigration as well as by *gestores*, non-attorney "agents," who assist immigrants with their applications. A common occurrence is that more than one person obtained amnesty under the same file number. When attempting to renew their documents, immigrants, who filed for amnesty in good faith, learn that their documents actually belong to another person.⁹⁷

In addition to specific amnesty programs, the Immigration Department has promulgated decrees which have provided Peruvians and Bolivians with "precarious" residence⁹⁸ and employment authorization for approximately sixty to ninety days.⁹⁹ "Precarious" residence may be renewed so long as the decree remains in effect. If the "precarious" resident obtains an employment contract, he or she may apply for temporary residence under the normal immigration procedures. High unemployment in Argentina makes it difficult for undocumented immigrants to obtain an employment contract as required by the immigration law in order to qualify for a more permanent status.

VII. REFUGEES

Argentina has ratified the United Nations Convention on the Status of Refugees and the Protocol on the Status of Refugees.¹⁰⁰ Subsequently, by decree in 1985, the government established the *Comité Para La Elegibilidad de Refugiados*, or CEPARE (Committee for the Eligibility of Refugees), within the Immigration Department.¹⁰¹ The committee is comprised of the

97. See Interviews in Argentina, *supra* note 66. See also Fleet, *supra* note 19, at 268-69.

98. See Res. No. 1315, July 7, 1997, A.O.N. (extending Resolution No. 3850, Oct. 10, 1994, to Peruvians). See also Res. No. 1178, June 19, 1997, B.O. 8 (July 27, 1997) (extending Res. No. 2912, 1996, and Res. No. 1178, 1991). The Argentine Immigration Law gives the Department of Immigration broad powers to grant "precarious" residence and to cancel such status at the agency's discretion. See Law No. 22439, art. 21, Mar. 23, 1981 [1981-A] L.A. 273. The most analogous provision under U.S. immigration law is the practice of granting deferred enforced departure with employment authorization to allow certain individuals or groups to remain in the United States for determinative periods of time. See also INS Cable, June 11, 1992, File No. CO 1810/14, reprinted in 69 INTERPRETER RELEASES 736 (1992).

99. See Interview with Violeta Correa, CAREF, in Buenos Aires (Aug. 1996).

100. See Law No. 15869, Dec. 11, 1961, [1961] A.L.J.A. 65; Law No. 23160, Nov. 11, 1984 [1984-B] A.L.J.A. 879. Argentina also recognizes territorial or diplomatic asylum under the Caracas Convention on Diplomatic Asylum, § 3, Mar. 28, 1954, 10th Inter-American Conf., OAS Treaty Series, No. 18, and the Caracas Convention on Territorial Asylum, § 3, Mar. 28, 1954, 10th Inter-American Conf., OAS Treaty Series, No. 19. See also Alejandro O. Iza, *The Asylum and Refugee Procedure in the Argentine Legal System*, 6 INT'L J. REFUGEE L. 643 (1994).

101. See Decree No. 464, art. 1, Mar. 11, 1985, B.O. No. 25636.

National Director of Immigration, the head of the Legal Affairs Department of the Immigration Department, the head of the Department of the Admission of Foreigners, and a representative of the Ministry of Foreign Relations and Culture.¹⁰² In addition, a member of the United Nations High Commission for Refugees (UNHCR) may serve on the committee in an advisory capacity without voting rights.¹⁰³

Most refugees apply for status without the assistance of an attorney and rarely present, or are rarely required to provide, the quantum of proof required in asylum cases in the United States.¹⁰⁴ Upon the filing of the application, the applicant is issued permission to work. Employment authorization is extended while the application is pending. There is no precise time limit for filing for refugee status, although the regulations state that an applicant "must appear before the immigration authorities upon arrival in the country or without delay."¹⁰⁵ However, in practice, the filing of a tardy application may be considered a negative factor by CEPARE in its determination of refugee status.¹⁰⁶

The applicant is interviewed by the Immigration Department which sends a recommendation to CEPARE regarding the validity of the claim. Persons who are granted refugee status are considered permanent residents.¹⁰⁷ The general grounds of inadmissibility, such as physical

102. *See id.* art. 3

103. *See id.*

104. *See Matter of S-M-J*, Interim Decision 3303 (B.I.A. 1997). The number of persons applying for refugee status in Argentina is much smaller than in the United States. In 1997, 10,400 refugees resided in Argentina. *See UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES STATISTICAL UNIT, Refugees and Others of Concern to UNHCR, 1997 STATISTICAL OVERVIEW 5* (1998). Cubans, Peruvians, and Africans make up most of the refugees. In contrast, according to recent statistics, the United States received an annual total of 297,687 refugee and asylum applications and approved 52.7% of these cases. *See IMMIGRATION & NATURALIZATION SERVICE, STATISTICS DIVISION, INS FACT BOOK: SUMMARY OF RECENT IMMIGRATION DATA 16* (Jan. 1997). This figure does not include cases that were referred by the Asylum Office to an immigration judge for decision. Conclusions regarding the informality, quantum of evidence, attorney representation, and country of origin of refugees are based on the author's interviews in Argentina. *See Interviews with Legal Advisor, Argentine office of the UNHCR, and service providers, refugees, and refugee seekers, in Buenos Aires* (Aug. 1996) [hereinafter Interviews with the UNHCR].

105. *See Res. No. 1872, 1985. Cf. Immigration and Nationality Act, 8 U.S.C.A. § 1158(a)(2)(B)* (West 1999). The new U.S. law requires an applicant to file for asylum status within one year of arrival in the United States unless the applicant establishes changed circumstances which materially affect eligibility or extraordinary circumstances which excuse the delay in filing. *See id.*

106. *See Interviews with Alicia Curiel, private attorney, in Buenos Aires* (Oct. 1996); Interviews with the UNHCR, *supra* note 104.

107. *See Decree No. 1434, art. 178, Aug. 31, 1987 B.O. No. 26224. Cf. Immigration and Nationality Act, 8 U.S.C.A. § 1159* (West 1999) (showing a person granted asylum or refugee status in the United States must wait one year to apply for permanent resident status).

incapacity, age or criminal record, are inapplicable to refugees.¹⁰⁸ If CEPARE denies the claim, the applicant may request a reconsideration and, if the unfavorable decision is upheld, may appeal to the Ministry of Interior within ten days of the denial.¹⁰⁹ Appeals of denials are handled by the UNHCR¹¹⁰ and the very limited service providers who assist refugees.¹¹¹

VIII. CONSTITUTIONAL PROTECTIONS AND JURISPRUDENCE

The Argentine Constitution provides very specific constitutional rights for foreigners and immigrants.¹¹² Article 20 of the Constitution of 1994 explicitly states that foreigners enjoy the same civil rights as citizens and can exercise their profession or business, own, buy and sell property, navigate the waterways, practice their religion freely, make wills, and marry.¹¹³ Under Article 14, "inhabitants" of Argentina, a constitutional term which has been defined to include foreigners, enjoy additional constitutional and civil rights, including the right to enter and live in Argentina.¹¹⁴

108. See Decree No. 1434, art. 179, Aug. 31, 1987 B.O. No. 26224.

109. See Decree No. 464, arts. 7-8, Mar. 11, 1985, B.O. No. 25636.

110. The UNHCR has the right to appeal the denial of a refugee application. See *id.* art. 4.

111. As of the writing of this article, only the *Comisión Católica Argentina de Migraciones* (CCAM) handles appeals of the denial of refugee status.

112. Based on the author's investigations in Argentina, as previously noted, immigrants in Argentina, particularly the undocumented, are unable to exercise their constitutional rights due to factors such as the lack of an immigration and public interest bar, lack of resources, unfettered discretion of the Department of Immigration, and discrimination against immigrants. See generally Interviews in Argentina, *supra* note 66; Fleet, *supra* note 19.

113. See CONST. ARG. art. 20 (1994). See also *supra* note 4 (stating the text of article 20); "Repetto," CSJN, 311 Fallos 2272 (1988) (prohibiting the state from requiring Argentine citizenship for teachers). Under U.S. precedent, the constitutional rights of immigrants have been found to be implied under more general constitutional provisions. See, e.g., U.S. CONST. amends. V, XIV; *Takahashi v. Fish & Game Comm'n.*, 334 U.S. 410 (1948); *Truax v. Raich*, 239 U.S. 33 (1915). In addition, legal immigrants in the United States may be denied entry into certain professions and thus do not enjoy the full right to exercise their profession. See, e.g., *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982) (denying employment as a state probation officer); *Ambach v. Norwick*, 441 U.S. 68 (1979) (denying employment as a teacher); *Foley v. Connelie*, 435 U.S. 291 (1978) (denying employment as a police officer). See also Personal Responsibility and Work Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (restricting the rights of legal residents to public benefits, which would ostensibly be unconstitutional under the Argentine Constitution).

114. The Spanish term is *habitante*. The Constitution provides:

All inhabitants of the Nation enjoy the following rights, in accordance with the laws that regulate their exercise, namely: working in and practicing any lawful industry; of navigating and trading; of petitioning the authorities; of entering, remaining in, travelling through and leaving Argentine territory; of publishing their ideas through the press without previous censorship; of using and disposing of their property; of associating for useful purposes; of freely

A. Case Law

Due to the relatively limited number of contested immigration proceedings and lack of direct judicial review, there are fewer reported cases in Argentina involving the legal rights of immigrants than are reported in U.S. jurisprudence. As previously discussed, the lack of pro-bono legal resources or an organized immigration bar also restricts litigation regarding the rights of immigrants. Nevertheless, both article 20, bestowing constitutional rights on foreigners, and article 14, recognizing additional constitutional rights of "inhabitants," have been applied in immigration proceedings to challenge both expulsion and the denial of residence.¹¹⁵ A discussion of the major Argentine court decisions relating to immigration matters follows.

The constitutional protections enjoyed by "inhabitants" to enter and remain in Argentine territory have been extended to undocumented immigrants and those in irregular immigration status. In *Macía y Gassol*,¹¹⁶ the Argentine Supreme Court ruled that the term "inhabitant" extends to both foreigners and the native born and that the term is defined to include all persons who reside and have the intention of remaining in the territory of the Republic, even without legal domicile.¹¹⁷

The Court in *Macía y Gassol* did not consider the manner of entry in construing the term "inhabitant." However, the jurisprudence has not always been consistent.¹¹⁸ In some decisions, the Court has concluded that the Constitution only protects those immigrants who entered the country legally. In other decisions, the Court has extended the definition of "inhabitant" to persons whose initial entry into Argentina was illegal.

For example, in *Coito*,¹¹⁹ the Immigration Department denied residence to a Jehovah's Witness on national security and public order grounds. While recognizing the government's right to control immigration, the Court reiterated that the administrative agency's decision-making process must not violate the Constitution.¹²⁰ Although Carrizo Coito's tourist visa had expired at the time he applied for residence, the Court concluded he was an "inhabitant" who could invoke his right to religious freedom and his right to

professing their religion; of teaching and learning.

CONST. ARG. art. 14 (1994).

115. See, e.g., "Coito," CSJN, 302 Fallos 604 (1980) (denying permanent residence); "Acosta," CSJN, 278 Fallos 147 (1970) (expelling immigrant).

116. See "Macía," CSJN, 151 Fallos 211 (1928).

117. See *id.*

118. The Argentine legal system is based on the Napoleonic civil system, not the English system of common law and binding precedents.

119. CSJN, 302 Fallos 604 (1980).

120. See *id.* at 635, (citing "Urrutia," CSJN, 200 Fallos 99 (1944)).

remain in Argentina guaranteed under articles 14 and 20 of the Constitution.¹²¹ The Court defined an inhabitant as a person who has not entered clandestinely and who has the intention of remaining permanently in the country.¹²²

Nevertheless, in other cases the Argentine Supreme Court has broadly defined "inhabitant" to include even persons whose initial entry was illegal. For instance, in *Lino Sosa*,¹²³ the Court held that neither the Constitution nor the immigration laws specifically set a time frame after which an illegal entrant becomes an "inhabitant."¹²⁴ Nevertheless, the Court reasoned that Sosa's five-year residence in Argentina, his demonstrated attachment to the country, and his record of good behavior elevated him to the status of "inhabitant."¹²⁵

Although the Court has vacillated on the relevance of the manner of entry, the primary factor in concluding that a foreigner is an inhabitant appears to be his or her ties to Argentina, length of residence, and lack of criminal record. For example, the Argentine Supreme Court overturned a decision to deny residence to a Paraguayan because of purported Communist activities ten years earlier.¹²⁶ The Court noted that it would be unreasonable to deport the applicant who had been a temporary resident of the country for a lengthy period of time and who had established family and business ties in the country.¹²⁷ The Court ruled that the administrative decision making must be reasonable and concluded that the Immigration Department's decision to expel the foreigner conflicted with the constitutional right to enter, remain, travel through, and leave the country.¹²⁸

A similar result was reached in *Argüello*.¹²⁹ In that case, the Immigration Department denied the permanent residence application of a Nicaraguan on national security and public order grounds based on his alleged membership in left-wing political groups in Argentina and Nicaragua.¹³⁰ Relying on the applicant's ties with the country, including a previous grant of temporary residence, presence in Argentina for thirteen

121. *See id.*

122. *See id.* at 633.

123. CSJN, 234 Fallos 203 (1956).

124. *See id.*

125. *See id.* at 209.

126. *See* Horacio N. Dassen, *Expulsion de Extranjeros*, [1955] L.L. 837. Many of the Supreme Court cases involve the denial of residence on national security and public order grounds. The reported cases interpret earlier versions of the immigration statutes which also provide for deportation and inadmissibility based on national security and public order. *See* Chausovsky, *supra* note 60, at 169.

127. *See* Dassen, *supra* note 126, at 837.

128. *See* "Acosta," CSJN, 278 Fallos 147.

129. CSJN, 268 Fallos 393 (1967).

130. *See id.*

years, and an Argentine citizen child, the Court invoked the protections of articles 14 and 20 of the Constitution to prevent Argüello's deportation.¹³¹

In *Silvestre Ramón Britez*,¹³² the Court again overruled the denial of residence to a foreigner based on his union activism. Citing Britez's marriage to an Argentine citizen and his lengthy residence in the country, the Court held that the constitutional right of an inhabitant to live in Argentina prevented Britez's deportation.¹³³ In *Juliana B. Zlatnik*,¹³⁴ the immigrant was detained by the immigration authorities upon arrival to Argentina because of her medical condition; she was subsequently released pending resolution of her case. Focusing on Ms. Zlatnik's intent to reside in Argentina and her family ties, the Supreme Court declared that she was an inhabitant and thus entitled to admittance.¹³⁵

Residents who travel abroad and return to Argentina do not lose their status as inhabitants and thus are not subject to expulsion.¹³⁶ Moreover, a legal resident who re-enters Argentina illegally does not lose his resident status.¹³⁷ In *Cesare*, a long-time resident departed for ten months and returned to Argentina illegally as a stowaway.¹³⁸ Characterizing the immigrant as an "inhabitant" under article 14, the Court held that Cesare could not be deported or required to reestablish his residence in Argentina.¹³⁹

Due process rights in expulsion proceedings have also been recognized by the Argentine courts. In the seminal case of *Scheimberg*,¹⁴⁰ the Argentine Supreme Court set out basic constitutional guarantees that should be afforded in deportation proceedings: the rights to a fair hearing, to be heard, to

131. *See id.*

132. CSJN, 268 Fallos 406 (1967).

133. The Supreme Court criticized the lack of evidence relating to the alleged subversive materials that Britez was accused of distributing. *See id.*

134. CSJN, 182 Fallos 39 (1938).

135. *See id.*

136. *See* "Bertone," CSJN, 164 Fallos 290 (1932). Note, however, that the current immigration law provides that a permanent resident who remains outside Argentina for more than two years without special permission from the consulate or the immigration authorities loses his residence. *See* Law No. 22439, art. 16(b), Mar. 23, 1981 [1981-A] L.A. 273. *Bertone* does not discuss the length of the immigrant's absence but notes that he departed to visit an ailing relative. *See* "Bertone," CSJN, 164 Fallos 290 (1932).

137. *See* "Cesare," 184 Fallos 101 (1939). Under U.S. law, a lawful permanent resident who enters illegally is subject to removal proceedings. *Compare* Immigration and Nationality Act, 8 U.S.C.A. § 1227(a)(1)(B) (West 1999), and *id.* § 1101(a)(13)(C)(vi).

138. *See* "Cesare," CSJN, 184 Fallos 101 (1939).

139. *See id.*

140. CSJN, 164 Fallos 344 (1932).

present a defense, and to a review by a competent court.¹⁴¹ Nonetheless, in *Scheimberg* and numerous other cases, the Court upheld the right of the government to deport foreign anarchists and other activists accused of subverting public order.¹⁴²

In *M.P., J.H.*,¹⁴³ the Immigration Department denied the residence and ordered the expulsion of an alleged Chilean transvestite because he did not have a profession, art, or science which was beneficial to the country.¹⁴⁴ The appellate court criticized the immigration agency for using this provision as a means of disapproval of the applicant's sexual orientation without providing the applicant a meaningful right to be heard.¹⁴⁵ The court's decision was strongly influenced by the fact that the twenty-nine year old applicant had lived in Argentina since the age of eleven months and that his application for permanent residence had been pending for twelve years.¹⁴⁶

In contrast to the Court's seemingly generous extension of constitutional protections to those with ties to Argentina, in *Don Jose Fernandez Rodriguez*,¹⁴⁷ the Supreme Court affirmed the denial of residence to an arriving foreigner who was afflicted with trachoma but who had married an Argentine and had lived in the country previously. The Court reasoned that the petitioner had not adequately established that she was an "inhabitant" and thus was not entitled to constitutional protection.

In *Rial y Freire*,¹⁴⁸ the Court concluded that the denial of residence to two foreign crewmen who entered the country illegally did not violate article 14 of the Constitution. In the latter case, there was no discussion of any family ties or lengthy residence in the country.

141. *See id.* While the Supreme Court has articulated these rights, there are no immigration courts and few formal procedures to resolve expulsion cases. *Scheimberg* reached the Supreme Court on habeas corpus, not by direct appellate review. *See supra* Part IV (discussing expulsions).

142. Many other foreigners were deported as threats to public order pursuant to prior Law No. 4144, Nov. 23, 1902.

143. "M.P., J.H.," CFed [1991-B] L.L. 455 (1989). The case was decided under an earlier immigration decree. *See* Decree No. 1434, 1987, art. 22(f), *reprinted in* 2 GEODEMOS 469 (Graciela M. de Marco et al. eds., 1994). Nevertheless, the language of the prior law is identical to the current decree. *See* Decree No. 1023, Annex, art. 21(g), July 5, 1994, B.O. No. 27925.

144. *See* "M.P., J.H.," CFed [1991-B] L.L. 455 (1989). *See also* Decree No. 4418, art. 25(c), June 14, 1965, [1965] A.L.J.A. 144. The current Argentine law contains a similar provision. *See* Law No. 22439, art. 21(g), Mar. 23, 1981, [1981-A] L.A. 273.

145. *See* "M.P., J.H.," CFed., [1991-B] L.L. 455 (1989).

146. *See id.*

147. CSJN, 148 Fallos 410 (1927).

148. CSJN, 205 Fallos 628 (1946).

B. *Restrictions of the Rights of the Undocumented*

While the Argentine Constitution theoretically provides for broad constitutional rights for all foreigners, the immigration laws severely restrict the rights of the undocumented population and arguably violate constitutional and international law.¹⁴⁹ Undocumented foreigners may not work, are restricted in commercial transactions, and are prohibited from attending secondary school. The police may search the homes of the undocumented without a warrant or probable cause. Argentine citizens are required to report undocumented foreigners to the authorities in a variety of situations. The constitutionality of these provisions has not been subject to extensive court challenge.

1. *Access to Public Education*

Article 102 of Law No. 22439 limits public education beyond the primary school level to foreigners who are permanent residents or temporary residents.¹⁵⁰ There have been only a few challenges¹⁵¹ mounted against the constitutionality of this provision and no reported decisions on the issue, although access to secondary education is a significant problem in the undocumented community.¹⁵²

Possible challenges to restrictions on educational access could be based on the Argentine Constitution, international law, and comparative U.S. law.¹⁵³ In addition to the general constitutional protections that foreigners

149. Many human rights treaties, declarations and covenants have been incorporated into the Argentine Constitution and have parity with other constitutional provisions and superiority to domestic laws. See ARG. CONST. art. 75, para. 22 (1994). Additional ratified treaties and pacts not specifically listed in paragraph 22 supersede national law, although they do have not constitutional force. See *id.* art. 75, para. 24. Undocumented immigrants might avail themselves of the courts' broad interpretation of the term "inhabitant" to include those foreigners in irregular immigration status but who evince an intention to reside in Argentina. Litigants could argue that restricting rights of the undocumented violates the constitutional protections afforded under articles 14 and 20 of the Argentine Constitution.

150. See Law No. 22439, art. 102, Mar. 23, 1981, [1981-A] L.A. 273. "Institutes of middle or secondary schools, whether public or private, national, provincial or municipal, shall only admit as students those foreigners who establish for each course their duly authorized status as 'permanent residents' or 'temporary residents.'" *Id.* (translation by author).

151. CELS has successfully obtained school admission for a few individual clients through administrative channels or through the filing of an *acción de amparo*.

152. See Interviews in Argentina, *supra* note 66.

153. Cf., e.g., *Plyer v. Doe*, 457 U.S. 202 (1982). Many Argentine court decisions cite U.S. precedents in support of their holdings.

enjoy,¹⁵⁴ the Argentine Constitution specifically provides all "inhabitants" with the "right to learn."¹⁵⁵ Moreover, the 1994 Argentine Constitution gives "constitutional hierarchy" to certain ratified international treaties and recognizes that these treaties take precedence over conflicting national laws.¹⁵⁶ Protection against discrimination, the right to equal protection, and the right to education¹⁵⁷ are included in many human rights treaties. Thus, the denial of secondary education may violate both Argentine and international law.¹⁵⁸

2. *Employment and Property Rights*¹⁵⁹

Permanent residents may engage in any employment or business endeavor.¹⁶⁰ Temporary and transitory residents may only work with explicit permission from the Department of Immigration.¹⁶¹ Persons who have "precarious residence" are authorized to work under the terms and for the

154. Article 20 states that foreigners have all the rights of citizens. *See supra* note 4 (stating the text of article 20). *See also supra* Part VIII-A (discussing Argentine jurisprudence).

155. "All inhabitants of the Nation enjoy the following rights, in accordance with the laws that regulate their exercise, namely . . . teaching and learning." ARG. CONST. art. 14 (1994).

156. *See* discussion *supra* note 149.

157. *See, e.g.*, Universal Declaration of Human Rights, art. 26, Dec. 10, 1948, G.A. Res. 217(A), U.N. GAOR, 3rd Sess., U.N. Doc.A/810 (1948); International Covenant of Economic, Social and Cultural Rights, art. 13, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976); American Declaration of the Rights and Duties of Man, art. XIII, May 2, 1948, O.A.S. Off. Rec. OEA/Ser L/V/I.4 Rev. (1965); Convention of the Rights of the Child, art. 28, Nov. 20, 1989, G.A. Res. 44/25 (Annex.), UN GAOR, 44th Sess., Supp. No. 49, at 166, U.N. Doc.A/44/49 (1990) (entered into force Sept. 2, 1990). *See also* Stephen Knight, *Proposition 187 and International Human Rights Law: Illegal Discrimination in the Right to Education*, 19 HASTINGS INT'L & COMP. L. REV. 183 (1995) (providing an in-depth analysis of the right to education under international law).

158. The U.S. legal doctrine of "self-executing treaties," which serves as an obstacle to litigation based on the violation of international human rights law, is not applied in Argentine jurisprudence. *Compare* *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829), and *Dreyfus v. Von Finck*, 534 F.2d 24, 30 (2d. Cir. 1976), with "Ekmekdjian," [1992-III] J.A. 199 (recognizing the right of an individual litigant to raise a claim based on a violation of article 14 — the "right of reply" of the American Convention on Human Rights). *See generally* LA APLICACIÓN DE LOS TRATADOS SOBRE DERECHOS HUMANOS POR LOS TRIBUNALES LOCALES, (Martin Abregú & Christian Courtis eds., Centro de Estudios Legales y Sociales, 1997).

159. This article focuses on the immigration laws affecting the undocumented and does not address the rights, or lack thereof, of the undocumented in relation to labor, criminal, or other Argentine laws.

160. *See* Law No. 22439, art. 26, Mar. 23, 1981, [1981-A] L.A. 273. As discussed previously, in addition to statutory rights, legal residents have broad constitutional rights. *See* CONST. ARG. arts. 20, 25 (1994). *See also* "Repetto," CSJN, 311 Fallos 2272 (1988) (holding that a foreigner has equal rights to employment under article 20 of the Constitution.)

161. *See* Law No. 22439, arts. 27, 28, Mar. 23, 1981, [1981-A] L.A. 273.

period authorized by the Immigration Department.¹⁶² Undocumented persons are prohibited from engaging in any type of employment or remunerative business.¹⁶³ A person or company who hires an undocumented immigrant is subject to a fine of \$5000 for each violation or \$200 for each violation relating to a domestic worker.¹⁶⁴

The law also prevents the sale of property for value to undocumented immigrants and imposes a fine of approximately \$3000 for a violation of this provision.¹⁶⁵ While other commercial transactions with an undocumented person are not *per se* prohibited, the law requires that the seller report the undocumented person to the immigration authorities¹⁶⁶ and provides for a fine of \$500 for failure to do so.¹⁶⁷

3. *Reporting the Undocumented*

In addition to requiring private citizens to report undocumented persons to the authorities in the course of business transactions, the immigration law also obligates notary publics who prepare documents relating to commercial transactions to do the same.¹⁶⁸ Likewise, officials who perform a marriage involving an undocumented person must report such person to the immigration authorities.¹⁶⁹ While the immigration law does not prohibit the celebration of the marriage, possible detection by immigration authorities has a chilling effect. In addition, this reporting requirement contravenes the rights to marry and to establish a family, which are protected under numerous international human rights documents,¹⁷⁰ as well as the right to

162. See *id.* art. 29. See also sources cited *supra* note 98 (regarding "precarious" residence for Bolivians and Peruvians).

163. See Law No. 22439, art. 30, Mar.23, 1981, [1981-A] L.A. 273.

164. See *id.* arts. 31, 48; Law No. 24393, art. 2(a), Nov. 18, 1994 [1994-C] L.A. 3228 (modifying Law No. 22439, art. 48).

165. See Law No. 22439, arts. 32, 48, Mar.23, 1981, [1981-A] L.A. 273; Law No. 24393, art. 2(a), Nov. 18, 1994, [1994-C] L.A. 3228 (modifying Law No. 22439, art.48, Mar.23, 1981, [1981-A] L.A. 273).

166. See Law No. 22439, arts. 32, 35, Mar.23, 1981, [1981-A] L.A. 273. From a civil rights standpoint, one might question how an ordinary citizen can determine the immigration status of a foreigner. However, in Argentina, a national identity card (*Documento Nacional de Identidad* — DNI) is required for official transactions.

167. See *id.* art. 48; Law No. 24393, art. 2(b)-(c), Nov. 18, 1994, [1994-C] L.A. 3228 (modifying Law No. 22439, art. 48)

168. See Law No. 22439, art. 105, Mar. 23, 1981, [1981-A], L.A. 273.

169. See *id.* art. 101.

170. See, e.g., Universal Declaration of Human Rights, art. 16, Dec. 10, 1948, G.A. Res. 217(A), U.N. GAOR, 3rd Sess., U.N. Doc.A/810 (1948); International Covenant of Economic, Social and Cultural Rights, art. 10, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Jan. 3, 1976); American Declaration of the Rights and Duties of Man, art. VI, May 2, 1948, O.A.S. Off. Rec. OEA/Ser L/V/I.4 Rev. (1965); American Convention on Human

privacy under article 19 of the Argentine Constitution.¹⁷¹ A medical facility that treats an undocumented person must furnish her name and address to the Immigration Department within twenty-four hours.¹⁷² The law also contains similar reporting requirements within twenty-four hours for all municipal, provincial, and federal agencies and employees.¹⁷³

4. *Searches of the Undocumented*

The immigration law authorizes the Immigration Department or its designees to require that all foreigners prove their legal status in the country.¹⁷⁴ The immigration authorities are further given the power to enter commercial establishments, factories, educational facilities, hospitals, or any other place where a violation or presumption of a violation of the law has occurred.¹⁷⁵ None of these provisions of the law require a judicial order, probable cause, or reasonable suspicion before questioning or searching a person or entering an establishment. Thus, they may be subject to challenges under the provisions of the Argentine Constitution and international law incorporated into the Constitution.¹⁷⁶

Rights, art. 17, Nov. 22, 1969, OAS Off. Rec. OEA/Ser. L/V/IL.23, Doc. 21 Rev. 6 (1979), reprinted in 9 ILM 673 (1970); International Covenant on Civil and Political Rights, art. 23, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976). These treaties are incorporated in the Argentine Constitution under article 75, paragraph 22. Challenges could also be based on the rights of equal protection and privacy encompassed by numerous human rights treaties.

171. Article 19 states:

The private actions of men that in no way offend public order or morality nor injure a third party, are reserved only to God and are exempt from the authority of the magistrates. No inhabitant of the Nation shall be obliged to do what the law does not command nor be deprived of what it does not forbid.

CONST. ARG. art. 19 (1994).

172. See Law. No. 22439, art. 103, Mar. 23, 1981, [1981-A] L.A. 273. The law makes clear, however, that the medical facility may provide medical treatment, notwithstanding the immigration status of the patient.

173. See *id.* arts. 104, 106.

174. See *id.* art. 107(a).

175. See *id.* art. 107(c).

176. "The residence is inviolable, as are letters, correspondence and private papers; and a law shall determine in what cases and for what reasons their search and seizure shall be allowed." CONST. ARG. art. 18 (1994). See also "Solaris Transporte Internacional," 166 E.D. 176 (1995) (holding that the search of a business without a court order violates article 18); International Covenant on Civil and Political Rights, art. 17, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); Eric Bentley, Jr., *Toward an International Fourth Amendment: Rethinking Searches and Seizures Abroad After Verdugo-Urquidez*, 27 VAND. J. TRANSNAT'L L. 329 (1994).

IX. CONCLUSION

While Argentina is truly a country of immigrants, its immigration system is paradoxical. The Constitution provides some of the broadest protections for immigrants and foreigners in the world. Nevertheless, the immigration laws contain provisions which openly discriminate against the undocumented. While the statute provides the broad parameters of the immigration law, substantive and procedural issues are delegated to the Immigration Department. Thus, categories of immigrants, grounds and procedures relating to deportation and expulsion, and many other matters are determined by the immigration agency, rather than by the Argentine Congress. Moreover, the statute and the regulations provide few procedural or formal processes for the resolution of disputed cases, waivers, or expulsion hearings. In practice, most cases are resolved informally by the Immigration Department. Its broad discretion and lack of formal hearing procedures provide immigrants with few protections. Finally, the lack of an established immigration bar or low-cost legal services makes legal challenges to the system extremely difficult.

