IMMIGRATION DETENTION AND THE RULE OF LAW

NATIONAL REPORT: GERMANY
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Introduction

According to German law, the right of asylum is a fundamental right and is laid down in the German constitution (Basic Law) under Article 16. As stated in Article 16a (1) GG, “politically persecuted persons have the right to asylum”. However, an amendment to the Basic Law in 1993, led to major changes in the Asylum Procedure Act, as the possibility to appeal to the basic right to asylum was constrained. As the adoption of the amendment was highly debated in German politics, it is referred to as the “asylum compromise”. In addition to the Basic Law amendment, statutes in the “aliens act” followed, such as the Act on Benefits for Asylum Seekers and a distinct status of war refugee. Furthermore, Article 16 GG is reserved to people outside the European Union or third country-border, where the application of the Geneva Convention relating to the status of refugees and the European Convention for the Protection of Human Rights and Fundamental Freedoms, are not guaranteed. The limitation of the asylum law stems from a statute that allows the German state, with the approval of the Federal Assembly, to prove the legislative basis, application of law and general political circumstances. If the German Federal Assembly regards the aforementioned conditions as given, it can be assumed that a foreigner from a controlled state is not politically persecuted (Art. 16a(3) GG).

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1 Art. 18 GG
2 Deutsches Grundgesetz (GG)
3 „Politisch Verfolgte genießen Asylrecht“
4 Asylverfahrensgesetzes
5 „Asylkompromiss“
6 Ausländergesetz
7 Asylbewerberleistungsgesetz
8 Kriegsflüchtlingsstatus
I. Substantive Criteria

Mainly five legal acts form the basis of German asylum and immigration law:

1. Aufenthaltsgesetz (Residence Act)\(^9\)
2. Allgemeine Verwaltungsvorschrift zum Aufenthaltsgesetz (general administrative regulation to the Residence Act)\(^10\)
3. Zuwanderungsgesetz (Immigration Act)\(^11\)
4. Gesetz zur Umsetzung aufenthalts- und asylrech Asylverfahrensgesetz, Gerichtsverfahren, Klagefrist, Zurückweisung verspäteten Vorbringens, Article 74 (1), (2): htlcher Richtlinien der Europäischen Union (Implementation of the asylum regulations of the European Union)\(^12\)
5. Asylverfahrensgesetz (Asylum Procedure Act)\(^13\).

Immigration detention is mentioned in all but the last document and in each case a distinction is made between Vorbereitungshaft (preparation detention)\(^14\) and Sicherungshaft (safeguarding detention)\(^15\) which require different substantive criteria of detention and procedural safeguards.

\(^14\) Translated by author.
\(^15\) Translated by author.
1a.) Grounds for Detention

1. Hard Law

Sources:
- Aufenthaltsgesetz (AufenthG) ([Article 62 (3.1) – (3.5)])
- Allgemeine Verwaltungsvorschrift zum Aufenthaltsgesetz (AufenthG-VwV) ([Article 15.5.1, Article 57.3.2, Article 62.0.1, Article 62.0.2, Article 62.0.3.2, Article 62.2.1.6.1, 62.2.1.6.2, Article 62.3.0.2])
- Zuwanderungsgesetz, ([Article 62 (2)])
- Gesetz zur Umsetzung aufenthalts- und asylrechtlicher Richtlinien der EU (Richtlinienumsetzungsgesetz) ([Article 1.51])

Detention should be the exception rather than the rule, and should be a measure of last resort. If no less restrictive measures are available, detention might be imposed under the condition that it is procedurally and substantially lawful. Showing lawfulness under German law requires, among others conditions, to give non-arbitrary reasons for detention. As illustrated in the box above, each of the German immigration and asylum laws touches upon grounds of detention.

Before going into substantive details it is important to stress the existence of two different types of detention (Abschiebungshaft) since each type requires different detention justifications. First, “Vorbereitungshaft” (preparation detention) intends to prepare for the expulsion of the migrant and must not be longer than six weeks. Second, “Sicherungshaft” (safeguarding detention) is a measure to safeguard the expulsion of the migrant. It can last longer and is applied in cases where a risk of absconding exists.

Article 63 AufenthG mentions five grounds for arresting aliens which refer only to “Sicherungshaft” (safeguarding detention). The first reason is, that “der Ausländer aufgrund einer unerlaubten Einreise vollziehbar ausreisepflichtig ist”, [the alien is, due

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17 AufenthG, Article 62 (1).
18 Article 62.1.1 AufenthG_VwV.
19 Article 62.2.0.0. AufenthG_VwV.
20 In German law, migrants are referred to “Ausländer” which can be translated with the term “alien”.
21 Article 62 (3.1) AufenthG.
to irregular entry, obliged to leave the country].

Similarly, if an expulsion order has been issued which cannot be executed immediately “Sicherungshaft” might be legitimately justified. Second, where the permission to stay expired and the alien changed his location without informing the aliens’ registration authority “Sicherungshaft” might be applied. Third, “Sicherungshaft” might be applied when the alien does not appear at the expulsion appointment. Fourth, if the alien circumvented the expulsion in any other way, “Sicherungshaft” might be appropriate. Ultimately, detention is legitimate when there is sufficient evidence indicating that the alien intends to elude the expulsion.

The administrative act accompanying the Aufenthaltsgesetz also mentions on several occasions reasons for detention. In Article 15.5 and 15.5.1 it is made clear that detention shall only be applied to legally regulate expulsion. Interestingly, in Article 57.3.2 it is explicitly mentioned that applying coercion in order to accomplish immediate expulsion does not count as detention. Only where expulsion cannot be executed immediately does it fall under Sicherungshaft. Furthermore, the article clarifies that Sicherungshaft can be applied in order to prevent the commission or the continued commission of a crime.

In Article 62, “Abschiebungshaft” as such is treated in greater detail. In 62.2.1 it is mentioned that one reason for ordering either “Vorbereitungs- or Sicherungshaft” must be the thwarting or exacerbation of expulsion in the case that no detention is ordered. Additionally, the sole purpose of detention is to ensure that expulsion can take place. Therefore, where detention cannot serve this purpose anymore it is deemed to be illegitimate. In addition to the substantial reasons mentioned for “Abschiebungshaft” in

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22 Translation of Article 62 (3).1 AufenthG by the author.
23 Article 62 (3).1a AufenthG.
24 Article 62 (3).2 AufenthG.
25 Article 62 (3).3 AufenthG.
26 Article 62 (3).4 AufenthG.
27 Article 15.5 and 15.5.1 AufenthG_VwV.
28 Article 57.3.2 AufenthG_VwV.
29 Ibid.
30 Article 62.0.1 AufenthG_VwV.
31 Article 62.0.2 AufenthG_VwV.
general, it is also stated that grounds for detention shall always be communicated to the court and the detainee in a transparent manner.\textsuperscript{32}

Subsequent to the general statements on detention, reasons which count exclusively for “Sicherungshaft” are mentioned. More precisely examples are mentioned which show that expulsion is endangered and consequently justify detention. Thus, instances where Sicherungshaft is appropriate are: First, if the alien conceals that he has the necessary documents for departure.\textsuperscript{33} Second, the alien entered the country with false identity documents or was smuggled in the country and makes no or wrong statements about his identity.\textsuperscript{34} Third, the alien absconded after a granted parole of his/her detention.\textsuperscript{35} Fourth, the alien infringed applicable regulations, for example non-compliance with geographical residence limitations.\textsuperscript{36} In contrast to positive grounds of detention, Article 62.3.02 also mentions a factor that does not count as sufficient justification for detention. It is stated that detention cannot be justified with the reduced administrative burden which exists when aliens remain always at same place.\textsuperscript{37}

In addition to these provisions in the administrative act accompanying the Aufenthaltsgesetz, the Zuwanderungsgesetz also mentions grounds for ordering Sicherungshaft. In Article 62 it is stated that Sicherungshaft needs to be considered when: First, the alien is, due to an illegal entry, obliged to leave the country\textsuperscript{38} or an order for expulsion has been ordered but could not be immediately executed.\textsuperscript{39} Second, the time limit for departure had been passed and the alien changed his place of residence without informing the authorities.\textsuperscript{40} Third, the alien did not appear to the authorities for an expulsion appointment.\textsuperscript{41} Fourth, he/she evaded expulsion in any other way.\textsuperscript{42} Fifth, the alien is suspected to abscond in order to evade expulsion.\textsuperscript{43}

\begin{itemize}
\item \textsuperscript{32} Article 62.0.3.1.1 – 62.0.3.1.3 AufenthG_VwV.
\item \textsuperscript{33} Article 62.2.1.6.1.1 AufenthG_VwV.
\item \textsuperscript{34} Article 62.2.1.6.1.2 AufenthG_VwV.
\item \textsuperscript{35} Article 62.2.1.6.1.3 AufenthG_VwV.
\item \textsuperscript{36} Article 62.2.1.6.1.4 AufenthG_VwV.
\item \textsuperscript{37} Article 62.3.0.2 AufenthG_VwV.
\item \textsuperscript{38} Article 62 (2) 1. Zuwanderungsgesetz
\item \textsuperscript{39} Article 62 (2) 1a. Zuwanderungsgesetz
\item \textsuperscript{40} Article 62 (2) 2. Zuwanderungsgesetz
\item \textsuperscript{41} Article 62 (2) 3. Zuwanderungsgesetz
\item \textsuperscript{42} Article 62 (2) 4. Zuwanderungsgesetz
\item \textsuperscript{43} Article 62 (2) 5. Zuwanderungsgesetz
\end{itemize}
Ultimately, the law implementing the EU Returns Directive also mentions grounds of detention by amending Article 62 of the Aufenthaltsgesetz. However, these amendments refer only to reasons when detention is legitimate even without a judicial decision.\textsuperscript{44} In this regard, reasons are: first, the alien did not appear to the authorities for an expulsion appointment. Second, the judicial decision for ordering detention cannot be obtained before the beginning of the detention. Third, there is justified suspicion that the alien wants to evade expulsion.\textsuperscript{45}

2. Case Law


**Sources:**
- Bundesgerichtshof Beschluss \textit{V ZB 8/01} vom 28.02.2001 in der Abschiebehaftssache
- Bundesgerichtshof Beschluss \textit{VZA 194/09} vom 18.03.2009 in der Abschiebehaftssache
- Bundesgerichtshof Beschluss \textit{V ZB 193/09} vom 06.05.2010 in der Abschiebehaftssache
- Bundesgerichtshof Beschluss \textit{V ZB 6/03} vom 20.03.2003 in der Abschiebehaftssache
- Bundesgerichtshof Beschluss \textit{V ZB 93/10} vom 26.05.2010 in der Abschiebehaftssache

Before dealing with cases on grounds for detention a general remark of the use of German case law is made. First, due to the focus on German law, only the decisions of the Bundesgerichtshof (BGH; Federal Court of Justice of Germany) are considered. Decisions of regional courts are not included. Second, the focus is mainly on decisions that are “Leitsatzentscheidungen”.\textsuperscript{46} This is due to their high relevance for further decisions.

In regard to grounds for detention, mainly three decisions of the BGH are relevant. First, in \textit{V ZB 8/01} it was stated that „Sicherungshaft ist möglich wenn der Ausländer illegal und ohne Paß einreist“.\textsuperscript{47} This can be translated in the following way: „Sicherungshaft [safeguarding detention] is permitted if the migrant enters the country

\textsuperscript{44} Article 1.51. EU Richtlinienumsetzungsgesetz
\textsuperscript{45} Article 1.51. EU Richtlinienumsetzungsgesetz
\textsuperscript{46} “Leitsatzentscheidung” is a “guiding principle decision” of the court.
\textsuperscript{47} Bundesgerichtshof Beschluss V ZB 8/01 vom 28.02.2001 in der Abschiebehaftssache, paragraph II b.)
illegally or without passport.” By ruling in this way, the BGH rejected a complaint of unlawful detention by an Indian migrant who illegally entered Germany via France without passport.

In V ZA 9/10 the Court confirmed that a previous absconding of a migrant is a valid ground to assume that the migrant might plan to abscond again in order to prevent expulsion. Consequently, this assumption can be used as valid foundation for ordering “Sicherungshaft”.

In addition to that, in V ZB 193/09 a migrant came to Germany in order to participate in a language course. After the end of the course and the residence permit expired, the migrant changed is place of residence without informing the authorities. In this regard the BGH ruled that a reason for detention can solely be based on the fact that a migrant does not provide his address to the authorities.

V ZB 6/03 dealt with situations in which migrants should be detained. More precisely the case concerned a Turkish national who illegally migrated to Germany. Two days after his arrival he was arrested and then claimed that wanted to apply for asylum. The court referred to its decision in V ZB 49/02 where it was ruled that “Die Aufenthaltsgestattung des unerlaubt aus einem sicheren Drittstaat in die Bundesrepublik Deutschland eingereisten Ausländer setzt einen förmlichen Asylantrag voraus.” This means that if a migrant wants to enter Germany from a safe third state, the application for asylum has to be done before arrival. In the case at hand, the Turkish national only applied for asylum two days after his arrival. Thus, the illegal nature of his stay allows for “Sicherungshaft”.

Contrarily in V ZB 93/10 the Court ruled that „Jedenfalls darf die Abschiebungshaft dann nicht angeordnet werden, wenn der Abschiebung - wie hier - keine tatsächlichen Hindernisse entgegenstehen und nicht festgestellt ist, dass die Staatsanwaltschaft ihr Einvernehmen trotz zuvor erfolgter Verweigerung innerhalb der in § 62 Abs. 2 Satz 4 AufenthG genannten Frist doch noch erteilt." This means that detention cannot be ordered, in cases where expulsion of rejected asylum seekers can be

48 "(...)der begründete Verdacht bestehe, dass er erneut im Bundesgebiet untertauchen werde, um sich seiner Abschiebung zu entziehen“ (para.6, page 4)
49 Bundesgerichtshof Beschluss V ZB 193/09 vom 06.05.2010 in der Abschiebehaftsache, paragraph 12 a, page 6)
achieved even without detention. The case concerned a Moroccan national who entered Germany several times and applied for asylum and was then detained in order to secure the expulsion.

1b.) Who has the Authority to Detain?

1. Hard Law

To begin with, the Aufenthaltsgesetz mentions on several occasions that any form of detention has to be based on a judicial authority’s decision. Article 62 (2) stipulates that “Vorbereitungshaft” is only possible after a judicial decision has been reached. In Article 62 (3) the same provisions are mentioned in regard to “Sicherungshaft”. Nevertheless, in Article 62 (5) three occasions are mentioned where the authorities are allowed to detain without a judicial decision: First, where the alien is due to illegal entry obliged to leave the country. Second, where the judicial decision to order “Sicherungshaft” cannot be obtained before the start of the detention. Third, where sufficient evidence exists that the alien wants to evade “Sicherungshaft”.

Also the administrative regulation accompanying the Aufenthaltsgesetz mentions that a judicial authority needs to impose detention. In Article 15.5.3 it is mentioned that after migration authorities formally request detention a judge has to confirm it. Detention without judicial approval can only be justified with “ordnungsrechtlichen Vorschriften” [regulatory law]. In the following article it is also stressed that the judge decides exclusively about the detention of the migrants and not about the migrant’s entry into the

Sources:
- Aufenthaltsgesetz (AufenthG) (Article 62 (2), Article 62 (3), Article 62 (5))
- Allgemeine Verwaltungsvorschrift zum Aufenthaltsgesetz (AufenthG-VwV) (Article 15.5.3, Article 15.5.4, Article 62.0.0, Article 62.0.3.5, Article 62.0.4, Article 62.3.0.2)
- Zuwanderungsgesetz, (Article 62 (1), Article 62 (2))
- Gesetz zur Umsetzung aufenthalts- und asylrechtlicher Richtlinien der EU (Richtlinienumsetzungsgesetz) (Article 1.51)

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51 Article 62 (5), 1-3, AufenthG.
52 Translated by author.
Furthermore, Article 62 goes more into detail. In the first sentence it is mentioned that generally an alien shall not be detained without a judicial decision even if the detention lasts for a short period. However, subsequently it is mentioned that in certain circumstances aliens can be detained without the judicial decision. In these cases the judicial decision has to be obtained as soon as possible after the detention took place.

It is also specified which judicial authority has to decide on the detention. The “Amtsgericht” [district court] in which the alien resides is responsible for taking the decision. In the case that the alien does not have a permanent residence, the district court in which the detention shall take place has to take a decision. Furthermore, it is stated that the right to detain a migrant based on other legal grounds is not affected by migration related detention. In this case, the responsible judge can order the transition from “Gewahrsam” [custody] to “Abschiebungshaft” [expulsion detention].

In the Zuwanderungsgesetz, it is mentioned that “Vorbereitungshaft” is only permissible after a judicial order. In the following paragraph the same provision is mentioned in regard to “Sicherungshaft”: only after a judicial order is detention considered permissible.

Ultimately, the Richtlinienumsetzungsgesetz determines in Article 1.51 the three exceptions that require no preliminary judicial order which have been already mentioned in regard to the Aufenthaltsgesetz above.

2. Case Law

Sources:
- Bundesgerichtshof Beschluss VZA 9/10 vom 25.05.2010 in der Abschiebehaftssache

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53 Article 15.5.4 AufenthG_VwV.
54 Article 62.0.0 AufenthG_VwV.
55 Article 62.0.3 AufenthG_VwV.
56 Ibid.
57 Article 62.0.3.5 AufenthG_VwV.
58 Article 62 (1) Zuwanderungsgesetz.
59 Article 62 (2) Zuwanderungsgesetz.
60 See page 6, para. 1
In V ZA 9/10 it was ruled that „Der Haftrichter hat auf einer hinreichend vollständigen Tatsachengrundlage die für die Anwendung des § 62 Abs. 2 Satz 4 AufenthG erforderliche Prognose grundsätzlich auf alle im konkreten Fall ernsthaft in Betracht kommenden Gründe, die der Abschiebung entgegenstehen oder sie verzögern können, zu erstrecken (BVerfG NJW 2009, 2659, 2660).“\[61] This means that only the committing magistrate has the authority to order detention while he has the duty to conduct a complete analysis of the facts and reasons before doing so. The case concerned an asylum-seeker whose asylum application was refused whereas he tried again to enter Germany. On the occasion of his second entry he was detained.

1c.) Use of fast-track procedures/administrative detention

1. Hard Law

Sources:
- Allgemeine Verwaltungsvorschrift zum Aufenthaltsgesetz (AufenthG-VwV) (Article 62.0.2, Article 62.3.0.2)

The use of fast-track procedures and administrative detention is only mentioned in the AufenthG-VwV. Neither the AufenthG nor the Zuwanderungsgesetz mentions it. In Article 62.0.2 it is stated that

“bei freiheitsentziehenden Maßnahmen im Rahmen der Abschiebung ist zu berücksichtigen, dass das aus Artikel 2 Absatz 2 Satz 2 GG abzuleitende Beschleunigungsgebot die Behörden verpflichtet, die Abschiebung eines in Abschiebungshaft befindlichen Ausländer mit größtmöglicher Schnelligkeit zu betreiben“.

This sentence obliges the authorities in charge to carry out the expulsion process as quickly as possible where an asylum-seeker is detained. This does not explicitly authorize the use of fast-track procedures however it establishes the preferred method of dealing with cases where the asylum seeker is detained.

In addition to that, in Article 62.3.0.2 it is stated that

“Die Freiheitsentziehung muss zu jedem Zeitpunkt ihrer Dauer von der gesetzlichen Ermächtigung gedeckt sein. Daher ist es ausgeschlossen, die
Fortdauer der Abschiebungshaft wegen des Zeitaufwandes für Verwaltungsvorgänge zu beantragen bzw. anzuordnen, mit denen ein anderer Zweck als derjenige verfolgt wird, der die Haft dem Grunde nach rechtfertigt."

This provision requires that detention must at any time be justified by legal authorization. Therefore, it is impermissible to request or order the extension of detention on grounds of time management of administrative processes. This is because, time management of administrative processes does not pursue the goal which was determined when ordering detention.

2. Case Law

Sources:
- Bundesgerichtshof Beschluss V ZB 111/10 vom 07.04.2010 in der Abschiebehaftsache

The case V ZB 111/10 concerned an Algerian national who tried to apply for asylum in several states. Due to the unclear situation on which authority needed to assess the asylum application, the migrant was detained even though his asylum application was not processed. The court ruled that „a) Das Beschleunigungsgebot verpflichtet die Behörden, alle notwendigen Anstrengungen zu unternehmen, damit der Vollzug der Haft auf eine möglichst kurze Zeit beschränkt werden kann (vgl. Senat, Beschluss vom 11. Juli 1996 - V ZB 14/96, BGHZ 133, 235, 239). Die Gerichte müssen, wenn sie auf Grund eines Rechtsmittels oder eines Aufhebungsantrags mit einer nach § 62 Abs. 2 AufenthG erlassenen Haftanordnung befasst sind, stets prüfen, ob die Behörde die Zurück- oder Abschiebung des Ausländers ernstlich und mit der grösstmöglichen Beschleunigung betreibt.“. This judgment can be translated in the following way: The fast-track requirement obliges the authorities to ensure with all necessary means that the duration of detention is for the shortest possible period. If the courts deal with a detention order they always have to monitor whether the migration authorities treated the expulsion with the highest possible efficiency.

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62 Bundesgerichtshof Beschluss V ZB 111/10 vom 07.04.2010 in der Abschiebehaftsache, paragraph 12a.) page 5.
The Judgment continues by stating “Da die Nichteinhaltung der für Eilverfahren geltenden Fristen auch auf Fehlern und Versäumnissen des Bundesamts beruht, ist ein Verstoß gegen den Beschleunigungsgrundsatz festzustellen. Ist die Zurück- oder Abschiebung von der Behörde nicht mit der gebotenen Beschleunigung betrieben worden, stellt sich die weitere Fortdauer der Haft als ein unverhältnismäßiger Eingriff in das Freiheitsgrundrecht des Betroffenen dar.” This means that the non-compliance with the fast-track procedure was due to the default of German authorities and is thus a breach of the fast-track requirement. If the state authorities do not comply with the fast-track procedures, the continuous detention is a disproportionate intrusion in the fundamental right to freedom of the concerned person. Consequently the person has to be released from detention.

1d.) What is a fair hearing?

1. Hard Law

Sources:
- Aufenthaltsgesetz (AufenthG) (Article 62 (3.5))
- Allgemeine Verwaltungsvorschrift zum Aufenthaltsgesetz (AufenthG-VwV) (Article 62.0.0, Article 62.0.3.1, Article 62.0.3.6, Article 62.2.0.1, Article 62.2.1.1, Article 62.2.1.3)

There are two legal sources for providing a fair hearing to a detained migrant. First, the AufenthG indirectly applies the principle of “fair hearing” in Article 62 (3.5) where it is stated “von der Anordnung der Sicherheitshaft nach Satz 1 Nr. 1 kann ausnahmsweise abgesehen werden, wenn der Ausländer glaubhaft macht, das er sich der Abschiebung nicht entziehen will.” This provides that where the immigrant is able to provide evidence that he does not intend to abscond before expulsion is executed, detention need not necessarily be ordered. Although this provision does not directly oblige the judicial authorities to apply a fair hearing, it shows that immigrants can provide evidence, which can positively affect their detention.

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63 Bundesgerichtshof Beschluss V ZB 111/10 vom 07.04.2010 in der Abschiebehaftasache, paragraph 20.cc p. 8
In AufenthG-VwV there are more direct provisions on fair hearing. The first step is mentioned in Article 62.0.0 where it is stated that all decisions of immigrant detention have to be obtained by a judicial decision (according to Article 104 Absatz 2 Satz 1 GG, § 62 Absatz 2). Article 104, which is referred to in the aforementioned provision also states that every judicial decision has to be based on a hearing of the suspect. Nevertheless, Article 62.0.0 also states that in exceptional cases, detention is also possible without judicial decision. However, in these cases the judicial decision has to be obtained immediately afterwards.

Article 62.0.3.1 requires that “Mit dem Antrag der Ausländerbehörde auf Vorbereitungshaft beim zuständigen Amtsgericht (§ 416 FamFG soll die Akte des Ausländer vorgelegt werden (§ 417 Absatz 2 Satz 3 FamFG). Für die Zulässigkeit ist der Antrag zu begründen und hat Tatsachen zu den in § 417 Absatz 2 Satz 2 FamFG aufgeführten Vorraussetzungen für die Anordnung der Haft zu enthalten (...)” This means that where the immigration authorities request the detention of a migrant, the file of that migrant needs to be available to the judicial authority. For the request to be eligible, grounds for the detention need to be presented which are based on the specific case facts. This provision prevents arbitrary detention and contributes to a fair consideration of the facts.

In Article 62.0.3.6 it is mentioned that “Die Ausländerbehörde hat Haft- und Haftverlängerungsanträge so rechtzeitig zu stellen, daß die mündliche Anhörung des Ausländer vor der zu treffenden Entscheidung des Haftrichters durchgeführt werden kann. Ausnahmen sind zulässig, wenn die Vorraussetzungen des §420 Absatz 2 FamFG (Nachteile für die Gesundheit des Anzuhörenden oder das Vorhandensein einer übertragbaren Krankheit) erfüllt sind; bei Gefahr im Verzug kann das Gericht ohne Anhörung des Ausländer eine einstweilige Freiheitsentziehung anordnen. (...)“.

This provides that the migration authorities have to request detention of immigrants in a timely manner, so that there can be a oral hearing of the concerned immigrant before a decision is taken. In exceptional circumstances, immigrants can be detained without a previous hearing. This is the case when the health condition of the immigrant does not allow it; or if he/she suffers from a communicable disease. Furthermore, in exigent

64 Article 104 Absatz 3 Satz 1 GG.
circumstances, the court is also allowed to order detention without previous hearing. Nevertheless, it is not specified what exactly counts as exigent circumstance, leaving a relatively broad leeway to circumvent a hearing.

In article 62.2.0.1 it is stated that in cases where the immigrant demonstrates that he does not intend to abscond before expulsion is executed (e.g. by showing a flight ticket), it is not sufficient to detain a migrant based on grounds as stipulated in § 62 Absatz 2, Satz 3). Nevertheless, this provision is limited in Article 62.2.1.1.1 where it is mentioned that evidence given by an immigrant just counts as valid where it is realizable (for instance immigration to a third state).

Article 62.2.1.3 regulates another exception where an oral hearing is not applicable. It is stated that where the grounds for detention are available but the migrant is due to unknown place of residence untraceable, it can be abstained from an oral hearing.

2. Case Law

Sources:
- Bundesgerichtshof Beschluss V ZB 223/09 vom 06.05.2010 in der Abschiebehaftssache
- Bundesgerichtshof Beschluss V ZB 193/09 vom 06.05.2010 in der Abschiebehaftssache
- Bundesgerichtshof Beschluss V ZB 3/10 vom 17.06.2010 in der Abschiebehaftssache
- Bundesgerichtshof Beschluss V ZB 120/10 vom 16.09.2010 in der Abschiebehaftssache

V ZB 193/09 concerns a migrant from Sierra Leone who illegally entered Germany. He applied for asylum which was refused with the additional requirement that he needs to leave Germany within one month. Additionally, German authorities ordered “Sicherungshaft” in order to ensure this expulsion. In this regard, the migrant formulated a complaint against his detention. The court ruled: “Das Verfahren gegenüber dem Betroffenen leidet zudem daran, dass er zu keinem Zeitpunkt über sein Recht belehrt

65 Translated by author.
Here the court objected that in the proceedings against him he was at no point informed about his rights. The Court continues by stating that “Die Belehrung ist unerlässlicher Bestandteil eines rechtsstaatlichen fairen Verfahrens (vgl. BVerfG NJW 2007, 499, 500). Unterbleibt die Belehrung bei der Inhaftierung, leidet die Anordnung der Freiheitsentziehung an einem grundlegenden Verfahrensmangel, der zu ihrer Rechtswidrigkeit führt. So verhält sich hier.” This means that the information about rights is an unabating part of a lawful, fair proceeding. Without this information (like in the case at hand), a detention order is the result of a procedural default and thus unlawful.

V ZB 193/09 concerns a case where a regional court ruled that the concerned migrant agreed to a marriage of convenience in order to prevent his expulsion. However, the BGH mentions that this ruling might be the result of a procedural error since at no point was the wife of the concerned person interviewed. This contravenes the principle of procedural fairness.

In V ZB 3/10 a migrant immigrated to Germany and was detained, at which point he mentioned that he had Italian identity documents which were at a friends’ house. He was detained by the German authorities, he formulated a complaint to the regional court. The BGH ruled that “Das Beschwerdegericht hat die gebotene persönliche Anhörung des Betroffenen versäumt.“ (…) (Es) hat sich allein darauf gestützt, dass der Betroffene bei seiner Festnahme keine Papiere bei sich führte und keinen Flüchtlingsstatus hat. Das ist unzureichend.” This means that the regional court failed to arrange a hearing with the concerned person, which is a procedural error. Furthermore, the court used as the only ground for detention the fact that the migrant did not possess identifying documents, which is not sufficient for detention. Additionally, the BGH ruled that „Die Vorschrift legt vielmehr fest, dass der Richter den Betroffenen persönlich anhören muss, aber nicht, in welchem Umfang das zu geschehen hat.“ (V ZB 3/10, document i, p. 10). This means

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66 Bundesgerichtshof Beschluss V ZB 223/09 vom 06.05.2010 in der Abschiebehaftsache, paragraph 16
67 Bundesgerichtshof Beschluss V ZB 223/09 vom 06.05.2010 in der Abschiebehaftsache, paragraph 18
68 Bundesgerichtshof Beschluss V ZB 193/09 vom 06.05.2010 in der Abschiebehaftsache, paragraph 17, page 7.
69 Bundesgerichtshof Beschluss V ZB 3/10 vom 17.06.2010 in der Abschiebehaftsache, paragraph 7, page 4.
70 Ibid, 22.b.) page 10.
that according to the rules of procedure, the judge has to hear the concerned person. Nevertheless, the extent to which this happens is not regulated.

Another judgment regulating the importance of hearings in order to ensure procedural fairness is V ZB 120/10. The case concerned a Philippine migrant who stayed illegally in Germany for a few years before it was revealed that she did not possess a residence permit or identifying documents. Consequently, the authorities ordered “Sicherungshaft” in order to ensure her expulsion. The migrant formulated a complained against this detention. The Court ruled that “die Entscheidung beruht auf einem Verfahrensmangel. Die Feststellung, die Betroffene habe nicht glaubhaft gemacht, dass sie sich der Abschiebung nicht entziehen werde (vgl. § 62 Abs. 2 Satz 3 AufenthG), hätte nur nach einer persönlichen Anhörung der Betroffenen durch das Beschwerdegericht ergehen dürfen.”71 This can be translated in the following way: The decision to detain is based on a procedural error because she was not given the chance to prove that she had no desire to abscond. Such a demonstration could have been made at a personal hearing before the court.

1e.) Duration of Detention

1. Hard Law

Sources:
- Aufenthaltsgesetz (AufenthG) (Article 62 (1), Article 62 (2), Article 62 (4)
- Allgemeine Verwaltungsvorschrift zum Aufenthaltsgesetz (AufenthG-VwV) (Article 62.0.2, Article 62.0.3.1, Article 62.0.3.6, Article 62.1.1, Article 62.1.3, Article 62.3.-62.3.4)
- Zuwanderungsgesetz, (Article 62 (1), Article 62 (3))

The Aufenthaltsgesetz mentions in the first paragraph of the article on detention that detention shall always last for the shortest possible period.72 In the following paragraph it is stipulated that “Vorbereitungshaft” [preparation detention] shall not exceed six

71 Bundesgerichtshof Beschluss V ZB 120/10 vom 16.09.2010 in der Abschiebehaftssache, paragraph 6a, p.4
72 Article 62 (1) AufenthG.
weeks. Subsequently, it is mentioned that “Sicherungshaft” [safeguarding detention] can last up to six months. In cases where the alien obstructs his/her expulsion, detention can be extended to a maximum of twelve months. Consequently, “Sicherungshaft” can last up to 18 months. Further, it is specified that “Vorbereitungshaft” has to count against the maximum period of “Sicherungshaft”.

The administrative act accompanying the Aufenthaltsgesetz includes a provision on the length of detention in Article 62.0.2. Although not mentioning a specific limited period it is stated that in any case the detention is only permissible as long as it allows for the preparation of expulsion. Furthermore, in Article 62.0.3.1 it is mentioned that in exceptional cases, it is possible that “Vorbereitungshaft” could last longer than six weeks, but only if it is requested prior to the initial detention, and if it is not caused by administrative delays of the authorities. In any case, every duration of detention has to be justified in due time, so that the alien can be interviewed before the judge orders detention.

The third subparagraph of Article 62 AufenthG_VwV deals with the length of “Sicherungshaft” [safeguarding detention]. In the first sub-paragraph it is mentioned that in general Sicherungshaft shall not exceed three months. Furthermore, it is stated that if the period has to be extended to six months, it shall not automatically be regarded as proportionate. Ultimately, an extension to up to 12 months more is only legitimate where the alien is responsible for the extended expulsion period.

In the Zuwanderungsgesetz length of detention is also mentioned. In Article 62 (1) it is also mentioned that “Vorbereitungshaft” shall not exceed 6 month while Sicherungshaft can last up to six month with a possible extension of twelve month. While Vorbereitungshaft merely serves the direct preparation of expulsion, Sicherungshaft is applied to ensure expulsion (e.g. if there is the risk of absconding).

73 Article 62 (2) AufenthG.  
74 Article 62 (4) AufenthG.  
75 Ibid.  
76 Article 62.0.2 AufenthG_VwV.  
77 Article 62.0.3.1 AufenthG_VwV.  
78 Article 62.0.3.6 AufenthG-VwV.  
79 Article 62.3.0 AufenthG_VwV.  
80 Ibid.  
81 Ibid.  
82 Article 62 (3) Zuwanderungsgesetz.
2. Case Law

Sources:
- Bundesgerichtshof Beschluss V ZA 9/10 vom 25.03.2010 in der Abschiebehaftssache
- Bundesgerichtshof Beschluss V ZB 261/11 vom 30.06.2011 in der Abschiebehaftssache

V ZA 9/10 concerns a migrant whose Asylum application was rejected. Nevertheless, after he left Germany he again entered the country whereas he was detained. The detention (Sicherungshaft) was first ordered for 3 month but then extended. The BGH in its judgment mentioned that „Die Haft durfte über die Dreimonatsfrist (§ 62 Abs. 2 Satz 4 AufenthG) hinaus verlängert werden. Die Regelung in § 62 Abs. 2 Satz 4 AufenthG lässt allerdings erkennen, dass im Regelfall die Dauer von drei Monaten Haft nicht überschritten werden soll und eine Haftdauer von sechs Monaten (§ 62 Abs. 3 Satz 1 AufenthG) nicht ohne weiteres als verhältnismäßig angesehen werden darf. Daraus folgt, dass die Verlängerung einer zunächst in zulässiger Weise auf drei Monate befristeten Haftanordnung unzulässig ist, wenn die Abschiebung aus Gründen unterblieben ist, die von dem Ausländer nicht zu vertreten sind (Senat, BGHZ 133, 235, 237 f., zu § 57 AuslG). Diese Voraussetzung liegt hier jedoch nicht vor.”

The court stressed that normally „Sicherungshaft” shall not last longer than three months. Exceptionally, a detention of six months is lawful but this only if the detainee himself causes the extension of detention. This was the situation in the case at hand. Thus, the complaint against the duration of detention was rejected by the BGH.

This issue was also discussed in V ZB 261/11 where the court ruled that „Der Ausländer hat es nicht zu vertreten, wenn eine Abschiebung auf Grund einer einstweiligen Anordnung des Verwaltungsgerichts nicht durchgeführt werden kann. Das Scheitern der Abschiebung aus diesem Grund rechtfertigt keine weitere Verlängerung der

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83 Bundesgerichtshof Beschluss V ZA 9/10 vom 25.03.2010 in der Abschiebehaftssache, paragraph 19 (p.7-8)
bereits über drei Monate andauernden Abschiebungshaft.”\textsuperscript{84} Here the Court stressed that if expulsion fails to take place due to a delay caused by the administrative court, an extension of detention is not permitted.

\textbf{1f.) Alternatives to Detention}

\textit{1. Hard Law}

\begin{quote}
Sources:
\begin{itemize}
  \item Aufenthaltsgesetz (AufenthG) (\textit{Article 62 (1)})
  \item Allgemeine Verwaltungsvorschrift zum Aufenthaltsgesetz (AufenthG-VwV) (\textit{Article 24.5})
\end{itemize}
\end{quote}

In regard to alternatives to detention, German Law does not provide a detailed legal foundation. In the Aufenthaltsgesetz it is merely stated that detention is prohibited where other sufficient means can lead to the same results.\textsuperscript{85} However, no examples or clarifications are provided.

In the administrative act accompanying the Aufenthaltsgesetz there is one article which could either be identified as an alternative to detention or an alternative form of detention. Article 24.5 deals with “\textit{Oertliche Aufenthaltsbeschränkung}” [local residence constraint].\textsuperscript{86} It is stipulated that the alien needs to reside in a specified area or building. The aim of this measure is to sort out legal disputes against requirements imposed by the responsible immigration authorities.\textsuperscript{87}

\begin{flushright}
\textsuperscript{84} Bundesgerichtshof Beschluss V ZB 261/11 vom 30.06.2011 in der Abschiebehaftssache, paragraph 20, page 8.
\textsuperscript{85} Article 62 (1) AufenthG
\textsuperscript{86} Translated by the author.
\textsuperscript{87} Article 24.5 AufenthG-VwV.
\end{flushright}
2. Procedural Safeguards

2a.) The requirement to inform a detainee of reason for detention

1. Hard Law

- Aufenthaltsgesetz (AufenthG) Article 62a (5)
- Aufenthaltsgesetz (AufenthG) Article 77 (3)

Before the detainee has to go to detention, Article 77 (3) of the Aufenthaltsgesetz states that the judgement of the administrative act has to be translated to the asylum seeker in order for the convicted person to comprehend why he or she lost the right of asylum. This Rechtsbehelfsbelehrung furthermoe has to be costless and in a language which the asylum seeker understands. Additionally, “The translation can be in oral or written form”. If the foreigner however came into the country illegally or was convicted due to criminal reasons, then the state does not have to provide a translation.

In the Aufenthaltsgesetz it is mandated that “deportation detainees are to be informed about their rights and obligations and about the rules that are applied in the facility.” Nevertheless, it is not specifically stated when detainees are to be informed and if there is a possibility to get special assistance, such as an interpreter.

2b.) Automatic review of detention order

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88 Explanation of legal remedy
89 “Die Übersetzung kann in mündlicher oder in schriftlicher Form zur Verfügung gestellt werden.“ (Translated by the author)
90 “Abschiebungsgefangene sind über ihre Rechte und Pflichten und über die in der Einrichtung geltenden Regeln zu informieren.” (Translated by the author).
In German asylum law, automatic review of detention order does not exist; nevertheless, it is possible for the plaintiff to take legal action against the detention order. According to the Asylverfahrensgesetz, the indictment against a judgement has to be made within two weeks after the notification of the decision. Moreover, the so-called Klagefrist, represents a time limit for action by the asylum seeker. As specified in paragraph 2, the plaintiff shall state the grounds setting out the facts and evidence within a period of one month after the notification of the decision.\textsuperscript{91}

2c.) Access to justice

1. Hard Law

Access to justice is secured by two legislative texts: firstly, the Aufenthaltsgesetz and secondly, the Allgemeine Verwaltungsvorschrift zum Aufenthaltsgesetz. During detention, the Abschiebungsgefangenen (“deportation prisoners”) are authorized to contact legal representatives or their correct consulates.\textsuperscript{92} In addition, Article 58a.4.0 states that in order to ensure a fair hearing, the Vollstreckungsorgane (“enforcement bodies”) shall provide the plaintiffs with a list of lawyers in order to have a representative for a possible litigation in front of the Bundesverwaltungsgericht (“Supreme Administrative Court”). As a result, access to justice is given under German asylum law.

\textsuperscript{91} Ibid. (Translated by the author).
\textsuperscript{92} Retrieved from: \url{http://www.verwaltungsvorschriften-im-internet.de/pdf/BMI-MI3-20091026-SF-A001.pdf}
2d.) Places of detention

1. Hard Law

<table>
<thead>
<tr>
<th>Law</th>
<th>Title</th>
<th>Section</th>
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<tr>
<td>Aufenthaltsgesetz (AufenthG)</td>
<td>Aufenthaltsgesetz, Article 62a (1)</td>
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<td>Asylverfahrensgesetz</td>
<td>Asylverfahrensgesetz, Schaffung und Unterhaltung von Aufnahmeeinrichtungen, Article 44</td>
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<td>Asylverfahrensgesetz</td>
<td>Asylverfahrensgesetz, Aufnahmequoten, Article 45</td>
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<td>Asylverfahrensgesetz</td>
<td>Asylverfahrensgesetz, Bestimmung der zuständigen Aufnahmeeinrichtungen, Article 46</td>
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The places of detention for individuals seeking asylum in Germany is strictly controlled and differs to “common” German places of detention. As specified in AufenthG, Article 62a (1),

“Die Abschiebungshaft wird grundsätzlich in speziellen Hafteinrichtungen vollzogen. Sind spezielle Hafteinrichtungen im Land nicht vorhanden, kann sie in diesem Land in sonstigen Haftanstalten vollzogen werden; die Abschiebungsgefangenen sind in diesem Fall getrennt von Strafgefangenen unterzubringen. Werden mehrere Angehörige einer Familie inhaftiert, so sind diese getrennt von den übrigen Abschiebungsgefangenen unterzubringen. Ihnen ist ein angemessenes Maß an Privatsphäre zu gewährleisten.”

This means that remand pending deportation is in principal to be enforced in special detention facilities. Furthermore, the Article provides exceptions for federal states that do not have special detention facilities for asylum seekers. In this case, Art. 62a (1) allows the imprisonment to be in common detention facilities, with the exception that asylum seekers have to be accommodated separately from prisoners.

It is further required, as stated in Asylverfahrensgesetz, Art. 44, that federal states have to create specialized reception centers for asylum seekers and additionally have to assure that the provision of a minimum amount of accommodation is fulfilled. The Federal Ministry of the Interior informs the federal states on a monthly basis about the number of newly arrived asylum seekers. According to Article 45, the federal states can

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95 Ibid.
establish an admission rate of asylum seekers, which is also called Königsteiner Schlüssel.

Additionally, Art. 46 (1) regulates the jurisdiction of the admission of foreigners. There are several requirements, such as rate according to the aforementioned Art. 45, that has to be fulfilled in order to enter detention. In case the requirements are not fulfilled, paragraph 2 regulates the jurisdiction.

Further, a “central distribution point of the Federal Ministry of the Interior, names at the request of a detention center, the responsible detention centre” 96. This central distribution point also makes sure to update their necessary information regularly in order to determine entries and departures. This helps to specify the occupancy level and vacant places of accommodation.97

All in all, the federal states manage the places of detention and regulate the asylum seekers’ appropriate allocation.

3. Conditions of detention
3a.) Access to healthcare

1. Hard Law

- Aufenthaltsgesetz (AufenthG), Chapter 6, Art. 68 (1)
- Gesetz zur Umsetzung aufenthalts- und asylrechtlicher Richtlinien der EU (Richtlinienumsetzungsgesetz), 3. Article 2
- Asylverfahrensgesetz (Asylvfg), Article 62

In cases of detention, the statutes provide that the detainee has to pay for his or her health, via –if possible- his or her own health insurance. If the asylum seeker does not have the resources to compensate for his or her health insurance, he or she is required to determine a responsible person to pay any costs relating to his or her stay in Germany,

96 “Eine vom Bundesministerium des Innern bestimmte zentrale Verteilungsstelle benennt auf Veranlassung einer Aufnahmeeinrichtung dieser die für die Aufnahme des Ausläanders zuständige Aufnahmeeinrichtung” (Translated by the author).
97 Asylverfahrensgesetz, Art. 46 (4). (Translated by the author).
which also includes the “care in case of illness.” As asylum seekers are required to pay for their own health through an insurance, the Richtlinienumsetzungsgesetz, 3. Article 2, confirms that the asylum seeker has enough health insurance coverage, in the case that she or he has a health insurance. Lastly, the Asylverfahrensgesetz states in Article 62 (1) under the paragraph of “health examination” that foreigners living in a remand pending deportation or shared accommodation are required to take a physical examination. Generally, German law does allow, and in some cases require, physical examination and therefore access to healthcare; however, there are no specific statutes that prescribe the access to healthcare during detention only.

3b.) Protection of vulnerable people

1. Hard Law

Sources:
- Aufenthaltsgesetz (AufenthG), Chapter 5, (Article 56 (1) 2.)
- Aufenthaltsgesetz (AufenthG), Chapter 5, (Article 58 (1a))
- Aufenthaltsgesetz (AufenthG), Chapter 5, (Article 62 (1))
- Aufenthaltsgesetz (AufenthG), Chapter 5, (Article 62 (a) (3))
- Allgemeine Verwaltungsvorschrift zum Aufenthaltsgesetz, 2.3 Sicherung des Lebensunterhalts, Article 2.3.1.1.
- Gesetz zur Umsetzung aufenthalts- und asylrechtlicher Richtlinien der EU (Richtlinienumsetzungsgesetz), Article 104a (3)

According to the five available legislations regarding asylum in Germany, there is no definition of vulnerable people. However, other statutes in German law, such as Arbeitsrecht, imply that it means children under the age of 18, pregnant women and handicapped people as besonders schutzbedürftige Personengruppen. Chapter 5 of the Aufenthaltsgesetz deals with i.a. Besonderer Ausweisungsschutz, which means that under special circumstances, an expulsion may be declined. As stated in Article 56 (1) 2.,

98 “Versorgung im Krankheitsfalle” (Translated by the author).
99 “Ist der Ausländer in einer gesetzlichen Krankenversicherung krankenversichert, hat er ausreichenden Krankenversicherungsschutz” (Translated by the author).
100 “Ausländer, die in einer Aufnahmeinrichtung oder Gemeinschaftsunterkunft zu wohnen haben, sind verpflichtet, eine ärztliche Untersuchung auf übertragbare Krankheiten einschließlich einer Röntgenaufnahme der Atmungsorgane zu dulden. Die oberste Landesgesundheitsbehörde oder die von ihr bestimmte Stelle bestimmt den Umfang der Untersuchung und den Arzt, der die Untersuchung durchführt.“
101 Labor Law (Translated by the author).
102 Vulnerable people (Translated by the author).
103 Special protection from expulsion (Translated by the author).
a person who has “a residence permit and was born in Germany or entered Germany as a minor and has lawfully been in the federal territory for at least five years, enjoys special protection from expulsion.”

Article 58 (1a) of the Aufenthaltsgesetz states “Vor der Abschiebung eines unbegleiteten minderjährigen Ausländer hat sich die Behörde zu vergewissern, dass dieser im Rückkehrstaat einem Mitglied seiner Familie, einer zur Personensorge berechtigten Person oder einer geeigneten Aufnahmeeinrichtung übergeben wird.”

Therefore, German asylum law protects the right of unaccompanied minors in case of deportation, as it requires that national authorities investigate -before the return to a third country- whether a family member or other primary carer can guard the child/children.

The statutes concerning Abschiebungshaft underline in the first paragraph the distinct regulations for minors in case of detention of the whole family. According to German law, “minors may only be taken in detention in exceptional cases and only for so long as it is appropriate in the light of the child’s welfare.” Moreover, Art. 62a (3) highlights the incorporation of guidelines by the European Parliament, 2008/115/EG, which establish common norms and methods relating to the return of illegally staying third-country nationals, for underage deportation detainees.

In addition, the federal states of Germany create programs to support the protection of vulnerable people, led by institutions, such as the church. One example is the city of Trier (in the federal state of Rhineland-Palatinate), which created therapeutic help to vulnerable refugees, called “Therapeutische Hilfen für besonders schutzbedürftige Flüchtlinge.”

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104 ”Ein Ausländer, der eine Aufenthaltserlaubnis besitzt und im Bundesgebiet geboren oder als Minderjähriger in das Bundesgebiet eingereist ist und sich mindestens fünf Jahre rechtmäßig im Bundesgebiet aufgehalten hat, genießt besonderen Ausweisungsschutz.“ (Translated by the author).

105 Remand pending deportation


Furthermore, the *allgemeine Verwaltungsvorschrift zum Aufenthaltsgesetz*,\(^{109}\) in Article 2.3.1.1 secures the help of financial means in exceptional cases, which includes pregnancy.\(^{110}\)

Lastly, the implementation of the asylum regulations of the European Union led to changes in German law concerning the case of detention. According to Article 104a (3), when a person who is not only a parent, but also the legal guardian has to go to prison with the consequence that the parent and his/her child will be separated, the German state will have to guarantee care.\(^{111}\)

### 2. Case Law

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<td>• VG Ansbach, Urteil Az. AN 11 K 12.30158 vom 27.09.2012 zur Ausreise mit Eltern in den Iran.</td>
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The two precedent cases are related to dispensations of justice regarding Article 58 (1a) AufenthG.\(^{112}\) While the first case, *Urteil A 11 S 3392/11*,\(^{113}\) treats the protection against deportation (“Abschiebungsschutz”) of unattended children, the second case, *Urteil Az. AN 11 K 12.30158*,\(^{114}\) deals with a family whose credibility of political persecution was not proven sufficiently. Both cases show different situations and how German asylum law deals with the protection of vulnerable people.

In the first case, the *Volksgerichtshof* (People’s Court of Justice) of the federal state Baden-Württemberg, had to decide whether the protection against deportation for

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109 See p. 25
110 “Dem entsprechend ist die Inanspruchnahme einzelner Hilfen nach dem SGB II oder XII in seltenen Ausnahmefällen unschädlich, etwa bei Studierenden aufgrund einer Schwangerschaft” (Translated by the author).
112 See p. 26
114 Retrieved from: [http://openjur.de/u/542361.html](http://openjur.de/u/542361.html)
unaccompanied afghan children and adolescents is given, when the referred children do not have any relatives in their country of origin. Next to Article 58 (1a) AufenthG, Article 60, para. 7, sentence 1 AufenthG,\textsuperscript{115} states that “it shall be refrained from deporting an alien to another state if the country of destination would portray major concrete threat for the body, life or freedom.”\textsuperscript{116} Even though the same case was previously overruled, because “the plaintiff’s factual submissions were not credible and unsubstantiated”,\textsuperscript{117} the plaintiff filed an application for dismissing the appeal, while presenting new evidence which support his claim of risk exposure in the country of Afghanistan. According to the court, there must be a high probability of risk for the plaintiff in order to avail oneself of Art. 60, para.7, as mentioned above.\textsuperscript{118} The court further ruled “this degree of probability marks the border, from which deportation in his country of origin, under constitutional law, appears to be unreasonable”.\textsuperscript{119} As a result, the \textit{Gesamtgefahrenschau} (“exhibition to total danger”) must be established.\textsuperscript{120} Even though, previously, the court had referred back to other more recent cases where it was established that the situation in Kabul, Afghanistan had improved and that a deportation would be legitimate (Arts. 26-30, \textit{Urteil A 11 S 3392/11}), it was decided that the situation of danger cannot be excluded, behind the background that children and young adults would be in Kabul without any family member or other care taker.\textsuperscript{121}

In the second case, \textit{Urteil Az. AN 11 K 12.30158}, the Verwaltungsgericht (“Administrative Court”) of Bavaria ruled upon a young male who did not want to be deported back to Iran. The plaintiff claimed to be subjected to danger, as Taliban had threatened his father with violence and the plaintiff feared to pay for his father’s escape.

\textsuperscript{115} Retrieved from: \url{http://dejure.org/gesetze/AufenthG/60.html}

\textsuperscript{116} “Von der Abschiebung eines Ausländer in einen anderen Staat soll abgesehen werden, wenn dort für diesen Ausländer eine erhebliche konkrete Gefahr für Leib, Leben oder Freiheit besteht.“ (Translated by the author).

\textsuperscript{117} \textit{Urteil A 11 S 3392/11}, Article 2, sentence 3. “weil der Sachvortrag des Klägers zu unsubstantiiert und damit nicht glaubhaft sei“ (Translated by the author).

\textsuperscript{118} „Diese Gefahren müssen dem Ausländer daher mit hoher Wahrscheinlichkeit drohen.“ \textit{Urteil A 11 S 3392/11}, Art. 18a (Translated by the author).

\textsuperscript{119} Dieser Wahrscheinlichkeitsgrad markiert die Grenze, ab der seine Abschiebung in den Heimatstaat verfassungsrechtlich unzumutbar erscheint (BVerwG, Urteil vom 29.09.2011 - 10 C 24.10 - juris Rn. 20) (Translated by the author), ibid..

\textsuperscript{120} Das Vorliegen der Voraussetzungen ist im Wege einer Gesamtgefahrenschau zu ermitteln (BVerwG, Beschluss vom 23.03.1999 - 9 B 866.98 - juris Rn. 7). (Translated by the author), ibid..

\textsuperscript{121} Retrieved from: \url{http://www.rechtslupe.de/verwaltungsrecht/unbegleitete-afghanische-kinder-und-jugendliche-ohne-verwandte-im-heimatland-342076}
The court therefore took many reports by international organisations, such as Amnesty International, the UN and ISAF and reports by the Auswärtiges Amt (AA, “Foreign Office) into consideration that treated assessments of the situation of danger in the plaintiff’s country of origin. The court decided that neither Art. 60 AufenthG, nor Art. 58 (1a) AufenthG concern the plaintiff’s situation, as the situation in the plaintiff’s destination –the country, the plaintiff flew from- was ranked as safe enough and additionally the plaintiff would be received by caretakers. All in all, this case underlined the fine difference of exhibitions to threat, which was established by the aforementioned case.

3c.) Access to legal aid/ advice

1. Hard Law

Sources:

- Aufenthaltsgesetz (AufenthG) (Article 62a (2), Article 62a (4), Article 62a (5))

In Article 62a (2) of the AufenthG it is mentioned that “Abschiebungsgefangenen wird gestattet, mit Rechtsvertretern, Familienangehörigen und den zuständigen

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123 Ibid.
124 Ibid.
125 Ibid.
Konsularbehörden Kontakt aufzunehmen.“ This means that “detained migrants are permitted to contact lawyers, family members and the responsible consulate.”

Furthermore, Article 62a (4) stipulates that “Mitarbeitern von einschlägig tätigen Hilfs-und Unterstützungsorganisationen soll auf Antrag gestattet werden, Abschiebungsgefangene auf deren Wunsch hin zu besuchen.“ This requires that representatives of aid and support organisations need to be permitted to visit the detained migrant on request if the migrant agrees. This access to aid organizations might ensure that the detained migrant has access to legal advice suitable in his or her situation.

Ultimately, Article 62a (5) states that „Abschiebungsgefangene sind über ihre Rechte und Pflichten und über die Einrichtung geltenden Regeln zu informieren“. This provision is more general and means that detained migrants need to be informed about their rights and duties in the facility where they are detained.

3d.) Restrictions on movement

1. Hard Law

In Article 54a (3) of the AufenthG it is stated that a migrant „(…) kann verpflichtet werden, in einem anderen Wohnort oder in bestimmten Unterkünften auch außerhalb des Bezirks der Ausländerbehörde zu wohnen, wenn dies geboten erscheint, um die Fortführung von Bestrebungen, die zur Ausweisung geführt haben, zu erschweren oder zu unterbinden und die Einhaltung vereinsrechtlicher oder sonstiger gesetzlicher Auflagen und Verpflichtungen besser überwachen zu können.“ This means that a migrant who shall be expelled can be requested to live in a predetermined accommodation even beyond the district regulated by the responsible immigration authority in the case that this

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is evaluated as serving the purpose of expelling the migrant or leads to a better surveillance of the migrants’ compliance with legal restraints.\textsuperscript{128}

In Article 24.5 of AufenthG-VwV it is written that „Der Ausländer hat Wohnung und gewöhnlichen Aufenthalt an dem Ort zu nehmen, dem er nach Absatz 3 und Absatz 4 zugewiesen wurde. Durch diese kraft Gesetzes vorgesehene örtliche Aufenthaltsbeschränkung soll verzögernden Rechtsstreitigkeiten mit aufschiebender Wirkung von Widerspruch und Klage gegenüber einer isoliert anfechtbaren ausländerbehördlichen Auflage entgegengewirkt werden. Weitergehende Modifizierungen der Aufenthaltserlaubnis (z. B. durch Auflagen nach § 12 Absatz 2) sind möglich, soweit diese nicht mit Bestimmungen der Richtlinie kollidieren.“ This provision regulates situations where the migrant has to move to a location that was allocated to him or her. Such restriction of movement shall negate any civil disputes that may arise.

Ultimately, Article 61.1a of AufenthG-VwV stipulates that „Bei Erteilung einer Duldung nach §60a Absatz 2a ist der Aufenthalt auf den Bezirk der zuletzt zuständigen Ausländerbehörde im Inland zu beschränken (§61 Absatz 1a Satz 1). Soweit der zuständigen Grenzbehörde (§ 71 Absatz 3 Nummer 2) die zuletzt zuständige Ausländerbehörde nicht bekannt ist, da diese zunächst nicht feststellbar oder nicht vorhanden ist, ist das Verfahren nach §15a anwendbar (§61 Absatz 1a Satz 3). This article provides that in the case of the suspension of deportation, the migrant’s residence shall be limited to the district of the responsible migration authority. Where the last responsible migration authority is not known, the process according to §15a is applicable (§ 61 Absatz 1a Satz 3).

In this case, the dividing line between detention and restriction of movement is relatively clear-cut.

\textsuperscript{128} Translated by the author.