

# The Legal Position of Migrants – German Report

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*Introduction: Who qualifies as ‘migrant’ in the German context?*

A report on the legal position of migrants has to first clarify who, in the context particular to Germany, should be regarded as a ‘migrant’. A definition of the term could be based on the assumption that migration, or more specifically international migration, is a social phenomenon involving people who, at least once in their lifetime and for whatever reasons, made the decision to move across an international border in order to relocate in a country different from their origin. For the purpose of this report, this definition seems overly inclusive, for two reasons. First, German nationals are not a proper subject of investigation, although they statistically form the largest migrating nationality per year – both with respect to expatriation and repatriation<sup>1</sup>. Taking into account that international law and German constitutional law guarantee them an unrestricted right to leave and return<sup>2</sup>, the legal regime that is relevant to them would not be of significant interest here. There is one caveat to this preclusion. The term ‘Germans’ as defined in Art. 116 Basic Law (*Grundgesetz*, the German Constitution) includes ethnic Germans living abroad who actually do not hold German nationality. These Germans and their relatives obtain German nationality with their recognition under a statutory procedure, which occurs immediately after their arrival. They are usually not covered by statistical data on the migrant population. Nevertheless, in sociological terms they should be considered migrants proper, and hence be included in this report.

Second, not all non-citizens residing in Germany fit into the above definition. Among the 6,717,115 registered aliens staying in Germany on December 31, 2004, a significant number had come to Germany decades ago, or was even born in the country and has thus never made a personal experience of migrating. The average duration of stay (minors included) was 16.1 years<sup>3</sup>. One out of five foreign nationals, or 1.4 million people, was born in Germany and has not yet acquired German nationality<sup>4</sup>. The majority of these second- or third-generation aliens are descendants of migrants workers who, in the 1950s and 1960s, had been recruited from countries such as Turkey, Yugoslavia, Italy, Greece, Portugal, Spain, or Morocco. The numbers of aliens steadily increased until the mid-1990s, despite the fact that the Federal Republic, as early as in 1973, had officially adopted a policy of non-immigration. In 1997, the figures reached a climax of 7.4 million people, or 9.0% of the resident population. German policy

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<sup>1</sup> *Beauftragte der Bundesregierung für Migration und Flüchtlinge*, Daten – Fakten – Trends: Migrationsgeschehen (Stand: 2004), at 29; available at [http://www.integrationsbeauftragte.de/download/Modul\\_1\\_Migrationsgeschehen.pdf](http://www.integrationsbeauftragte.de/download/Modul_1_Migrationsgeschehen.pdf).

<sup>2</sup> See, *inter alia*, Art. 2(2) and Art. 3 Protocol No 4 to the ECHR; the right to re-entry is implied in Art. 11 Basic Law, see Federal Constitutional Court, in: *Decisions* vol. 2, 266, 273.

<sup>3</sup> *Bundesamt für Migration und Flüchtlinge*, Ausländer- und Flüchtlingszahlen (August 19, 2005), at 76; available at [http://www.bamf.de/cln\\_043/nn\\_564242/SharedDocs/Anlagen/DE/DasBAMF/Downloads/statistik-auslaender-fluechtlinge.templateId=raw.property=publicationFile.pdf/statistik-auslaender-fluechtlinge.pdf](http://www.bamf.de/cln_043/nn_564242/SharedDocs/Anlagen/DE/DasBAMF/Downloads/statistik-auslaender-fluechtlinge.templateId=raw.property=publicationFile.pdf/statistik-auslaender-fluechtlinge.pdf).

<sup>4</sup> *Id.*, at 78.

towards non-citizens for a long time was largely based on the assumption of return, and German nationality law did not provide for a *ius soli* principle<sup>5</sup>. Only in recent years has Germany started to develop more comprehensive integration and naturalization policies *vis-à-vis* aliens who are long-term residents, eventually recognizing that Germany is (or at least *was*) a country of immigration. Hence, although it could well be argued that the legal position of non-German nationals raises questions of minorities and migration law alike<sup>6</sup>, this report will address the legal position of all main categories of aliens residing in Germany.

## 1. *The structure of legal regulation of migrant's status: the emergence of a multi-level system of migration law*

### 1.1. *Current dynamics*

German migration law is in a state of transition. On January 1, 2005, after years of intense political struggle<sup>7</sup>, Germany witnessed the entry into force of a package of new immigration laws called *Zuwanderungsgesetz* (the term *Zuwanderung* is a neologism chosen in order to avoid the contested term *Einwanderung*, meaning 'immigration'). As its centerpiece, the package comprises the Residence Act (*Aufenthaltsgesetz*)<sup>8</sup> which replaces the Aliens Act (*Ausländergesetz*) in force since 1990, and the Freedom of Movement Act (*Freizügigkeitsgesetz/EU*) which substitutes the former act dealing with the legal position of Union citizens<sup>9</sup>. However, experts are of the opinion that the *Zuwanderungsgesetz* represents only a provisional solution<sup>10</sup>. Next to economic needs, which are likely to call for a more open approach to labor migration in the future, the main cause of reform is the Europeanization of migration law. With the amendments of the Treaty of Amsterdam, the European Union acquired the powers to legislate on most aspects of migration law, and has in fact started to do so<sup>11</sup>. At the time of this writing, most EU Council directives enacted in the initial five years period are yet to be transposed into German law; further steps towards a common European asylum and mi-

<sup>5</sup> For a policy analysis, see *S. Green*, *The Politics of Exclusion: Institutions and Immigration Policy in Contemporary Germany*, 2004.

<sup>6</sup> See *G. Sasse and E.R. Thielemann*, *A Research Agenda for the Study of Migrants and Minorities in Europe*, 43 *Journal of Common Market Studies* (2005), 655.

<sup>7</sup> See *St. Angenendt and I. Kruse*, *Migrations- und Integrationspolitik in Deutschland 2002–2003*, in: *Bade et al. (ed.)*, *Migrationsreport 2004*, 2004, 175.

<sup>8</sup> All acts and executive rules referred to in this report are available at the web-site of the Federal Ministry of Justice: [http://www.gesetze-im-internet.de/bundesrecht/GESAMT\\_index.html](http://www.gesetze-im-internet.de/bundesrecht/GESAMT_index.html). Official translations are not available to my knowledge.

<sup>9</sup> For a comprehensive overview, see *B. Huber*, *Das Zuwanderungsgesetz*, *Neue Zeitschrift für Verwaltungsrecht* 2005, 1; as to the previous legal situation, see *Th. Groß*, *Germany*, in: *Higgins (ed.)*, *Migration and Asylum Law and Policy in the European Union: FIDE 2004 National Reports*, 2004, 111.

<sup>10</sup> See *G. Renner*, *Vom Ausländerrecht zum Zuwanderungsrecht*, *Zeitschrift für Ausländerrecht und Ausländerpolitik (ZAR)* 2004, 266.

<sup>11</sup> The new developments are covered by the *European Journal of Migration and Law (EJML)*, see recently *St. Peers*, *Key Legislative Developments on Migration in the European Union*, 7 *EJML* (2005), 87; for a comparative impact assessment, see *K. Hailbronner*, *European Immigration and Asylum Law*, 11 *Irish Journal of European Law* (2004), 281.

gration policy are envisioned<sup>12</sup>. This development is also transforming the relationship of national and international law. Not only is the EU itself increasingly active in concluding international agreements relating to migration, such as readmission or association agreements. EU law also determines how its Member States have to comply with their international obligations in the field of migration law, in particular with human rights aspects such as *non-refoulement* of persons in need for protection, family unity, and the rights of long-term residents<sup>13</sup>. Germany will become more and more integrated in a multi-level system of migration law governing a common European migration space. Within this framework, one State's discretion to decide on the admission of migrants, as generally recognized under international law, is curtailed by decisions adopted at other levels with the participation of this State.

## 1.2. German migration laws, according to their rank within the legal order

### 1.2.1. Constitutional Law

The German constitutional document of 1949 (the Basic Law) contains some provisions of direct relevance to migrants. Against the background of Germany's history of dictatorship, the Basic Law guarantees an individual right to political asylum. After amendments made in 1993, the new Art. 16a Basic Law, however, authorizes several restrictions as to access to that right<sup>14</sup>. Other fundamental rights, in particular the rights to life and the integrity of the person (Art. 2(2) Basic Law) and to protection of marriage and family (Art. 6(1) Basic Law), come into play when legal barriers to deportations are concerned. To a certain extent, Art. 6(1) Basic Law guarantees a right to family reunion in Germany<sup>15</sup>.

### 1.2.2. Parliamentary Legislation

There are various pieces of federal parliamentary legislation that are relevant to German migration law. The main acts are: the Residence Act (*Aufenthaltsgesetz*) which contains the general rules for the admission of alien migrants; the Freedom of Movement Act (*Freizügigkeitsgesetz*) which defines a separate legal regime for Union citizens and their relatives; the Act on Asylum Procedures (*Asylverfahrensgesetz*) which determines the processing of applications for asylum or other forms of international protection; the Act on Benefits for Asylum Seekers (*Asylbewerberleistungsgesetz*) providing for a separate regime of social assistance for persons admitted on a temporary basis; the Federal Act on Displaced Persons (*Bundesvertriebenengesetz*) governing the situation of ethnic Germans living abroad; and, the Nationality Act (*Staatsangehörigkeitsgesetz*) which defines the conditions for acquiring German nationality via naturalization or birth. All of these acts were either introduced or substantially amended by the *Zuwanderungsgesetz* of 2004.

<sup>12</sup> See European Council, 'The Hague Programme: strengthening freedom, security and justice in the European Union', [2005] OJ C 53, 1.

<sup>13</sup> See *J. Fitzpatrick*, The Human Rights of Migrants, in: Aleinikoff and Chetail (eds.), *Migration and International Legal Norms*, 2003, 169; *K. Jastram*, Family Unity, *ibid.*, 185.

<sup>14</sup> See below, section 3.3.5.

<sup>15</sup> See below, section 3.3.2.

### 1.2.3. Rule-Making by the Federal Government

To a greater extent than is common in German public law, the said acts authorize the federal government to enact executive rules (so-called *Rechtsverordnungen*, ‘regulations of law’), which are strictly binding rules for the implementation of, and partly also for the derogation from, a parliamentary act. The consent of the *Bundesrat*, the second chamber of the federal Parliament which is composed of the regional states’ governments, is regularly needed. The three main examples of *Rechtsverordnungen* are the Residence Regulation (*Aufenthaltsverordnung*) implementing the Residence Act, the Employment Regulation (*Beschäftigungsverordnung*) concerning access of migrants from abroad to the German labor market, and the Employment Procedure Regulation (*Beschäftigungsverfahrenverordnung*) providing the rules for labor market access of resident migrants (*Bundesrat* consent is not needed here).

A second type of federal executive orders, ranking below those mentioned previously, are general administrative rules (*Allgemeine Verwaltungsvorschriften*). These guidelines for the application of the law are binding on the administration but cannot create new rights or duties, or bind the courts. Again, the assent of the *Bundesrat* is required. As of now, there are no general administrative rules with respect to the new law. There are only the Provisional Guidelines for the Application of the Residence Act and the Freedom of Movement Act, issued by the Federal Ministry of the Interior on December 22, 2004. Although these Provisional Guidelines are non-binding, they may nevertheless have a major impact on the practice of the local Aliens Offices in dealing with the new law.

### 1.2.4. Rule-Making by the Länder Governments

Taking into account that German migration policies are almost exhaustively regulated by federal laws and regulations, there is little room for legislation by the regional states, the *Länder*. The main role of the *Länder* in migration law is thus application and enforcement of the law<sup>16</sup>. There is, however, some room for the *Länder* governments to adopt a particular policy within the framework laid down in federal law and to this end, issue the respective circulars to the local Aliens Offices.

Yet another form of executive rule-making should be cited here. The Residence Act provides some legal bases for general decisions to be adopted by the Minister of the Interior of the respective *Land*. These ministerial orders, *e.g.*, define the conditions for issuing residence permits on humanitarian grounds, or declare a temporary deportation stop for certain migrant groups<sup>17</sup>. In practice, these types of decisions are adopted unanimously at the meetings of the 17-headed ‘Conference of the Ministers and Senators of the Interior’. It is thus one of the power centers of German migration law although it is not a constitutional body in the strict sense.

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<sup>16</sup> See below, section 3.2.

<sup>17</sup> See below, sections 3.3.6. and 3.3.7.

## 2. *Legal conceptions used in national legislation: ‘alien’ as the basic concept of German migration law*

### 2.1. *Aliens*

The terms ‘migrant’ or ‘immigrant’ are largely unknown in German law and do not refer to a specific legal concept. The Residence Act only refers to *Zuwanderung* (‘immigration’) as the social phenomenon which is to be controlled and restricted by way of this Act. The basic term and concept of German migration law is *Ausländer* (‘alien’, or ‘alien national’, yet with less pejorative connotations than the English term). Decades ago, the term *Ausländer* replaced the term *Fremder* (equating both to ‘foreigner’ and ‘stranger’), which is still used in Austrian law. As defined in § 2(1) Residence Act, an alien is a person who is not a German in the sense of Art. 116 Basic Law. All non-German nationals and stateless persons are aliens, except for ethnic Germans living abroad and persons holding dual nationality of which German is one.

### 2.2. *Union citizens*

A *Unionsbürger* (‘Union citizen’) as referred to in the Freedom of Movement Act is a national of another Member State of the European Union (§ 1 of this Act). This definition designates a particular sub-set of aliens and therefore does not fully correspond to that in Art. 17 EC Treaty, which also comprises German nationals. Under the conditions set out in the Freedom of Movement Act, non-German EU nationals and their relatives qualify as *Freizügigkeitsberechtigte* (‘persons entitled to freedom of movement’). This concept also applies to family members who are not themselves Union citizens. For the purposes of the Freedom of Movement Act, nationals of a state party of the European Economic Area Agreement (EEA nationals, *i.e.*, of Iceland, Liechtenstein, and Norway) are equal to Union citizens (§ 12 Freedom of Movement Act). Swiss nationals, however, are still governed by the Residence Act, although they are exempted from the residence permit requirement, in accordance with the Freedom of Movement Agreement concluded with Switzerland by the EC and its members in 1999 (see § 29 Residence Regulation).

### 2.3. *Refugees*

The term *Flüchtling* (‘refugee’) is used when German law directly refers to the status under the Geneva Refugee Convention. For historical reasons, German migration law is based on a two-tier system of implementing this Convention. Refugee status is recognized either for *Asylberechtigte* (‘persons entitled to asylum’) or persons whose expulsion is prohibited for grounds contained in the Refugee Convention. An asylee proper is an alien entitled to protection as *politisch Verfolgter* (‘a person persecuted on political grounds’) according to Art. 16a(1) Basic Law, which under narrow conditions guarantees a fundamental right to asylum. Other persons who qualify for refugee status are referred to as *Personen, denen die in § 60 Absatz 1 des Aufenthaltsgesetzes bezeichneten Gefahren drohen* (‘persons under the threat of dangers indicated in § 60(1) Residence Act’), which is the provision replicating the wording of the *non-refoulement* clause of Art. 33(1) of the Refugee Convention. The term ‘subsidiary protection’ is not used in German law, although the concept itself is reflected in § 60(2)–(7) Residence Act. In these paragraphs, an alien who is not granted refugee status but nevertheless, under international or constitutional law, enjoys protection against forced return

to a particular state is referred to as *Ausländer, der nicht abgeschoben werden darf* ('an alien who must not be deported').

#### 2.4. *Migrant workers*

The term 'migrant worker' has no direct correspondent in German migration law. The closest equivalent is the notion of *Aufenthalt zum Zweck der Erwerbstätigkeit* ('residence for purposes of employment'). The term *Erwerbstätigkeit* includes activities as a self-employed person as well as *Beschäftigung* ('employment' in the narrow sense, *i.e.* non-independent work). A residence permit granted for other purposes, however, may also authorize an alien to employment, in which case the beneficiary constitutes a migrant worker in the sense of the relevant international conventions, as well.

#### 2.5. *Illegal residents*

There are no particular provisions in German law dealing with the status of undocumented migrants. Although in political discourses they are often called *Illegale* ('illegal persons'), the legal concept of *illegaler Aufenthalt* ('illegal stay') has a broader meaning. It circumscribes the position of all aliens, be they documented or non-documented, who are under the obligation to leave due to the absence of a necessary residence permit. Even if the deportation of an alien has proven to be impossible for factual or legal grounds, his/her further stay is technically deemed illegal. According to § 60a Residence Act, the person concerned receives a document certifying that his/her deportation is temporarily suspended, the so-called *Duldung* ('toleration'). As opposed to other forms of illegal entry or stay, tolerated residence does not constitute a criminal offence.

### 3. *Acquiring the status of migrant: a plurality of residence permits*

#### 3.1. *The types of residence permits under the Residence Act*

Under the Residence Act, three main types of permits exist: the visa (*Visum*), the Residence Authorization (*Aufenthaltserlaubnis*), and the Establishment Authorization (*Niederlassungserlaubnis*). Moreover, under the Freedom of Movement Act, family members who are non-EU or non-EEA nationals receive an EU-Residence Authorization (*Aufenthaltserlaubnis/EU*), proving their entitlement to free movement. In addition to these residence permits proper, there are the Residence Leave (*Aufenthalts gestattet*), which is issued to asylum seekers and allows them to remain during the process of deciding their application, and the Certificate of Toleration (*Bescheinigung der Duldung*), which is issued to persons whose deportation is temporarily suspended.

According to § 5 Residence Act, certain requirements apply to all three main types of permits, subject to certain exceptions in the context of family reunification and, more broadly, in cases of persons seeking international protection. As a general rule, an applicant must hold a valid passport, his/her identity and nationality must be clear, and none of the grounds for issuing an expulsion decision must be on hand, *e.g.*, a significant criminal record<sup>18</sup>. Admission is almost always barred if the person concerned is suspected to be engaged in terrorist activities, pur-

<sup>18</sup> On that grounds, see below, section 6.1.

sues or appeals for violent political action, or otherwise constitutes a serious threat to public security. Moreover, the alien must have sufficient means of living at his/her disposal in order not to become a burden on the social assistance system. If the application is filed while staying in Germany, the person must have entered with the “necessary visa” (§ 5(2) Residence Act). This excludes, *inter alia*, persons entering with a tourist visa from then applying for a Residence Authorization for employment purposes. If, however, the alien is entitled to a residence permit anyway, the requirement for carrying out the visa procedure can be waived.

A *visa* is a residence permit issued by a German authority before entry. It is provided in either the form of a Schengen or of a national visa (§ 6 Residence Act). Short-stay Schengen visas are issued in accordance with EU law, in particular the Visa Regulation No 539/2001 and the Schengen Implementation Agreement. For national visas for intended stays of more than three months, the rules for granting a Residence Authorization or an Establishment Authorization apply.

The *Residence Authorization* is limited in time and granted only in connection with the pursuit of a particular purpose. Such residence purposes are enumerated in the Residence Act, and include educational purposes (§§ 16–17), purposes of employment (§§ 18–21), residence for international law, humanitarian, or political grounds (§§ 22–26), and residence on family grounds, in particular family reunification (§§ 27–36). The time limit depends on the purpose and the circumstances of the individual case. Further constraints may be attached to a Residence Authorization, in particular with respect to the movement within the German territory or access to the labor market, subject to specific provisions in the Residence Act and a proportionality test. The renewal of a Residence Authorization is possible if the reasons for granting it persist.

The *Establishment Authorization* is unlimited in time and gives full access to employment. Attaching any constraints to this permit is prohibited, except for possible restrictions of political activity<sup>19</sup>. As a rule, a person applying for an Establishment Authorization must have been holding a Residence Authorization for a minimum of five years. Among the further requirements for being entitled to an Establishment Authorization, as set out in § 9 Residence Act, two are particularly noteworthy. First, the applicant has to demonstrate sufficient German language skills and basic knowledge of German society and legal order. Both can be proven by successfully taking part in an integration course program, which is one of the novelties of the Residence Act<sup>20</sup>. Second, the applicant must have been contributing to a payroll based pension scheme for a minimum of sixty months. This requirement, which was also introduced by the Residence Act, may lead to a considerable extension of the actual waiting period, especially if one takes into account the high level of unemployment in Germany among the migrant population in particular. In derogating from the above prerequisites for an Establishment Authorization, the Residence Act provides for some mitigation with respect to internationally protected persons. Specifically, recognized refugees receive an Establishment Authorization after three years of holding a Residence Authorization if the need for protection persists (§ 26(3) Residence Act). Other instances of mitigation are foreseen in the context of family

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<sup>19</sup> See below, section 4.2.1.

<sup>20</sup> See below, section 4.3.

reunion, e.g., for spouses of Germans after three years of holding a Residence Authorization (§ 28(2) Residence Act). If special political interests of the Federal Republic so require and once a general decision on the ministerial level was made to that end, members of certain migrant groups may even be granted an Establishment Authorization on the very first day (§ 23(2) Residence Act).

As a rule, an application for a residence permit is decided on a discretionary basis, which implies the need for taking into account the general interests of the Federal Republic and the individual circumstances of the case at hand. In a variety of clauses, however, the Residence Act establishes an enforceable right to receive a residence permit, leaving no room for the exercise of administrative discretion. This concerns, in particular, recognized refugees, certain constellations of family reunification, second- and third-generation minors, and (as discussed above) the right to receive an Establishment Authorization for aliens who reside on a long-term basis and are sufficiently integrated in German society.

### 3.2. *Administrative procedures and legal review*

German principles of federalism require federal laws and regulations to be executed by the sixteen regional states, the *Länder*. Consequentially, most administrative decisions of German migration law are made by local Aliens Offices (*Ausländerbehörden*) under the guidance and supervision of the *Länder* governments. In cases where an administrative appeal is admissible, the appeal is also decided at the *Länder* level. Judicial review is exercised by the district's administrative court of first instance and the *Land's* administrative high court, acting as a court of appeal. In cases of particular importance or when divergent decisions have been issued by the administrative high courts, the matter may be appealed, on grounds of law only, to the Federal Administrative Court in Leipzig, whose decisions are final. In extraordinary cases, the person concerned may eventually bring a constitutional complaint to the Federal Constitutional Court in Karlsruhe, claiming that his/her fundamental rights have been infringed.

Only as an exception are federal authorities involved in administrative decision-making. In migration law, one can distinguish three main instances. First, the determination of refugee status is centralized at the Federal Office for Migration and Refugees (*Bundesamt für Migration und Flüchtlinge*). It sits in Nürnberg and has satellite offices at every larger reception facility. This Federal Office has the responsibility for determining whether a person is persecuted on political grounds, is under the threat of dangers indicated in § 60(1) Residence Act, or must not be deported for other reasons relating to his/her country of origin. Except for border area cases, it is also competent for determining whether Germany is responsible for examining an asylum application in accordance with the Dublin Regulation No 343/2000<sup>21</sup>. The determinations of the Federal Office are binding on the local Aliens Office, which grants or refuses a residence permit or a toleration. Judicial review of the determinations of the Federal Office is available under more restrictive conditions and in an expedited procedure, in particular when the application is considered manifestly unfounded or the 'safe third country' ex-

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<sup>21</sup> See below, section 3.3.5.

emption applies<sup>22</sup>. A suit can be filed with the administrative court in the district where the Federal Office's satellite office is located.

The second example of federal agency involvement is the visa procedure. Visa applications are examined and decided by the diplomatic or consular representations abroad, *i.e.* within the authority of the Federal Minister of Foreign Affairs. In cases of visas for intended stays of more than three months, however, the Aliens Office of the district where the alien will habitually reside has to give its assent before the visa is issued (§ 31 Residence Regulation). Legal review is exercised by the Administrative Court and the Administrative High Court of Berlin, where the ministry is seated.

Third, when a residence permit is issued for educational or employment purposes, or when access to the labor market is authorized at a later date, the Federal Agency for Labor regularly has to give its internal assent prior to the decision of the Aliens Office. The Federal Agency for Labor is acting under the instructions of the Federal Minister of Labor and within a framework laid down in executive rules. The Federal Agency holds local branches in every labor market district. An action against a failure to consent can be brought before the administrative courts by challenging the ensuing Aliens Office's decision to refuse the requested residence permit or to lift the ban on employment<sup>23</sup>. The Federal Agency is involved in the case as an intervening party.

Other examples of the federal administration's involvement include the responsibilities of the Federal Police for guarding the borders and for immediate deportations in cases of illegal border-crossing. They also include the extraordinary power of the Federal Minister of the Interior to issue deportation orders against terror suspects, according to § 58a(2) Residence Act. In the latter case, legal review is exercised by the Federal Administrative Court, acting as a court of first and last instance<sup>24</sup>.

### 3.3. *The main groups of migrants in Germany, according to their legal status*

In the following section, this report will give a review on the different channels of migration to Germany. The main groups are considered, according to their legal status. The list, however, is not meant to be exhaustive.

#### 3.3.1. *Union citizens and their relatives*

The largest group of migrants living in Germany with a more or less unified legal status consists of non-German Union citizens. By the end of 2003, 25% of aliens were nationals of an EU Member State<sup>25</sup>. These figures increased to 34% after accession of ten new Member

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<sup>22</sup> See below, section 3.3.5.

<sup>23</sup> See *R. Marx*, Rechtsschutz gegen aufenthaltsrechtliche Versagung der Erlaubnis zur Erwerbstätigkeit, ZAR 2005, 48.

<sup>24</sup> See *Ch. Tams*, Die Abschiebungsanordnung nach § 58a Aufenthaltsgesetz, Deutsches Verwaltungsblatt 2005, 1482; *K. Sperlich*, Abschiebungsanordnung gemäß § 58a AufenthG und effektiver Rechtsschutz, Informationsbrief Ausländerrecht (InfAusIR) 2005, 250.

<sup>25</sup> *Beauftragte der Bundesregierung für Migration und Flüchtlinge*, Daten – Fakten – Trends: Strukturdaten der ausländischen Bevölkerung (Stand: 2004), at 18; available at <http://www.integrationsbeauftragte.de/download/Strukturdaten.pdf>.

States in 2004, the largest new nationality being Polish (4% of all aliens). The most prevalent nationality is still Italian (8%), followed by Greek (5%)<sup>26</sup>.

Not much needs to be said here with respect to German law, since the legal regime of Union citizens is almost exclusively predetermined by EU law, in particular by the provisions on freedom of movement (Art. 18, 39, 43 and 49 EC Treaty), the non-discrimination clause of Art. 12 EC Treaty, and the various pieces of EC legislation enacted for implementing them. Outstanding among the latter is Directive 2004/38/EC on the right of Union citizens and their family members to move and reside freely within the Union territory, which is to be transposed by April 30, 2006. The Freedom of Movement Act anticipated some of the innovations of Directive 2004/38/EC, although further amendments are required to bring German law fully in line with the Directive. The Freedom of Movement Act already abolished the obligation of a Union citizen to apply for a – at any rate declaratory – residence permit. Henceforth, the local Registry Office issues a non-formal certification of the right to reside when the Union citizen registers his/her relocation with that office (an obligation which also pertains to Germans). As required by the Directive, Union citizens and their relatives acquire a right of quasi-permanent residence after five years, which is independent of any economic activity or of having sufficient resources. Residing as a person entitled to freedom of movement under the Freedom of Movement Act implies an unrestricted right to employment.

Some problems, however, are likely to remain. The first problem concerns the still possible restrictions on the right of residence on grounds of public policy. In that respect, the Freedom of Movement Act brought about amendments that were meant to bring the contested German practice of expelling Union citizens in line with EU law requirements<sup>27</sup>. Second, it remains to be seen how German authorities will apply § 5(4) Freedom of Movement Act, which, on a non-systematic basis, allows for a review of whether a person still satisfies the conditions for freedom of movement. This could actually endanger the residence status of persons who rely on social assistance but have not yet passed the five years threshold. In this regard, the Directive provides the Member State with a considerable degree of discretion in stating that the person may not become “an unreasonable burden on the social assistance system” (Art. 14(1) Directive 2004/38).

Another crucial point is the legal position of family members who are not nationals of an EU Member State. EU law guarantees them a derived right of residence when accompanying or joining the Union citizen (Art. 6(2) Directive 2004/38/EC). This will at least require that the necessary condition of residing with the Union citizen, as yet foreseen in § 2(1) Freedom of Movement Act, be abolished<sup>28</sup>. A third-country family member’s right of entry may be subjected to a visa requirement (Art. 5(2) Directive 2004/38/EC). The European Court of Justice, however, made plain that a family member’s rights of entry and residence must not depend on the formalities of a visa procedure<sup>29</sup>. One may thus question whether the visa requirement of

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<sup>26</sup> Ausländer- und Flüchtlingszahlen (note 3), at 75.

<sup>27</sup> See below, section 6.2.

<sup>28</sup> *K. Hailbronner*, Neue Richtlinie zur Freizügigkeit der Unionsbürger, *ZAR* 2004, 259, 263.

<sup>29</sup> EJC, Case C-459/99, *MRAX*, [2003] ECR I-6591; Case C-157/03, *Commission v. Spain*, [2005] ECR I-0000 (Judgment of April 14, 2005, nyr).

§ 2(4) Freedom of Movement Act and the limited exceptions to it under the Residence Act<sup>30</sup> are in conformity with EU law. Finally, a loophole exists with respect to third-country nationals who are family members of a German. The Freedom of Movement Act does not apply, since Germans are not Union citizens in the sense of that act. Under the applicable Residence Act, however, the scope of the right to family reunion is framed more restrictively. It excludes subsequent immigration of relatives in the ascending line, except for extraordinary hardship cases (§§ 28 and 36 Residence Act). German law fails to acknowledge that in certain constellations a Union citizen is able to invoke an EU law-based right to family reunification against his/her own state, in particular when the Union citizen has exercised free movement rights and then returns to his/her country<sup>31</sup>.

### 3.3.2. Long-term residents and their relatives

The majority of aliens in Germany are long-term residents. By the end of 2004, 61% of them have stayed in the country for at least ten years (75% of Turkish nationals, and 60% of the nationals of Serbia and Montenegro, just to mention the two largest non-EU nationalities<sup>32</sup>). 34% of all aliens have lived in Germany for at least twenty years, 20% even for thirty years<sup>33</sup>. These figures reflect the worker recruitment of the 1950s and 1960s, and the subsequent immigration of family members since the 1970s. To a certain extent, they also mirror the refugee influx of the 1980s and 1990s resulting, *e.g.*, from civil wars in Turkey/Kurdistan and Yugoslavia. The bulk of aliens in Germany, however, are former migrant workers and their descendants who either do not qualify for naturalization to German nationality or, for various reasons, do not apply for it.

The legal status of long-term alien residents differs widely. By the end of 2003, 48% of all aliens held an unlimited residence permit<sup>34</sup>. Pursuant to § 101(1) Residence Act, these permits are classified as valid Establishment Authorizations under the new law; the reinforced integration requirements do not apply retroactively. Union citizens, and EEA or Swiss nationals, are henceforth freed from the need for a permit. Yet, 22% of all aliens, *i.e.* close to 1.5 million people, were holding a limited residence permit under the former Aliens Act which ensured them a semi-secured residence status<sup>35</sup>. Of them, 65% lived in Germany for at least five years, 38% for ten years or longer. Their permits are acknowledged as Residence Authorizations

<sup>30</sup> For details, see *O. Maor*, Die Visabestimmungen der Aufenthaltsverordnung, ZAR 2005, 185.

<sup>31</sup> See ECJ, Case C-370/90, *Singh*, [1992] ECR I-4265, para. 19 *et seq.*; Case C-109/01, *Akrich*, [2003] ECR I-9607, para. 47 *et seq.*; for an analysis of the German law, see *A. Fischer-Lescano*, Nachzugsrechte von Drittstaatsangehörigen Familienmitgliedern deutscher Unionsbürger, ZAR 2005, 288.

<sup>32</sup> The proportion is even higher among the Spanish, Greek, and Italian nationals (78–80%), who has meanwhile indiscriminately become Union citizens due to EU enlargement. All data taken from: *Ausländer- und Flüchtlingszahlen* (note 3), at 76.

<sup>33</sup> *Id.*

<sup>34</sup> An *Aufenthaltsberechtigung* (11%), an *unbefristete Aufenthaltserlaubnis* (28%), or an *unbefristete Aufenthaltserlaubnis-EU* (9%), according to the typology of the law as it stood before January 1, 2005. Source: *Strukturdaten* (note 25), at 25.

<sup>35</sup> These figures does neither include recognized refugee who did not qualify as persons entitled to asylum, nor persons with a subsidiary protection status. For both, the Aliens Act offered a limited residence permit called *Aufenthaltsbefugnis*. By the end of 2003, 4% of all aliens were holding that type of permit. Source: *Strukturdaten* (note 25), at 25.

according to the new law. In order to receive an Establishment Authorization, only basic language skills and no pension scheme contributions are required (§ 104(2) Residence Act)<sup>36</sup>.

Of particular concern is the situation of persons who have stayed in Germany on a long-term basis without qualifying for a residence permit. At the end of 2003, some 227,000 aliens were only tolerated in Germany, which means that their deportation was temporarily suspended. Of them, 62% had arrived at least five years ago<sup>37</sup>. Among the Serb and Montenegrin population in Germany, which includes different ethnic groups from Kosovo, 11% of those who had lived in Germany for ten years or more still hold a short-term Certificate of Toleration<sup>38</sup>. Reacting to this situation, the German legislature intended to overcome the long-standing practice of issuing ‘chains of tolerations’ (*Kettenduldungen*). According to § 25(5) Residence Act, the Aliens Office can issue a Residence Authorization if, for the foreseeable future, an alien is unable to leave through no fault of his/her own. A Residence Authorization should (notably not: shall) be issued if the deportation is suspended for eighteen months. Much will depend of how this clause is interpreted in practice. First reports indicate a rather restrictive approach of the *Länder* administrations<sup>39</sup>.

For obvious reasons, the rules on family reunification are of great importance to aliens who reside on a long-term basis. Between 1999 and 2003, an average of 78,000 persons per year had been admitted to Germany to unite with their spouses or parents. Of the 76,000 visas issued for that purpose in 2003, 33% were granted to spouses of an alien, 44% to spouses of a German, and the rest were newly arriving children<sup>40</sup>. Aliens who hold an Establishment Authorization, or have held a Residence Authorization for at least five years, are entitled to sponsor their spouse; the same holds true for recognized refugees (§ 30 Residence Act). After two years of cohabitation in Germany, alien spouses acquire an independent right of residence (§ 31). For the purposes of family reunification, registered partnerships of same-sex couples are treated as equivalent to marriage (§ 27(2)). Unmarried minors are entitled to a Residence Authorization when accompanying their parents (§ 32(1)). Subsequent immigration of minors is permitted if the persons having the care and custody themselves hold a residence permit. In cases of minors above the age of fifteen, however, it must be proven that the child meets certain integration requirements, e.g., by speaking German (§ 32(2)). When a child is born in Germany but nonetheless does not acquire the German nationality, a Residence Authorization is granted ex officio if the mother holds a Residence Authorization or an Establishment Authorization (§ 33)<sup>41</sup>. Once a minor who is legally residing in Germany attains full age, he/she acquires an independent right of residence (§ 34). Collateral relatives or family members in

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<sup>36</sup> For a discussion of the transitional arrangements, see *K. Dienelt*, Die Anrechnung von Voraufenthaltszeiten zur Erlangung einer Niederlassungserlaubnis, *InfAuslR* 2005, 247.

<sup>37</sup> *Strukturdaten* (note 25), at 25.

<sup>38</sup> *Strukturdaten* (note 25), at 24.

<sup>39</sup> *R. Göbel-Zimmermann*, Die Erteilung eines Aufenthaltstitels aus humanitären Gründen nach § 25 Abs. 4 und 5 AufenthG, *ZAR* 2005, 275; see also *G. Benassi*, Zur praktischen Bedeutung des § 25 Abs. 4 und 5 AufenthG, *InfAuslR* 2005, 357.

<sup>40</sup> *Migrationsgeschehen* (note 1), at 31.

<sup>41</sup> In a recent judgment, however, the Federal Constitutional Court held that this provision constitutes an unjustified discrimination on grounds of sex and thus violates Art. 3(3) Basic Law: Case 2 BvR 524/01 (Judgment of October 25, 2005, nyr).

the ascending line do not have a right to family unity in Germany, except for particular hardship cases (§ 36).

These regulations on family reunification reflect the legislature's human rights obligations as stipulated in Art. 6(1) Basic Law and Art. 8 ECHR. Both provisions guarantee everyone a right to respect for his family life. According to the German courts, however, the constitutional protection for marriage and family (*Ehe und Familie*) is limited to married couples and minor children, whereas the case-law of the Strasbourg Human Rights Court operates on the basis of a broader family concept<sup>42</sup>. The Residence Act's provisions are subject to reform in order to implement the Directive 2003/86/EC on the right to family reunification, which Germany failed to transpose in a timely manner by October 3, 2005. The aforementioned integration requirement of § 32(2) Residence Act is likely to persist, since it is covered by an explicit derogation in Art. 4(1) of the Directive 2003/86/EC, which was incorporated into the text at the request of the German delegation.

### 3.3.3. Migrant workers of Turkish nationality and their relatives

The single largest alien nationality in Germany is Turkish: by December 2004, they formed 26% of the alien population, or a total of over 1.7 million people<sup>43</sup>. Most of them have resided in Germany on a long-term basis or were actually born in Germany. The legal position of the Turkish population differs from that of other nationals because they potentially benefit from the Association Agreement of 1963, concluded between Turkey on the one hand, and the EEC and its Member States on the other ('Ankara Agreement'). Of particular significance is Decision No 1/80 of September 19, 1980. This decision was adopted by the Association Council, a joint decision-making body of the contracting parties which is, *inter alia*, mandated to progressively implement the free movement of workers. Three clauses of Decision No 1/80 are noteworthy here. Art. 6(1) states that a Turkish worker, duly registered as belonging to the labor force of a Member State, shall enjoy free access to the labor market after four years of legal employment. Art. 7 provides that any family member who has been authorized to join the worker shall be entitled to take up an employment after he/she has been legally resident for at least three years; children who have completed a course of vocational training in the host country shall have immediate access to the labor market, provided one of their parents has been legally employed for at least three years. Art. 14(1) authorizes national limitations on these rights for reasons of public policy, public security, or public health – the very same formula as applicable to Union citizens. In its landmark *Sevince* judgment of 1990, the European Court of Justice held that the rights to employment granted in Decision No 1/80 imply a duty on the side of the Member State to recognize the persons concerned as legal residents; moreover, the provisions granting these EU law-based rights shall have direct effect<sup>44</sup>. In a series of cases, the ECJ further clarified the content of Decision No 1/80. For instance, it held that the phrase "have been authorized to join" also covers persons that were born and have always resided in the host country<sup>45</sup>. The ECJ also held that the concomitant right of residence

<sup>42</sup> See, e.g., ECtHR, *Marckx v. Belgium*, [1979] Series A No 31, 21.

<sup>43</sup> Ausländer- und Flüchtlingszahlen (note 3), at 76.

<sup>44</sup> ECJ, Case C-192/89, *Sevince*, [1990] ECR I-3461, para. 15.

<sup>45</sup> ECJ, Case C-467/02, *Cetinkaya*, [2004] ECR I-10895, para. 34.

implied in Art. 7 does not depend on the continuing existence of the conditions for access to this right. It persists unless the person concerned constitutes a genuine and serious threat to public interests mentioned in Art. 14, or has left the territory of the host State for a significant length of time without legitimate reason<sup>46</sup>. Notably, under Art. 7 there is no requirement of being registered as belonging to the labor force or of having worked for a certain period<sup>47</sup>.

This case-law has a huge impact on the legal position of the Turkish population in Germany. A large number of first- and second-generation migrants meets the requirements stipulated in Art. 6 or 7 of Decision No 1/80, and therefore has a right to reside that is independent of national law. Exact figures are unknown because there is no legal procedure for certifying these rights. The question generally only arises when German authorities intend to expel a Turkish national for public policy reasons<sup>48</sup>. The Residence Act, in its § 4(1) and § 50(1), for the first time acknowledged that a right to reside in Germany can either follow from holding a residence permit or from the Ankara Agreement. One has to admit, however, that this agreement and the Association Council decisions only fragmentarily regulate the legal status of the Turkish nationals. These nationals do not enjoy a right to enter and move freely within the Union territory. The decision on the first admission of a Turkish migrant worker and on the conditions for reuniting with family members is still up to the Member States. In that respect, Directive 2003/86/EC on the right to family reunification, Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents (to be transposed by January 23, 2006 at the latest), and Association Council Decision No 1/80 will henceforth mutually complement each other.

#### 3.3.4. Admission for purposes of employment

The provisions on issuing a residence permit for employment purposes distinguish between unskilled, skilled, and high-skilled employees (§ 18(3), § 18(4), and § 19 respectively), and self-employed persons (§ 21 Residence Act). Admission of unskilled laborers is strict as to requiring an executive rule or an inter-state agreement regulating access to employment. On the basis of the equivalent provisions of the former Aliens Act, German authorities granted in 2003 close to 320,000 short-term residence permits to seasonal or carnival laborers, mainly from Eastern and Southeastern Europe. 90% of the seasonal laborers were employed in agriculture and forestry, 7% worked in the hotel and catering industry<sup>49</sup>. Moreover, some 44,000 contract laborers of foreign companies have been admitted on the basis of bilateral agreements with Central and Eastern European countries and Turkey<sup>50</sup>.

Admission of skilled workers for employment purposes is typically only available through executive rule which defines the occupational groups for which the general ban on labor recruitment is lifted. The relevant Employment Regulation identifies a limited number of such occupations, including language teachers, specialty cooks, social workers, and nursing staff (§§ 25 *et seq.* Employment Regulation).

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<sup>46</sup> ECJ, Case C-329/97, *Ergat*, [2000] I-1487, paras. 40 and 48.

<sup>47</sup> ECJ, Case C-373/03, *Aydinli*, [2005] ECR I-0000, para. 29 (Judgment of July 7, 2005, nyr).

<sup>48</sup> See below, section 6.2.

<sup>49</sup> Migrationsgeschehen (note 1), at 20.

<sup>50</sup> Migrationsgeschehen (note 1), at 19.

Special rules apply to highly qualified employees. According to § 19(1) Residence Act, an Establishment Authorization may be granted if the person concerned has sufficient resources and will probably integrate into German society. § 19(2) Residence Act enumerates a non-exhaustive list of professions to which this privilege applies, namely scientists with special expertise (No 1), teachers or academic assistants with specially recognized functions (No 2), and specialists or executives with high professional experience and a yearly income over 84,600 Euro (No 3).

Admission of a self-employed person is based on an evaluation of whether a positive impact on the economy is expected and adequate financing of the enterprise is ensured. The required economic demand is proven under the cumulative conditions of investing one million Euro and creating ten jobs (§ 21(1) Residence Act). A Residence Authorization for self-employed activity may also be granted if preferential treatment is foreseen in international agreements (§ 21(2) Residence Act). This is currently the case for nationals of Bulgaria, the Dominican Republic, Indonesia, Iran, Japan, the Philippines, Romania, Sri Lanka, Switzerland, the U.S.A., and Turkey<sup>51</sup>.

### 3.3.5. *Persons with refugees status or other forms of international protection*

Over the last fifteen years, the issue of asylum and refugee protection was subject to intense political debate, and German law has witnessed major changes. In the beginning of the 1990s, the numbers of asylum applications increased to a climax of almost 440,000 in 1992. German policymakers felt pressure to adopt a more restrictive approach. In 1993, the legislature amended the German Constitution in order to limit the access to asylum, which was – and still is – guaranteed as a fundamental constitutional right. The new Art. 16a Basic Law allows for the incorporation of the concepts of ‘safe third country’ and ‘safe country of origin’, for limiting access to the courts, and for mutual recognition of asylum decisions as foreseen in the Dublin Convention of 1990. All these concepts were implemented in the Act on Asylum Procedures (*Asylverfahrensgesetz*)<sup>52</sup>. Asylum applications dropped to 130,000 in 1993 and in the meantime has reached the lowest level since 1984 (less than 36,000 in 2004)<sup>53</sup>. Recognition rates as to refugee status were and are low. Of the 200,000 applications decided by the Federal Office in 1995, 9% of asylum seekers were recognized as asylee pursuant to Art. 16a Basic Law, another 2.5% of applicants were recognized as Geneva Convention refugees, and 1.8% were granted subsidiary protection. For the 62,000 decisions issued in 2004, the respective figures are 1.5%, 1.8%, and 1.6%<sup>54</sup>. Not included in the above statistics, however, is the number of asylum seekers who filed a successful appeal and have been granted refugee status

<sup>51</sup> See No 21.2. of the Provisional Guidelines for the Application of the Residence Act, issued by the Federal Ministry of the Interior, 22. December 2004.

<sup>52</sup> Moreover, the Act on Benefits for Asylum Seekers was introduced, see below, section 4.2.3.

<sup>53</sup> *Bundesamt für Migration und Flüchtlinge*, Migration und Asyl (August 19, 2005), at 19; available at [http://www.bamf.de/cln\\_043/nn\\_564242/SharedDocs/Anlagen/DE/DasBAMF/Downloads/statistik-migration-asyl,templateId=raw,property=publicationFile.pdf/statistik-migration-asyl.pdf](http://www.bamf.de/cln_043/nn_564242/SharedDocs/Anlagen/DE/DasBAMF/Downloads/statistik-migration-asyl,templateId=raw,property=publicationFile.pdf/statistik-migration-asyl.pdf).

<sup>54</sup> Figures taken from *Bundesamt für Migration und Flüchtlinge*, Statistik aktuell (August 19, 2005), at 6; available at [http://www.bamf.de/cln\\_043/nn\\_564242/SharedDocs/Anlagen/DE/DasBAMF/Downloads/statistik-aktuell,templateId=raw,property=publicationFile.pdf/statistik-aktuell.pdf](http://www.bamf.de/cln_043/nn_564242/SharedDocs/Anlagen/DE/DasBAMF/Downloads/statistik-aktuell,templateId=raw,property=publicationFile.pdf/statistik-aktuell.pdf).

or subsidiary protection through a court decision. No statistical data is available as to that aspect.

As already noted<sup>55</sup>, refugee protection in Germany depends on a two-tier system. Besides the ‘first class asylum’ (*‘großes Asyl’*) based on the Constitution which requires the persecution to occur on political grounds by a state or quasi-state actor, there is the ‘second class asylum’ (*‘kleines Asyl’*) for other refugees. The main consequence of this distinction was that persons entitled to ‘first class asylum’ received an unlimited residence permit, whereas persons who must not be deported for reasons qualifying them as refugees under the Geneva Convention received a limited residence permit specially designed for that purpose (the so-called *Aufenthaltsbefugnis*). With a view to the draft EC Directive on minimum standards for the qualification as refugees, already on the table in Brussels, political consensus among the parties in Germany was eventually reached that the distinction between first and second class asylum should be leveled. Under the Residence Act, both kinds of refugees at first receive a (limited, but privileged) Residence Authorization, which after three years is to be replaced by an (unlimited) Establishment Authorization when a mandatory review has verified that the need for protection persists<sup>56</sup>. For all practical purposes, and for the purpose of transposing the qualification Directive 2004/83/EC (in the meantime adopted), the difference between the two sources of refugee status in Germany has become meaningless.

Another change concerns the definition of the concept of refugee. Under the Aliens Act, the Federal Administrative Court held that even for ‘second class asylum’ a danger of persecution attributable to a state, or at least a quasi-state actor, is required<sup>57</sup>. As opposed to the practice of most Geneva Convention state parties, and contrary to the interpretative guidelines of UNHCR, Germany therefore adopted a narrow reading of its obligations under the Convention, which largely prevented civil war refugees and victims of gender-related persecution from refugee status<sup>58</sup>. In order to remedy this situation, and again, with a view to the draft qualification Directive, the legislature amended the law by explicitly stating that actors of persecution may also be non-state actors, and that persecution for reasons of membership of a social group may also be at hand if the threat is of a gender-specific nature (§ 60(1) Residence Act)<sup>59</sup>. It can be thus estimated that the judiciary will have to change its approach, at the latest when the time-line for transposing Directive 2004/83/EC expires on October 10, 2006<sup>60</sup>.

Further changes to German refugee law result from the Dublin regime integrating the 25 EU members, Norway, Iceland, and in the future, Switzerland, into a system of mutual recognition of asylum decisions. Regulation No 343/2003 establishing the criteria and mechanisms for determining the State responsible for examining an asylum application (Dublin II Regula-

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<sup>55</sup> See above, section 2.3.

<sup>56</sup> As to international law’s requirements for withdrawing refugee status, see *R. Marx*, *Widerruf wider das Völkerrecht*, *InfAusLR* 2005, 218.

<sup>57</sup> Federal Administrative Court, in: *Decisions* vol. 95, 42.

<sup>58</sup> See *G. Renner*, *Nichtstaatliche und geschlechtsspezifische Verfolgung*, *AWR-Bulletin* 2004, 47.

<sup>59</sup> See *J. Duchrow*, *Flüchtlingsrecht und Zuwanderungsgesetz unter Berücksichtigung der sog. Qualifikationsrichtlinie*, *ZAR* 2004, 393.

<sup>60</sup> See Administrative High Court Baden-Württemberg, Case A 3 S 358/05, in: *Die Öffentliche Verwaltung* 2005, 747 (duty to interpret in conformity with EU law not yet existing).

tion), which replaced the Dublin Convention of 1990, has had an increasing impact on German law. In 2004, the Federal Office for Migration and Refugees in 6,939 cases called upon another Dublin State to take charge of or take back an asylum seeker, which amounts to 19.5% of new asylum claims in that year. In 3,328 cases, the applicant was in fact transferred to that State. In the same period, 8,581 requests were directed at Germany, and 4,150 persons were actually transferred<sup>61</sup>. Germany most frequently called upon Austria, Sweden, and France, whereas the most frequent calls were received from Sweden, France, and Norway<sup>62</sup>. According to the Federal Office, the increase in Dublin procedures is in particular due to the fact that the ‘Eurodac’ Regulation No 2725/2000 on the collection and comparison of fingerprints of asylum seekers is becoming more and more operative<sup>63</sup>.

With respect to legal issues of how to implement the Dublin system in Germany, a number of open questions remain. It is contested, *e.g.*, whether the ‘safe third country’ exemption can cumulatively be used in a Dublin procedure (§§ 26a(1) and 29(3) Act on Asylum Procedures, respectively). If so – and the Federal Office in fact operates on that assumption – the stricter rule of immediate deportation would apply, preventing the applicant from voluntarily leaving the country, although Art. 9 Dublin II Regulation seems open to this choice<sup>64</sup>. Other legal issues concern the legality of further detention when delays occur in the inter-state communication, and the condition for exercising discretion, under Art. 3(2) Dublin II Regulation, to examine an asylum application even if such examination is not required under the criteria of the Regulation.

Finally, some words should be added to the concept of subsidiary protection as defined in Directive 2004/83/EC (yet to be transposed). § 60 Residence Act mentions different categories of legal barriers to deportation which seem to match the grounds for subsidiary protection as required by Art. 7 of the Directive, namely torture (§ 60, para. 2), death penalty (para. 3), guarantees of the European Convention of Human Rights (para. 5), and a concrete danger of a serious risk for life, personal integrity, or freedom (para. 7)<sup>65</sup>. According to § 25(3) Residence Act, the persons concerned shall, as a rule, receive a Residence Authorization as long as the threat persists. The legal status is weaker than that of recognized refugees, *e.g.*, with respect to labor market access and family reunion. An Establishment Authorization can be granted after seven years, subject to the general requirements for that permit (§ 26(4) Residence Act).

### 3.3.6. *Persons whose deportation is temporarily suspended (so-called toleration)*

The toleration has, albeit somewhat against the spirit of the law, transformed into a residence title of its own<sup>66</sup>. This particularly concerns persons whose application for asylum was re-

<sup>61</sup> Migration und Asyl (note 53), at 39.

<sup>62</sup> *Id.*, at 37.

<sup>63</sup> *Id.*, at 35.

<sup>64</sup> As yet, neither have higher administrative courts spoken on that issue, nor has the ECJ. For a first instance ruling, see Administrative Court Darmstadt, Case 5 E 403/04.A, in: *InfAuslR* 2005, 495 (immediate deportation contradicts EU law).

<sup>65</sup> As to the situation under the Aliens Act, see *K. Hailbronner*, Comparative Legal Study on Subsidiary Protection – Germany, in: Bouteillet-Paquet (ed.), *Subsidiary Protection of Refugees in the European Union*, 2002, 491.

<sup>66</sup> See above, section 3.3.2.

jected but who are nevertheless unwilling or unable to leave the country. There are two routes for issuing a Certification of Toleration, as foreseen in § 60a Residence Act. The Ministers of the Interior of the German *Länder*, individually or collectively, can order a temporary stop of deportations with regard to a group of aliens. For a deportation stop order exceeding six months, the consent of the Federal Minister is needed. In the absence of such an order, a toleration is to be granted by the local Aliens Office if the deportation of an individual is impossible for legal or factual grounds. Legal barriers against deportation may be constituted by human rights law in cases of illness, a serious danger of suicide, or a compelling need to take care for a family member. Factual barriers include unsettled identity, lack of necessary travel documents, or non-cooperation by the country of origin. Non-cooperation on the part of the alien does not preclude him/her from being entitled to a toleration, although it most likely prevents a Residence Authorization from being issued. A tolerated person may be granted access to the labor market after his/her deportation has been suspended for one year through no fault of his/her own, subject to discretionary assent of the Federal Agency for Labor (§§ 10, 11 Employment Procedure Regulation)<sup>67</sup>.

A further innovation of the Residence Act, to be mentioned in this context, is § 23a, which calls upon the *Länder* governments to establish within their respective jurisdiction a so-called hardship case commission (*Härtefallkommission*). This commission shall recommend the grant of a residence permit to a person whose further residence is justified on humanitarian or personal grounds, although the legal requirements for a permit are not met. The final decision of the *Land's* Minister of the Interior is entirely discretionary<sup>68</sup>.

### 3.3.7. Admission of migrant groups on the basis of political discretion

Besides the highly regulated channels of admission under administrative discretion, the Residence Act provides for some instances of admission on purely political grounds. In the absence of an international law obligation, political discretion to admit an alien is typically allocated at the ministerial level and largely preempted from judicial review.

According to § 22 Residence Act, the Federal Minister of the Interior has the power to declare that admitting a particular person from abroad is necessary to protect political interests of the Federal Republic. The Minister's decision is binding on the local Aliens Office. The practical impact of the equivalent provision of the former Aliens Act was low.

The *Länder* Ministers of the Interior possess a comparable power with respect to groups of aliens, to order admission either from abroad or of persons already staying in Germany. § 23(1) Residence Act provides a legal basis for general decisions that define the framework for Residence Authorizations for the protection of political interests of the Federal Republic, or for humanitarian or international law grounds. Such a ministerial order must have the consent of the Federal Minister, so that in practice bipartisan political agreement within the Conference of the Ministers and Senators of the Interior needs to be reached. This clause provides a possible basis for the regularization of successively tolerated persons, and arguably also of

<sup>67</sup> See *J. Zühlcke*, Die Zulassung von geduldeten Ausländern zur Ausübung einer Beschäftigung, ZAR 2005, 317; *H. Leineweber*, Die Beschäftigung von geduldeten Ausländern seit Inkrafttreten des Zuwanderungsgesetzes, InfAuslR 2005, 302.

<sup>68</sup> See *Th. Groß*, Zuwanderung aus humanitären Gründen, ZAR 2005, 61, 65 *et seq.*

illegal immigrants. Its predecessor was used, *e.g.*, with respect to certain persons from Bosnia-Herzegovina and the Federation of Yugoslavia staying in Germany<sup>69</sup>. § 23(1) also replaced the section of the Aliens Act providing for temporary admission of persons fleeing war and civil war situations, which has only been used once for Albanian Kosovo refugees<sup>70</sup>.

The main example of permanent admission on political grounds concerns Jewish emigrants from the territory of the former Soviet Union<sup>71</sup>. German policymakers, in 1991, decided to foster Jewish immigration in order to strengthen the Jewish communities in Germany. It was agreed that the existing Act on Refugees Admitted Under Humanitarian Relief Programs (so-called *Kontingentflüchtlingsgesetz*) should be applied in an analogous fashion, although the beneficiaries are not refugees in the sense of the Geneva Convention<sup>72</sup>. Between 1993 and 2003 some 180,000 Jewish people migrated to Germany under that program.<sup>73</sup> Meanwhile, the Residence Act provides a proper legal basis for this type of immigration policy. According to § 23(2), a ministerial order of admission pursuant to § 23(1) Residence Act may determine that special political interests of the Federal Republic require Establishment Authorizations to be issued even for newly arriving immigrants.

### 3.3.8. Ethnic Germans and their relatives

Another facet of German immigration policy is located within a completely different legal framework. Reacting to the special situation after World War II, the German Constitution of 1949 established, in Art. 116(1) Basic Law, the category of Germans without German nationality (so-called *Statusdeutsche*). This legal concept referred to the millions of refugees and displaced persons of German ethnic origin who were forced to migrate from their homes in what later became the ‘communist bloc’<sup>74</sup>. Their legal status, including the right to be admitted and naturalized, is determined in the Federal Act on Displaced Persons (*Bundesvertriebenengesetz*) and the Nationality Act (*Staatsangehörigkeitsgesetz*), which were both subject to amendments in the recent years.

Of continuing importance as a source of migration is the status of a ‘late resettler’ (*Spätaussiedler*). This status for people of German origin living in particular areas in (South-)Eastern Europe and Central Asia was created in 1993, after Germany had faced increasing immigration of ‘resettlers’ (*Aussiedler*) from these areas in the late 1980s, with peaks of about 380,000 and 400,000 in 1989 and 1990, respectively. Between 1990 and 2003, close to 2.4 million ‘(late) resettlers’ migrated to Germany. With the 1993 amendments the numbers fell, down to 73,000 new arrivals in 2003. Of them, 99% came from successor states of the Soviet Union, in particular the Russian Federation and Kazakhstan<sup>75</sup>.

<sup>69</sup> Hailbronner, Subsidiary Protection (note 65), at 499, 513 and 521 *et seq.*

<sup>70</sup> *Id.*, at 497.

<sup>71</sup> See E. Weizsäcker, Jüdische Migranten im geltenden deutschen Staatsangehörigkeits- und Ausländerrecht, ZAR 2004, 93.

<sup>72</sup> For a critical view, see J. Raabe, Rechtswidrige Verwaltungspraxis bei der Zuwanderung jüdischer Emigranten aus der ehemaligen Sowjetunion?, ZAR 2004, 410.

<sup>73</sup> Migrationsgeschehen (note 1), at 16.

<sup>74</sup> For an overview, see G. Lübke-Wolff, in: Dreier (ed.), Grundgesetz: Kommentar vol. III, comments on Art. 116 Basic Law, para. 11 *et seq.*

<sup>75</sup> All figures taken from: Migrationsgeschehen (note 1), at 15.

In order to be recognized as a ‘late resettler’ and thus as a German in the sense of the Basic Law, applicants must prove that they are facing substantial disadvantages due to their ethnic affiliation, except for persons living within the territory of the former Soviet Union, who basically only have to prove their German origin. Persons born after December 31, 1992, are excluded from recognition. Spouses and descendants have a right to join their sponsor irrespective of their ethnic affiliation, though since 2005 non-German spouses and children have to demonstrate basic German language skills. The person concerned acquires German nationality with a final certification of his/her status after arrival in Germany (§ 7 Nationality Act, as amended in 1999). The same holds true for non-German family members that are included in the recognition proceeding (§ 4(3) Act on Displaced Persons). Since ‘late resettlers’ enjoy full citizen’s rights, the legal position of these migrants hardly differs from domestic Germans. The Federal Constitutional Court, however, upheld temporary restrictions on the right to freely move within German territory, as protected by Art. 11 Basic Law, in order to share, among the units of the state, the financial burden for housing, social assistance, and integration measures<sup>76</sup>. ‘Late resettlers’ and their family members have a right to take part in an integration course program at no charge (§ 9 Act on Displaced Persons)<sup>77</sup>.

### 3.3.9. Undocumented migrants

There is no precise figure as to the number of undocumented aliens in Germany, though estimates range from half a million to over one million<sup>78</sup>. German policymakers have always been very reluctant with respect to regularization programs for illegal immigrants<sup>79</sup>. According to § 95(1) Residence Act, illegal entry to or stay within the German territory constitutes a criminal offence. Aiding and abetting the above is penalized, also for Germans; exceptions for humanitarian motives are not foreseen.

## 4. Guarantees of migrants’ status: graded integration into the German system of social and political rights

### 4.1. Sources of fundamental rights guarantees for migrants

German public law is to a large degree shaped by the fundamental rights as they are guaranteed in the Basic Law. Therefore, differential treatment of, or legal regimes specially designed for, aliens are particularly likely in areas where the Basic Law does not provide for equal protection of everyone within its ambit. In contrast to guarantees such as freedom of religion, freedom of speech, access to justice, or right to property, certain fundamental rights are exclusively for Germans. These rights of citizens include freedom of assembly (Art. 8(1) Basic Law), freedom of association (Art. 9(1)), freedom of movement within the German territory (Art. 11(1)), freedom of occupation (Art. 12(1)), and protection from extradition (Art. 16(2)).

<sup>76</sup> *Bundesverfassungsgericht*, Case 1 BvR 1266/00, in: *Neue Zeitschrift für Verwaltungsrecht* 2005, 797.

<sup>77</sup> On these courses, see below, section 4.3.

<sup>78</sup> *K. Schönwälder, D. Vogel and G. Sciortino*, Migration und Illegalität in Deutschland: AKI Forschungsbilanz 1, 2004, at 27, available at [http://www.wz-berlin.de/zkd/aki/files/aki\\_illegalitaetsbericht.pdf](http://www.wz-berlin.de/zkd/aki/files/aki_illegalitaetsbericht.pdf); *J. Alt*, *Illegal in Deutschland*, 1999, 50.

<sup>79</sup> See *K. Hailbronner*, *The Regularisation of Illegal Immigrants in Germany*, in: de Bruycker (ed.), *Les régularisations des étrangers illégaux dans L’Union européenne*, 2000, 251.

In these respects, aliens only enjoy the weaker protection of Art. 2(1) Basic Law, which stipulates a subsidiary right that protects the free development of one's personality and thereby prohibits arbitrary treatment by a public authority. Additional human rights protection follows from provisions of the ECHR. In the context of citizen's rights, one can also cite the right to vote and stand as a candidate in elections at the different levels of the German state. The equal treatment clauses of Art. 3 Basic Law do not contain a prohibition of discriminations on grounds of nationality, although other grounds such as 'race' or 'descent', as well as the general 'equality before the law' clause, may come into play in some situations.

As a matter of principle, 'illegal persons' are entitled to basic rights as guaranteed by the German Constitution and international human rights law as well. Access to a court for enforcing these rights is, in reality, almost always precluded.

#### 4.2. *Restrictions to political and social rights*

As previously noted, the rights of citizens reveal those fields in which aliens are accorded special treatment. The freedom of occupation, which in the present context relates to the question of access to the labor market, is dealt with in a separate section<sup>80</sup>. The right to remain in the country under almost all circumstances, a right which is not guaranteed to aliens and which constitutes a fundamental difference between citizens and aliens, is the subject of the final section<sup>81</sup>.

##### 4.2.1. *Political rights*

With regard to political rights, one should highlight the fact that aliens are entirely precluded from taking part in elections. In two remarkable judgments, the Federal Constitutional Court held that "the people", referred to in Art. 20(2) Basic Law as the sole source of public power, comprises only Germans in the sense of Art. 116 Basic Law. The *Länder* legislatures are thus prevented from extending to aliens the right to vote or stand as a candidate in local elections<sup>82</sup>. The exception to this rule is Union citizens. According to the explicit provision of Art. 28(1) Basic Law, Union citizens are eligible to vote and be elected in county and municipal elections.

With respect to the rights to freely assemble and associate, the federal legislature has only cautiously made use of the authorization to impose specific restrictions on aliens. As a general rule, aliens possess these rights under the same conditions as Germans. A special registration procedure applies to an association, though, if the majority of its members are aliens. The rules for 'alien associations' have recently been tightened in the context of anti-Islamist measures. Henceforth, an 'alien association' whose political aims contradict the German Constitution is not immune from being banned by relying on privileged protection for religious activities – a privilege that is still in force for German religious associations<sup>83</sup>. In addition, an

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<sup>80</sup> See below, section 5.

<sup>81</sup> See below, section 6.

<sup>82</sup> Federal Constitutional Court, in: Decisions vol. 83, 37, and vol. 83, 60.

<sup>83</sup> The Federal Constitutional Court upheld this differentiation, Case 1 BvR 536/03 (Verbot des 'Kalifatsstaats'), in: Neue Juristische Wochenschrift 2004, 47.

alien's political activity can be restricted on the basis of an individual decision by the Aliens Office (§ 47 Residence Act).

#### 4.2.2. Freedom of movement

The Residence Act and the Act on Asylum Procedures provide for several limitations as to moving within Germany. For people holding a Residence Authorization, the obligation to reside within a particular district or regional state can be imposed at any time if this decision is justified by a legitimate aim and withstands a proportionality test (§ 12(2) Residence Act). Territorial restrictions are exceedingly strict *vis-à-vis* persons who are only tolerated or asylum seekers. According to § 61(1) Residence Act, an alien whose obligation to leave has been determined must reside within the territory of a particular regional state; further restrictions are possible. The territorial scope of a Residence Leave for asylum seekers is *per se* limited to the district of the responsible Aliens Office (§ 56(1) Act on Asylum Procedures). Administrative fines can be imposed if the asylum seeker leaves this district without prior authorization. This German practice is enabled by Art. 7 of Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers.

#### 4.2.3. Access to the welfare system

The issue of alien's access to Germany's systems of social security is all-too complex to be dealt with in this report. Some remarks have to suffice. Major parts of the German welfare state are based on mandatory contributions to social insurance systems. They operate on a non-discriminatory basis as to the nationality of the insured person. Problems particular to aliens arise from the fact that these systems are connected to employment, so that legal barriers as to labor market access also pertain to social security<sup>84</sup>. Other social benefits, however, are non-contributory (*i.e.*, tax-based), such as various family benefits, grants for vocational training, or the basic social assistance. Here the question regularly arises as to whether and under which conditions aliens are entitled to benefits. The relevant laws distinguish between different categories of aliens, according to their legal status under the Residence Act or the Freedom of Movement Act. The Federal Constitutional Court held, however, that excluding certain migrants from Child Allowance (*Kindergeld*) and Child-Raising Allowance (*Erziehungsgeld*) solely on the basis of their residence permit violates the equal treatment clause of the Constitution. A particular permit may not, according to the Court, sufficiently reveal whether an alien will only reside on a temporary basis or not. Moreover, the Court held that deterring unwanted migrants from entering the country is, in itself, not a justification for the unequal treatment of residing aliens<sup>85</sup>. A separate system of social assistance is foreseen for asylum seekers, tolerated persons, and certain aliens holding a Residence Authorization granted for humanitarian grounds – the Act on Benefits for Asylum Seekers. For a period of up to 36 months, these temporarily admitted aliens are barred from access to the regular system of social assistance.

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<sup>84</sup> See below, section 5.1.

<sup>85</sup> Federal Constitutional Court, Case 1 BvL 4/97 et al. (*Kindergeld*), in: *Neue Zeitschrift für Verwaltungsrecht* 2005, 201. The European Court of Human Rights drew the same conclusions from Art. 8 and 14 ECHR, see ECtHR, *Okpizsh v Germany*, Appl. No 59140/00 (Judgment of October 25, 2005, nyr).

#### 4.3. *The new integration policy*

The *Zuwanderungsgesetz* added a new facet to German migration law by introducing a section on ‘promotion of integration’ (§§ 43–45 Residence Act). Henceforth, the economic, cultural, and social integration of aliens who are going to reside in Germany on a continuing basis shall be promoted. The main tool for achieving this aim is the integration course program, conducted under the authority of the Federal Office for Migration and Refugees<sup>86</sup>. An integration course is offered to newly arriving aliens or ‘late resettlers’, which consists of a language course and an ‘orientation course’. The latter is supposed to provide knowledge about Germany’s legal order, culture, and history (§ 43 Residence Act). The details are subject to a federal executive order (*Integrationskursverordnung*). According to this regulation, one course comprises 630 lessons (600 language, 30 ‘orientation’). A participation fee of 1 Euro per lesson is levied.

In legal terms, the integration course program is a double-edged instrument<sup>87</sup>. On the one hand, it is an *entitlement* to participate for aliens who had been admitted for employment purposes (except for high-skilled workers), for the purpose of family reunification, on political grounds according to § 23(2) Residence Act, or as recognized refugees. The right to participate does not extend to, *inter alia*, Union citizens and their family members, aliens who are admitted on a temporary basis, minors who attend a German school, and persons who demonstrate sufficient language or social skills (§ 44 Residence Act). On the other hand, participation in an integration course program is *obligatory* for those entitled to participation, unless he/she has the ability to communicate in German, at least in a simple manner. Participation is also mandatory on the basis of an individual decision by the Aliens Office if a ‘particular need for integration’ is detected (§ 44a Residence Act). An alien who does not fulfill his/her obligation may be at a disadvantage with respect to his/her future legal status. According to § 8(3) Residence Act, the Aliens Office shall take this fact into account when the alien applies for a discretionary renewal of his/her Residence Authorization. Moreover, in order to be entitled to naturalization an alien must, among other prerequisites, have been a legal resident for a minimum of eight years. This threshold is lowered to seven years if a certificate proves his/her successful participation in an integration course (§ 10(3) Nationality Act).

### 5. *The migrant and the employer: immigration policy from a labor market perspective*

#### 5.1. *Alien’s access to the labor market: involvement of the Federal Agency for Labor*

Access of alien workers to the German labor market has expanded slightly with the recent implementation of the *Zuwanderungsgesetz*. The new law constitutes a modification on the virtual ban on recruitment of foreign labor that had been in place since 1973, in particular with respect to high-skilled workers. The Residence Act now explicitly provides for the entry of aliens into the labor market to address the demands of the market and to reduce unemployment within Germany in an effective manner (§ 18(1)). However, in reality, access con-

<sup>86</sup> For an overview, see *Ch. Hauschild*, Die Integrationskurse des Bundes, ZAR 2005, 56.

<sup>87</sup> For a skeptical view, see *B. Huber*, Die geplante ausländerrechtliche Pflicht zur Teilnahme an Integrationskursen, ZAR 2004, 86.

tinues to be limited and highly regulated, and the extent to which the new law will satisfy future economic demands remains questionable.

Pursuant to § 4(2) Residence Act an alien must not take up an employment unless provided for by his/her residence permit. Some permits allow for unrestricted access to employment, such as a Residence Authorization granted for family reunion with a German (§ 28(5) Residence Act), or any kind of Establishment Authorization (§ 9(1) Residence Act). In other cases, the local Aliens Office decides on the scope of permission when issuing the individual residence permit. An authorization of employment may be (and often is) limited in time and to a particular employer, occupation, or district.

A grant of access to the labor market regularly requires the assent of the Federal Agency for Labor, unless the Residence Act itself or an executive rule eliminates this requirement as to particular occupations, residence purposes, or nationals<sup>88</sup>. According to § 39 Residence Act, the Federal Agency's consent is based on a determination that the employment will not have a negative impact on the German labor market and that no privileged employees are available for the position. Privileged persons are Germans and aliens with an unrestricted right to employment, such as Union citizens from the old Member States, EEA, Maltese, Cypriote or Swiss nationals, or Turkish nationals benefiting from Decision No 1/80<sup>89</sup>. Alternatively, an assessment of the market segment concerned may lead to the conclusion that the employment is economically and politically acceptable. In all cases, the Federal Agency's assent is based on an employer guarantee that employment conditions are comparable to those provided to German nationals. Pursuant to executive rule however, certain types of employment do not require consent due to the fact that they will unlikely have a negative impact on the labor market or the employment opportunities of privileged employees<sup>90</sup>. Examples of these types of employment include: mandatory internships in the context of academic learning; some executives and managers; professors, academics and teachers; renowned artists and athletes, etc. The number of employment permits<sup>91</sup> issued since 2000 has continued to decrease (2000: 1,083,268; 2001: 1,054,526; 2002: 945,073; 2003: 886,386), mainly due to the rise in unemployment. A total of 873,470 employer requests for foreign workers were approved in 2004, although in some cases the same individual could have come to Germany several times, as with the seasonal worker program<sup>92</sup>. Only 14% of the permits were not contingent on the market and, therefore, unrestricted as to employment<sup>93</sup>.

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<sup>88</sup> See above, sections 3.2. and 3.3.4.

<sup>89</sup> EU nationals from the new Member States other than Malta or Cyprus enjoy second-range privileged access to the German labor market, in accordance with the transitional arrangements in the Act of Accession (see § 39(6) Residence Act). For these Union citizens, a system of issuing employment permits is still in force.

<sup>90</sup> See §§ 1–16 Employment Regulation; §§ 1–4 Employment Procedure Regulation.

<sup>91</sup> Before 2005, there was a two-fold application process, in which the applicant submitted separate applications to two government agencies for a residence permit and an employment permit. The two-fold process was recently replaced with a single internal process ('one-stop-government').

<sup>92</sup> See above, section 3.3.4.

<sup>93</sup> All figures taken from *Bundesagentur für Arbeit, Arbeitsmarkt 2004: Amtliche Nachrichten der Bundesagentur für Arbeit*, 53. Jahrgang, Sondernummer (August 30, 2005), at 33; available at [http://www.pub.arbeitsamt.de/hst/services/statistik/000100/html/jahr/arbeitsmarkt\\_2004\\_gesamt.pdf](http://www.pub.arbeitsamt.de/hst/services/statistik/000100/html/jahr/arbeitsmarkt_2004_gesamt.pdf)

### 5.2. *The employers' stance on future immigration policy*

Throughout the recent debate on immigration reform, employer groups advocated for a more permanent system of migration for employment purposes in order to more effectively address Germany's economic difficulties and labor shortages<sup>94</sup>. One model adopted in an early draft of the Residence Act provided for a selection process based on a point system, similar to systems in Canada and Australia, in which a specified number of qualified workers based on criteria such as age, health, education, familial status, country of origin, language capacity and ties to Germany, would be admitted irrespective of the availability of a specific position in Germany. This system, however, was not incorporated into the final legislation. Moreover, employer advocates have stressed the need to expand recruitment programs, such as Germany's 'green card' program for IT specialists, to other industry areas with labor shortages<sup>95</sup>. In addition, they have emphasized the need to improve integration policies so that Germany can attract foreign talent away from other immigration countries<sup>96</sup>.

A further concern involves the capacity of the Federal Agency for Labor to evaluate aptly the needs of the labor market and as a result, to provide proper consent or not with regard to individual applications. The task of the Federal Agency in this matter is significant and could threaten it with overload, thereby risking the issuance of bureaucratic, inaccurate decisions<sup>97</sup>.

### 5.3. *Undocumented migrants and the issue of illegal employment*

The above regulations reveal the highly regulated nature of aliens' entry into the German labor market. Some experts attribute the restrictive nature of the German labor market, in which entry is primarily based on contemporary market indicators and often only temporary, to producing a substantial number of undocumented migrants since many overstay their temporary visas<sup>98</sup>.

In the 1990s, Germany expanded the availability of restricted residency and work authorization for seasonal work and contract work, in reaction to the increase of unauthorized employment and the increase in the undocumented population from Eastern Europe in the agricultural sphere, in the hotel and restaurant industry, and in construction<sup>99</sup>. With the opportunity to employ workers legally, it was thought that industries would have the incentive to forego hiring undocumented workers and to pay taxes and social benefits on the employment<sup>100</sup>. In

<sup>94</sup> *Bundesverband der Deutschen Industrie*, Die 8 BDI Thesen zur Zuwanderungspolitik, 2001; *H.-O. Henkel*, Die Steuerung der Zuwanderung durch ein Zuwanderungsgesetz aus bevölkerungs- und wirtschaftspolitischer Sicht, ZAR 2003, 124.

<sup>95</sup> BDI Thesen zur Zuwanderungspolitik (note 94).

<sup>96</sup> Id.

<sup>97</sup> *K.F. Zimmermann and H. Hinte*, Zuwanderung und Arbeitsmarkt: Deutschland und Dänemark im Vergleich, 2005, 236.

<sup>98</sup> It is estimated, however, that only 13% of unlawful employment in Germany is engaged in by aliens. As a result, most infractions of unlawful employment involve Germany citizens: *Beauftragte der Bundesregierung für Migration, Flüchtlinge und Integration*, Bericht über die Lage der Ausländerinnen und Ausländer in Deutschland, 2005, 75.

<sup>99</sup> *Ph. Martin*, *Bordering on Control: Combating Irregular Migration in North America and Europe*, 2003, 51 et seq.

<sup>100</sup> See *Beauftragte der Bundesregierung für Migration, Flüchtlinge und Integration*, Migrationsbericht 2003, at 52 et seq.; available at [http://www.integrationsbeauftragte.de/download/Migrationsbericht\\_2003.pdf](http://www.integrationsbeauftragte.de/download/Migrationsbericht_2003.pdf).

addition, in 2002, employment authorizations were made available to caretakers in private households, and private households were entitled to tax benefits for their employees in order to decrease the cost difference between legal and illegal employment.

On the other hand, a variety of controls exist that are designed to prevent the entry of unauthorized employees into the labor market<sup>101</sup>. Employers who hire unauthorized aliens face substantial sanctions, including monetary fines and imprisonment terms. Raids are also common as a result of tips received from the public (competitive businesses, neighbors, unions, those legally employed) or from other agencies. If detected in a position of unauthorized employment, the undocumented are most likely subject to detention, criminal charges for illegal stay, and deportation.

#### 6. *State protective measures: graded protection against expulsion*

Hardly any other part of German migration law is as complex as the rules on the termination of residence. This report can only give a roughly-textured review.

##### 6.1. *Expulsion and deportation decisions in German law*

According to general administrative law, one can distinguish between decisions imposing an obligation to act – that is, in the given context: the obligation to leave –, and their execution, that is, measures taken to enforce compliance<sup>102</sup>. The main type of a decision imposing the obligation to leave is the expulsion (*Ausweisung*), which is tantamount to a withdrawal of an existing residence permit. In the case of an asylum seeker, the temporary Residence Leave is automatically invalidated when the application is refused, so that the obligation to leave arises without a separate decision. The same holds true for persons who never held a valid residence permit, or whose permit has expired. The main enforcement measures are the threat of deportation (*Abschiebungsandrohung*) which fixes the ultimate date for leaving and can be combined with the expulsion, and the deportation (*Abschiebung*) itself, that is, the forced removal from the territory. As a rule, a threat of deportation must be issued prior to a deportation (even though the person might not be able to comply, *e.g.*, while being imprisoned). In cases such as illegal border-crossing, however, immediate deportation is provided. Once an expulsion decision has become definitive and the time-limit for leaving has expired, the decision to deport is not discretionary. If deportation is impossible for legal or factual grounds, the person is temporarily tolerated. According to § 11 Residence Act, an expelled or deported person must not return to Germany, at least not until the ban has been lifted.

The Residence Act maintained a particularity of German migration law, namely, that under certain conditions the Aliens Offices have no discretion as to issuing an expulsion decision. §§ 53–55 Residence Act distinguishes between mandatory expulsion (*zwingende Ausweisung*), expulsion as a rule (*Ausweisung im Regelfall*), and discretionary expulsion (*Ermessensausweisung*). A discretionary expulsion can be founded on a wide range of public policy

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<sup>101</sup> For a comparative perspective, see A. Díaz-Pedrosa, A Tale of Competing Policies: The Creation of Havens for Illegal Immigrants and the Black Market Economy in the European Union, 37 Cornell International Law Journal (2004), 431, 474 *et seq.*

<sup>102</sup> For a review on the new law, see H. Jakober, Auf der Suche nach Änderungen im Bereich Aufenthaltsbeendigung und Ausweisung durch das Zuwanderungsgesetz, InfAusIR 2005, 97.

concerns, which have to be balanced with other considerations such as the duration of stay and social ties to Germany. There is no room for such weighing of interests with respect to the other two types of expulsion. According to § 53 Residence Act, an alien is to be expelled when sentenced to a term of imprisonment of three years or more (the threshold is lower for certain offences, such as drug-related crimes, breach of the public peace, or organized migrant smuggling). § 54 Residence Act delineates conditions under which expulsion is mandatory unless an atypical case is at hand. The grounds for ‘expulsion as a rule’ include any term of imprisonment without parole, a sentence for organized migrant smuggling, having committed a drug-related crime or having breached the public peace (a sentence is not required), and being engaged, or having been engaged, in terrorist activities (a fact-based suspicion is sufficient).

To a certain extent, the inflexibility of these rules is mitigated by way of § 56 Residence Act, which provides for special protection against expulsion. Special protection is granted to recognized refugees (§ 56(1), No 5), to spouses or registered partners of Germans (No 4), and to some categories of aliens after five years of legal residence. The latter consist of persons holding an Establishment Authorization (No 1), persons holding a Residence Authorization who entered as a minor or were born in the country (No 2), and persons holding a Residence Authorization who are the spouse or the registered partner of an alien referred to in No 1 or No 2 (No 3). In these cases, “serious grounds” (*schwerwiegende Gründe*) of public policy must be raised in order to issue an expulsion decision. If grounds for mandatory expulsion are at hand, the person concerned shall as a rule be expelled; if the requirements for ‘expulsion as a rule’ are met, the decision shall be on a discretionary basis. Even higher hurdles are foreseen for minors holding a valid residence permit, and for adolescents (18 to 21 years) who grew up in the country and hold an Establishment Authorization. According to § 56(2) Residence Act, expulsion of these aliens is at any rate discretionary. In sum, German law provides for instances of protection from expulsion for persons with close links to Germany, but this is not an automatic result of any particular type of residence permit. In that event, the law is more open for the particularities of the individual case, including its human rights aspects.

## 6.2. *Supranational and international sources for protection against expulsion*

However, German expulsion policy had some difficulties in complying with international and EU law requirements whenever national law does not provide for the exercise of discretion and thus a proper proportionality test.

A ‘classical’ type of protection is foreseen in international treaty law on the basis of reciprocity. This concerns, in particular, the Council of Europe’s ‘Convention on Establishment’ of 1955, which requires that a national of a contracting state who has been lawfully residing for more than ten years enjoys special protection against expulsion. German courts held that in this case the “serious grounds of public policy” clause (now § 56(1) Residence Act) applies and expulsion shall be discretionary<sup>103</sup>.

More complicated are constellations for which international law establishes an absolute ban on forced return, as is the case, *e.g.*, with Art. 3 of the UN Convention against Torture and

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<sup>103</sup> Federal Administrative Court, in: Decisions vol. 101, 247, at 260 *et seq.*

Art. 3 ECHR, which both require that no person shall be returned to a state where he/she would be in danger of being subjected to torture. When German law demands mandatory expulsion, these obligations can only be complied with by suspending the deportation of the expelled, that is, at the enforcement stage of the administrative procedure. It seems somewhat contradictory that one chapter of German migration law states a duty which another chapter prevents from becoming effective. Moreover, according to the case-law of the European Court of Human Rights, the removal of an alien may give rise to issues under Art. 8 ECHR and thus require a balancing of interests in accordance with Art. 8(2) ECHR,<sup>104</sup> which is not always possible under German expulsion law.

Finally, a grave conflict resulted from the German policy of expelling (and in fact deporting) Union citizens and Turkish nationals benefiting from equivalent protection under the Ankara Agreement. It is settled case-law of the European Court of Justice that expulsion of a Union citizen for grounds of public policy must be based exclusively on the personal conduct of the individual concerned. The existence of a previous criminal conviction can justify an expulsion only in so far as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present and sufficiently serious threat to a requirement of public policy which affects one of the fundamental interests of society<sup>105</sup>. Consequentially, the ECJ held that the German system where the expulsion automatically follows a criminal conviction is not in line with EU law<sup>106</sup>. In August 2004, the Federal Administrative Court intervened by declaring that henceforth expulsion of Union citizens, or Turkish nationals benefiting from Art. 6 or 7 of Decision No 1/80, is only available through a discretionary decision. In addition, such a decision is subject to repeal until it becomes definitive, should a change in circumstances require a new prognosis as to whether there is a ‘present threat’<sup>107</sup>. The Freedom of Movement Act eventually remedied the situation by removing Union citizens from the scope of the Residence Act’s provision on expulsion. Under the new law, the termination of residence of a person entitled to the freedom of movement is only possible in compliance with the said requirements of EU law (§ 6 Freedom of Movement Act)<sup>108</sup>. With respect to privileged Turkish nationals, however, German law is still silent as to equivalent protection. Whenever special protection from expulsion does not already follow from national law, the need for a discretionary decision, which gives full weight to the EU law-based rights involved, results from the primacy of EU law, rendering §§ 53 and 54 Residence Act inapplicable<sup>109</sup>.

In the years to come, yet another layer of supranational protection against expulsion will follow from the implementation of Directive 2003/109/EC concerning the status of third-country

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<sup>104</sup> See, *inter alia*, ECtHR, *Abdulaziz, Cabales and Balandali v. the United Kingdom*, [1985] Series A No 94; *Nasri v. France*, [1995] Series A No 320-B, para. 34 *et seq.*

<sup>105</sup> ECJ, Case 30/77, *Bouchereau*, [1977] ECR 1999, para. 35; Case C-348/96, *Calfa*, [1999] ECR I-11, para. 22 *et seq.*

<sup>106</sup> ECJ, Joined Cases C-482/01 and C-493/01, *Orfanopoulos*, [2004] ECR I-5257, para. 71.

<sup>107</sup> Federal Administrative Court, Cases 1 C 29.02 and 1 C 30.02, in: *InfAuslR* 2005, 18 and 26.

<sup>108</sup> As to the impact of Directive 2004/38/EC, see *K. Hailbronner*, *Die Unionsbürgerrichtlinie und der ordre public*, *ZAR* 2004, 299, 302 *et seq.*

<sup>109</sup> For a summary of the current legal situation, see *H. Dörig*, *Erhöhter Ausweisungsschutz für türkische Staatsangehörige*, *Deutsches Verwaltungsblatt* 2005, 1221.

nationals who are long-term residents<sup>110</sup>. According to its Art. 12, Member States may take a decision to expel a long-term resident solely where he/she constitutes an actual and sufficiently serious threat to public policy or public security. A decision to expel must not be founded on economic considerations and shall consider factors such as the duration of stay, the age of the person concerned, and links with the country of residence or the absence of links with the country of origin. These requirements are modeled after the case-law of the Human Rights Court in Strasbourg, though in future the Court of Justice in Luxembourg will give the binding interpretation as to their content.

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<sup>110</sup> See *Ch. Hauschild*, Neues europäisches Einwanderungsrecht: Das Daueraufenthaltsrecht von Drittstaatsangehörigen, ZAR 2003, 350.