



In the Name of Prevention

Insufficient Safeguards in National Security Removals

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I. Executive Summary

Radical Islamists too often scoff at being sentenced to prison, but there's one thing they dread above all: expulsion from French territory.
—French counterterrorism police officer, 2006¹

France has pursued unapologetically a policy of forcibly returning non-French citizens accused of links to terrorism and extremism to their countries of origin since the 1980s.

Over the past five years France has forcibly removed dozens of such foreigners. Some were deported after serving prison sentences for terrorism-related offenses. Others were Muslim religious leaders (imams) expelled for preaching ideas deemed by the authorities to advocate extremism and contribute to radicalization. Available government figures indicate that 71 individuals described as “Islamic fundamentalists” were forcibly removed from France between September 11, 2001, and September 2006. Fifteen of these were described by the government as imams.

In at least one case the government stripped a man of his acquired French citizenship in order to return him to his country of birth.

France, like all states, has the right to control its borders and exclude foreigners who pose a threat to its national security. It has a duty to protect the population from acts of terrorism. But it also has an obligation under European and international human rights law to ensure that measures taken in the name of countering terrorism and protecting the public are compatible with coexisting human rights protections, including the rights of those deemed to pose a threat. The French government is obliged to ensure that the process of removals on national security grounds has effective safeguards to guarantee due process and to protect those subject to removal against serious violations of their fundamental human rights.

¹ Unnamed counterterrorism police officer, quoted in Jean Chichizola, “Eleven Islamists to be expelled” (“*Onze religieux islamistes en instance d’expulsion*”), *Le Figaro* (Paris), September 27, 2006.

At first glance French law appears to contain adequate protections against expulsion for long-term or otherwise integrated foreign residents. The appeals processes available to individuals subject to forced removal from France appear to satisfy the requirement for due process. But on closer examination, the process is insufficient to ensure that fundamental rights are indeed protected. Forced removal is a dramatic measure with serious—and potentially irreparable—consequences for the individuals and their families. The greatest danger is that in its haste to forcibly remove, France may send individuals back to countries where they risk being tortured or subjected to cruel, inhuman or degrading treatment, a serious violation of France’s obligations under international law.

National security exceptions to the legal protections against forced removal that apply in France to various categories of foreign residents mean that anyone designated as a threat can be removed, even if they have lived in France their entire lives. Once an initial decision on their case has been taken, French law allows the government to expel or deport while an appeal is pending, even in cases where there is a fear of persecution upon return to the country of nationality, unless a judge grants a stay of execution in the specific case. Asylum claims have suspensive effect only at first instance, so an initial negative decision by the Office for the Protection of Refugees and Stateless Persons paves the way for immediate removal even if the individual has appealed the decision to the independent refugee appeals board.

The United Nations Committee Against Torture condemned France over the deportation of an Algerian man, Mahfoud Brada, in 2002, for violating its absolute obligation not to return anyone to a country where they face torture or prohibited ill-treatment. Brada, who had been convicted for rape and ordered barred from French territory for ten years, was deported while his appeal was pending and despite the committee’s request for a stay on the deportation. Notwithstanding the committee’s strong criticism and call on the French authorities to “strictly compl[y]” with its requests in the future, France again ignored the committee’s request for a stay when it expelled a Tunisian man, Adel Tebourski, in mid-2006.

The expulsion of imams largely because they have engaged in speech deemed a national security threat raises concerns about the protection of freedom of

expression and the bypassing of due process safeguards for those facing forced removal. Expulsions on national security grounds take place following administrative procedures. In opting to pursue a policy to expel a person by way of administrative decision—rather than prosecute them for speech offenses—the French authorities in effect use immigration law to bypass the more stringent evidential and procedural guarantees in the criminal justice system. Cases examined by Human Rights Watch, based on intelligence reports that do not disclose either the sources of their information or how the information was obtained, involved speech that, while offensive, did not involve obvious incitement to violence that would justify the draconian sanction of expulsion, or any such extreme interference with the fundamental right of freedom of expression.

Finally, forced removals can interfere with the right to family and private life of the individuals removed and their relatives in a way that infringes international human rights law. This is especially true for individuals who were born in France or lived there for the better part of their lives, are married to French citizens or residents, and have children with French citizenship.

Deportation and expulsion are not the only tools the government has at its disposal for dealing with those deemed to pose a threat to national security. Another option is to make more effective and fairer use of the administrative system of assigning individuals to compulsory residence in a specific location in France. Recourse to this option is preferable given that it can be effected in a way that—unlike forced removals of the type described in this report—does not breach international law.

Removals from France do not occur in a political or social vacuum. They take place in the context of a broad debate about security, integration, and immigration in a country that is home to Western Europe's largest Muslim community. Forced removals of long-term residents and Muslim religious leaders are viewed with concern within France's Muslim population. To the extent that these measures are perceived by French Muslims to be discriminatory and unjust, they may prove to be counterproductive, by alienating communities whose cooperation is vital to the effort to combat terrorism.

There is growing interest in Europe in exploring a common approach to national security removals within the framework of the European Union’s Action Plan to combat terrorism, and specifically the strategy to counter violent radicalization and recruitment. France is a leading voice on these issues, and has most recently pushed for a European Council resolution on information sharing with respect to expulsions of terrorism suspects and those who incite discrimination, hatred or violence. Any effort toward a common European approach must be based on a better model than current French policy and practice, and must be firmly grounded in international human rights law.

Key Recommendations

Human Rights Watch believes that France can best set standards in both counterterrorism efforts and commitment to human rights by improving the procedural safeguards governing national security removals, and actively pursuing less draconian alternatives, such as residential orders, based on fair process and judicial oversight. We urge the French government to take the following key steps:

- Ensure that any person subject to forced removal from France is allowed to remain in France until the determination of any appeal in relation to the risk of torture or other ill-treatment or interference with the right to family life.
- Ensure that individuals claiming asylum may remain in France until the conclusion of the asylum determination procedure.
- End the national security exception to the granting of “subsidiary protection”—a temporary form of protection in lieu of refugee status—where a person faces the risk of the death penalty, or torture or other ill-treatment.
- Improve and apply more fairly the system of assigning individuals to compulsory residence in France as an alternative to forced removal when the removal cannot be carried out in a manner consistent with human rights law.
- Clarify in law and jurisprudence the materiality and intensity of the threat to national security allowing for expulsions, especially in cases involving speech offenses.

As France and other nations look to forced removals as a tool in the strategy to counter violent radicalization and recruitment to terrorism, regional and international

human rights authorities could help clarify more precise benchmarks for legitimate interference with the right to family life and the right to freedom of expression.

Detailed recommendations can be found at the end of the report.

II. Background

Forced removals are not a new phenomenon in France, nor are they limited to terrorism suspects. French criminal and immigration legislation provides for the deportation or expulsion of legal residents for a wide range of offenses and behaviors. The numbers of Islamists removed from France on national security grounds became significant in the 1990s, at a time when the crisis in Algeria made France a direct target for terrorist attacks, including inside France itself. The September 11, 2001 terrorist attacks in the United States and the succession of attacks in Casablanca (2003), Madrid (2004), and London (2005) strengthened the resolve of the French authorities.

Although France had suffered a wave of international terrorist attacks in 1986 leading to the adoption of centralized counterterrorism judicial machinery, France's preventive approach to counterterrorism was not consolidated until the 1990s. Forced removals of terrorism suspects now form an integral part of this approach. Such removals are also part of France's strategy to counter violent radicalization and recruitment on French soil. Whether the person removed is a foreigner convicted of membership in or association with a terrorist network, or an imam suspected of preaching a radical and violent interpretation of Islam, the goal is the same: to prevent an attack in France by sending him back to his country of nationality.²

France's Experience of Terrorism

By the time the fight against Islamist terrorism had become an international priority, following the September 11, 2001 attacks in the United States, France already had in place perhaps the most developed counterterrorism machinery in Europe.

In the 1960s and 1970s France had experienced internal violence by Corsican and Basque separatists, extreme left-wing groups, and several attacks linked to specific

² To the best of Human Rights Watch's knowledge no female has been subject to forced removal on national security grounds in relation to Islamist terrorism.

political contexts in other countries.³ It was in the mid-1980s, however, that France experienced a new form of “de-territorialized” terrorism.⁴ Over a dozen attacks in Paris in 1986 on department stores, trains, subways, and public buildings claimed 11 lives and injured over 220 people. A previously unknown group called the Committee for Solidarity with Near Eastern Political Prisoners took responsibility for the strikes. In 1995 another wave of attacks between July and September—including a bomb at the Saint-Michel subway station in Paris—killed 10 and injured over 150 people. French authorities attributed the attacks to the Algerian Armed Islamic Groups (Groupes Islamiques Armees, GIA).⁵

Endemic political violence in Algeria, sparked in January 1992 when the military-backed government suspended the second round of parliamentary elections that the Islamic Salvation Front (Front Islamique du Salut, FIS) was poised to win, had seen the ascendancy of the GIA. France’s colonial history in Algeria and the brutal eight-year war that had led to Algeria’s independence in 1962 informed the concern of French authorities about the arrival of numerous members of the FIS and armed Islamist groups in France.⁶ In October 1993 the GIA kidnapped three French consular officers in Algiers (they were released a week later), and it hijacked an Air France flight from Algiers to Paris on December 25, 1994, demanding a stop to all aid to the Algerian government and reparations for the colonial period. The following day, French commandos stormed the plane on the tarmac in Marseilles, killing all hijackers.

Beginning in November 1993, France carried out a series of police raids, the collective expulsion of 20 terrorism suspects without a hearing, and the mass trial of 138 people in what would come to be known as the “Chalabi Affair” (after the alleged ringleader). In reaction to the kidnapping of the three consular officers in Algeria,

³ It should be noted that France began forcibly removing Basques with Spanish citizenship in the mid-1980s, first to third countries (primarily in Latin America) due to concerns about torture and inhuman or degrading treatment or punishment in Spain, and then directly to Spain.

⁴ Antoine Garapon, “Is there a French Advantage in the Fight Against Terrorism?”, *Análisis del Real Instituto (ARI)*, issue 110/2005, September 1, 2005, El Cano Royal Institute, <http://www.realinstitutoelcano.org/analisis.807.asp> (accessed October 10, 2006).

⁵ For a discussion of the history of terrorist attacks in France, and the evolution of the French counterterrorism model, see Jeremy Shapiro and Benedicte Suzan, “The French Experience of Counter-terrorism,” *Survival*, vol. 45, no. 1, spring 2003.

⁶ Ibid.

then-Interior Minister Charles Pasqua ordered Operation Chrysanthemum, in which 110 people were questioned and 87 arrested over two days in early November 1993. In August 1994, after five French citizens were killed in Algeria, Pasqua ordered mass identity card checks in “sensitive neighborhoods”; over 27,000 people were stopped and checked in just two weeks. At the time, Pasqua defended casting a wide net, rather than specifically targeting known Islamists, by saying that “you don’t catch fish if you don’t go fishing.”⁷

As a result of this operation, 26 men were detained for one month in abandoned gendarmerie barracks in Folembay, a small town in the northern *département* of Aisne; whether this internment was legal is still a matter of debate. On August 31, 1994, 20 of these individuals—19 Algerians and one Moroccan—were collectively expelled to Ouagadougou, Burkina Faso.⁸ The other six who had been held in Folembay were subject to compulsory residence in France (see Chapter VII for more details on this measure). Calling the Folembay internees “Islamists” and “accomplices of terrorists,” Pasqua ordered their expulsion as a matter of absolute urgency to protect national security. “May this serve as a lesson to those who do not respect the laws of the Republic and those of hospitality,” he said at the time.⁹

In November 1994, 93 people were arrested in one day, the first of a series of arrests over the next two years of alleged members of a network in support of Islamist combatants in Algeria. Ultimately, 138 people were tried in 1998 for association with a terrorist group, referred to in France as the “Chalabi network.” The highly controversial trial was held in a prison gymnasium on the outskirts of Paris because of lack of space in the central court house. Fifty-one people were acquitted, in some instances after as long as three years in pretrial detention, while 87 were found guilty. Four more were acquitted on appeal. Of those convicted, 39 were given sentences of less than two years, while the four prime defendants, including Mohamed Chalabi, the presumed ringleader, received sentences ranging from six to eight years. Over

⁷ Thomas Deltombe, “When Islamism becomes a spectacle” (“*Quand l’islamisme devient spectacle*”), *Le Monde Diplomatique* (Paris), August 2004, <http://www.monde-diplomatique.fr/2004/08/DELTOMBE/11466> (accessed July 7, 2006).

⁸ As of 2004, six remained in Burkina Faso; one man had succeeded in having his expulsion overturned and he returned to France; while the rest went to the United Kingdom, Switzerland, The Netherlands, and Morocco.

⁹ Deltombe, “When Islamism becomes a spectacle,” *Le Monde Diplomatique*.

half of those convicted were ordered deported following completion of their prison sentence.¹⁰

The French Counterterrorism Model

In response to the threat of international terrorism, France adopted an approach characterized by centralization of terrorism cases in Paris among specialized prosecutors and magistrates, an exceptionally close relationship between the latter and intelligence services, and a judicial approach involving the preventive detention of terrorism suspects. Legislation adopted in 1986 created the centralized judicial system for terrorism-related offenses: a specialized corps of investigating magistrates and prosecutors, and non-jury trials in the Trial Court of Paris (Cour d'Assise) for serious terrorist felony offenses and non-jury trials in the Correctional Court (Tribunal Correctionnel) for minor terrorist felony offenses.¹¹ The law also extended pre-arraignment police custody (*garde a vue*), in terrorism cases from the normal maximum of 48 hours to 96 hours. In January 2006, this was extended to six days.¹² During *garde a vue*, detainees have limited access to legal counsel and may be questioned at will by police interrogators without their lawyer present. Any information obtained during police questioning can be used against the detainee in subsequent proceedings, even if his or her lawyer was not present at the time.

The cornerstone of France's preventive approach is the offense of belonging to a criminal association in relation to a terrorist undertaking (*association de malfaiteurs en relation avec une entreprise terroriste*), which allows investigating magistrates to detain terrorism suspects before they have been linked to any specific act of terrorism that has been planned or carried out. Introduced to the Criminal Code in 1996, *association de malfaiteurs* is a minor felony offense defined as "the participation in any group formed or association established with a view to the preparation, marked by one or more material acts, of any of the acts of terrorism"

¹⁰ Forty-four were banned permanently from French territory, four for ten years, two for five years, and one for three years. Judgment of 11 January 1999, 11th Chamber of the Paris Correctional Court, pp. 639-743. On file with Human Rights Watch.

¹¹ Law 86-1020 of 9 September 1986 on the fight against terrorism. There are three categories of offense in French law, *contraventions* (equivalent to misdemeanors); *delits* (minor felonies) and *crimes* (serious felonies).

¹² Law No. 2006-64 of 23 January 2006 on the fight against terrorism and diverse provisions relating to security and border controls, art. 17.

provided for in the Criminal Code punishable by up to 10 years in prison.¹³ The overwhelming majority of those accused in France of involvement in activities related to Islamist terrorism are charged with this offense.

The association de malfaiteurs offense has been singled out for criticism because it lends itself to arbitrary interpretation and application.¹⁴ In a 1999 report, “Paving the Way for Arbitrary Justice,” the International Federation for Human Rights (Federation Internationale des ligues des Droits de l’Homme, FIDH) concluded that “[t]he intention of the article is quite clear: the investigating and prosecuting authorities... are statutorily absolved from any duty to link the alleged participation with any actual execution of a terrorist offense or even a verifiable plan for the execution of such a plan.”¹⁵ FIDH argued that examining magistrates have used speculation and insinuation rather than hard proof, and that they did not give proper weight to the issue of criminal intent. More recently, the United Kingdom Parliament’s Joint Committee on Human Rights reported its “strong impression” in the absence of detailed statistics that the large number of arrests in France for this offense were accompanied by only a small number of convictions, and concluded that “the offense was mainly being used, not to prosecute individuals for their actions, but in order to gather evidence about possible future terrorist attacks.”¹⁶

Criminal lawyers who work on terrorism cases are largely critical of the lack of legal certainty in the association de malfaiteurs offense. Jean-Jacques de Felice, an attorney who has defended numerous terrorism cases, complained, “You are the cousin of the cousin of the cousin of someone who’s done something, so you are in

¹³ Article 421-2-1 of the Criminal Code, introduced by Law 96-647 of 22 July, 1996. Legislation enacted in January 2006 makes participation in an association formed for the purposes of committing a terrorist act that could lead to the death of one or more persons a felony offense punishable by up to 20 years’ imprisonment; leadership of such an association is now punishable by up to 30 years’ imprisonment. Law No. 2006-64 of 23 January 2006, art. 11.

¹⁴ A detailed examination of the association de malfaiteurs offense is beyond the scope of this report.

¹⁵ FIDH, “France: paving the way for arbitrary Justice,” no. 271-2, March 1999, <http://www.fidh.org/IMG/pdf/271fran.pdf> (accessed October 10, 2005), p. 9.

¹⁶ Joint Committee on Human Rights, United Kingdom Parliament, “Counter-Terrorism Policy and Human Rights : Prosecution and Pre-Charge Detention,” August 1, 2006, <http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/240/24002.htm> (accessed October 20, 2006), para. 92.

an association de malfaiteurs. The concept is very vague. It's the law itself that's dangerous... [and] the defense becomes impossible.”¹⁷

A European Debate

Forced removals of non-nationals are permitted under international law. Article 13 of the International Covenant on Civil and Political Rights (ICCPR) allows for expulsions of legally resident foreigners in accordance with the law and where the individual has a meaningful right to challenge the expulsion.¹⁸ The United Nations Human Rights Committee, tasked with monitoring compliance with the ICCPR, has noted that the provisions of article 13 may be departed from in cases involving “compelling reasons of national security,” but also that “[n]ormally, an alien who is expelled must be allowed to leave for any country that agrees to take him.”¹⁹ More generally, the committee takes the view that non-nationals may enjoy the protection of the ICCPR even in respect to entry and residence when issues arise related to non-discrimination, the prohibition of inhuman treatment, and the right to family life.²⁰

Within Europe, while there is growing consensus that long-term foreign residents should be protected against removal, support for that position—and its reflection in regional instruments—wears thin when questions of national security or public order (*ordre public*) are raised. Both of the Council of Europe’s main human rights treaties address the need to protect legal foreign residents against arbitrary expulsion and to ensure adequate procedural safeguards. But both permit expulsions, without such safeguards, to be carried out on grounds of national security. As well as a general prohibition on collective expulsions of foreigners,²¹ Protocol 7 to the European Convention on Human Rights (ECHR) provides for procedural guarantees relating to the expulsion of foreigners: decisions on expulsions must be taken in accordance

¹⁷ Human Rights Watch interview with Jean-Jacques de Felice, Paris, June 7, 2006.

¹⁸ International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976.

¹⁹ UN Human Rights Committee, General Comment No. 15, The position of aliens under the Covenant (Twenty-seventh session, 1986), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev.6 at 140 (2003), paras. 9-10.

²⁰ *Ibid.*, para. 5.

²¹ Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S. No. 46, entered into force May 2, 1968, art. 4.

with the law, and individuals subject to expulsion must have the right to submit reasons against the measure, to have their case reviewed, and to have appropriate legal representation for the purposes of this appeal.²² The Protocol continues, however, to stipulate that a foreigner “may be expelled before the exercise of his rights... when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.”²³ The European Social Charter also obliges states to ensure that migrants lawfully residing in their territory are not expelled “unless they endanger national security or offend against public interest or morality.”²⁴

In a 2001 recommendation, the Parliamentary Assembly of the Council of Europe (PACE) took the view that the removal of long-term immigrants is both disproportionate, “because it has lifelong consequences for the persons concerned, often entailing separation from his/her family and enforced uprooting from his/her environment,” and discriminatory, “because the state cannot use this procedure against its own nationals who have committed the same breach of the law.” The PACE added that “the mere prospect of expulsion weakens the process of integration into society of aliens and their communities, and might well give rise to a suspicion of foreigners, whether they face expulsion or not.”²⁵ PACE did, however, consider that such expulsions should be possible in “highly exceptional cases” where the individual has been proven to constitute a real danger.

At the European Union (EU) level, the 2003 Council Directive concerning the status of third-country nationals who are long-term residents stipulates that member states may expel a long-term resident “solely where he/she constitutes an actual and sufficiently serious threat to public policy or public security.”²⁶ In deciding whether to expel, member states should take into consideration the amount of time the

²² Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S. 117, entered into force November 1, 1988, art. 1(1).

²³ Ibid., art. 1 (2).

²⁴ European Social Charter (revised), E.T.S. 163, 1996, art. 19, para. 8.

²⁵ Parliamentary Assembly of the Council of Europe, Recommendation 1504 (2001) on Non-expulsion of long-term immigrants, <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/tao1/EREC1504.htm> (accessed July 2, 2006), paras. 3-4 .

²⁶ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, Official Journal of the European Union L 16/44, January 23, 2004, art. 12, para. 1.

person has been a resident, the person's age, the consequences of deportation for the person and family members, and the person's links with the country of residence or absence of links with the country of origin.²⁷

Several European governments have expressed strong support for a common EU policy on expulsions of terrorism suspects. At an extraordinary meeting of the Justice and Home Affairs Council in July 2005, Italy proposed examining a common approach to such expulsions, and in September 2005 then-UK Home Secretary Charles Clarke called for common rules among EU countries for deporting people who incite hatred or encourage terrorism.²⁸ In March 2006, the interior ministers from the "G6" countries (France, Germany, Italy, Poland, Spain, and the UK) agreed to share information about expulsions of suspects for preaching racial or religious hatred and stressed that this cooperation was intended to forge a common European interior and security policy.

In the first step towards this goal, and on the basis of a proposal from the French government, an EU Council Working Party on Migration and Expulsion has drawn up a draft resolution on information exchange on the expulsion of radical preachers inciting violence and racial hatred. As currently drafted, the resolution would require member states to inform all other member states when they expel any third-country national on the grounds of behavior linked to terrorist activities or constituting acts of explicit and deliberate provocation of discrimination, hatred, or violence. Reflecting the tension between the goal of a common approach, on the one hand, and the desire of many member states to retain autonomy on the other, the draft resolution for the moment specifically precludes any requirement to harmonize criteria governing expulsions or any interference with the discretionary power of each government on these issues.²⁹

²⁷ Ibid., para. 3.

²⁸ Note from EU presidency, "JHA Council Declaration: Follow-Up," Council of the European Union Doc. 11330/05, July 19, 2005, <http://www.statewatch.org/news/2005/aug/jha-declaration-follow-up.pdf> (accessed January 25, 2007).

²⁹ Council of the European Union, "Draft Council Resolution on information exchange on the expulsion of radical preachers inciting violence and racial hatred," Doc. 5824/07, February 5, 2007, <http://www.statewatch.org/news/2007/feb/eu-radicals-resolution-5424-07.pdf> (accessed March 5, 2007).

In September 2005, the European Commission submitted its proposal for a Directive on Common Standards and Procedures in Member States for Returning Illegally Staying Third-country Nationals (the “Returns Directive”). Although there are human rights concerns with the proposal as drafted, its stated purpose is to provide minimum standards for fair procedures that comply with international human rights standards.³⁰ The current draft explicitly excludes from its scope the situation of third-country nationals whose stay has been interrupted by an expulsion order for reasons of public order and security.

Any effort to adopt a common European approach to national security expulsions must ensure that all harmonization instruments—both soft-law guidelines and hard-law rules—regulating the removal of terrorism suspects include appropriate human rights protections and provide for viable alternatives to forced removal that are in accordance with international law.

³⁰ See for example ECRE, “Comments from the European Council on Refugees and Exiles on the Proposal for a Directive of the European Parliament and the Council on common standards and procedures in Member States for returning illegally staying third country nationals (COM(2005) 391 final),” May 2006, <http://www.ecre.org/files/Comretidir.pdf> (accessed February 26, 2007).

III. Forced Removal on Grounds of National Security

Forced removals from France are regulated by the Code on the Entry and Stay of Foreigners and the Right to Asylum (*Code de l'Entree et du Sejour des Etrangers et du Droit d'Asile*, CESEDA), hereafter “the Immigration Code.” The Immigration Code, which entered into force on March 1, 2005, consolidates and replaces the 1945 Foreigners Act and the 1952 Asylum Law. It also incorporates important reforms since 2001 to facilitate the expulsion of persons suspected of links to international terrorism.

There are two main mechanisms for the forced removal of foreign residents lawfully present in France that are applied in national security cases. The first is criminal deportation ordered by a court as a sanction following criminal conviction, known as “*Interdiction du Territoire Français*” (ITF), or ban from French territory. The second is an administrative expulsion, known as “*arrete ministeriel d’expulsion*” (AME), or ministerial expulsion order, which can be ordered by the Interior Ministry. A third mechanism authorizes prefects to order expulsions on the grounds of grave threats to public order, but these *arretes prefectoral d’expulsion* (APE), or prefectural expulsion orders, are not commonly used in cases involving terrorism suspects.

The law ostensibly protects certain categories of foreign residents from forced removal, but exceptions written into both the Criminal Code and the Immigration Code allow for the “seriousness” of the criminal conviction or alleged behavior to override the criteria for protection from removal.

Human Rights Watch reviewed cases of removal on national security grounds carried out by both ministerial expulsion order and criminal deportation order. In some cases we reviewed, both means were used to enforce a removal. In these later cases, the Interior Minister issued an expulsion order against a person already subject to a criminal deportation order, presumably to ensure removal even if a criminal judge were to lift the deportation order upon appeal.

Criminal Deportation

Criminal deportation orders can be made by a competent judicial authority as a complementary or even principal sanction for a wide variety of minor and serious felony offenses. No single legislative instrument or statute lists all of the offenses that may give rise to a deportation order; these are enumerated in different instruments, including the Immigration Code, the Criminal Code, the Labor Code, and the Public Health Code. The decision to impose a deportation order as a complementary sanction is always at the discretion of the competent criminal court. The criminal court may also determine whether to impose a temporary ban—ranging usually from three to ten years maximum, depending on the offense—or a definitive, life-long ban from entering French territory.

A broad network of migrants' rights, human rights, and grassroots organizations launched a campaign against criminal deportations in 2000. They argued that the “double punishment” (*double peine*), as they call it, is tantamount to double jeopardy because it imposes two sanctions for the same crime, and discriminatory in that it affects only foreigners. The campaign members were successful in promoting a 2003 reform that increased protection from deportation for certain categories of foreigners.³¹ The Criminal Code now establishes two tiers of protected categories based on criteria including length of residency in France, marriage to a French citizen, and whether the individual is responsible for the care and upbringing of minor children, among others.³²

All of these protections are subject to exceptions, however, and the only foreigners who enjoy an absolute protection from deportation are minors—persons under age 18.³³ The Criminal Code stipulates that foreigners convicted of “attacks on the fundamental interests of the nation... acts of terrorism... [and] crimes with respect to combat groups and disbanded movements” are not protected against criminal

³¹ Law 2003-1119 of 26 November 2003 concerning immigration control, the stay of foreigners in France, and nationality, published in the Official Journal No. 274, November 27, 2003, p. 20136.

³² Criminal Code (CC), arts. 131-30-1 and 131-30-2.

³³ Code on the Entry and Stay of Foreigners and the Right to Asylum (CESEDA), art. 521-4.

deportation regardless of their status,³⁴ and foreigners convicted of a terrorism-related offense may be deported and barred permanently from reentering France.³⁵ The competent court must weigh the individual's ties with France, his or her ties with the country of nationality, as well as the individual's level of integration into French society against the seriousness of the offense in determining whether to impose a deportation order.³⁶

The vast majority of terrorism-related criminal deportation orders are handed down with convictions for the minor felony offense of criminal association in relation with a terrorist undertaking, or association de malfaiteurs (described in the previous Chapter).³⁷ This charge can cover a wide range of behavior, from hosting an identified or alleged terrorist operative or helping to arrange fake papers or a cell phone for that person, lending or delivering money, and recruiting fighters to go to Afghanistan or Iraq, to materially plotting an attack on French soil. Foreign nationals convicted of association de malfaiteurs are routinely subject to expulsion even when they are given relatively short prison sentences.

The national security exception built into the language on protected categories of foreigners means that even foreigners who were born in France or moved there at a very young age can be deported upon release from prison. Mohamed Chalabi, the presumed ringleader in the Chalabi case, and his brother Brahim Chalabi received eight and four years in prison, respectively, and permanent criminal deportation orders. Although they are Algerian nationals, both were born and raised in France, were married to French citizens, and had children with French nationality. Mohamed Chalabi was deported in 2001; the French government halted its effort to deport his

³⁴ CC, art. 131-30-2. Those involved in counterfeiting are likewise not protected. Individuals who would otherwise be protected from a criminal deportation order because they are either married to a French citizen and have lived in France legally for at least 10 years, or are the parent of a French minor and have lived in France legally for at least 10 years, do not enjoy this protection if the crime for which they were convicted was perpetrated against their spouse or their children.

³⁵ CC, art. 422-4. In cases where the bar from entry to French territory is not permanent, the maximum duration that can be imposed is 10 years.

³⁶ Serious felony offenses (*crimes*) are considered a priori serious enough to outweigh these factors; in these cases, the court is not obliged to provide a reasoned defense of the criminal deportation order.

³⁷ As of January 2006, this offense may also lead to a felony conviction in cases where the conspiracy aimed at perpetrating an attack liable to cause the death of one or more people.

brother Brahim in 2003 when the European Court of Human Rights requested a stay in execution due to concerns over the risk of torture in Algeria.

Abderrazak Mezouar, an Algerian national, also was tried in the Chalabi case and sentenced to four years in prison—he had already spent four years and two months in pretrial detention when the verdict was handed down—and deportation, though he had been born in France, was married to a French citizen, and had four children who were French citizens.

Appeals against criminal deportation orders

Appeals against criminal deportation are lodged with the appropriate criminal appellate court as part of a general appeal against a criminal sentence. This appeal is non-suspensive, so if the deportation order is the only sentence—in other words, if the convicted person is not given a jail term—or if the prison sentence handed down by the criminal court is suspended or covers time already served in pretrial detention (as in Abderrazak Mezouar’s case, mentioned above), the order may be executed even while the appeal is pending.

An affected individual may also apply to the court that imposed it to rescind the order. This is different from an appeal. The first petition for rescission may only be filed six months after the conviction,³⁸ and these petitions are only admissible if the individual is still in prison in France, is out of prison but has been assigned to compulsory residence in France (see below), or is already outside the country; those released from prison and awaiting deportation but not assigned to compulsory residence may not apply for rescission. There is no limit on the number of times an individual can ask the court to rescind the criminal deportation order. Six months must transpire before renewing the request, however.³⁹

³⁸ There is one exception to this rule: an individual released from prison less than six months after conviction may apply immediately for rescission.

³⁹ Individuals may also ask the justice minister for a pardon, though this appears to be very rare.

Administrative Expulsion

The Immigration Code authorizes the interior minister to expel legal foreign residents on the grounds they pose a grave threat to public order (*menace grave a l'ordre public*).⁴⁰

Ministerial expulsion orders are one-page documents that reference the relevant articles of national immigration law as well as the European Convention on Human Rights, succinctly describe the grounds for the expulsion (for example, the individual “has engaged in activities of a nature to compromise State security” or “openly incites violence and hatred”), and may state that the expulsion is an “overwhelming necessity” and/or “absolutely urgent” for the protection of the state and public security.

The Immigration Code sets out roughly the same criteria for two protected categories of foreign nationals as in criminal deportation cases.⁴¹ Once again, however, exceptions to protected status apply in cases where the expulsion is considered an “overwhelming necessity for the safety of the State or public security” (*une necessite imperieuse pour la sùrete de l'Etat ou la securite publique*),⁴² and in cases involving behavior that constitutes “an attack on the fundamental interests of the State, or related to terrorist activities, or constituting explicit and deliberate incitement to discrimination, hatred or violence against an individual or a group of individuals.”⁴³ Expulsion by ministerial order precludes reentry to French territory until such time as the order is lifted.

Ministerial expulsion orders are theoretically subject to review by an Expulsion Commission composed of two judicial magistrates and one administrative magistrate, in a hearing at which the person subject to expulsion and his or her

⁴⁰ CESEDA, art. L.521-1.

⁴¹ These criteria are stipulated in articles L521-2 and L.521-3. Reforms adopted in July 2006 to modify CESEDA tightened some of the criteria: the amount of time individuals must be married to a French citizen to qualify for protection was increased from two to three years in some cases, and three to four years in others; and individuals who can prove they have lived habitually—in other words not necessarily legally—in France for at least 15 years are no longer protected. Law 2006-911 of 24 July 2006, arts. 67 and 68, modifying art. L. 521-2 of CESEDA.

⁴² CESEDA, art. L. 521-2.

⁴³ CESEDA, art. L. 521-3.

lawyer can participate.⁴⁴ The commission's role is to evaluate whether the expulsion is necessary and proportionate, based on the seriousness of the threat to public order and the individual's integration into French society and his or her personal and family attachments in France. The commission plays an advisory role only and its view on the expulsion is not binding.

However, the Immigration Code also creates an expedited procedure in which the Expulsion Commission is bypassed. The interior minister may issue an expulsion order citing "absolute urgency" (*urgence absolue*), giving authorities the power to expel immediately.⁴⁵ In almost all of the cases reviewed by Human Rights Watch, the administrative expulsion order cited both absolute urgency *and* overwhelming necessity.

Key reasons for recourse to administrative expulsions

Typically, administrative expulsions are issued against individuals whom the government is unable or unwilling to prosecute. Administrative expulsion appears to be the preferred method for dealing with foreigners accused of incitement to discrimination, hatred, or violence in part because immigration measures like expulsion allow the government to bypass the procedural safeguards built into the criminal justice system, and in part because under current law a conviction for incitement does not allow for a complementary order for criminal deportation.

Indeed, this latter argument was raised in favor of the 2004 reform to the Immigration Code that broadened the scope of speech giving rise to administrative expulsion. Whereas a reform in 2003 had allowed for expulsions for incitement to discrimination, hatred or violence on the grounds of ethnicity or religion, then-Interior Minister Dominique De Villepin sponsored a modification introducing the current, more expansive language allowing for expulsion for incitement to discrimination, hatred or violence *against a specific person or group of persons* (emphasis added).⁴⁶

⁴⁴ CESEDA, art. L. 522-1.

⁴⁵ Ibid.

⁴⁶ CESEDA, art. L. 521-3.

The most high-profile cases involve imams accused of preaching hatred against groups of people, advocating support for resistance to perceived oppression either abroad or in France, and expressing contempt for “French values.”

Administrative expulsions are also used to banish terrorism suspects the authorities fear they will not be able to prosecute successfully, and individuals who were convicted for association de malfaiteurs but did not receive a criminal deportation order. Algerian Chellali Benchellali was issued an expulsion order when he was in police custody on suspicion of terrorist activity, presumably because authorities believed there was a chance the investigating magistrate would release him without charge.⁴⁷ Tunisian Adel Tebourski was due for release from prison after serving a six-year prison term on an association de malfaiteurs conviction.⁴⁸ Tebourski had acquired French citizenship in 2000 and was thus not capable of being subject to a criminal deportation order. The Interior Ministry resolved this obstacle by rescinding Tebourski’s French citizenship the day before he was due to be released from prison and issued an administrative expulsion order on the grounds that his expulsion was a matter of absolute urgency and overwhelming necessity.

Safeguards within the administrative justice system

Appeals against expulsions ordered by the Interior Ministry fall within the jurisdiction of the system of administrative justice. France has a well-developed administrative justice system. There are 28 administrative courts (Tribunaux Administratifs, TA) that rule at first instance, and eight administrative courts of appeal (Cours Administratifs d’Appel, CAA).⁴⁹ The highest jurisdiction within the administrative justice system is the Council of State (Conseil d’Etat, CE).

Administrative law provides the framework for judicial review of the exercise of executive functions. In contrast with proceedings in a criminal court of law, most administrative proceedings are written, the presence of the interested parties is not required at any hearings that may be held, and the court’s primary duty is to

⁴⁷ Benchellali was in fact remanded into pretrial detention and eventually convicted. His case is detailed below.

⁴⁸ Tebourski’s case is discussed in detail below.

⁴⁹ There are 27 TAs on mainland France and one in Corsica; there are nine additional administrative courts in French territories.

determine whether an executive authority has exercised its power in accordance with the law. Council of State case law is binding on lower courts.

Ministerial expulsion orders, as well as the separate orders designating the country of destination for deportation (“country designation order”), may be appealed within the administrative court system.⁵⁰ For either order there are in fact three types of appeal: the appeal on the merits; the appeal on the merits in conjunction with a petition for suspension (*refere-suspension*); and a petition for protection of fundamental liberties (*refere-liberte*). Country designation orders, which may be issued by the interior minister or by a local prefect, are crucial in cases involving concerns about risk of torture upon return. On appeal, a court may uphold the forced removal but annul the order designating the country of nationality as the destination on the grounds that the individual would face inhuman treatment upon return.

Appeals against country designation orders must be filed with the local administrative court, while appeals against administrative expulsion must be filed with the administrative court in Paris. The centralization of expulsion cases in the Paris administrative court—which mirrors the centralization of terrorism-related criminal cases in the Paris Correctional Court—is quite recent. After the administrative court in Lyon suspended the expulsion of a local imam, Abdelkader Bouziane, in April 2004, then-Interior Minister De Villepin told *Le Figaro* newspaper,

I am convinced that it is necessary to expel foreign extremists who do not have a place on our territory. If the current system does not allow [us] to take the necessary decisions and to carry them out, the law will have to be changed to take into account the reality of the risk.⁵¹

⁵⁰ At any time, individuals may also request an abrogation of the expulsion order. After two months from the date of notification of the expulsion order—the timeframe for filing an appeal—requests for abrogation may be filed but only if the individual is already out of the country, is in prison in France, or has been assigned to compulsory residence. Requests submitted after five years may not be rejected without prior consultation with the Expulsion Commission. By law, all active expulsion orders must be reviewed after five years, and the competent authority must evaluate whether the individual continues to pose a threat to public order, any changes in his personal or family situation, and guarantees for his or her social and professional reintegration. The Expulsion Commission is not consulted for the purposes of this automatic review, but a negative decision may be appealed. CESEDA, art. L.524.

⁵¹ Interview with Dominique de Villepin, *Le Figaro*, May 13, 2004.

De Villepin asked the National Assembly to consider changing the law to make the Council of State the first and last instance for appeals against expulsion orders, “in order to better reconcile the defense of individual rights and the imperatives of the Republican state.”⁵² This proposal was met with significant opposition, including from the Syndicat de la Juridiction Administrative (SJA), a union of administrative court judges, and the Council of State itself, and ultimately a compromise alternative was found in the centralization of appeals against expulsions ordered by the interior minister in the Paris administrative court.⁵³

The appeals process can take months, even years, as a case makes its way through the three levels of the court hierarchy (local administrative court, appellate court, and Council of State). None of the types of appeal is suspensive in the mere act of filing, however. In order to suspend execution of the expulsion order, individuals must get a positive ruling on either a petition for suspension or a petition for protection of fundamental liberties (both petitions may be filed in the same case). Initial filing is to the interim relief judge (*juge des referes*) at the Paris administrative court.

A petition for suspension is not admissible if not accompanied by the appeal on the merits. It must provide serious grounds for doubting the legality of the expulsion order and must fulfill an “urgency” criterion.⁵⁴ The case law of the Council of State suggests that the notion of urgency is presumed in cases involving expulsion, precisely because the appeal on the merits is not suspensive.⁵⁵ The law does not

⁵² National Assembly, “Compte rendu, premiere seance du mercredi 19 mai 2004,” <http://www.assemblee-nationale.fr/12/cr/2003-2004/20040224.asp> (accessed November 17, 2006).

⁵³ The SJA argued that the proposal “demonstrates the government’s distrust in the ability of the administrative courts to reconcile the needs of public order and the protection of freedoms, and calls into question the very principles at the center of the creation of the administrative courts.” “Projet de transfert de competence juridictionnelle en matiere d’expulsion et de modification du champ d’application de l’article 26 de l’ordonnance du 2 novembre 1945: Analyses critiques du SJA, etude du 18 juin 2004,” in Syndicat de la Juridiction Administrative, “Dossier documentaire relatif au projet de reforme de la procedure juridictionnelle aux arrêtes ministeriels d’expulsion des etrangers,” June 26, 2004, http://www.rajf.org/article.php?id_article=2583 (accessed October 10, 2006) (available only in French).

⁵⁴ Code of Administrative Justice (CJA), art. L. 521-1.

⁵⁵ In its decision in the Dos Santos Martins case, the Council of State noted that “the condition of urgency is fulfilled when the suspension of an expulsion order is requested insofar as this order is immediately executable and there is no suspensive appeal,” Council of State decision, 14 December 2001, Minister of the Interior v. Dos Santos Martins, No. 234323.

impose a timeframe for the judge's ruling on a petition for suspension, but once rendered it is final and cannot be appealed.⁵⁶

The petition for fundamental liberties, which may be filed even in the absence of an appeal on the merits, must demonstrate that the expulsion constitutes a serious and manifestly illegal violation of a fundamental right.⁵⁷ The interim relief judge is empowered to take “all measures necessary to safeguard a fundamental right,” and must render a decision within 48 hours of receiving the petition.⁵⁸ The requirement for a swift decision in cases involving potential violations of fundamental rights is an important one, but the authorities may still legally remove someone before the interim relief judge has rendered a decision. In the cases reviewed by Human Rights Watch, French authorities generally stayed the removal until the interim relief judge had issued a judgment. In the case of Algerian Nacer Hamani, however, the government did attempt to deport him while the interim relief judge examined the petition. This case is detailed below. A negative decision on this kind of petition may be appealed directly to the interim relief judge at the Council of State within 15 days; the Council of State judge must render a decision within 48 hours.⁵⁹

The interim relief judge determines whether proceedings involving either petition will be oral or written,⁶⁰ and the judge may reject a petition in a reasoned decision without calling for any hearing of any type if he or she considers the petition manifestly inadmissible, unfounded, not within its jurisdiction, or that it does not meet the urgency criterion.⁶¹ A decision to reject as manifestly inadmissible or unfounded may not be appealed.⁶²

⁵⁶ CJA, art. L. 523-1.

⁵⁷ CJA, art. L. 521-2.

⁵⁸ Ibid.

⁵⁹ CJA, art. L. 523-1.

⁶⁰ CJA, art. L. 522-1.

⁶¹ CJA, art. L. 522-3.

⁶² CJA, art. L. 523-1.

Procedural concerns

In the administrative justice system, the standard of proof required to uphold an expulsion ordered by the Interior Ministry is significantly lower than it is to convict in criminal proceedings. The government's evidence against radical preachers is contained in intelligence reports that must be disclosed to the defense. The information contained within the reports, however, cannot be independently verified or easily contested by the defense.

The concept of proof in these proceedings is understood to be flexible, allowing for all manner of evidence including scribbled "post-it" notes.⁶³ "There is no formalism with respect to proof [in administrative justice]... it's not really a matter of proof, [rather] one tries to convince the judge. It is prohibited to use the word 'proof' in rulings, because it's not about proving but [rather] convincing," a government commissioner⁶⁴ at the Council of State told Human Rights Watch.⁶⁵ With specific regard to the information necessary to substantiate an expulsion on grounds of national security or public order, the Council of State has taken the view that assessments of these kinds of threats cannot be subject to the "same regime of proof" as when it comes to establishing the existence of crime.⁶⁶

Council of State jurisprudence has established that the ministry must include in the expulsion order the legal and factual basis for the decision to expel.⁶⁷ In practice, the one-page orders include only summary information, and it is only if the order is appealed that the government must provide supporting evidence to substantiate the threat assessment. It does so through intelligence service reports commonly referred to as "*notes blanches*" ("white notes") because they are unsigned and do

⁶³ Human Rights Watch interview with Emmanuelle Prada-Bordenav, government commissioner, Council of State, Paris, December 6, 2006.

⁶⁴ Despite the name, a government commissioner is an independent advisor who produces a report on a given case and recommends a preferred ruling. His or her views are not binding on the Council of State justices, but are often followed.

⁶⁵ Ibid.

⁶⁶ Council of State decision, 3 March, 2003, Minister of the Interior v. Rakhimov, No. 238662.

⁶⁷ See Council of State decision, 29 December, 1997, Minister of the Interior v. Salah Karker, No. 168042; Council of State decision, 25 February, 1998, Minister of the Interior v. Monsieur Magri, No. 163007; and Council of State decision, 29 July, 1998, Minister of the Interior v. Monsieur Chiabani, No. 165622. Cited in Minister of the Interior brief submitted to the Administrative Court of Cergy-Pontoise, dated 24 March 2006, in the case of Minister of the Interior v. Mister Yashar Ali, No. 0401902-2. On file with Human Rights Watch.

not provide any details about the sources of the information they contain.⁶⁸ These reports, usually produced by the domestic intelligence service (Renseignements Generaux, RG), are often based on information from informants, some of whom have been pressured into service in exchange for not being expelled themselves, either because they are liable to receive a ministerial expulsion order or because they are in France illegally.⁶⁹ One lawyer explained, “Lots of people are pressed into being informants, they get their residency cards in exchange, and then they have to provide some kind of information, so they amplify rumors. And then there’s no chance for a criminal judge to verify the information and its source.”⁷⁰

All of the lawyers interviewed in the course of research for this report said that they believed they had had access to all of the information submitted by the government to the administrative court, including all intelligence reports. Only one lawyer mentioned a case in which a judge with the Paris administrative court had refused to give her a copy of a note blanche produced by government counsel at the hearing on a prefectoral expulsion order.

The case involved a Tunisian, Hamed Ouerghemi, who was ordered expelled in February 2005. Ouerghemi, a member of the Tunisian Islamist movement Ennadha, applied for asylum from the detention center where he was placed pending deportation and the Office for Refugees granted him subsidiary protection.⁷¹ A few weeks later, on March 4, 2005, the Administrative Court judge upheld the expulsion order, citing the RG report verbatim in his ruling. Ouerghemi, who in the meantime had been assigned to compulsory residence, appealed to the Paris Administrative Court of Appeals, which annulled part of the lower court’s decision in September

⁶⁸ Although Nicolas Sarkozy, in his first tenure as interior minister, announced in October 2002 that unsigned notes blanches would no longer be allowed, and Dominique De Villepin reaffirmed this policy in June 2004 when he served in the post, unsigned notes blanches continue to be submitted as evidence in expulsion cases, as demonstrated in recent cases examined by Human Rights Watch and confirmed by representatives of the Interior Ministry. Human Rights Watch interview with Jean-Pierre Guardiola, Chief of Sub-Division for Foreigners and Cross-border Circulation, and Christian Pouget, Chief of Bureau of Law and Procedures for Removals, Division of Public Liberties and legal Affairs, Ministry of the Interior, Paris, December 6, 2006.

⁶⁹ Human Rights Watch interview with RG agent who spoke on condition of anonymity, Paris, June 30, 2006. Several deportees also told Human Rights Watch they were told they could stay in France if they turned informant.

⁷⁰ Human Rights Watch interview with Mahmoud Hebia, lawyer, Lyon, June 22, 2006.

⁷¹ The Office for Refugees can grant one-year renewable “subsidiary protection” to individuals who do not fulfill all the conditions for refugee status, but face a serious threat on return of death, torture or inhumane treatment.

2005, saying it had been based “on information contained in extracts of a note blanche from the Renseignements Generaux mentioned at the hearing by counsel for the prefect, whereas neither the document nor the information it contained had been communicated to Mr. Ouerghemi.”⁷²

The Council of State’s binding interpretation is that a note blanche should be rejected if it is “brief, provides very little detail, and... is limited to... assertions.”⁷³ Noting that “negative proof is not always easy to provide,” the government commissioner, in an important case regarding the use of notes blanches, proposed an approach that favors “a balanced concept of the burden of proof” taking into equal consideration the nature of the threat, guided for the most part by the contents of the intelligence report, and the arguments for the defense. The commissioner held that these latter must be specific, and not consist in merely objecting to the use of the note blanche on principle.⁷⁴

For its part, the Interior Ministry argues that “the formalism should not be such that the Minister is obliged to provide details of the precise circumstances of each act characterizing the behavior of a foreign national subject to an expulsion order.”⁷⁵ This position was endorsed by the Nantes Administrative Court of Appeal in a 2001 case when it took the view that the Interior Ministry did not have the obligation to “specify in what way the presence of the petitioner [an individual subject to an expulsion order] on French territory poses an especially grave risk to public security.”⁷⁶

The lack of precision of the legal concept of threat to public order and the comparatively low standard of proof in the system of administrative justice give judges in these matters significant room for discretion. Defense lawyers complain that administrative judges rely blindly on intelligence reports, and many of the

⁷² Human Rights Watch interview with Dominique Noguères, lawyer, Paris, October 6, 2006.

⁷³ Council of State decision, 3 March, 2003, *Minister of the Interior v. Rakhimov*, No. 238662.

⁷⁴ Quoted in the report of Government Commissioner Mattias Guyomar in Council of State, *Minister of the Interior v. Bouziane*, 4 October, 2004, Nos. 266947 and 266948, p. 5. On file with Human Rights Watch.

⁷⁵ Interior Ministry memoire against the appeal lodged by Chellali Benchellali, submitted to the Lyon Administrative Court on April 20, 2004.

⁷⁶ Nantes Administrative Court of Appeal decision, 3 May 2001, *Minister of the Interior v. Jean-Claude Ndouke*, No. 98NT02794.

rulings examined by Human Rights Watch quote the notes blanches verbatim. The government commissioner in the Bouziane case, detailed below, noted the “absence of well-established jurisprudence on the intensity and materiality of the threat justifying the expulsion of a foreigner belonging to one of the categories benefiting from an almost absolute protection.”⁷⁷

Human Rights Watch acknowledges the critical role of intelligence services in counterterrorism efforts. Effective surveillance and intelligence gathering with appropriate judicial oversight is a key feature of both prevention and prosecution of terrorism offenses. We also recognize that Council of State jurisprudence allows intelligence service reports to be submitted in cases concerning the entry and stay of foreigners, and to be considered as one element of proof among others.⁷⁸ We are nonetheless concerned that the minimum requirements established by the Council of State for admissibility of a note blanche are neither sufficiently clear nor sufficiently respected in practice, and may result in expulsions based on unverifiable information that is difficult to refute. Human Rights Watch is also concerned by the fact that there is no means to establish whether information contained in a note blanche has been extracted under torture. The use of information extracted under torture in judicial proceedings would violate obligations on states to respect the absolute prohibition on torture.

Impact of Asylum Claims on Removal

Persons facing deportation or expulsion can apply for asylum.⁷⁹ Petitions for asylum under these circumstances are processed under an expedited “priority” procedure in which the Office for the Protection of Refugees and Stateless Persons (Office Français de Protection des Réfugiés et Apatrides, OFPRA, hereafter “Office for Refugees”), must examine the petition and render a decision within 15 days, or within 96 hours if

⁷⁷ Government Commissioner Guyomar report, Council of State, *Minister of the Interior v. Bouziane*, p. 9.

⁷⁸ Council of State decision, 11 October 1991, *Minister of the Interior v. Diori*, No. 128160; Council of State decision, 3 March 2003, *Minister of the Interior v. Rakhimov*, No. 238662; Council of State decision, 4 October 2004, *Minister of the Interior v. Bouziane*, No. 266948.

⁷⁹ France ratified the 1951 Convention relating to the Status of Refugees, 189 U.N.T.S. 150, on June 23, 1954. The Convention entered into force on April 22, 1954.

the individual is detained pending deportation.⁸⁰ Appeals are heard by the Appeals Board for Refugees (Commission des Recours des Refugies, CRR, hereafter “Appeals Board”).

The Office for Refugees is a governmental body under the aegis of the Ministry of Foreign Affairs. The Appeals Board is what is called in France a “specialized administrative jurisdiction” and is composed of three judges: a professional magistrate, a representative of the ministries that sit on OFPRA’s board of directors, and a representative of the United Nations High Commissioner for Refugees (UNHCR). As a result, the Appeals Board enjoys the greater credibility as an autonomous arbiter of asylum claims.⁸¹

Filing for asylum is the only certain way to suspend removal, but here again, national security concerns are grounds for an exception to the general rule of prohibition on deportation for the entire period while the asylum claim is under review. Ordinarily, asylum seekers are entitled to a temporary residency card for the duration of the asylum determination procedure. This procedure includes an initial decision by the Office for Refugees, as well as the optional appeal of a negative ruling to the Appeals Board.⁸² The Appeals Board’s decision is final, and asylum seekers whose claims have been refused are then subject to deportation. In cases involving persons considered to pose a threat to state security or public order, no temporary residency permit is issued and deportation is suspended only while the Office for Refugees

⁸⁰ French law provides for detention pending deportation in cases where the government needs time to arrange for physical removal, for example when it must procure a passport or laissez-passer for the individual from his or her country of nationality. The local prefect may remand an individual into detention for 48 hours; if this period is insufficient a special judicial authority known as the “liberty and detention judge” (*juge des libertes et de la detention*) may extend the detention for 15 days, renewable once. The total amount of time a person may be held in detention pending deportation is therefore 32 days. CESEDA, art. L. 552-1.

⁸¹ Human Rights Watch interview with Stephane Julinet, member of Group providing Information and Support to Immigrants (GISTI), Paris, December 6, 2006, and with Lucile Hugon and Sophie Crozet, Action by Christians Against Torture (ACAT-France), Paris, October 5, 2006. The budget of the Appeals Board is nonetheless determined by the Office for Refugees, with whom it also shares its staff.

⁸² CESEDA, art. L. 742-3.

considers the application.⁸³ In the event of a negative decision, the individual may be deported even if he or she has appealed the decision to the Appeals Board.⁸⁴

UNHCR has consistently argued that all appeals concerning asylum claims should be automatically suspensive: “Given the potentially serious consequences of an erroneous determination at first instance, the remedy against a negative decision at first instance is ineffective if an applicant is not permitted to await the outcome of an appeal... in the territory of the Member State.”⁸⁵ The EU Network of Independent Experts on Fundamental Rights has similarly remarked on “the connection between the requirement of a suspensive remedy and the potentially irreversible nature of the damage that would be caused by the enforcement of a removal order adopted on the basis of incomplete information on the reality of the risks incurred in the country of return.”⁸⁶

The Office for Refugees can grant one-year renewable “subsidiary protection” to individuals who do not fulfill all the conditions for refugee status, but face a serious threat in their country of being subjected to the death penalty, torture, or cruel, inhuman or degrading treatment or punishment, or “serious and individual threat to a civilian’s life because of indiscriminate violence resulting from a situation of national or international armed conflict.”⁸⁷ But the office can refuse or revoke this subsidiary protection status in cases where the individual’s presence on French territory is considered a serious threat to public order, public security, or state

⁸³ CESEDA, art. L. 742-6. The priority procedure is applied in other cases as well, including cases in which the application is deemed fraudulent or abusive, or the individual is a citizen of a country considered to be a “safe country of origin” (CESEDA, art. L. 741-4).

⁸⁴ In 2004, the Office for Refugees processed 9,212 asylum requests under the accelerated priority procedure (16 percent of the total number of asylum requests processed for that year). The recognition rate in these cases is low: only 1.8 percent of those whose applications were processed under this procedure were granted some kind of protection (either refugee status or subsidiary protection). The overall recognition rate for asylum requests in 2004 was 16.6 percent. European Council on Refugees and Exiles, “Country Report 2004: France,” www.ecre.org/country04/France%20-%20FINAL.pdf (accessed August 1, 2006).

⁸⁵ UNHCR, “Observations on the European Commission Communication on ‘A More Efficient Common European Asylum System: the Single Procedure as the Next Step,’” August 2004, <http://www.unhcr.org/home/RSDLEGAL/4156eee84.pdf> (accessed November 15, 2006), para. 10

⁸⁶ EU Network of Independent Experts on Fundamental Rights, “Report on the Situation of Fundamental Rights in the European Union and its Member States in 2005: Conclusions and Recommendations,” http://ec.europa.eu/justice_home/cfr_cdf/doc/report_eu_2005_en.pdf (accessed November 21, 2006), p. 140.

⁸⁷ CESEDA, art. L. 712-1.

security.⁸⁸ Even where protected status has been revoked for these reasons, France is obliged under international human rights law not to return any person to a country where he or she faces a risk of torture or prohibited ill-treatment (see below).⁸⁹

⁸⁸ Ibid., arts. L. 712-2 and 712-3. Subsidiary protection is also refused or revoked if the individual has committed a war crime, a crime against peace, a crime against humanity, a serious crime under ordinary criminal law, or is guilty of acts contrary to the objectives and principles of the United Nations.

⁸⁹ Return to risk of torture is prohibited by the European Convention on Human Rights, the Convention Against Torture, and the International Covenant on Civil and Political Rights. France has ratified all three treaties. For more information see section on Protection against Return to Risk of Torture, below.

IV. Protection against Return to Risk of Torture

What reigns is a concept of precaution. Judges are very afraid of making mistakes in terrorism cases. [They think] it's less serious to expel and something happens over there than to not expel and then something happens here.

—Jacques Debray, lawyer⁹⁰

The countries to which France forcibly removes terrorism suspects generally have in common draconian counterterrorism legislation, inadequate fair trial provisions, and poor records on torture. Human Rights Watch is aware of returns from France to Morocco, Tunisia, and Turkey, but the vast majority of those removed from France on national security grounds are returned to Algeria. The history of threats and actual attacks attributed to Algerian networks in France, the large presence of Algerian nationals residing in France and the special—if troubled—relationship between the two countries as a result of their shared colonial history explain this predominance.

Despite considerable improvement in the overall security situation in Algeria, ample evidence exists to suggest that terrorism suspects are at particular risk of torture and ill-treatment there. In an April 2006 report, “Unrestrained Powers,” Amnesty International documented dozens of reports of torture and cruel, inhuman or degrading treatment or punishment (ill-treatment) of people held by Algeria’s Department for Information and Security (Departement du Renseignement et de la Securite, DRS) on suspicion of involvement in terrorist activity.⁹¹

The DRS, a military intelligence unit considered responsible for systematic and widespread torture, extrajudicial executions, and forced disappearances throughout the 1990s, is now by all accounts specialized in gathering counterterrorism intelligence. There is evidence, based on dozens of cases of torture and ill-treatment collected by Amnesty International between 2002 and 2006, to suggest that the DRS

⁹⁰ Human Rights Watch interview with Jacques Debray, lawyer, Lyon, June 22, 2006.

⁹¹ Amnesty International, “Unrestrained Powers: Torture by Algeria’s Military Security,” AI Index: MDE 28/004/2006, July 10, 2006, <http://web.amnesty.org/library/Index/ENGMDE280042006> (accessed September 1, 2006).

routinely arrests and holds terrorism suspects in incommunicado detention in secret locations, with no access to a lawyer and no right to communicate with their families, where they are at particular risk of being subjected to torture and ill-treatment. According to Amnesty International, the most commonly reported forms of torture include beatings, electric shocks, and the *chiffon*, where “the victim is tied down and forced to swallow large quantities of dirty water, urine or chemicals through a cloth placed in their mouth.”⁹² An amnesty law adopted in 2006 ratified impunity for abuses committed by Algerian security forces, including the DRS.⁹³

The United States has not returned any of the Algerian nationals currently detained at Guantanamo Bay at least in some cases because of concerns about risk of torture. In these cases, the US government appears to be seeking third-country solutions. For example, Fethi Boucetta, an Algerian national, was released from Guantanamo on November 17, 2006, and sent to Albania.

Insufficient Procedural Guarantees

French authorities have a clear obligation under international and national law to conduct a thorough review before removal to ensure an individual does not face a risk of being tortured or ill-treated upon return. While at first glance the various types of appeals available to individuals subjected to removal would appear to satisfy the requirement for adequate safeguards, in practice this is not the case. The lack of an automatically suspensive appeal against expulsion, and misuse of the expedited procedure, create a situation in which individuals facing deportation do not have access to an effective remedy.

International law prohibits the return, deportation, or extradition of a person when there is a risk of torture or ill-treatment. Article 3 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment stipulates,

⁹² Ibid., p. 16.

⁹³ For a discussion of the amnesty, see “Algeria: New Amnesty Law Will Ensure Atrocities Go Unpunished,” Human Rights Watch news release, March 1, 2006, <http://hrw.org/english/docs/2006/03/01/algeri12743.htm>.

No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he will be in danger of being subjected to torture... For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.⁹⁴

Article 3 of the European Convention on Human Rights states that “No person shall be subjected to torture or to inhuman or degrading treatment or punishment.”⁹⁵ The European Court of Human Rights (ECtHR) has consistently and repeatedly held that the prohibition extends to placing people at real risk of torture or inhuman treatment and that the prohibition against refoulement is a clear element of the general and absolute prohibition on torture. In its 1989 decision in *Soering v. the United Kingdom*, the court firmly established its interpretation of article 3 as prohibiting refoulement:

It would hardly be compatible with the underlying values of the Convention, that “common heritage of political traditions, ideals, freedom and the rule of law” to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed.⁹⁶

The absolute protection against refoulement applies to all people at all times regardless of the nature of the alleged or proven crimes or threats to national

⁹⁴ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), adopted December 10, 1984, G.A. Res. 39/46, annex, 39 UN GAOR Supp. (No. 51) at 197, UN Doc A/39/51 (1984), entered into force June 26, 1987.

⁹⁵ European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, entered into force September 3, 1953, as amended by Protocols 3, 5, 8 and 11 which entered into force on September 21, 1970, December 20, 1971, January 1, 1990, and November 1, 1998, respectively.

⁹⁶ *Soering v. the United Kingdom*, Judgment of July 7, 1989, Series A no. 161, available at www.echr.coe.int, para. 88.

security. The court articulated the current European standard in the landmark 1996 case *Chahal v. the United Kingdom*:

The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct... The prohibition provided by article 3 against ill-treatment is equally absolute in expulsion cases... In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration.⁹⁷

French national law also explicitly prohibits refoulement. The Immigration Code states that “[a] foreigner may not be deported to a country if it is established that his life or his liberty are threatened or that he is exposed to treatment contrary to the stipulations of article 3 of the European Convention on Human Rights and Fundamental Freedoms.”⁹⁸

The key test under the nonrefoulement obligation is whether appropriate procedures and safeguards are in place to allow for a full, good-faith review of the risk of torture and prohibited ill-treatment upon return. At issue is whether there exists a *risk* of torture, not a *certainty* of torture. A state may be found in violation of article 3 even if a returnee was not subjected to torture or ill-treatment, if authorities knew or should have known there was a reasonable chance the person might be tortured upon return.

⁹⁷ *Chahal v. the United Kingdom*, Judgment of November 15, 1996, Reports of Judgments and Decisions 1996-V, available at www.echr.coe.int, para. 79-80. The Committee Against Torture, the UN body tasked with monitoring implementation of the Convention against Torture, has stated that “[t]he nature of the activities in which the person concerned engaged cannot be a material consideration when making a determination under article 3 of the Convention.” UN Committee against Torture Decision: *Tapia Paez v. Sweden*, CAT/C/18/D/39/1996, April 28, 1997, <http://www1.umn.edu/humanrts/cat/decisions/39-1996.html> (accessed November 20, 2006), para. 14-5.

⁹⁸ CESEDA, art. L. 513-2.

Lack of automatically suspensive appeal

How can my husband defend himself if he's not here?

—Dilek D., wife of an expellee⁹⁹

We have noted above that French law does not provide for an automatic suspension of an expulsion order or a country designation order upon appeal. Rather, the individual must file one or both interim relief appeals that are designed to allow a judge to suspend execution of the expulsion order while the administrative court considers the appeal on the merits. Until the judge has ruled, the government is free to expel even in cases where the individual alleges a risk of torture upon return.

In the case of Nacer Hamani, discussed in detail below, the government did indeed attempt to expel someone by ferry to Algeria after he had filed a petition for protection of fundamental liberties on the grounds that he was at risk of being tortured or subjected to ill-treatment. A mobilized opposition by local migrants' rights groups and the protest of the port workers' union held up the boat's departure long enough for the interim relief judge to suspend the expulsion.

Human Rights Watch heard from several sources that administrative judges view petitions grounded in concerns of torture with considerable suspicion. Lucille Hugon, head of asylum issues at the anti-torture organization Action by Christians Against Torture (Action des chrétiens pour l'abolition de la torture, ACAT-France), said lawyers tend to avoid torture complaints because administrative courts are "very reticent" about article 3 of the ECHR.¹⁰⁰ Two judges with the Paris Administrative Court confirmed this view.¹⁰¹ "The administrative judge has a problem assessing risk... there's very little knowledge about the situation in certain countries... the judge is going to seek refuge in the OFPRA [Office for Refugees] and CRR [Appeals Board] decisions," according to Judge Stephane Julinet.¹⁰² Petitions based on the

⁹⁹ Human Rights Watch interview with Dilek D.(pseudonym), Villeurbanne, France, June 23, 2006.

¹⁰⁰ Human Rights Watch interview with Lucille Hugon, head of asylum issues, ACAT-France, Paris, October 5, 2006.

¹⁰¹ Human Rights Watch interview with Stephane Julinet, administrative judge, Paris December 6, 2006. Judge Julinet spoke in his capacity as representative of the Syndicat de la Juridiction Administrative (SJA), a union of administrative judges. Separate Human Rights Watch interview with administrative judge who spoke on condition of anonymity, Paris, December 6, 2006.

¹⁰² Human Rights Watch interview with Stephane Julinet, administrative judge, Paris December 6, 2006.

right to family, discussed later in this report, are “better known and easier for the judge,” he said.¹⁰³

As noted in Chapter III, above, while asylum claims filed with the Office for Refugees do have suspensive effect, appeals against negative rulings by it are not suspensive in cases involving threats to national security, and individuals may be deported while the Appeals Board is reviewing this appeal.

Human Rights Watch understands the general principle in French administrative law that appeals against administrative acts should not be suspensive, applying the logic that a single individual should not be empowered to block administrative orders taken in the public interest.¹⁰⁴ We believe, however, that the multilayered system of appeals to suspend forced removals does not provide sufficient safeguards against what could be irreparable harm, and falls short of France’s obligation to provide an effective remedy against forced removal where there is a risk of torture.

The right to an effective remedy is a fundamental human right as well as a basic principle of law. This right, guaranteed in article 13 of the ECHR, requires states to create appropriate mechanisms for individuals to seek correction and redress when they have an arguable claim that one of their rights has been violated. The European Court of Human Rights assesses cases involving immigration and asylum issues through the prism of the right to an effective remedy,¹⁰⁵ and takes the view that this right imposes an obligation on states to provide for adversarial proceedings with sufficient procedural safeguards before an independent and impartial body.¹⁰⁶

¹⁰³ Ibid.

¹⁰⁴ It is interesting to note that an exception already exists: appeals against removal orders for irregular immigrants (APRFs) are automatically suspensive. Experts in administrative law explained to Human Rights Watch that this right was firmly established in the early 1990s after a series of contradictory reforms moved APRFs back and forth from the administrative to the criminal jurisdiction several times. The accepted principle now is that irregular immigrants are not inherently a threat to public order and should therefore benefit from greater protection. Human Rights Watch interview with Emmanuelle Prada-Bordenav, government commissioner, Council of State, Paris, December 6, 2006; Human Rights Watch interview with Stephane Julinet, administrative judge, Paris, December 6, 2006.

¹⁰⁵ The ECtHR has determined that as the majority of immigration or asylum cases do not involve the determination of disputes involving civil rights and obligations nor are they criminal cases, that the right to a fair trial guaranteed under article 6 of the Convention cannot be invoked. See *Maaouia v. France* [GC], no. 39652/98, ECHR 2000-X, available at www.echr.coe.int, paras. 35-40.

¹⁰⁶ See *Al-Nashif v. Bulgaria*, no. 50963/99, 20 June, 2002, available at www.echr.coe.int, paras. 123, 133.

The ECtHR attaches particular importance to the need for effective remedies, and specifically for suspensive appeals, in cases where individuals may face a risk of torture upon deportation because “the proper administration of justice requires that no irreparable action be taken while proceedings are pending.”¹⁰⁷ In the case of *Conka v. Belgium*, for example, the court found that Belgium had violated article 13 of the Convention because national law allowed authorities to carry out an expulsion while an appeal was pending. The court held,

First, it is not possible to exclude the risk that in a system where stays of execution must be applied for and are discretionary they may be refused wrongly, in particular if it was subsequently to transpire that the court ruling on the merits has nonetheless to quash a deportation order for failure to comply with the Convention, for instance if the applicant were to be subject to ill-treatment in the country of destination...

Secondly, even if the risk of error is in practice negligible... it should be noted that the requirements of Article 13, and of the other provisions of the Convention, take the form of a guarantee and not of a mere statement of intent or a practical arrangement.¹⁰⁸

The Court reaffirmed the importance of a suspensive appeal in its April 2007 decision in the case of *Affaire Gebremedhin v. France*. Asebeha Gebremedhin was an Eritrean asylum seeker who was held in the “international waiting zone” at Charles de Gaulle airport outside Paris upon his arrival on June 29, 2005. On July 5, OFPRA rejected his request to enter officially French territory in order to seek asylum, and the Interior Ministry denied him admission to France and ordered him returned to Eritrea or a third country the following day. The Court found that France had violated article 13 in conjunction with article 3 because none of the appeals at Gebremedhin’s disposal against these decisions had suspensive effect. The Court noted that filing interim relief petitions before the administrative court is not

¹⁰⁷ *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99), ECHR 2005-I, available at www.echr.coe.int, para. 124.

¹⁰⁸ *Conka v. Belgium*, no. 51564/99, ECHR 2002-I, available at www.echr.coe.int, paras. 82-83

suspensive, and agreed with the plaintiff Gebremedhin that a “practice” of suspending expulsion until a decision has been made on these petitions “cannot substitute for a fundamental procedural guarantee of a suspensive appeal.”¹⁰⁹ In the Court’s view, “[A]rticle 13 requires that the concerned party have access to a remedy with automatic suspensive effect.”¹¹⁰

The UN Committee Against Torture (CAT), which monitors compliance with the Convention against Torture and adjudicates individual complaints against member states, has insisted that the remedy against refoulement requires “an opportunity for effective, independent, and impartial review of the decision to expel or remove.”¹¹¹ In a 2005 decision, the committee found that France had violated its treaty obligation under the Convention against Torture when it deported Mahfoud Brada to Algeria in September 2002 at a time when his appeal to the Bordeaux Administrative Appeals Court was still pending.¹¹² The CAT had requested a stay in the execution of the expulsion order in December 2001 and renewed that request in September 2002, shortly before Brada’s expulsion. Brada—who as an airforce pilot had been detained and tortured for three months in military brigs in Algeria after refusing to bomb civilian areas—went missing for a year-and-a-half upon his expulsion to Algeria. He later claimed he had been held in different locations by the Algerian secret service and severely tortured.

In its ruling, the committee stressed that French authorities were, or should have been, aware that Brada’s pending appeal contained additional arguments against his expulsion that still required judicial review at the time he was expelled,¹¹³ and concluded that

¹⁰⁹ *Affaire Gebremedhin v. France*, no.25389/05, available at www.echr.coe.int, paras. 65-66.

¹¹⁰ *Ibid.*, para. 66.

¹¹¹ UN Committee Against Torture, Decision: Agiza v. Sweden, CAT/C/34/D/233/2003, May 20, 2005, <http://www1.umn.edu/humanrts/cat/decisions/233-2003.html> (accessed January 1, 2007), para. 13.7.

¹¹² UN Committee Against Torture, Decision: Brada v. France, CAT/C/34/D/195/2002, May 24, 2005, <http://www1.umn.edu/humanrts/cat/decisions/195-2002.html> (accessed November 22, 2006). Brada had been sentenced in 1998 to eight years in prison and a ten-year ban from French territory.

¹¹³ *Ibid.*, para. 13.3.

enforcing the deportation order rendered the appeal irrelevant by vitiating its intended effect... the appeal was so intrinsically linked to the purpose of preventing deportation, and hence to the suspension of the deportation order, that it could not be considered an effective remedy if the deportation order was enforced before the appeal concluded.¹¹⁴

The committee protested France's failure to respect its request for interim protection, saying this rendered action by the CAT "futile" and its comments "worthless."¹¹⁵ It found France in violation of its obligations under article 22 of the Convention accepting the CAT's competence and establishing the system of review of individual complaints.¹¹⁶ According to the French government, this was the first time it had not heeded the committee's requests for a stay in removal.¹¹⁷ It would not be the last.

In August 2006, French authorities expelled Tunisian Adel Tebourski to Tunisia despite the committee's request for a stay in execution of his expulsion order (see below for a full discussion of his case). On May 11, as this report was being finalized, the CAT concluded that France had violated article 3 of the Convention against Torture in Tebourski's case. In its comments to the committee in the Brada case, the French government argued that in its view the committee does not have the authority to take steps binding on member states, and insofar as France had cooperated with requests for interim protection in the past, it had done so in good faith, and not in fulfillment of what should be considered a legal obligation.¹¹⁸ In this and other cases, the CAT has stressed that ratification of the Convention and acceptance of CAT competence to review individual complaints under article 22 imposes an obligation to cooperate fully with the committee.¹¹⁹

¹¹⁴ Ibid., para. 7.8

¹¹⁵ Ibid., para. 6.1

¹¹⁶ Ibid., para. 13.4.

¹¹⁷ Ibid., para. 8.2

¹¹⁸ Ibid.

¹¹⁹ UN Committee Against Torture, Decision: Agiza v. Sweden, para. 13.10.

Case studies

Nacer Hamani

Nacer Hamani, age 41, moved to France from Algeria when he was 13 years old. He married in 1989 and is father to three children. In 1999 he was sentenced at last instance to eight years in prison, and issued with a permanent criminal deportation order, for membership in a terrorist group providing support to the GIA. On October 2, 2001—four days before Hamani was due to be released from prison after serving his sentence—the local prefect issued an order designating Algeria as the country of return. On October 6 Hamani was taken from prison to the Saint-Exupery detention center in Lyon pending his deportation. His lawyer filed a petition for protection of fundamental liberties with the Lyon Administrative Court on October 8, alleging that Hamani’s deportation would place him at risk of torture or ill-treatment.

On the afternoon of the following day, October 9, 2001, Nacer Hamani was taken under tight security to the Marseille port and put on a boat almost mockingly named *Liberte*. Port personnel became suspicious when a large convoy of vehicles bypassed the typically stringent security checks. Investigations by port staff, and protests by local activists from CIMADE, a migrants’ rights organization that had spearheaded the movement against the *double peine*, delayed the boat’s departure. The *Liberte* was still at port when news arrived that the interim relief judge had that afternoon suspended the expulsion until a full hearing could be held on October 12.

Hamani was quoted in a newspaper at the time: “I was in the cell on the boat. When they opened [the door], I thought I was in Algeria, I was saying my prayers... But, it was the same police officers.”¹²⁰

At the full hearing three days later, the interim relief judge confirmed the suspension until the court could rule on the merits. The judge took the view that Hamani faced a risk of torture because of his prior conviction and noted membership in the GIA. Several French human rights organizations, including CIMADE, the Human Rights League, and Divercite, a grassroots organization in the low-income suburbs of Lyon, submitted supporting documents.

¹²⁰ Charlotte Rotman and Michel Henry, “The Case of Mr. Hamani” (“*Le cas de Monsieur Hamani*”), *Liberation* (Paris), October 12, 2001.

The French government immediately appealed the decision, and the Council of State convened an emergency session on Sunday, October 14, 2001, at which all parties were present. The following day, the Council of State ruled that “considering that Mr. Hamani... has lived in France since he was thirteen [and] does not allege that he has engaged in any political or militant activity... in Algeria or in connection with Algeria... it does not follow that he would be exposed to the kind of risks” mentioned in article 3 of the European Convention on Human Rights.¹²¹ A representative of CIMADE commented, “They consider him an Islamist when it comes to convicting him... And they say he isn’t an Islamist when it comes to expelling him.”¹²²

Hamani’s family and friends gathered at the port to see him put aboard on that same boat, the *Liberte*, on the afternoon of October 16 after they learned he had been taken from the detention center where he had been held pending deportation. They eventually learned he had been flown to Algiers earlier in the day. Upon arrival, Hamani was held in a secret location for 11 days. His lawyer said that he told her he did not want to have any more contact with her and asked her to desist all legal action on his behalf. Human Rights Watch was unsuccessful in its efforts to contact him.

Adel Tebourski

Adel Tebourski was born in Tunisia in 1963. He moved first to Belgium in 1985 and then later to France, where he married a French citizen in 1995, with whom he had a son in 1996; he became a French citizen himself in 2000. In November 2001 Tebourski was arrested in connection with the assassination of Ahmad Shah Massoud on September 9, 2001, in Afghanistan.¹²³ He was accused of providing logistical support for the two men who carried out the assassination (and died along with their victim). In May 2005 he was convicted of association de malfaiteurs and sentenced to six years in prison.

¹²¹ Council of State decision, 15 October, 2001, *Minister of the Interior v. Hamani*, Nos. 238943 and 239022.

¹²² Michel Samson, “Council of State authorizes Islamist Nacer Hamani’s expulsion to Algeria” (*“Le Conseil d’Etat autorise l’expulsion vers l’Algerie de l’islamique Nacer Hamani”*), *Le Monde*, October 16, 2001.

¹²³ Massoud was a military leader who fought against the Soviet occupation of Afghanistan, and later became the leader of the United Islamic Front for the Salvation of Afghanistan fighting against the Taliban.

Tebourski was scheduled to be released from prison in Nantes on July 22, 2006. According to Tebourski, he was looking forward to spending time with his son and to finishing a book he was writing. But on July 21, the eve of his release, everything changed when he was officially stripped of his French citizenship. The following day, July 22, the Ministry of the Interior issued an expulsion order citing absolute urgency and a decision designating Tunisia as the country of return.¹²⁴ Instead of walking free, Tebourski was taken from his prison cell to a detention center pending deportation.

Tebourski applied for asylum on July 21, the day he learned he had been stripped of his French citizenship. Two nongovernmental organizations, CIMADE and ACAT-France, petitioned the UN Committee Against Torture on Tebourski's behalf for an injunction against the expulsion. In a letter dated July 27 the CAT informed the two organizations that the committee had asked France to provide information on the case and to refrain from expelling Tebourski until the committee had examined the case on its merits. Other organizations such as the French section of Amnesty International, FIDH, and the Human Rights League submitted documents to substantiate the risk of persecution, including torture, faced by Tebourski were he to be returned.

The Office for Refugees rejected Tebourski's asylum claim on July 28, saying he did not have a well-founded fear of being persecuted in Tunisia, since he had left there long ago, did not appear to have engaged in significant activities against the Tunisian authorities, and had not proved that he would be at risk of being persecuted for activities committed outside that country. Tebourski was notified of the decision on August 1; the same day, he was taken to the Tunisian consulate to receive a laissez-passer. His lawyer submitted an appeal to the Refugee Appeals Commission, but (as noted in Chapter III, above) such an appeal is not suspensive in cases involving national security.

¹²⁴ French law allows for nationalized citizens to be stripped of their French citizenship if they have been convicted of a crime against the "fundamental interests of the nation" or of an act of terrorism. Nationality can only be stripped if the individual will not be left stateless (in Tebourski's case, he had retained his Tunisian citizenship) and if the criminal acts were committed before French nationality was acquired or within the first 15 years after acquisition. Civil Code, art. 25. The Bureau for Naturalizations in the Ministry of Employment, Social Cohesion and Housing had notified Tebourski of the intention to strip him of his French citizenship in a letter dated June 15, 2006. On file with Human Rights Watch.

On August 7 Tebourski was taken by force onto an airplane bound for Tunis. Accompanied by three French gendarmes, he was hand-cuffed and shackled, and strapped into his seat with velcro belts around his chest and thighs until the flight was well underway.¹²⁵ Upon arrival in Tunis he was not detained or questioned.

On October 17, 2006, two months after Tebourski was deported to Tunisia, the Refugee Appeals Board acknowledged that Tebourski had had a well-founded fear of being persecuted within the meaning of the Refugee Convention, given that “his behavior taken as a whole is of a nature to lead the Tunisian authorities to consider it a manifestation of political opposition...” and that he had had a legitimate fear of being tried under Tunisian counterterrorism legislation for the same acts that had led to his conviction in France. The Appeals Board concluded that “the fact that... he has remained free but placed under ostentatious police surveillance, without being arrested, must be viewed as expressing the wish of the Tunisian authorities to conceal their real intentions.”¹²⁶

The Appeals Board’s decision rejected Tebourski’s asylum claim under article 1F(c) of the Refugee Convention, which excludes from protection any person established to be involved in acts contrary to the aims and principles of the United Nations, including terrorism. This decision, though it denies Tebourski refugee status, would have nevertheless required the French authorities to refrain from deporting him to Tunisia because of the absolute prohibition on returning someone to a country where that person faces a risk of torture. Had it been reached while Tebourski was still in France, the French government would have had to either rescind the expulsion order or not execute it until a safe third country willing to accept him could be identified.

Misuse of Expedited Procedure

As explained in Chapter III, above, the interior minister can expedite administrative expulsions by citing “absolute urgency” and in doing so bypass consultation with an Expulsion Commission.

¹²⁵ Human Rights Watch interview with Adel Tebourski, Tunis, October 31, 2006.

¹²⁶ Decision of the Refugee Appeals Commission, dated October 17, 2006. On file with Human Rights Watch.

The expedited procedure was created to respond to situations in which the perceived urgency to expel means there is no time to convene the commission. The commission must notify all participants 15 days ahead of a hearing. The jurisprudence of the Council of State on the use of “absolute urgency” puts the onus on the government to prove the existence of such urgency, and requires the administrative judge to take into account, *inter alia*, the amount of time between when the Ministry of Interior learned of alleged acts giving rise to the expulsion order and the date of the expulsion order itself.¹²⁷ Council of State jurisprudence has also established that imminent release from prison of a foreigner whose “dangerousness is manifest” justifies recourse to “absolute urgency.”¹²⁸

Several cases reviewed by Human Rights Watch raise concerns that reliance on the expedited measure is more a matter of expediency than of genuine need.

Samir Korchi, a 32-year-old Moroccan who moved to France with his family in the 1980s, was sentenced in December 2004 to four years in prison for participation in a criminal association in relation with a terrorist enterprise. He did not receive a criminal deportation order, but six weeks before his expected release from prison, on February 28, 2005, the Paris prefecture issued a prefectoral expulsion order and the expulsion commission was set to examine Korchi’s case on April 19, 2005. However, on April 12, just two days before Korchi was to be released from prison, the interior minister issued his own ministerial expulsion order citing absolute urgency and overwhelming necessity to protect public and state security. Korchi was released from prison on April 14 but immediately taken into administrative custody and placed in a detention center pending deportation. He was expelled to Casablanca, Morocco, the following day.

Chellali Benchellali, a 62-year-old Algerian imam living in Venissieux at the time, was taken into police custody on January 6, 2004, on suspicion of involvement in a criminal association with a view to perpetrating a terrorism offense. On January 8, while Benchellali was still in police custody, the Interior Ministry issued an urgent expulsion order. Benchellali was remanded into pretrial detention on January 12 and

¹²⁷ See, for example, Council of State decision, 1 April 1998, *Ministry of the Interior v. Kisa*, No. 163901.

¹²⁸ Council of State decision, 16 October 1998, *Minister of the Interior v. Antate*, No. 171333.

was eventually convicted and sentenced to two years in prison on June 14, 2006 (six months plus 18 months suspended). He was expelled on September 7, 2006.

In this case, the government argued that Benchellali's imminent release from police custody—since at the time of the administrative expulsion order there was no guarantee Benchellali would be remanded into pretrial detention—justified the urgent measure. Nonetheless, the intelligence reports substantiating the government's case are dated July 2003 and November 2003, at a minimum 44 days and a maximum of five months before the ministerial expulsion order was issued. Benchellali's lawyer argued in his brief that “the inertia of the administration during this period... inevitably demonstrates the absence of absolute urgency...”¹²⁹ Benchellali's case is discussed in detail below (Chapter V).

Abdullah Cam, a 43-year-old Turkish citizen living in France since 1986, was arrested on September 6, 2005, outside his home in a suburb of Lyon as he was taking his young child to school. He was expelled the following day. The Interior Ministry had issued an expulsion order on August 26, 2005, but the local prefect took action only two weeks later.¹³⁰ The intelligence report, dated July 1, 2005, summarizing the government's case against Cam lists numerous counts against him, the majority of which date back to the mid-1990s. The most recent act—attendance at a clandestine meeting of Kaplanites¹³¹ in Germany—dated from June 18, 2005, almost two-and-a-half months before the expulsion order was issued. In this case, which is discussed in greater detail in Chapter V, the expulsion was so swift Cam's lawyer was able to file appeals only the day after his client had been deported.

¹²⁹ Memoire Appel du Jugement rendu le 7 juillet 2005 par la 1ere Chambre du Tribunal Administratif de Lyon (Dossier No. 0401903-1), filed by Berenger Tourne on behalf of Chellali Benchellali before the Administrative Court of Appeals of Lyon, September 7, 2005.

¹³⁰ The local prefect is tasked with taking the necessary steps to effect the physical removal, including in most cases issuing the country designation order.

¹³¹ “Kaplanites” are followers of Metin Kaplan, the leader of the “Caliphate State” that allegedly seeks to overthrow the Turkish government and establish an Islamic state in that country. The organization, based in Germany, was banned by the German government in 2001.

Returns to Algeria

The staff researcher for Human Rights Watch was unable to obtain a visa to Algeria to carry out research in the context of preparing this report.¹³² Instead, a Human Rights Watch consultant conducted interviews in Algeria in November 2006 with 12 Algerian nationals deported from France. The interviews confirmed that terrorism suspects returned to Algeria are likely to be detained by the Department for Information and Security (DRS).

Out of the 12 interviewees, eight had been detained upon return to Algeria for periods ranging from four to 12 days.¹³³ Of these, five were detained by the DRS, but only one could identify the place in which he had been kept (the Ben Aknoun military barracks). A sixth man said he had been detained by the “judicial police” in the Chateauneuf military barracks. Because the DRS is empowered by Algerian law to exercise judicial police functions, it is possible that he too was in DRS hands. The remaining two deportees were detained in the Algiers central police station. With the exception of Abdelkader Bouziane, an imam expelled by ministerial order, all of those interviewed had been subject to criminal deportations following convictions for membership in or association with a terrorism network. They had served prison terms in France ranging from one to six years.¹³⁴ While none of these men reported suffering ill-treatment upon return, they endured days and nights of uncertainty, and in some cases, constant interrogations.

Mahdi E., 46, an Algerian national who was born in France and had lived there his entire life, was put aboard a boat to Algiers on February 25, 2005. Upon arrival, Mahdi was taken to an unknown place by the DRS, interrogated, and held for 10 days.¹³⁵ His wife Nejla says that she developed an ulcer from the emotional stress of

¹³² Several attempts to apply for a visa at the Algerian consulates in Rome and Milan were rejected for procedural reasons. The Algerian consulate in Milan accepted the application in late October 2006. As of March 2007, no decision had been made on the visa request despite repeated phone calls and personal visits to the consulate.

¹³³ The other four were questioned for periods of time ranging from 30 minutes to several hours and then released.

¹³⁴ Some received sentences for three or four years, but two or three years were suspended so the effective prison term was only one year.

¹³⁵ Human Rights Watch interview with Mahdi E. (pseudonym), Algiers, November 17, 2006.

this period: “When he was expelled, I went to look at websites and saw what happened to people in Algeria, and I was very frightened.”¹³⁶

Driss Saiad, 41, was held for 18 days in a detention center pending deportation before he was flown to Algiers on March 26, 2006. Upon arrival he was detained in the Ben Aknoun military barracks for 12 days, during which time his wife and children (two with his current wife and two from a previous marriage) had no information about his whereabouts.¹³⁷

Hazim S., 42, was detained and flown to Algiers on December 11, 2002. Hazim was detained upon arrival. “The Algerian police took me to an unknown place where I spent eight days without anyone, not my lawyer nor my wife nor my parents in Algeria, knowing where I was. On December 18, 2002, around 7 p.m., I was released and left on a highway near my [parents’] home.”¹³⁸

Khelif Zoubir, 52, was deported to Algiers by boat on June 28, 2006. He told Human Rights Watch that he was held for four days in Algeria by the judicial police in the Chateauneuf military barracks.¹³⁹

Abdelkader Bouziane, 54, was flown to Algeria on April 21, 2004. At the airport in Algiers he was put in a van and driven to an unknown location where he was held for interrogation for seven days. During that time his family had no idea of his whereabouts and he was prohibited from using the telephone.¹⁴⁰

Mohamed Touam, 50, was expelled in October 2001. He was detained in the central police station in Algiers for eight days. “I was interrogated day and night,” he told Human Rights Watch.¹⁴¹ Touam says that he suffers from hypertension as a result of the experience. “I was in isolation the whole time. They would interrogate me say

¹³⁶ Human Rights Watch interview with Nejla E. (pseudonym), Vaulx-en-Velin, France, December 7, 2006.

¹³⁷ Human Rights Watch interview with Driss Saiad, Algiers, November 14, 2006.

¹³⁸ Human Rights Watch interview with Hazim S. (pseudonym), Algiers, November 14, 2006.

¹³⁹ Human Rights Watch interview with Khelif Zoubir, Algiers, November 14, 2006.

¹⁴⁰ Human Rights Watch interview with Abdelkader Bouziane, Oran, Algeria, November 16, 2006.

¹⁴¹ Human Rights Watch interview with Mohamed Touam, Algiers, November 15, 2006.

until 9 in the evening and then they'd come and get me up at 2 or 3 o'clock to question me some more. They'd say, 'Let's see what we need to do to make you talk,'" Touam said.¹⁴²

Several reported abusive treatment by French officers at the moment of arrest or during the journey. Hazim S. was detained in front of his son's pre-school and taken into custody pending deportation:

They put me in their car with handcuffs on in front of my wife [and] my son. When we got to the Paris prefecture, an agent came to tell me, "It's over for you, you're an undesirable in France..." The next day... the same agents came to get me from my cell and when I asked where they were taking me, they said to the Vincennes detention center, but really they took me to the Bourget military airport where a special plane was waiting. I resisted, they used force and managed to get me on the plane... We took off for an unknown destination... my hands and feet were tied up the whole way, nothing to drink or eat. When I saw the RG officers laughing, I realized we were heading for Algeria.¹⁴³

Mahdi E. was taken from his prison cell at 5 a.m., put in a straightjacket and driven to Marseille, where he was "thrown in a cell" on a boat heading for Algiers.¹⁴⁴

¹⁴² Human Rights Watch telephone interview with Mohamed Touam, December 21, 2006.

¹⁴³ Human Rights Watch interview with Hazim S., Algiers, November 14, 2006.

¹⁴⁴ Human Rights Watch interview with Mahdi E., November 17, 2006.

V. Right to Freedom of Expression

We will not keep people on our territory who issue calls to hatred, to violence and to disrespect of our democratic values. They will leave the territory, and they will leave quickly.

—Nicolas Sarkozy, then-interior minister¹⁴⁵

France has made international headlines in recent years with its uncompromising stance towards those the authorities describe as “hate-preachers.” It is difficult to get a clear measure of how many imams or religious leaders associated with mosques or prayer halls have actually been expelled. Part of the problem is that statements by politicians and press reports tend to speak of expulsions of “Islamist radicals,” conflating those who were removed pursuant to a criminal deportation order following a terrorism-related conviction and individuals identified by intelligence services as proselytizers of a radical form of Islam and subsequently expelled by administrative order. In September 2006 the police Unit for the Coordination of the Fight against Terrorism (UCLAT) reported that 71 “Islamic fundamentalists,” 15 of whom were imams, had been expelled outside of judicial proceedings (in other words pursuant to administrative orders) since September 11, 2001.¹⁴⁶ In January 2007 UCLAT stated France had expelled 17 “Islamist activists,” including four imams, during 2006.¹⁴⁷

At this writing, the French government has not responded to a request by Human Rights Watch, submitted in October 2006, for information on the exact number of legal residents in France expelled for incitement to discrimination, hatred, or violence. Human Rights Watch is aware of eight cases since 2003: Larbi Moulaye, Algerian, expelled in October 2003; Orhan Arslan, Turkish, expelled in January 2004; Omer Ozturk, Turkish, expelled in February 2004; Abdelkader Yahia Cherif, Algerian, expelled in April 2004; Abdelkader Bouziane, Algerian, expelled in April 2004 and

¹⁴⁵ Katrin Bennhold, “France stands firm on deportation of cleric,” *International Herald Tribune*, July 26, 2005.

¹⁴⁶ Migration Policy Group, “Migration News Sheet,” October 2006, p. 3

¹⁴⁷ Jean Chichizola, “Seventeen Islamist activists expelled in 2006” (“*Dix-sept activistes islamistes expulsés en 2006*”), *Le Figaro*, January 16, 2007.

again in October 2004; Midhat Guler, Turkish, expelled in May 2004; Abdullah Cam, Turkish, expelled in September 2005; and, Chellali Benchellali, Algerian, expelled in September 2006.¹⁴⁸ Yashar Ali, an Iraqi imam with refugee status in France since 1983, was assigned to compulsory residence in 2004 because he could not be expelled.

The determination to banish “radical preachers” stems from the interlocking goals of promoting a moderate Islam and marginalizing representatives of certain Islamic movements, in particular Salafism;¹⁴⁹ countering radicalization and recruitment to terrorism in mosques and prayer halls; and advancing integration of France’s large Muslim population. It is no coincidence that then-Interior Minister Sarkozy warned that “imams who propagate views that run counter to French values will be expelled” shortly after the first elections, in April 2003, for the newly created French Council of the Muslim Creed (Conseil Français du Culte Musulman, CFCM) (The Council is discussed in Chapter VIII, below).¹⁵⁰ The Union of Islamic Organizations of France (UOIF)—the French affiliate of the Muslim Brotherhood, an Islamic group banned in Egypt—which champions political engagement based on an Islamic communalist identity, won a significant number of the seats on the CFCM.¹⁵¹ At various times, public officials have insisted on the need to protect “the youngest and weakest-minded” from those promoting separatist, discriminatory, or violent ideologies. The 2004 statute in French immigration law allowing for the expulsion of foreigners for explicit and deliberate incitement to discrimination, hatred, or violence “against a specific person or group of persons” reflects this resolve.

Forms of public expression that directly or indirectly incite discrimination, hatred, or violence on the basis of ethnicity, nationality, race, religion, gender, sexual orientation, or handicap, or that directly incite terrorist acts or justifies such acts, are

¹⁴⁸ This list includes only individuals residing legally in France who were issued a ministerial expulsion order based on article L. 521-3 of CESEDA, or its precursor article 26 of the 1945 Ordinance.

¹⁴⁹ The term “Salafism” refers to a fundamentalist interpretation of Islam. French scholar of Islam Gilles Kepel argues there are two branches of contemporary Salafism: conservative or “pietist” Salafism that advocates a rigorous interpretation of Islam but no political engagement, and “jihadist” Salafism that combines a fundamentalist reading of Islam with a conviction that engagement in holy war against the enemies of Islam, including bad Muslims, is necessary.

¹⁵⁰ Kim Housego, “France May Expel Islamic Extremists,” Associated Press, April 17, 2003.

¹⁵¹ For a discussion of the different, and rival, fundamentalist Islamic ideologies represented in France, see Gilles Kepel, “The Battle for Europe” in *The War for Muslim Minds: Islam and the West* (Boston: Harvard University Press, 2004).

all punishable offenses in France.¹⁵² Sanctions range from one to five years in prison and hefty fines; the law does not, however, allow for criminal deportation as a complementary sanction for these crimes. Human Rights Watch is aware of only one case in which an imam was prosecuted for the offense of incitement to physical violence (see the discussion of Abdelkader Bouziane, below).

Many public officials and analysts underline the lack of public solidarity demonstrated in these cases of expulsions of imams as evidence of a national consensus that promoters of certain ideas are simply unwelcome in France. One commentator expressed this sentiment in this way: “You’re a radical Islamist preaching hate every Friday? Well sorry, but good-bye.”¹⁵³

IPSOS France, a survey-based research institute, conducted a telephone survey of 523 Muslims in France in early April 2003 on a variety of subjects, including “measures designed to encourage the emergence of an Islam of France.” An overwhelming majority—83 percent—of those polled supported the creation of an institution to train imams in France in order to prevent “foreign imams preaching an extremist fundamentalist Islam from coming to France.” When asked how they felt about prohibiting imams from preaching “an extremist fundamentalist Islam contrary to the values of the French Republic,” 55 percent of those interviewed said they favored such measures, while 39 percent said they opposed them.¹⁵⁴

How expulsions are viewed within France’s Muslim community, and how they may prove counterproductive to French government objectives, is explored in Chapter VIII, below.

Freedom of Expression in Europe

The right to freedom of expression has a special place in international human rights law and European societies. Enshrined in the International Covenant on Civil and Political Rights and the European Convention on Human Rights, freedom of

¹⁵² Law of 29 July 1881 on Freedom of the Press, arts. 23 and 24.

¹⁵³ Human Rights Watch interview with journalist (name withheld on request), Paris, October 4, 2006.

¹⁵⁴ IPSOS, “The Opinion of French Muslims,” April 7, 2003, www.ipsos.fr/Canallpsos/poll/7756.asp (accessed February 5, 2007).

expression is considered a fundamental right.¹⁵⁵ Article 10 of the ECHR gives everyone the right to freedom of expression, understood as “the freedom to hold opinions and to receive and impart information and ideas without interference from public authorities and regardless of frontiers.” The European Court of Human Rights takes the view that free expression “constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man.”¹⁵⁶ Freedom of opinion, thought and expression is frequently identified by European institutions and politicians as a key “European value.” This was vividly demonstrated by the concerted defense of the right of the Danish newspaper *Jyllands-Posten* to publish a series of cartoons depicting the Prophet Muhammad that sparked a worldwide controversy and sometimes violent protests in Muslim countries and elsewhere in February 2006.

At the same time, freedom of expression is not an absolute right: international law explicitly allows for restrictions in the interest of the public good, public order, and national security.¹⁵⁷ The ICCPR prohibits “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence” and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) requires States to make the dissemination of ideas based on racial superiority, incitement to racial discrimination or to acts of violence “against any race or group of persons of another colour or ethnic origin” a punishable offense.¹⁵⁸

In Europe, the experience of fascism and the horrors of the Holocaust have created a strong sensitivity to the real harm that hate-filled and racist opinion and expression can inflict. Several European Union and Council of Europe guidelines and binding instruments address the issue of hate speech, and a number of countries have specific laws making hate speech a crime. Seven countries in Europe, including France, have made denial of the Holocaust a criminal offense. The jurisprudence of

¹⁵⁵ ICCPR, art. 19; ECHR, art. 10.

¹⁵⁶ *Handyside v. the United Kingdom*, Judgment of 7 December 1976, Series A no. 24, available at www.echr.coe.int, para. 49.

¹⁵⁷ ICCPR, art. 19, (3)(b) and ECHR, art. 10 (2).

¹⁵⁸ ICCPR, art. 20; International Convention on The Elimination of All Forms of Racial Discrimination, adopted December 21, 1965, G.A. Res. 2106 (XX), annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, entered into force January 4, 1969, art. 4.

the European Court of Human Rights reflects this sensitivity. The court has asserted that “it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance,”¹⁵⁹ and has consistently taken the view that speech involving Holocaust denial is not protected by article 10 of the European Convention.

The European Court has frequently grappled with the tension between freedom of expression, on the one hand, and the authority of governments to restrict certain forms of expression, on the other. In accordance with the court’s jurisprudence, legitimate interference with the right to freedom of expression within the meaning of article 10 must be prescribed by law, pursue a legitimate aim, and be necessary in a democratic society. The court is primarily concerned with assessing whether the interference was strictly necessary to meet a pressing social need and proportionate to the legitimate aims pursued. National authorities must provide sufficient and relevant reasons to justify the interference.¹⁶⁰

In assessing whether an interference with freedom of expression was necessary and proportionate, the court takes into account a number of criteria, including the potential impact of the expression in view of where and how it was disseminated; the figure, position, and personal history of the speaker or writer; the nature of the target of the criticism; and the context in which the expression was made. The main test, however, is whether the expression incited violence or communicated a message that violence was necessary or justified.

The court has thus taken the view that interference with speech could be justified where it advocated “intensifying the armed struggle, glorified war and espoused the intention to fight to the last drop of blood” in a context of ongoing conflict¹⁶¹ but has ruled that even statements giving moral support to terrorist movements are protected by article 10 if the authorities are unable to provide convincing evidence that these statements would have a “harmful effect on the prevention of disorder

¹⁵⁹ *Müslüm Gündüz v. Turkey* No. 1, no. 35071/97, ECHR 2003-XI, available at www.echr.coe.int, para. 40.

¹⁶⁰ See for example, *Ceylan v. Turkey* [GC], no. 23556/94, ECHR 1999-IV, available at www.echr.coe.int, para. 32.

¹⁶¹ *Özgür Gündem v. Turkey*, no. 23144/93, ECHR 2000-III, available at www.echr.coe.int, para. 65.

and crime.”¹⁶² The court has considered expressions of hostility for national authorities, support for separatist aspirations, virulent criticism of government action, condemnation of democracy, and promotion of sharia law to be protected speech within the meaning of article 10 to the extent they do not directly advocate violence.¹⁶³

Two critical elements of incitement—intent and causality—emerge from ECtHR jurisprudence. These are found in other international instruments. In May 2005 the Council of Europe adopted the Convention on the Prevention of Terrorism, requiring states to establish the crime of “public provocation to commit a terrorist offence.”¹⁶⁴ This is defined as the dissemination of a message to the public “with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed.”¹⁶⁵ The Convention creates a clear causal link between a statement deemed to be provocative and the act that is to be prevented; it also establishes a “mental requirement” in providing that such public provocation should be a criminal offense if committed “intentionally.”¹⁶⁶

The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, a non-binding set of guidelines drafted in 1995 by a group of international experts, stipulate that authorities may legitimately punish expression as a threat to national security only under the following conditions: 1) the expression is intended to incite imminent violence; 2) it is likely to incite such violence; and 3) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.¹⁶⁷

¹⁶² *Öztürk v. Turkey* [GC], no. 22479/93, ECHR 1999-VI, available at www.echr.coe.int, para. 69.

¹⁶³ See *Association Ekin v. France*, no. 39288/98, ECHR 2001-VIII; *Okçuoglu v. Turkey* [GC], no. 24246/94, 8 July 1999; and *Müslüm Gündüz v. Turkey No. 1*. All available at www.echr.coe.int.

¹⁶⁴ Council of Europe Convention on the Prevention of Terrorism, CETS 196, Warsaw, May 16, 2005, article 5(1).

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.*, art. 5(2).

¹⁶⁷ The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, U.N. Doc E/CN.4/1996.39 (1996), <http://www1.umn.edu/humanrts/instree/johannesburg.html> (accessed November 10, 2006), principle 6.

Case studies

The three cases detailed below reflect the kind of expression giving rise to expulsions from France and the content of the intelligence reports used in court. All of the state's evidence, generally contained in these intelligence reports, must be made available to the defense; the use of classified, or secret, evidence is not allowed. There is little doubt that many of the comments these three imams allegedly made are contrary to the principles of human dignity, tolerance, and respect, and are deeply offensive to many people in France. In some cases, these comments appear to justify the use of violence. There is considerable doubt, however, that these comments constitute criminal incitement to violence and/or terrorism as contemplated under international law.

Abdelkader Bouziane

Abdelkader Bouziane, the 54-year-old imam of the El Forquan mosque in Venissieux, a suburb of Lyon, was expelled twice from France in 2004 in what was undoubtedly the most high-profile case to date involving the administrative expulsion of an imam. The case prompted the French government to change the law to broaden the grounds for hate speech expulsions, and to centralize all appeals against ministerial expulsion orders in the Paris Administrative Court (as noted in Chapter III, above). Human Rights Watch shares the view of the two administrative judges in the minority who reviewed the case and considered that the government failed to establish a convincing case that expulsion was necessary.¹⁶⁸

Bouziane moved to France from his native Algeria in 1979 and resided there legally until 2004. He is the father of 16 children, 14 of whom are French citizens, by two wives. On February 26, 2004, then-Interior Minister Dominique de Villepin issued a ministerial expulsion order stating that Bouziane “openly incites hatred and violence... appears to be one of the principle vectors of Salafist ideology in the Lyon area... [and] appears to entertain in an active manner contacts with very determined members of the fundamentalist Islamist movement in the Lyon area and

¹⁶⁸ Order No. 0402886 of 23 April 2004 of Interim Relief Judge M. du Besset, Lyon Administrative Court, suspending execution of the administrative expulsion; Conclusions of Government Commissioner Mattias Guyomar, Council of State, in the case of Ministry of the Interior v. M. Bouziane, 4 October, 2004. Both on file with Human Rights Watch.

internationally in relation with organizations that promote terrorist acts.”¹⁶⁹ His expulsion was deemed an “overwhelming necessity” and “absolutely urgent.”

Unaware of the ministerial expulsion order, which had already been issued but not yet communicated to him, Bouziane gave an interview to a local magazine, *Lyon Mag*, published on April 1, 2004, in which he was quoted as saying that women are not equal to men, that they do not have the right to work alongside men because they would be tempted to commit adultery, and that husbands are authorized by the Koran to beat their wives in certain situations such as adultery. He is quoted as clarifying that husbands cannot hit women just anywhere: “He should not hit the face but should aim low, [for] the legs or the stomach. And he can hit hard to scare his wife so she won’t do it again.”¹⁷⁰

The public furor these comments provoked apparently prompted the authorities to move more swiftly. On April 20 Bouziane was notified of the expulsion order and detained. He was expelled to Algeria the following day.

Bouziane’s lawyer filed appeals the same day as the expulsion, and on April 23 the interim relief judge at the Lyon Administrative Court upheld Bouziane’s petition for suspension on the grounds that the intelligence reports did not convincingly demonstrate that the expulsion was justified. The judge confirmed his ruling three days later, after the government had contested the decision and submitted further documents. As a result of this ruling, Bouziane returned to France on May 21. The Interior Ministry appealed the lower court’s decision to the Council of State, which ruled in favor of the Interior Ministry on October 4. Bouziane was expelled for the second time on October 6. In July 2005 the Lyon Administrative Court rejected Bouziane’s appeal on the merits against the expulsion order, and the Court of Appeals confirmed that ruling in November 2006. According to Bouziane’s lawyer: “I asked the judge to examine the materiality of the facts, to verify that this man’s [Bouziane’s] speech was subversive, to go further, but the judge said no, we cannot, the RG file is complete.”¹⁷¹

¹⁶⁹ Ministerial expulsion order, February 26, 2004, DA No. 002572056/No. 280.

¹⁷⁰ Interview with Abdelkader Bouziane, *Lyon Mag*, April 2, 2004.

¹⁷¹ Human Rights Watch telephone interview with Mahmoud Hebia, lawyer, May 17, 2007.

The intelligence reports submitted by the government to substantiate the threat posed by Bouziane were at the center of the legal debate. The government submitted three intelligence reports (notes blanches) to the interim relief judge hearing a petition in April 2004 to suspend the expulsion, and a fourth to the Council of State in May 2004. According to the conclusions of the government commissioner¹⁷² for the case in the Council of State, the first note is “at the same time brief and lacking in detail” and “limits itself to making assertions.” The second note is a discussion of Salafism, while the third is a two-page report describing Bouziane’s role as “religious reference point” for Salafist groups, and his “privileged contact” with militants providing logistical support for jihadist movements.¹⁷³ The government commissioner said that this report, though more detailed than the others, “still does not provide any... specific act, any date, any name... to support the allegations it contains.”¹⁷⁴

Human Rights Watch was able to study the fourth note blanche, submitted to the Council of State in May. It describes Bouziane as a “veritable spiritual leader” of Salafist groups in the Lyon area and his doctrine as consisting essentially of a “permanent denunciation of the West, of its values and the rules of democracy... This propaganda, with a strong anti-Christian and anti-Semitic dimension, is identical to that used by Salafist imams who have already been expelled [Larbi Moulaye and Yahia Cherif, named in the report].”¹⁷⁵ The report contends that Bouziane “formed a network of the faithful engaged in militant jihadism” and that he had maintained relationships with the “most extremist elements” in Chalons-en-Champagne and Villefranche-sur-Saone where he had served as imam, but clarifies that Bouziane does not use his regular sermons as a “vector” to avoid attracting attention, but rather “his extremist declarations are reserved for the circle of convinced militants he has selected.” In the same report, Bouziane is said to have called for a *fatwa*, on

¹⁷² Despite the name, a government commissioner is an independent advisor who produces a report on a given case and recommends a preferred ruling. His or her views are not binding on the Council of State justices, but are often followed.

¹⁷³ Conclusions of Government Commissioner Mattias Guyomar, Council of State, in the case of Minister of the Interior v. M. Bouziane, 4 October, 2004, p. 9

¹⁷⁴ Ibid., pp. 9-10.

¹⁷⁵ Note Blanche on Abdelkader Bouziane, heading DCRG/SDR, submitted as evidence to the Council of State on May 12, 2004, p. 4.

March 28, 2003, against US citizens in Iraq in the following terms: “He who wishes to die a martyr and go to heaven must now take up arms and fight the atheists.”

The report contains much information about jihadist Salafism and relations between Salafists in France and “terrorist structures in Frankfurt[-am-Main, Germany]” as well as information about a gunfight in Frankfurt in June 1999 and the plot to bomb the Christmas market in Strasbourg. There is, however, no mention of Bouziane in relation to these events or people connected to these events. Some attention is devoted to Bouziane’s “trusted lieutenant” who remains unnamed but is quoted as advocating resistance to imams he called “Chirac’s men” and was allegedly in contact with certain people identified as militants. The report concludes that Bouziane presents a “high degree of dangerousness” and is “a decisive actor in the process of recruitment leading to membership in jihadist networks.”

The Lyon interim relief judge who initially suspended the expulsion, paving the way for Bouziane to return to France, weighed Bouziane’s denials of specific accusations in the note blanche, as well as the full transcript of the *Lyon Mag* interview, against the intelligence report to conclude there was a serious doubt as to the legality of the expulsion. Bouziane denied having ever pronounced a *fatwa*, indeed even being in a position of authority to pronounce one. In the full transcript of the magazine interview, Bouziane said he was a Salafist, “in other words partisan of a return to the true Muslim religion with a strict respect for prayer, pilgrimage, Ramadan, etc...” and that he wished for not only France but the entire world to be Muslim. He states, however, that the Koran prohibits forcing people to convert to Islam, and that “[e]ven if I am critical of the West, I always ask Muslims who listen to me to respect the laws of the country where they live.” On terrorism, Bouziane said that “it is a great sin to plant a bomb” and “I firmly condemn terrorism in my sermons.” Asked about the headscarf, Bouziane said, “We don’t force women to wear the veil... We tell them it is a sin [not to do so]. But not with the stick... With words, and soft words. It’s not with a stick. We’re not going to tell her, ‘you’ll go to hell, you’re against your religion.’ No, we tell her it’s an obligation.” In his appeals, Bouziane’s lawyer argued that his client is an acknowledged follower of what Gilles Kepel, a prominent scholar on Islam and professor at the Institut d’Etudes Politiques de Paris (Sciences Po), calls

the “pietistic” branch of Salafism, while the Interior Ministry had mistakenly qualified him as a representative of the so-called jihadist branch.

It is worth emphasizing again that the ministerial expulsion order was issued *before* Bouziane gave the interview to *Lyon Mag* in which he arguably incited Muslim men to commit domestic violence. The decision to expel was based on the speech and association detailed in the intelligence reports. In October 2005 the Lyon appellate court convicted Bouziane of “incitement without effect to commit an involuntary attack on the physical integrity of a person,” on the basis of the interview published in *Lyon Mag*, an offense punishable by up to five years in prison. He was sentenced, in his absence, to a six-month suspended prison term and a €2,000 fine. The appeals court rejected the reasoning of the lower court, which had acquitted Bouziane in June 2005, that he had spoken in his capacity as an imam and was therefore protected by freedom of religion.

Chellali Benchellali

Chellali Benchellali moved to France from his native Algeria in 1963 and lived near Lyon until his expulsion on September 7, 2006. He served as imam at the Abou Bakr mosque in Venissieux. On January 6, 2004, Benchellali, his wife Hafsa Benchellali, and one of their sons, Hafed, were arrested on terrorism charges. Another son, Menad, had been arrested and put in pretrial detention in 2002 on terrorism charges; a third son, Mourad, had been apprehended in Afghanistan in February 2002 and was at the time being held in Guantanamo Bay.¹⁷⁶ On January 8, 2004, while Benchellali was still in police custody, the interior minister issued a ministerial expulsion order arguing that Benchellali openly incited violence and hatred. On January 12 Benchellali was remanded into pretrial detention, where he remained until May 2005. On June 16, 2006, he was convicted of association de malfaiteurs and sentenced to two years in prison (of which 18 months suspended); he was not ordered criminally deported.¹⁷⁷ However, he was detained on September 5, 2006,

¹⁷⁶ Mourad Benchellali, along with three of the other five French citizens held at Guantanamo Bay, was returned to France in July 2004 and placed into pretrial detention on association de malfaiteurs charges. He is currently on trial for association de malfaiteurs.

¹⁷⁷ His son, Menad Benchellali, tried with him, was sentenced to 10 years in prison, the maximum sentence for association de malfaiteurs. Hafsa Benchellali received a two-year suspended sentence, while Hafed Benchellali was given a four-year prison term.

and expelled two days later upon execution of the 2004 ministerial expulsion order. Benchellali appealed the expulsion on the grounds that it was illegal because based solely on protected speech and violated his right to family life.

The two intelligence reports submitted by the government to substantiate the expulsion state that Benchellali “incites openly jihad during very politicized sermons.” It provides several examples. First, it mentions seven separate sermons from 2003 in which Benchellali allegedly said, “May Iraq be the tomb of the Americans, may Palestine be the tomb of the Jews, and may Chechnya be the tomb of the Russians.” In a different sermon, still in 2003, the imam is said to have complained about the humiliation of Muslims by a “handful of Jews that God has damned,” and on another occasion denounced what he viewed as the passivity of Muslims, saying “Jews dominate the world even though there are only 14 million of them.”¹⁷⁸

Benchellali’s lawyer argued in his appeal that “[n]one of these remarks... incite... neither directly nor indirectly nor tacitly the perpetration of acts of terrorism,” adding that they “do not in any way address the situation of Muslims in France or the behavior, positions or attitudes of the French state with respect to the above-mentioned armed conflicts... As virulent as they may be, [these remarks] do no more than express an opinion about ongoing armed conflicts in which Muslims are engaged.”¹⁷⁹ These statements, the lawyer argued, do support Mujahidin, “that is, fighters resisting what is considered, in Mr. Benchellali’s opinion and more broadly by a large swath of public opinion, to be an unjustified oppression.”¹⁸⁰

One of the intelligence reports also asserts that Benchellali is close to the Salafist Group for Preaching and Combat (Groupe Salafiste pour la Predication et le Combat, GSPC) and in close relations with “very determined members of the fundamentalist Islamist movement in the Lyon area,” but according to Benchellali’s lawyer, the only people mentioned directly in the report are Benchellali’s sons Menad and Mourad,

¹⁷⁸ Quoted in Memoire Appel du Jugement rendu le 7 juillet 2005 par la 1ere chambre du Tribunal Administratif de Lyon, No. 0401903-1), submitted by Berenger Tourne on behalf of Chellali Benchellali.

¹⁷⁹ Ibid.

¹⁸⁰ Ibid.

and Mourad's friend Nizar Sassi (also detained at Guantanamo Bay and awaiting a verdict on association de malfaiteurs charges in France). Nothing besides the quotes from his sermons is provided to substantiate the claim that Benchellali is close to the GSPC.

Boualam Azzaoum, an activist in Divercite, a grassroots organization active in the suburbs of Lyon, minimized the influence Benchellali may have had: "He can hardly speak French, nobody listens to him. He's on the margins of the community."¹⁸¹ There appears to be very little in the intelligence reports beyond the quotes from his sermons. Benchellali's lawyer told Human Rights Watch, "There's nothing else in there, so that must be the worst he said... This is a crime of opinion. It's an open door to expel everyone if they can expel [someone] for saying virulent things."¹⁸²

Abdullah Cam

Abdullah Cam, a Turkish national, had lived in France for almost 20 years when he was expelled on September 7, 2005. Having settled in Villeurbanne, a suburb of Lyon, Cam was married to a Turkish woman who had moved to France when she was five years old; they have four children, all of whom were born in France. The ministerial expulsion order issued on August 26, 2005, called him "one of the principal religious leaders in France of the extremist Islamic movement called KAPLAN that promotes recourse to violence and terrorist action."¹⁸³ Metin Kaplan is the leader of the "Caliphate State," which is alleged to seek the overthrow of the Turkish government and the establishment of an Islamic state.¹⁸⁴ Cam was notified of the expulsion order and detained on September 6, and flown to Istanbul the following day. His lawyer was able to file a petition for suspension on September 8 after Cam had already been expelled; this petition was rejected on September 26. The Paris Administrative Court rejected Cam's appeal on the merits against the expulsion order and the country designation order on July 7, 2006.

¹⁸¹ Human Rights Watch interview with Boualam Azzaoum, activist, Divercite, Lyon, June 23, 2006.

¹⁸² Human Rights Watch interview with Berenger Tourne, lawyer, Paris, June 27, 2006.

¹⁸³ Ministerial expulsion order, August 26, 2005. Capital letters in original.

¹⁸⁴ The German government expelled Metin Kaplan to Turkey in October 2004 on the basis of diplomatic assurances. For a discussion of this case, see Human Rights Watch, *Cases Involving Diplomatic Assurances against Torture, Developments since May 2005*, January 2007, <http://www.hrw.org/backgrounder/eca/eu0107/>; and *"Empty Promises": Diplomatic Assurances No Safeguard Against Torture*, vol. 16, no. 4 (D), April 2004, <http://www.hrw.org/reports/2004/uno404/diplomatic0404.pdf>.

In early 2004, the French authorities had expelled two other alleged followers of Metin Kaplan—Omer Ozturk and Orhan Arslan—by ministerial expulsion; in January 2006 Ilyas Harman, another alleged member of the Kaplan movement, was notified of an expulsion order adopted on October 24, 2005. The organization was outlawed in Germany in 2001. French intelligence services are concerned that “the existence of cadres composed of young Turkish Islamists from the Kaplan movement... encourages the constitution of networks for the active support of the international radical Islamist cause. In addition, the dissolution of the organization in Germany could incite its leaders... to transfer their activities to France and to radicalize their position.”¹⁸⁵

The intelligence report submitted as government evidence in Cam’s case is quite detailed. As far as Human Rights Watch is aware, based on information from Cam’s lawyer and family, the intelligence report is the only evidence submitted by the government. It contains information about travel, meetings, and association with certain individuals, such as Ozturk and Arslan, seeking to establish that Cam is a follower of Metin Kaplan. In addition, the report suggests that Cam is an active supporter of the Algerian Islamic Salvation Front and says, “His physical appearance (beard and head-gear) leave no room for doubt as to his fundamentalist convictions.”¹⁸⁶

Particular emphasis is placed on criticisms by Cam of French laws, society and authorities, as well as statements critical of integration. The report states that Cam’s sermons “vilify the French state, Western governments and Israel, inciting the faithful to [adopt] a communal response and to [carry out] civil disobedience. Sometimes engaging in apology of terrorism, he also relegates Muslim women to a position of inferiority.”¹⁸⁷ The report recounts statements made as far back as 1994, when for example he apparently called the interior minister “a venomous snake who wants the death of Islam in order to subjugate Muslims and integrate them into

¹⁸⁵ Report of the Renseignements Generaux on Abdullah Cam, submitted as evidence in expulsion case, dated July 1, 2005, p. 15.

¹⁸⁶ *Ibid.*, p. 5.

¹⁸⁷ *Ibid.*, p. 4.

European society.” A year later he apparently urged those gathered at Friday prayer to “revolt against the diktat of the French” and said that “France is no longer a country of freedom.” He called the French state “racist and secular” and urged the faithful to ignore the “anti-Muslim warnings made by the French government.” He is said to have discouraged intermarriage and patronage of non-Muslim shops, to have encouraged parents to take their girls out of school if they cannot wear the headscarf (this was before the law prohibiting all religious symbols in public schools), and to have urged young students to “refuse all integration in a society that is not one of Islam.”

References to expressions that allegedly incite violence are very few and indirect. In the mid-1990s Cam is said to have announced that he was in favor of helping “all those who fight for Islam” and to have welcomed a May 1996 attempt on the Turkish president’s life in a meeting after Friday prayer. The report asserts that Cam “clamors for pursuing attacks and invites young people to join the ranks of the Kaplan movement in order to participate in these violent acts to support the Algerian Islamists.”

Impact on Freedom of Expression

Human Rights Watch acknowledges that the content of the speech detailed in the cases above is deeply controversial and in some cases widely seen as offensive, and that many people in France consider measures to restrict this kind of speech to be both positive and necessary. Nonetheless, we remain concerned that the expulsion of imams accused of preaching hatred amounts to disproportionate interference with freedom of expression. Administrative expulsion, while not a criminal sanction, is a form of very severe penalty imposed in these cases in response to instances of exercise of the freedom of expression. Indeed, it is hard to categorize it as other than a dramatic interference with an individual’s freedom to hold opinions and ability to impart and receive information. It is worth restating the position of the European Court that the right to freedom of expression is applicable,

not only to “information” or “ideas” that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism,

tolerance and broadmindedness without which there is no
“democratic society.”¹⁸⁸

In view of the ICCPR and ICERD provisions on speech, as well as the Johannesburg Principles, Human Rights Watch believes that restrictions on the content of expression must address speech that is likely to incite violence, discrimination, or hostility against an individual or clearly defined group of persons in circumstances where this violence, discrimination, or hostility is imminent, and where alternative measures to prevent such conduct are not reasonably available.

There is always a danger that laws that penalize speech will have a chilling effect on free expression generally, creating self-censorship and inhibiting political discourse, including criticism of the government. This runs directly contrary to the view that public debates based on the free and unhindered dissemination of ideas and opinions are an important way of countering radicalization and promoting understanding and tolerance with the overall aim of preventing terrorism.

Where persons deliberately and directly incite violence, discrimination, or hostility (a form of criminal behavior), the criminal justice system, with its high standard of proof, is a more appropriate response than the use of immigration powers.

¹⁸⁸ ECHR, *Öztürk v. Turkey*, para. 64.

VI. Right to Family and Private Life

Expulsions create widows and orphans... I don't understand why they want to make someone pay more than they can bear.

—Mahmoud Hebia, lawyer¹⁸⁹

Forced removals have a direct impact on the right to family and private life, both of the individuals themselves and of their families. In a significant number of cases reviewed by Human Rights Watch, men who had lived for many years in France were returned to countries they no longer (or never) knew and where they had no employment or social network. They left behind wives caring for school-age children—many of them French citizens—in precarious financial and emotional states.

In France the right to family life enjoys a prominent place in both public opinion and law. A coalition of nongovernmental and grassroots organizations galvanized considerable debate about the impact of criminal deportations on individuals and families. As noted above (see Chapter III), the coalition successfully campaigned for reforms in 2003 that increased protections against deportation for certain categories of people,¹⁹⁰ but none of these protections apply in cases involving threats to national security, so that even someone who would otherwise enjoy absolute protection against deportation may be removed where the authorities allege he or she is implicated in terrorist activities. Most appeals against ministerial expulsion orders and administrative orders implementing criminal deportations in terrorism-related cases are based on right to family life concerns.

¹⁸⁹ Human Rights Watch interview with Mahmoud Hebia, lawyer, Lyon, June 22, 2006.

¹⁹⁰ In its most recent report, published in 2005, the European Commission against Racism and Intolerance (ECRI) “note[d] with concern that the law does not fully guarantee the right to private and family life, in every sense of the term,” and “strongly recommend[ed] that the French authorities ensure that no expulsion order is served on non-citizens in violation of their private and family life.” ECRI, Third Report on France, Adopted on 25 June 2004 and made public on 15 February 2005, CRI (2005) 3, http://www.coe.int/t/e/human_rights/ecri/1-ecri/2-country-by-country_approach/france/third_report_France.pdf (accessed February 6, 2007), paras. 47-48.

International and French Law on Right to Family Life

Under international and national law, the right to family life is a qualified right, insofar as interference with its enjoyment is legitimate where necessary to protect a greater public interest—such as national security—and proportionate to the threat. In cases where there is no dispute that the expulsion will interfere with an individual's right to family life, the judicial authority charged with reviewing the legality of the measure must consider whether this interference is indeed necessary—that is, the individual does pose a threat and there is no other way to eliminate this threat—and proportionate—that is, the gravity of the threat justifies overriding a fundamental right.

This is the approach adopted by the European Court of Human Rights in numerous cases involving alleged violations of the right to family and private life guaranteed under article 8 of the European Convention. To assess whether interference with this right strikes the correct balance between the private interest of the individual in having a family life and the public interest in prevention of disorder and crime, the ECtHR takes into account, among other factors, the nature of the offense committed by the individual and his or her behavior in the time since the commission of the offense, the individual's ties to the country of residence and the country of nationality, his or her family situation, and the obstacles a spouse or children would face in the individual's country of nationality.¹⁹¹

In France, judicial authorities in both the criminal and administrative justice systems are required to conduct proportionality reviews when assessing criminal deportations and administrative expulsions. This was not always the case. Until the early 1990s the Council of State considered appeals against deportation orders grounded in the right to family life to be inadmissible.¹⁹²

The Beldjoudi case of 1991 marked a turning point. Mohand Beldjoudi was born in 1950 in France to Algerian parents. When Algeria gained independence in 1962

¹⁹¹ See *Boultif v. Switzerland*, no. 54273/00, ECHR 2001-IX, para. 48; *Mokrani v. France*, no. 52206/99, 15 July 2003, para. 30. Both available at www.echr.coe.int.

¹⁹² See Council of State decision, 25 July, 1980, *Touami ben Abdeslem v. Minister of the Interior*, No. 21222, and Council of State decision, 6 December, 1985, *Minister of the Interior v. Chrouki*, No. 55912.

Beldjoudi's parents did not declare their intention to retain French citizenship under the terms of the French parliament's Order of 21 July, 1962. Beldjoudi, then a minor, lost his French citizenship on January 1, 1963. In 1970 Beldjoudi married a French woman born to French parents. By the time the French government was seeking his deportation; Beldjoudi had been convicted of a string of criminal offenses including assault and battery, weapons possession, theft and aggravated theft, and had spent almost eight years in prison. The government commissioner recommended in this case that the Council of State reverse its jurisprudence, admit the effect of article 8 in deportation cases, and conduct full proportionality reviews. The administrative court acquiesced and, after assessing proportionality, upheld Beldjoudi's deportation. The Council of State reaffirmed this new approach in two other important cases that same year. The applicability of article 8 of the European Convention in expulsion cases and the need to conduct proportionality reviews are now well-established in administrative jurisprudence in France.

The European Court has nonetheless found France in violation of article 8 in a number of cases, including with respect to Beldjoudi.¹⁹³ In the cases of Ali Mehemi (1997) and Boubaker Mokrani (2003), both Algerian nationals, the court took the view that the fact they had been born in France, had lived there their entire lives, and had strong family attachments outweighed the gravity of their offenses (drug trafficking in both cases).¹⁹⁴ In two other cases involving foreigners who had moved to France at a very young age, the court similarly found that expulsion would interfere disproportionately with their right to family life even though neither was married nor had children.¹⁹⁵ The European Court has not, at this writing, had to consider under article 8 any of the cases in which France has deported a long-term French resident on suspicion of terrorist links or incitement.

¹⁹³ *Beldjoudi v. France*, judgment of 26 March 1992, Series A no. 234-A, available at www.echr.coe.int.

¹⁹⁴ *Mokrani v. France; Mehemi v. France*, judgment of 26 September 1997, *Reports of Judgments and Decisions 1997-VI*, available at www.echr.coe.int. After the judgment in the case of Ali Mehemi the competent criminal appellate court converted the permanent exclusion order to a temporary 10-year exclusion and the Interior Ministry issued Mehemi a visa to return to France, subject to a compulsory residency order. Mehemi made a second application to the ECtHR alleging that the continued existence of the temporary exclusion order was a disproportionate interference with his right to family life, but the court found that as the issuing of the visa had deprived the order of legal effect there was no violation of article 8. With respect to the compulsory residence order, the court did not consider it on the merits as Mehemi had not challenged it before the French courts, and when the 10-year order elapsed, the Ministry lifted the compulsory residence order. *Mehemi v. France (no. 2)*, no. 53470/99, ECHR 2003-IV, available at www.echr.coe.int.

¹⁹⁵ *Ezzouhdi v. France*, no. 47160/99, 13 February 2001, available at www.echr.coe.int; *Nasri v. France* judgment of 13 July 1995, Series A no. 320-B, available at www.echr.coe.int.

Impact on Those Subject to Removal

Forced removal of individuals who were born in France or lived there for the better part of their lives, and who have stable marriages and children with French citizenship can amount to disproportionate interference with the right to family and private life of the individuals removed and their relatives, even in cases involving national security. At least seven of the deportees whose cases were examined by Human Rights Watch would have been protected against expulsion were it not for the national security exception.

Mahdi E. was born in France and had lived there his entire life; his four children, all of whom are minors, are French citizens. Although he had spent brief stints of time in Algeria, Mahdi did not speak fluent Arabic when he was deported from France in 2005. Mohamed Chalabi was also born in France to Algerian parents, and lived there his entire life until he was deported in November 2001. He is the father of four French citizens. Nacer Hamani, another man who was convicted in the Chalabi affair, had moved to France when he was 13 years old. He married in 1989 and has three children, all born in France. Khelif Zoubir had lived in France for 30 years when he was deported in 2006. He is the father of five children, four of whom are French citizens. Zoubir was sentenced to two years in prison and a permanent ban from French territory. Abdelkader Bouziane had lived legally in France since 1979 and, as noted above, is the father of 16 children, 14 of whom are French citizens; most are minors.

The European Court has in the past taken the view that even individuals convicted of serious crimes should have the right to remain in France, in cases when they have deep family ties to the country. In the *Beldjoudi* case, for example, Judge Martens wrote a concurring opinion in which he argued that “expulsion severs irrevocably all social ties between the deportee and the community he is living in and I think the totality of those ties may be said to be part of the concept of private life, within the meaning of Article 8.”¹⁹⁶ In this he agreed with Henry G. Schermers of the former European Commission of Human Rights¹⁹⁷ that the provisions of article 8 should

¹⁹⁶ ECtHR, *Beldjoudi v. France*, Concurring Opinion of Judge Martens.

¹⁹⁷ Henry G. Schermers was a member of the now defunct European Commission of Human Rights, which prior to 1998 examined and issued a report on the merits of any case before it could be referred to the European Court of Human Rights.

protect certain individuals from expulsion even in the absence of close family ties because the expulsion of a second-generation immigrant fully integrated into French society “necessarily destroys his private life.”¹⁹⁸ Echoing the view that long-term foreign residents, especially second-generation immigrants, should be afforded the same security of residence as nationals, Schermers wrote,

If there is a country responsible for the education and behavior of the applicant, there is room to consider that it is France, rather than Algeria. If it is not illegal, it is in any case morally rejectable to send to Algeria those of the numerous immigrants who become criminals, while those who contribute to the prosperity of the country can remain in France. It seems to me more just that France should keep the good as well as the bad immigrants.¹⁹⁹

In his separate opinion to the court’s judgment, Judge De Meyer went even further to argue that Beldjoudi’s deportation would also constitute inhuman treatment, “in that Mr. Beldjoudi would be ejected, after over 40 years, from a country which has always in fact been ‘his’ since birth, even though he does not possess its ‘nationality.’”²⁰⁰

Impact on Family Members

Forced removal also interferes with the right to family life of the spouses and children of those subject to removal. While the impact of forced removal on the individual’s family is generally taken into account by the courts in their review of the proportionality of the measure, this review does not examine whether the measure might violate the autonomous right of family members to family and private life. It is our understanding that there is no established jurisprudence in France suggesting

¹⁹⁸ Beldjoudi/Teychene v. France (App. 12083/86) (Rapport de la Commission) (Opinion Concordante de M.H.G. Schermers à laquelle Mme G.H. Thune declare se rallier) (1990), available in French at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Beldjoudi&sessionId=10995812&skin=hudoc-en> (accessed October 19, 2006).

¹⁹⁹ Ibid.

²⁰⁰ ECHR, Beldjoudi v. France, Concurring Opinion of Judge De Meyer. The UN Human Rights Committee has argued that the scope of “his own country” in article 12 of the ICCPR, guaranteeing the right to freedom of movement, is “not limited to nationality in a formal sense, that is nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien...” Human Rights Committee General Comment 27, Freedom of Movement (Art. 12), U.N. Doc. CCPR/C/21/Rev.1/Add.9 (1999), <http://www1.umn.edu/humanrts/gencomm/hrcom27.htm> (accessed December 10, 2006).

that a wife or child of a deportee would have standing to allege a violation of their rights under article 8 in a proceeding to determine the legality of a forced removal. Provided that family members are not implicated in the activities of the individual giving rise to a forced removal, there may be cases where the interference with their right to family life is disproportionate, even though the rights of the person subject to removal have not been violated.

The impossibility of enjoying each other's company, which the European Court of Human Rights views as a fundamental element of the right to family life, is the clearest consequence of forced removal.²⁰¹ All of the seven families whose members we interviewed are well-established in France: the wives are either French citizens or long-term residents, and none considers it viable that they relocate to the country of their husband's nationality. Mothers of school-age children emphasized not only the fact that France is the only home their children have ever known, but also the need to ensure the continuity and quality of their education as reasons why they would not be able to join their husbands permanently.

For the most part, the only contact between deportees and their families—which in many cases include young sons and daughters—is through phone calls and, in some cases, the internet. One woman said her children say they have a “father by internet.”²⁰² Most families are reunited during very occasional visits, though two deportees told us they had not been able to see their families since their expulsion (periods of time ranging from seven months to two years). The frequency of phone calls and visits is limited due to financial considerations. The majority of those forcibly removed with whom we spoke in Algeria are currently unemployed and unable to contribute to the family economy, and most of the families we met rely on some form of state welfare.

Human Rights Watch spoke with seven wives and two adult sons of people who had been removed. In some cases, we also spoke with children who were minors, or they were present or nearby during the interview. All of them spoke of the emotional

²⁰¹ See for example *Mehemi v. France* (no. 2), para. 45.

²⁰² Human Rights Watch interview with Nadija R., Paris, December 5, 2006.

stress caused by the separation and the hopelessness of the situation. All names have been changed to protect the identity of minors.

The wife of Hazim S. described her commitment to remaining in France despite her husband's deportation:

How could I leave the country of my roots, my bearings, my family and my friends to which I am very attached?... Despite the unfavorable... environment in which I grew up, I fought so hard to prove my citizenship and my ability to integrate in France... I acquired the conviction that in France you can be an observant Muslim woman, honest and integrated, while at the same time a good French citizen.²⁰³

The primary concern for most of the wives is the impact on their children. This is particularly acute for younger children and those who witnessed their father being detained. Dilek D., a Turkish national who has lived in France since she was five, said her 11-year-old son has not been the same since he witnessed his father being arrested in his apartment building parking lot in 2005. "Since that day my son is aggressive, he has a rage inside. He's been having problems at school. And then they say my child is problematic, but where does it come from, who created it? We want our children to be integrated, to trust people here, but how can they do that when they see who has torn their family apart?"²⁰⁴

Several mothers have sought psychological counseling for their children. Nadija R. said she became concerned because her 11-year-old son, who had seen his father arrested, started falling apart after the expulsion. "He cried all the time. [Name omitted; her older daughter] keeps everything to herself, but he cries a lot still. I've forbidden them from telling their teachers at school [about the expulsion] and one day my youngest one cried and nobody could understand why. I know this is going to do harm to my children."²⁰⁵ Haala L. said her six-year-old daughter suffers from anxiety and stomach pains, and her nine-year-old boy has constant nightmares. He

²⁰³ Letter dated September 30, 2002. On file with Human Rights Watch.

²⁰⁴ Human Rights Watch interview with Dilek D., Villeurbanne, France, June 23, 2006.

²⁰⁵ Human Rights Watch interview with Nadija R., Paris, December 5, 2006.

and his older sister, 10, are both being monitored by their school's psychologist for problems with cognitive and emotional development. The psychologist works with them "to try to elaborate and calm everyone's tension and anxiety... The complex situation of their father and the expulsion causes them great anxiety."²⁰⁶

Several expressed concerns that their sons were at risk of being harassed, incarcerated, or otherwise limited in their life choices because of their fathers' expulsion. Florence T., a French Muslim convert, said, "I'm afraid my son might be imprisoned because of his father, I'm afraid he might want to study certain things like chemistry [which would invite attention]... I noticed that I shouldn't buy ammonia for the house to avoid problems..."²⁰⁷ Florence has seven children: five with her first husband, and two with the man who was deported.

Florence, like many others, talked about the economic hardship brought about or exacerbated by the removal. Although she received state subsidies while her husband was in prison, she said she was told she no longer had the right once he was expelled, as this implied only a geographical separation and not the impossibility of him earning money to contribute to his children's welfare. Florence said she was told she would have to be a single mother to receive more financial aid; "I would have to get a divorce to feed my children," she complained.²⁰⁸ In contrast, several other women do receive state support though they said it was insufficient and problematic. Laila N. is a 22-year-old French citizen who gave birth to her son in March 2005, roughly a month before her husband was deported. Because she has been unable to place her child in a public daycare center, she does not work and survives on roughly €750 per month in state welfare. Every month there are delays because the authorities insist on getting her husband's signature, even though he is in Algeria. Laila is now trying to find a night job so she can continue to take care of her child during the day until she finds another solution. In any event, she said, "I can't sleep. I have anxiety attacks. I have to keep the television and all the lights on. I don't know where I am or where I'm going."²⁰⁹

²⁰⁶ Handwritten note by psychologist with the National Educational System, dated October 3, 2006.

²⁰⁷ Human Rights Watch interview with Florence T., Montfermeil, France, December 7, 2006.

²⁰⁸ Ibid.

²⁰⁹ Human Rights Watch interview with Leila N., Paris, December 4, 2006.

Nejla E. gave up her studies in 2004, when her husband was remanded to prison to complete the remaining six months on a three-year sentence he had received for association de malfaiteurs in 1999. With children aged thirteen, ten, eight and four, Nejla does not work. “Already they don’t have their father with them. I don’t want them to be really affected by that, so I need to be there 100 percent for them. I take them to their sports classes, I tell them always to study... I don’t want to raise sick people.”²¹⁰

²¹⁰ Ibid.

VII. Alternative to Forced Removal

I just want him back, even if he has to stay in the home [under house arrest], so at least the children can grow up with their father. We've paid enough.

—Nadija R., wife of a deportee²¹¹

Deportation and expulsion are not the only tools the government has at its disposal for dealing with those deemed to pose a threat to national security. And in many cases—such as when the person faces a risk of torture if returned—forced removal is an inappropriate response. Even in other cases—including those, for example, where the person has long-standing ties to France through residence, marriage, and children—the government should consider alternative methods of protecting against terrorism. French law already provides an alternative, albeit in Human Rights Watch's view flawed, to deportation: the use of compulsory residence orders.

Provided that compulsory residence orders do not include conditions so severe as to amount to a criminal sanction, and there are adequate judicial safeguards in place, such orders can represent a viable alternative to removal, where to do so would put an individual at risk of torture. Judicial safeguards should include the following: an order can only be issued by a court (not by the executive branch); an order can only be issued following a process in which credible evidence of its necessity is presented to the court and the person subject to removal; the person subject to removal has an opportunity to challenge that evidence; and there is appropriate access to a meaningful appeal and review. Orders must be time limited and open to rescission and amendment of conditions on the presentation of new evidence, and the person subject to the order must be able to maintain family life and be permitted to work.

Compulsory residence along these lines would also be appropriate in national security cases where the individual would otherwise be protected against expulsion

²¹¹ Human Rights Watch interview with Nadija R., Paris, December 5, 2006.

due to the duration, intensity and stability of social and family ties in France, and where expulsion would constitute a disproportionate interference with the right to family life of the person's spouse and children.

France's Present Use of Compulsory Residence

In cases where the courts determine that deportation to the country of origin is impossible on human rights or other grounds, or where the individual already has refugee status and cannot be returned to his home country, the interior minister can issue a "compulsory residence order" (*arrete d'assignation a residence*).²¹² Under such an order, an individual must live in a specific place, report periodically to the local prefecture, and request prior authorization for any travel outside the defined area. Failure to comply with any of the provisions of the compulsory residence order is punishable by up to three years in prison.²¹³ Individuals assigned to compulsory residence in these cases generally do not have the right to work, and are invited to take the necessary steps to find a third country willing to admit them.

The explicit objective is for compulsory residence to be a short-term measure until it is possible to expel the person, and this is generally stated in the ministerial order.²¹⁴ This would explain, in part, why those assigned to residence are typically denied work authorization. The individuals themselves must try to find a third country willing to accept them, which translates in most cases into a fairly futile exercise of writing periodic letters to a variety of countries. It is unclear whether the French government itself takes any steps to find a third country solution. As a result, many people assigned to residence live in an indefinite limbo.

However, according to an official at the Interior Ministry, assigning someone to compulsory residence serves two other key goals: it facilitates surveillance and it

²¹² CESEDA, arts. L. 513-4, L. 523-3 to L. 523-5, L. 541-3. Compulsory residence orders may be imposed in a variety of situations where an individual ordered expelled demonstrates that he or she cannot be removed to his or her country of nationality. Their use is not confined to national security cases.

²¹³ CESEDA, art. L. 624-4.

²¹⁴ For example, the order assigning Iraqi refugee Yashar Ali to compulsory residence sets out in article 1 that he is assigned to compulsory residence "until the time it is possible for him to comply with the expulsion order." Article 2 clarifies that he must provide evidence on a monthly basis of his efforts to find a third country willing to accept him. Ministry of the Interior, Order dated February 24, 2004. On file with Human Rights Watch.

minimizes the threat by, for example, removing someone from his urban base and putting him in a rural area.²¹⁵ Human Rights Watch believes that imposing restrictions on freedom of movement for the mere purposes of surveillance without judicial oversight violates several due process rights as well as amounting to a disproportionate interference with other rights.

As expressed to us by this official, another goal is to create such an unpleasant situation that the person himself will make the necessary arrangements to leave France.²¹⁶

The conditions under which these individuals live vary significantly. In the case of Yashar Ali, an Iraqi refugee and imam suspected of links to radical Islamists, the authorities removed him from Paris where he served as an imam and assigned him to residence in Mende, in the southern *département* of Lozère. The area is notable for having very few Muslim residents, and the immediate goal of issuing Ali with a ministerial expulsion order and assigning him to residence appears to have been to distance him from his base of support in order to “destabilize the Salafist movement in the Paris area and reduce the vague intentions to organize a jihadist network on national territory.”²¹⁷ In the beginning, Ali spent two months in pretrial detention for failing to report to Mende himself—he claims he never received the notification to report within eight days to the Mende prefecture—before he was sentenced to one month in prison for this misdemeanor offense.²¹⁸

In another case, Mohamed Kerrouche was assigned to residence 150 kilometers from his home in Paris. He lived in a hotel for one-and-a-half years before, as his lawyer described it, “he cracked” and went back to Algeria of his own accord.²¹⁹ Salah Karker, a co-founder of the Tunisian Islamist movement Ennadha, was granted refugee status in 1988. The Interior Ministry ordered his expulsion in 1993 and

²¹⁵ Human Rights Watch interview with Jean-Pierre Guardiola, Ministry of the Interior, Paris, December 6, 2006.

²¹⁶ Ibid.

²¹⁷ Note Blanche on Yashar Ali, undated and unsigned, submitted to the administrative court of Cergy-Pontoise, March 19, 2004. On file with Human Rights Watch.

²¹⁸ Human Rights Watch interview with Stephane Nakache and Abdel Kherrar, lawyers, Paris, October 4, 2006.

²¹⁹ Human Rights Watch interview with Dominique Nogueres, lawyer, Paris, June 29, 2006.

assigned him to compulsory residence in Dignes-les-Bains, near the border with Italy. He was transferred back to his home near Paris 12 years later, in 2005, after suffering a brain hemorrhage.²²⁰ By contrast, Mouldi Gharbi, a Tunisian refugee, was assigned to residence in 1998 in his Paris apartment after the Paris prefect ordered his expulsion on the grounds he presented a “grave threat to public order.” Gharbi had been granted refugee status while in pretrial detention on association de malfaiteurs charges and was thus protected from expulsion. He was eventually sentenced to one year in prison—time already served pretrial—and was not given a criminal deportation order. Gharbi, a tailor with an atelier on the Champs-Élysées, was granted authorization to work in 2004.²²¹

Compulsory residence orders clearly interfere significantly with certain fundamental rights such as an individual’s right to freedom of movement, right to family life, and in the case of France, the right to work. Both the ICCPR and the European Convention on Human Rights guarantee the right to freedom of movement, including the right of everyone lawfully within the territory of a state to liberty of movement and the freedom to choose his or her residence. However, restrictions may be placed on these rights in accordance with the law and in the interests of national security or public safety and for the prevention of crime, among other reasons.²²²

It is arguable that conditions could be imposed that would render compulsory residence orders akin to detention.²²³ However, as each set of conditions that are imposed by way of compulsory residence can vary from case to case, it is likely that most compulsory residence orders would not reach the level of severity necessary to be considered akin to a criminal sanction.

Since the orders are based on the same low threshold of proof and use of unverifiable intelligence reports discussed above in relation to appeals against

²²⁰ This case has also been the subject of a decision by the UN Human Rights Committee. Communication No 833/1998, October 30, 2000, CCPR/C/70/D/833/1998, <http://www1.umn.edu/humanrts/undocs/833-1998.html> (accessed January 20, 2007).

²²¹ Human Rights Watch interview with Mouldi Gharbi, Paris, October 3, 2006.

²²² Protocol 4 to the ECHR, art. 2; ICCPR, art. 12.

²²³ See, for example, *Guzzardi v. Italy*, judgment of 6 November 1980, Series A. no. 39, available at www.echr.coe.int, para. 95, where the European Court of Human Rights determined that the conditions imposed in an order for compulsory residence in Italy amounted to an instance of deprivation of liberty.

expulsion orders, the same concerns apply with respect to the compatibility of these orders with human rights law, notwithstanding the right to appeal the orders within the administrative system of justice.

To date, the UN Human Rights Committee has upheld the imposition of a compulsory residence order in France as compatible with the ICCPR. In the case of Salah Karker, mentioned above, his wife Samira submitted a complaint to the Human Rights Committee under the ICCPR, explaining how the order interfered with their family life and her husband's freedom of movement and alleging that the conditions of residency were akin to detention. The committee upheld the restrictions, finding that France "produced evidence to the domestic courts that Mr. Karker was an active supporter of a movement which advocates violent action"; that "the restrictions of movement on Mr. Karker allowed him to reside in a comparatively wide area"; and that "the restrictions on Mr. Karker's freedom of movement were examined by the domestic courts which, after reviewing all the evidence, held them to be necessary for reasons of national security."²²⁴

Other Countries Use of Control Measures

Human Rights Watch opposes restrictive measures amounting to a criminal sanction where not imposed by a criminal court in accordance with international fair trial standards.

In the **United Kingdom**, for example, "control orders" imposed on terrorism suspects can include curfews, electronic tagging, restrictions on the use of certain items (such as a computer), restriction on the use of certain communications technology (such as the internet), limits on the people with whom the individual may associate, and travel bans. Human Rights Watch considers that the restrictions imposed through control orders can be so severe as to amount to the equivalent of punishment upon the determination of a criminal charge. Yet control orders are imposed by the British home secretary (interior minister) on the basis of a low standard of proof and without

²²⁴ Communication No 833/1998 Karker v. France, Decision of October 30, 2000, CCPR/C/70/D/833/1998, <http://www1.umn.edu/humanrts/undocs/833-1998.html> (accessed January 20, 2007).

sufficient judicial supervision. As such Human Rights Watch considers that the system of control orders does not comply with international human rights law.²²⁵

In **Italy**, the law provides a framework for placing a person deemed a danger to society under special police supervision.²²⁶ That measure may be accompanied, if need be, by a requirement not to stay in one or more named towns or provinces or—if the person concerned is considered to be particularly dangerous—by a compulsory residence order requiring him to live in a named municipality.²²⁷

Police supervision and residence orders can only be imposed by a court. The court sits in private, but must give a reasoned decision after hearing the representative of the public prosecutor's office and the person on whom it is proposed to impose the measure. When making an order, the court must fix its duration—between one and five years maximum—and specify the conditions with which the person concerned must comply. The person subject to the measures has the right to lodge an appeal, first to the Court of Appeal and then to the Court of Cassation, and to be represented by a lawyer.

Although police supervision and residence orders can be imposed on persons who have not been found guilty of any offense—indeed who may have been acquitted—they are subject to time limits, can only be imposed by a court of law, and are subject to judicial supervision. Moreover, the relevant law was amended in 1988 to provide that a person can only be ordered to reside in the town where he has his domicile or residence.²²⁸

The European Court of Human Rights has considered the compatibility of these provisions in Italian law with the ECHR, and while it has to date upheld the

²²⁵ For a full discussion of control orders in the United Kingdom, see Human Rights Watch, *Commentary on Prevention of Terrorism Bill 2005*, March 1, 2005, <http://hrw.org/backgrounder/eca/uko305/>.

²²⁶ Law no. 1423 of 27 December 1956.

²²⁷ Section 3 of Law 1423/56.

²²⁸ Law no. 327 of 3 August 1988.

framework in principle, it has found that in particular instances the use or scope of the measures amounted to unjustified interference with freedom of movement.²²⁹

Sweden in the past also provided for compulsory residence orders similar to those used in France. The 1980 Swedish Aliens Act gave the government the authority to prescribe restrictions and conditions regarding place of residence, change of domicile and employment in cases where an expulsion order could not be enforced for example on grounds that the individual might have been exposed to political persecution or torture upon return.²³⁰ The Human Rights Committee in a case from 1991 upheld the imposition of such measures on a Kurdish suspect living in Sweden.²³¹ The committee simply stated that as Sweden had invoked reasons of national security to justify the restrictions on freedom of movement, the restrictions to which the suspect was subjected were compatible with those allowed pursuant to article 12, paragraph 3, of the ICCPR.²³² The 1991 Act concerning special controls in respect of aliens abolished the system of compulsory residence. Under current legislation, the police may order foreigners who cannot be expelled to report to the police at regular intervals and conduct searches of their premises and their persons.²³³ A court may authorize the police to intercept the foreigners' communications and correspondence.²³⁴

²²⁹ See *Guzzardi v. Italy*; *Raimondo v Italy*, judgment of 22 February 1994, Series A no. 281-A, available at www.echr.coe.int ; and *Labita v. Italy* [GC], no. 26772/95, ECHR 2000-IV, available at www.echr.coe.int. All cases involved persons suspected of involvement with the mafia.

²³⁰ 1980 Swedish Aliens Act, art. 48 (1).

²³¹ Human Rights Committee, *Celepli v. Sweden*, Communication No. 456/1991, Decision of August 2, 1994, CCPR/C/51/D/456/1991.

²³² Paragraph 3 provides for restrictions on freedom of movement that are "provided by law, are necessary to protect national security, public order (ordre public),... and are consistent with the other rights recognized in the present Covenant."

²³³ 1991 Act concerning special controls in respect to aliens, Section 11.

²³⁴ *Ibid.*, Section 20.

VIII. Impact on France's Muslim Communities

Estimates of the number of Muslims living in France range between three and five million. The vast majority are of Algerian, Moroccan, or Tunisian nationality or descent, while a smaller number are of Turkish, Iraqi and other Arab, Bosnian, or sub-Saharan African nationality or descent, among others. In the decades following World War II, hundreds of thousands of immigrants from the Maghreb region, especially Algerians, came seeking work, some of them with a view to returning eventually to their countries. Family reunification policies established in the mid-1960s allowed many to bring their families to France, however, and short-term immigration became permanent settlement.

An uneasy conversation about the place of Muslims, and the Muslim faith, has dominated public debate in France in recent years. Long-term residency, acquisition of French nationality, and mixed marriages, among other factors, have contributed to greater integration of Maghreb communities in France.²³⁵ Still, the widespread rioting in October and November 2005 in poor, predominantly immigrant communities—*banlieues*—on the periphery of Paris and other major cities vividly called into question the French assimilationist approach. While some commentators attempted to link the revolt to the influence of political Islam, most analysts now agree that the rioting was largely an expression of rage by mostly Muslim youths against what they perceive as economic and social marginalization.²³⁶ Samy Debah, an anti-discrimination activist, says his organization, the Collectif contre l'Islamophobie (Collective against Islamophobia), constantly documents instances of employment and housing discrimination against Muslims. In his view, "Nobody in France would say, I won't hire you because you're a woman or you're black or you're Jewish, but they would say, I won't hire you because you wear the headscarf. It's totally acceptable. And you can only talk like that in a particular political context of discrimination."²³⁷

²³⁵ International Crisis Group (ICG), "France and its Muslims: Riots, Jihadism and Depoliticisation," Europe Report No. 172, March 9, 2006, <http://www.crisisgroup.org/home/index.cfm?1=1&id=4014> (accessed April 10, 2006) (full report only available in French).

²³⁶ *Ibid.*, p. 4.

²³⁷ Human Rights Watch interview with Samy Debah, Collective Against Islamophobia, Paris, June 30, 2006.

The debate about integration has been “securitized” in the context of the fight against terrorism, and this conflation is perhaps demonstrated most forthrightly in the focus on controlling and shaping the Muslim faith in France. In the name of encouraging the emergence of an “Islam of France,” the French government created the French Council of the Muslim Creed (CFCM) in 2003. The goal was to provide an institutional interlocutor for the government on matters relating to the practice of Islam, and a body that could oversee mosques and prayer halls, train French-speaking imams, and develop religious services in prison.²³⁸ An important part of the reasoning behind the creation of the CFCM was the concern that foreign-born imams, many of whom cannot speak French and who preach strict adherence to fundamentalist Islamic principles, are over-represented in the nation’s Muslim places of worship. Their teachings, the logic goes, are both at odds with French values and may contribute to radicalization. Speaking generally about countering radicalization, then-Interior Minister Nicolas Sarkozy asserted, “We must act against these radical preachers who are capable of influencing the youngest and weakest-minded.”²³⁹

The 2004 law banning religious symbols in public schools can also be viewed in this light. Though the law prohibits all conspicuous religious symbols, including the Jewish Kippah, Sikh turban, and large Christian crosses, it was so widely interpreted as targeting the Muslim headscarf that it is now commonly referred to simply as the “headscarf law.” Proponents of the ban saw it as an imperative in defense not only of France’s tradition of *laïcité* but also the “French value” of gender equality.

Counterproductive Counterterrorism Measures

Many Muslims feel acutely what one analyst has called the “common misrepresentation that Islam is inherently radical or resolutely incompatible with French republicanism.”²⁴⁰ Kamel Kabtane, the rector of the Grand Mosque of Lyon, explained,

²³⁸ Interview with then-Interior Minister Dominique de Villepin, *Le Figaro*, May 13, 2004.

²³⁹ “The French lesson,” *The Economist*, August 13, 2005.

²⁴⁰ Stephanie Giry, “France and its Muslims,” *Foreign Affairs*, September/October 2006, <http://www.foreignaffairs.org/20050901faessay85508/stephanie-giry/france-and-its-muslims.html> (accessed October 17, 2006).

Every time someone defends a right, he is seen as a fundamentalist. So the mere act of wearing the headscarf is interpreted as an act of violence against society... the fact of sporting a beard, praying, reading the Koran makes you suspect. Muslims know that every word, every gesture, is interpreted within a context of permanent suspicion.²⁴¹

Lhaj Thami Breze, the president of the Union of Islamic Organizations of France, one of the country's leading organizations of Muslims, said that expulsions of imams "feed the fear in the Muslim community that it, once again, is being singled out... It gives the impression that France is persecuting Muslims."²⁴² Samy Debah of the nongovernmental Collective against Islamophobia articulated his perspective of "two different regimes" in France with respect to freedom of expression, contrasting the expulsion of imams for things they say and the defense of those who express insulting views on Islam: "When it comes to the Danish cartoons or Redeker, people said, 'I don't agree but I defend your right to say it,' and they tell us [Muslims] we don't have the right to be offended."²⁴³

The expulsion of imams identified as "hate-preachers" is clearly a counterterrorism measure geared specifically toward preventing violent radicalization and recruitment to terrorism. Here too, though, government arguments often refer to opinions or statements that are "contrary to French values" or that promote separatism and rejection of integration into mainstream society.²⁴⁴ Azzedine Gaci, the Lyon representative of the Regional Council of the Muslim Creed, acknowledged the legitimate concern with radicalization of young people "who develop hatred and a rejection of the Republic," but he cautioned that,

²⁴¹ Human Rights Watch interview with Kamel Kabtane, rector, Grand Mosque of Lyon, Lyon, June 23, 2006.

²⁴² Elaine Ganley, "France targets radical imams in bid to keep terrorism at bay," Associated Press, May 3, 2004.

²⁴³ Human Rights Watch interview with Samy Debah, Collective Against Islamophobia, February 1, 2007. Robert Redeker, a French writer and philosopher, published an opinion piece in French daily newspaper *Le Figaro* in September 2006 describing the Prophet Muhammad as a "pitiless war leader, pillager, butcher of Jews and polygamous" and calling the Koran a "book of incredible violence." He was subsequently given police protection after receiving death threats. A group of French intellectuals published a defense of Redeker's right to freedom of expression. Human Rights Watch's own position on the Danish cartoons and freedom of speech is set out at <http://hrw.org/english/docs/2006/02/15/denmar12676.htm>.

²⁴⁴ See for example the notes blanches concerning Abdelkader Bouziane and Abdullah Cam, discussed in Chapter V.

It has to do with political, social and economic exclusion... There is an increasingly extremist interpretation of Islam in France, by those who take advantage of this exclusion and stigmatization, especially among young people. We are aware of this and willing to work on this, but the state also has to modify its discourse and stop stigmatizing Islam.²⁴⁵

He argued that in this context, highly politicized and media-conscious expulsions are counterproductive because,

They instill fear in [Muslim] associations and imams, so much fear that they don't know what they can say in their sermons. The imams do less and less in the mosques, they don't want to deal with young people, so they turn them away, and they can become radicalized. We have to find solutions, but not ones that can lead to radicalization. Expulsions bring more incomprehension, more fear, than a solution to the problem.²⁴⁶

Kamel Kabtane agreed that the overall impact of these kinds of measures is deleterious insofar as they send the message that individuals from the Muslim community are not welcome. "The more [you adopt] exceptional measures, the more you put people in a situation of exclusion. And the more you radicalize," he said.²⁴⁷ Commenting on those most directly affected by expulsions, lawyer Mahmoud Hebia concurred: "Expulsions... generate families full of hatred [and] make them susceptible to pressure from terrorist groups."²⁴⁸

The United Nations special rapporteur on racism, Doudou Diene, noted what he called the "alarming number of expulsions from some European countries in the context of efforts to fight fundamentalism" in a 2004 report on defamation of religions and racism. He drew particular attention to expulsions from France, stating

²⁴⁵ Human Rights Watch interview with Azzedine Gaci, representative of the Regional Council of the Muslim Creed in Rhone Alpes, Lyon, June 26, 2006.

²⁴⁶ Ibid.

²⁴⁷ Human Rights Watch interview with Kamel Kabtane, June 23, 2006.

²⁴⁸ Human Rights Watch interview with Mahmoud Hebia, lawyer, Lyon, June 22, 2006.

that the emergency expulsions procedure gives too much discretion to authorities in decisions regarding expulsions of imams.²⁴⁹

There is a perception among some in French Muslim communities that the broad powers enjoyed by counterterrorism investigating magistrates lead to mass arrests and accusations of associating with terrorism networks based on meager evidence, suggesting that all Muslims are somehow suspect. “They tell us to separate plastic and paper for recycling, but they don’t distinguish among us [Muslims],” said Dilek D., the wife of a deportee.²⁵⁰

This perception is fed by experiences such as that of Tunisian opposition figure Mouldi Gharbi, who was in the apartment of a friend when it was raided by counterterrorism police in 1995. Gharbi recalled that one of the officers called the investigating magistrate who had ordered the raid to ask if he should also detain Gharbi. According to Gharbi, the officer said the magistrate had told him to arrest everyone there.²⁵¹ Gharbi was eventually convicted of association de malfaiteurs and sentenced to one year in prison, time he had already served in pretrial detention. Gharbi was granted asylum in 1996, when he was still in pretrial detention.

Official statistics would seem to support the claim that specialized counterterrorism investigating magistrates tend to err on the side of “prevention.” Not long ago, then-Interior Minister Nicolas Sarkozy said that 1,161 people had been detained in the context of the fight against terrorism. Of these, only 462 were placed under official investigation.²⁵²

Some note that many in the Muslim community are hesitant to speak out on behalf of anyone tarnished with the label “radical” or “Islamist” for fear of being associated

²⁴⁹ UN Commission on Human Rights, “Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia, and related intolerance, Doudou Diene, Addendum: Defamation of Religions and Global Efforts to Combat Racism: Anti-Semitism, Christianophobia and Islamophobia,” E/CN.4/2005/18/Add.4, December 13, 2004, <http://daccessdds.un.org/doc/UNDOC/GEN/G05/102/18/PDF/G0510218.pdf?OpenElement>, para. 27.

²⁵⁰ Human Rights Watch interview with Dilek D., Lyon, June 23, 2006.

²⁵¹ Human Rights Watch interview with Mouldi Gharbi, Paris, October 3, 2006.

²⁵² Speech by Nicolas Sarkozy, Minister of the Interior, at the press conference on June 8, 2006, http://www.interieur.gouv.fr/misill/sections/a_1_interieur/le_ministre/interventions/o8-o6-2006-evolutions-securite/view (accessed June 15, 2006).

with terrorism themselves. Kamel Kabtane told Human Rights Watch that when he protested Abdelkader Bouziane's expulsion, "I was immediately categorized, they said I was becoming radicalized."²⁵³

²⁵³ Human Rights Watch interview with Kamel Kabtane, Lyon, June 23, 2006.

Detailed Recommendations

France is positioned to be a global leader in the effort to combat terrorism. It can best fulfill this promise of leadership by steadfastly upholding human rights principles in all aspects of its counterterrorism strategy. We urge the French government to take the following steps:

To the Ministries of Interior and Justice

- Bring France’s legislation into line with its obligations under the European Convention on Human Rights and the Convention Against Torture by jointly commencing legislative reform to ensure that all appeals against expulsions have automatic suspensive effect. In particular, the parliament should:
 - Reform the Code of Administrative Justice to make appeals against ministerial expulsion orders automatically suspensive;
 - Reform the Code of Administrative Justice to make appeals against country designation orders automatically suspensive;
 - Reform the Code on Entry and Stay of Foreigners to make all appeals to the Refugee Appeals Commission automatically suspensive, including in cases involving national security.
 - Reform the Code on Entry and Stay of Foreigners to remove the national security exception to the granting of “subsidiary protection” where a person faces the risk of the death penalty, or torture or other ill-treatment.

To the Ministry of Interior

- Until such time as necessary legislative reforms are enacted, adopt a policy to suspend all forced removals until all appeals have been exhausted, including the appeal on the merits.
- Refrain from contacting national consulates to arrange forced removal (that is, to verify nationality or obtain travel documents) until all appeals, including on the merits, have been exhausted. National consulates should never be contacted while the Office for Protection of Refugees and Stateless Persons

(OFPRA) and the Refugee Appeals Board (CRR) are considering requests for asylum.

- Propose legislation to eliminate the expedited expulsion procedure in “absolute urgency” to ensure that the Expulsion Commission has the chance to review all removal orders and offer its view.
- Revise the compulsory residence order system so that such orders are issued by a court, on application by the public prosecutor, rather than issued by the interior minister. Provide that orders must have a maximum time limit. Further, include a system of automatic periodic reviews for compulsory residence orders to consider positive changes in the conditions, such as relocations to areas of habitual residence and granting of work authorizations.
- Ensure that no one is ever returned where there is a risk of torture in the country of origin, and in those cases where such risk exists use compulsory residence orders, insofar as the conditions imposed are not so severe so as to amount to either a criminal sanction or a disproportionate interference in family life.
- Compulsory residence should not be used merely to facilitate surveillance.
- Ensure that compulsory residence orders are used as an alternative to forced removal in national security cases where the individual would otherwise be protected against removal by the duration, intensity, and stability of his or her social and family ties in France, and where expulsion would constitute a disproportionate interference with the right of the spouse and children to family life, insofar as the conditions imposed are not so severe so as to amount to either a criminal sanction or a disproportionate interference in family life.
- Ensure that intelligence reports, or “notes blanches,” are properly sourced and disclosed to lawyers acting for any person subject to an administrative expulsion order. As a general principle, the reports should discuss the sources and methods used to gather the information. In cases where revealing the identity of government witnesses would put them at risk, pseudonyms could be used.

To the Ministry of Justice

- Establish a working group to develop more precise legal benchmarks for the materiality and intensity of the threat to national security justifying expulsion, in particular with respect to speech offenses.

To the Ministry of Foreign Affairs

- Promote and support legislative change to ensure that all appeals against negative decisions of the OFPRA to the CRR are suspensive.

To the National Assembly and Senate

- Establish a parliamentary commission of inquiry to examine procedural safeguards in cases of forced removals on national security grounds, with particular emphasis on producing recommendations relating to the materiality and the intensity of the threat that would justify forced removal.
- The same commission should explore alternatives to compulsory residence that would have a more limited impact on fundamental rights.

To the National Consultative Commission of Human Rights

- Task the subcommission on National Questions with drafting a recommendation to the government on appropriate procedural safeguards in cases of forced removals on national security grounds, with particular emphasis on recommendations relating to the materiality and the intensity of the threat that would justify forced removal.
- Task the same subcommission with drafting a recommendation to the government on appropriate alternatives to compulsory residence that would have a more limited impact on fundamental rights.

International and regional organizations tasked with monitoring the compliance of counterterrorism policies with international human rights law play a critical role. As the European Union, for example, further develops its strategy to counter violent radicalization and recruitment, human rights authorities should ensure that international human rights law, and in particular standards in relation to due process and family life, are complied with in any effort to produce a common approach to

national security removals. To this end, Human Rights Watch makes the following recommendations:

To the Council of Europe

- The Human Rights Commissioner should consider developing an opinion or recommendation on best practices in accordance with international human rights law on expulsions based on national security grounds. The Commissioner's recommendations should provide guidance both to individual member states and relevant EU institutions on appropriate procedural safeguards in these cases and viable alternatives to removals.
- The Parliamentary Assembly should consider a follow-up report on its Recommendation 1504(2001) on Non-expulsion of long-term immigrants, and in particular clarify its position regarding the "highly exceptional cases" in which it considered expulsions to be permissible.
- The European Commission against Racism and Intolerance (ECRI) should consider elaborating a General Policy recommendation on legitimate limits on the right to freedom of speech and protection from racism and discrimination

To the European Parliament's Committee on Civil Liberties, Justice and Home Affairs

- Develop an own-initiative report on national security removals with specific recommendations on minimum procedural safeguards and viable alternatives to removal.

To the United Nations

- The Committee Against Torture should recommend that France institute an automatically suspensive appeal against expulsion orders.
- The special rapporteurs on freedom of expression, on human rights and counterterrorism, on torture, and on racism should address the concerns detailed in this report and elaborate recommendations in their respective fields of competence with the view of ensuring that violations such as those described here do not occur further.

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