

MAJA GRUNDLER, Germany's Asylum Law Reforms: Developing a Foul Heart Behind a Fair Face?

Germany's response to the ongoing refugee "crisis" has been portrayed as "liberal" in international media. Germany's intake of asylum seekers certainly seems generous in terms of numbers, however, in terms of treatment of some of these applicants Germany's response is in fact illiberal. Recent changes to the asylum law severely restrict some asylum seekers' rights and freedoms and may result in violations of human rights and international law.

Germany's response to the ongoing refugee "crisis" has been portrayed as liberal in international media – both by supporters who applaud it as generous and by opponents who criticise it as unstinted. While Germany's intake of asylum seekers certainly seems generous – it has the highest total number of asylum applications in the European Union (EU), as well as more than twice the EU average in asylum applications per 100,000 inhabitants (BBC 2016) – the term "liberal" also carries the idea of endorsing individual rights and freedoms. However, by way of legislative amendment, Germany has placed new restrictions on the rights and freedoms of certain groups of asylum seekers and beneficiaries of subsidiary protection.¹⁸ As these amendments have received little attention in international media coverage, this article outlines the most significant changes and briefly touches on how some of the provisions lead to unfair asylum procedures, which may result in violations of human rights and international law. This article draws heavily on domestic media coverage (in German), and government and NGO statements, in particular the excellent explanations and summaries provided by *Pro Asyl*.¹⁹

The New Asylum Law Reforms

The recent "tightening" – as activists termed it (Pro Asyl 2014, 'Asylrechtsverschärfung') – of German asylum law began in 2014 by classifying Serbia, Macedonia, and Bosnia and Herzegovina as safe countries of origin (Pro Asyl 2014, 'Sichere Herkunftstaaten'). Asylum seekers from those countries became subjected to an accelerated asylum procedure and shorter appeal deadlines (Bundesamt für Migration und Flüchtlinge 2015). The government obtained consent to the safe country provisions from political parties professing to have an interest in refugee rights²⁰ by easing residence restrictions for certain groups of asylum seekers and by improving access to the job market (Pro Asyl 2014, 'Sichere Herkunftstaaten'). A so-called "asylum compromise" (*Asylkompromiss*) was agreed upon, which was not seen since the major asylum law reforms in 1993 (see Joppke 1999). Several more laws were then passed, all following the same pattern: rights improvements for certain refugees and asylum seekers were coupled with rights limitations for other (or sometimes the same) asylum seekers and subsidiary protection beneficiaries.

¹⁸ As set out in Arts. 2(f) and 15 of the EU Qualification Directive, a "person eligible for subsidiary protection" means a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15' which includes 'the death penalty or execution; or torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.'

¹⁹ *Pro Asyl* is a German human rights NGO focussing on refugee protection.

²⁰ The government requires consent for certain laws from the lower house of the German parliament, in which the Green Party is strong enough to block new laws. In spite of the party's professed interest in refugee rights it has not prevented the asylum law reforms, justifying its decision by pointing to the concomitant rights improvements.

Another asylum compromise was made in 2015 when on 1 August the “law on the redefinition of the right to remain and the termination of residence” (*Gesetz zur Neubestimmung des Bleiberechts und der Aufenthaltsbeendigung*) entered into force (Bundesministerium des Inneren 2015). Whilst this new law allows those who are “tolerated” (*geduldet*) in Germany (i.e. those who have exceptional leave to remain) to not be deported and to apply for residence permits (Ghelli 2015), it creates new grounds for imposing immigration detention (Pro Asyl 2015, ‘Ausweitung’). Provided they have integrated well, these individuals are eligible to receive a two-year residence permit rather than having to renew their exceptional leave every six to eighteen months (Ghelli 2015). However, despite the rights contained within the Dublin regulation,²¹ new grounds for immigration detention have come into force which prescribe that detention may be imposed upon those who enter Germany from another EU member state or those who pay substantial amounts of money to a smuggler (Pro Asyl 2015, ‘Ausweitung’).

Few Improvements, Harsh Restrictions

The most recent changes to the German asylum law were delivered in two “asylum packages” (*Asylpaket I* and *II*) as the legislators termed it, one in October 2015 and one in February 2016. Each “package” was fast-tracked through the lower (*Bundestag*) and upper (*Bundesrat*) house of the German parliament (Bundesrat 2016; Tagesschau 2015). The first package, the “asylum process acceleration act” (*Asylverfahrensbeschleunigungsgesetz*) entered into force on 23 October 2015 (Pro Asyl 2015, ‘Asylpaket I’) and the second package, entitled “law on the introduction of accelerated asylum procedures” (*Gesetz zur Einführung beschleunigter Asylverfahren*) entered into force on 17 March 2016 (Bundesregierung 2016).

Significantly, the first package allows asylum seekers from countries with a recognition rate of over 50% (Syria, Iraq, Eritrea and Iran) to access integration courses as soon as they have lodged an asylum claim (Yücel 2015). Meanwhile, the second package provides recognised refugees, who successfully complete a vocational training course / apprenticeship, with the right to work in Germany for two years following completion of the course, irrespective of their status during this time (Die Welt 2016). To elaborate, in Germany, refugee status²² is initially granted for three years - the same duration of most apprenticeships. Thus, if after those three years refugee status cannot be extended (e.g. because conditions in the country of origin have changed), the refugee will nevertheless be able to remain and work for another two years.

Unfortunately, however, these developments are dwarfed by the severe rights restrictions imposed upon asylum seekers and subsidiary protection beneficiaries. To begin with, the first package revoked the 2014 improvements on freedom of movement and access to the job market. More specifically, asylum seekers now have to remain in initial reception centres for up to six rather than three months and residency restrictions apply, namely, travel is not permitted outside the region in which the centre is located (Pro Asyl 2015, ‘Asylpaket I’). This raises the question of whether asylum seekers will be able to access the integration courses referred to above. Though initial reception centres offer language courses, integration

²¹ Art. 28(1) of the Dublin Regulation provides that ‘Member States shall not hold a person in detention for the sole reason that he or she is subject to the procedure established by this Regulation,’ the procedure being ‘determining the Member State responsible for examining an application for international protection,’ which is often the first EU Member State entered ‘by land, sea or air having come from a third country’ (Art. 13(1)).

²² This includes recognition as a refugee under the 1951 Convention as well as political asylum under Art. 16a (1) of the German basic law.

courses are only available from providers located in the region around the centres (Volkshochschulen Schleswig-Holstein 2015). It remains to be seen whether there is a sufficient supply of courses for all asylum seekers entitled to access them. While living in these reception centres, asylum seekers are not allowed to work (Pro Asyl 2015, 'Asylpaket I'). Moreover, asylum seekers from safe countries of origin are required to remain in the reception centres for the entire duration of their asylum proceedings and possibly until they are deported (Pro Asyl 2015, 'Asylpaket I'). Incidentally, the first package expands the list of safe countries of origin (Ghana, Senegal, Serbia, Macedonia and Bosnia and Herzegovina) (Bundesamt für Migration und Flüchtlinge 2015) to include Albania, Kosovo and Montenegro (Pro Asyl 2015, 'Asylpaket I'). Moreover, the Federal Office for Migration and Refugees will no longer notify those liable for removal prior to being deported (Pro Asyl 2015, 'Asylpaket I').

The second package shortens the duration of asylum proceedings (Pro Asyl 2016, 'Stellungnahme'). More specifically, applications are to be fast-tracked and decided within a week where one of the following apply: the asylum seeker is from a safe country of origin, has deliberately made false representations as to their identity or nationality, has disposed of documents that could have established their identity or nationality, has submitted a fresh claim, has filed an application for the stay of removal procedures, refuses to have their fingerprints taken for the Eurodac database, has been expelled on grounds of public order and security, or if there are serious reasons to believe they are a danger to national security or public order (Pro Asyl 2016, 'Stellungnahme'). Moreover, an asylum claim will be considered withdrawn if an asylum seeker deliberately withholds information, fails to attend a hearing, absconds, or breaches their residency requirements. Such residency requirements will, for example, demand that those subject to fast-track procedures reside in 'special initial reception centres' (Pro Asyl 2016, 'Stellungnahme'). Further, the claims of asylum seekers who arrive in the special centres belatedly will be treated as fresh claims and therefore only succeed if, since their arrival in Germany, new grounds or evidence have arisen, unless it can be proven that the reason for the delay was beyond the asylum seeker's control (Pro Asyl 2016, 'Stellungnahme'). Though the asylum seeker can request a reopening of the asylum proceedings, a second transgression will lead to a final exclusion from proceedings (unless there are new grounds or new evidence) and thus possibly to removal (Pro Asyl 2016, 'Stellungnahme'). Significantly, removal will be possible even where deportees suffer from PTSD or other mental or bodily illnesses (Pro Asyl 2016, 'Stellungnahme'). Finally, the right to family reunion will be suspended for subsidiary protection beneficiaries, including unaccompanied minors, for two years (Pro Asyl 2016, 'Stellungnahme').

Meanwhile, a third package of laws is already being discussed. Following the familiar pattern, it is said to contain further measures on integration (Die Welt 2016), as well as the classification of Algeria, Morocco and Tunisia as additional safe countries of origin, and Turkey as a safe third country (Pro Asyl 2016, 'Asylverschärfungen').

Violations of Human Rights and International Law?

Many of the rights restrictions detailed above will arguably lead to the violation of human rights and international law. Though both packages severely restrict asylum seekers' rights, it is the second package in particular which jeopardises fair asylum procedures and is likely to lead to a rise in incorrect decisions (Amnesty International 2016). Amnesty International expects that asylum seekers will not have sufficient access to lawyers in special reception centres, which, coupled with short decision-making time frames and appeal deadlines, as well as traumatised asylum seekers' mental state, will lead to claims being falsely rejected and

possibly to individuals being incorrectly deported (2016). This could also affect those excluded from asylum proceedings or whose claims are considered as having been withdrawn (Pro Asyl 2016, 'Stellungnahme'). Research from other countries using accelerated asylum procedures highlights problems which may arise as a result. These include insufficient time to obtain expert testimony and legal representation, as well as insufficient consideration of the impact of trauma on memory and thus on the credibility of the asylum seeker (Kenny and Procter 2016). Research also highlights the low quality of decisions. In examining the detained fast-track (DFT) procedure in the UK, UNCHR found that accelerated procedures 'often fail to engage with the individual merits of the claim', apply refugee law incorrectly and do 'not always identify' those claimants eligible for international protection (2008: 8-9). Further, and most significantly, the DFT was recently ruled unlawful in the UK due to a '[l]ack of appropriate time to seek and obtain legal assistance' (Kenny and Procter 2016).

If, as a result of wrong decisions, deportations occur, Article 3 of the European Convention on Human Rights (ECHR) will be violated where applicants are subjected to torture or inhuman or degrading treatment upon return. Such a scenario would breach the *non-refoulement* obligation of the 1951 Refugee Convention (Pro Asyl 2016, 'Stellungnahme'). Further, asylum seekers who cannot access a lawyer or sufficient information to represent themselves in appeal proceedings will be denied the right to an effective remedy (Art. 13 ECHR). In addition, the suspension of family reunion violates Article 8 (right to private and family life) of the ECHR (Pro Asyl 2016, 'Stellungnahme') and forces family members to make use of non-legal, dangerous channels to leave their countries (Amnesty International 2016).

In conclusion, although Germany has recently been perceived as generous and liberal for admitting vast numbers of asylum seekers, its treatment of some of these individuals is arguably illiberal and in certain cases may constitute a violation of their human rights and Germany's international obligations. Even though human rights protection is at the very heart of the refugee regime, the government is trading this protection off for efficiency. Granted, the government may believe this is necessary, be it because it is overwhelmed by numbers, due to the lack of cooperation in Europe, or because it seeks to appease those parts of the German public which have given far-right anti-immigration parties a major boost in recent state elections. Nevertheless, when it comes to refugee protection, quality must not be exchanged for quantity. Germany will be able to process claims speedily but not thoroughly. Though it remains to be seen what consequences the new legislation will have for individual asylum seekers, there is a real danger that these accelerated proceedings will lead to incorrect decisions. Should such decisions result in serious human rights violations, refugee protection will be undermined and Germany will have developed a foul heart behind the fair face that has welcomed so many refugees.

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Bibliography

AMNESTY INTERNATIONAL (2016) *Das Asylpaket II: Menschenrechte in Gefahr* (online). Available from: <<http://www.amnesty.de/2015/12/9/das-asylpaket-ii-menschenrechte-gefahr>> (Created February 2016, accessed 1 April 2016).

BBC (2016) *Migrant crisis: Migration to Europe explained in seven charts* (online). Available from: <<http://www.bbc.co.uk/news/world-europe-34131911>> (Created 4 March 2016, accessed 12 March 2016).

BUNDESAMT FÜR MIGRATION UND FLÜCHTLINGE (2015) *Sichere Herkunftsländer* (online). Available from: <<http://www.bamf.de/DE/Migration/AsylFluechtlinge/Asylverfahren/BesondereVerfahren/SichereHerkunftslaender/sichere-herkunftslaender-node.html>> (Created 22 December 2015, accessed 1 April 2016).

BUNDESMINISTERIUM DES INNEREN (2015) *Gesetz zur Neubestimmung des Bleiberechts und der Aufenthaltsbeendigung tritt in Kraft* (online). Available from: <<http://www.bmi.bund.de/SharedDocs/Pressemitteilungen/DE/2015/07/bleiberecht-tritt-in-kraft.html>> (Created 31 July 2015, accessed 12 March 2016).

BUNDESRAT (2016) *Asyl- und Flüchtlingspolitik* (online). Available from: <<http://www.bundesrat.de/DE/plenum/themen/asyl/asyl.html>> (Created 26 February 2016, accessed 12 March 2016).

BUNDESREGIERUNG (2016) *Asylpaket II in Kraft: Kürzere Verfahren, weniger Familiennachzug* (online). Available from: <https://www.bundesregierung.de/Content/DE/Artikel/2016/02/2016-02-03-asylpaket2.html> (Created 17 March 2016, accessed 25 March 2016).

DIE WELT (2016) *Das sind die wichtigsten Beschlüsse in Asylpaket II* (online). Available from: <<http://www.welt.de/politik/deutschland/article151615015/Das-sind-die-wichtigsten-Beschluesse-in-Asylpaket-II.html>> (Created 28 January 2016, accessed 12 March 2016).

GHELLI, F. (2015) *Langzeit-Geduldete dürfen bleiben* (online). Available from: <<https://mediendienst-integration.de/artikel/langzeit-geduldete-gesetz-neuregelung-bleiberecht-aufenthaltsbeendigung-auslaenderbehoerde.html>> (Created 16 July 2015, accessed 12 March 2016).

JOPPKE, C. (1999) *Immigration and the Nation-State: the United States, Germany, and Great Britain*, Oxford, Oxford University Press.

Kenny, M.A. and Procter, N. (2016) 'The Fast Track Refugee Assessment Process and the Mental Health of Vulnerable Asylum Seekers', *Psychiatry, Psychology and Law* **23**(1): 62-68.

PRO ASYL (2014) *Asylrechtsverschärfung soll heute ab 17:15 im Hauruckverfahrenn durch den Bundestag* (online). Available from: <<https://www.proasyl.de/news/asylrechtsverschaeerfung-soll-heute-ab-1715-im-hauruckverfahrenn-durch-den-bundestag/>>(Created 03 July 2014, accessed 11 April 2016).

-- (2014) „*Sichere Herkunftstaaten*“: *Deal auf Kosten der Roma-Flüchtlinge im Kabinett beschlossen* (online). Available from: <http://www.proasyl.de/en/news/newsenglish/news/sichere_herkunftstaaten_deal_auf_kosten_der_roma_fluechtlinge_im_kabinett_beschlossen> (Created 30 October 2014, accessed 12 March 2016).

-- (2015) *Ausweitung der Abschiebungshaft droht: Gesetz zu Bleiberecht und Aufenthaltsbeendigung verabschiedet* (online). Available from: <http://www.proasyl.de/de/news/detail/news/ausweitung_der_abschiebungshaft_droht_gesetz_zu_bleiberecht_und_aufenthaltsbeendigung_verabschiedet> (Created 3 July 2015, accessed 12 March 2016).

-- (2015) *Asylpaket I: Asylrechtliche Änderungen seit dem 23.10.2015 in Kraft* (online). Available from: <http://www.proasyl.de/de/news/detail/news/asylpaket_i_asylrechtliche_aenderungen_seit_dem_23102015_in_kraft/> (Created 17 November 2015, accessed 8 March 2016).

-- (2016) *Stellungnahme zum Gesetzentwurf der Bundesregierung zur Einführung beschleunigter Asylverfahren (Stand 1.2.2016)* (online). Available from: <http://www.proasyl.de/fileadmin/fmdam/f_Presse/PRO_ASYL_Stellungnahme_Gesetzentwurf_Beschleunigte_Asylverfahren_16.2.2016.pdf> (Created 16 February 2016, accessed 12 March 2016).

-- (2016) *Asylverschärfungen beschlossene Sache – stehen weitere bevor?* (online). Available from: <http://www.proasyl.de/de/news/detail/news/asylverschaeerfungen_beschlossene_sache_stehen_weitere_bevor/> (Created 26 February 2016, accessed 12 March 2016).

TAGESSCHAU (2015) *Bundesrat stimmt für Asylpaket* (online). Available from: <<https://www.tagesschau.de/inland/bundestag-asylgesetze-107.html>> (Created 16 October 2016, accessed 12 March 2016).

UNHCR (2008) *Quality Initiative Project: Second Report to the Minister* (online). Available from: <http://www.unhcr.org.uk/fileadmin/user_upload/pdf/QI_Fifth_Report.pdf> (Created March 2008, accessed 12 April 2016).

Volkshochschulen Schleswig-Holstein (2015). *Sprachkurse für Flüchtlinge - Situation an den Volkshochschulen in SH* (online). Available from: <http://www.vhs-sh.de/fileadmin/docs/aktuelles/Sprachkurse_fuer_Fluechtlinge_-_Situation_in_Schleswig-Holstein.pdf> (Created September 2015, accessed 17 April 2016).

YÜCEL, D. (2015) *Flüchtlinge nehmen Integrationsangebote freiwillig wahr* (online). Available from: <<https://mediendienst-integration.de/artikel/deutschkurs-integrationskurs-einstiegskurs-integrationspflicht-fuer-fluechtlinge-bamf.html>> (Created 29 December 2015, accessed 10 March 2016).