

Pauline Endres de Oliveira

Safe Access to Asylum in Europe

Normative assessment of safe pathways to protection
in the legal context of the European Union



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*'I wouldn't have been able to travel to Switzerland on my own.
The possibility to seek asylum at the Swiss embassy saved my life.'*

*Statement of a Somali refugee,
published by the European Council on Refugees
in Exiles (ECRE) in 2011*

Preface

This book was defended as PhD thesis at the Faculty of Law of the University of Giessen in May 2022. The idea for the thesis was born in 2012, when I worked as a migration and asylum lawyer in Berlin. I remember my first case of a Syrian woman, resident in Germany, asking me to help her family members to obtain visas to leave Syria after the outbreak of the Syrian Civil War in 2011. My client stressed that she would be willing to pay for everything, all travel and living expenses of her relatives. I remember explaining that money was not the problem – the issue was the law. Her family members – her elderly mother and adult siblings – did not qualify for family reunification. The exceptional provision of humanitarian admission under Section 22 of the German Residence Act did not apply, as all Syrians were said to be in the same situation of danger and distress. There was no humanitarian admission program at the time and resettlement, as I was told by UNHCR, did not apply to Syrians – their situation was not protracted (yet). Nevertheless, I supported the family with their claims for humanitarian visas at the German embassy in Beirut. I remember sharing their fears the day they crossed the border from Syria to Lebanon, to submit their visa applications in person. I accompanied every bureaucratic step on the way, witnessing all the administrative hurdles of the visa procedure. But it was only when Germany launched its *ad hoc* humanitarian admission programs that the family was granted visas – based on a private sponsorship scheme. This scheme was one of several *ad hoc* humanitarian admission schemes implemented at *Länder* level from 2013 onwards in Germany, granting access to over 21,000 Syrians fleeing the war. Additionally, Germany set up *ad hoc* humanitarian admission schemes at federal level from 2013 to 2015, with more than 21,000 beneficiaries. By the time of implementation, I had begun working as consultant for UNHCR, where I responded to legal queries from Syrian relatives living in Germany. All of them wanted to know how their family members in Syria could safely reach the EU. I constantly repeated that the options were limited, that UNHCR did not have the power to decide, that States have the sole decision-making authority. By 2016, the number of around 42,000 beneficiaries of the *ad hoc* humanitarian admission schemes in Germany contrasted starkly with the

Preface

number of people estimated to have been displaced due to the Syrian civil war by then: 13.5 million.

Now, at the end of 2023, more than ten years after I first had the idea for my thesis, the war in Syria has not come to an end, but most of the humanitarian admission schemes have. Meanwhile, the war in Ukraine has led to the largest refugee crisis in Europe since the Second World War. While the European Union took effective legal measures to offer protection seekers from Ukraine a visa-free entry option and temporary protection status, the majority of the over 108 million people UNHCR declares to be displaced worldwide by the end of 2022 are still in their home countries or regions of origin. There is a political struggle at EU and national level over how to deal with the continuous need for evacuation of thousands of Afghans, whose lives are threatened since the Taliban takeover in 2021. Humanitarian admission programs and other safe pathways are the only way the majority of protection seekers worldwide can reach protection in the EU without risking their lives once more. My practical experiences in the field have raised several questions with regard to the implementation of safe pathways to protection, which I address in this book. My main research interest, however, lies in the relevance of safe pathways with a view to what I describe as the asylum paradox: the paradoxical interplay between the granting of territorial protection by States on the one hand, and the prevention of access to territory through measures of border and migration control on the other.

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Writing this book has been a privilege I owe to the support of several people and institutions. First and foremost, I want to thank my supervisor, Professor Jürgen Bast from the Justus Liebig University Giessen, for his constant support at every step of the way. When I approached him with the idea for my thesis, he asked why I wanted to focus on safe pathways and advised me to remember my motivation whenever I faced difficulties or challenges along the way. In the following years, Professor Bast was always approachable and supportive, offering insightful advice and constructive critique. Whenever I faced a challenge, I remembered his words. I am also particularly thankful to Professor Cathryn Costello for being the second reviewer of the thesis. Professor Costello offered invaluable feedback and advice during my stay at the Refugee Studies Centre in Oxford in 2016. Her work has been a great inspiration during the time of writing. Another great source of support was the group of researchers at the Justus Liebig University. Our regular research seminars have always been an inspiration and very valuable to me. Special thanks go to Rhea Nachtigall, who joined forces with me in Berlin during the last years, constantly exchanging drafts and thoughts with me. Valuable comments and advice were also provided by Dr Dana Schmalz.

Writing and publishing this book has not only taken time, but also required financial resources. I am therefore particularly grateful to the German Research Foundation (Deutsche Forschungsgemeinschaft) for a publication grant. I am further thankful for the scholarship granted by the Heinrich Böll Foundation, which gave me time and freedom for my research and allowed me to spend invaluable time researching abroad. My research stays at the Refugee Studies Centre in Oxford, the University of Copenhagen and the Danish Institute of Human Rights provided me with new insights on the legal and practical implications of safe pathways. Seminars in Oxford, at the Raoul Wallenberg Institute in Lund and the University of Aarhus have been a great source of inspiration. I had the honour to exchange thoughts with outstanding experts in the field. I am particularly thankful for the feedback of Professor Gregor Noll, Professor Jens Vedsted-Hansen and Professor Thomas Gammeltoft-Hansen. Special thanks to Dr Nikolas Feith Tan, who has continuously supported my work.

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I owe the idea for this book to my practical work in the field of asylum law. I therefore want to thank all my former colleagues at the law firm, UNHCR and Amnesty International Germany, as well as all my colleagues from the Network of Migration Law. Their daily commitment to the rights of protection seekers is a constant source of motivation and inspiration to me.

Finally, I want to thank my family and friends for their love and support during the years of writing my dissertation. Special thanks to my parents and my sister, for their constant encouragement. I am also particularly thankful for the help my parents-in-law provided with childcare during the pandemic. Noah and Elias, thank you for always making me smile. Most of all, I am endlessly grateful to my husband David for his tireless support and for always having my back.

Abbreviations

| | |
|--------|--|
| AG | Advocate General |
| APD | EU Asylum Procedures Directive |
| ARAP | Active Refugee Admission Policies |
| ARSIWA | Articles on Responsibility of States for Internationally Wrongful Acts |
| ATCR | Annual Tripartite Consultations on Resettlement |
| BGB | Bürgerliches Gesetzbuch (German Civil Code) |
| BVOR | Blended Visa Office Referred |
| CAT | Convention against Torture |
| CEAS | Common European Asylum System |
| CFR | EU Charter of Fundamental Rights |
| CJEU | Court of Justice of the European Union |
| CPA | Comprehensive Plan of Action |
| CRC | Convention on the Rights of the Child |
| CRRF | Comprehensive refugee response framework |
| e.g. | for example |
| EC | European Communities |
| ECHR | European Convention on Human Rights |
| ECRE | European Council on Refugees in Exiles |
| ECtHR | European Court of Human Rights |
| ed/eds | editor/editors |
| EMN | European Migration Network |
| ERN | European Resettlement Network |
| EU | European Union |
| ff | and the following pages |

Abbreviations

| | |
|--------|--|
| GCM | Global Compact for Safe, Orderly and Regular Migration |
| GCR | Global Compact on Refugees |
| GRSI | Global Refugee Sponsorship Initiative |
| HAP | humanitarian admission program |
| IA | Immigration Act |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| ICJ | International Court of Justice |
| ICORN | International Cities of Refuge Network |
| IDP | internally displaced people |
| IRCC | Immigration, Refugees, and Citizenship Canada |
| JAS | Joint Assistance Sponsorship |
| LTV | limited territorial validity |
| n | footnote |
| NYD | New York Declaration for Refugees and Migrants |
| NGO | non-governmental organisation |
| OAS | Organization of American States |
| OUA | Organization of African Unity |
| PEP | Protected Entry Procedure |
| OR | Obligationenrecht (Swiss Code of Obligations) |
| QD | EU Qualification Directive |
| R2P | Responsibility to Protect |
| RDP | regional disembarkation platform |
| SUR | Strategic Use of Resettlement |
| TEU | Treaty on European Union |
| TFEU | Treaty on the Functioning of the European Union |
| UDHR | Universal Declaration of Human Rights |

| | |
|-------|---|
| UN | United Nations |
| UN GA | United Nations General Assembly |
| UNHCR | United Nations High Commissioner for Refugees |
| VHAS | Voluntary Humanitarian Admission Scheme |
| vol | volume |

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