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The granting of non-EU harmonised protection statuses in Germany: research study II/2009 in the framework of the European Migration Network (EMN)

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Veröffentlichungsversion / Published Version
Arbeitspapier / working paper

Empfohlene Zitierung / Suggested Citation:
Parusel, B. (2010). *The granting of non-EU harmonised protection statuses in Germany: research study II/2009 in the framework of the European Migration Network (EMN).* (Working Paper / Bundesamt für Migration und Flüchtlinge (BAMF) Forschungszentrum Migration, Integration und Asyl (FZ), 30). Nürnberg: Bundesamt für Migration und Flüchtlinge (BAMF) Forschungszentrum Migration, Integration und Asyl (FZ); Bundesamt für Migration und Flüchtlinge (BAMF) Nationale Kontaktstelle für das Europäische Migrationsnetzwerk (EMN). https://nbn-resolving.org/urn:nbn:de:0168-ssoar-67800-6

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for Migration
and Refugees

The Granting of Non-EU Harmonised Protection Statuses in Germany

Research Study II/2009 in the framework of the European Migration Network (EMN)

Working Paper 30

German National
EMN Contact Point and
Research Section of
the Federal Office

published 2010

Project financed by the European Commission

Bernd Parusel

The Granting of Non-EU Harmonised Protection Statuses in Germany

Research Study II/2009 in the framework of the European Migration Network (EMN)

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List of abbreviations

§	Section (of a legal act)
Art.	Article (of a legal act)
AufenthG	German Residence Act *(Aufenthaltsgesetz)*
AuslG	Former German Foreigners Act *(Ausländergesetz)*
AsylVfG	German Asylum Procedure Act *(Asylverfahrensgesetz)*
AVwV-AufenthG	General Administrative Regulation relating to the Residence Act *(Allgemeine Verwaltungsvorschrift zum Aufenthaltsgesetz)*
AZR	Central Register of Foreign Nationals *(Ausländerzentralregister)*
BAMF	Federal Office for Migration and Refugees *(Bundesamt für Migration und Flüchtlinge)*
BMI	Federal Ministry of the Interior *(Bundesministerium des Innern)*
BVerwG	Federal Administrative Court *(Bundesverwaltungsgericht)*
BVerfG	Federal Constitutional Court *(Bundesverfassungsgericht)*
CDU	Christian Democratic Union
CSU	Christian Social Union
Cf.	confer
COM	Commission of the European Communities
Doc.-No.	Document number
EC	European Community / Communities
EMN	European Migration Network
ECHR / EMRK	European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (*Europäische Menschenrechtskonvention)*
EU	European Union
FDP	Free Democratic Party
GRC	Geneva Refugee Convention of 28 July 1951 (United Nations Convention Relating to the Status of Refugees)
GG	German Basic Constitutional Law *(Grundgesetz für die Bundesrepublik Deutschland)*
IMK	Standing Conference of Ministers and Senators of the Interior of the Federal German Länder *(Ständige Konferenz der Innenminister- und Senatoren der Länder)*
No.	Number
PICUM	Platform for International Cooperation on Undocumented Migrants
RP	Residence Permit *(Aufenthaltserlaubnis)*
Rs.	Legal proceedings *(Rechtsache)*
SP	Settlement Permit *(Niederlassungserlaubnis)*
Statistics-Regulation	Regulation (EC) No 862/2007 of the European Parliament and of the Council of 11 July 2007 on Community statistics on migration and international protection
StGB	German Criminal Code *(Strafgesetzbuch)*
UNHCR	United Nations High Commissioner for Refugees

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Summary

The present study, which was compiled within the framework of the work programme for 2009 of the European Migration Network (EMN), concerns itself with the granting of protection to third-country nationals within Germany. Taken in conjunction with the national studies that are being carried out within the other EU Member States, the intention is for it to contribute to an improvement in the situation as regards awareness in respect of the granting of protection within Europe. In particular, clarification is to be provided in respect of the extent to which protection on the basis of European law is being granted within individual states, and in respect of which national forms of protection are also being applied in addition to this. Since it is intended to revise some significant EU regulations during the course of 2010 and thereafter – such as, for example, the so-called "Qualification Directive" – the study is also intended to help clarify to the political decision-makers the extent to which further regulation might be needed at an EU level.

In Germany, the reception of asylum applicants and other persons in search of protection has, since 2005, been influenced heavily by European Law. Following the coming into force of the Immigration Act (Zuwanderungsgesetz) on 1 January 2005, which had already introduced significant changes with the fact that non-state parties engaged in persecution were to be taken into account when evaluating the recognition of a person as a refugee, a further significant step in the direction of a common European asylum system was taken in the form of the Directives Implementation Act (Richtlinienumsetzungsgesetz), which came into force on 28 August 2007. In particular, the evaluation and determination of refugee status with the help of the Geneva Convention on Refugees, plus the lion's share of "subsidiary protection", will from now on be oriented towards EU law. Furthermore, the (temporary) granting of residence to victims of trafficking in human beings in accordance with Section 25, Paragraph 4a of the Residence Act (Aufenthaltsgesetz) will also be based upon an EU directive.

In addition to the above, however, the Aufenthaltsgesetz (AufenthG) has at its disposal a multiplicity of national regulations for the granting of residence under international law or for humanitarian or political reasons, all of which should also be considered to be "forms of protection". These are:

- admission from abroad (§ 22, AufenthG);
- the granting of residence by the supreme Länder authorities (§ 23, Paragraph 1, AufenthG);
- admission by the German Federal Authorities when special political interests apply (§ 23, Paragraph 2, AufenthG);
- the granting of residence in cases of hardship (§ 23a, AufenthG);
- residence for humanitarian reasons for persons entitled to asylum (§ 25, Paragraph 1 of the AufenthG in conjunction with Article 16a, Paragraph 1 of the German Basic Constitutional Law);
- residence for persons entitled to subsidiary protection (§ 25, Paragraph 3 in conjunction with § 60, Paragraps 5 and 7, Sentence 1, AufenthG);

- temporary residence (§ 25, Paragraph 4, AufenthG);
- residence for persons who are subject to an enforceable obligation to leave the country (§ 25, Paragraph 5, AufenthG);
- the temporary suspension of a removal ("Duldung" in accordance with § 60a, AufenthG).
- the granting of residence within the framework of the regulations governing old cases ("Altfallregelung" in accordance with § 104a and § 104b, AufenthG);

Today, as regards the forms of protection that are a component part of the asylum procedure, European legal bases have a far greater significance than national law. During 2008, the Federal Office for Migration and Refugees reached decisions concerning a total of 20,817 applications for asylum. In 33.9 percent of these cases, refugee status was awarded in accordance with § 60, Paragraph 1, AufenthG, which is by now oriented towards EU law. In contrast, only 1.1 precent of the decisions taken saw third-country nationals recognised in accordance with national law as persons entitled to asylum. In 2.7 percent of the decisions taken, the presence of a prohibition on deportation in accordance with § 60, Paragraphs 2, 3, 5 or 7, AufenthG (subsidiary protection) was determined. These prohibitions on deportation are oriented partly towards European law and partly towards national law. Seen from a statistical viewpoint, the national prohibitions on deportation are of greater relevance than those reached under European law. There is, however, a recognisable tendency towards an increasing significance of prohibitions on deportation reached under European law.

Although Europeanisation is taking place to a noticeable degree, the existing national forms of protection do continue to serve important functions. In this context, particular emphasis should be placed upon various forms in which residence may be granted to persons who, despite not actually having been persecuted, cannot be deported for reasons of illness. These forms include subsidiary protection in accordance with § 25, Paragraph 3 in conjunction with § 60, Paragraph 7, Sentence 1, temporary residence in accordance with § 25, Paragraph 4 or the granting of residence in the case of foreigners who are subject to an enforceable obligation to leave the country in accordance with § 25, Paragraph 5, AufenthG. Other national forms of protection, such as the regulations governing old cases under § 104a and § 104b or the regulation governing cases of hardship under § 23a, AufenthG, are likewise of considerable significance, since under certain conditions, they provide third-country nationals who might not have any claim to a right of residence in Germany, but who would not be willing to depart voluntarily and/or who cannot be deported, with possibilities for remaining in the country legally.

Amongst the professional community in this sector, the fact that significant portions of the granting of protection in Germany have by now been "europeanised" has by and large met with a positive reception. It is not generally disputed that thanks to the Immigration Act and the Directives Implementation Act, considerable improvements have been achieved in the field of protection for refugees. Since 2007 a positive development has been discernible within Germany in terms of the overall quota of asylum applicants granted protection – that is to say, in the proportion of asylum applicants who have been recognised as persons entitled to asylum, or who have been awarded refugee status and/or subsidiary protection. During the second quarter of 2009 this quota was around 40 percent – higher than

in any other state within the EU. Alongside other influences, this development in terms of protection can also be attributed to the impletation of the EU Qualification Directive within Germany. There have, however, been occasional criticisms to the effect that European law relating to asylum and migration has up to now been lacking in coherence: in the opinion of the German Federal Ministry of the Interior, for example, on the one hand EU law continues to contain loopholes, while on the other hand, EU regulations have, in certain areas, led to wide-ranging special regulations that are not sufficiently coordinated with each other.

In respect of the national regulations that continue to exist alongside the granting of protection on the basis of European law, suggestions have been made repeatedly amongst the German professional community for reforms and/or enhancements. This applies, for example, in respect of the political objective of avoiding so-called "Kettenduldungen" (the issuing and subsequent extension of an exceptional leave to remain, "Duldung", over a longer period of time), which has not yet been fully realised. There have also been suggestions that a permanent resettlement programme should be set up following the decision at the end of 2008 to grant Iraqi refugees from Syria and Jordan permanent residence in Germany, and/or that the protection accorded to victims of forced marriages under the law relating to residence should be improved.

Overall, however, it is not disputed that national practices of granting protection must continue to exist alongside the opportunities for protection granted on the basis of European law. This study, too, reaches the conclusion that national forms of protection in Germany are not in competition with European regulations – rather, that they constitute a sensible element to complement them, thus contributing to an effective system of protection.

1 Introduction

1.1 Background and objectives of this study

Since 2005, the admission into Germany of asylum applicants and those seeking protection has been heavily influenced by the implementation of EU directives and regulations within German law. Following the coming into force on 1 January 2005 of the Immigration Act, which already introduced striking changes with the fact that non-state parties engaged in persecution were to be taken into account when evaluating the recognition of refugees, the implementation of the EU's so-called "Qualification Directive" within national law constitutes a significant step in the direction of a common European asylum system.

Within the framework of the term "international protection", the Qualification Directive encompasses recognition of, and the content, of refugee status[1] on the basis of the Geneva Convention on Refugees (GRC)[2], together with forms of "subsidiary protection". Subsidiary protection may be awarded to third-country national or stateless persons who do not fulfil the qualifications for recognition as refugees but who have put forward substantive reasons for proceeding on the assumption that they would, upon returning to their respective countries of origin, be at risk of suffering serious harm such as the imposition of the death penalty, torture or a serious individual threat to their life or physical integrity as a result of indiscriminate violence within the context of an international or domestic armed conflict.[3]

The specifications of the Qualification Directive can be applied to the majority of third-country nationals who are seeking protection within the countries inside the EU. Notwithstanding this, there also exist within the EU member states, in addition to the provisions of the Qualification Directive for the granting of protection to refugees and of subsidiary protection, national forms for the granting of protection. In certain cases, for example, Sweden grants to third-country nationals who are fleeing from environmental catastrophes a form of "other protection". Other countries, including Germany, provide protection on the basis of national law for persons who cannot, by reason of an illness or of the need for an operation, be reasonably expected to make the return journey to their country of origin. Likewise, other countries, within the framework of so-called "resettlement programmes" or by means of fixed "refugee quotas", admit persons who have been "selected" *in situ* by employees of national authorities or who have been designated as being in need of protection by the United Nations High Commissioner for Refugees. One objective of this study by the European Migration Network (EMN) is to provide a closer examination of such forms of protection, which are allocated outside of the common EU rules – in other words, on the basis of national criteria. The present study is the German contribution to this comparison-oriented project.

1 Recognition of a third-country national or of a stateless person as a refugee by a Member State.

2 The Geneva Convention relating to the Status of Refugees of 28 July 1951, as amended by the New York Protocol of 31 January 1967.

3 For a comprehensive analysis and interpretation of the harmonisation of the substantive law relating to refugees by the Qualification Directive, please see Löhr (2008), inter alia.

The starting point for the EMN is the fact that the institutions of the EU will, over the coming months and years, be concerning themselves with a further development of the common rules for the protection of refugees and subsidiary protection within Europe. A number of directives in the field of asylum and refuges are to be revised, the intention being the eventual setting up of a common "European Asylum System". In this context, an in-depth appraisal of the situation to date is also to be undertaken.

In a memorandum concerning the "future asylum strategy" of the European Union, the EU Commission recorded that in recent years, three significant trends could be discerned in respect of the granting of asylum in Europe. In the first place, the number of applications for asylum was, according to the Commission, diminishing; and as a result, the asylum systems of the various Member States were being subjected to less pressure than before. Secondly, the considerable divergence in some areas of the decision-making practice within the individual Member States was an indication that the common regulations to date were insufficient. This was generating secondary flows of people between the various Member States, and contravening the basic principle that the same conditions should apply to the granting of protection right across the EU. Thirdly, the Commission recorded that more and more asylum applicants were being granted not refugee status but subsidiary forms of protection by the Member States, and that these subsidiary forms of protection were being granted not on the basis of common EU rules but on the basis of national provisions:

> "When looking at positive decisions, an ever-growing percentage of applicants are granted subsidiary protection or other kinds of protection status based on national law, rather than refugee status according to the Geneva Convention. This is probably due to the fact that an increasing share of today's conflicts and persecutions are not covered by the Convention. It will therefore be important during the second phase of the common European asylum system to pay particular attention to subsidiary and other forms of protection."[4]

The following two risks might arise as a result of such a development:[5]

- If refugee status is being determined less frequently, the general level of protection could sink. The Geneva Convention, on the basis of which refugee status is determined, includes a whole series of rights that must be granted to refugees; however, the granting of refugee status itself is subject to strict criteria. Other (subsidiary) forms of protection are in many cases easier to obtain – however, they will generally entail fewer rights being granted to the party in question. Such cases will, for example, often involve the granting only of a stay of limited duration, and limited associated rights.

4 Commission of the European Communities: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Policy Plan on Asylum: an Integrated Approach to Protection Across the EU, Doc.-No.: KOM(2008) 360 final, Brussels, 17 June 2008.

5 To date, this tendency is not discernible within the Federal Republic of Germany. Here, the determination of refugee status, as opposed to the awarding of subsidiary forms of protection, has increased rather than decreased in recent years (please see information provided in Chapters 4 and 6 of this study).

- An increase in national subsidiary forms of protection, bringing with it a differentiation among the official practices and procedures, would in the medium and long term undermine the development of a common asylum system within the EU. And yet the Member States have on many occasions expressed their desire to create a functioning asylum system – one that, as far as possible, provides asylum applicants with comparable conditions throughout the EU and thus minimises the incentives for secondary flows of people between the Member States.[6]

It would therefore appear sensible to examine in closer detail national practices in respect of the granting of forms of protection that are harmonised across the EU and, in particular, of national forms of protection.

The main objective of the present German partial study is to show which forms of protection granted to third-country nationals within Germany are accorded on the basis of European law that has been carried over into national law, and which are awarded on the basis of national regulations – in other words, without the need for any EU provisions to be respected.

In Chapter 2, these varying forms of protection are explored and explained, with reference to the respective legal basis of each. This is further developed in Chapter 3, in which there follows a brief descriptive overview of the procedures associated with these individual forms of protection (e.g. asylum procedures or procedures relating to the right of residence) and of the rights that are granted to the persons in question in connection with the protection awarded. In Chapter 4, the awarding of individual forms of protection is quantified to the greatest extent possible. Above all, the aim is to ensure that the following factors become apparent: the numerical extent to which forms of protection are, respectively, being granted on the basis of European law and on the basis of national law; whether forms of protection that are harmonised across the EU are outweighing national forms of protection; and the extent to which, in recent years, a tendency is apparent for the significance of forms of protection under European law to increase or decrease in comparison to national forms of protection. Chapter 5 aims to map out political perceptions and expert opinions concerning the development of protection for refugees within Germany and to make it possible to gain insight into the extent to which the increasing Europeanisation of protection for refugees is perceived in a positive or a negative light. The study concludes with Chapter 6, in which, on the basis of the findings arrived at, conclusions are drawn and, insofar as this is possible, possible measures to be taken are highlighted.

6 For example, the "European Pact on Immigration and Asylum", as adopted by the heads of state and government of the EU in October 2008, contains the following statement: "The European Council welcomes the progress achieved in recent years as a result of the implementation of common minimum standards with a view to introducing the Common European Asylum System. It observes, however, that considerable disparities remain between one Member State and another concerning the grant of protection and the forms that protection takes. While reiterating that the grant of protection and refugee status is the responsibility of each Member State, the European Council considers that the time has come to take new initiatives to complete the establishment of a Common European Asylum System, provided for in the Hague programme, and thus to offer a higher degree of protection" (Council of the European Union 2008).

The study conforms to an organisational structure specified by EMN. This is to be adhered to by all EMN contact points, in order to make it easy to draw comparisons between the individual country studies. It should also be noted that because of limitations in the scope of this study, a historical analysis of the development and differentiation of the individual forms of protection is either absent or present only in a rudimentary form. As such, this study can only be seen as an appraisal of the forms of protection in evidence as of 2009.

1.2 Definitions, methods and sources of information and data

In the present study, the terms "protection" and "forms of protection" are used in an extended context. If one were to follow a "narrow" legal definition, the term "protection" would be applicable only to persons who have been recognised as being entitled to asylum under the German Basic Constitutional Law (Grundgesetz), who have been awarded refugee status or to whom subsidiary protection has been granted because, although they do not count as refugees in the sense of the internationally applicable regulations, they cannot reasonably be expected to return to their country of origin.

In order to answer the questions posed by this study satisfactorily, however, it also appears necessary to take into consideration certain forms for the granting or toleration of residence within Germany – forms that cannot, in the strictest sense, be termed "protection". For example, the legislative body envisages that in certain cases, the removal of foreigners to certain countries may be suspended. Any suspension of a removal that is merely temporary is, taken in the strictest sense – not protection, since, of necessity, there is no resulting right of residence for the person affected. However, since this person will, at least on a temporary basis, be permitted to remain in Germany, thus indirectly receiving protection, such regulations should also be taken into consideration.

First and foremost, the present study relies on legal literature. In order to provide adequate answers to the questions raised, the appropriate laws, EU legislative documents and other sources of law (e.g. the Residence Act, the Asylum Procedure Act and the "Qualification Directive"), together with current jurisprudential commentaries regarding these documents and the General Administrative Regulation relating to the German Residence Act (Allgemeine Verwaltungsvorschriften zum Aufenthaltsgesetz[7]) were inspected. To some extent, in addition, the legislation of former years was taken into consideration, and expertise from within the Federal Office for Migration and Refugees (BAMF) and the UNHCR in Nuremberg was consulted. In respect of the statistical portion (Chapter 4), numerical data from the asylum statistics of the BAMF was consulted, as were evaluations of the Central Register of Foreign Nationals (Ausländerzentralregister, AZR).

7 In the version published on 30 October 2009.

2 The granting of protection in Germany

2.1 The overall spectrum of forms of protection in Germany

With the coming into force of the Immigration Act on 1 January 2005, a change occurred in Germany, with control of immigration shifting over to a more strongly normative basis. The background to this law was on the one hand, the opinion that the Federal Republic had, over the course of recent decades, become a country of immigration without the applicable laws having been provided with sufficient provisions for controlling flows of migration. On the other hand, on the EU level, the beginnings of a common approach to certain aspects of immigration policy were becoming apparent – including those expressed in the Qualification Directive adopted by the Council of the EU on 29 April 2004 – which needed to be implemented within Germany. Since the coming into force of the Immigration Act, the core component of German immigration law has been the Residence Act (Aufenthaltsgesetz, AufenthG), which superseded the previously applicable Foreigners Act (Ausländergesetz, AuslG).

The Residence Act recognises five purposes for residence: education or training (Chapter 2, Part 3, AufenthG), employment (Chapter 2, Part 4, AufenthG), residence for reasons of international law or for humanitarian or political reasons (Chapter 2, Part 5, AufenthG), residence for family reasons (Chapter 2, Part 6, AufenthG) and special rights of residence (e.g. former German citizens, Chapter 2, Part 7, AufenthG).

From a quantitative perspective, residence for reasons of international law or for humanitarian or political reasons is one of the most significant purposes for residence in Germany. Within this framework, the following circumstances are possible:

Admission from abroad (§ 22, AufenthG):
"A foreigner may be granted a residence permit for the purpose of admission from abroad in accordance with international law or on urgent humanitarian grounds. A residence permit shall be granted if the Federal Ministry of the Interior or the body designated by the Federal Ministry of the Interior to uphold the political interests of the Federal Republic of Germany has declared that the foreigner is to be admitted. (...)"

The granting of residence by the supreme Länder authorities, the so-called "Right of residence regulation" (§ 23, Paragraph 1, AufenthG):
"The supreme Land authority may order a residence permit to be granted to foreigners from specific states or to certain groups of foreigners defined by other means, in accordance with international law, on humanitarian grounds or in order to uphold the political interests of the Federal Republic of Germany. (...) In order to ensure a nationwide uniform approach, the order shall require the approval of the Federal Ministry of the Interior."

Admission by the German Federal Authorities when special political interests apply (§ 23, Paragraph 2, AufenthG):
"In order to safeguard special political interests of the Federal Republic of Germany, in consultation with the supreme Land authorities the Federal Ministry of the Interior may order foreigners from specific states or certain categories of foreigners defined by other means to be granted approval for admission by the Federal Office for Migration and Refugees. (...) The foreigners concerned shall be issued with a residence permit or settlement permit, in accordance with the approval for admission. (...)"

The granting of residence in cases of hardship (§ 23a, AufenthG):
Insofar as it is not possible for a residence permit to be issued for other reasons, it may be possible, in cases of hardship in which pressing humanitarian or personal reasons justify the presence of a foreigner within Germany, that a residence permit may be issued in accordance with the Hardship Regulation ("Härtefallregelung"), the application of which was originally limited in time up to 31 December 2009. The supreme Land authority may, at the request of a Commission for Cases of Hardship set up by the respective Land Government, issue instructions for a foreigner who is subject to an enforceable obligation to leave the country to be issued with a residence permit notwithstanding the other preconditions for the issuing and extension of a temporary residence permit (cf. Kluth et alt. 2008: 224). A change in the Immigration Act introduced on 20 December 2008 removed the time limit for the "Härtefallregelung".

The granting of residence for temporary protection (§ 24, AufenthG):
This provision contains the implementation of EU Directive EU 2001/55/EC of 20 July 2001 dealing with temporary protection. According to this provision, a foreigner who has, by reason of a decision of the Council of the European Union in accordance with this Directive, been granted temporary protection and who has declared his readiness to be accepted within the territory of the Federal Republic, will be issued with a residence permit for the duration of the temporary protection as determined in accordance with Articles 4 and 6 of the Directive.

Residence for humanitarian reasons for persons entitled to asylum
(§ 25, Paragraph 1, AufenthG):
"A foreigner shall be granted a residence permit if he or she is incontestably recognised as being entitled to asylum (...)"

Residence for humanitarian reasons for persons who have been granted refugee status in the sense of the Geneva Convention on Refugees
(§ 25, Paragraph 2, AufenthG):
"A foreigner shall be granted a residence permit where the Federal Office for Migration and Refugees has incontestably granted refugee status. (...)"

Residence for persons entitled to subsidiary protection
(§ 25, Paragraph 3, AufenthG):
"A foreigner should be granted a residence permit where a prohibition on deportation applies pursuant to § 60, Paragraphs 2, 3, 5 or 7, AufenthG. (...)"

Temporary residence (§ 25, Paragraph 4, AufenthG):
"A foreigner who is non-enforceably required to leave the Federal territory may be granted a residence permit for a temporary stay if his or her continued presence in the Federal territory is necessary on urgent humanitarian or personal grounds or due to substantial public interests. (...) a residence permit may be extended if departure from the Federal territory would constitute exceptional hardship for the foreigner due to special circumstances pertaining to the individual case concerned."

Victims of human trafficking (§ 25, Paragraph 4 a, AufenthG):
Victims of human trafficking may be issued with a residence permit provided their temporary presence within Germany is necessary for the implementation of criminal proceedings. This provision is designed to make it possible for victims who have no right of residence within the Federal Republic to testify in court against persons who are suspected of human trafficking.

Residence for persons who are subject to an enforceable obligation to leave the country (§ 25, Paragraph 5, AufenthG):
"(...) a foreigner who is enforceably required to leave the Federal territory may be granted a residence permit if his or her departure is impossible in fact or in law and the obstacle to deportation is not likely to be removed in the foreseeable future. The residence permit should be issued if deportation has been suspended for 18 months. A residence permit may only be granted if the foreigner is prevented from leaving the Federal territory through no fault of his or her own.

The system of protection provided by the Residence Act is complemented by the instrument for the **temporary suspension of removal ("Duldung")** in accordance with § 60a, AufenthG, as contained in Chapter 5 ("Termination of residence"), Part 2 ("Enforcement of the obligation to leave the Federal territory") of the Act. Paragraph 1 determines the following:

"For reasons of international law or on humanitarian grounds or to safeguard the political interests of the Federal Republic of Germany, the supreme Land authority may order the deportation of foreigners from specific states or of categories of foreigners defined by any other means to be suspended in general or with regard to deportation to specific states for a maximum of six months."

While Paragraph 1 relates to groups of foreign nationals, Paragraph 2 also makes decisions concerning a suspension of removal possible in individual cases:

"The deportation of a foreigner shall be suspended for as long as deportation is impossible in fact or in law and no residence permit is granted. The deportation of a foreigner shall also be suspended if the public prosecutor's office or the criminal court considers his or her temporary presence in the Federal territory to be appropriate in connection with criminal proceedings relating to a criminal offence, because it would be more difficult to investigate the facts of the case without his or her information. A foreigner may be granted a temporary suspension of deportation if his or her continued presence in the Federal territory is necessary on urgent humanitarian or personal grounds or due to substantial public interests."

Since reference is made here explicitly to humanitarian reasons, the exceptional leave to remain ("Duldung") can be evaluated in the context of this study as a "form of protection".

In addition to the existing regulations for the granting of residence for reasons of international law or for humanitarian or political reasons, and for the suspension of deportation, Chapter 10 ("Authorisation to issue statutory instruments; transitional and final provisions") contains a **regulation governing old cases ("grandfather clause")** in the form of § 104a and § 104b:

> According to this clause, foreign nationals who are in possession of a "Duldung" and who, on 1 July 2007, have been resident in Germany for at least eight years – or, in the event that they are living in a domestic unit with one or more underage children, for at least six years – who can show that they satisfy the minimum requirements in terms of readiness to integrate, who have sufficient living space at their disposal, who have an adequate knowledge of the German spoken language, and who have not intentionally deceived the public authorities responsible for foreigners, will receive a residence permit, the duration of which will be restricted up to 31 December 2009, coupled with access to the employment market, to enable them to make enough to live off through employment and without drawing on public social security benefits. After 31 December 2009, this residence permit will only be extended if, in respect of the future, it is justifiable to make the assumption that the foreigner in question will be able to earn sufficient funds to live off and proves that he or she was predominantly in gainful employment in the past.[8] In addition, in respect of well-integrated children of foreigners who are in possession of an exceptional leave to remain, the conditions for obtaining a right of residence in their own right are made easier. Foreigners who have for at least six years been resident within the territory of the Federal Republic as unaccompanied minors, on the basis of a temporary suspension of deportation or of some other form of permission or with a residence permit granted for humanitarian reasons, and in the case of whom it appears to be certain that they are, by reason of their education and living circumstances to date, capable of fitting into the prevailing way of life within the Federal Republic of Germany, will also be able to benefit from this regulation.

In the sub-chapters below, the named possibilities for protection are divided into "Forms of protection on the basis of European law" (Chapter 2.2) and "on a national basis" (Chapter 2.3) and described in greater detail.

2.2 The granting of protection on the basis of European law

With the coming into force on 1 January 2005 of the Immigration Act (Zuwanderungsgesetz) and the coming into force on 28 August 2007 of the Directives Implementation Act (Richtlinienumsetzungsgesetz), German asylum and immigration law underwent considerable changes, one of which was a heightened Europeanisation. The Immigration Act, for example, saw the harmonisation of the status in terms of the right of residence of acknowledged refugees under the Convention of 28 July 1951 on the Status of Refugees (Ge-

8 On 4 December 2009, the Standing Conference of the Federal States' Ministers and Senators of the Interior agreed on a follow-up regulation, which basically means a prolongation of the regulation governing old cases by two years, see Chapter 2.3.10.

neva Convention, GRC) and that of persons entitled to asylum under Art. 16a, German Basic Constitutional Law (Grundgesetz, GG). Likewise, from that point onwards non-state parties involved in persecution had to be taken into consideration. The Directives Implementation Act implemented into German law a total of 11 EU directives that also were partly related to the granting of protection.

Currently, the following circumstances of residence for humanitarian reasons, as named in Chapter 2.1, have been “europeanised” within Germany:

- refugee status in the sense of the Geneva Convention (§ 25, Paragraph 2, AufenthG),
- subsidiary protection (§ 25, Paragraph 3, AufenthG),
- the granting of residence for temporary protection (§ 24, AufenthG),
- the granting of residence for victims of human trafficking (§ 25, Paragraph 4 a, AufenthG).

Refugee status and subsidiary protection are among the most important circumstances of residence for humanitarian reasons in Germany, and are therefore dealt with in a more comprehensive fashion in Sections 2.2.1 and 2.2.2. By contrast, the granting of residence for temporary protection will only take place if the Council of the EU makes a decision to that effect – in other words, if it establishes that there is a “mass influx of displaced persons”.[9] Since this has not yet occurred since the coming into force of this EU Directive, this form in which residence may be granted is not examined further within the framework of this study. The granting of residence for victims of human trafficking is relatively rare in statistical terms; however, it is discussed in Section 2.2.3.

2.2.1 Refugee status in the sense of the Geneva Convention (§ 25, Paragraph 2, AufenthG)

The question of whether or not the conditions for recognition as a refugee have been met is examined in accordance with § 3, Paragraph 1, of the Asylum Procedure Act (AsylVfG)[10], drawing on § 60, Paragraph 1, AufenthG (“Prohibition on deportation”). This provision was introduced in 2005 as a replacement for § 51, Paragraph 1, of the Foreigners Act (AuslG), which had applied up to that point. The provision continues, however, to represent the domestic norm for the implementation of the Geneva Convention. Its interpretation will from now on be oriented more towards the Qualification Directive of the EU, and this makes it a form of the granting of protection on the basis of European law. The body responsible for the examination of whether the conditions for recognition have been met in each individual instance is the Federal Office for Migration and Refugees (BAMF, see Chapter 3). The wording of § 60, Paragraph 1 of the AufenthG expressly refers both to the Geneva Convention and to the “Qualification Directive”:

9 Cf. Article 5 (1) of Directive 2001/55/EC of the Council of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.

10 “An alien is a refugee within the meaning of the Convention on the Status of Refugees if within the country of his/her citizenship, or in which he or she habitually resided as a stateless person, he or she is exposed to the threats listed in § 60, Paragraph 1, Residence Act.”

"In application of the Convention of 28 July 1951 relating to the Status of Refugees (...), a foreigner may not be deported to a state in which his or her life or liberty is under threat on account of his or her race, religion, nationality, membership of a certain social group or political convictions. This shall also apply to persons who are entitled to asylum and to foreigners who have been incontestably granted refugee status or who enjoy the legal status of foreign refugees on other grounds in the Federal territory or who have been granted foreign refugee status outside of the Federal territory in accordance with the Convention relating to the Status of Refugees. When a person's life, freedom from bodily harm or liberty is threatened solely on account of their sex, this may also constitute persecution due to membership of a certain social group. Persecution within the meaning of sentence 1 may emanate from

a) the state,
b) parties or organisations which control the state or substantial parts of the national territory, or
c) non-state parties, if the parties stated under letters a and b, including international organisations, are demonstrably unable or unwilling to offer protection from the persecution, irrespective of whether a power exercising state rule exists in the country,

unless an alternative means of escape is available within the state concerned. Article 4 (4) and Articles 7 to 10 of Council directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise require international protection and the content of the protection granted (...) shall additionally be applied in establishing whether a case of persecution pursuant to sentence 1 applies. Where the foreigner cites the ban on deportation pursuant to this sub-section, the Federal Office for Migration and Refugees shall establish in an asylum procedure whether the conditions stated in sentence 1 apply and the foreigner is to be granted refugee status, except in cases covered by sentence 2. The decision by the Federal Office shall only be appealable subject to the provisions of the Asylum Procedure Act."

The specifications within the Directive that are referred to here relate to the provisions for the examination of the events and circumstances that are being submitted in substantiation of applications for international protection, and also to parties who are in a position to offer protection, to "internal protection", to acts of persecution and to reasons for persecution.

It needs to be borne in mind that political persecution can proceed not just from the state, from parties or from organisations who are in control of the state or of substantial portions of the territory of the state, but also from non-state parties. The granting of protection will, however, be conditional upon the state, parties or organisations who are in control of the state or of substantial portions of the territory of the state, including international organisations, demonstrably being either unable or unwilling to provide protection from persecution within the subject's country of origin. This applies irrespective of whether or not a power exercising state rule exists within that country. If the persecution under considerati-

on is not proceeding from non-state parties, it is irrelevant whether or not the persecution can be attributed to the state; all that will then remain to be examined is whether or not the foreigner is in a position to obtain protection from political persecution, be it from the state or from parties comparable to the state or from international organisations who are in control of the state or of substantial portions of the territory of the state. In addition, as a condition for the awarding of protection to persons as refugees it must be examined whether a "domestic alternative means of flight" is available – in other words, the issue must be addressed of whether the affected party has the possibility of finding protection in another part of his/her country of origin. If there is such an alternative means of flight, the party in question will not be recognised as a refugee.

The Act also clarifies expressly that persecution because of adherence to a social group may also be present if there is a threat to the subject's life, physical integrity or liberty solely on account of his/her gender.

When examining whether any persecution on religious grounds is present, due consideration must be given to the very broadly formulated definition of the concept of religion as set out in Art. 10 (1) (b) of the Qualification Directive. According to this Article, "the concept of religion shall in particular include the holding of theistic, non-theistic and atheistic beliefs, the participation in, or abstention from, formal worship in private or in public, either alone or in community with others, other religious acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief".

The question of whether a sufficiently serious act of persecution is present – one that is linked to the religion of the affected party as a reason for the persecution – will be decided in accordance with Art. 9 of the Qualification Directive. Accordingly, acts of persecution must "be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights (...)". This includes, among other factors, intrusions upon the life, limb or liberty of the subject. Should there be an intrusion upon other legally protected interests, such as the practising of one's religion, it should be examined whether this intrusion is similarly serious. To the extent that an applicant for asylum has suffered a serious infringement of his/her fundamental human rights in connection with his/her religion, or that he or she was under a current and concrete threat of such an infringement at the time of his/her departure ("pre-persecution"), the awarding of refugee status will regularly fall to be considered. Likewise, in the case of a change of religion ("conversion") after leaving the country of origin, it must be examined whether the applicant would, upon returning, be under threat of persecution in connection with his/her religion. The danger of persecution may also result from the behaviour to be expected from the asylum applicant.

2.2.2 Subsidiary protection (§ 25, Paragraph 3, AufenthG)

In the event that it is not possible for a subject to be recognised as a refugee in accordance with Article 16a, GG (see Section 2.3.5) or as a refugee in accordance with the Geneva Convention, it is still possible for a prohibition on deportation (and thus a right of residence) to arise out of the fact that in the destination country of a deportation, the party concerned will come under the threat of serious harm or other serious dangers to freedom, life and limb. Protection from these dangers is designated as subsidiary protection. It is true

that German law has no concept of the explicit granting of a protection status to a person who is entitled to subsidiary protection. However, the protection status called for under European law is nonetheless established on a domestic level through the determination of a "prohibition of deportation", the issuing of a residence permit in accordance with § 25, Paragraph 3, AufenthG and the associated legal consequences (cf. Kluth et al. 2008: 272).

Subsidiary protection is granted irrespective of whether there is a threat of serious harm or of any other serious dangers on account of political circumstances. The conditions for the granting of residence in accordance with § 25, Paragraph 3, AufenthG are regulated in § 60, Paragraphs 2, 3, 5, 7, Sentence 1 and 7, Sentence 2, AufenthG. § 60, Paragraphs 2 and 3, AufenthG implement Articles 15 (a) and (b) of the Qualification Directive, while Article 15 (c) is implemented by § 60, Paragraph 7, Sentence 2, AufenthG. § 60, Paragraphs 5 and 7, Sentence 1, AufenthG on the other hand, are subsidiary forms of protection based on national law (see Section 2.3.6).[11]

In detail, the following are subsidiary forms of protection in accordance with EU law:

- **§ 60, Paragraph 2, AufenthG:**
  "A foreigner may not be deported to a state in which a concrete danger exists of the said foreigner being subjected to torture or inhumane or degrading treatment or punishment."

- **§ 60, Paragraph 3, AufenthG:**
  "A foreigner may not be deported to a state in which he or she is wanted for an offence and a danger of imposition or enforcement of the death penalty exists. In such cases, the provisions on deportation shall be applied accordingly."

- **§ 60, Paragraph 7, Sentence 2, AufenthG:**
  "A foreigner shall not be deported to another state in which he or she will be exposed, as a member of the civilian population, to a substantial individual danger to life or limb as a result of an international or internal armed conflict."

The examination of these standards must take precedence over national prohibitions on deportation. They will, if there is a threat of the dangers set out above, lead to a prohibition on deportation under European law, and a residence permit will be issued.

In contrast to the situation under previous German law, the dangers of torture or inhumane or degrading treatment or punishment set out in § 60, Paragraph 2, AufenthG can also proceed from non-state parties. On the other hand, the danger of the death penalty in accordance with § 60, Paragraph 3, AufenthG can only exist in a country in that has enshrined this penalty within its legal system.

11 Likewise, § 60, Paragraphs 2, 3 and 7, Sentence 2 should be considered as national prohibitions on deportation if the dangers threatening the applicant are not in his/her country of origin but in a different country. It is, however, rare for a decision to return an applicant to a country that is not his/her country of origin to be considered – for example, if an alien from a particular country of origin has a spouse who comes from another country, the alien would have to travel together with his/her spouse to the country of origin of that spouse, and he or she would there come under threat of dangers in accordance with § 60, Paragraphs 2, 3, 5 or 7, AufenthG.

The possibility of protection being granted in accordance with § 60, Paragraph 7, Sentence 2, AufenthG has been newly inserted into the AufenthG in order to implement Article 15 (c) of the Qualification Directive. This regulation offers protection to persons who, as civilians, are exposed to a considerable individual danger to life or limb in the context of an international or internal armed conflict.[12]

2.2.3 Victims of human trafficking (§ 25, Paragraph 4 a, AufenthG)

According to § 25, Paragraph 4a, AufenthG, victims of human trafficking can be issued with a residence permit for the purposes of a temporary residence if the temporary presence of the foreigner in question is considered to be appropriate for the implementation of criminal proceedings. This provision was used to implement the "Victim Protection Directive"[13] of 29 April 2004. The provision serves the purpose of combatting organised human trafficking; issuing victims with a residence permit is intended to make it easier to implement criminal proceedings against traffickers and to create incentives for victims to cooperate with the law enforcement authorities and courts. The regulation is not, on the other hand, designed to enable victims of human trafficking to better their situation in relation to the right of residence, nor is it designed to grant victims who turn witness a right of residence by way of compensation for the criminal acts they have suffered (cf. Kluth et alt. 2008: 292). The Victim Protection Directive offers the national legislative body the possibility of determining, when implementing the Directive, whether the Directive should also be applied in the case of underage foreigners or in the case of foreigners who have been provided with assistance in respect of illegal immigration. The Federal Republic has made use of the first of these possibilities, since in cases in which women have been trafficked, a substantial number of underage victims can be reckoned with. The legislative body has made no use of the second possibility.

12 The question of in which cases a "considerable individual danger" is present is one that has been brought to administrative courts. In its judgement handed down on 24 June 2008 (BVerwG 10 C 43.07), the 10th Senate of the Federal Administrative Court (Bundesverwaltungsgericht) in Leipzig ruled that in exceptional cases involving a particularly high concentration of dangers, general dangers arising out of an armed conflict can constitute a serious individual threat in the sense of Article 15 (c) of the Qualification Directives even without the presence of individual personal circumstances heightening the danger(s) in question. This has also been argued by the Court of Justice of the European Communities in a judgement of 17 February 2009 (Case C-465/07). According to this, when general dangers are present, it is, in exceptional cases, also possible to consider the presence of a serious individual threat as established if the degree of indiscriminate violence that typifies the existing armed conflict reaches such a high level that a civilian, solely by virtue of his/her presence within the affected area, would be running an actual danger of being exposed to such a threat. On 14 July 2009, in relation to two Iraqi nationals, the Federal Administrative Court in Leipzig ruled that when examining whether or not these persons are seriously threatened individually by indisriminate violence in the context of armed hostilities within Iraq, it should first be examined whether, and in which areas of Iraq, an armed domestic conflict is underway. If such a conflict is not nationwide, then as a rule it will only be possible to consider an individual threat to be present if the conflict extends to the region of origin of the claimants, to which they can typically be expected to return. If, for the relevant region, the presence of an individual threat can be assumed either because of individual personal circumstances that heighten the danger or – in exceptional cases – because of a particularly high level of general dangers arising out of the armed conflict, it should further be examined whether the claimants are in a position to find internal protection in other parts of Iraq in which dangers of this kind are not present.

13 Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities.

The issuing to a foreigner of a residence permit in accordance with § 25, Paragraph 4 a, AufenthG presupposes that

- he or she has become the victim of the criminal offence of human trafficking for the purposes of sexual exploitation (§ 232 of the German Criminal Code), for the purpose of work exploitation (§ 233 of the Criminal Code) or for assisting in human trafficking (§ 233a of the Criminal Code). The Act does not give the possibility of residence to victims of people smuggling;
- he or she will only remain in Germany on a temporary basis;
- his/her presence within the territory of the Federal Republic is considered by the public prosecutor's office or a criminal court to be appropriate for criminal proceedings in respect of this criminal offence because without the information he or she can provide, it would be more difficult to investigate the facts of the case;
- he or she has broken off all connections with the persons who are accused of having committed the criminal offence in question, and
- he or she has declared his/her willingness to testify as a witness in these criminal proceedings.

2.3 The granting of protection on a national basis

Despite the Europeanising effect of the Immigration Act and the Directives Implementation Act, a whole range of forms of protection issued solely on the basis of national law continue to exist within the Federal Republic. They are not in competition with the European system of protection; rather, they complement it. In detail, these forms are:

- **admission from abroad** (§ 22, AufenthG);
- the **granting of residence by the supreme Länder Authorities**, the so-called "Right of residence regulation" (§ 23, Paragraph 1, AufenthG);
- **admission by the German Federal Authorities when special political interests apply** (§ 23, Paragraph 2, AufenthG);
- the **granting of residence in cases of hardship** (§ 23a, AufenthG);
- **persons entitled to asylum** in terms of Art. 16a, German Basic Constitutional Law (§ 25, Paragraph 1, AufenthG);
- **persons entitled to certain forms of subsidiary protection** (§ 25, Paragraph 3, AufenthG);
- **temporary residence** (§ 25, Paragraph 4, AufenthG);
- **residence for persons who are subject to an enforceable obligation to leave the country** (§ 25, Paragraph 5, AufenthG);
- the **temporary suspension of removal**, the so-called "Duldung" (§ 60a, AufenthG);
- the **granting of residence within the framework of the regulations governing old cases** ("grandfather clause", §§ 104a and 104b, AufenthG).

The following sections briefly set out the characteristics of these forms of protection.

2.3.1 Admission from abroad (§ 22, AufenthG)

In quantitative terms, this regulation is of comparatively little significance. During 2008, only 25 persons were admitted to Germany using this regulation (see Chapter 4.3.1).

§ 22, AufenthG contains two variant cases: admission for reasons of international law or for pressing humanitarian reasons (§ 22, Sentence 1, AufenthG) and admission for the safeguarding of the political interests of the Federal Republic of Germany (§ 22, Sentence 2, AufenthG). In respect of the admission of foreigners in accordance with Sentence 1, the responsible parties are the diplomatic missions of the Foreign Office and the Federal Länder. Admission in accordance with Sentence 2, on the other hand, must be declared by the Federal Ministry of the Interior or by an office nominated by said Ministry.

Reasons of international law in the sense of Sentence 1 will be present in cases in which a treaty binding upon the Federal Republic under international law gives rise to the obligation to admit individual foreigners. These might be treaties concerning the admission of war refugees, or relieving the burden upon other host countries. No such treaties exist at present.

An admission for pressing humanitarian reasons in the sense of Sentence 1 presupposes that the foreigner is in a particular emergency situation that urgently calls for intervention and justifies admitting this particular foreigner as opposed to other persons who are in a comparable situation. Here, the admission of the person in search of protection must, in each individual concrete case, be something dictated by humanity (cf. AVwV-AufenthG, No. 22.1.1.2).

An admission for the safeguarding of the political interests of the Federal Republic in accordance with Sentence 2 may be considered if the Federal Republic evinces an interest in accepting the individual in question. The offices appointed to make the decision enjoy an extensive degree of freedom in respect of determining these political interests in closer detail; interests related both to internal and domestic affairs may be taken into account. Some conceivable examples in relation to this might be the admission of known members of the opposition or dissidents, individual refugees from overburdened host states or indeed individual persons for whom, in the view of the German security authorities, allowances should be made.

For residence to be granted, in accordance both with Sentence 1 and with Sentence 2, the following conditions – amongst others – apply:[14]

- In order to be eligible, foreigners must still be located in a foreign country.
- Only individual persons, as opposed to groups of persons, can be admitted.
- There is no legal entitlement to acceptance.
- There is considerable latitude for political decision-making and discretion.
- These forms of protection are subsidiary in relation to other provisions for the granting of protection.

14 For a complete list of the relevant conditions, see Kluth et alt. 2008: 234.

2.3.2 The granting of residence by the supreme Länder authorities, the so-called "Right of residence regulation" (§ 23, Paragraph 1, AufenthG)

§ 23, Paragraph 1, AufenthG provides the supreme authorities of the Federal Länder with the option of issuing instructions, for reasons of international law or for humanitarian reasons, or for the safeguarding of the political interests of the Federal Republic of Germany, that foreigners from particular countries, or groups of foreigners determined in some other fashion – according to their ethnicity, for example, or religious affiliation – should be issued with a residence permit. The provision is capable both of encompassing the admission of foreigners arriving from foreign countries, within the framework of so-called "resettlement programmes", and of taking into consideration persons who are already inside Germany but who have no right of residence. The provision differs from § 22, AufenthG in that § 23, Paragraph 1, AufenthG does not make possible the admission of individuals, only the admission of particular groups. In addition, § 23, Paragraph 1 applies in respect not only of admission from foreign countries but also of the granting of a right of residence to foreigners who are already residing within Germany. The regulation is intended to make it possible to react quickly and flexibly to changes in the humanitarian situation in other countries.

Instructions in the sense of a right of residence have in the past been issued by Länder Authorities in relation to such matters as refugees from Afghanistan who were subject to an obligation to leave the country (2004 and 2005), persons from Bosnia and Herzegovina and Yugoslavia, including Kosovo who, though subject to an obligation to leave the country, were in gainful employment (2001) and indeed Ethnic German repatriates whose application had been rejected (2001). In 2008, 20,319 persons were given a right of residence on the basis of § 23, Paragraph 1, AufenthG. This regulation has worked most particularly to the benefit of persons from Turkey, Serbia and Montenegro, Lebanon, Bosnia and Herzegovina and Afghanistan (see Chapter 4.3.2).

As is the case with admission from abroad in accordance with § 22, AufenthG, the responsible authorities enjoy considerable latitude for discretion. There is no such thing as a legal entitlement on the part of foreigners to be covered by an instruction issued in accordance with § 23, Paragraph 1, AufenthG. In practice, most instructions issued in accordance with § 23, Paragraph 1, AufenthG occur during the implementation of so-called "right of residence rulings" (Bleiberechtsbeschlüsse) from the Standing Conference of Ministers of the Interior and Senators of the Federal German Länder (IMK). Such rulings are based on a political consultation and coordination between the supreme Länder authorities in which the Federal Ministry of the Interior (BMI) also participates. In order for an IMK right of residence ruling to come into operation, it must be implemented by ministerial enactment in each individual Federal State. In principle, however, the Federal States are not under any legal obligations to implement IMK rulings by instructions issued in accordance with § 23, Paragraph 1, AufenthG. Likewise, an instruction issued in accordance with § 23, Paragraph 1, AufenthG by a particular Federal State does not necessarily presuppose the presence of an IMK ruling.[15]

15 Instructions issued in accordance with § 23, Paragraph 1, AufenthG but without any IMK ruling are, however, unlikely, since there does need to be agreement with the BMI and the BMI will generally have an interest in keeping procedural methods unified across the Federal Republic.

On 17 November 2006, the IMK passed a right of residence ruling intended to find a solution for those foreign nationals who had for many years been in possession of an exceptional leave to remain ("Duldung") and who were in an employment relationship. The ruling was implemented by all the Federal Länder. However, the points of emphasis in the corresponding Länder decrees differed, and in respect of some individual issues envisaged different regulations. In principle, all those foreign nationals with a "Duldung", who have the prospect of a right of residence in accordance with the IMK regulation, were entitled to lodge an application with the relevant foreigners authority by 17 May 2007. The most important precondition for having a claim to a right of residence was that the applicant needed to have been resident within Germany for eight years (adults without children) or six years (parents with underage children). Spouses living within the territory of the Federal Republic on the effective date (17 November 2006) and underage children living in families could also be included if the duration of their residence was less than six or eight years. A further precondition was that the affected party should be in a permanent employment relationship and that the means of sustenance for the family should be ensured without making any claim upon social security benefits. Exceptions to the precondition were permitted in the case of trainees in recognised trades or skilled professions and families with children who were only temporarily reliant upon supplementary social security benefits (cf. Deutscher Bundestag 2007a: 117).

2.3.3 Admission by the German Federal Authorities when special political interests apply (§ 23, Paragraph 2, AufenthG)

According to § 23, Paragraph 2, AufenthG, the Federal Ministry of the Interior (BMI) can, "for the safeguarding of special political interests of the Federal Republic of Germany", issue an instruction ordering the Federal Office for Migration and Refugees (BAMF) to issue an undertaking to admit certain groups of foreigners. This regulation can be compared with § 22, Sentence 2, AufenthG, since the German Federal Authorities are being granted the authority to make it possible for foreigners to enter Germany in certain cases. Unlike § 22, Sentence 2, and similarly to § 23, Paragraph 1, AufenthG, this regulation does not, however, apply in respect of the admission of individual persons, but only in respect of groups. In contrast to § 23, Paragraph 1, AufenthG (the "Right of residence regulation"), the affected persons must still be located outside Germany.

§ 23, Paragraph 2, AufenthG was created with the Immigration Act, replacing the so-called "Quota Refugees' Law" (Kontingentflüchtlingsgesetz) of 1980. During the 1980s, this law was the basis on which "Boat People" from Vietnam and refugee groups from Chile, Argentina, Cuba and Iraq were admitted. After the beginning of the nineties, the Quota Refugees' Law was used in a similar manner only in respect of Jewish immigrants from the former Soviet Union (with the exception of the Baltic countries after their EU accession).

There are four stages to the procedure to be followed in respect of § 23, Paragraph 2, AufenthG: first of all, the BMI reaches agreement with the supreme Länder authorities in respect of the "special political interests" of the Federal Republic. Following this, the BMI issues an instruction to the BAMF concerning the admission of foreigners from particular countries, or groups of foreigners determined in some other fashion. On the basis of this, the BAMF then issues, in individual instances, an undertaking to admit the foreigner who is

benefiting from this provision. The diplomatic missions and the local foreigners' authorities within Germany then issue a residence permit on the basis of this.

The purpose of § 23, Paragraph 2, AufenthG is to enable groups of foreigners who would otherwise have no possibility of legally coming to Germany and receiving a right of residence to enter and be allowed to stay for purely political considerations. This, in a similar manner to previous arrangements within the framework of the Quota Refugees' Law, primarily affects Jewish immigrants from the former Soviet Union, though it also affects persons who are admitted in the context of special humanitarian measures ("resettlement"). This is how the Ministers and Senators of the Interior of the Federal Länder came to decide on 5 December 2008 to admit to Germany a total of 2,500 refugees from Iraq who had fled to Jordan and Syria.[16]

2.3.4 The granting of residence in cases of hardship (§ 23a, AufenthG)

According to § 23a, AufenthG, foreigners who are subject to an enforceable obligation to leave the country can, in cases of particular hardship and at the request of a "Commission for Cases of Hardship", be issued with a residence permit by means of an instruction issued by the competent supreme Land authority. This will be possible in the event that there is no possibility of a residence permit being issued or extended in accordance with other legal provisions. The objective of the regulation is to provide a humanitarian solution to individual instances that cannot be dealt with appropriately through routine application of the Residence Act. § 23a, AufenthG therefore creates a "case of clemency", in line with its intention. Procedures for dealing with cases of hardship cannot be examined in the judicial sense – they are purely humanitarian in nature and, when compared with all the other provisions in the AufenthG, "extralegal" (Kluth et alt. 2008: 253).

The procedure for dealing with cases of hardship includes a number of stages. First of all, the "Commission for Cases of Hardship" needs to direct a request relating to a case of hardship to the competent supreme Land authority or to the office that has been designated for this purpose by a statutory instrument of the Federal Land. A precondition for this is that a Commission for Cases of Hardship must have been set up in the Federal State in question.[17] There is no legal obligation to do so. On the basis of the request relating to a case of hardship, the supreme Land authority will then decide whether or not to issue an instruction for a residence permit to be issued to a foreigner. If such an instruction has been issued, the relevant foreigners' authority will then issue the foreigner with a residence permit.

At the present time, all the Federal Länder within the Federal Republic have set up Commissions for Cases of Hardship. These are active exclusively on their own initiative; third parties are not entitled to demand that the Commission concerns itself with any particular individual case. A precondition for a request relating to a case of hardship from the

16 For the details of this admission programme, see Schneider/Parusel 2009: 20-21.

17 As regards the organisation of Commissions for Cases of Hardship, and their composition in terms of personnel, the Federal Länder have considerable latitude. The Länder Governments may include governmental representatives on these commissions, or they may fill them with non-governmental representatives of various interests. The functions of the Commission for Cases of Hardship may also be transferred to a Committee on Petitions of the respective Land Parliament, provided this Committee is in agreement.

Commission is that the foreigner in question must be subject to an enforceable obligation to leave the country and that this must be a case of hardship. This will be the case if pressing humanitarian or personal reasons justify his/her presence in Germany. When examining whether or not a case of hardship is present, the Commission should apply a strict standard, on the basis of the exceptional character of this legal provision. Additional factors that should be taken into consideration as well as the presence or otherwise of humanitarian or personal reasons include the duration of the foreigner's residence in Germany to date, his/her economic and social integration and the disadvantageous conjunction of personal and economic circumstances that exclude the affected foreigner from being covered by other forms of protection such as the "Right of residence regulation" in accordance with § 23, Paragraph 1, AufenthG or the regulations governing old cases ("grandfather clause") in accordance with § 104a or § 104b, AufenthG. Reasons for exclusion shall be present if, for example

- the foreigner is resident outside the territory of the Federal Republic;
- an official or judicial procedure, or a petition procedure relating to the subject's right of residence, is pending;
- the foreigner is not, or is no longer, in possession of a valid exceptional leave to remain ("Duldung");
- the foreigner has been the subject of an announcement for the purposes of the termination of his/her residence or so that he or she may be apprehended;
- it cannot be expected that the foreigner will be able to earn his/her livelihood without making any claim upon the public purse.[18]

Up until the point at which an instruction may be issued by the supreme Land authority for a residence permit to be issued, the existence of a request relating to a case of hardship does not constitute any legal obstacle to removal. The request itself does not have any suspensive effect upon measures for the termination of residence.

2.3.5 Persons entitled to asylum (§ 25, Paragraph 1, AufenthG)

Foreigners who have been recognised by the BAMF as being subject to political persecution in the sense of Article 16a, Paragraph 1, German Basic Constitutional Law ("Grundgesetz", GG), as the result of an asylum procedure carried out in accordance with the Asylum Procedure Act (AsylVfG) should be issued with a residence permit. This recognition must be incontestable and the foreigner who is affected must not have been expelled from Germany for serious reasons of public security and order.

According to Article 16a, Paragraph 1, GG, persons who are subject to political persecution are entitled to asylum within the Federal Republic. The form and construction of this basic right are oriented towards the essential contents of the constitution, and are subject solely to the legislation and case law of the Federal Republic of Germany. By way of contrast to the awarding of refugee status, the regulations of the Qualification Directive do not apply here.

18 For a complete overview of the reasons for exclusion, see Kluth et alt. 2008: 256.

It is a precondition for recognition as a person entitled to asylum in the sense of the GG that the foreigner in question must be exposed to political persecution in his/her country of origin – that is to say, if he or she needs to worry about targeted violations of his/her rights at a nationwide level in connection with his/her political conviction, basic religious choices or characteristics beyond his/her control that mark him or her out as being different. This political persecution must proceed from the state or be prompted or approved of by the state, or at least the state must, through inaction despite having the capability to provide protection, have acquiesced in it. It may also be exercised by quasi-state organisations who have supplanted the state. In addition, the acts of persecution in question must also reach a certain intensity – in other words, they must be of such a type as to exclude the foreigner from the overall peaceful framework inside the unified state. Either the foreigner must already have suffered acts of persecution or such acts must be directly imminent. It must as a result be unreasonable to expect the foreigner to remain in his/her country of origin or to return there. Until such time as the BAMF issues a decision concerning the recognition of the foreigner as a person entitled to asylum, no residence permit will be issued, but the foreigner will be allowed to reside within the Federal Republic. Foreigners who have been granted family asylum in accordance with § 26, Paragraphs 1 to 3, AsylVfG will be on equal terms with persons recognised as being entitled to asylum. Such persons are – under certain conditions – spouses and children who are underage and unmarried.

To a considerable extent, the preconditions for recognition as a person subject to political persecution in the sense of Article 16a, Paragraph 1, GG are congruent with those for the awarding of refugee status on the basis of European law. However, in accordance with § 26a, AsylVfG, foreigners who have entered Germany from a third country in the sense of Article 16a, Paragraph 2, Sentence 1, GG ("safe third country") will not be entitled to rely upon Article 16a, Paragraph 1, GG and will not be recognised as persons entitled to asylum. This also applies, in accordance with § 27, AsylVfG, in the case of safety from persecution being available elsewhere. According to this, foreigners who, prior to their entry into Germany, were already safe from political persecution in some other third country will likewise not be recognised as persons entitled to asylum. It will, however, be possible for refugee status to be awarded in such cases. This is one significant reason why it is considerably more frequent for refugee status (on the basis of European law) to be determined than for an individual to be recognised as a person entitled to asylum (on a national basis).

Likewise, the legal consequences of recognition as a person entitled to asylum are to a considerable extent on a par with those of the awarding of refugee status (cf. § 2, Paragraphs 1 and 2, AsylVfG). Both forms of protection can, under certain conditions, cease or be revoked.

2.3.6 Persons entitled to subsidiary protection (§ 25, Paragraph 3, AufenthG)

As already mentioned, in the case of subsidiary protection a distinction must be drawn between the granting of protection on the basis of the Qualification Directive (which affects subsidiary protection in accordance with § 60, Paragraphs 2, 3 and 7, Sentence 2, AufenthG) and the granting of protection on a national basis.

Subsidiary forms of protection on a national basis are:

- **§ 60, Paragraph 5, AufenthG:**
  A foreigner may not be deported if deportation is inadmissible under the terms of the Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms.

- **§ 60, Paragraph 7, Sentence 1, AufenthG:**
  A foreigner should not be deported to another state in which a substantial concrete danger to his or her life and limb or liberty applies.

§ 60, Paragraph 5, AufenthG requires, as a condition for a national prohibition on deportation, that the danger proceeds from the state or from a quasi-state organisation, or at least can be attributed to the state or such an organisation because the capability to provide protection is lacking. Protection in accordance with § 60, Paragraph 7, Sentence 1, AufenthG may be granted in the event of other individual dangers to life, limb or liberty. These include, for example, the danger of a significant or life-threatening deterioration of an illness if such a deterioration cannot be avoided by treatment within the target country (cf. PICUM 2009: 21).[19]

2.3.7 Temporary residence (§ 25, Paragraph 4, AufenthG)

§ 25, Paragraph 4, Sentence 1 makes it possible for foreigners who are not under an enforceable obligation to leave the country to be issued with a residence permit for a temporary residence for pressing humanitarian or personal reasons or if the temporary presence of the foreigner in question within Germany would serve the public interest. The formulation "pressing humanitarian or personal reasons" corresponds to the terminology used in the regulation governing cases of hardship in § 23a, AufenthG. However, in contrast to the regulation governing cases of hardship, the regulation in § 25, Paragraph 4, AufenthG applies to persons who are not under an enforceable obligation to leave the country. It is not designed to establish any permanent right of residence, and should not be seen as a catch-all clause for cases in which there is a need for protection without any regular possibility of a residence permit being issued. For this reason, the foreigners' authorities must, prior to the issuing of any residence permit in accordance with § 25, Paragraph 4, AufenthG, draw up a prognosis as to whether the pressing humanitarian or personal reasons and/or public interests present in the case genuinely call for a temporary residence, or rather for a residence of longer, albeit undetermined, duration. They must also, in advance, evaluate whether the foreigner in question will leave the country again once the circumstances that necessitate his/her temporary presence no longer apply.

19 In addition to § 60, Paragraphs 5 and 7, Sentence 1, AufenthG, even § 60, Paragraphs 2, 3 and 7, Sentence 2, AufenthG should be considered as national prohibitions on deportation if the dangers threatening the applicant are not in his/her country of origin but in a different country. It is, however, rare for a decision to return an applicant to a country that is not his/her country of origin to be considered – for example, if an alien from a particular country of origin has a spouse who comes from another country, the alien would have to travel together with his/her spouse to the country of origin of that spouse, and he or she would there come under threat of dangers in accordance with § 60, Paragraphs 2, 3, 5 or 7, AufenthG.

Since the pressing humanitarian or personal reasons must be such as to necessitate the temporary "continued" residence of the foreigner in question within the Federal Republic, only reasons relating to internal domestic matters and conflicting with the termination of the subject's residence can be considered. Reasons relating to the destination country, such as dangers that would be incurred in the event of a return to the subject's country of origin, are not relevant to § 25, Paragraph 4.

Given this background, matters that may be considered as "pressing humanitarian or personal reasons" include the following:

- the carrying out of a medical operation, the conclusion of an ongoing medical treatment or the performance of an urgent treatment because of a physical or mental dysfunction if any of the above cannot, by reason either of urgency or of the stage that has already been reached in the treatment or procedure in question, be carried out or continued in the subject's country of origin;
- temporary care the subject is giving to family members who are ill;
- the conclusion of an ongoing course of schooling or professional training or of a study course;
- the direct imminence of a marriage with a German national or with a foreigner who is entitled to residence;
- the settlement of important personal affairs, such as attendance at a funeral or partipation in judicial proceedings.

Significant public interests may be present if:

- the foreigner is needed as a witness in judicial proceedings or is collaborating with the German authorities in the investigation of criminal offences;[20]
- the residence of the foreigner is necessary for the safeguarding of the interests of the German security authorities or because of interests relating to foreign policy or sports policy.

§ 25, Paragraph 4, Sentence 2, AufenthG opens up a possibility of residence being granted that is independent of Sentence 1. In accordance with this provision, a residence permit may be extended if, "by reason of special circumstances pertaining to the individual case, leaving the territory of the Federal Republic would constitute an exceptional hardship for the foreigner". This regulation is designed to make allowance for cases of hardship in the event that the conditions on the basis of which a residence permit had originally been issued are, because of unfortunate circumstances, no longer present, so that it is no longer possible for the residence permit to be extended for the original purpose of the residence.[21] Accordingly, § 2, Paragraph 4, Sentence 2 relates to individual instances of distress that

20 Depending on the individual case, a right of residence in accordance with § 25, Paragraph 4a, AufenthG may also be a possibility – see Section 2.2.3.

21 In principle, the same provisions apply to the extension of a residence permit as do to the original issuing of one. According to the conception of the AufenthG, residence permits are issued for specific purposes; in general, therefore, any change in the purpose of the residence would be an obstacle to any extension.

could not have been predicted by the legislative body and that cannot be regulated for. Therefore, there may also be the possibility of an extension if, for example, the foreigner in question had previously been in possession of a non-humanitarian form of right of residence for purposes of employment, for example, or the reunification of families.

When examining whether "special circumstances pertaining to the individual case" are present, the individual and personal circumstances of the foreigner in question are what counts. Circumstances that affect him or her only as a member of an entire section of the population are not material. Circumstances will be "special" if the foreigner is in an exceptional situation and he or she would, in the event of leaving the country, meet with an exceptionally difficult fate that is different from the the usual difficulties that would meet other foreigners upon leaving the country. The use of "exceptional hardship" as a criterion is an indication that this provision is intended for emergency situations – in other words, for cases in which the termination of an foreigner's residence appears unjustifiable (cf. Kluth et alt. 2008: 288).

2.3.8 The granting of residence to persons who are subject to an enforceable obligation to leave the country (§ 25, Paragraph 5, AufenthG)

The regulation in § 25, Paragraph 5, AufenthG makes it possible for a foreigners' authority to issue a foreigner who is subject to an enforceable obligation to leave the country with a residence permit if leaving the country is, "for legal or factual reasons" that are not the responsibility of the foreigner himself or herself, impossible and there is no likelihood of these reasons ceasing to apply in the foreseeable future. The term "leaving the country" should here be read as encompassing both voluntary departure and removal (cf. Storr et alt. 2008: 213). Any decision in this respect falls within the discretion of the foreigners' authority; there is no legal entitlement on the part of the foreigner.

The impossibility of leaving the country for factual reasons applies, for example, to cases in which the subject is not fit to travel or is without his/her passport for no fault of his/her own, or in which transport links have been interrupted or are absent altogether, provided that there is no likelihood of these obstacles ceasing to apply in the foreseeable future. Impossibility for legal reasons encompasses obstacles to departure related to internal domestic matters – for example, the presence of a physical or mental illness if there is a serious danger that the foreigner's state of health would, because of his/her leaving the country as such – in other words, independently of the circumstances in the country to which he or she would be deported – become significantly worse. Other legal obstacles to departure might also be pregnancy, an upcoming operation, the danger of suicide, the fact that the subject is expecting a child by a German national or an impending marriage with a German national.

A danger of a significant deterioration in health that threatens the foreigner because of the specific circumstances within his/her country of origin, and which cannot be dealt with through a suitable treatment, will not in general fall within the scope of application of § 25, Paragraph 5, but should instead be taken into consideration when examining any prohibitions on deportation relating to the destination country in accordance with § 60, Paragraph 2, 3, 5 or 7 (subsidiary protection), and may lead to the issuing of a residence permit in accordance with § 25, Paragraph 3 (cf. Deutscher Bundestag 2009: 213). For this reason,

when examining whether leaving the country is impossible in the sense of § 25, Paragraph 5, AufenthG, the only dangers that should, as a matter of principle, be taken into account are those that would arise solely as a result of removal or voluntary departure, and not as as a result of the specific circumstances within the destination country.

If there is a likelihood of the obstacle to departure ceasing to apply in the foreseeable future, no residence permit may be issued. When deciding whether or not a residence permit should be issued, a prognosis should therefore be made as to whether the obstacle to departure will continue to exist for the foreseeable future. This condition would, for example, be satisfied if the obstacle to departure is not, by its very nature, something temporary.

§ 25, Paragraph 5, Sentences 3 and 4, AufenthG ensure that a residence permit will only be issued once it has been determined that the foreigner is prevented from leaving the territory of the Federal Republic through no fault of his/her own. The foreigner will for example, be at fault if:

- the foreigner deceives the foreigners' authority with regard to his/her identity or nationality;
- her or she provides false declarararations of facts or misuses, destroys or suppresses documents or evidence;
- he or she disappears in order to frustrate a measure taken for the purpose of terminating his/her residence, or offers active or passive physical resistance against measures for the enforcement of the termination of his/her residence;
- the foreigner fails to give particulars known to him or her that are necessary for his/her departure;
- he or she fails to produce documents or evidence that he or she has at his/her disposal;
- he or she fails to cooperate in the determination of his/her identity and in the furnishing of papers needed for his/her return journey.

§ 25, Paragraph 5, Sentence 2, AufenthG establishes that the residence permit should be issued if the removal of the foreigner in question has been suspended for at least 18 months. The purpose of this passage is to ensure that an foreigner who is subject to an enforceable obligation to leave the country, and who has, for a lengthy period, only been in possession of an exceptional leave to remain ("Duldung", see Section 2.3.9), may, provided the the appropriate conditions apply, be placed in a better legal position – in other words, receive a residence permit.

In practice, the granting of residence in accordance with § 25, Paragraph 5, AufenthG to persons who are subject to an enforceable obligation to leave the country is of considerable significance for German law relating to foreigners. In 2008, as many as 30,861 persons received a residence permit in accordance with this provision.

2.3.9 The temporary suspension of removal, the so-called "Duldung" (§ 60a, AufenthG)

As has already been mentioned in Section 1.2, persons who receive an exceptional leave to remain ("Duldung") are, by definition, not entitled to protection. The "Duldung" is no more than a temporary suspension of the removal of persons who are subject to an obligation to leave the country. However, since it is possible for a "Duldung" to be issued not only in cases in which removal is impossible for "factual or legal reasons", but also for "reasons of international law or humanitarian reasons" or for pressing humanitarian or personal reasons, it makes sense to deal with it in the context of this study.

§ 60a, Paragraph 1, Sentence 1, AufenthG gives the supreme Länder authority the power to suspend the removal of particular groups of foreigners for a maximum duration of six months. This regulation is designed to make it possible for supreme Länder authorities to provide humanitarian protection to specific groups of foreigners in particular circumstances, irrespective of the presence or otherwise of endangerment on an individual level. For decisions of this type, in addition to the humanitarian criteria, considerations of external and domestic policy are the pivotal factors. Such "deportation stoppages" will be a matter of political decisions that will only be amenable to judicial review in exceptional cases. In determining the group of people to be covered, the supreme Länder authority is free to limit the scope according to personal and factual criteria (e.g. membership of a particular group of the population, regional origin, or indeed reasons for exclusion such as the commission of a criminal offence). The factors to be taken into consideration above all when taking a decision in accordance with § 60a, Paragraph 1 are dangers in accordance with § 60, Paragraph 7, Sentence 1 to which the population or a particular group of the population is exposed in general in the country of origin, and which therefore do not, in each respective individual case, constitute an obstacle to removal related to the country of origin.

According to § 60a, Paragraph 2, Sentence 1, AufenthG, there will be a claim to an exceptional leave to remain ("Duldung") if removal is not possible for reasons of law or of fact. The same applies if the temporary presence of the foreigner in question is considered by the public prosecutor's office or the criminal court to be appropriate for the implementation of criminal proceedings arising out of a criminal act because without the information that he or she can provide, it would be rendered more difficult to investigate the facts of the case (§ 60a, Paragraph 2, Sentence 2) and there is no question of the issuing of a residence permit in accordance with § 25, Paragraph 4 or Paragraph 4a, AufenthG. Among the factors capable of counting as legal or factual reasons for the impossibility of removal are:

- the presence of a prohibition on deportation related to the destination country in accordance with § 60, Paragraph 1 or Paragraphs 2 to 5 or Paragraph 7, AufenthG, without the issuing of a residence permit;

- the presence of an obstacle to the enforcement of deportation relating to internal domestic matters;[22]
- the suspension of the deportation by judicial order;
- unfitness to travel occasioned by illness;
- an ongoing lack of a passport if, in the experience of the foreigners' authority, deportation without a passport or a German substitute for a passport is not possible, or if an attempt to deport the subject has failed;
- interrupted transport routes for a deportation.

In addition, an exceptional leave to remain may be issued and renewed on a discretionary basis if pressing humanitarian or personal reasons or substantial reasons of public interest call for the temporary continued presence of the foreigner within the territory of the Federal Republic (§ 60a, Paragraph 2, Sentence 3, AufenthG). This provision is designed to deal with hardships that could in practice arise out of the fact that § 25, Paragraph 4, Sentence 1, AufenthG ("Temporary Residence") does not apply to foreigners who are subject to an enforceable obligation to leave the country.

In certain cases, a "Duldung" may also be issued in relation to a basis in European law. § 60a, Paragraph 2a, AufenthG envisages that the removal of a foreigner shall be suspended for one week if an attempt at forced return or removal has failed, detention for the purpose of removal has not been ordered and the Federal Republic of Germany is under an obligation to readmit him or her by reason of a legal provision, in particular Article 6 (1) of Council Directive 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purposes of removal by air. The issuing of a residence title cannot be considered because of the continuing obligation to leave the country. For this reason, in such cases a short-term regulation of the status by means of the issuing of an exceptional leave to remain is envisaged.

Exceptional leave to remain does not confer any right of residence. Pursuant to the intention of the legislative body, the residence in question remains unlawful, with the obligation persisting to leave the country without delay. However, one purpose of exceptional leave to remain is also to prevent foreigners becoming culpable, despite the obligation to leave the country to which they remain subject. Residence on the basis of an exceptional leave to remain is not a residence in the proper form under international law, nor does it constitute a residence title in the sense of the "Dublin II Regulation"[23] (cf. AVwV-AufenthG, No. 60a.3).

22 One factor that might be considered an obstacle to deportation relating to internal domestic matters would, for example, be unacceptable impairments of the right to maintain marital and family life within the territory of the Federal Republic with family members who are entitled to residence within the said territory, such as the separation of underage children from parents who are entitled to care for them (to be taken into consideration in accordance with Article 6 of the German Basic Constitutional Law and Article 8 of the European Convention for the Protection of Human Rights), or (temporary) dangers, caused by deportation, to the physical integrity of the alien.

23 Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

In 2008, the German foreigners' authorities issued "Duldung" documents to a total of 88,152 persons. This comparatively high number reflects, on the one hand, the low level of willingness to comply with an obligation to leave the country, once this has been determined, by departing voluntarily. Likewise, removals often fail because of an unwillingness to cooperate – in terms of providing a passport, for example – on the part of the foreigner in question. On the other hand, even if a factual or legal obstacle to deportation that cannot be attributed to the foreigner in question, an exceptional leave to remain will as a rule be issued; a residence permit will not be issued until such time as there is no longer any prospect of the obstacle to deportation ceasing to apply in the foreseeable future (§ 25, Paragraph 5, AufenthG).

2.3.10 The granting of residence within the framework of the regulations governing old cases ("Altfallregelung", § 104a and § 104b, AufenthG)

The legal "grandfather clause" contained in § 104a and § 104b, AufenthG is intended to make allowance for the need of foreigners who have for some years been within the territory of the Federal Republic on the basis of an exceptional leave to remain ("Duldung"), and who have integrated, for lasting prospects within Germany. Since foreigners in possession of an exceptional leave to remain are subject to an obligation to leave the country, this regulation can, factually speaking, be seen as a measure of regularisation (cf. Baldwin-Edwards/Kraler 2009: 7)[24]. This is not, however, a possibility for across-the-board regularisation, but rather one dependent upon individual cases and to which strict conditions apply. It is aimed at persons who are in possession of an exceptional leave to remain and who have "nonetheless integrated" themselves into the prevailing way of life within the Federal Republic on both an economic and a social level, and who are therefore predominantly capable of securing their livelihood themselves. The orientation of this regulation governing old cases, also called "statutory grandfather clause", and the conditions it contains, tie in with the Right of residence ruling ("Bleiberecht") passed by the Standing Conference of Ministers and Senators of the Interior of the Federal German Länder (IMK) on 17 November 2006 (cf. section 2.3.2 of this study). § 104a and § 104b, AufenthG contain a total of five different legal bases for the issuing of a residence permit for "old cases":

- A "residence permit on trial" in accordance with § 104a, Paragraph 1, Sentence 1, 3 AufenthG forms the legal basis for the issuing of a residence permit to foreigners who are subject to an enforceable obligation to leave the country and to any underage children who are theirs and who have been living together with them in a domestic unit. This residence permit will be issued if the foreigner is not able to secure a livelihood for the said domestic unit, and is therefore valid only until 31

24 Baldwin-Edwards und Kraler define regularisation as "any state procedure by which third country nationals who are illegally residing, or who are otherwise in breach of national immigration rules, in their current country of residence are granted a legal status".

December 2009 at the latest. It will only be extended if the foreigner in question has, in the meantime, managed to secure his/her livelihood to a great extent.[25]

- The provision in § 104a, Paragraph 1, Sentence 2, in conjunction with § 23, Paragraph 1, Sentence 1, AufenthG, forms the legal basis for the issuing of a residence permit to foreigners and their underage children whose livelihood is secured independently through employment.

- The regulation in § 104a, Paragraph 2, Sentence 1, in conjunction with § 23, Paragraph 1, Sentence 1, AufenthG, contains a separate grandfather clause for unmarried children of full age of foreigners who have for many years been in possession of an exceptional leave to remain, even if these children have not themselves been resident within Germany for the required number of years.

- The provisions of § 104a, Paragraph 2, Sentence 2, in conjunction with § 23, Paragraph 1, Sentence 1, AufenthG, contain a grandfather clause for unaccompanied underage migrants.

- § 104b, in conjunction with § 23, Paragraph 1, Sentence 1, AufenthG, envisages a right of residence independent of parents for unmarried children aged 14 to 17 who have integrated, whose parents have left the country and who do not meet the conditions for the issuing or extension of a residence permit in accordance with the regulations governing old cases. In introducing this regulation, the intention of the legislative body was to give prospects of a right to residence to chidren who have been living in Germany for years and who have integrated well, even if their parents have not adhered to the law while in Germany.

25 Because, as a result of the economic crisis in 2008 and 2009, the affected parties were often unable to fulfil this condition through no fault of their own, the Ministers and Senators of the Interior of the Federal German Länder decided on 4 December 2009 to extend the legal deadline for the residence permit on trial. According to this follow-up regulation, foreigners holding a „residence permit on trial" are issued a residence permit valid through 31 December 2011, if they either give proof of at least halftime employment over the last six months before 31 December 2009, or satisfactorily show until 31 January 2010 that they will be part-time employed for the next six months to come. The same applies if the foreigner in question has successfully completed a school or apprenticeship education before the end of 2009, or if he/she is still in education, as there are justifiable grounds to assume that integration and the ensurance of his/her independent subsistence are assured. Foreigners holding a „residence permit on trial", who cannot give proof of appropriate employment inducing extension of their residence title, may be issued another 2-year-residence permit „on probation" if they demonstrate that they have endeavoured to secure means of subsistence for themselves and their dependents through employment, and when the assumption is justified that their livelihood will be secured independently after these two years by taking up employment.

3 Procedures and rights associated with the granting of protection

3.1 Introductory remarks

Because of the large number of forms of protection possible under the law, it is not possible for this study to provide a complete overview covering every aspect of procedure and every law. Instead, the study focuses upon the asylum procedure, in the course of which the presence of political persecution, the conditions for the granting of protection to refugees and the presence of prohibitions on deportation (subsidiary protection) are all examined (Section 3.2). Attention is also paid to the rights associated with the status of persons entitled to asylum and/or refugees in the sense of the Geneva Convention or of persons entitled to subsidiary protection. The procedures that are used in respect of other forms of protection have already been addressed in Chapter 2, and are given no more than a brief descriptive overview in Section 3.3.

For the sake of simplicity, the asylum procedure and the granting of subsidiary protection are dealt with in this chapter under the heading of "The granting of protection on the basis of European law", although – as has already become clear – to some degree, national forms of protection still have a role to play here.

3.2 Procedures and rights relating to the granting of protection on the basis of European law

3.2.1 The asylum procedure

The granting of protection to foreigners who lodge an application for asylum is carried out in Germany by means of a three-tiered system. The following is to be considered:

a) recognition as a person entitled to asylum in accordance with Article 16a of the German Basic Constititional Law,
b) the award of protection to refugees in accordance with § 60, Paragraph 1, AufenthG ("refugee status"), or
c) the granting of prohibitions on deportation in accordance with § 60, Paragraphs 2, 3, 5 or 7, AufenthG ("subsidiary protection").

When an application for asylum is lodged, this has the legal consequence that the BAMF, which is the central Federal authority for the examination of applications for asylum, examines whether or not the conditions necessary for the granting of the respective forms of protection have been met (§ 5, Paragraph 1 in conjunction with § 13, Paragraph 2 and § 24, Paragraph 2 of the Asylum Procedure Act). If a person is recognised as being entitled to asylum, that person also automatically becomes a refugee in the sense of § 60, Paragraph 1, AufenthG. It is, however, also possible for a person who is not entitled to asylum in the sense of the Basic Constitutional Law to be recognised as a refugee. If there is no possibility either of a recognition as a person entitled to asylum or an awarding of refugee status, there may conceivably remain a further possibility of protection in the form of the granting of subsidiary protection.

The basis of the asylum procedure in Germany is the Asylum Procedure Act (Asylverfahrensgesetz, AsylVfG). When the BAMF receives an application, its first task is to determine whether a complete asylum procedure, including the substantive examination of the reasons for asylum should be carried out. About one third of all applications for asylum never get as far as a full examination in terms content – for example, in cases in which another European country is responsible for the applicant.[26] In order that the asylum procedure may be carried out, the foreigner will be allowed to reside within the territory of the Federal Republic.

The asylum applicant will have to visit the BAMF in person. The BAMF has a total of 22 branch offices throughout the Federal Länder; these can be found on the premises of the respective "central initial reception centres" for asylum-seekers. All asylum applicants who have passed their 14th birthday are photographed and fingerprinted. They must also hand over personal documents and papers containing information about the route taken. An asylum file for the applicant is then opened in the branch office. The subject's personal data are inputted into an IT system in order to determine whether this is a first-time application or possibly a repeat or multiple application. There is also a comparison with Eurodac, the European fingerprint identification system, intended to determine whether the asylum applicant has already lodged an application in another Member State. In addition, a data comparison is also carried out with the Central Register of Foreign Nationals (AZR). Following this, the asylum applicant is issued with a temporary residence permit, giving him or her a provisional right of residence up to the conclusion of the asylum procedure (cf. Schneider 2009: 39-40).

The heart of the asylum procedure is the personal and private interview, which will generally make use of an interpreter and in which the asylum applicant may present any statements of facts concerning political persecution and/or the reasons why persecution is to be feared. This interview will be carried out a few days after the asylum application has been lodged, by appropriately trained and professionally experienced case workers from the BAMF who have special knowledge of the country of origin to be dealt with here. A lawyer or some other representative of the asylum applicant may, if prior notification has been given, also be present at the interview. In principle, circumstances justifying recognition as a person entitled to asylum or as a refugee do not need to be proved by the asylum applicant – all that needs to be established is their believability. There is, however, a requirement for all the facts that justify his/her fear of political persecution or that in some other manner stand in the way of any deportation should be comprehensively presented and all the available documentation provided. Following the interview, the responsible official will reach the decision concerning the application for asylum on the basis of all the relevant findings. The decision in respect of the application for asylum will be issued in writing, and

26 An absence of such responsibility on the part of Germany may arise out of the application of the Council Regulation (EC) No 343/2003 of 18 February 2003 (the "Dublin II regulation").

will include a justification. At any stage of the proceedings, the asylum applicant may call in a legal advisor. When contesting a negative decision, the asylum applicant is entitled to apply to the administrative court. In addition to the “regular” asylum procedure, there also exists the so-called “airport procedure“, a special accelerated procedure for those entering the country by air (§ 18a, AsylVfG).[27]

Persons entitled to asylum and refugees under the Geneva Convention will, in accordance with § 25, Paragraph 1 and Paragraph 2 in conjunction with § 26, Paragraph 1, Sentence 2, AufenthG, receive a residence permit with an initial limited three year duration, provided there are no serious reasons relating to public safety and order for which they should be expelled. After three years, they should be granted a settlement permit in accordance with § 26, Paragraph 3, AufenthG if the BAMF has provided notification that the conditions for a revocation or a withdrawal do not apply. Accordingly, the BAMF will, three years at the most after the incontestability of the positive decisions named, carry out an investigation into whether the conditions for a revocation or a withdrawal prevail. The residence permit and settlement permit entitle the holder to engage in employment and, in accordance with § 29, Paragraph 2, AufenthG, to privileged family reunification.

If protection as a refugee is not granted, but a prohibition on deportation exists in accordance with § 60, Paragraphs 2, 3 and 7, Sentence 2, AufenthG, persons entitled to protection will receive a residence permit for a minimum period of one year in accordance with § 25, Paragraph 3 in conjunction with § 26, Paragraph 1, Sentence 2, AufenthG. This permit may be extended – however, a transition to a settlement permit is envisaged only after seven years in accordance with § 26, Paragraph 4, AufenthG, with the time spent on the earlier asylum procedure counting towards this period. Likewise, in the case of persons entitled to subsidiary protection, the BAMF must examine whether its determination concerning the presence of the conditions in § 60, Paragraphs 2, 3, 5 or 7, AufenthG should be revoked or withdrawn (§ 73, Paragraph 3, AsylVfG). In the case of persons entitled to subsidiary protection, access to the labour market will initially be a low priority; until the subject has resided in Germany for many years will his/her access to the labour market be dependent on the agreement of the Federal Employment Agency (Bundesagentur für Arbeit).[28] The right to family reunification is limited in the case of persons entitled to subsidiary protection. In accordance with § 29, Paragraph 3, Sentence 1, AufenthG, such reunification of family members is permitted only for reasons of international law or for humanitarian reasons, or for the safeguarding of political interests.

In the case of national prohibitions on deportation (§ 60, Paragraph 5 and 7, Sentence 1, AufenthG), the issuing of a residence permit is a directory provision (cf. BAMF 2009: 44).

27 Concerning this, please see Schneider 2009: 42.

28 The Federal Employment Agency will carry out a priority check, among other things, and and will evaluate whether or not the employment of aliens is capable of having a negative impact on the employment market.

3.2.2 Subsidiary protection without asylum procedure

While recognition as a person entitled to asylum and the awarding of refugee status fall exclusively into the responsibility of the BAMF, decisions concerning the granting of subsidiary forms of protection can also be taken at a Länder level by the relevant foreigners' authorities. This will happen if a foreigner does not lodge any application for asylum and only presents an "isolated application for subsidiary protection" to a foreigners' authority in accordance with § 60, Paragraphs 2, 3, 5 or 7, AufenthG. The foreigners' authority must, prior to taking its decision concerning the presence of a prohibition on deportation relating to the destination country and of grounds for exluding the subject from the granting of a residence permit for reasons relevant to security in accordance with § 72, Paragraph 2, AufenthG, involve the BAMF. During 2008, between 200 and 250 persons received a residence permit (as persons entitled to subsidiary protection) in accordance with § 25, Paragraph 3, AufenthG, without these persons being recorded on the Central Register of Foreign Nationals as asylum applicants. The most important countries of origin of these persons were Serbia and the former State Union of Serbia and Montenegro, Afghanistan, Bosnia and Herzegovina, Somalia and Turkey.

3.3 Procedures and rights relating to the granting of protection on a national basis

In addition to the forms of protection that are dealt with in the context of the asylum procedure, the BAMF is also responsible for the admission of Iraqi refugees in accordance with § 23, Paragraph 2, AufenthG as decided in December 2008 by the Ministers and Senators of the Interior ("resettlement") and for the admission of Jewish immigrants from the former Soviet Union (likewise in accordance with § 23, Paragraph 2, AufenthG). Responsibilities of other authorities and/or ministers, and the rights granted to foreigners in Germany, depending upon their respective residence permit – concerning family reunification, for example, or access to the job market – are shown below in table form.

Table 1: Overview of procedures and rights relating to the granting of protection

Forms of Protection	Facts of the Case	Responsibility	Status Awarded	Family Reunification	Access to the Job Market
§ 22 Sentence 1	Admission from abroad	Diplomatic missions / Länder	Residence Permit (RP), settlement permit (SP) can be granted after 7 years (see § 26 Paragraph 4)	Limited family reunification (spouse and minor children) only for reasons of international law or for humanitarian reasons or for the safeguarding of political interests of the Federal Republic of Germany.	Subordinate access; unrestricted access at the latest after 3 years
§ 22 Sentence 2	Admission by BMI	BMI or authority determined by BMI			Immediate unrestricted access
§ 23 Paragraph 1	Admission by Länder Authorities	Länder Authorities (consultation with BMI)			Subordinate access; unrestricted access at the latest after 3 years
§ 23 Paragraph 2	Admission by Federal Government	BMI (consultation with Länder authorities) and BAMF	RP or SP	Family reunification according to standard terms	Immediate unrestricted access
§ 23a	Hardship Regulation	Länder Authorities	RP (SP can be granted after 7 years)		Subordinate access; unrestricted access at the latest after 3 years
§ 24	Temporary Protection	EU Council Decision / Federal Government / Länder Authorities		Limited family reunification	
§ 25 Paragraph 1	Persons entitled to asylum	BAMF (Decision on protection) / Foreigners' authorities (granting of residence title)	RP (SP after three years)	Privileged family reunification, family asylum, refugee protection for families	Immediate unrestricted access
§ 25 Paragraph 2	Geneva Convention Refugees				
§ 25 Paragraph 3	Subsidiary Protection	BAMF (if asylum application lodged) / Foreigners' authorities	RP (SP can be granted after 7 years)	Limited family reunification	Subordinate access; unrestricted access at the latest after 3 years
§ 25 Paragraph 4	Temporary Residence	Foreigners' authorities		not applicable (§ 29 Paragraph 3 Sentence 3)	
§ 25 Paragraph 4a	Victims of Human Trafficking	Foreigners' authorities (collaboration withlaw enforcement authorities)	RP for 6 months		
§ 25 Paragraph 5	Persons subject to an enforceable obligation to leave the country	Foreigners' authorities	RP (SP can be granted after 7 years)		
§ 104a Par. 1 S. 1	Grandfather clause (RP on trial)		RP valid until 31st December 2009 (with possibility of extension in case of an independent securing of livelihood)		Immediate unrestricted access
§ 104a Par. 1 S. 2 in conn. with § 23 Par. 1 S. 1	Grandfather clause (independent securing of livelihood)			Limited family reunification for reasons of international law or for humanitarian reasons or for the safeguarding of political interests of the Federal Republic of Germany	
§ 104a Par. 2 in conn. with § 23 Par. 1 S. 1	Grandfather clause (adult children and unaccompanied minors)				
§ 104b in conn. with § 23 Par. 1 S. 1	Grandfather clause (integrated children)		RP	not applicable (§ 29 Paragraph 3 Sentence 4)	Subordinate access; unrestricted access at the latest after 3 years
§ 60a	Exceptional leave to remain („Duldung")	Länder Authorities / Foreigners' authorities	"Duldung" (if applicable with residence requirements)	Not applicable (§ 29 Paragraph 1 No. 1)	Subordinate access after waiting period of 1 year; unrestricted after 4 years at the latest, unless residence is abusive

4 Statistics relating to the granting of protection

4.1 Introductory remark: the availability of data and methods of evaluation

The statistics presented below relating to the forms of protection available in Germany are based primarily upon two data sources, the Central Register of Foreign Nationals (AZR) and the asylum statistics of the BAMF. The AZR is a nationwide database of individuals that is centrally managed by the BAMF, consisting of a general pool of data and a separate visa data file. Its contents include detailed data concerning foreign nationals who are resident in the Federal Republic on a more than temporary basis, or who were so within the past ten years. The Central Register of Foreign Nationals makes it possible – among other things – to produce statements related to any given reference date concerning how many persons were issued with which residence title during a particular period and on which respective legal basis this took place. The available figures can be broken down according to gender, age groups and nationality, and narrowed down by region of residence.

There is, however, an important restriction, in that the issuing of residence titles cannot be traced as far back as one might wish. On the one hand, it was not possible for the legal bases used for the issuing of residence titles to be recorded in the AZR until December 2005, and on the other, older databases were not preserved, and therefore can no longer be evaluated. For this reason, this study only contains detailed statements on the basis of the AZR concerning residence permits issued in the years 2008 and – insofar as these are available – 2007. In addition, "stock figures" relating to the reference date of 31 December 2008 are quoted, making it possible to gain an insight into the overall number of foreign nationals who were resident in Germany with any given residence title on the relevant date.

In contrast to the AZR data, the asylum statistics of the BAMF can be traced back quite far. This applies – among other things – to the number of persons who were recognised as being entitled to asylum, who were granted refugee status or who received subsidiary protection. The sole limitation in respect of the present study is the fact that as described in Chapter 2, subsidiary protection is granted partly on the basis of European law and partly on the basis of national law. Looked at statistically, however, the subsidiary protection granted in recent years has been combined together, since there was no reason for breaking subsidiary protection down according to the individual legal bases used. This has only been possible since 2009. In the present study, therefore, for the purpose of arriving at a statistics-based appraisal of the significance of subsidiary protection granted on the basis of European law and on a national basis respectively, figures from the statistics of the BAMF relating to applications, decisions and the number of persons with pending asylum applications have been been provided covering the first half year of 2009 (1 January to 30 June). As regards the statistics for the years 2008 and 2007, it is not possible for subsidiary protection to be broken down.

In the following sections, it is also indicated which forms of protection fall under Regulation (EC) No. 862/2007 of the European Parliament and of the Council of 11 July 2007 on Community statistics on migration and international protection (hereinafter referred to as the "Statistics-Regulation") and have, in accordance with this Regulation, been provided by Germany to Eurostat, the EU office for statistics.

In general, it should be noted in respect of the following sections that statistics relating to the granting of protection on the basis of European law are not wholly comparable with data concerning the granting of protection on the basis of national law. National forms of protection are in part "secondary" forms of protection – the regulations governing old cases ("grandfather clause"), for example, or the regulation on cases of hardship. The persons who have benefited from these have already been resident within Germany over a lengthy period of time, and were asylum applicants or were in possession of other residence permits or of an exceptional leave to remain ("Duldung").

4.2 Statistics relating to the granting of protection on the basis of European law

4.2.1 Persons entitled to asylum, refugee status in the sense of the Geneva Convention and subsidiary protection

Since the presence of reasons for recognition as a person entitled to asylum, a determination of refugee status in the sense of the Geneva Convention and the awarding of subsidiary protection by the BAMF within the framework of the asylum procedure are all being examined, it makes sense to look at these together on a statistical level, even if we are dealing here partly with Europeanised forms of protection and partly with national forms.

Tables 1, 2 and 3 provide information concerning the frequency of these three forms of protection, with Table 1 giving the gender of the respective persons, Table 2 the age groups and Table 3 the ten most important countries of origin. The reference period for all three tables is 1 January to 30 June 2009. Instances in which an "isolated application for subsidiary protection" was lodged with a foreigners' authority are not included.

Table 2: **Asylum decisions, classified according to gender (1 January - 30 June 2009)**

	Decisions total	Recognition as persons entitled to asylum (incl. family asylum)	Protection for refugees § 60 Paragraph 1 AufenthG (incl. refugee protection for families)	Subsidiary protection § 60 Paragraph 2, 3, 7 Sentence 2 AufenthG	Subsidiary protection § 60 Paragraph 5 and 7 Sentence 1, AufenthG	Rejections	Formally closed
M	9 564	147	2 714	107	269	3 608	2 719
F	4 491	88	1 432	48	250	1 602	1 071
Total	**14 055**	**235**	**4 146**	**155**	**519**	**5 210**	**3 790**

Source: BAMF

Table 3: Asylum decisions, classified according to age groups (1 January - 30 June 2009)

	Decisions total	Recognition as persons entitled to asylum (incl. family asylum)	Protection for refugees § 60 Paragraph 1 AufenthG (incl. refugee protection for families)	Subsidiary protection § 60 Paragraph 2, 3, 7 Sentence 2, AufenthG	Subsidiary protection § 60 Paragraph 5 and 7 Sentence 1, AufenthG	Rejections	Formally closed
Unknown	1	-	-	-	-	1	-
under 16	3 681	90	1 351	7	170	1 274	789
16 - under 18	724	8	264	11	62	300	79
18 - under 25	3 354	33	1 039	36	72	1 359	815
25 - under 35	3 863	55	942	58	74	1 534	1 200
35 - under 45	1 527	29	317	17	59	510	595
45 - under 55	594	11	141	7	35	169	231
55 - under 65	198	5	66	9	23	35	60
65 and older	113	4	26	10	24	28	21
Total	**14 055**	**235**	**4 146**	**155**	**519**	**5 210**	**3 790**

Source: BAMF

Table 4: Asylum decisions, classified according to countries of origin (1 January - 30 June 2009)

	Decisions total	Recognition as persons entitled to asylum (incl. family asylum)	Protection for refugees § 60 Paragraph 1 AufenthG (incl. refugee protection for families)	Subsidiary protection § 60 Paragraph 2, 3, 7 Sentence 2, AufenthG	Subsidiary protection § 60 Paragraph 5 and 7 Sentence 1, AufenthG	Rejections	Formally closed
Iraq	4 433	19	3 126	10	69	426	783
Turkey	1 036	13	85	-	18	543	203
Kosovo	759	-	5	1	40	372	341
Vietnam	738	-	1	-	3	557	177
Iran	607	54	231	13	5	185	119
Afghanistan	520	14	91	10	202	101	102
Syria	491	14	58	2	8	250	614
Russia	456	6	85	1	5	190	169
Serbia	408	-	2	-	6	200	200
Lebanon	376	-	10	-	4	276	86
All countries of origin	**14 055**	**235**	**4 146**	**155**	**519**	**5 210**	**3 790**

Source: BAMF

When Tables 2 to 4 are considered, it becomes evident that during the reference period, decisions were taken concerning more than 14,055 applications for asylum, these being both first-time and repeat applications. It is clear that in the context of the asylum procedure, forms of protection decided or awarded on the basis of European law significantly outweigh those on a national basis. Thus, not just in respect of the gender of the applicant but also in respect of individual age groups and the ten most important countries of origin, the-

re were significantly more positive decisions in the sense of the Geneva Convention (GRC) as examined on the basis of European law than those relating to entitlement to asylum on a national basis (Article 16a, Paragraph 1, German Basic Constitutional Act). And while, during the first half of 2009, refugee status was determined in the cases of 4,146 persons in all (including protection as refugees awarded to spouses and underage children of recognised refugees), only 235 persons were recognised as being entitled to asylum.[29]

Likewise, on a quantitative level, the granting of refugee status outweighs subsidiary protection (awarded only partly on the basis of European law) to a striking extent. While 4,146 persons were recognised as refugees in the sense of the GRC, "only" 674 received subsidiary protection. The only areas in which exceptions can be observed – that is to say, in which the frequency of subsidiary protection outweighs that of refugee status – are the "65 and over" age group, and persons whose country of origin is Kosovo, Afghanistan or Serbia. During the first half of 2009, decisions were taken concerning more than 520 asylum applications from Afghan asylum applicants. Of these, in 91 cases the decision was to award refugee status, with subsidiary protection being decided on in 212 cases. In the case of other countries of origin, including Iraq, Turkey, Iran, Syria or indeed the Russian Federation, the proportion of cases in which protection as refugees was awarded outweighed the proportion involving subsidiary protection several times over.

Meanwhile, if the figures for the awarding of subsidiary protection are considered separately, one notices that national prohibitions on deportation outweigh prohibitions on deportation on the basis of European law. In all the age groups and in respect of both genders and virtually every country of origin, (national) subsidiary protection in accordance with § 60, Paragraphs 5 and 7, Sentence 1, AufenthG is awarded more often than (European) subsidiary protection in accordance with § 60, Paragraphs 2, 3 and 7, Sentence 2, AufenthG. The sole exception among the ten countries of origin in respect of which the greatest number of decisions were taken was, for the first half of 2009, Iran. Here, subsidiary protection in accordance with § 60, Paragraphs 2, 3 or 7, Sentence 1, AufenthG was awarded in 13 cases, while protection in accordance with § 60, Paragraphs 5 and 7, Sentence 1, AufenthG was awarded in only 5 cases. Setting aside the ten principal countries of origin, subsidiary protection on the basis of European law also outweighted national prohibitions on deportation in respect of asylum applicants from Eritrea and Sri Lanka.[30]

If we divide the awarding of subsidiary protection during the period from 1 January to 30 June 2009 up into the individual legal bases contained in § 60, Paragraphs 2 to 7, AufenthG, the following picture emerges:

29 One of the factors to which this can be attributed is the fact that recognition as a person entitled to asylum is not possible if the person in question has entered Germany via a safe third country or comes from a safe country of origin. These matters have no significance in terms of the determination of refugee status.

30 Eritrea: 31 decisions taken in respect of prohibitions on deportation on the basis of European law, 4 on prohibitions on a national basis; Sri Lanka: 73 decisions taken in respect of prohibitions on deportation on the basis of European law, 26 on prohibitions on a national basis.

Table 5: Subsidiary protection, classified according to legal basis (1 January - 30 June 2009)

Total of subsidiary protection national and EU	§ 60 Paragr. 5	§ 60 Paragr. 7 Sentence 1	Protection not evaluable separately (national)	Total of subsidiary protection (national)	§ 60 Paragr. 2	§ 60 Paragr. 3	§ 60 Paragr. 7 Sentence 2	Protection not evaluable separately (EU)	Total of subsidiary protection (EU)
674	4	341	174	519	101	-	12	38	155

Source: BAMF

It is noticeable that in more than 50% of the cases in which subsidiary protection was awarded, § 60, Paragraph 7, Sentence 1, AufenthG ("concrete danger to his/her life and limb or liberty") was brought to bear.

If we take a look at the way decision-making developed over the individual months[31], however, it emerges that the awarding of subsidiary protection on the basis of European law increased month by month in comparison to the awarding of national subsidiary protection. In January 2009, a prohibition on deportation on the basis of European law was determined in only 9 cases, as opposed to 49 cases in which a prohibition on a national basis was determined. In June 2009, a prohibition on deportation on the basis of European law was determined in 38 cases, with a prohibition on a national basis determined in 95. The progression seen here indicates that the amount of consideration being given to prohibitions on deportation on the basis of European law is gradually increasing.

As already mentioned, it is not possible to draw any distinction between subsidiary protection granted on the basis of European law and that granted on the basis of national law in the statistics for 2008 and 2007 (Tables 5 and 6). Here too, however, it can be discerned that decisions in favour of protection as refugees (with EU law as a basis) significantly outweigh those in favour of recognition as a person entitled to asylum (with national law as a basis). Expressed in terms of percentages, in 33.9% of the decisions taken during 2008, refugee status was determined, as opposed to 24.1% during 2007. Meanwhile, only 1.1% of the respective decisions in both 2008 and 2007 involved recognition as a person entitled to asylum. Likewise, subsidiary protection is awarded significantly less (2.7% of all decisions taken in 2008 and 2.4% in 2007) than protection as refugees. As the tables show, however, there are in some instances significant differences in respect of the individual countries of origin.

31 We have refrained from the depiction of detailed monthly tables for reasons of space.

Table 6: **Asylum decisions, classified according to principal countries of origin (2008)**

	Total of decisions	Recognition as persons entitled to asylum (and family asylum)	Protection for refugees § 60 Paragraph 1, AufenthG (and refugee protection for families)	Subsidiary protection § 60 Paragraph 2, 3, 5 or 7, AufenthG	Rejections	Formally closed
Iraq	7 390	38	5 692	64	467	1 129
Turkey	1 383	34	83	13	659	594
Vietnam	1 104	1	3	-	841	259
Serbia*	929	-	5	16	363	545
Iran	874	31	273	20	268	282
Russia	787	17	133	21	252	364
Kosovo**	780	-	4	15	333	428
Syria	617	9	97	9	285	217
Afghanistan	398	5	77	96	67	153
Nigeria	358	-	12	2	231	113
All countries of origin	**20 817**	**233**	**7 058**	**562**	**6 761**	**6 203**

*Up to 30 April 2008, applicants from Kosovo were included.
**Since 1 May 2008, Kosovo is shown separately in the statistics.

Source: BAMF 2009: 49

Table 7: **Asylum decisions, classified according to principal countries of origin (2007)**

	Total of decisions	Recognition as persons entitled to asylum (and family asylum)	Protection for refugees § 60 Paragraph 1 AufenthG (and refugee protection for families)	Subsidiary protection § 60 Paragraph 2, 3, 5 or 7 AufenthG	Rejections	Formally closed
Iraq	7 779	128	5 632	34	1 025	960
Serbia	2 904	-	19	31	1 525	1 329
Turkey	2 191	19	83	17	1 227	845
Iran	1 300	45	237	98	427	493
Russia	1 210	15	184	26	569	416
Vietnam	1 062	-	4	4	850	204
Syria	749	15	83	15	421	215
Lebanon	722	1	4	1	523	193
Afghanistan	720	2	70	127	230	291
Nigeria	600	-	10	3	448	139
All countries of origin	**28 572**	**304**	**6 893**	**673**	**12 749**	**7. 953**

Source: BAMF 2008: 43

Within the framework of Article 4 (2) (b) of the Statistics-Regulation, the number of persons affected by decisions of first instance involving the awarding or refusal of refugee status must be delivered to Eurostat on a quarterly basis. In this respect, decisions of first instance involving recognition as a person entitled to asylum and the granting of protection as a refugee are combined together in Germany. Since the legal consequences of both forms in which protection may be granted are virtually identical, it no longer makes any sense to distinguish between the two forms of protection on a statistical level. Numbers in respect of subsidiary protection in accordance with § 60, Paragraphs 2, 3 and 7, Sentence 2, AufenthG are delivered to Eurostat within the framework of Article 4 (2) (c) of the Statistics-Regulation; numbers in respect of national subsidiary protection in accordance with § 60, Paragraphs 5 and 7, Sentence 1, AufenthG, on the other hand, are delivered on the basis of Article 4 (2) (e), Statistics-Regulation, which encompasses "residence permits for humanitarian reasons in accordance with national law". Refusals are reported in accordance with Article 4 (2) (a), Statistics-Regulation.

According to the AZR, on 31 December 2008 a total of 2,189 persons who had a residence permit in accordance with § 25, Paragraph 1, AufenthG (persons entitled to asylum) were living in Germany. 37,994 had a residence permit in accordance with § 25, Paragraph 2, AufenthG (refugees under the GRC). A further 24,283 had a residence permit in accordance with § 25, Paragraph 3 (subsidiary protection). In addition, there were 50,261 persons entitled to asylum or to refugees status under the GRC in possession of a settlement permit in accordance with § 26, Paragraph 3, AufenthG, because their recognition had not been revoked or withdrawn after three years.

4.2.2 Victims of human trafficking

In quantitative terms, the issuing of a residence permit to victims of human trafficking who are cooperating with the law enforcement authorities and the courts (§ 25, Paragraph 4a, AufenthG) has to date barely been of any significance. According to the AZR, in 2008 only 21 persons were issued with a residence permit on this legal basis. 20 of these were women. Most of the persons involved were between 18 and 35 years old. As Table 4 shows, the most significant nationalities here were Bulgaria and Nigeria, with 5 persons apiece.[32]

32 Data for 2007 are not available, since the appropriate data storage capability was not created until 1 March 2008.

Table 8: Residence in accordance with § 25, Paragraph 4a, AufenthG (2008)

	under 16	16 - under 18	18 - under 25	25 - under 35	35 - under 45	45 - under 55	55 - under 65	65 and older	Total
Bulgaria	-	-	3	1	1	-	-	-	5
Nigeria	-	-	3	2	-	-	-	-	5
Romania	-	-	1	1	1	-	-	-	3
Poland	-	-	2	-	-	-	-	-	2
Russia	-	-	-	2	-	-	-	-	2
Belarus	-	-	1	-	-	-	-	-	1
Ukraine	-	-	-	1	-	-	-	-	1
India	1	-	-	-	-	-	-	-	1
Korea	-	-	-	-	-	1	-	-	1
Total	**1**	**-**	**10**	**7**	**2**	**1**	**-**	**-**	**21**

Age groups in years

Source: BAMF (Central Register of Foreign Nationals)

According to the AZR, on 31 December 2008, 22 persons with a residence permit in accordance with § 25, Paragraph 4a, AufenthG, were resident in Germany.

4.3 Statistics relating to the granting of protection on a national basis

4.3.1 Admission from abroad (§ 22, AufenthG)

As described in Chapter 2.3.1, § 22, AufenthG contains two variant cases: admission for reasons of international law or for pressing humanitarian reasons (§ 22, Sentence 1, AufenthG) and admission for the safeguarding of the political interests of the Federal Republic of Germany (§ 22, Sentence 2, AufenthG). The following tables no. 9 and 10 display numbers for the first category of cases (§ 22 Sentence 1, AufenthG) for the years 2008 and 2007, that is they specify the number of residence permits granted on this legal basis to foreign nationals who entered the terroitory of the Federal Republic in each given year 2008 and 2007 respectively. The numbers show that admission from abroad is of comparatively little significance for immigration in Germany. However, from the fact that among the nationalities considered most frequently in 2007 and 2008, most persons came from the Republic of Yemen – in other words, from a country that is not one of the most significant countries of origin for asylum applicants in Germany – the conclusion can be drawn that the admission from abroad in individual instances can be of strong significance. It is also noticeable that in most cases, children below the age of 16 benefitted from this legal provision.

In 2008, 25 persons who entered Germany during that year, were granted residence under § 22 Sentence 1, AufenthG, 17 of which came from Yemen. In 2007, 22 foreign nationals received a recidence permit according to this legal provison, 18 of which were from Yemen.

Table 9: Residence granted in accordance with § 22 Sentence 1, AufenthG (2008)

		under 16	16 - under 18	18 - under 25	25 - under 35	35 - under 45	45 - under 55	55 - under 65	65 and older	Total	Total
Yemen	M	10	-	-	-	-	-	-	-	10	17
	F	7	-	-	-	-	-	-	-	7	
Eritrea	M	-	-	-	-	-	-	-	-	-	1
	F	1	-	-	-	-	-	-	-	1	
Iraq	M	-	-	-	-	-	1	-	-	1	1
	F	-	-	-	-	-	-	-	-	-	
Morocco	M	1	-	-	-	-	-	-	-	1	1
	F	-	-	-	-	-	-	-	-	-	
Russia	M	-	-	-	-	-	-	-	-	-	1
	F	-	-	-	-	-	-	-	1	1	
Sudan	M	-	-	-	-	-	-	-	-	-	1
	F	1	-	-	-	-	-	-	-	-	
Unknown	M	1	-	-	-	-	-	-	-	-	1
	F	-	-	-	-	-	-	-	-	-	
Uzbekistan	M	-	1	-	-	-	-	-	-	1	1
	F	-	-	-	-	-	-	-	-	-	
USA	M	-	-	1	-	-	-	-	-	1	1
	F	-	-	-	-	-	-	-	-	-	
All Nationalities		**21**	**1**	**1**	**-**	**-**	**1**	**-**	**1**	**25**	**25**

Age groups in years

Source: BAMF (Central Register of Foreign Nationals)

Table 10: Residence granted in accordance with § 22 Sentence 1, AufenthG (2007)

		under 16	16 - under 18	18 - under 25	25 - under 35	35 - under 45	45 - under 55	55 - under 65	65 and older	Total	Total
Yemen	M	13	-	-	-	-	-	-	-	13	18
	F	5	-	-	-	-	-	-	-	5	
Ukraine	M	-	-	-	-	-	-	1	-	1	1
	F	-	-	-	-	-	-	-	-	-	
Gambia	M	1	-	-	-	-	-	-	-	1	1
	F	-	-	-	-	-	-	-	-	-	
India	M	-	-	-	-	-	-	-	-	-	1
	F	-	-	-	-	-	-	1	-	1	
Iraq	M	-	-	-	1	-	-	-	-	1	1
	F	-	-	-	-	-	-	-	-	-	
All Nationalities		**19**	**-**	**-**	**1**	**-**	**-**	**2**	**-**	**22**	**22**

Age groups in years

Source: BAMF (Central Register of Foreign Nationals)

For the second category of cases, § 22 Sentence 2, AufenthG, no detailed tables are displayed here. In 2008, no foreign nationals were granted residence of the basis of this regulation. In 2007, three persons were issued a residence permit on the basis of § 22 Sentence 2, AufenthG. They all came from Iraq.

According to the annual statistics of the AZR, on 31 December 2008 a total of 311 persons were living in Germany with a residence permit in accordance with § 22, Sentence 1, AufenthG, and 283 with a residence permit under Sentence 2.

4.3.2 The granting of residence by the supreme Land authorities, the so-called "Right of residence regulation" (§ 23, Paragraph 1, AufenthG)

The following two tables include both persons who received a residence permit in 2008 and 2007 respectively as a result of the "Right of residence regulation" by the Standing Conference of the Ministers and Senators of the Interior of the Federal German Länder of 17 November 2006, and those who received a right of residence as a result of other rulings passed on at Länder level, or who already had a right of residence that was extended.

Table 11: Residence granted in accordance with § 23, Paragraph 1, AufenthG (2008)

		under 16	16 - under 18	18 - under 25	25 - under 35	35 - under 45	45 - under 55	55 - under 65	65 and older	Total	Total
Serbia*	M	905	140	392	217	334	201	45	6	2 240	4 400
	F	887	122	349	249	367	148	28	10	2 160	
Turkey	M	247	43	200	122	113	121	70	110	1 026	2 136
	F	266	38	145	102	165	146	106	142	1 110	
Bosnia and Herzegovina	M	205	45	94	91	121	191	122	60	929	2 057
	F	217	26	83	80	220	251	144	107	1 128	
Lebanon	M	183	44	160	116	134	150	111	92	990	2 043
	F	178	35	117	109	163	200	140	111	1 053	
Afghanistan	M	119	18	57	58	66	46	31	74	469	1 022
	F	125	24	38	53	69	54	69	121	553	
Former Rep. of Yugoslavia	M	177	24	67	67	81	48	8	2	474	945
	F	189	28	56	64	80	37	11	6	471	
Unknown	M	96	15	91	60	60	57	35	39	453	909
	F	97	18	74	72	54	62	48	31	456	
Kosovo	M	160	17	54	35	57	27	8	2	360	678
	F	145	19	32	43	57	18	3	1	318	
Ukraine	M	51	11	36	21	52	37	33	21	262	594
	F	50	12	30	64	46	51	46	33	332	
Sri Lanka	M	43	6	15	24	39	68	57	14	266	506
	F	52	3	17	17	39	51	38	23	240	
All Nationalities		**5 717**	**862**	**2 617**	**2 239**	**3 385**	**2 723**	**1 443**	**1 333**	**20 319**	**20 319**

*Includes the former Serbia and Montenegro. Likewise, persons from Kosovo who came to Germany prior to that country's independence are also included in these figures.

Age groups in years
Source: BAMF (Central Register of Foreign Nationals)

Table 12: Residence granted in accordance with § 23, Paragraph 1, AufenthG (2007)

		under 16	16 - under 18	18 - under 25	25 - under 35	35 - under 45	45 - under 55	55 - under 65	65 and older	Total	Total
Serbia*	M	2 028	317	1 017	595	1 040	590	116	10	5 713	
	F	1 998	295	913	665	1 062	362	50	12	5 357	
	u.	1	-	-	-	-	-	-	-	1	11 071
Turkey	M	424	74	307	188	216	167	91	134	1 601	
	F	448	64	281	196	267	184	117	164	1 721	3 322
Bosnia and Herzegovina	M	282	86	173	127	195	310	177	151	1 501	
	F	264	77	176	103	308	386	244	197	1 755	
	u.	1	-	-	1	-	-	1	-	3	3 259
Former Rep. of Yugoslavia	M	412	88	237	160	274	159	22	8	1 360	
	F	446	75	184	189	281	111	19	8	1 313	2 673
Lebanon	M	249	62	217	151	173	186	103	89	1 230	
	F	255	67	160	151	204	214	144	90	1 285	2 515
Afghanistan	M	269	55	155	132	152	118	49	56	986	
	F	278	64	137	116	138	102	64	78	977	1 963
Unknown	M	141	30	136	81	107	72	38	38	643	
	F	146	31	84	85	93	57	41	37	574	1 217
Vietnam	M	142	31	24	14	162	125	11	1	510	
	F	132	24	19	17	105	49	5	0	351	861
Iran	M	63	8	38	35	112	94	39	44	433	
	F	46	2	41	38	61	57	55	75	375	808
Sri Lanka	M	79	7	23	35	87	87	50	14	382	
	F	85	7	29	20	66	59	26	21	313	695
All Nationalities		**10 036**	**1 698**	**5 091**	**4 066**	**6 744**	**4 363**	**1 778**	**1 514**	**35 290**	**35 290**

*Includes the former Serbia and Montenegro. Likewise, persons from Kosovo who came to Germany prior to that country's independence are also included in these figures.

Age groups in years
Source: BAMF (Central Register of Foreign Nationals)

In 2008, a total of 20,319 persons received a right of residence in the sense of § 23, Paragraph 1, AufenthG, and in 2007 the total was 35,290. In both years, the persons benefiting from this came predominantly from Serbia, Turkey and Bosnia and Herzegovina. Particular points of emphasis in respect of age groups were 35 to 45-year-olds and children under 16. Men and women benefited from the right of residence regulation in approximately equal measure.

The AZR showed a total of 43,757 persons who were in possession of a residence permit in accordance with § 23, Paragraph 1, AufenthG as of the reference date of 31 December 2008.

4.3.3 The granting of residence by the German Federal Authorities when special political interests apply (§ 23, Paragraph 2, AufenthG)

Throughout recent years, the granting of residence by the German Federal Authorities in accordance with § 23, Paragraph 2, AufenthG was used primarily for the admission of Jewish immigrants from the successor states to the former Soviet Union, with the exception

of the Baltic States. In contrast to all the other humanitarian forms in which residence may be granted in Germany, it is possible not just for residence permits to be issued on the basis of § 23, Paragraph 2, AufenthG, but also settlement permits. In practice, the Jewish immigrants receive a settlement permit upon arrival in Germany, while their dependents are issued with a residence permit.

Between 1993 and 2007, a total of 200,691 Jewish immigrants came from former Sowjet Union countries to Germany, including their dependants. In addition, another 8.535 Jewish persons entered Germany before 1992. After the immigration of Jews had been more or less constant with between 15,000 and 20,000 coming to Germany each year from 1995 to 2003, the numbers fell considerably in the subsequent years. In 2006, only 1,079 Jewish immigrants were registered (cf. BMI/BAMF 2008: 95-96). In 2007, an increase was noted, with 2,502 Jewish immigrants arriving in Germany. In 2008, the number was 1,436 (see Table 13).

The main countries of orgigin of Jewish immigrants are Ukraine and the Russian Federation. Further to these, Jewish immigrants also come from Uzbekistan, Belarus, the Republic of Moldova and other succession states of the Sowjet Union. The immigration of Jews to Germany is characterised by a high proportion of elderly persons. In average, more than one fifth of all Jewish immigrants were older than 65 years when immigration to Germany. Another fifth were between 50 and 65 years old (cf. BMI/BAMF 2008: 96).

Table 13: Immigration of Jewish immigrants and their dependents (2004 – 2008)

Year	Number of persons
2004	11 208
2005	5 968
2006	1 079
2007	2 502
2008	1 436

Source: Federal Office of Administration (Bundesverwaltungsamt), BAMF (Central Register of Foreign Nationals)

In 2009, in addition to Jewish immigrants, also around 2,500 Iraqi refugees were admitted on the basis of § 23, Paragraph 2, AufenthG, from Syria and Jordan ("resettlement"). Precise figures for this group of persons are not available yet. Figures in respect of resettlement are reported to Eurostat in the context of Article 4 (3) (g) of the Statistics-Regulation. By way of contrast, Jewish migrants are not taken into consideration under Article 4 (3) (g) of the Statistics-Regulation.

According to the annual statistics of the AZR, as of 31 December 2008, 50,932 persons were living in Germany who had a settlement permit in accordance with § 23, Paragraph 2, AufenthG, while a further 190 were in possession of a residence permit in accordance with this legal provision.

4.3.4 The granting of residence in cases of hardship (§ 23a, AufenthG)

During the year 2008, the number of residence permits issued on the basis of § 23a, AufenthG showed a slight increase in comparison with the number for 2007. There was, however, little change in respect of the countries of origin of the persons who benefited. There is a particular preponderance of successor countries to the former Yugoslavia, most particularly Serbia, Bosnia and Herzegovina and Kosovo (since 2008). As ever, a large number of citizens of the "former Yugoslavia" are present. These are persons who were already in Germany before fragmentation of the erstwhile federal state. Turkey, too, is strongly represented. The age groups represented most strongly in the statistics are the 0 to 16-year-olds, the 18 to 25-year-olds and the 35 to 45-year-olds. This indicates that quite often families with underage children were involved.

Table 14: Residence granted in cases of hardship (§ 23a AufenthG, 2008)

		under 16	16 - under 18	18 - under 25	25 - under 35	35 - under 45	45 - under 55	55 - under 65	65 and older	Total	Total
Serbia	M	127	31	77	18	56	67	7	1	384	
	F	148	30	57	48	73	40	9	1	406	790
Turkey	M	40	6	39	18	14	8	3	2	130	
	F	46	9	36	26	21	16	4	3	161	291
Former Rep. of Yugoslavia	M	37	5	24	9	16	9	2	0	102	
	F	39	8	14	9	27	14	1	1	113	215
Bosnia and Herzegovina	M	29	5	11	6	13	16	6	1	87	
	F	35	8	15	9	21	14	8	3	113	200
Kosovo	M	29	5	9	6	7	6	1	0	63	
	F	34	6	6	9	11	4	1	0	71	134
Syria	M	20	1	3	5	7	6	0	1	43	
	F	15	2	7	5	10	2	0	1	42	85
Vietnam	M	16	3	5	1	6	11	0	0	42	
	F	11	1	6	1	13	7	0	1	40	82
Russia	M	15	0	5	3	4	5	2	2	36	
	F	7	3	3	5	8	5	1	4	36	72
Armenia	M	3	3	14	1	6	5	1	0	33	
	F	9	1	8	4	7	4	3	1	37	70
Sri Lanka	M	8	2	7	5	6	5	2	0	35	
	F	10	1	2	4	4	6	5	1	33	68
All Nationalities		889	167	476	262	463	314	73	34	2 678	2 678

Age groups in years

Source: BAMF (Central Register of Foreign Nationals)

Table 15: Residence granted in cases of hardship (§ 23a AufenthG, 2007)

		under 16	16 - under 18	18 - under 25	25 - under 35	35 - under 45	45 - under 55	55 - under 65	65 and older	Total	Total
Serbia*	M	138	43	94	23	53	60	10	0	421	
	F	145	37	80	47	82	38	6	1	436	857
Turkey	M	40	6	20	26	22	10	3	3	130	
	F	68	13	33	20	19	15	1	5	174	304
Former Rep. of Yugoslavia	M	47	11	28	8	21	18	3	0	136	
	F	41	10	19	12	30	14	5	1	132	268
Bosnia and Herzegovina	M	29	2	8	5	16	17	8	2	87	
	F	28	11	18	9	18	15	5	5	109	196
Sri Lanka	M	11	1	6	6	9	6	2	0	41	
	F	18	1	1	3	8	1	2	0	34	75
Vietnam	M	12	2	3	1	10	8	0	0	36	
	F	6	2	4	0	15	1	0	0	28	64
D.R. Kongo	M	13	1	4	1	4	5	1	0	29	
	F	5	3	4	1	4	2	2	0	21	50
Iran	M	6	0	6	1	4	3	0	2	22	
	F	4	2	2	5	6	3	3	0	25	47
Afghanistan	M	5	1	12	2	4	2	2	1	29	
	F	6	0	5	0	2	1	2	0	16	45
Armenia	M	6	2	5	2	1	1	1	0	18	
	F	7	3	4	3	3	2	2	1	25	43
All Nationalities		**780**	**171**	**466**	**238**	**434**	**268**	**70**	**23**	**2 450**	**2 450**

*Includes the former Serbia and Montenegro. Likewise, persons from Kosovo who came to Germany prior to that country's independence are also included in these figures.

Age groups in years
Source: BAMF (Central Register of Foreign Nationals)

In respect of the overall total, it can be seen that according to the AZR, on 31 December 4,567 persons in possession of a residence permit in accordance with § 23a, AufenthG were resident in Germany.

4.3.5 Persons entitled to asylum (§ 25, Paragraph 1, AufenthG)

The issuing of a residence title to persons entitled to asylum has been dealt with in Section 4.2.1. During the first half of 2009, 151 persons were recognised as being entitled to asylum on a national basis. Around half of those entitled to asylum were men. The most important country of origin was Iran. According to the AZR, on 31 December 2008, 2,189 persons who were in possession of a residence permit in accordance with § 25, Paragraph 1, AufenthG, were living in Germany.

4.3.6 Persons entitled to subsidiary protection (§ 25, Paragraph 3, AufenthG)

The residence of persons entitled to subsidiary protection has also been discussed in Section 4.2.1. During the first half of the year 2009, 674 persons were awarded this status – 155 of these on the basis of European law and 519 on the basis of national law. 298 were women, 376 were men. The most important country of origin in respect of subsidiary protection was Afghanistan. According to the AZR, on 31 December 2008, 24,283 persons were in possession of a residence permit in accordance with § 25, Paragraph 3.

4.3.7 Temporary residence (§ 25, Paragraph 4, AufenthG)

The number of persons who were issued with a residence permit on account of pressing humanitarian or personal reasons, or because of significant public interests, fell from 9,940 in 2007 to 6,741 in 2008.

Table 16: Residence in accordance with § 25, Paragraph 4, AufenthG (2008)

		under 16	16 - under 18	18 - under 25	25 - under 35	35 - under 45	45 - under 55	55 - under 65	65 and older	Total	Total
Serbia	M	153	22	37	35	49	40	17	12	365	
	F	108	27	43	50	68	52	16	31	395	
	u.	1	-	-	-	-	-	-	-	1	761
Turkey	M	71	12	40	31	22	31	17	34	258	
	F	84	11	44	30	44	50	38	61	362	620
Russia	M	39	5	18	22	27	33	24	15	183	
	F	32	3	15	40	42	54	37	46	269	
	u.	-	-	-	-	1	-	1	-	2	454
United Arab Emirates	M	38	8	25	67	44	17	18	15	232	
	F	29	2	16	45	25	28	10	7	162	
	u.	-	-	1	-	-	-	-	-	1	395
Saudi Arabia	M	41	4	27	54	53	39	15	12	245	
	F	28	2	20	20	20	21	15	5	131	376
Afghanistan	M	142	1	6	4	5	6	5	5	174	
	F	91	3	3	2	5	7	4	13	128	
	u.	-	-	-	-	-	-	1	-	1	303
Bosnia and Herzegovina	M	22	5	12	13	14	12	16	9	103	
	F	41	-	5	16	27	18	9	21	137	240
Iraq	M	30	3	8	30	35	10	4	6	126	
	F	22	3	4	16	18	16	6	5	90	216
Former Rep. of Yugoslavia	M	31	2	11	14	16	14	6	4	98	
	F	28	3	13	8	16	17	2	3	90	188
Angola	M	97	1	1	-	4	1	-	-	104	
	F	66	1	-	7	3	-	-	1	78	182
All Nationalities		**1 837**	**195**	**637**	**955**	**988**	**827**	**479**	**553**	**6 471**	**6 471**

Age groups in years

Source: BAMF (Central Register of Foreign Nationals)

Table 17: Residence in accordance with § 25, Paragraph 4, AufenthG (2007)

		under 16	16 - under 18	18 - under 25	25 - under 35	35 - under 45	45 - under 55	55 - under 65	65 and older	Total	Total
Serbia*	M	309	60	123	85	110	82	41	28	**838**	
	F	309	66	107	90	124	93	37	35	**861**	**1 699**
Turkey	M	93	21	79	44	48	41	23	44	**393**	
	F	91	18	79	56	52	58	36	64	**454**	
	u.	-	-	-	-	-	-	-	1	**1**	**848**
Bosnia and Herzegovina	M	61	18	38	24	36	37	17	39	**270**	
	F	67	9	22	23	59	53	27	62	**322**	**592**
United Arab Emirates	M	52	5	35	96	82	26	21	23	**340**	
	F	42	2	24	68	41	26	24	10	**237**	**577**
Russia	M	46	8	20	18	33	35	32	21	**213**	
	F	40	7	21	51	42	53	46	37	**297**	
	u.	1	-	-	-	-	-	-	-	**1**	**511**
Former Rep. of Yugoslavia	M	73	14	24	29	30	31	12	4	**217**	
	F	61	20	30	25	47	24	11	15	**233**	**450**
Iraq	M	53	11	34	98	61	25	4	5	**291**	
	F	52	7	16	18	28	20	7	5	**153**	**444**
Saudi Arabia	M	48	5	19	63	68	35	11	19	**268**	
	F	36	3	22	28	30	20	13	2	**154**	
	u.	-	-	1	1	-	-	-	1	**3**	**425**
Afghanistan	M	177	8	7	5	3	2	6	6	**214**	
	F	97	2	2	4	6	5	5	14	**135**	**349**
Lebanon	M	30	14	12	20	14	18	9	9	**126**	
	F	22	7	21	19	27	19	13	12	**140**	**266**
All Nationalities		**2 732**	**436**	**1 171**	**1 455**	**1 537**	**1 164**	**677**	**768**	**9 940**	**9 940**

*Includes the former Serbia and Montenegro. Likewise, persons from Kosovo who came to Germany prior to that country's independence are also included in these figures.

Age groups in years
Source: BAMF (Central Register of Foreign Nationals)

The most significant nationalities captured in the tables reflect the fact that not only do persons from principal countries of origin of asylum seekers, (Kurds from Turkey, for example, or Serbs or Afghans) benefit from this form of protection, but so too, in part, do persons from highly developed industrial nations, such as the United Arab Emirates or Saudi Arabia. This underscores the broad operation of this form of protection, which can be granted to a range of persons including those who have to remain within Germany by reason of a medical treatment, those who are needed as witnesses in judicial proceedings, those who wish to enter into a marriage or those who would like to finish a training or educational process.

During 2008, a total of 2,812 persons benefited from the possibility opened up by § 25, Paragraph 4, Sentence 2 of extending their residence permit by reasons of special circumstances in their individual case. Of these, 877 were children under the age of 16, 210 of whom came from Serbia and the former Serbia and Montenegro. We have refrained here from the depiction of detailed monthly tables because this "form of protection" consists solely of the extension of already-extant residence permits.

In respect of the overall total, however, it can be ascertained that as of 31 December 2008, 10,860 persons were in possession of a residence permit in accordance with § 25, Paragraph 4, Sentence 1, AufenthG, while 2,858 were in possession of a residence permit in accordance with § 25, Paragraph 4, Sentence 2, AufenthG.

4.3.8 Residence for foreigners who are subject to an enforceable obligation to leave the country (§ 25, Paragraph 5, AufenthG)

The issuing of a residence permit to foreigners who are subject to an enforceable obligation to leave the country represents a significant form of residence from a quantitative perspective. First and foremost, it reflects the fact that many foreigners, while having no actual entitlement to a residence permit, are nevertheless unable to leave the country – for example, because they are not fit to travel on account of illness, or because transport links to their country of origin have been interrupted. An overwhelming proportion of the foreigners who were issued with a residence permit in accordance with § 25, Paragraph 5, AufenthG in recent years had already been resident in Germany for a lengthy period (one year and longer). The number of persons who were issued with a residence permit on this basis in one specific year, and who had entered Germany for the first time during the same year, amounts only to a few hundred (cf. BMI/BAMF 2008: 114). If all the foreigners, including those who had been resident in Germany for a lengthier period, are considered together, then the figures for 2007 and 2008 respectively are each in excess of 30,000 persons. There is much to indicate that these are, in many cases, persons whose applications for asylum have met with no success. Almost all the countries identified in the tables below as principal countries of origin are also important countries of origin for asylum applicants.

Table 18: Residence in accordance with § 25, Paragraph 5, AufenthG (2008)

		under 16	16 - under 18	18 - under 25	25 - under 35	35 - under 45	45 - under 55	55 under 65	65 and older	Total	Total
Serbia*	M	1 374	245	353	326	446	376	171	99	3 390	
	F	1 305	247	308	341	495	350	185	140	3 371	6 761
Turkey	M	633	90	153	235	263	131	57	42	1 604	
	F	591	83	120	192	220	119	60	82	1 467	3 071
Unknown	M	540	67	197	271	305	148	45	29	1 602	
	F	530	54	171	179	169	83	41	34	1 261	
	u.	1	-	-	-	-	-	-	-	1	2 864
Former Rep. of Yugoslavia	M	231	51	91	90	105	98	57	27	750	
	F	256	51	87	62	131	89	43	35	754	
	u.	1	1	-	-	-	-	-	-	2	1 506
Afghanistan	M	261	27	60	106	118	63	35	48	718	
	F	207	23	74	130	87	60	60	105	746	1 464
Bosnia and Herzegovina	M	229	41	68	59	100	96	52	40	685	
	F	191	33	72	86	109	83	55	104	733	1 418
Kosovo	M	232	32	62	54	80	58	18	19	555	
	F	298	38	43	61	99	45	26	30	640	1 195
Stateless	M	163	23	62	137	128	69	31	15	628	
	F	154	19	69	81	68	49	23	17	480	1 108
Iraq	M	160	26	73	151	106	31	13	10	570	
	F	139	13	35	86	61	32	10	6	382	952
Syria	M	149	19	47	83	67	30	6	16	417	
	F	122	13	41	70	53	28	20	34	381	798
All Nationalities		10 450	1 553	3 169	4 595	5 202	3 089	1 353	1 450	30 861	30 861

*Includes the former Serbia and Montenegro. Likewise, persons from Kosovo who came to Germany prior to that country's independence are also included in these figures.

Age groups in years

Source: BAMF (Central Register of Foreign Nationals)

Table 19: Residence in accordance with § 25, Paragraph 5, AufenthG (2007)

		under 16	16 - under 18	18 - under 25	25 - under 35	35 - under 45	45 - under 55	55 - under 65	65 and older	Total	Total
Serbia*	M	1 479	268	416	334	523	452	169	74	**3 715**	
	F	1 371	277	421	375	592	357	159	126	**3 678**	**7 393**
Unknown	M	713	85	264	383	457	167	53	31	**2 153**	
	F	663	70	192	270	223	108	56	38	**1 620**	
	u.	7	0	0	0	0	0	0	0	**7**	**3 780**
Turkey	M	511	105	189	185	232	134	43	44	**1 443**	
	F	521	80	160	184	195	109	55	89	**1 393**	
	u.	1	0	0	0	0	0	0	0	**1**	**2 837**
Former Rep. of Yugoslavia	M	401	91	163	124	199	146	72	29	**1 225**	
	F	418	86	147	102	201	128	58	38	**1 178**	
	u.	1	0	0	0	0	0	0	0	**1**	**2 404**
Afghanistan	M	258	29	74	114	130	75	40	65	**785**	
	F	248	29	91	138	102	67	71	128	**874**	
	u.	1	0	0	0	0	0	0	0	**1**	**1 660**
Bosnia and Herzegovina	M	215	35	90	69	101	120	65	60	**755**	
	F	192	37	100	91	106	112	73	134	**845**	
	u.	1	0	0	0	0	0	0	0	**1**	**1 601**
Stateless	M	120	20	54	122	101	64	23	10	**514**	
	F	125	16	49	57	54	31	13	20	**365**	**879**
Iraq	M	110	26	70	125	88	29	6	6	**460**	
	F	112	13	35	51	45	21	8	7	**292**	
	u.	0	0	1	0	0	0	0	0	**1**	**753**
Lebanon	M	113	22	44	49	62	44	15	14	**363**	
	F	108	19	30	58	60	38	16	18	**347**	**710**
Syria	M	120	17	52	64	53	31	11	16	**364**	
	F	101	15	45	56	40	30	18	25	**330**	**694**
All Nationalities		**9 941**	**1 660**	**3 570**	**4 308**	**5 258**	**3 106**	**1 318**	**1 387**	**30 548**	**30 548**

*Includes the former Serbia and Montenegro. Likewise, persons from Kosovo who came to Germany prior to that country's independence are also included in these figures.

Age groups in years
Source: Federal Office of Administration (Bundesverwaltungsamt), BAMF

As of 31 December 2008, 45,634 foreigners were living in the Federal Republic with a residence permit issued in accordance with § 25, Paragraph 5, AufenthG – a figure that underscores the considerable significance of this form of protection.

4.3.9 The temporary suspension of removal, the so-called “Duldung” (§ 60a, AufenthG)

The table below shows that the “Duldung” status (exceptional leave to remain) occurs frequently. During the course of 2008, an exceptional leave to remain was issued to a total of 88,152 persons. There are no reliable figures in respect of 2007 and previous years.[33]

Table 20: Persons with a “Duldung” issued in 2008 (cut-off date: 31 December 2008)

		under 16	16 - under 18	18 - under 25	25 - under 35	35 - under 45	45 - under 55	55 - under 65	65 and older	Total	Total
Serbia*	M	2 594	410	890	1 042	897	619	292	150	6 894	13 437
	F	2 461	404	728	942	813	595	341	256	6 540	
	u.	3	-	-	-	-	-	-	-	3	
Unknown	M	1 181	189	896	1 346	1 005	379	99	39	5 134	7 765
	F	1 063	164	332	444	357	161	63	47	2 631	
Iraq	M	652	94	870	2 174	1 064	230	52	24	5 160	6 815
	F	571	57	176	389	284	105	31	40	1 653	
	u.	-	1	1	-	-	-	-	-	2	
Turkey	M	970	188	548	992	751	295	67	41	3 852	6 499
	F	946	154	341	443	428	173	68	91	2 644	
	u.	2	-	1	-	-	-	-		3	
Syria	M	822	83	397	724	557	214	51	30	2 878	4 883
	F	733	80	293	391	252	139	55	61	2 004	
	u.	1	-	-	-	-	-	-	-	1	
Lebanon	M	549	115	445	774	511	197	36	27	2 654	4 013
	F	508	96	177	205	204	107	45	17	1 359	
Iran	M	208	51	260	589	748	336	129	46	2 367	3 355
	F	164	22	103	164	249	146	65	74	987	
	u.	-	-	-	-	-	-	-	1	1	
China	M	178	5	187	577	785	285	25	1	2 043	3 113
	F	153	4	87	288	389	130	15	4	1 070	
Azerbaijan	M	474	77	216	276	319	211	49	22	1 644	3 097
	F	416	63	155	231	308	186	55	38	1 452	
	u.	-	-	-	-	1	-	-	-	1	
Russia	M	436	61	238	320	315	179	44	12	1 605	3 001
	F	432	49	161	266	263	142	37	45	1 395	
	u.	-	-	-	1	-	-	-	-	1	
All Nationalities		22 136	3 619	13 151	21 330	16 470	7 334	2 467	1 645	88 152	88 152

*Includes the former Serbia and Montenegro. Likewise, persons from Kosovo who came to Germany prior to that country’s independence are also included in these figures.

Age groups in years
Source: BAMF (Central Register of Foreign Nationals)

33 It is not possible for older data records to be evaluated in accordance with the requirements of this study.

It should be observed that the frequency with which exceptional leave to remain is granted decreases as the age of the persons in question rises. Particular points of emphasis in respect of age groups are children aged under 16 and persons aged between 25 and 35. Many cases may involve young families with underage children who cannot be deported because of their particular circumstances. It is also worth noting that statistics indicate 7,765 persons in possession of an exceptional leave to remain issued in 2008 whose nationality has not been clarified. In many cases, these might be asylum applicants who have been rejected because, in the opinion of the BAMF, they did not come from the country that they had named as their country of origin during the asylum procedure. The fact that it is not always possible to determine the actual nationality of these persons can mean that removal is temporarily impossible and that an exceptional leave to remain will therefore be issued. And likewise, in respect of the other nationalities that are apparent from the table, these are countries from which many asylum-seekers have travelled to Germany in recent years.

Standing at 104,945 persons as of 31 December 2008, the overall total is even higher than the number of persons whose removal was suspended first during the course of 2008. This is due in part to the fact that the foreigners' authorites do not always note down the extension of an exceptional leave to remain in the AZR as a renewed suspension of removal.

Germany does not provide Eurostat with information concerning the issuing of exceptional leave to remain on the basis of the Statistics-Regulation because by definition, the temporary suspension of removal does not count as a method of granting residence for humanitarian reasons. It is not possible to determine from the available data records the number of cases in which an exceptional leave to remain was issued on account of actual obstacles to deportation (e.g. the lack of a passport, the interruption of the travel routes) and the number in which it was issued because of humanitarian or personal circumstances.

4.3.10 Residence in the framework of the regulations governing old cases ("grandfather clause" of § 104a and § 104b, AufenthG)

Given that the statutory grandfather clause contains a total of five legal bases for the issuing of a residence permit to persons who are subject to an enforceable obligation to leave the country, we shall refrain here from providing a comprehensive depiction in table form. Instead, the table below provides a resumé of the issuing of residence titles in accordance with § 104a and § 104b, AufenthG during 2007 and 2008.

This overview demonstrates that the issuing of a residence permit on the basis of the grandfather clause increased significantly in all categories in 2008 in comparison with 2007 – that is to say, it more than doubled. This is attributable primarily to the fact that the grandfather clause was only created by the so-called Directives Implementation Act (Richtlinienumsetzungsgesetz), which did not come into force until August 2007.

Table 21: Residence in the framework of the "grandfather clause" (overview)

Legal foundation	Number of persons in 2007	Number of persons in 2008	Figures at 31st December 2008 ("stocks")
§ 104a Paragraph 1 Sentence 1 AufenthG (Residence Permit on Trial)	9 414	20 685	27 449
§ 23 i.V. mit § 104a Paragraph 1 Sentence 2 AufenthG (Residence Permit with independent securing of the subject's livelihood)	1 658	3 629	4 814
§ 23 i.V. mit § 104a Paragraph 2 Sentence 1 AufenthG (adult children of persons with an exceptional leave to remain)	334	816	1 073
§ 23 i.V. mit § 104a Paragraph 2 Sentence 2 AufenthG (unaccompanied minors)	51	139	181
§ 23 i.V. mit § 104b AufenthG (integrated children of persons with an exceptional leave to remain)	48	113	152

Source: BAMF (Central Register of Foreign Nationals)

2007 saw a total of 9,414 persons qualifying for a residence permit on trial in accordance with § 104a, Paragraph 1, Sentence 1. Of these, 3,081 persons – almost one third – were children under the age of 16. This indicates that out of all the foreigners who received a residence permit on trial, many were families with children. Setting aside the under-16s, the main emphasis was on the 35-45 age group (1,645 persons). The most significant nationalities here were Serbia, including the former Serbia and Montenegro (4,695 Personen), the former Yugoslavia[34] (1,166 persons) and Turkey (734 persons). During 2008, 20,685 persons received a residence permit on trial. Once again, the emphasis in terms of quantity was on children aged under 16 (8,145) and on the 35 to 45-year-olds (3,269). The three most important countries of origin were – as they had already been in 2007 – Serbia, including the former Serbia and Montenegro (8,390), the former Yugoslavia and Kosovo (2,812) and Turkey (1,745).

A residence permit associated with the independent securing of the subject's livelihood was granted to a total of 1,658 persons in 2007 and to a total of 3,629 in 2008. In this category, too, many children under the age of 16 were represented (2007: 484; 2008: 1,188). The most important countries of origin were Serbia, including the former Serbia and Montenegro, the former Yugoslavia and Turkey.

In 2007, 334 persons received a residence permit within the framework of the grandfather clause for adult children of persons holding an exceptional leave to remain, and in 2008 a total of 816 persons. By far the majority of these were aged respectively between 18 and 25. In this category, again, the most important regions of origin were Serbia (including its predecessor state), Turkey and the former Yugoslavia.

34 If the "former Yugoslavia" is named as the country of origin, it is no longer possible for the subject to be assigned to the successor states that exist today. In many cases, this also means that persons to whom "former Yugoslavia" is assigned were already, prior to the fragmentation of that country, in Germany.

In 2007 and 2008, a total of 51 and 139 persons respectively benefited from the grandfather clause for persons who had come to Germany as unaccompanied minors. Alongside Serbia, Serbia and Montenegro and Turkey, other important countries of origin in respect of unaccompanied minors were Afghanistan, Vietnam and Iraq.

In 2007 and 2008, a total of 48 and 113 persons respectively benefited from the granting of residence for integrated children of persons in receipt of an exceptional leave to remain. Two thirds of these were aged between 0 and 24 in 2007, and in 2008 this proportion rose to as much as three quarters. In both of these years, the most important country of origin was Serbia, including the former Serbia and Montenegro.

5 Scientific and political perceptions relating to the granting of protection in Germany

5.1 General remarks

It has already been established that the granting of protection to foreign persons within Germany has, in recent years, experienced some striking incentives towards Europeanisation. By means of both the Immigration Act and the Directives Implementation Act, legal norms have been adjusted to match European specifications. Today, when protection is granted, a major proportion of this is done on the basis of EU directives that have been agreed at European level and then implemented within the Federal Republic.

This process of Europeanisation is, in general, not contentious. In the opinion of the German Federal Government, the Immigration Act and the Directives Implementation Act have brought about "significant improvements in the field of protection for refugees" – improvements relating, among other things, to:

- taking into consideration non-state and gender-specific persecution in relation to the awarding of refugee status;
- the introduction of family protection against removal;
- the improvement of the position of refugees and persons with subsidiary protection in respect of their right of residence;
- protection as refugees for asylum applicants who are refusing to enter military service in their country of origin because of acts that are in violation of international law, and
- the granting of subsidiary protection for persons who are affected by international or internal domestic armed conflicts (cf. Deutscher Bundestag 2008: 14).

From the point of view of the Federal Governments in office during recent years, another reason why a common asylum and immigration policy within the EU makes sense is that it will allow the international flows of migration to be better controlled, monitored and managed. European cooperation in the field of asylum and protection for refugees is intended, among other things, to ensure that the burdens arising in connection with the admission of refugees are divided up and shared, and to prevent multiple applications for asylum in different countries within the EU, irregular immigration and the lodging of improper claims to the right of asylum.

Non-governmental organisations active in the field of asylum and protection for refugees have associated the Europeanisation of refugee policy in particular with the expectation that what they view as gaps in the available protection might be closed, and that the protection available to refugees in Europe might be expanded. These organisations are, in part, dissatisfied with the direction in which in the process of Europeanisation has moved to date because the EU is concentrating too heavily on a "compartmentalisation" in respect of

refugees and on holding these off (Amnesty International et alt. 2009: 2). It is, on the other hand, acknowledged to a considerable extent that the Qualification Directive has exercised a positive influence upon the protection afforded to refugees within Germany. The reasons that are capable of leading to a determination in favour of refugee status have been expanded by the Directive (cf. UNHCR 2007: 9; Löhr 2008: 95-97). In October 2009, however, the UNHCR urged that an EU mechanism should be created for dealing with situations in which a member state is failing to grant any effective protection, whether this is because the national asylum system is deficient or because it is temporarily overloaded. In such cases, the EU Member States should refrain from making any transfers within the framework of the Dublin system to that country (cf. UNHCR 2009: 10).

The attitude of the Federal Government in respect of any further expansion or any more extensive standardisation of asylum and refugee policy in the EU is somewhat sceptical. Admittedly, in June 2008 former Federal Justice Minister Brigitte Zypries described the EU legislation in the field of asylum as “indisputably positive”; however, the Minister spoke out against rushing into any further standardisation of asylum policy within the EU, and referred to the remaining latitude for manoeuvre on a national level, which could be used in a positive manner by the Member States.[35]

A representative from the Ministry for the Interior, Sport and Integration of the Federal State of Lower Saxony observed in June 2009 that more and more regulations that national foreigners’ authorities were compelled to observe and apply had their provenance in Brussels. “If initially, following Tampere and The Hague, general objectives in the field of the law relating to foreigners and asylum were agreed on the basis of minimum standards, a more extensive process of harmonisation is now being pushed forward at a considerable speed.” It was, however, pointed out that the increased speed at which norms were being set was not necessarily leading to an improvement in quality. “It is true that the continuing progression of the harmonising process is creating the desired unified European legal framework. It is also, however, leading to a lack of coherence, because the transitional provisions, the regulations for exceptions for individual Member States and the differences in implementation on a national level (…) are creating the impression that the EU directives are leading to bureaucratic administrative processes that are very difficult to understand. There is also a fear of excessive standardisation and of overburdening if, for example, it is determined that the affected institutions will be subject to obligations to provide detailed reports and notification on a regular basis.” (Middelbeck 2009: 1)

In the opinion of the BMI, a codification of European migration law is “desirable, if not indeed urgently required”. As a representative of the Ministry declared in June 2009, the EU Commission is “continuously introducing specific suggestions for directives” that are being dealt with on an individual basis without being sufficiently coordinated with each other. In terms of national law, this was said to be leading to a kind of “patchwork quilt”. In order to implement EU law, provision had to be made in national law for “an extensive

35 Cf. Speech by Brigitte Zypries, Federal Minister of Justice, at the 8th Berlin Symposium on Refugee Protection, 23 June 2008.

range of special regulations in all manner of places". At the same time, the European regulations frequently contained "loopholes". In the absence of sufficient coordination between the individual legal instruments, problems in their implementation and application were often built in in advance. It was therefore to be desired that the EU introduce an overall approach in respect of the law relating to foreigners that was coherent in itself. Unified basic conditions at a European level in the field of migration would be a welcome development overall, because this would be the only way to avoid an artificial distortion of the migratory streams: "And likewise in the light of the demographic development that forms the backdrop here, a balanced and controlled European migration policy is called for, one that can only be created and shaped by means of a common, coordinated approach in which all the respective partners participate." (Hammerl 2009: 7-8)

Irrespective of any general assessments of the protection provided to refugees within Germany, in recent months discussions of some substance have taken place concerning individual aspects of asylum and refugee policy, such as the continued existence of the basic right to asylum (Article 16a, GG), the granting of residence to persons who have been in possession of an exceptional leave to remain ("Duldung") for a long time, enhanced protection for victims of enforced marriages and the resettlement of refugees. However, apart from the granting of residence to persons who have for a long time been in possession of a "Duldung" and enhanced protection for victims of enforced marriages and resettlement, these discussions have not caught the attention of the public at large; instead, they have taken place primarily in specialist professional circles. The sub-sections below are intended to provide a broad outline of these discussions.

5.2 The continued existence of the basic right to asylum in accordance with Article 16a, GG

This basic right to asylum in accordance with Article 16a of the German Basic Constitutional Law (GG), sees Germany adopting a special position in comparison with many other countries. Whereas in most countries, the right to asylum is regulated by means of legal entitlements or discretionary provisions under standard legislation, in Germany it is formulated as a fundamental right of the individual. The reasons for this are primarily historical. In providing this right to asylum, the Parliamentary Council that approved the GG in 1949 was reacting to the policical persecution that took place during the time of the National Socialists. Article 16, Paragraph 2, Sentence 2, GG (old version) therefore granted every foreigner who referred to political persecution a temporary right of residence as a matter of principle, effected by means of the anticipatory effect of the basic right to asylum. He or she would be entitled to have his/her asylum application examined; this also applied to obviously unpromising course of actions during the administrative proceedings and, if applicable, in the Court proceedings following.

During the public debate in the nineties, which was accompanied by very high numbers of asylum applicants, there was much vigorous discussion of the basic right to asylum, which was eventually altered in 1993 by means of a revision. Up to this point in time, the basic right to asylum had been granted without any reservation; now, however, it was linked to the extent to which the person desiring asylum is in need of protection, as set out in the paragraphs following Article 16a, Paragraph 1, GG, and thus limited by the so-called third

country regulation and the regulation concerning safe countries of origin. Consequently, over the following years, it was rare for asylum applicants to be recognised as being entitled to asylum in the sense of Article 16a, GG. It was now considerably more common for refugee status to be awarded in accordance with the Geneva Convention (GRC) – in other words, what was then known as the "little asylum". However, this too was interpreted in a manner that was fairly restrictive in comparison with the situation today.

With the more recent reforms of 2005 and 2007, which implemented the Qualification Directive into German law, the extent of the protection provided by the GRC, through the medium of the Qualification Directive, was expanded. The scope of this protection now exceeds that of the basic right to asylum by a considerable margin. This applies most particularly in respect of non-state persecution, but also to religion when cited as a reason for persecution and to the subjective element in the concept of the refugee – that is, the "fear of persecution" (cf. Tiedemann 2009: 166-167). Whereas previously, recognition as a person entitled to asylum offered the affected party a wider range of legal consequences than protection as a refugee in the sense of the GRC, the legal consequences are now virtually identical.[36] In other words: status as a refugee is no longer inferior to recognition as a person entitled to asylum.

As a result of this, it is now being called into question whether the basic right to asylum is still needed at all. In the more recent specialist professional literature, it is argued that the right to asylum has "lost all its functions". It is therefore proposed that German procedural law relating to asylum should be streamlined so that all it would envisage would be the procedure for the awarding of refugee status. In its current form, it is argued, asylum law is so complex that it is no longer compatible with the demands of the constitutional state (Tiedemann 2009: 167).

This viewpoint could be contradicted with the argument that the basic right of asylum should be retained on account of its historical significance, and as a part of German judiciary culture. Likewise, it might also be worth preserving as a "fall-back option" in the (unlikely) event of the EU drifting apart, with the associated loss of the validity of European legal norms. A simplification of asylum law could also be achieved without the abolition of the basic right to asylum – for example, by adjusting the scope of the protection afforded under Article 16a of the GG to match that afforded by the GRC and the Qualification Directive through case law in the Federal Constitutional Court (cf. Kraft 2009: 46).

36 The sole "advantage" that is still associated with the basic right to asylum is access to the Federal Constitutional Court (Bundesverfassungsgericht), whilst any legal disputes concerning the application of the GRC end up in front of the Federal Administrative Court (Bundesverwaltungsgericht). This "advantage" of the basic right to asylum according to the GG is sometimes considered to be dispensable because the scope of the protection afforded by the basic right to asylum no longer exceeds that provided by the GRC, but rather the reverse (cf. Tiedemann 2009: 167). On the other hand, the Federal Constitutional Court is still taking on important controlling functions (cf., for example, the Federal Constitutional Court concerning the enactment of a provisional ordinance in the event of a complaint on a constitutional issue 9/2008, in: Asylmagazin 9/2008).

5.3 The "Duldung" and the "grandfather clause"

In connection with the Directives Implementation Act of 19 August 2007, the legislative body had created a temporary "grandfather clause" for migrants who have for a long time been in possession of an exceptional leave to remain ("Duldung") and who have achieved some integration merits (§ 104a, AufenthG). The objective of this regulation was to make allowance for the need for long-term prospects on the part of those migrants who have been in possession of a "Duldung" for some years and who have integrated here, and to bring down the amount of so-called "chain exceptional leaves to remain" ("Kettenduldungen"), that is to say, the extension for years of exceptional leaves to remain without any prospect of a continuous right of residence. According to this law, persons in possession of an exceptional leave to remain should receive a right of residence if, as of the reference date of 1 July 2007, they have been resident in Germany for a minimum of eight years (if single) or six years (for families with underage children). In accordance with the Standing Conference of the Federal State's Ministers and Senators of the Interior (IMK) regulation, the applicant must have sufficient living space at his/her disposal, be earning his/her livelihood independently, not have committed any offence and possess an adequate knowledge of the spoken German language, and must not have deliberately deceived the foreigners' authority concerning circumstances that are of relevance to his/her situation in terms of the right of residence.

If the foreigner is already in a position to ensure his/her livelihood independently through employment, a residence permit will be issued in accordance with § 104a, Paragraph 1, Sentence 2, AufenthG. If this livelihood is not being secured, however, the affected parties will receive only a residence permit "on trial". They will then, up to the end of 2009, have time to find work (§ 104a, Paragraph 1, Sentence 1, AufenthG). If they do not achieve this goal, they will be at risk of losing their right to remain – that is to say, to "fall-back" to an exceptional leave to remain.

Even if the comparatively large number of persons who have received a right of residence as a result of the grandfather clause (Chapter 3.4.9) speaks for its success, at the end of 2008 it became apparent that there were intensified doubts as to its effectiveness. In the German Federal Parliament, there was discussion of the fact that out of a good 35,000 residence permits issued in the context of the "grandfather clause" in accordance with § 104a and § 104b, AufenthG, more than four fifths were issued solely "on trial", because the affected parties were not able to provide evidence of sufficient income. The affected parties would therefore, as of 1 January 2010, be under threat of losing their residence permit and of being removed, although in most cases they would be then have lived in Germany for more than ten years. Only around 500, out of around 27,000 persons, had succeeded in converting a residence permit that had originally been issued on trial to one in accordance with § 23, Paragraph 1, AufenthG by means of finding employment. Furthermore, 62,000 out of the approximate total of 100,000 persons who were in possession of an exceptional leave to remain within Germany had already been in this position for longer than six years. The right of residence regulation passed in 2006 by the IMK and the statutory "grandfather clause" were said to be too restrictive to counteract the practice of "chain exceptional leaves to remain" effectively (cf. Deutscher Bundestag 2009: 1).

Likewise, non-governmental organisations, private individuals and international organisations such as the UNHCR, for example, have appealed for the statutory grandfather clause to be expanded – for example, by abolishing the relevant entry dates included in the regulation (cf. UNHCR 2009: 8-9).

As of 31 December 2008, there were 104,945 persons living in Germany to whom the foreigners' authorities had only given an exceptional leave to remain.[37] Admittedly, this figure is significantly lower than two years earlier. On 31 December 2006, there were still 174,980 foreigners resident within the territory of the Federal Republic under an exceptional leave to remain who were also subject to an obligation to leave the country (Deutscher Bundestag 2007b: 201). Going by these figures, the practice of "chain exceptional leaves to remain" has improved significantly following the amendments to the law in 2005 and 2007. However, since the effects of the grandfather clause were obviously limited and exceptional leaves to remain continued to be issued widely, the discussion concerning extensions or further developments in the grandfather clause proceeded.

Following the elections to the Federal Parliament of 27 September 2009, the Christian Democratic Union (CDU), the Christian Social Union (CSU) and the Free Democratic Party (FDP) formed a new coalition government. In respect of the grandfather clause, it was recorded in the Coalition Agreement that in the light of the basic economic conditions that formed the backdrop, there was a need for action in relation to persons who were in possession of a residence permit "on trial" and who could be expected to fall short of the legal requirements that their livelihood be ensured by the end of the year (cf. Koalitionsvertrag 2009: 79). Accordingly, on 4 December 2009, the IMK agreed on a follow-up regulation, which basically means a prolongation of the regulation governing old cases by two years (see Chapter 2.3.10 of this study).

5.4 Enhanced protection for victims of enforced marriages

In September 2009, the Federal Council of Germany (Bundesrat) passed a resolution concerning enhanced protection for victims of enforced marriages (Bundesrat 2009). Some forms of enforced marriage contain an element relating to a foreign country, and can entail significant legal risks for the affected parties. It sometimes happens that men and women living in Germany may be married with fellow countrymen and women who are living in a foreign country and who then, by means of joining their respective spouse, enter Germany. For two years, their residence permit is linked to their marriage.[38]

There are also cases of "abduction for the purpose of marriage" ("Heiratsverschleppung"). This form of enforced marriage involves young girls and boys being betrothed or married against their will in their country of origin or the country of origin of their parents – where they might, for example, be spending their school holidays – and thereupon having to remain in this foreign country. There are certain legal loopholes associated with this form of enforced marriage: persons who do not have German nationality and who are in a

37 Source: BAMF (annual statistics of the Central Register of Foreign Nationals)

38 In cases of hardship, it is possible for a residence permit to be issued even before the expiration of this time period – in cases of domestic violence, for example.

foreign country will, in accordance with § 51, Paragraph 1, No. 7, AufenthG, lose their right of residence in Germany after six months – a time period that can be too short in order to liberate oneself from this enforced situation and to return to Germany in time to avoid the loss of one's residence title. It is true that the AufenthG envisages a right to return in § 37, Paragraph1; however, this is only on condition of being able to ensure one's livelihood. For many affected parties, it is difficult to fulfil this condition, since they are often financially dependent upon their parents, from whom it must in some instances be concealed that their offspring wish to escape from an enforced marriage (cf. Freudenberg 2007).

The Bundesrat has therefore requested that the next time the AufenthG is revised, the Federal Government provide for an improved possibility of return to Germany for victims of enforced marriages by means of an extension of § 51, AufenthG. The residence permit of such victims should not, according to the Bundesrat, be allowed to expire at the end of a mere six months spent abroad. Furthermore, the Bundesrat also put it on record that the next time the General Administrative Regulation relating to the Residence Act is revised, it should be examined whether the particular situation of victims of enforced marriages can be improved by means of a reference in connection with § 22, AufenthG (admission from abroad) (cf. Bundesrat 2009).

5.5 Resettlement

The resolution passed by the Standing Conference of Ministers and Senators of the Interior of the Federal German Länder (IMK) in December 2008, designed to make it possible for around 2,500 Iraqi refugees from Syria and Jordan to resettle in Germany in 2009, has met with a favourable evaluation from the authorities involved and in the public arena. In October 2009, the UNHCR recorded in a benchmark paper produced on the occasion of the formation of the new Federal Government, that with this action, Germany had "taken a pioneering role among the Member States of the EU", and had "made a significant contribution on an international level to the alleviation of the consequences of the Iraqi refugee crisis" (UNHCR 2009: 2).

In the opinion of the UNHCR, the global need for admission places for the resettlement of refugees in need of assistance will continue to rise over the coming years. Resettlement is going to become increasingly important in dealing with long-standing refugee situations without hope; the admission places currently available around the world are not sufficient. The UNHCR therefore considers the establishment of a permanent and systematic resettlement programme in Germany to be desirable, the aim being to provide a binding ruling allowing "in general" for "the continuous admission, from their initial country of refuge, of an annually determined number of refugees." The UNHCR goes on to point out that "The establishment of an institutionalised resettlement programme of this kind would, in case of need, make it possible to react more quickly and flexibly to each respective acute need for resettlement". Resettlement could, according to the UNHCR, be used to supplement – but not to replace – either instruments for protection that are already in existence or, as the case may be, instruments that have yet to be created in connection with considerations as to how the responsibility for the protection of refugees may be shared out more equitably within the EU (cf. UNHCR 2009: 4).

In addition to the UNHCR, the BAMF and the BMI are also positive in their assessment of the resettlement of Iraqi refugees in Germany. However, at this point in time, there is no continuous resettlement programme in Germany.

6 Conclusions

The analysis by the European Commission cited at the beginning of this study, according to which a growing proportion of asylum applicants in the EU were not receiving refugee status in accordance with the Geneva Convention but subsidiary protection or some other national protection status, does not apply in respect of the situation in Germany. Whereas in some EU Member States, subsidiary protection significantly outweighs protection as a refugee, in Germany far and away the majority of positive decisions in asylum proceedings consist of a determination of refugee status. In the light of the fact that the overall quota of applicants granted protection[39] has been rising significantly since 2007, from 6.3 percent in 2006 through 27.5 percent in 2007 to 37.7 percent in 2008, there can – at least from the German perspective – be no talk of the emergence of a general weakening of the level of protection available in Europe. During the second quarter of 2009, the Federal Republic had the highest quota of applicants granted protection of all EU Member States, at around 40 percent. The average quota throughout the EU (including all 27 Member States) was only 29 percent (cf. Albertinelli/Juchno 2009: 7-8).

There are no clear-cut explanations available for the rise in the overall quota of applicants granted protection in Germany. In the final analysis, it is likely that a combination of factors has contributed to this – the implementation in Germany of the Qualification Directive, for example; a rise in awareness of gender-specific persecution; the recently changing line-up of principal countries of origin (with a larger proportion of asylum applicants coming from Iraq and Afghanistan); political will and the exerting of influence by the UNHCR and non-governmental organisations.

With regard to the further development of EU legal instruments for the protection of refugees, a fundamental analysis should be carried out as to why national decision-making practices across the EU differ from each other to such a strong extent. It is to be hoped that the comparative EMN study and the present German report can contribute to such an analysis. Alongside the further development of the EU legal framework, it should also be ensured that all Member States take into consideration and implement to an appropriate degree the already existing provisions under European law in the field of asylum and refugee protection. In recent months, doubts have repeatedly been cast upon this – not least in relation to the situation in Greece (cf. Schneider/Parusel 2009: 18).

39 The overall quota of applicants granted protection is calculated from the figures relating to recognition for asylum, to the granting of protection to persons as refugees and to the determination of prohibitions on deportation (subsidiary protection) in relation to the overall number of decisions taken within the time period in question. In making this calculation, other methods by which asylum applications are dealt with – for example, a determination that responsibility rests with another Member State within the framework of the Dublin Procedure – are also included in the overall total of decisions taken. This is handled in various ways within the EU. If other methods by which applications are dealt with were not included within the quota of applicants granted protection, then this overall protection quota would be much higher in Germany than stated here.

The national forms of protection set down in the German Residence Act (AufenthG) are not in competition with the system of protection on the basis of European law – rather, they serve as an indispensable supplement to it, in the interests of an effective overall system of protection. This applies, for example, in respect of the consideration given in the context of subsidiary protection to dangers relating to sickness and diseases (§ 60, Paragraph 7, Sentence 1, AufenthG); in respect of the admission of endangered persons from foreign countries in accordance with § 22, AufenthG; in respect of the granting of residence to persons subject to an enforceable obligation to leave the country (§ 25, Paragraph 5, AufenthG); and also in respect of "secondary" forms of protection such as granting of residence in cases of hardship or the "grandfather clause" (Altfallregelung).

Some thought will need to be given to whether a permanent resettlement programme can be established along the lines of the measure for admission decided upon in December 2008 by the IMK in respect of Iraqi refugees who had initially found themselves in Jordan or Syria. Experiences to date with the admission of Iraqi refugees have shown the progess of this project to have been satisfactory from the point of view of all parties concerned. A permanent – or at least repeatable – resettlement programme might form a meaningful complement to the existing asylum system, since it would enable consideration to be given to persons for whom, under normal circumstances, entry into the EU for the purpose of lodging an application for asylum would not be possible. The German Residence Act already provides a possible legal framework for this in the form of § 23, Paragraph 2, AufenthG. It would also be possible for a programme of this kind to be agreed at EU level. Here, however, it would be of crucial importance for the EU Member States to be in a position to participate on a voluntary basis, determining the extent of their respective resettlement figures for themselves.

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Imprint

Published by:
Federal Office for Migration and Refugees (BAMF)
German National EMN Contact Point/Migration and Integration Research
Frankenstraße 210
90461 Nürnberg

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Source of supply:
Bundesamt für Migration und Flüchtlinge
Frankenstraße 210
90461 Nürnberg
www.bamf.de
E-Mail: info@bamf.de

Date:
January 2010

Layout:
Gertraude Wichtrey

ISSN:
1865-4770 Printversion
ISSN:
1865-4967 Internetversion

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