

Humanitarian Visas and Admission Programmes

Legal Situation and Practice in Germany

August 13, 2023

About IRAP

The International Refugee Assistance Project (IRAP) is a global legal aid and advocacy organization working to create a world where refugees and all people seeking safety are empowered to claim their right to freedom of movement and a path to lasting refuge.

Everyone should have a safe place to live and a safe way to get there.

In Germany, IRAP works in particular for the reunification of families as well as access to other pathways to safety. IRAP offers legal assistance and representation in individual visa proceedings and litigation of these issues. For more information about IRAP's work in Germany, please contact Kristine Rembach (krembach@refugeerights.org).

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List of abbreviations

AA	Federal Foreign Office
UDHR	Universal Declaration of Human Rights
AsylbLG	Asylum Seekers Benefits Act
AufenthG	German Residence Act
BAMF	Federal Office for Migration and Refugees
BAP Afghanistan	Federal Admissions Programme for Afghanistan
BMI	Federal Ministry of the Interior and Community
BMZ	Federal Ministry of Economic Cooperation and Development
BVerfG	Federal Constitutional Court
BVerwG	Federal Administrative Court
CEAS	Common European Asylum System
DGMM	Turkish Directorate General for Migration Management
ECtHR	European Court of Human Rights
ECHR	European Convention on Human Rights
EU	European Union
EUAA	European Union Agency for Asylum
ECJ	European Court of Justice
EU Charter	EU Charter of Fundamental Rights
Geneva Convention	Geneva Convention Relating to the Status of Refugees (1951)
GG	Constitution of the Federal Republic of Germany
GIZ	Society for International Cooperation
HAP Syria	Federal humanitarian admission programmes for Syrian nationals seeking protection

HAP Turkey	Federal humanitarian admission programmes for Syrian nationals seeking protection and, in individual cases, stateless persons from Turkey
ICCPR	International Covenant on Civil and Political Rights
IntB	Federal Government Commissioner for Migration, Refugees and Integration
IOM	International Organization for Migration
LAP Syria	State admission programmes for Syrian nationals seeking protection
NesT	New Start in the Team (NesT) – a government and civil society resettlement programme for particularly vulnerable refugees
OVG Berlin-Brandenburg	Higher Administrative Court of Berlin-Brandenburg
SGB II	Code of Social Law Volume II – Unemployment payment, basic provision for jobseekers
SGB XII	Code of Social Law Volume XII - social assistance
UNHCR	United Nations High Commissioner for Refugees
VEV	Ordinance on Entry and Visa Issuance of the Swiss Federal Council
VG Berlin	Administrative Court of Berlin
VG Bremen	Administrative Court of Bremen

Overview of key findings and key recommendations from the analysis

This analysis of humanitarian admission programmes to Germany focuses on admission in individual cases pursuant to § 22 (1) and (2) of the AufenthG and the admission of groups of people at the State and Federal level pursuant to § 23 (1) and (2) of the AufenthG. Both the rights and interests of those seeking protection and the interests of the state are used as criteria for the assessment. Against the background of the findings and the human rights-related urgency of humanitarian admission, the analysis contains recommendations for possible changes in application practice (*short term*) as well as for legal changes (*legislative*):

1. Germany has several legal foundations for entry on humanitarian grounds but does not fully utilise them. Rather, it applies the existing regulations largely restrictively.

Recommendation (short term): application of existing regulations in conformity with human rights and based on the need for protection. This means a more generous use of § 22 (1) of the AufenthG as a possible legal basis for an individual visa for applying for asylum (asylum visa), admission of particularly vulnerable people pursuant to § 22 (2) of the AufenthG and priority given to humanitarian criteria within the framework of Federal and State admission programmes.

Recommendation (legislative): create a clearer legal basis, expressly enshrine the protective purposes of the regulations and the goals of admission in law.

Recommendation (legislative): visa-free entry as an alternative, also for non-Ukrainian refugees.

2. Existing admission programmes are often lacking clear and accessible information and transparency at all stages of the process.

Recommendation (short term): information and transparency in all stages of the process for humanitarian admission programmes, in particular regarding the options for submitting an application, admission and security criteria, the procedural sequence, the role of the agencies involved, admission decisions and legal protection options.

3. Inconsistent official procedures, as well as bureaucratic and practical hurdles in the visa process, can effectively restrict access to admission on humanitarian grounds.

Recommendation (short term): simplification, standardisation and acceleration of the procedures, in particular uniform regulations for cooperation between different authorities and non-governmental agencies, as well as the avoidance of

unnecessary bureaucratic hurdles and excessive requirements for proof of identity of persons seeking protection in precarious situations; use of digital technology and creation of additional resources for processing visa applications.

4. The involvement of non-governmental agencies can make access easier, but it also harbours risks such as being overwhelmed or overburdened, as well as the risk of a "gatekeeper" effect.

Recommendation (short term): primacy of government responsibility, in particular, no transfer of sovereign decision-making powers on the admission itself; limit financial obligations of private individuals.

5. Differences in legal status after entry via different programmes can lead to subsequent problems for individuals and the state. Strict adherence to the passport obligation and restrictions on family reunification result in legal uncertainty and major practical barriers for individuals. They also mean that people who have been admitted file more asylum applications after entry, which means that state structures are unnecessarily burdened.

Recommendation (legislative): uniform status after entry based on the need for protection.

A. Executive summary

I. Aim and focus of the analysis

The following analysis of safe access options for those seeking protection contains **specific recommendations for the design of humanitarian access routes to Germany**. The asylum regulations in both the EU and Germany are based on a territorial protection concept. There are only a **few safe access routes with a humanitarian purpose**. Overall, the existing legal basis at the EU level is currently insufficient to institutionalise a regular system for the safe entry of people seeking protection in the EU Member States.

This analysis focuses on regulations for **humanitarian admission to Germany**, which are regulated in §§ 22 ff. of the AufenthG. The focus is on the previously implemented options for admission in individual cases pursuant to § 22 (1) and (2) of the AufenthG and the admission of groups of people at the State and Federal level pursuant to § 23 (1) and (2) of the AufenthG. The provisions of **§ 22 (1) of the AufenthG** have been increasingly asserted in recent years to enable **family reunification in cases of hardship**. The regulations of **§ 22 (2) of the AufenthG**, for example, have served as the basis for the admission of former **local staff from Afghanistan** since 2013. On the basis of **§ 23 (1) of the AufenthG**, **humanitarian State admission programmes** have been implemented several times since 2013, such as for **Syrians** seeking protection. Admission programmes for individuals from **Afghanistan** seeking protection are currently being launched in some Federal States. Finally, individuals from **Syria** seeking protection were admitted in the years 2013 to 2016, and individuals from **Turkey** since 2017 via **Federal admission programmes** under **§ 23 (2) of the Residence Act**. The current **BAP Afghanistan** is also based on this standard. With reference to these cases, **legal issues and practical hurdles** of the respective types of admission are being worked out and then evaluated.

The **rights and interests of those seeking protection** and the **interests of the state** are both used as **criteria** for the assessment. This comparison shows that these **interests are not conflicting, but rather predominantly parallel**. Accordingly, the evaluation and the recommendations based on it are established on the developed **criteria** of a humanitarian admission practice based on Germany's **constitutional and human rights obligations** and the need for protection of the individuals to be admitted, the aim of which is to avoid **irregular escape routes**. Aspects of the **practicability of admission procedures** are also taken into account.

II. Fundamental results of the analysis of existing admission options

Due to the large number of different refugee situations and individual needs, it is, concerning the most comprehensive range of protection schemes possible, to be regarded as positive that **several humanitarian admission options are enshrined in law in Germany**. In this respect, Germany differs from European countries such

as France, Switzerland or Italy, where there is not such a variety of humanitarian access routes that are anchored in law. However, the analysis indicates **shortcomings in the implementation** of these legal foundations. In practice, the **existing legal framework in Germany is not fully utilised**, which leads to multiple, sometimes significant access restrictions and a lack of transparency and inefficiency in terms of administrative processes, thus **contradicting the protective purpose of the legal foundations**. The current legal situation allows for **more flexible handling of individual cases** on the one hand and the creation of **more effective humanitarian admission programmes** on the other.

The main conclusion of this analysis is that, given the need for protection and the protective purpose of the admission regulations in Germany, **changes are urgently needed**. The options for humanitarian admission to Germany already enshrined in law require **legal concretisation**. Above all, however, there is a need for consistent and **less restrictive application and simplification in the admissions process in practice**. These fundamental considerations are based on the following main results of the analysis:

1. Germany uses existing national regulations on humanitarian admission in a largely restrictive manner.

The humanitarian admission options regulated in §§ 22 ff. of the AufenthG are all applied at Germany's discretion. In practice, the broad scope of application by the authorities means that these regulations are only used in **exceptional cases**, especially **in the case of individual admissions under § 22 (1) of the AufenthG**. **In individual cases, admission by the BMI pursuant to § 22 (2) of the AufenthG is also extremely rare** in practice. One obstacle to the widest possible application of **State admission programmes under § 23 (1) of the AufenthG** lies in the **discrepancies between the Federal and State governments** and the associated delays in obtaining the required **Federal consent**. In the context of the analysed **Federal admission programmes pursuant § 23 (2) of the AufenthG**, some **restrictive admission criteria** and the application of non-humanitarian criteria can be seen.

2. Existing admission programmes often lack clear and accessible information and transparency at all stages of the process.

In several of the admission programmes analysed, there is a **lack of clarity** concerning the applicable admission and safety criteria, the role of the agencies involved, options for submitting an application and the subsequent stages of the process. This **lack of clarity** is due to a **lack of information** and a **lack of transparency**. This situation prevents those seeking protection who find themselves in vulnerable situations from making informed decisions and lodging an application for **legal protection**. This is because, in many cases, applicants will **either not be**

informed at all **about non-inclusion** in the respective procedures or are not told the reasons for rejection.

Another factor that leads to a restriction of effective legal protection is the **contentious legal nature of the fundamental decision on admission**. This is particularly the case with regard to the declaration of admission by the BMI in individual cases pursuant to § 22 (2) of the AufenthaltG, but also applies to Federal or State admission arrangements. In the case of **the involvement of non-governmental agencies**, there is also the fact that there is no contestable decision in the context of individual legal protection, for example, if they make a (pre)selection.

3. The involvement of non-governmental agencies in humanitarian admission can facilitate access but also carries the risk of a "gatekeeper" effect, which can exclude those seeking protection.

It is essential for the granting of effective alternatives to irregular escape routes that those seeking protection have **actual access to humanitarian admission procedures**. The analysis of German admission programmes shows that the participation of non-governmental agencies can, in some cases, simplify access to existing procedures. However, depending on the cooperation between the agencies involved and the decision-making powers they have, their involvement can also lead to more bureaucracy, the need for coordination and, in some cases, to exclusions.

4. The involvement of private individuals and non-governmental agencies can expand secure access options but also carries the risk of overloading and overburdening those concerned.

Making admission conditional on the involvement of non-governmental bodies or even private funding can create problems connecting with **overloading and overburdening**. Depending on the extent of private responsibility after entry, there may be subsequent problems for those seeking protection if their relatives are overburdened financially. Government structures are also additionally called upon when beneficiaries choose the path of the asylum procedure after entry, in order, through a change of status, to free their relatives from any financial obligation.

Another way in which non-governmental agencies are overburdened (sometimes accompanied by a de facto overload) can be seen in the BAP Afghanistan due to the **responsibility of authorised reporting bodies** for the pre-selection of persons to be admitted.

5. Inconsistent procedures and bureaucratic and practical hurdles in the visa process can effectively restrict access to admission on humanitarian grounds.

The analysis points to cases in which **contradictory official practice** (by diplomatic missions abroad and the Foreigners' Authority) **has led to inconsistent application of standards in admission decisions and security checks**. **Long waiting times** due to a **lack of official capacity**, especially at diplomatic missions abroad, can put those seeking protection in difficult situations, especially in transit countries where their safety is at risk.

There are also practical problems with actual **access to German missions abroad**, for example, if the German Embassy in the country of origin or transit has been closed. In addition, problems can arise when accessing the embassy in the transit country, for example, due to a lack of jurisdiction, restrictions on actual access to the embassy premises, lack of proof of identity, high requirements in terms of proof, no or late appointment allocation for visa applications.

Finally, there are possible **difficulties when leaving the country, which are related to the respective country of residence and transit** or an **unsafe situation when staying in the country of transit**. Even if Germany has no influence on these circumstances, it should be noted that they are **regularly** present in **conflict situations** and in relation to **authoritarian regimes** and must, therefore, be taken into account when organising admission.

6. Differences in legal status after entry via various humanitarian programmes can lead to subsequent problems on the part of those seeking protection and on the part of the host country.

The analysis of the German admission programmes shows the consequences of the different residence permits that are issued within the framework of the programmes. Differences in legal status can lead to problems if people who basically belong to the same group of people seeking protection (e.g. people from Syria seeking protection) are admitted through different programmes and do not enjoy the same rights in Germany.

In particular, the questions of whether it is possible to issue a refugee passport or a passport replacement document and the requirements for family reunification are of great relevance for people admitted to Germany. These significant differences in legal status are not only substantial **restrictions for those seeking protection** but can also lead to them applying for asylum in Germany after humanitarian admission to improve their status. This, in turn, leads to an unnecessary **strain on Federal structures** and resources.

III. Central recommendations of the analysis

The recommendations based on the results of this analysis aim to make safe access for those seeking protection in Germany more effective and consistent with the **protective purpose of the standards**, ensuring that those seeking protection are admitted based on **constitutional and human rights guarantees**. The following recommendations contain both short-term measures that can be implemented without legal changes and legislative measures that require a legal change.

1. Measures that can be implemented in the short term

Recommendation: application of existing regulations in conformity with human rights and based on the need for protection

- Generous application of existing admission options pursuant to §§ 22 ff. of the AufenthG.
- In particular, application of § 22 (1) of the AufenthG as the basis for an **institutionalised humanitarian visa** and admission of particularly vulnerable persons under § 22 (2) of the AufenthG (such as human rights defenders).
- Speedy granting of the **Federal Government's approval** for State admission programmes based on § 23 (1) of the AufenthG.
- The **requirement for financial commitments** could be **waived** in the context of State admission programs.
- **Admission criteria** should be based on the **need for protection**; **non-humanitarian criteria** should not be exclusion criteria and should only be given secondary consideration.
- Only **clear security considerations** should play a role in security checks.
- **Individual access** to all procedures without intermediary agencies.

Recommendation: primacy of government responsibility

- **Maintaining the primacy of government responsibility** for admission to **avoid overloading and overburdening** non-governmental agencies and, above all, private individuals.
- **Limiting financial obligations** of private individuals following the example of the NesT programme.

Recommendation: information and transparency in all procedural stages of humanitarian admission programmes

- **Concrete and transparent requirements** for the admission and visa procedure.
- Provision of **easily accessible information** on admission criteria, the procedure and the role of the agencies involved.
- **Clear legal nature** of the individual official procedural steps.
- **Information about rejection decisions and legal protection options.**

Recommendation: simplification and acceleration of procedures

- Use of **digital technology**, for example, to submit applications or conduct initial interviews.
- **Creation of additional resources** for processing visa applications, for example, by increasing the number of staff or involving other Federal agencies.
- **Uniform regulation for collaboration** between cooperating authorities and non-governmental agencies, in particular:
 - uniform procedure and review standards;
 - avoidance of duplicate checks;
 - coordination of security checks with UNHCR;
 - general approval from the Foreigners' Authorities involved.
- Avoiding excessive bureaucracy, in particular avoiding **excessive requirements for proof of identity** for people in precarious safety situations/exceptions to the requirement for official proof of identity if identity can be proven in another way.
- **Elimination of practical hurdles** in the visa process, such as problems with actual access to diplomatic missions abroad and difficulties when leaving countries of origin or transit.
- Issuance of a **visa for applying for asylum** after entry on the basis of § 22 (1) of the AufenthG after a prima facie examination by the German diplomatic mission in cooperation with the BAMF in cases of particular urgency.

2. Legislative measures

Recommendation: create a clearer legal basis, expressly enshrine in law the protective purposes of the regulations and the goals of admission

- Legal concretisation of the regulations in § 22 (1) of the AufenthG to create a clear legal basis for a **permanent humanitarian visa** to Germany.
- The regulations in § 22 (2) of the AufenthG could also be **worded more precisely** to make the admission of **particularly vulnerable people** clearer.
- Clear definition of the **protective purpose of the standards** of §§ 22 and 23 of the AufenthG **as enabling safe entry** for persons in need of protection **based on constitutional and human rights guarantees**.

Recommendation: visa-free entry as an alternative

- Use of **visa liberalisation measures** and the direct issue of residence permits without prior visa or asylum procedures based on the example of the legal treatment of those from Ukraine seeking protection.

Recommendation: uniform status after entry based on the need for protection

- The protection status and the subsequent rights after admission are to be organised **in accordance with the given needs**. This applies, in particular, to the **right to family reunification** and the possibility of obtaining a **refugee passport**. The legal status granted should be adapted to refugee status.

B. Analysis

I. Introduction

More than 108 million people across the world are on the run.¹ Most of them are in their regions of origin and not in the EU. The **lack of regular entry routes and restrictive migration and border control measures** effectively prevent those seeking protection from entering. For the majority of those seeking protection, the EU can only be reached via perilous irregular escape routes.² Those seeking protection are dependent on smuggling and risk becoming victims of human trafficking.³ Internationally, the main responsibility for refugee protection remains with countries in the Global South, including Turkey. The number of irregular arrivals within the EU is leading to overburdening of countries with external EU borders, such as Italy and Greece. Many of those seeking protection who make it to the EU despite arriving via dangerous irregular routes are stuck in so-called hotspots⁴ and go through lengthy asylum procedures, sometimes under disastrous admission conditions.⁵ The EU has become "Fortress Europe".⁶ At the same time, the lack of solidarity among the Member States is criticised.⁷ Irregular arrivals do not allow state structures to prepare for the admission of those seeking protection. Ultimately, the focus on isolationism and preventing entry leads to a loss of state control over whether and how those seeking protection enter the EU. Particularly vulnerable people, such as the sick or elderly, women and children, are often unable to undertake a dangerous, irregular journey.

This analysis focuses on an alternative solution to the access dilemma: **secure access routes, i.e. visa procedures that enable safe and legal entry into a host country**. These differ primarily with respect to their purpose and, thus, the target group. While secure access routes for non-humanitarian purposes, such as visas for gainful employment or study purposes, can also be relevant for those seeking protection, they are not tailored to their particular situation and needs. While humanitarian considerations can play a role in discretionary decisions when issuing visas for the

¹ See UNHCR Global Trends Report 2022, available at: <https://tinyurl.com/bdhjbn8v>.

² Between 2014 and June 2023, more than 26,924 refugees drowned in the Mediterranean Sea; see the estimates on Statista, available at: <https://tinyurl.com/m46wmkh5>.

³ Van Liempt, *Humanitarian smuggling in a time of restricting and criminalizing mobility*, in: The Routledge Handbook of Smuggling, Routledge 2021.

⁴ About the hotspot concept: Danish Refugee Council, *Fundamental Rights and the EU Hotspot Approach - A legal assessment of the implementation of the EU hotspot approach and its potential role in the reformed Common European Asylum System*, October 2017, available at: www.drc.dk or www.flygtning.dk

⁵ On the development of asylum law in the EU, see Buckel/Graf/Kopp/Löw/Pichl (eds.), *Kämpfe um Migrationpolitik seit 2015, Zur Transformation des europäischen Migrationregimes* [Fighting for migration policy since 2015, On the transformation of the European migration regime], transcript 2021.

⁶ On "Fortress Europe", see P. Bendel, *Immigration Policy in the European Union: Still bringing up the walls for fortress Europe?*, in: *Migration Letters*, No. 1/2005, pp. 20-31.

⁷ See Pelzer, *Auswege aus der Solidaritätskrise – Modelle zur Verteilung von Flüchtlingen in der Europäischen Union* [Ways out of the solidarity crisis - models for the allocation of refugees in the European Union], article for the Friedrich Ebert Foundation, available at: <https://tinyurl.com/s74x8f4m>.

purpose of family reunification, they only come into play for a small proportion of those protection seekers who already have relatives in an EU country. The requirements are, for the most part, very high, and the procedures sometimes take several years. For those seeking protection, humanitarian access routes, such as **humanitarian visas**, admission programmes or UNHCR resettlement programme, are therefore particularly relevant.

In connection with humanitarian admission, it is sporadically suggested in the political debate that individual access via asylum law could be replaced by admission (currently, for example, "admission quotas"; in 2015, for example, "upper limits"). **However, humanitarian admission can only exist alongside the individual right to access an asylum procedure.** The restriction of the individual right to asylum would be incompatible with constitutionally and internationally guaranteed human rights, international refugee law and European law requirements.⁸

This analysis focuses on humanitarian visas and admission programmes to Germany. The research on practical examples is mainly based on an evaluation of generally accessible information regarding the respective admission programmes, specialist legal and commentary literature, as well as relevant case law. In addition, in preparation for the analysis, discussions were held with experts from various civic organisations and UNHCR. Information regarding admission options in selected European countries was also obtained for a comparative evaluation of the German legal situation and practice. The knowledge gained in this way is used below as an example.

After an overview of the international and European legal framework (II.), the current German legal situation and practice is analysed (III). The focus is on the already existing and previously implemented options for humanitarian admission, which are examined with regard to implementation challenges. On this basis, the most important findings are summarised and evaluated using a standard developed from the protective purpose of the standards (IV.). The analysis concludes with recommendations for the future organisation of humanitarian access routes into Germany (V.).

II. Safe access to protection in the EU: relevant legal norms at international and European level

After an overview of international legal foundations that may be relevant for the secure access of those seeking protection in a host country (1.), this section explains the legal context and existing options for safe access to the EU (2.).

⁸ Also the German Institute for Human Rights statement on "upper limits" for the right to asylum of 30 November 2015, available at: <https://tinyurl.com/576rfns2>; for a comprehensive overview of this topic, see Endres de Oliveira/Tan, External Processing: A tool to expand protection or further restrict territorial asylum: MPI Report, February 2023, available at: <https://tinyurl.com/5n7aatva>.

1. Access to protection under international law

Although international refugee law offers an international legal framework for refugee protection with the Convention Relating to the Status of Refugees (1951) (Geneva Convention)⁹ and the additional Protocol of 1967¹⁰, it remains unclear how those seeking protection can safely reach a country offering protection.¹¹ For the granting of refugee status, the Geneva Convention requires amongst other things that the persecuted person is *outside* their country of origin (Art. 1 A of the Geneva Convention). But it leaves the question of access open. The only starting point for a right of entry is the **non-refoulement principle** enshrined in Art. 33 (1) of the Geneva Convention, i.e. the principle of not being returned to a country where a refugee would be threatened with persecution. This creates an **implicit right of entry** for those seeking protection who seek asylum at a country's border - because the country must allow the person to enter to be able to check whether repatriation would violate the ban on refoulement.

This basic principle of refugee law can also be found in other human rights agreements, such as Art. 3 of the European Convention on Human Rights (ECHR)¹², Art. 3 of the UN Convention Against Torture¹³ or Art. 7 of the International Covenant on Civil and Political Rights (ICCPR)¹⁴. Otherwise, all human rights agreements are silent on the question of access to asylum. The "right to emigration", anchored in Art. 13 of the ICCPR, i.e. the right to leave any country, including one's own, lacks a corresponding "right to enter" and the right "to seek and enjoy asylum", enshrined in Article 14 of the Universal Declaration of Human Rights (UDHR)¹⁵, grants those seeking protection a right of access to a fair asylum procedure. However, it does not imply a **right to enter** a specific country to be able to carry out such a procedure there. Overall, international law offers only a weak response to the question of access. In the EU, too, how access is structured depends to a large extent on national regulations and the willingness of the Member States to accept them, as outlined below.

2. Access to protection in the EU

The following sections outline the territorial protection concept of the EU (a.), which has been reinforced as such in case law of courts of last resort on humanitarian visas (b.). Following this is an overview of political requirements and legal developments with regard to humanitarian visas for entry into the EU and its Member States (c.). Finally, the alternative of visa-free entry is presented using the example of the legal treatment of those from Ukraine seeking protection (d.).

⁹ Agreement of 28.7.1951 on the Legal Status of Refugees (BGBl. [Federal Law Gazette] 1953 II p. 560).

¹⁰ Protocol on the Legal Status of Refugees of 31.1.1967 (BGBl. 1969 II p. 1294)

¹¹ See again Endres de Oliveira, *Legaler Zugang zu internationalem Schutz – Zur Gretchenfrage im Flüchtlingsrecht* [Legal access to international protection – On the crucial question of refugee law], *Kritischer Justiz* 2016 Issue 2, pp. 2 – 14.

¹² Convention for the Protection of Human Rights and Fundamental Freedoms of 4.11.1950 (BGBl. 1952 II, p. 685, 953)

¹³ Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment of 10.12.1984 (BGBl. 1990 II p. 246).

¹⁴ International Covenant on Civil and Political Rights of 19.12.1966 (BGBl. 1973 II 1553).

¹⁵ Universal Declaration of Human Rights of 10.12.1948.

a. The territorial protection concept of the EU

The Geneva Convention and the international human rights treaties form the legal basis of the European asylum system. The non-refoulement principle is firmly anchored in Art. 4 of the EU Charter of Fundamental Rights (EU Charter).¹⁶ In addition, the "right of asylum" under Article 18 of the EU Charter is based on the Geneva Convention. However, these primary law provisions do not go beyond the protection under international law and, therefore, do not entail a right of entry either.¹⁷

According to the secondary law provisions of the Common European Asylum System (CEAS), **asylum is also a territorial protection concept in the EU**. To be able to apply for asylum in an EU Member State, a person must therefore be at the border or on the territory of the Member State in question (see Art. 3 (1) of the EU Asylum Procedures Directive¹⁸). At the same time, reaching the border and thus access to the territory of the EU is effectively prevented by a progressive shift of migration and border controls beyond the borders of the EU.¹⁹ These measures of externalisation (or extra-territorialisation) of border protection include, for example, cooperation with third countries, including financial or personnel support for border controls there, or sanctions for private transport companies that transport people without valid travel documents (so-called carrier sanctions). The most recent example of an expansion of externalisation and thus deterrence from entry into the EU is the declaration of intent signed between the EU and Tunisia in July 2023. In accordance with this, the EU is promising Tunisia financial aid of up to 900 million in order, among other things, to take tougher action against irregular Mediterranean crossings.²⁰

b. Case law from courts of last resort on visas for asylum applications in the EU

The majority of people displaced worldwide need a visa to enter the EU legally.²¹ However, there is no "asylum visa" at the EU level that would allow entry to apply for asylum. This was confirmed in 2017 by the European Court of Justice (ECJ) in the decision in the case *X. and X.*²² The ECJ ruled in this case that there is **no legal basis under European law (specifically EU Visa Code²³) for a visa for the purpose of applying for asylum after entry**. The case concerned a Syrian family with young children who had unsuccessfully applied for humanitarian visas at the Belgian Embassy in Lebanon in order to apply for asylum after arriving in Belgium. In doing

¹⁶ Charter of Fundamental Rights of the European Union of 18.12.2000, ABI EU No. C 364

¹⁷ For a comprehensive account of access to protection in the EU, see Endres de Oliveira, *Safe Access to Asylum in Europe*, Nomos 2023 (forthcoming).

¹⁸ Directive 2013/32/EU of the European Parliament and of the Council of 26.6.2013 on common procedures for granting and withdrawing international protection (revised version).

¹⁹ See, for example, Jürgen Bast, Frederik von Harbou and Janna Wessels, *Human Rights Challenges to European Migration Policy: The REMAP Study* (Nomos 2022) 29-37

²⁰ Cf. Memorandum of Understanding of 16.7.2023, available at: <https://tinyurl.com/ysxztldhw>.

²¹ See Annex I to Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14.11.2018

²² ECJ, judgment of 7.3.2017 - C-638/16 PPU, X. and X. vs. Belgium - asyl.net: M24792.

²³ Regulation (EC) No. 810/2009 of the European Parliament and of the Council of 13.7.2009 on a Community Code on Visas (Visa Code), ABI. 2009, L 243, p. 1, amended in ABI. 2013, L 154, p 10, as amended by Regulation (EU) No. 610/2013 of the European Parliament and of the Council of 26.6.2013 (ABI. 2013, L 182, p. 1).

so, they referred to the provision of Article 25 of the EU Visa Code, which gives Member States the option of waiving the standard conditions for issuing a Schengen visa. On the basis of Article 25 (1) (a) of the Visa Code, Member States had previously issued visas to people seeking protection for the purpose of applying for asylum after entry.

In his opinion on the case, EU Advocate General Mengozzi argued that the refusal of the humanitarian visa in this specific case violated the prohibition of refoulement enshrined in Article 4 of the EU Charter. In its decision, however, the ECJ did not confront this legal opinion and instead stated that the scope of the EU Charter was not open to interpretation at all. Art. 51 of the EU Charter states that the Charter only applies to the "implementation of Union law" and that the Charter itself does not extend the scope of Union law and does not create any new competence for the Union. Given that such a visa was not regulated in EU secondary law (in this case, the EU Visa Code), the Charter was not applicable in the case.²⁴

A decision by the European Court of Human Rights (ECtHR) in 2020 was similar. In the case of *M. and N.*, which also concerned applications from a Syrian family for visas to apply for asylum in Belgium, the ECtHR did not consider the ECHR to be applicable.²⁵ This judgment of the ECtHR was predated by its decision in the case *N.D. and N.T.*, which involved so-called "hot returns" at the border to the Spanish enclave of Melilla in Morocco.²⁶ This is a form of so-called "pushbacks", i.e. the direct refusal of people to prevent access to the territory. The ECtHR had dealt with the collective expulsion ban under Art. 4 of Protocol No. 4 of the ECHR, and the lawfulness of the deportations of the claimants was supported, among other things, by the fact that they had not used regular entry routes.²⁷ However, the Court did not specify in this decision which regular entry routes were suitable for those seeking protection. Therefore, the decision on asylum visas in the case of *M. and N.* was eagerly awaited but ultimately did not offer a solution and actually exacerbated the access dilemma.

c) Safe access routes to the EU: political demands and legal developments

However, the decision in case *X. and X.* led to an important venture by the European Parliament in 2018: the proposal for a **humanitarian visa regulation at EU level**.²⁸ Although this project was not pursued any further, there are still efforts at EU level to expand the application of existing visa regulations for certain groups of people. A special focus is on **human rights defenders**. The underlying reason for this is the 2008 European Council guidelines on the protection of human rights defenders. The recommendations made therein include "immediate measures" such as issuing

²⁴ ECJ judgment *X. and X.*, loc. cit. (footnote 22), recital 45.

²⁵ ECtHR, decision of 5.3.2020 - 3599/18 M.N. including vs. Belgium - asyl.net: M28416.

²⁶ ECtHR, judgment of 13.2.2020 - 8675/15; 8697/15 - N.D. and N.T. versus Spain - asyl.net: M28138.

²⁷ ECtHR judgment *N.D. and N.T.*, *ibid.*, recital 231.

²⁸ See European Parliament, Directorate-General for Parliamentary Research Services, Navarra, C., Ballegooij, W., Humanitarian visas: European added value assessment accompanying the European Parliament's legislative own-initiative report (Rapporteur: Juan Fernando López Aguilar), European Parliament, 2018, available at: <https://tinyurl.com/5e2bkj4w>

emergency visas and promoting the temporary admission of persons at risk in third countries to the Member States of the EU.²⁹ According to the UN definition, human rights defenders are classified as "individuals, groups and organs of society" "who promote and protect universally recognised human rights and fundamental freedoms".³⁰ A study by the EU Agency for Fundamental Rights was also recently published, which contains recommendations on how EU institutions and Member States can use existing legal foundations flexibly to provide protection to human rights defenders.³¹ Civil society organisations, however, complain that the lack of reliable access to visa procedures in the EU increases the risks for these individuals. An international alliance is therefore calling for simplified visa procedures for human rights defenders and an adjustment to the guidelines for temporary protection to cover this group of people separately.³²

However, as long as corresponding demands and recommendations are not implemented at the EU level, those seeking protection can only apply for a **national humanitarian visa in an EU Member State**, provided the relevant regulations exist there. The **term "humanitarian visa"** is fundamentally a **generic term** for visas that are based on a "humanitarian" reason. "Humanitarian" reasons for issuing a visa can be many and varied and depend on the respective national regulations. They range from family constellations to necessary medical treatment to persecution relevant under refugee law, which can lead to admission via regulations relating to individual cases, humanitarian programmes or national resettlement procedures. In principle, a humanitarian visa must be applied for at a diplomatic mission abroad of the EU Member State the applicant wishes to enter. In the visa procedure, the diplomatic mission checks the existence of humanitarian reasons. Identity, security and health checks also take place. Depending on the type of procedure, the beneficiary of a humanitarian visa after entry is either granted a humanitarian residence permit directly or granted access to the national asylum procedure. However, there is no entitlement to a humanitarian visa. There is also no uniform European status for beneficiaries of such a visa.

Some **EU Member States issue national visas** (so-called "type D" visas) for various humanitarian reasons, but only at their discretion in each individual case.³³ Information from **France** (concerning the "**visa au titre de l'asile**" there)³⁴ and

²⁹ Schutz von Menschenrechtsverteidigern – Leitlinien der Europäischen Union [Protection of Human Rights Defenders – European Union Guidelines], p. 2, available at: <https://tinyurl.com/bdh4vveh>; see also report on the EU guidelines on the protection of human rights defenders, 17.2.2023 – (2021/2204 (INI)), recital 14.

³⁰ UN General Assembly, Resolution 53/144 of 9.12.1998, available at: <https://tinyurl.com/yckxcmhr>.

³¹ Further to this, European Union Agency for Fundamental Rights, "Protecting Human Rights Defenders at Risk – EU entry, stay and support", study of 11.7.2023, available at: <https://tinyurl.com/y9vpafa5>.

³² Call from 50 civil society organisations to the EU, available at: <https://tinyurl.com/5d7ayt2e>.

³³ See, for example, Ulla Iben Jensen, Humanitarian Visa: Options or obligations? Study for the LIBE Committee, 2014, available at: <https://tinyurl.com/57kujz2x>.

³⁴ General information on this option can be found on the French Government's website, available at: <https://tinyurl.com/ecyft3bc>. Information on implementation was provided by legal experts from IRAP Europe as part of the compilation of this analysis.

Switzerland (regarding the **humanitarian visa** there),³⁵ which each grant access to the national asylum procedure after entry, suggests for example that the allocation is administered differently depending on the diplomatic mission abroad. Overall, the practice is characterised by lack of information sharing and, particularly in the case of Switzerland, by very restrictive handling.³⁶ Those seeking protection who are already in a third country have particularly poor chances of obtaining such a humanitarian visa for Switzerland, as it is assumed that they are no longer in acute danger.³⁷

In principle, close connections to the host country are also required, whether through financial sponsors (France) or other personal connections (Switzerland).³⁸ A **connection with the host country** is also required in the case of so-called "**humanitarian corridors**" to **Italy**, which were initiated by the Catholic community of **Sant'Egidio** in cooperation with the **Union of Evangelical Churches in Italy, the Waldensian Table and the Italian Government**. Volunteers in the countries of origin and transit make contact with those seeking protection and make appropriate suggestions for admission to the Italian diplomatic missions abroad. In the event of an acceptance of admission, humanitarian visas with limited territorial validity are issued by the Italian Ministry of the Interior, and those seeking protection can apply for asylum after entering the country. In the meantime, there is also cooperation with the churches in France, Belgium and Andorra; since 2016, over 6,000 visas have been issued within the framework of such humanitarian corridors for safe entry into the EU.³⁹

Overall, the focus at the EU level and among the Member States is primarily on resettlement as a quota solution in cooperation with UNHCR.⁴⁰ The EU has been funding national resettlement programs since 2015, with the European Union Agency for Asylum (EUAA) supporting the Member States with respect to implementation. For 2023, 17 Member States have pledged more than 29,000 places for resettlement and humanitarian admission.⁴¹ And finally, the so-called "EU-Turkey Deal"⁴² of March 2016 also contains resettlement elements.⁴³ In 2016, within the framework of the CEAS

³⁵ In 2012, the humanitarian visa replaced the "embassy asylum" that had existed until then. An overview of the developments can be found in the conclusions and recommendations of the Swiss Red Cross of December 2021, available at: <https://tinyurl.com/5x4jfw7>.

³⁶ According to information from IRAP Europe in June 2023. For figures from Switzerland, see the 2022 Annual Visa Monitoring Report, according to which 351 humanitarian visas were issued in 2022, available at: <https://tinyurl.com/25prspa8>; for the problems in the Swiss procedure, see the report of the Swiss Red Cross from December 2021, available at: <https://tinyurl.com/5x4jfw7>.

³⁷ See also the wording of Art. 4 (2) Sentence 2 of the Ordinance on Entry and the Issuing of Visas of the Swiss Federal Council (VEV): "Such a case exists in particular if the life and limb of the person concerned is directly, seriously and specifically endangered in the country of origin."

³⁸ The legal basis is Art. 4 (2) of the VEV.

³⁹ As of 15/03/2023, see the information sheet of St'Egidio, available at: <https://tinyurl.com/2axzhhsu>; see also the program information at: <https://tinyurl.com/3n5uxuxz>.

⁴⁰ Regarding resettlement, see UN High Commissioner for Refugees (UNHCR), Resettlement Handbook (2011).

⁴¹ An overview can be found on the website of the EU Commission, available at: <https://tinyurl.com/5n6ehw66>.

⁴² EU-Turkey Statement of 16.3.2016. For the classification of the legal nature of this declaration as a "press release", see the decision of the European Court of Justice (EuG) of 28.2.2017, T-193/16.

⁴³ Since March 2016, more than 38,000 people have been resettled from Syria to EU countries; see information from the EU Commission, available at: <https://tinyurl.com/2n6scp33>.

reform proposals, a regulation was finally drafted to create a resettlement framework at EU level.⁴⁴ When it comes into force, however, this would not establish any new or more comprehensive admission obligations for the Member States, but would only (partially) harmonise the corresponding admission procedures.

d) Visa-free entry as an alternative: dealing with protection seekers from Ukraine

An important alternative to entering the country with a humanitarian visa is visa-free entry, but this has yet to be an option for the majority of people seeking protection. An exception currently exists for **refugees from Ukraine**. The EU Directive on Temporary Protection⁴⁵ has been activated for these. In accordance with the corresponding resolution of the European Council⁴⁶ and national regulations in Germany,⁴⁷ they can enter Germany without a visa. After entering the country, they usually receive a residence permit for temporary protection for up to three years without first having to go through an asylum procedure.⁴⁸ The group of beneficiaries includes Ukrainian nationals forced to leave Ukraine since 24 February 2022 as a result of the military invasion by the Russian armed forces, in principle also stateless persons and nationals of other third countries who lived in Ukraine, as well as their family members. In addition, Member States can expand the group of beneficiaries under national law. The legal treatment of those from Ukraine seeking protection has shown that visa liberalisation and the direct issue of residence permits without prior visa or asylum procedures can be a real alternative to the access dilemma. Therefore, there are already calls to adapt the Directive on Temporary Protection so that other people seeking protection can also benefit from it. These demands also focus on human rights defenders.⁴⁹

⁴⁴ Proposal for a regulation of the European Parliament and of the Council establishing a Union resettlement framework and amending Regulation (EU) No 516/2014 of the European Parliament and of the Council, COM/2016/0468 final – 2016/0225 (COD).

⁴⁵ Directive 2001/55/EC on rules for granting temporary protection in the event of a mass influx of displaced persons and measures to encourage balancing the burden across EU Member States (also known as the "Mass Influx Directive"). The Directive sets minimum standards that apply across the EU for granting temporary protection if a relevant Council decision (by a qualified majority of the Member States) applies them.

⁴⁶ Council Implementing Decision (EU) 2022/382 of 04.03.2022 determining the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC and introducing temporary protection.

⁴⁷ See Ukraine Residence Transitional Ordinance.

⁴⁸ In Germany, the granting of a residence permit for temporary protection is governed by §24 of the AufenthG; see also the current fact sheet from the Federal Office for Migration and Refugees (BAMF) on entry from Ukraine, available at: <https://tinyurl.com/yc6rcrmr>.

⁴⁹ See, for example, the corresponding call from 50 civil society organisations to the EU, available at: <https://tinyurl.com/5d7ayt2e>.

III. Humanitarian admission to Germany: analysis of the German legal situation and practice

This section analyses the German legal situation and practice regarding admission on humanitarian grounds. After an overview of the existing legal foundations for admission in individual cases and ad hoc admission of groups of people at the Federal or State level as well as the permanent resettlement programme (1.), the first-mentioned admission options are examined in more detail (2.-4.).

Resettlement is not analysed in depth because it is an internationally negotiated programme, and the focus of this analysis should be on special national programmes. However, because the evaluations in Section IV also refer to aspects of resettlement, particularly the NesT programme based on them, it will be briefly explained below. The situation is similar to the granting of residence for temporary protection under § 24 of the German Residence Act (AufenthG), which is based on European regulations.⁵⁰ This, combined with a visa exemption, can also lead to safe entry and is therefore considered separately in Section IV. As shown here and in the admission of earthquake victims from Turkey,⁵¹ visa facilitation plays a central role in granting safe access to protection. The willingness of cities and municipalities to accept people can also play a role within the framework of the existing admission options, for example, in the approval of the Foreigners' Authority for the visa in accordance with § 22 of the AufenthG or taking into account the additional willingness to accept when designing admission programs per § 23 of the AufenthG and further structuring of admission options.⁵²

For admission in individual cases in accordance with § 22 of the AufenthG (2.), ad hoc admission options at the State level in accordance with § 23 (1) of the AufenthG (3.), and ad hoc admission options at the Federal level in accordance with § 23 (2) of the AufenthG (4.), shown below are the respective admission requirements, procedure and legal status after admission. Legal questions and the practical hurdles of the respective types of admission are presented in detail with reference to individual cases.

1. Overview

Safe entry for those seeking protection in Germany can take place in several ways, all of which are legally anchored in §§ 22, 23 and 24 of the AufenthG. § 22 of the AufenthG contains a provision for **admission in individual cases**, while § 23 of the AufenthG contains three different provisions for the admission of certain groups of

⁵⁰ See Section II.2.d above.

⁵¹ For more information, see the information from the Asylum and Migration Information Network, available at: <https://tinyurl.com/5n8jv5py>.

⁵² In this regard, reference is made to the comprehensive study by Helene Heuser: Städte der Zuflucht, Kommunen und Länder im Mehrebenensystem der Aufnahme von Schutzsuchenden [Cities of refuge, municipalities and countries in the multi-level system of admitting those seeking protection], Nomos, 1st edition 2023.

people. § 23 of the AufenthG includes the legal basis for ad hoc admission programmes at the State and Federal level (paragraphs 1 and 2) and for a permanent programme for the resettlement of those seeking protection (paragraph 4, "Resettlement"). Finally, § 24 of the AufenthG grants temporary protection based on European regulations.

As will be shown below, the various humanitarian admission options differ primarily according to which groups of people they can cover (**admission requirements**) and which **agencies** are involved **in the admission procedure**. In the following analysis, the focus is on § 22, § 23 (1) and (2) and § 23 (2) of the AufenthG as humanitarian entry routes that enable individual or group admission in the event of serious threats. Ad hoc admission at the Federal level (§ 23 (2) of the AufenthG) and via resettlement (§ 23 (4) of the AufenthG), as well as "admission from abroad" (§ 22 of the AufenthG) only affects people who are still abroad, while the State admission in accordance with § 23 (1) of the AufenthG is also applicable to persons who are already on German territory.

a) Remark: resettlement

Resettlement, i.e. the permanent resettlement of those seeking protection, which is legally anchored in § 23 (4) of the AufenthG, plays an important role with regard to safe access to Germany. Resettlement refers to people seeking protection who are already living in the country of first asylum but will not stay there permanently and will not be able to return to their country of origin in the foreseeable future. These people are selected by the Federal Office for Migration and Refugees (BAMF) in cooperation with UNHCR, taking into account, among other things, that they are particularly vulnerable⁵³ based on their legal and physical condition, their age (children and older people), their gender (single women) and their experiences in their home country (victims of violence or torture).

The programme "**New Start in the Team (NesT)** – a State-run social admission programme for particularly vulnerable refugees" is an additional humanitarian admission programme based on § 23 (4) of the AufenthG, which ties admission to collective civil society support ("private sponsorship"). It was launched in May 2019 as a pilot project and made into a regular Federal admissions program in January 2023. Admission is subject to support from a mentoring group. This can consist of institutions, associations or (at least five) private individuals. The mentoring group undertakes to make living space available to those who have been taken in or to finance the basic rent for a period of two years and also to provide them with practical support (e.g. when dealing with authorities or looking for an apprenticeship or job). NesT is a joint programme between the Federal Ministry of the Interior and Community (BMI), the Federal Government Commissioner for Migration, Refugees

⁵³ See in this respect the information from the BAMF, available at: <https://tinyurl.com/2p8et3dp>.

and Integration (IntB) and the BAMF.⁵⁴ The NesT programme can set an example with regard to the legal status of beneficiaries after admission.

b) General granting requirements and visa requirements

What these admission options have in common is that in principle⁵⁵, they **do not release admittees from the visa requirement**, which is a general prerequisite for the granting of a permit (see § 5 (2) of the AufenthG). Therefore, the general regulations for the visa procedure at German diplomatic missions abroad apply. It should be noted here that the refusal of a visa, unlike administrative decisions by other authorities, requires neither a reason nor instructions on legal remedies (§ 77 (2) of the AufenthG). In addition, as always when a residence permit is issued or extended in Germany, the other "**general granting requirements**" must also be checked here, such as clarification of identity, fulfilment of the passport requirement, or securing a livelihood (see § 5 (1) of the AufenthG). As with all residence permits for humanitarian reasons, § 5 (3) (2) of the AufenthG means that the requirements for granting can be waived. If there is an entry ban that may have been imposed in the past, the ban in accordance with § 11 (4) (2) of the AufenthG should also be lifted for the permits outlined here.⁵⁶

2. Humanitarian admission from abroad in accordance with § 22 of the AufenthG

§ 22 of the AufenthG regulates admission from abroad on a case-by-case basis, which also includes families.⁵⁷ In addition, a large number of people can also be admitted in similar individual cases.⁵⁸ On the one hand, the regulations provide for the granting of a residence permit for international law or urgent humanitarian reasons at the discretion of the authorities (sentence 1). On the other hand, they provide for the BMI to declare admission to protect Germany's political interests (sentence 2). According to the explanatory memorandum to the law, the area of application of § 22 of the AufenthG only includes persons who are not yet resident in Germany at the time of the first decision to grant a residence permit.⁵⁹

The legal basis for admission from abroad according to under § 22 (1) (in a) and (2) of the AufenthG (in b)) is set out below based on the admission requirements (aa) and the procedure (bb), as is as a discussion of practical and legal challenges including particular cases. Then, the legal protection options (c) and the legal status after entry (d) are explained for both alternatives of the standard.

⁵⁴ See in this respect the Caritas NesT information website, available at: <https://www.neustartimteam.de/>
Information on current admissions can also be found here.

⁵⁵ Exceptions were made for the evacuation of local staff from Afghanistan (see III.2.b.bb below).

⁵⁶ Göbel-Zimmermann/Hupke in Huber/Mantel, Kommentar zum AufenthG/AsylG [Comments on the AufenthG/AsylG], 3rd edition 2021, AufenthG, preamble, §§ 22-26, recital 3.

⁵⁷ Huber/Eichenhofer/Endres de Oliveira, Aufenthaltsrecht [Admission Law], 1st edition 2017, recital 433.

⁵⁸ Göbel-Zimmermann/Hupke, loc.cit. (footnote 56), § 22, recital 2.

⁵⁹ Federal Government, Immigration Act, draft law of 7.2.2003, Bundestag document 15/420, p. 77, see also Göbel-Zimmermann/Hupke, loc.cit. (footnote 56), § 22 recital 1 with reference to the Federal Administrative Court.

a) Case-by-case decision by the Federal Foreign Office (AA)/Foreigners' Authority in accordance with Clause 1

The provisions of § 22 (1) of the AufenthG are only applied very restrictively in practice. A total of 312 visas were issued under this standard between 2017 and August 2020.⁶⁰

(aa) Admission requirements

The granting of the residence permit pursuant to Clause 1 is a discretionary decision. The prerequisite for this is international law or urgent humanitarian reasons. According to the explanatory memorandum to the law, there are grounds under international law, in particular when admission is based on international obligations.⁶¹ Human rights guarantees do not lead directly to a right to admission, but they can reduce discretion "to zero" in certain cases.⁶²

According to the explanatory memorandum to the law, there are **urgent humanitarian reasons** if admission is justified in terms of a "special situation" compared to other people who might be considered.⁶³ It is assumed that the norm has an "exceptional character" and admission can therefore only take place if it is "a requirement of humanity in a specific individual case".⁶⁴ This is likely to be the case, for example, for serious illnesses that can only be treated domestically or also if more specific statutory hardship regulations do not apply.⁶⁵ **Family reunification** can also qualify as a reason.

Practical example: family reunification in accordance with § 22 (1) of the AufenthG

In recent years, the application of § 22 (1) of the AufenthG has been relevant, for example, in connection with the suspension of family reunification for persons entitled to subsidiary protection. The provision was invoked to enable family reunification in cases of hardship despite the suspension.⁶⁶ One example is the reunification of children to beneficiaries of subsidiary protection, for which a

⁶⁰ Kessler in: Hofmann, Nomos-Kommentar Ausländerrecht (NK-AusIR) [Nomos Commentary Aliens Law], 3rd edition 2023, AufenthG §22, recital 4 with reference to the answer of the Federal Government to a question from the DIE LINKE parliamentary group, Bundestag document 19/22007, 8, question 5; the majority in connection with the suspension of family reunification for persons entitled to subsidiary protection, see below Mungan/Muy/Weber, loc. cit., (footnote 71).

⁶¹ Bundestag document 15/420, loc.cit. (footnote 59), p. 77.

⁶² According to Kessler, loc.cit. (footnote 61), § 22, recital 3.

⁶³ Bundestag document 15/420, loc.cit. (footnote 60), p. 77; for humanitarian reasons, see Kessler, loc.cit. (footnote 61), § 22, recital 1, according to which the standard was made more restrictive in the legislative process than in the Government draft by inserting the term "urgent".

⁶⁴ Federal Ministry of the Interior, General administrative regulation on the Residence Act (AVV-AufenthG) of 26.10.2009, 22.1.1.2.

⁶⁵ According to Kessler, loc.cit. (footnote 61), § 22, recital 4.

⁶⁶ Schmitt/Muy, Aufnahme aus dem Ausland beim Familiennachzug [Admission from abroad with family reunification, Asylmagazin 6/2017, p. 217 ff., available at: <https://tinyurl.com/mppcd9bz>.

reduction in discretion to zero was claimed due to the priority of the child's best interests.⁶⁷

Problem: restrictive application of the norm as a hardship regulation for family reunification

The case law of the Federal Administrative Court (BVerwG) has meanwhile recognised that there may be urgent reasons under § 22 (1) of the AufenthG if the requirements for family reunification (pursuant to §§27 et seq. of the AufenthG) are not met, but a family separation in a specific case cannot be reconciled with the special protection of marriage and family.⁶⁸ Nonetheless, in practice, §22 (1) of the AufenthG is almost never applied in cases of hardship as a catch-all provision to restore family unity.

There were only a few cases of it being applied in connection with the suspension of family reunification for persons entitled to subsidiary protection.⁶⁹ In such proceedings, the Federal Constitutional Court (BVerfG) also assumed that § 22 (1) of the AufenthG could take **hardship cases** into account, albeit with the emphasis that this applies in particular if the specific hardship is due to the circumstances of the family member entitled to subsidiary protection in Germany.⁷⁰ However, during the period of the suspension, visas based on this provision were only issued in rare cases. From the beginning of the suspension in March 2016 to November 2018, only 277 visas for family members of beneficiaries of subsidiary protection were issued on the basis of this standard.⁷¹

(bb) Procedure and agencies involved

In both cases of § 22 of the AufenthG, a **visa procedure** is generally required before a residence permit is issued.⁷² In the case of Clause 1, the Foreigners' Authority must be involved before the decision of the diplomatic mission abroad, as provided for in § 31 (1) of the AufenthG for the issuance of certain visas. This fundamentally results in the following procedure:

⁶⁷ Schmitt/Muy, *ibid.*, p. 220; with reference to the German Institute for Human Rights, Stellungnahme: Das recht auf Familie: Familieneinheit von Kindern und Eltern ermöglichen – auch für subsidiär Geschützte [Comment: The right to family. Enabling family unity for children and parents – for people with subsidiary protection also], 16.12.2016, author: Hendrik Cremer, available at: <https://tinyurl.com/24r6fkr5>.

⁶⁸ BVerwG, decision of 4.7.2019 - 1 B 26.19 - asyl.net: M27529

⁶⁹ When asked by the authors, several advice centres focussing on family reunification confirmed that applications for visas under § 22 (1) of the AufenthG were mostly unsuccessful; cf. some case studies in which the application of § 22 (1) of the AufenthG was successfully enforced: <https://tinyurl.com/3x5ux87z>.

⁷⁰ BVerfG, decision of 20.3.2018 - 2 BvR 1266/17 - Asylmagazin 5/2018, p. 179 - asyl.net: M26135; the Federal Constitutional Court found in urgent decisions that the extent to which §22 of the AufenthG is actually applied in cases of hardship is relevant for the assessment of the constitutionality of the suspension. However, no decisions were made in principle proceedings due to the lifting of the suspension and the creation of a quota regulation in §36a of the AufenthG.

⁷¹ Cf. Mungan/Muy/Weber, Der Familiennachzug zu Subsidiär Schutzberechtigten [Family reunification for beneficiaries of subsidiary protection], Asylmagazin 12/2018, p. 406, available at: <https://tinyurl.com/y33msnrt>; with reference to: Bundestag document 19/5815.

⁷² Kessler, *loc.cit.* (footnote 61), § 22, recital 9.

1. Visa procedure at a German mission abroad in coordination with the AA in Berlin;
2. Primarily independent entry;
3. Granting of the residence permit by the Foreigners' Authority.

b) Individual decision of the BMI in accordance with Clause 2

§ 22 (2) of the AufenthG stipulates that the BMI must declare an admission to **safeguard Germany's political interests**. In the following analysis of the admission requirements (aa) and the procedure (bb), the so-called local staff procedure for those seeking protection from Afghanistan serves as a current practical example.

(aa) Admission requirements

According to the explanatory memorandum, the decision on the "preservation of political interests" is reserved for the Federal Government in terms of its scope of action in foreign policy.⁷³ This includes practically every politically motivated decision and is therefore largely beyond the control of the administrative court.⁷⁴ After the BMI has declared an admission, it can even accept the cessation of political interest, but not readily, since trust has already been created.⁷⁵

(bb) Procedure and agencies involved

If an admission is given, the beneficiaries must undergo a visa procedure at a German mission abroad, which coordinates with the AA in Berlin. The procedure corresponds to the process described in § 22 (1) of the AufenthG. In the case of a declaration of admission in accordance with Clause 2, the BMI decision replaces the approval of the Foreigners' Authority according to the AVV-AufenthG; after entry into the country, the latter is obliged to issue the relevant residence permit and only has to check whether the BMI declaration and the general requirements for granting are in place.⁷⁶

Practical example of local staff procedure - Afghanistan:

Since 2013, the provisions of § 22 (2) of the AufenthG have been used as the legal basis for the admission of persons who are considered individually at risk because of their work for German agencies in the context of the Afghanistan mission (so-called local staff) and for their close family members.⁷⁷ In the case of work based on a **work contract**, a check is performed in each individual case as to whether there is a direct connection to a German agency and whether the **individual**

⁷³ Bundestag document 15/420, loc.cit. (footnote 60), p. 77.

⁷⁴ Göbel-Zimmermann/Hupke, loc.cit. (footnote 57), § 22 recital 7: a temporary residence permit granted to whistleblower Edward Snowden for his testimony before the NSA investigative committee is given as an example.

⁷⁵ Göbel-Zimmermann/Hupke, loc.cit. (footnote 57), § 22 recital 7, with reference to OVG Bremen.

⁷⁶ AVV-AufenthG, 22.2.0.2 et seq.

⁷⁷ Wissenschaftliche Dienste, Deutscher Bundestag, Humanitärer Schutz für afghanische Ortskräfte [Academic Services, German Bundestag, Humanitarian Protection for Afghan Local Staff], status as of 23.6.2016, WD 3-3000-170/16, p. 3, available at: <https://tinyurl.com/5s3e37jh>.

endangerment can be traced back to this contractual relationship. The local staff procedure is not used for persons who were employed by subcontractors, but they can still be admitted under § 22 (2) of the AufenthG with a corresponding decision by the BMI.⁷⁸

This so-called local staff procedure was created through agreements between various ministries regarding responsibilities, processes and risk assessment. The standard of individual endangerment distinguishes this programme from other humanitarian admission procedures, in which a general endangerment of certain groups of people is assumed. In the Federal Ministries involved, so-called **departmental officers** check the reported threat and ask the AA to approve admission if the decision is positive. The latter, in turn, issues a "**foreign policy decision**" as to whether Germany's political interests are affected and, if the answer is yes, asks the **BMI** for a **declaration of admission** in accordance with § 22 (2) of the AufenthG, which is sent back to the AA.⁷⁹

According to the Federal Government, a generous standard is used for the risk assessment compared to other European countries, and the decision is made "in case of doubt for the local staff".⁸⁰ By October 2022, around 38,100 Afghan nationals had been promised admission. This includes around 24,500 former local staff and approximately 13,600 other persons at risk, each including eligible family members. Of the total number of people who have been granted admission, more than two-thirds (approx. 26,000 people) have already entered Germany.⁸¹ As far as can be seen, local staff were also affected by the suspension of the visa process as part of the Federal Admissions Programme for Afghanistan (BAP Afghanistan).⁸²

For admission under the local staff procedure, the local staff must initially submit a **risk notification**. They can email this to their former place of work or to an office of the International Organization for Migration (IOM), which has now been

⁷⁸ Regarding the above: Response from the Federal Government of 29.6.2016 to a question from the Greens parliamentary group, Bundestag document 18/8976, page 9.

⁷⁹ FAU Human Rights Clinic (HRC), Grund- und menschenrechtskonforme Ausgestaltung der Aufnahme afghanischer Ortskräfte [Organisation of the admission of Afghan local staff in accordance with constitutional and human rights], expert opinion of 5.8.2022, p. 16 f., available at: <https://tinyurl.com/f5hw2xar>.

⁸⁰ This is the response of 7.3.2014 to a parliamentary question, Bundestag document 18/729, pp. 15, 23, available at: <https://tinyurl.com/5n6c6am2>.

⁸¹ Joint press release by the AA and BMI on the Federal admissions programme for people from Afghanistan who are particularly at risk, dated 17.10.2022, available at: <https://tinyurl.com/4e3k4fwf>.

⁸² See III.4 below.

set up in Kabul.⁸³ Local staff were informed of the option of filing a risk notification in an **information sheet**.⁸⁴

During the evacuation from Afghanistan at the end of August 2021, so-called exceptional visas ("**visa on arrival**") were also issued to local staff upon their arrival in Germany, in accordance with § 14 (2) of the AufenthG, as part of the **fast-track procedure**.⁸⁵ A **simplified procedure** was also introduced in which the departmental representatives no longer had to justify and document the risk situation in individual cases, but could send the personal data directly to the BMI.⁸⁶

Central information on the local staff procedure has not been published by the Federal Government and, therefore, only stems from information provided by the Federal Government in response to a large number of parliamentary inquiries.⁸⁷

Problems in the context of the local staff procedure in Afghanistan:

Restrictive application criteria and lack of information in the procedure

With regard to the risk assessment, it is problematic on the one hand that persons who have worked indirectly for subcontractors or on the basis of fee contracts for the German government are excluded from recognition as local staff.

On the other hand, it is problematic that the criteria used for assessing the risk to an *individual* are not known to potential beneficiaries. Overall, the **poor information situation** is to be criticised. An information sheet is not sufficient to reach potential beneficiaries. In addition, people who have submitted a threat notification are not informed if admission is refused.

⁸³ HRC, loc.cit. (footnote 80), p. 15; Initially, notifications of threats could also be made to Germany's diplomatic missions in Afghanistan.

⁸⁴ Response of the Federal Government of 29.6.2016 to a question from the Greens parliamentary group, Bundestag document 18/8976, p. On the basis of a request under the Freedom of Information Act, only one information sheet (in German and Dari) has been published so far, which probably dates from 2013, the response from the BMI of 29.11.2022 to request #250145, p. 1 ff, available at: <https://tinyurl.com/5fr9rp49>.

⁸⁵ Wissenschaftliche Dienste, Deutscher Bundestag, Aufnahme von afghanischen Ortskräften und anderen schutzbedürftigen Personen in ausgewählten NATO-Staaten [Academic services, German Bundestag, admission of Afghan local staff and other persons in need of protection in selected NATO countries], status as of 1.11.2021, WD 3-3000-170/21, p. 5, available at: <https://tinyurl.com/bdfzmk2b>.

⁸⁶ HRC, loc.cit. (footnote 80), p. 16; with reference to BT-Drs. 19/32505.

⁸⁷ For the purposes of this report, some information from the Federal Government was evaluated; otherwise, the drafts of the HRC Expert Opinion were used, loc.cit (footnote 80).

There are also uncertainties regarding the **further course of the procedure**. Leaving Afghanistan is dangerous and now only possible with an Afghan passport.

There are also no offers of support for people who have been accepted.⁸⁸ Carrying out the security checks only after leaving Afghanistan poses a major problem: In cases where a visa is subsequently refused, those affected are already in a transit country from which they may have to fear being returned and would be at even greater risk if they returned to Afghanistan because they had previously left the country.

3. State admission pursuant to § 23 (1) of the AufenthaltG

As an initial option for the admission of groups of persons, § 23 (1) of the AufenthaltG provides for ad hoc admission at the State level. An overview of the admission requirements (a) is provided below, followed by an explanation of the procedure (b) and the legal status after entry (c). The State admission programs for Syria and Afghanistan serve as practical examples.

a) Admission requirements

The prerequisite for admission under Section § 23 (1) of the AufenthaltG is an **admission order** from the **highest state authority** in **agreement** with the **BMI**. The order can be issued for **international law or humanitarian reasons** or to **protect the interests of the Federal Republic**. Unlike § 22 of the AufenthaltG, there is no need for "urgent" humanitarian reasons for admission. Furthermore, in contrast to § 22 (1) of the AufenthaltG, the interests of the Federal Republic can be decisive for the state order, whereby, according to the explanatory memorandum to the Act, national uniformity⁸⁹ is maintained by obtaining **the consent of the BMI** (in accordance with §23 (1) (3) of the AufenthaltG).⁹⁰

According to §23 (1) (2) of the AufenthaltG, the state order can be linked to submitting a **declaration of financial commitment** in accordance with § 68 of the AufenthaltG. This means that admission can be made dependent on third parties (in practice, usually relatives of the applicants) committing to pay for the living expenses of the persons to be admitted.

The option of State admission has already been the basis for humanitarian programmes on several occasions in the past. Baden-Württemberg, for example, had an admissions program for 2014 for victims of traumatic violence from northern Iraq,

⁸⁸ For example, those affected have to finance the trip to the German diplomatic mission in the transit country themselves, and it is unclear how people in hiding should manage the visa procedure, HRC, loc. cit. (footnote 80), p. 19, 22 f.

⁸⁹ "Maintaining Federal uniformity" includes safeguarding Federal interests on the one hand and uniform treatment of certain humanitarian cases by the Federal states on the other.

⁹⁰ 90 Bundestag document 15/420, loc.cit. (footnote 60), p. 77.

primarily for women and children of the Yazidi faith.⁹¹ In Brandenburg and Berlin, there were and still are State admission programmes for people from Iraq seeking protection.⁹²

Practical examples: State admission programmes for those from Syria and Afghanistan seeking protection

One practical example of broad-based admission was the **State admission programmes for those from Syria seeking protection**, which were launched in all Federal States except Bavaria in 2013 and enabled over 20,000 people seeking protection to enter the country safely between 2013 and 2015.⁹³ In Thuringia, Hamburg, Brandenburg, Berlin and Schleswig-Holstein, correspondingly extended admission orders continue to apply.⁹⁴ Here, too, a standard requirement for admission is the existence of a declaration of commitment in accordance with § 68 of the AufenthG.

Another very current example are **State admission programmes for people from Afghanistan seeking protection**, which in practice are experiencing a slow start because, as far as can be seen, of the lack of agreement from the BMI. Thuringia was the first Federal State to adopt such a programme as early as 2021, but the BMI did not approve it until November 2022.⁹⁵ Schleswig-Holstein, Bremen, Berlin and Hesse have also adopted such programmes. At the moment, however, such programmes are only running in Hesse⁹⁶ and Berlin⁹⁷ in addition to Thuringia.

b) Procedure and agencies involved

Fundamentally, admission pursuant to § 23 (1) of the AufenthG follows the following procedural steps:

1. Admission order by the highest state authority (in agreement with the BMI),
2. Visa procedure at a German mission abroad (if the person is abroad) / application procedure at the Foreigners' Authority (if the person is already in Germany),
3. Assisted/independent entry (if the person is abroad),

⁹¹ Wissenschaftliche Dienste des Deutschen Bundestages, Aufnahmeprogramme der Länder nach §23 (1) Aufenthaltsgesetz [Academic services of the German Bundestag, Admission programs of the Federal States in accordance with §(1) of the German Residence Act], WD 3-3000-223/18, 27.6.2018, p. 9, available at: <https://tinyurl.com/uptdcpwc>.

⁹² Information on the State admission programme in Brandenburg: <https://tinyurl.com/5n8nkt5s>; on the State admissions programme in Berlin: <https://tinyurl.com/3np39h9p>.

⁹³ WD, admission programmes of the Federal States, loc.cit. (footnote 92), p. 7 f.

⁹⁴ See the current ProAsyl overview with a list of all admission orders issued to date, available at: <https://tinyurl.com/mtdwtckc>.

⁹⁵ See the information from the Thuringian Ministry of Justice, available at: <https://tinyurl.com/5n6mjuj6>; see also the official leaflet available at: <https://tinyurl.com/mefzp9wm>.

⁹⁶ See the information on the Hessian State Admissions Programme, available at: <https://tinyurl.com/bdd9zbr4>.

⁹⁷ See the information on the Berlin State Admissions Programme, available at: <https://tinyurl.com/3np39h9p>.

4. Granting of the residence permit by the Foreigners' Authority.

Depending on the State admission programme and the corresponding admission order, the procedural steps and the role of the agencies involved may vary. In the case of State admission programmes that run under the condition of declarations of commitment, the competent Foreigners' Authority at the place of residence of those who submit a declaration of commitment plays a central role. It accepts the declarations and contacts the diplomatic missions with prior approval if the check comes back positive.⁹⁸ Those who wish to enter the country must submit a visa application, including security checks. Other bodies such as UNHCR or IOM may also be involved, especially in the case of State admissions that are not dependent on declarations of commitment.

Problems in the context of State admission programmes:

Admission of persons within the EU

In contrast to § 22 of the AufenthG, a state order can refer not only to people who are abroad but also to people who are already in Germany.⁹⁹ It is disputed, however, whether this includes people who are outside Germany but already **within the EU**. When various Federal States intended to admit people from Greek reception centres, the BMI disallowed this and referred to overriding EU law. On the other hand, it was argued that this view could be based neither on the wording of the law nor on EU law and that the Federal States could certainly also accept people from within the EU.¹⁰⁰

Requirement of the agreement of the Federal Government

In connection with admissions from Greece, the need for the **agreement of the Federal Government** was also questioned.¹⁰¹ With regard to the requirement of "agreement of the BMI", the BVerwG decided on the occasion of a lawsuit brought by the State of Berlin against the Federal Government that the BMI may refuse to agree in order to maintain federal uniformity if the admission involves groups of people the Federal government also accepted at its own discretion for the same humanitarian reasons.¹⁰² This also applies if EU law provisions do not preclude the granting of consent.

⁹⁸ See WD in this regard, admission programmes of the Federal States, loc.cit. (footnote 92), p. 8.

⁹⁹ Federal Government, Immigration Act, draft law of 7.2.2003, Bundestag document 15/420, p. 77

¹⁰⁰ Kessler, loc.cit. (footnote 61), §23, recital 4 with reference to WD, admission programmes of the Federal States, loc.cit. (footnote 92), p. 10; see also Roya Sangi, Ulrich Karpenstein, "Aufnahme von Flüchtenden aus den Lagern auf den griechischen Inseln durch die deutschen Bundesländer" ["Admission of refugees from the centres on the Greek islands by the German Federal States"], legal opinion, March 2020, available at: <https://tinyurl.com/yc7bdzfm>.

¹⁰¹ Fundamentally, see Hertel/Karpenstein, Humanitäre Landesaufnahme under der Bund – zur Reichweite des "Einvernehmens" des Bundesinnenministeriums gem. §23 I des Aufenthaltsgesetzes [Humanitarian State Admissions and the Federal Government – on the scope of the "agreement" of the Federal Ministry of the Interior in accordance with §23 (1) of the AufenthG], ZAR 2015, 373, 375 f.

¹⁰² BVerwG judgment of 15.3.2022, 1 A 1.21.

Scope and duration of declarations of commitment

In the case of the admission orders for people from Syria seeking protection from 2013, there was originally an obligation to cover the living expenses – without limit, including health insurance costs.¹⁰³ In 2014, however, the Federal States agreed to exclude from the declaration of commitment the costs of care in the event of illness, pregnancy, childbirth, care dependency and disability as defined in §§ 4 and 6 of the Asylum Seekers Benefits Act (AsylbLG).¹⁰⁴ With the introduction of § 68a of the AufenthG through the 2016 Integration Act, the duration of the obligation was limited to five years, but given the extensive financial obligation for those affected, this is not manageable or assessable.

Above all, the originally unlimited duration of the declarations of commitment led in some cases to beneficiaries of admission under § 23 (1) of the AufenthG filing an application for asylum after entry. It is a moot point whether the change of status after the asylum procedure or just the status as an asylum seeker justifies an exemption from the obligation.¹⁰⁵

4. Federal admission pursuant to § 23 (2) of the AufenthG

The provisions of § 23 (2) of the AufenthG were created in 2005 to regulate the admission of Jewish emigrants by the BAMF.¹⁰⁶ In recent times, it has served as the legal basis for several Federal-level humanitarian admission programmes that are used as examples below in the analysis of the admission requirements (a), the procedure (b) and the legal status after admission (c).

a) Admission requirements

A prerequisite for admission under § 23 (2) of the AufenthG is a corresponding admission order from the BMI in consultation with the highest state authorities. The admission order is at the discretion of the BMI and is intended to **protect the particular political interests of the Federal Republic**. The Federal Government has scope for action that cannot be reviewed by a court, i.e. the BMI is free to determine the conditions for granting and reasons for exclusion.¹⁰⁷ The required "consultation with the highest state authorities" means that they must be given the opportunity to

¹⁰³ For a critical analysis of this, see for example Endres de Oliveira, Schutz Syrischer Flüchtlinge in Deutschland – Welche Möglichkeiten für einen sicheren Aufenthalt gibt es? [Protection of Syrian Refugees in Germany - What options are there for a safe stay?], Asylmagazin 9/2014, p. 291, available at: <https://tinyurl.com/2p9smefm>; Riebau/Hörich, Der Streit um die Verpflichtungserklärung geht weiter [The dispute over the declaration of commitment continues], Asylmagazin 7-8/2017, pp. 272-276, available at: <https://tinyurl.com/3ahfnr3p>.

¹⁰⁴ See Endres de Oliveira, loc.cit. (footnote 104), p. 291.

¹⁰⁵ Regarding the liability arising from the declaration of commitment despite recognition as refugee status, see judgment of the BVerwG of 13.2.2014 – 1 C 4.13 –, asyl.net, M21805.

¹⁰⁶ Kessler, loc.cit. (footnote 61), §23. recital 8; Göbel-Zimmermann/Hupke, loc.cit. (footnote), preamble §§ 22-26 recital 1.

¹⁰⁷ Kessler, ibid., § 23, recital 8 with reference to case law of the BVerwG.

comment. However, the BMI is not bound to act on these comments.¹⁰⁸ In practice, the respective **admission criteria** are laid down in a fixed-term admission order.

Case examples for Federal admission programmes in accordance with § 23 (2) of the AufenthG:

HAP Syria

From 2013 to 2016, § 23 (2) of the AufenthG served as the legal basis for three **temporary Federal humanitarian admission programs (HAP Syria)**, which enabled more than 20,000 Syrians seeking protection to enter the country safely from Egypt, Libya, Syria and its neighbouring countries.¹⁰⁹ In the selection as part of the HAP Syria, the following admission criteria applied, of which individuals had to meet at least one:

- Connections to Germany (family ties, previous stays, etc.);
- Humanitarian criteria (vulnerable children with parents, medical needs, women in vulnerable situations, etc.);
- Ability to contribute to post-conflict reconstruction in Syria.

With the first HAP Syria in 2013, UNHCR and Caritas Lebanon were involved in the pre-selection. In the subsequent programmes from 2014 and 2015, admission could also be initiated by relatives living in Germany.¹¹⁰

HAP Turkey

Since 2017, as part of the implementation of the so-called EU-Turkey Deal¹¹¹, the Federal Admissions Programme for Syrian nationals seeking protection and, in individual cases, stateless persons from Turkey has been implemented on the basis of § 23 (2) of the AufenthG (**HAP Turkey**). In addition to the degree of need for protection and the preservation of the family unit, the following (non-humanitarian) criteria were to be taken into account in the selection within the framework of HAP Turkey:

- Family or other integration-promoting ties to Germany;

¹⁰⁸ Kessler, *ibid.*, § 23, recital 8.

¹⁰⁹ See the information from the BMI, available at: <https://tinyurl.com/4v8aas8u>.

¹¹⁰ See Endres de Oliveira (footnote 104), p. 291.

¹¹¹ In accordance with the EU-Turkey deal, humanitarian admission was originally intended to be linked to the condition that for every person admitted, one person who entered Greece illegally is returned to Turkey as part of the so-called "1 to 1" solution. Even if the number of people admitted exceeds the number of people returned in practice, this agreement is problematic from a human rights point of view; see in this respect "EU-Türkei-Flüchtlingsvereinbarung: Bestandsaufnahme und menschenrechtliche Bewertung" ["EU-Turkey Refugee Agreement: Review and human rights assessment", Henrik Cremer, Anna Suerhoff for bpb.de, available at: <https://tinyurl.com/2p87ht3x>.

- "Integrative ability", including indicators such as the level of schooling and vocational training, vocational experience, linguistic proficiency, and young age.¹¹²

The people are **pre-selected** as part of HAP Turkey by the Turkish Directorate General for Migration Management (DGMM), which forwards its proposals to UNHCR. Finally, the BAMF examines the so-called "dossiers", i.e. the proposals that are communicated by UNHCR.

BAP Afghanistan

The most recent applicable case is the **BAP Afghanistan**. It was created in December 2022 on the basis of § 23 (2) and (3) in conjunction with § 24 of the AufenthG in order to enable other people who are particularly at risk in Afghanistan to be admitted in addition to local staff. The basic BMI order for this provides for a quota of 1,000 monthly admission commitments by the BAMF, which are only given to people who are still in Afghanistan.¹¹³ The programme was approved in the coalition agreement in 2021 and should be implemented during the current legislative period.¹¹⁴ However, the first selection procedure was only initiated in December 2022.¹¹⁵ At the end of March 2023, the procedures were then suspended due to security concerns¹¹⁶ and at the end of June 2023 were only resumed in Islamabad, Pakistan, with an "adapted" security check.¹¹⁷ By the end of June 2023, 229 positive admission decisions had been taken within the framework of the BAP and 15 visa applications processed in the "adapted procedure", although no one had entered the country by the end of June.¹¹⁸ According to the BMI order, people who are still in Afghanistan have access to **BAP Afghanistan**. Their individual risk must result from the fact that they

¹¹² Order for the Humanitarian Admission of Persons in Need of Protection from Turkey of 27.01.2023, no. 2. This criterion was criticised by the experts surveyed since the "ability to integrate" was difficult to predict; see interviews from 22 June 2023 and 29 June 2023_b.

¹¹³ Order for the admission of particularly endangered Afghan nationals from Afghanistan (BAP Afghanistan admission order), dated 19.12.2022, available at: <https://tinyurl.com/3n9dbd3m>; Unused quotas are carried over to the following month.

¹¹⁴ Coalition agreement 2021-2025 between the SPD, Bündnis 90/the Greens and the FDP, p. 142, available at: <https://tinyurl.com/ye26ma4p>; Implementation expected by September 2025 according to the BMI FAQ, available at: <https://tinyurl.com/dsxr2a9m>; after 18 months, an evaluation is to take place, which should particularly take into account the actual options for leaving the country and the accommodation capacities in the Federal States.

¹¹⁵ The second selection round followed at the end of February 2023, Bundestag document 20/6232, p. 3, available at: <https://tinyurl.com/fk24thnm>.

¹¹⁶ Response of the Federal Government to a question by MdB Clara Bünger (Die Linke), Bundestag Plenary Minutes 20/96 of 19.4.2023, p. 11574; this was due to an article by Cicero on security concerns which, according to the magazine, the German Ambassador in Islamabad expressed in a letter dated 22.3.2023 to the AA, see Cicero, "Bundesregierung holt Scharia-Richter nach Deutschland" [Federal Government brings Sharia judges to Germany, 3.3.2023, available at: <https://tinyurl.com/yd69twkw>.

¹¹⁷ "Optimised security procedures" in the form of interviews, according to a spokesman for the AA, cf. taz, "Aufnahmeprogramm vorerst gestoppt" ["Admission programme stopped for the time being"], 11.4.2023, available at: <https://tinyurl.com/ybwttjx4>; Further information for people who are in Pakistan and Iran with a letter of acceptance, as of 3.7.2023, available at: <https://tinyurl.com/39mj8s5c>.

¹¹⁸ Response from the Federal Government dated 5.7.2023 to a question by MdB Clara Bünger (Die Linke), BT plenary protocol 20th legislative period, 114th session, p. 14069.

- "particularly exposed" themselves through their activities or their commitment to women's or human rights or
- are experiencing or have experienced specific violence or persecution resulting from the special circumstances of the individual case due to their gender, sexual orientation, gender identity or religion.

The following criteria should be taken into account when making the selection:

- **personal vulnerability**, as defined, for example, by the UNHCR catalogue of criteria (e.g. single women with children, women in a precarious living situation, LGBTI+, people with special medical treatment needs);
- **connection with Germany**, e.g. German language skills, family ties that promote integration, previous stays in Germany, former work for German authorities/projects, support from German employers/German organisations;
- **particularly exposed personal position**, e.g. due to type and duration of activity in Afghanistan, prominent position, public statements;
- **special political interest for Germany** in admission.

Within the framework of **BAP Afghanistan**, only persons who are nominated by so-called **authorised reporting bodies** can be accepted. These are civil society organisations that have either worked with the AA in the context of the evacuation or further admissions programmes from Afghanistan or implemented projects financed by the BMZ in the course of the Afghanistan mission.¹¹⁹ In special cases, people can also be proposed directly by the AA, BMZ or BMI.¹²⁰ Authorised registration agencies propose in the first instance people about whom they already have information; there is **no provision for individual applications**.¹²¹ A list of authorised registration agencies has not been published, although some have become known through media reports.¹²² Authorised registration agencies collect data from people already known to them by sending them a link to a questionnaire and transmit the data by entering it into an IT application (both are provided by the Federal Government). Proposals entered in the IT application are collected by the Federal Government. The Federal Government chooses people from these proposals in selection rounds that take place periodically.

¹¹⁹ See admission order BAP Afghanistan, loc.cit. (footnote 114).

¹²⁰ Pivotal in this respect is a close connection with the activities of the AA and a particular urgency or high risk; as of 9.3.2023, the BMZ and the BMI had not yet proposed any cases, the AA had entered six people, Bundestag document 20/6232, loc. cit. (footnote 116), p. 11.

¹²¹ Opportunities for new registrations should be created at a later stage. However, this information has now been removed from the FAQ on the Federal Government's website for BAP Afghanistan; see Questions and Answers on the Federal Admission Programme for Afghanistan, available at: <https://tinyurl.com/4sebv5ac>.

¹²² Response of the Federal Government of 28.3.2023 to the Die Linke parliamentary group question, Bundestag document 20/6232, loc.cit. (footnote 116), p. 2 f., with reference to <https://tinyurl.com/28ye6nrf>.

The selection decision is based on the selection criteria. A points system (also "scoring system") attached to the questionnaire is used to support the latter.¹²³ According to the admission order, a "coordination office for civil society organisations" is to coordinate the procedure and support the authorised registration agencies.¹²⁴ The coordination office is funded by the BMI with around EUR 3.3 million.¹²⁵

Admission of family members: the three Federal admission programmes for people from Syria seeking protection from 2013-2015 (**HAP Syria**) and **HAP Turkey** all contain the provision that family members outside of the nuclear family can be considered during admission. In addition to core family members (spouse, life partner and underage children), other family members can also be admitted under **BAP Afghanistan** if it can be plausibly demonstrated that they are in a special dependent relationship with the person to be admitted or are themselves in a threat situation directly related to their endangerment.

Federal admission from Greece

Another applicable case was the **admission of 1,553 people from Moria** on the Greek island of Lesbos seeking protection after fires broke out in the reception centre there in September 2020. Those seeking protection were persons who had already received international protection status in Greece (refugee protection or subsidiary protection).¹²⁶

b) Procedure and agencies involved

If the BMI issues an admission order, this contains an instruction to the BAMF to issue a confirmation of admission to those persons who meet the stipulated requirements. However, this is granted subject to the following security checks.

After the admission order from the BMI and acceptance by the BAMF, recipients have one year to apply for a **visa** at the responsible German mission abroad.¹²⁷

Recipients then go through a visa process in which their identity and the existence of security concerns are checked.¹²⁸

¹²³ According to the Federal Government, no algorithms or artificial intelligence are used; more precise information on the points system could not be found, Bundestag document 20/6232, loc.cit. (footnote 116), p. 6 f.

¹²⁴ The website of the coordination body contains little information: <https://www.koordinierungsstelle.org/>.

¹²⁵ According to the information provided by the questioner in Bundestag document 20/6232, loc.cit. (footnote 116), p. 2; in January 2023, it comprised 16 operational positions and is to be expanded by 16 more in 2023, cf. taz, "Bedingt aufnahmebereit" ["Conditionally ready for admission"], 24.1.2023, available at: <https://tinyurl.com/28ye6nrf>.

¹²⁶ Order of 9.10.2020 to admit beneficiaries of international protection from Greece, available at: <https://tinyurl.com/48bvupzw>.

¹²⁷ Huber/Eichenhofer/Endres de Oliveira, loc.cit. (footnote 58), recital 471.

¹²⁸ Cf. admission order BAP Afghanistan, loc.cit. (footnote 113).

After entering the country, the local Foreigners' Authority will issue a residence permit or settlement permit in accordance with the acceptance letter (see § 23 (2) (3) of the AufenthaltG). So, the procedural steps are as follows:

1. Admission order by the BMI (in consultation with the highest state authorities),
2. Selection and acceptance by the BAMF,
3. Visa procedure at a German diplomatic mission,
4. Supported entry in most cases,
5. Issue of the residence permit by the local Foreigners' Authority after entry.

The agencies involved differ depending on the programme. For example, the "right of proposal" and the extent of participation of non-governmental agencies or family members may vary.

Problems with BAP Afghanistan

Comprehensive responsibility of authorised reporting bodies

Comprehensive responsibility was assigned to civil society agencies as part of BAP Afghanistan.¹²⁹ They play a key role because they "pre-filter" the cases and thus also act as "**gatekeepers**".¹³⁰ The selection of cases regularly requires extensive knowledge of the country, language and law and assumes primary responsibility for access to the procedures and thus the granting of protection. This can lead to **excessive demands** on civil society agencies.¹³¹ One of the controversial points here is whether the **lack of funding** for authorised reporting bodies is lawful.¹³² That depends on whether the pre-selection carried out by them can be considered as an implementation of a transferred "sovereign activity". The funding must have a legal basis, and the financial expenses of those receiving funding must be compensated.¹³³ If the bodies act as purely administrative assistants, i.e. they carry out auxiliary activities according to instructions, funding would not be necessary.

¹²⁹ An alliance of civil society organisations that are "involved in the BAP with their own resources" welcomes the programme in principle but has identified structural deficiencies and has repeatedly issued open letters to the interior and foreign ministers and made demands for adjustments, most recently on 11.5.2023, see press release from Reporters Without Borders: <https://tinyurl.com/2k2t76ut>.

¹³⁰ Critical in this regard is the open letter from the alliance of participating NGOs dated 11.5.2023, p. 2 f., available at: <https://tinyurl.com/2ydr2cvy>.

¹³¹ Interview from 27.6.2023.

¹³² Bundestag document 20/6232, loc.cit. (footnote 116), p. 2 f., with reference to the academic services of the Bundestag, The Federal Admissions Programme in Afghanistan: Questions on the use of civil society organisations as reporting bodies for the pre-selection, status as of 9.12.2022, WD 3-3000-161/22.

¹³³ WD BAP Afghanistan, ibid., p. 6.

In addition, the involvement of authorised reporting bodies adds a further **unwritten selection criterion** with BAP Afghanistan.¹³⁴ In reality, only people who are already in contact with an authorised organisation can be proposed.

Elaborate proposal procedure and overloading of registration agencies

Other issues related to registration agencies include the **high outlay** of these agencies with regard to **data collection** and (also) a resulting **overloading** of these agencies, which, in turn, can limit access to these procedures.¹³⁵ According to reports, the collection of data is very time-consuming. The questionnaire

consists of about 100 questions and the details provided should include evidence if possible.¹³⁶ In addition, persons who are unable to complete the questionnaire due to a lack of language or IT skills or due to not having the required technical equipment could be excluded.

Eligibility criteria within the framework of BAP Afghanistan

The criteria laid down within the framework of the Federal admission orders are not based solely on the need for protection. The "connection with Germany" criterion is not necessarily relevant to the threat in Afghanistan. Furthermore, only people who are still in Afghanistan can be accepted. This excludes people who, due to their being in acute danger, have fled to neighbouring countries since the Taliban took power in August 2021, but have no prospects there and may even be threatened with deportation.¹³⁷

Lack of transparency in the complex selection process with numerous agencies involved

Compared to HAP Syria, BAP Afghanistan is **very bureaucratic** and requires coordinated cooperation between numerous agencies. This can lead, on the one hand, to **organisational difficulties** and a lack of transparency in the individual decisions in the process. It is particularly problematic **that no published list of registration agencies** exists, and whether and how the agencies make the selection is unclear. It is also **unclear what role is played by the government agencies involved, such as the BAMF, how the subsequent selection is made,**

¹³⁴ See the criticism of ProAsyl, cf. ProAsyl, Bundesaufnahmeprogramm Afghanistan: Enttäuschung nach langem Warten [Federal Admissions Programme Afghanistan: Disappointment after a long wait,] 21.10.2022, available at: <https://tinyurl.com/2zeud45n>.

¹³⁵ In November 2022, the organisation Reporters Without Borders announced that it was no longer making the relevant online form, available at: <https://tinyurl.com/55h85kbk>.

¹³⁶ Statements by the questioner in Bundestag document 20/6232, loc.cit. (footnote 116), p. 2, with reference to <https://tinyurl.com/4rkr8ezc>.

¹³⁷ See the criticism from ProAsyl, loc.cit. (footnote 134); also, all those involved in interviews in June 2023. See also alliance of participating NGOs, loc.cit. (footnote 130), p. 2 f.; see there also for details regarding the intensification of the risk situation for those who remained in Afghanistan.

how the individual selection criteria are weighted and how the points system works.¹³⁸

The use of a **points system for the selection decision** itself is questionable. The underlying IT points system¹³⁹ is unsuitable for decision-making since neither individual life histories nor unusual case constellations can be taken into account.¹⁴⁰

General hurdles in the visa process

Difficulties in accessing diplomatic missions abroad and safe departure

When people are admitted **directly from their country of origin** or from conflict regions, practical problems often arise in the visa process when accessing German missions abroad to implement the visa process, for example, if the local embassy has been closed or can only be reached under dangerous conditions. For instance, the people admitted as part of the HAP Syria programs usually had to first reach the German Embassy in Lebanon for the visa procedure. This involved, in some instances, a dangerous border crossing between Syria and Lebanon. With BAP Afghanistan, the visa procedure for people who have received an acceptance letter only takes place after leaving Afghanistan, in the transit countries of Pakistan or Iran since the German Embassy in Kabul has closed.¹⁴¹

Departure can also be **difficult depending on the local circumstances**. For example, within the framework of the admission of Afghan people seeking protection until July 2022, it was possible, based on agreements with Pakistan, to leave Afghanistan and enter Pakistan without a passport but with a "Tazkira", the Afghan citizenship card. This option was stopped by the Taliban. People with a notice of admission are now advised by an external service provider to obtain a passport and leave the country.¹⁴²

¹³⁸ Interviews from 22.6.2023 and 29.6.2023_b.

¹³⁹ According to the Federal Government, no algorithms or artificial intelligence are used; more detailed information on the points system could not be found, Bundestag document 20/6232, loc.cit. (footnote 116), p. 6 f.

¹⁴⁰ See the criticism from ProAsyl, loc.cit. (footnote 134); as well as the alliance of participating NGOs, loc.cit. (footnote 130), p. 3.

¹⁴¹ Currently, the visa procedure with an adapted security check is only taking place in Islamabad. Persons who are already in Iran with a notice of acceptance must travel there.

¹⁴² For details on this, see Bundestag document 20/6232, loc.cit. (footnote 116), p. 19 f.

Multi-stage bureaucratic procedures with excessive requirements regarding proof of identity

A major problem in visa procedures is often the requirements imposed by German authorities regarding **proof of identity**.¹⁴³ It is often the case that only official documents (such as a passport) are accepted as proof of identity. However, obtaining a passport can be difficult and dangerous, especially for those seeking protection. In the case of admission procedures involving UNHCR, an identity check is already carried out as part of the registration process, which is frequently regarded as insufficient in the visa procedure. This problem currently occurs with HAP Turkey and BAP Afghanistan.¹⁴⁴ The same problems continue after entry when the residence permit is issued by the Foreigners' Authority.

Contradictory practice of missions abroad and Foreigners' Authorities

In the context of visa procedures, problems arise in certain constellations with the cooperation between the German missions abroad (in the context of the BAP schemes in Pakistan or Iran, for example) and the Foreigners' Authorities.¹⁴⁵ When examining certain criteria, different standards are applied, or applicants are given contradictory information.

Inadequate and inconsistent use of digitised processes

In principle, digital application options can facilitate access to visa procedures, provided they are uniform and easily accessible. If, however, there are a large number of web links for registering appointments at German missions abroad, as is the case with the BAP, confusion can arise as to which link a person can use to register for an appointment to submit an application. The use of external service companies and IOM can also lead to the information or even the options for the application being inconsistent or confusing.

Intransparent and inappropriate security checks

Intransparent security checks arise when questions are asked that are unrelated to security concerns (i.e. threats to public safety and order) with which potential recipients could be involved. As part of BAP Afghanistan, applicants were asked about attitudes of a socio-cultural nature that are clearly irrelevant under security law.¹⁴⁶

HAP Syria, HAP Turkey and resettlement initially had a high rejection rate after the security checks (when the resettlement process was introduced in 2019, there was

¹⁴³ According to all experts interviewed in June 2023.

¹⁴⁴ See interviews on 22.06.2023 and 27.06.2023.

¹⁴⁵ Interviews on 27.06.2023 and 29.06.2023.

¹⁴⁶ Interview on 29.6.2023_a.

a rejection rate of 30%). After clarification of the scope of security reviews between UNHCR and the BMI, the reviews were adjusted, and there were fewer refusals and fewer complaints from victims about non-security-related questions being asked during the security review.¹⁴⁷ BAP Afghanistan also experienced problems with the security checks, and the visa procedures were suspended. Now, the checks have been adjusted, but there is no information on what this means in practice.

5. Legal protection

With regard to the assertion of claims by affected individuals, individual admission in accordance with **§ 22 (1) of the AufenthaltG** differs from the other humanitarian admission options since the **discretion** granted is fully **reviewable by the courts**. It is **mandatory** to exercise discretion as per the purpose of the regulation, as well as the constitutional and human rights requirements, whereby the emergency situation of individuals is to be given special consideration.¹⁴⁸

Case law on self-commitment of the administration within the scope of § 22 of the AufenthaltG

In August 2021, the Administrative Court of Berlin (VG Berlin) obliged the AA to issue a visa in an urgent procedure on the basis of § 22 (1) of the AufenthaltG to an Afghan national who had worked for the Gesellschaft für Internationale Zusammenarbeit (GIZ) until 2017.¹⁴⁹ In this case, the official discretion granted fundamentally within the framework of § 22 (1) of the AufenthaltG is reduced to zero due to public announcements based on self-commitment of the administration pursuant to Art. 3 (2) of the Constitution. The VG also granted the wife and three children of the local staff member (two of them of legal age) a right to a visa. In November 2021, the Higher Administrative Court of Berlin-Brandenburg (OVG Berlin-Brandenburg) overturned this decision on the grounds that there was no corresponding administrative practice.¹⁵⁰

In the case of both **a declaration of admission by the BMI in accordance with § 22 (2) of the AufenthaltG** and **State and Federal admission orders in accordance with § 23 (1) and (2) of the AufenthaltG**, it is generally assumed that there are **no external effects and therefore no individual legal claims**.¹⁵¹ With regard to § 22 (2) of the

¹⁴⁷ Interview on 22.6.2023_a.

¹⁴⁸ According to Kessler, loc.cit. (footnote 61), § 22, recital 6.

¹⁴⁹ VG Berlin, decision of 25.8.2021 - 10 L 285/21 V.

¹⁵⁰ OVG Berlin-Brandenburg, decision of 3.11.2021 - 6 S 28/21 - asyl.net: M30506; also the 6th Chamber of the VG Berlin, decision of 26.8.2021 - 6 L 295/21 - asylum.net: M30011.

¹⁵¹ Regarding the legal nature of a State admission order as a purely administrative internal matter, see, for example, VG Bremen, judgment of 20.11.2020 - 2 K 3165/17, recital. 29.

AufenthG, the Federal Government is of the opinion that the declaration of admission by the BMI is a matter of **internal administrative cooperation** and not an independent administrative act that can be challenged in court.¹⁵² Appeals can only be lodged against the rejection notice of the diplomatic mission after the visa application has been made, as with other visa procedures. In the case of **Federal admission orders under § 23 (2) of the AufenthG**, it is also assumed that these cannot be challenged or contested directly in court. If the BMI issues an admission order, this contains an instruction to the BAMF to issue a confirmation of admission to those persons who meet the stipulated requirements.

The **decision of the BAMF** - after corresponding instructions within the framework of Federal admission programs - is clearly an **administrative act** that is fundamentally subject to judicial review.¹⁵³ However, the question arises as to how this should be handled in practice since potential recipients are not informed whether they have been considered at all and accordingly do not receive a negative decision. The same problem exists in the **visa procedure** when the diplomatic mission abroad decides. As with other visa procedures, a remonstrance or a lawsuit can be filed against a visa refusal. However, this is unlikely to be very promising because, in some cases, neither the selection criteria applied nor their weighting is known, and other reasons for rejection, such as security concerns, are not given. **The lack of transparency within the framework of the procedures represents a fundamental problem for access to effective legal protection.**

Overall, the question of the legal nature of the various procedural steps is controversial. Since there is also a great deal of **discretion** when making a decision about an admission commitment, the chances of success of a lawsuit are low.¹⁵⁴ Chances of success are likely to exist above all in cases in which the decision appears to be obviously arbitrary and, therefore, violates the rule of law.¹⁵⁵

Lack of access to effective legal protection

Unknown selection criteria and missing rejection decision

A catalogue of criteria was developed for the **procedure relating to local staff**, but this has not been published. This is problematic with regard to the legal remedy guarantee of Art. (4) of the Constitution, with the result that a

¹⁵² Bundestag document 18/8976, p.7 f., with reference to "valid case law".

¹⁵³ With an obligation action, the VG Ansbach is responsible due to the domicile of the BAMF; appeal procedures are not provided for (§23 (2) (2) of the AufenthG), cf. Zimmerer in: BeckOK MigR, 15th edition, as of 15.4.2023, AufenthG §23, recital 13; see also Kessler, loc.cit. (footnote 61), §23, recital 8.

¹⁵⁴ Bergmann/Dienelt/Röcker, 14th edition 2022, AufenthG §22 recital 16; also Göbel-Zimmermann/Hupke, loc.cit. (footnote 57), §23, recital 6, with reference to the BVerwG.

¹⁵⁵ Re. LAP: Kessler, loc.cit. (footnote 61), § 23, recital 5 with reference to the case law of the Supreme Court.

constitutional challenge would have to be considered if the list of criteria was refused in court proceedings.¹⁵⁶ With **BAP Afghanistan**, on the other hand, the selection criteria are known, but not their weighting, as no information on the IT point system used for the selection decision has been published.

Information could not be found for any of the programmes examined that applicants received an **official decision** that they had *not* been accepted through the respective program. In the context of **BAP Afghanistan**, for example, persons nominated by the registration agencies and not selected in rounds taking place periodically remain in the "pool" for possible further rounds. However, they are not informed whether they were considered in the selection rounds carried out.

The same applies to the criteria for and information about decisions within the framework of the **security checks**.

6. Legal status after entry

Depending on the admission procedure, legal status after entry can differ fundamentally. The following overview shows similarities and differences with regard to the duration of the residence permit (a), replacement passport documents (b), receipt of social benefits and the residency obligation (c), access to employment and integration courses (d), and family reunification (e). Problems with legal status after entry can arise above all if the status acquired through humanitarian admission does not correspond to the protection needs of the persons admitted. The large number of admission options can lead to people who have fled the same country for similar reasons living in Germany with different rights. It should also be noted that there is no secure entry route to refugee status under the Geneva Convention (with privileged family reunification), which can only be obtained by filing an application for asylum after entry.¹⁵⁷

a) Duration of the residence permit and consolidation of residence

The residence permit based on **§ 22 (1) or (2) of the AufenthG** can be granted for a period of **up to three years** in accordance with § 26 (1) (1) of the AufenthG. This is also the case with admission via **BAP Afghanistan** and **HAP Turkey**.¹⁵⁸ Permit recipients under HAP Syria, on the other hand, only received a residence permit for **two years** after entering the country.¹⁵⁹ The consolidation of residence through the granting of a **settlement permit** is generally based on § 26 (4) of the AufenthG and accordingly granted in accordance with the general requirements of § 9 (2) of the AufenthG – unless a settlement permit has already been granted as part of a Federal

¹⁵⁶ Kessler, loc.cit. (footnote 61), § 22, recital 7.

¹⁵⁷ Comprehensive information on this in Endres de Oliveira, Humanitarian admission to Germany: access vs. rights?, in: Foblets/Leboeuf (eds.) *Humanitarian admission to Europe: the law between promises and constraints*, Nomos 2020.

¹⁵⁸ See admission order BAP Afghanistan, loc.cit. (footnote 114); Admission Order HAP Turkey of 27.1.2023, no. 6.

¹⁵⁹ See Endres de Oliveira loc.cit. (footnote 104), p. 291.

admission scheme pursuant to § 23 (2) of the AufenthG (Section 23 (2) (3) of the AufenthG).

b) Passport replacement documents

In cases where one does not have a passport, and the obligation to obtain one is unreasonable, people seeking protection who have come to Germany via a humanitarian route can be issued a "travel document for foreigners" in accordance with § 5 of the Residence Ordinance. As refugee status in Germany is only granted as part of a national asylum procedure and not based on humanitarian admission, they **are not entitled to a refugee passport under the Geneva Convention.**

c) Receipt of social benefits and residency obligations

In the case of need after entry, beneficiaries of humanitarian admission programmes fundamentally have access to the **social benefit system** (in particular, SGB II and SGB XII). An exception can apply in the case of a State admission pursuant to § 23 (1) of the AufenthG (see §1 (1) (3a) of the AsylbLG). Just like persons entitled to protection who have gone through the asylum procedure, beneficiaries of admission programmes are subject to the **residency obligation** pursuant to § 12a of the AufenthG **when receiving benefits**. If a settlement permit is granted directly in accordance with a Federal admission order pursuant to § 23 (2) (3) of the AufenthG, this can also – in a deviation from § 9 (1) (2) of the AufenthG – contain a residence-restricting condition (§ 23 (2) (4) of the AufenthG). In principle, the **distribution** of people admitted on humanitarian grounds in Germany is based on the Königstein Key unless entry is directly to relatives in Germany via a privately financed State admissions program. The latter can also apply in the case of admission pursuant to § 22 (1) of the AufenthG, provided that the beneficiary joins relatives after entering the country.

d) Employment and integration course

In both cases under § 22 of the AufenthG, the residence permit entitles recipients to **gainful employment**.¹⁶⁰ However, this is not the case for admissions pursuant to § 23 (1) (1) of the AufenthG. Even so, permission to work through the granting of a permit or at the discretion of the Foreigners' Authority in accordance with § 4a (1) of the AufenthG can be provided for in the respective admission order. In the case of admission in accordance with § 23 (2) AufenthG, **gainful employment** is permitted in accordance with the general provisions of § 4a of the AufenthG. An **entitlement to an integration course** only exists in the case of admission in accordance with § 23 (2) of the AufenthG (as well as admissions within the framework of resettlement in accordance with § 23 (4) of the AufenthG, see § 44 (1) (2) of the AufenthG). In accordance with § 22 (1) and (2) and §23 (1) of the Subsection 1 of the AufenthG, admission to the integration course is only possible if there are places available on the course (§ 44 (4) (1) of the AufenthG).

¹⁶⁰ See in this respect the change made by the Skilled Immigration Act with effect from 1.3.2020.

e) Family reunification

In the case of admission on humanitarian grounds, family reunification is only possible for international law or humanitarian reasons or in the political interests of Germany, § 29 (3) (1) of the AufenthG. Family reunification pursuant to § 29 (1) of the AufenthG is only possible if one has a settlement permit.

Problems after entry

No permit is awarded in the event of a missing passport

The **requirement to present official proof of identity** can also be problematic when granting a residence permit after entry in accordance with § 23 (2) of the AufenthG (with a provisional replacement passport document). In contrast to recognised refugees and resettlement refugees, it is generally assumed that obtaining a passport from the embassy of one's home country in Germany is acceptable.¹⁶¹

There can however be different reasons for this **unacceptability**.¹⁶² For HAP refugees from Syria, it was about taking into consideration any expected threats to relatives living in the home country when applying for a passport.¹⁶³ Even the high passport fees, which are a key source of income for the Assad regime, can justify the unacceptability.¹⁶⁴ Nevertheless, in practice, there are always cases in which individuals with a residence permit in accordance with § 23 (2) of the AufenthG are asked to go to their home embassy to apply for a passport.¹⁶⁵ In addition, obtaining a passport can also be **objectively impossible** if, for example, the embassy of the home country refuses to issue one, delays issue for a long time or completely stops issuing passports (e.g. the Afghan Embassy in Germany has not issued any passports or tazkiras since the Taliban took power¹⁶⁶) or the

¹⁶¹ See Lutter/Deery: Mitwirkungspflichten nach Resettlement und humanitärer Aufnahme [Obligations to cooperate after resettlement and humanitarian admission], Asylmagazin 1-2/2018, p. 25 f.

¹⁶² General information on this, Becker/Saborowski: Die Unzumutbarkeit der Passbeschaffung [The unreasonableness of obtaining a passport] and Heinhold: Passpflicht für ausländische Staatsangehörige [The passport requirement for foreign nationals], both in Asylmagazin 1-2/2018, available at: <https://tinyurl.com/mwduhmrc>.

¹⁶³ Lutter/Deery: Mitwirkungspflichten nach Resettlement und humanitärer Aufnahme [Obligations to cooperate after resettlement and humanitarian admission], Asylmagazin 1-2/2018, p. 26, available at: <https://tinyurl.com/46354t25>.

¹⁶⁴ See campaign <https://defundassad.de/>; cf. Pro Asyl, "I have explained several times why I cannot go to the Syrian embassy", 31.03.2023, available at: <https://tinyurl.com/ayhjhvw>.

¹⁶⁵ See interview of 22.6.2023. With regard to obtaining a passport, the situation of HAP refugees corresponds to that of Syrian beneficiaries of subsidiary protection. Therefore, court decisions that have been made can be used, although the case law is inconsistent. Current decisions can be found in the database of decisions of the information network Asyl&Migration, available at: <https://tinyurl.com/295u24fr>, Tags: Passbeschaffung, Syrien [Passport procurement, Syria].

¹⁶⁶ See the verbal memorandum from the Afghan Embassy in Germany of 26.7.2022, available at: <https://tinyurl.com/msz3wdvj>.

relevant marital status documents from their home country cannot be submitted (de facto statelessness¹⁶⁷).

Limited family reunification

Even if family relationships should already be taken into account during humanitarian admission, there may still be a need for family reunification after entry. However, this is generally excluded with almost all secure access routes analysed here, with the result that those seeking protection are left after entry with only the asylum procedure to achieve an improvement in status. For this reason, for example, the refugee recognition quotas (§ 3 of the AsylG, §25 (2) (1) or (2) of the AufenthG) for Syrians seeking protection at the time the State admission programs were initiated in 2013 were comparatively high. Syrians seeking protection who entered the country irregularly and went through an asylum procedure were thus given better protection status than beneficiaries of the State admission programs. A major difference here was the possibility of **family reunification** with recognised refugees. For many of the beneficiaries of State admission programs, it was crucial for their application for asylum after admission that they could generally bring their nuclear family if they were recognised as refugees.

IV. Summary and assessment

This part summarises the most important findings of the analysis (1.) and, after an explanation of the criterion used (2.), assesses the key challenges in organising humanitarian access routes into Germany (3.). From the analysis of the existing regulations, admission programmes and political requirements, the specific recommendations for the organisation of safe entry routes into Germany follow (in Part V.).

1. Summary: safe access to the EU and Germany

International refugee protection is characterised by the access dilemma, the legally unresolved question of how those seeking protection can safely and legally reach the host countries. With this analysis, the existing access options to the EU and, specifically, to Germany are examined.

Parts I and II discussed in detail that the existing legal **basis at the EU level** is not sufficient to institutionalise a mainstream system for the safe entry of persons seeking protection in the Member States. The EU protection concept remains territorial: asylum can only be applied for upon reaching the territory. The only guideline that can be considered for a humanitarian visa, Art. 25 of the EU Visa Code,

¹⁶⁷ UNHCR investigation report by Hugh Massey, UNHCR and de facto statelessness, LPPR/2010/01, pp. 42, 49f, available at: <https://tinyurl.com/4s246a3v>.

is of an exceptional nature and, according to the case law of the ECJ, is not applicable to cases in which persons seeking protection apply for a visa to then apply for asylum. Although countries such as Italy use the guideline explicitly as a basis for humanitarian admissions in individual cases, there is a need for a comprehensive **reform of the EU Visa Code** to fundamentally enable safe entry to apply for asylum in the EU. As long as political reform proposals to expand safe access routes are not implemented at the EU level, those seeking protection must primarily use the national regulations of the Member States. **Part III** of this analysis focused on regulations for **humanitarian admission into Germany**. The focus was on the previously implemented options for admission in individual cases pursuant to § 22 (1) and (2) of the AufenthG and the admission of groups of people at the State and Federal level in accordance with § 23 (1) and (2) of the AufenthG.

The provisions of **§ 22 (1) of the AufenthG** have been increasingly asserted in recent years to enable children to be reunited with their parents in **cases of hardship** despite suspending family reunification to beneficiaries of subsidiary protection. The regulations of **§ 22 (2) of the AufenthG** have served since 2013 as the basis for the admission of former local staff from Afghanistan. On the basis of **§ 23 (1) of the AufenthG**, humanitarian **admission programmes** have been implemented several times, such as for **Syrians** seeking protection starting in 2013. Admission programmes for those from **Afghanistan** seeking protection are currently being launched in some Federal States. Finally, those from Syria seeking protection were admitted in the years 2013 to 2016 and from Turkey since 2017 via **Federal admission programmes in accordance with § 23 (2) of the AufenthG**. **BAP Afghanistan**, which is currently starting, is also based on this guideline.

Due to the large number of different refugee situations and individual needs, it is positive with regard to offering the most comprehensive protection possible that **several humanitarian admission options are legally anchored in Germany**. This is where Germany stands out from European countries such as France, Switzerland or Italy, where there is not such a variety of humanitarian access routes that are anchored in law. A key conclusion of this analysis is that safe access to Germany does not primarily require new legal regulations but that existing regulations need to be concretised and, above all, less restrictive admission practices are required (see V.).

2. Fundamental parameters for the arrangement of humanitarian admission

The **rights and interests of those seeking protection**, as well as the **interests of Germany**, are used as **criteria** for the subsequent evaluation of existing humanitarian admission programs in Germany. This juxtaposition shows that there are no conflicting interests here; rather, there are **parallel ones**.

With regard to the rights and interests of **those seeking protection**, the focus is on the following aspects:

- **Effective alternatives to dangerous escape routes**, including
 - efficient and safe access to admission procedures that are transparent, fair and non-discriminatory;
 - processing efficiency: access to the procedures (via the agencies or participants involved), rapid processing, no overly bureaucratic hurdles (e.g. excessive requirements in terms of the obligation to provide proof), avoidance of duplication in the procedure (e.g. interviews, security checks);
 - informed decision-making: clarity of information about admission, including criteria, participants and procedures;
 - effective legal protection against negative decisions.
- **Effective protection in the host country**, including
 - safe admission and appropriate life prospects after entry,
 - social participation,
 - family reunification.

From the **Government's perspective**, the following aspects are considered essential:

- **Regulation of migration, in particular**
 - avoiding irregular escape routes, including human smuggling and trafficking, and deaths on escape routes, by providing effective legal access routes;
 - control over how many people enter and who enters (security checks as part of visa procedures);
 - efficiency and practicability of secure access routes (e.g. exhaust existing capacities, create necessary capacities, avoid multiple processing).
- **Fulfilment of international humanitarian obligations, including**
 - protection and international solidarity,
 - provision of protection, constitutional and human rights, including social participation after admission.

3. Evaluation of central challenges for the humanitarian admission programmes to Germany

The following evaluation and subsequent recommendations (in Part V) are based on the **criterion** of a humanitarian admission practice based on Germany's **constitutional and human rights obligations** and the **need for protection** of the persons to be admitted, the aim of which is to avoid irregular escape routes. Aspects of **practicability** are also taken into account.

a) Restrictive application of existing regulations

The restrictive handling of existing admission options shown in Part III does not do justice to the purpose of offering effective alternatives to irregular escape routes. The humanitarian admission options governed in §§ 22 ff. of the AufenthG offer various

legal foundations to enable persons in need of protection to enter the country safely and legally. In order to fully meet this purpose, the existing regulations must be interpreted in accordance with constitutional and human rights and thus applied generously in favour of those seeking protection.¹⁶⁸ However, in practice to date, for example, **admission in individual cases pursuant to § 22 (1) of the AufenthG** is used by German missions abroad only in absolutely exceptional cases. However, this does not do justice to the protective purpose of the guidelines. Comprehensive interpretation and application are required,¹⁶⁹ taking into account constitutional and human rights guarantees. **Admission in individual cases by the BMI in accordance with § 22 (2) of the AufenthG** is also **extremely rarely used** in practice. The decision is entirely at the political discretion of the BMI. One obstacle to the widest possible application **of State admission programmes under § 23 (1) of the AufenthG** lies in the inconsistencies between the Federal and State governments and the associated delays in obtaining the **consent of the Federal Government**.

b) Lack of information and transparency in existing admission programmes

With several admission programmes, there was a lack of **clarity** for potential beneficiaries as to **which agencies to contact, how the procedure works** and what **admission and security criteria** apply. For example, the **endangerment criteria** in the context of the admissions from Afghanistan are sometimes unclear.¹⁷⁰ In the context of BAP Afghanistan, there are **uncertainties when submitting applications** via the authorised reporting bodies. The rest of the procedure is also characterised by great uncertainty for those seeking protection within the framework of several programmes examined here. In many cases, they are either **not informed at all** that they have not been included in the respective procedures or are not told the reasons why they were not included. With regard to the **criteria for the security checks, a lack of transparency** is often to be criticised. As a result, those seeking protection who find themselves in particularly precarious situations are prevented from making informed decisions. Finally, the lack of information and transparency can also **limit legal protection**.

c) Lack of access to procedures due to the "gatekeeper" function of non-governmental participants

It is essential for the granting of effective alternatives to irregular escape routes that those seeking protection **actually have access to humanitarian admission procedures**. First of all, this means that they must be able to apply for admission in as unbureaucratic a way as possible. The participation of non-governmental participants can sometimes simplify access but can also lead to more bureaucracy,

¹⁶⁸ See also Göbel-Zimmermann/Hupke, loc.cit. (footnote 57), §22 (6); Kessler, loc.cit. (footnote 61), §22, recital 1; Zur Auslegung nach den Vorgaben der UN-Kinderrechtskonvention [On interpretation in accordance with the specifications of the UN Convention on the Rights of the Child]: Cremer Asylmagazin 2018, 65 ff.

¹⁶⁹ Marie Holst, Visa für Schutzsuchende – Extraterritoriale Migrationssteuerung im Lichte der Menschenrechte [Visas for those seeking protection – extraterritorial migration management in the light of human rights], Nomos, 1st edition 2022, p. 404, with reference to the extraterritorial obligation to protect under Art. 16a (1) of the German Constitution.

¹⁷⁰ See the open letter from the alliance of NGOs involved in the BAP, loc. (footnote 130), p. 2 f.

the need for coordination and sometimes exclusions without a conscious governmental decision on access being made in individual cases.

For example, within the framework of **State programmes**, applications are often submitted via relatives living in Germany since admission usually depends on private support. Access to the procedure for potential beneficiaries can be made easier by involving their relatives, provided they are sufficiently informed. Those seeking protection who have no personal ties to Germany are effectively excluded from this type of admission.

In **Federal programmes**, the application is regulated differently. In principle, however, it is also the case here that the involvement of intermediate bodies such as UNHCR (HAP Syria and Turkey) or civil society organisations (BAP Afghanistan) can both facilitate access and have a **"gatekeeper" function**. In cases in which various, sometimes non-governmental, agencies are involved or should be involved in the admission, the following must be weighed: on the one hand, these can facilitate access for some groups of people (e.g. relatives of persons living in Germany; persons associated with civil society organisations in Germany), but on the other hand, this can exclude other groups of people without their actual risk being taken into account.

d) Overburdening of private individuals and non-governmental organisations

Making admission conditional on the involvement of non-governmental participants or even on private funding can create problems of **overload and overburdening**. On the one hand, safe access to protection in the EU can be effectively facilitated through relatives. On the other hand, depending on the extent of private responsibility after entry, problems can arise for those seeking protection and for government structures. When the granting of protection depends on the support of family members, onerous decision-making pressures can arise for family members who want to facilitate admission but have to shoulder a significant financial burden. For example, as part of HAP Syria, relatives living in Germany were overburdened financially due to permanent and extensive **financial obligations for taking in** people seeking protection. This led, for example, to beneficiaries choosing to go through the asylum procedure after entering Germany in order to free their relatives from the obligation by changing their status.

This double use of government resources (through admission and asylum procedures) is avoidable. The **NesT programme** is again a **positive example** of how further admissions can be made possible within the framework of civil society commitments without overburdening individuals. Another way in which non-governmental participants are overwhelmed (sometimes accompanied by a factual overload) can be seen in BAP Afghanistan due to the **responsibility of registration authorities** for the pre-selection of persons to be admitted.

e) Obstacles in the visa process

Obstacles in the visa process can make effective access to humanitarian admission and, thus, practical alternatives to irregular exodus impossible. Obstacles in the visa procedure can arise both from official practice and from practical problems that depend on the factual circumstances. Finally, problems can also arise due to the legal and security situation in countries of origin and transit.

The first group of cases includes the sometimes **contradictory official practice** (by diplomatic missions abroad and Foreigners' Authorities), which can lead to an **inconsistent application of standards** and **unclear information** to those seeking protection. Furthermore, faults can be found with inconsistent, non-transparent and, to some extent, unsuitable standards in the context of the **security checks** in admission procedures.¹⁷¹ **Long waiting times** due to **a lack of official capacity**, especially at diplomatic missions abroad, can put people seeking protection in difficult situations, especially if they are in transit countries (e.g. their passport has expired, their visa for the transit country has expired, deportation is threatened). **The use of digitised methods could remedy this, but it is inconsistent** and not sufficient in terms of effective access to admission.¹⁷²

Humanitarian admission opportunities generally concern people from war zones. This often gives rise to **practical problems** with actual **access to German missions abroad**, for example, if the local embassy has been closed. In addition, questions arise when accessing the German diplomatic mission in the transit country, such as a lack of jurisdiction, actual access to the embassy building, lack of proof of identity, high demands in terms of proof of identity, and no appointments or late appointments for visa applications. Finally, there are possible **difficulties when leaving the country, which are related to the respective country of residence and transit**, such as the risk of being checked by persecutors in the country of origin, the requirement for a passport to leave or enter a country of transit, the requirement for a visa for a transit country, dangers in transit, or an **unsafe situation when staying in the transit country**. Even if Germany has no influence on these circumstances, it should be noted that they are regularly present in war situations and in relation to authoritarian regimes and must, therefore, be taken into account when organising admission.

f) No effective legal protection due to a lack of (sovereign) rejection rulings

Effective legal protection is one of the cornerstones of effective human rights protection. All admission options currently available in Germany involve visa procedures. In principle, a protest against the decision of a foreign mission in the visa procedure is possible with the foreign mission, or a complaint can be lodged with the administrative court in Berlin. However, the lack of information and transparency poses a problem for effective legal protection since those seeking protection in the admission programmes analysed here do not usually receive an admission decision against which they could take legal action.

¹⁷¹ See interview of 27.06.2023.

¹⁷² See interview of 29.06.2023_a.

Another factor that leads to a restriction of effective legal protection is the **controversial legal nature of the fundamental decision on admission**. This is particularly questionable with regard to the declaration of admission by the BMI in individual cases in accordance with § 22 (2) of the AufenthG. However, it also applies to Federal or State admission orders. In the case of the **involvement of non-governmental participants**, there is also the fact that there is no contestable decision in the sense of individual legal protection, for example, if they make the (pre)selection.

g) Different legal status after entry

When applying the different legal foundations, it should be noted that the respective beneficiaries live in Germany with different residence permits and, thus, a different legal status. As the analysis shows, this can lead to problems if people who basically belong to the same group of people seeking protection (e.g. people from Syria seeking protection because of the war there or people from Afghanistan seeking protection after the Taliban took power) are admitted through different programmes and do not enjoy the same rights in Germany. In this regard, reference can be made to the situation of persons entitled to subsidiary protection compared to recognised refugees, which is parallel. Here, the demand for equality is based on the harmonisation of status rights and ECtHR case law on the principle of equality, which is the aim of European law.¹⁷³

In particular, the question of whether it is possible to issue a **passport** and whether **family reunification** is possible is of great relevance for people who have been admitted to Germany. These significant differences in legal status are not only significant **restrictions for those seeking protection**, but they can also lead to them applying for asylum in Germany after humanitarian admission in order to improve their status. This, in turn, leads to an unnecessary **strain on government structures** and resources.

V. Outlook: recommendations for the design of humanitarian access routes to Germany

Due to the large number of different flight situations and individual needs, it makes sense, as already mentioned, to **enshrine several humanitarian admission options in law**, as is already the case in Germany. However, the analysis shows **deficiencies in the implementation** of these legal foundations.¹⁷⁴ In practice, the **existing legal framework in Germany is not fully exploited**, which leads to multiple, sometimes significant access restrictions, lack of transparency and inefficiency of administrative processes and thus **contradicts the protective purpose of the legal foundations**. The current legal situation would allow **more flexible handling of individual cases**

¹⁷³ See for details on this Johanna Mantel, *Schutzberechtigt, aber ungleich behandelt* [Entitled to protection, but treated unequally], *Asylmagazin* 12/2018, p. 403 ff., available at: <https://tinyurl.com/yhw2uxrr>.

¹⁷⁴ Cf. Heuser, loc.cit. (footnote 53), p. 442, which describes the application of the legal foundation as hesitant.

on the one hand and the creation of **more effective humanitarian admission programmes** on the other. Commitments to the creation of legal access routes and statements on inter-state solidarity must be taken into account in concrete discretionary decisions in favour of admission.¹⁷⁵

The main conclusion of this analysis is, therefore, that, given the **need for protection** and the **protective purpose** of the admission regulations in Germany, **changes are urgently needed**. The options for humanitarian admission to Germany that are already enshrined in law require legal **substantiation** in order to effectively expand safe access to Germany and create more transparency and legal certainty in the context of admissions. Above all, however, it requires a **consistent** and less restrictive **application** of existing regulations and **simplifications in the admission procedure** in practice.

In this way, safe access to Germany can be arranged more effectively and in accordance with the **protective purpose of the norms**, and the **admission of those seeking protection** based on **constitutional and human rights guarantees** can be assured. At this point, it should be emphasised again that humanitarian admission can only ever take place **in addition to the individual right to asylum**.

Against this background, the analysis in this part concludes with recommendations for the design of temporary and long-term humanitarian access routes to Germany. The recommendations are structured according to the examination points from Part III and are based on the evaluations from Part IV. In terms of the practical applicability of these recommendations, it should be pointed out that only the possible adjustment of the legal foundation is a medium-term goal that could be achieved through the political decision-making process in a legal form. The majority of the recommendations are goals that can be implemented in the short term, which can be achieved by changing the application of the law, for example, by official measures or ministerial instructions. The recommendations contain relevant information on practical implementation.

1. Legal foundations for humanitarian admission

Recommendation (short term): application of existing regulations in conformity with human rights and based on the need for protection

Based on the wording alone, § 22 (1) of the AufenthG could serve as an **institutionalised humanitarian visa**.¹⁷⁶ This would provide an effective and permanent safe entry option for persons in need of protection, **independent of temporary admission programmes**. The option of admission under § 22 (2) of the AufenthG could be applied more generously in the sense of Germany's obligations under international law and the agenda of the Federal Government agreed upon in

¹⁷⁵ Also Heuser, loc.cit. (footnote 53), p. 248.

¹⁷⁶ See also Holst loc.cit. (footnote 168), p. 142.

the coalition agreement¹⁷⁷ in accordance with the protective purpose of the norm. The admission of journalists, activists, scientists and human rights defenders who are at risk in their countries of origin could be regularly guaranteed through the application of this norm.

⇒ *In principle, the proposed application could, therefore, be implemented without changing the law by changing the practice of the AA and its missions abroad or based on a ministerial directive to be created. In order to ensure approval by the Foreigners' Authorities, departmental coordination would be expedient.*

If individual Federal States are both politically willing and have sufficient capacity, they should not be prevented, within the scope of their self-government competence, from complying with human rights protection obligations through appropriate State admission programmes based on § 23 (1) of the AufenthG. The agreement of the Federal Government should, therefore, be granted as a matter of course and quickly in this respect.

⇒ *General approval by the BMI or agreements between the Federal and State governments could be helpful here.*

Recommendation (legislative): create a clearer legal basis, expressly enshrine the protective purposes of the regulations and the goals of admission in law

As the ECJ emphasised in its decisions in *X. and X.*, legislation at a national level is also completely free to create the thus far lacking legal regulations for issuing humanitarian visas.¹⁷⁸ The regulations of § 22 (1) of the AufenthG could be, not only by means of a more generous application of the law in practice but also through **legal substantiation**, the relevant legal basis for a **permanent humanitarian visa** to Germany.¹⁷⁹ In order to make specifications for the exercise of discretion clearer, the admission criteria "international law and urgent humanitarian reasons" could be defined more clearly and, in this regard, **standard examples** for persons in need of protection are included in the legal text.

The regulations of § 22 (2) of the AufenthG could also be worded more precisely to make the admission of particularly vulnerable people clearer. It could also be useful to add standard examples to the regulations. In this respect, certain groups of people, such as journalists, activists, scientists and human rights defenders, could be expressly named.

⇒ *A legislative change is required here.*

¹⁷⁷ Coalition agreement of the Federal Government loc.cit. (footnote 114), p. 146: "We are committed to strengthening and protecting these people [journalists, activists, scientists and other human rights defenders] and their work in a special way, including in the event of cross-border persecution. In this context, we want to simplify the admission of people at high risk and ensure a reliable application process."

¹⁷⁸ ECJ, *X and X*, loc.cit. (footnote 22), recital 44.

¹⁷⁹ Cf. coalition agreement, the Federal Government loc.cit. (footnote 114), p.142: "We will enable humanitarian visas for people at risk by introducing digital procurement procedures in this respect."; see also Holst loc.cit. (footnote 168), p. 389, citing the constitutional principle of certainty under Art. 20 (3) of the Constitution.

In connection with these new regulations, the **protective purpose of the norms** should be clearly defined in the wording of the Act or at least in the explanatory memorandum for the Act, namely the enabling of safe entry for persons in need of protection based on constitutional and human rights guarantees. Such a substantiation would also have an effect on the exercise of discretion in the context of a decision on admission in practice and could, in certain case constellations, lead to a reduction in discretion to zero and possibly to a claim to admission.¹⁸⁰

⇒ *A legislative change is required here.*

2. Admission criteria

Recommendation (short term): transparent admission criteria that are primarily based on the need for protection

In principle, easily accessible **information about the admission criteria** should be available as part of all humanitarian admission procedures. These should **be based on the need for protection and should be transparent**.¹⁸¹ Non-humanitarian criteria should, therefore, not be exclusion criteria and should only be given secondary consideration. Admission criteria such as the "ability to integrate", which are not also security criteria, should not play a role in the security checks. In addition, the criterion of "the ability to integrate" is a criterion that is difficult to prove in the context of entry and is, therefore, not transparent.

⇒ *There is no need to change the law to implement this recommendation. Appropriate measures can be taken when drawing up an admission order and the corresponding communication to authorities, those involved in the procedure and potential applicants.*

3. Procedure

Recommendation (short term): information and transparency in admission and visa procedures

Easily accessible **information** regarding admission options and **transparency** within the procedures are key factors in granting those seeking protection effective access to safe entry options. In the context of individual visas in accordance with § 22 of the AufenthG, central information could be posted on the websites of German diplomatic missions worldwide, as this is basically a permanent admission option. Within the framework of State and Federal admission programmes, effective access to information for those seeking protection and all those involved must be ensured. In the interests of improved transparency and legal certainty, **the legal requirements for the admission and visa procedures should be published in a comprehensible form**. They should also take into account the specific situation of individuals who find themselves in precarious and volatile situations. This is because they may not be able

¹⁸⁰ See also Holst, loc.cit. (footnote 168), 398 et seq., with reference to the duty to protect arising from Art. 16a (1) of the Constitution, which also applies extraterritorially.

¹⁸¹ In the case of BAP Afghanistan, the NGOs involved have offered to make their expertise available to the Federal Government for the development of admission criteria, cf. Alliance of NGOs involved in the BAP, loc.cit. (footnote 130), p. 3

to meet general requirements in the visa process and may need support in the visa process and when leaving the country.

⇒ *This recommendation can also be implemented at short notice without changing the law by changing the official information practice.*

Recommendation (short term): clear responsibilities and uniform procedures of cooperating authorities

Cooperation between the authorities involved must be clearly and uniformly regulated. The **assessment criteria** of diplomatic missions and Foreigners' Authorities must be aligned. The procedure could be accelerated if the Foreigners' Authorities gave **general approval** to the missions abroad for humanitarian admission.

Humanitarian admission **security screening** should be coordinated with UNHCR's experiences. It should be standardised and not make excessive demands, contain no duplicate checks and only take security-related aspects into account.

⇒ *This recommendation can be implemented in the short term without changing the law by standardising official practice.*

Recommendation (short term): simplifications in the visa process

Obstacles in the visa process, such as problems accessing diplomatic missions abroad, high demands with respect to proof of identity and difficulties when leaving countries of origin or transit, should be removed as far as possible. The use of **digital technology** can contribute to this (e.g. for submitting applications or conducting initial interviews).¹⁸² **Exceptions to the requirement for official proof of identity** are also relevant if identity can be proven in another way, as well as improved cooperation between government authorities (e.g. no duplicated identity checks).¹⁸³ Special **fast-track procedures** should be provided to take into account the risk of certain groups of people.¹⁸⁴

⇒ *This recommendation can be implemented at short notice by adapting official practice without changing the law.*

Recommendation (legislative): visa-free entry as an alternative

The legal treatment of those from Ukraine seeking protection has also shown that visa liberalisation and the direct issue of residence permits without prior visa or asylum procedures can be a real alternative to the access dilemma. This legal option could, therefore, also be used in the future for people seeking protection from other countries.¹⁸⁵

⇒ *A corresponding legal regulation is required here.*

¹⁸² See coalition agreement of the Federal Government, loc.cit. (footnote 114), p. 142: "We will enable humanitarian visas for vulnerable people and introduce digital procurement procedures."

¹⁸³ See UNHCR recommendations on family reunification for persons entitled to protection, which are transferable to visa procedures in the context of humanitarian admission, Asylmagazin 4/2017, p. 132 ff.

¹⁸⁴ Such as "Visa on Arrival" in the context of admission from Afghanistan, see III.2.b.bb above; so also Heuser, loc.cit. (footnote 53), p. 442.

¹⁸⁵ See also Heuser, loc.cit. (footnote 53), p. 442.

Recommendation (legislative): primacy of governmental responsibility

The participation of non-governmental agencies can be a practicable solution to expand existing humanitarian entry routes to include further options for safe entry, offer civil society an opportunity to act, and promote social acceptance of humanitarian admission. In doing so, however, attention must be paid to **prioritising governmental responsibility** to avoid **overloading and overburdening** non-governmental agencies and, above all, private individuals. **Financial obligations** of private individuals must, therefore, be **limited** as far as possible.

- ⇒ *The NesT program is an example of how further admissions can be made possible within the framework of civil society commitments without overburdening individuals financially.*
- ⇒ *The requirement for financial obligations could be waived within the framework of State admission programmes without requiring a legislative change.*

Recommendation (short term): individual access to admission programmes

If the participation of several, sometimes also non-governmental, agencies is considered, the advantage that these can make access easier for some groups of people must be weighed against the disadvantage that other groups can be excluded through their participation, regardless of their need for protection.

When private agencies are involved, they should not play the **sole key role at the selection decision** stage. Therefore, if other agencies are involved in the application or proposal process, the additional possibility should always be created so that potential beneficiaries of the admission can **submit an application independently**.

- ⇒ *These recommendations can be implemented without changing the law and by designing the admission orders accordingly.*

4. Legal protection

Recommendation (short term): clear legal nature of official decisions

The **legal nature** of the individual official procedural steps should be clearly defined and communicated so that, if possible, there is **access to effective legal protection**.

- ⇒ *This could be done by a ministerial directive.*

Recommendation (short term): information regarding the rejection decision and legal protection options

People seeking protection who apply for admission themselves or through a third party and whose application is **individually processed and rejected** should be informed both about this decision and about their resulting rights.

- ⇒ *This recommendation can be implemented at short notice by changing the official information practice without changing the law.*

5. Legal status after entry

Recommendation: as a rule, a humanitarian permit is issued directly after entry

The humanitarian admission options analysed all lead to a humanitarian permit being issued directly after entry. This approach has the advantage that those seeking protection do not first have to go through an asylum procedure but have direct access to the rights associated with the respective humanitarian status. This approach also saves government resources since government structures are not used twice. For certain groups of people seeking protection, a safe entry that only allows for a temporary stay without requiring an asylum procedure can make sense. This can be the case, for example, with human rights defenders if they want to be able to return to their country at any time.¹⁸⁶

⇒ *The current granting practice should be retained.*

Recommendation (short-term and legislative): issuance of asylum visas in particularly urgent cases

A humanitarian **visa for applying for asylum** after entry may be necessary in cases where there is a particular **need for urgency**, for example, in cases of acute danger in the event of an application from the country of origin. In these cases, a prima facie check could be carried out by the German mission abroad in cooperation with the BAMF. Such an "asylum visa" could be granted on the basis of § 22 (1) of the AufenthG.¹⁸⁷

⇒ *This recommendation requires a fundamental change in official practice and the introduction of a coordinated official procedure between the missions abroad and the BAMF. The introduction of such a procedure does not necessarily require a legislative change in § 22 (1) of the AufenthG but could also be achieved through appropriate official instructions. A legislative change in § 22 of the AufenthG would create clarity here.*

Recommendation (legislative): the status should be based on the protection needs

The **protection status** should not depend on the type of entry but on the respective protection needs. The equality of resettlement refugees with recognised Geneva Convention refugees (in § 23 (4) of the AufenthG) is based on the logic that the assessment procedures of UNHCR in the context of resettlement are similar to the asylum procedure of the BAMF. Accordingly, all persons admitted through a programme for which UNHCR makes its own pre-selection should be given such a legal status. In practice, it has been shown that people who are basically temporarily admitted via humanitarian admission programmes have the **same needs as recognised refugees**.

¹⁸⁶ See also European Union Agency for Fundamental Rights (FRA), Protecting Human Rights Defenders at Risk – EU Entry, Stay and Support, 2023, p. 16, with an overview of possible measures for the admission and protection of human rights defenders depending on the individual case, available at: <https://tinyurl.com/y9vpafa5>.

¹⁸⁷ See also Holst loc.cit. (footnote), p. 399.

In view of the equal need for protection, the equality required for persons entitled to subsidiary protection should also be transferred to persons who have been issued a humanitarian visa. The regulations are to be designed according to the given needs. This applies, in particular, to the **right to family reunification** and the option of obtaining a **refugee passport**.

- ⇒ The implementation of this recommendation requires a change in the AufenthG.