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Kevin Fredy Hinterberger

Regularisations of Irregularly Staying Migrants in the EU

A Comparative Legal Analysis of Austria, Germany and Spain

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Preface

The following book is the revised and updated translation of my PhD thesis which was originally written in German and which I completed with distinction at the University of Vienna in May 2019. This English translation includes the legislation, case law and literature up to 31 July 2022. The update also looks at new European Court of Justice case law and the recent reform of the 'roots' (*arraigo*) regularisations in Spain (Royal Decree 629/2022).

First and foremost, I would like to thank *Jonathon Watson* for his careful and precise translation of this study as well as for the pleasant and productive cooperation during the translation process.

I would also like to express my gratitude to all those who supported me in completing the thesis, most importantly my PhD supervisor, Prof. *Theo Öhlinger* from the Department of Constitutional and Administrative Law at the University of Vienna. He believed in this study from the outset. Prof. *Jürgen Bast* and Prof. *Konrad Lachmayer* are also to be mentioned for the constructive remarks made in their respective evaluations of my thesis.

My thanks also extend to the many who have accompanied me from the inception of the project to its completion. The inspiration to pursue this research came during my volunteer work as a legal advisor and representative for irregularly staying migrants and asylum seekers at the NGO 'Deserteurs- und Flüchtlingsberatung' in Vienna. Prof. *Anuscheh Farahat*, whom I first met in 2015 at the Network Migration's autumn conference, has continued to support me both as a colleague and friend in an incomparably great way. The same is true for *Philipp Janig* since 'day one' of my academic career (Jessup Moot Court). Associate Prof. *Félix Vacas Fernández* has served as an important academic point of contact in Madrid since my Erasmus semester in 2013.

Throughout the course of writing my thesis, I also had the privilege to undertake research at different institutions, contributing particularly to the comparative legal analysis of the Austrian, German and Spanish law. I would like to thank Prof. *Jürgen Bast* for welcoming me to his Chair for Public Law and European Law at the University of Giessen as a guest researcher from April to July 2016. From January to June 2017, I worked as a research assistant in the Department for Labour Market and Integration Policy at the Austrian Federal Chamber of Labour, where I have been employed since March 2019.

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I am especially thankful to *Johannes Peyrl* for always being available for professional and personal discussions.

I was able to continue my work from July 2017 to June 2018 as a researcher at the Research Centre Human Rights at the University of Vienna, headed by Prof. *Manfred Nowak*. Through this period, I also spent time at the Instituto Universitario de Estudios sobre Migraciones at the University Pontificia Comillas in Madrid (September-December 2017) where Prof. *Cristina Gortázar Rotaeche* supported me on many levels. Finally, I completed my research at the Centre for European Integration Research (EIF) at the University of Vienna from July 2018 to March 2019.

It would not have been possible to complete this study without the financial assistance from various bodies. Between January 2016 and March 2019, I received a scholarship from the Austrian Academy of Sciences (DOC) at the Department of Constitutional and Administrative Law at the University of Vienna. Additionally, I received a scholarship from the 'Heinrich Graf Hardegg'sche Stiftung' and the thesis was awarded the Theodor-Körner-Prize (2016) as well as the Dr. Alois Mock-Science Prize (2021). The English translation and publication was financed by a FWF Stand-Alone Publication grant and the University of Vienna has contributed to the publication through the Ars Iuris Vienna – Doctoral School.

I thank the editors for accepting the thesis in the series 'Schriften zum Migrationsrecht', and the publishers, Nomos as well as Hart Publishing for the excellent cooperation. At Nomos, I am especially grateful to *Matthias Knopik* and Prof. *Johannes Rux*, who both put their trust and energy into this – at times daring – translation project, and *Kristina Stoll* for the great editing work.

This thesis would have never been completed without my wonderful friends who take me the way I am (which is not always an easy task) and who I consider family: I would like to thank *Stefan Bermadinger* for the countless hours talking about life; *Raphaela Haberler* for her sharp and honest opinions; *Philipp Heiling*, my oldest friend; *David Lun* for 'simply' always being there in the good and bad times; *Max Märzinger* for his ever valuable contributions to my life; *Hanna Palmanshofer* for her support in difficult times and *Jorge Horacio Restrepo Moreno*, mi consejero colombo-español.

Finally, the thesis is dedicated to my mother, sister and brother, who have always believed in me and my work. I thank my mother who literally raised me in the spirit of the Notorious B.I.G. quote: 'Stay far from timid, only make moves when your heart's in it'.

Vienna, 13 January 2023 *Kevin Fredy Hinterberger*

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Abbreviations

AEUV	Vertrag über die Arbeitsweise der Europäischen Union (Treaty on the Functioning of the European Union)
AJIL	American Journal of International Law
AöR	Archiv des öffentlichen Rechts
Art(s)	Article(s)
ASVG	Allgemeines Sozialversicherungsgesetz in the version BGBl 108/2022 (Austria: General Social Security Act)
AsylbLG	Asylbewerberleistungsgesetz in the version of 10.12.2021 (BGBl I 5162) (Germany: Act on Benefits for Asylum Seekers)
AsylG (A)	Asylgesetz 2005 in the version BGBl I 83/2022 (Austria: Asylum Act)
AsylG (G)	Asylgesetz in the version of 9.7.2021 (BGBl I 2467) (Germany: Asylum Act)
ATC	Auto del Tribunal Constitucional (Decision of the Spanish Constitutional Court)
AufenthG	Aufenthaltsgesetz in the version of 23.5.2022 (BGBl I 760) (Germany: Residence Act)
AuslBG	Ausländerbeschäftigungsgesetz in the version BGBl I 106/2022 (Austria: Employment of Foreign Nationals Act)
AuslG 1990	Ausländergesetz in the version of 9.7.1990 (BGBl I 1354) (Germany: Foreigners Act 1990)
AVG	Allgemeines Verwaltungsverfahrensgesetz in the version BGBl I 58/2018 (Austria: General Administrative Procedure Act)
AVV-AufenthG	Allgemeine Verwaltungsvorschrift zum Aufenthaltsgesetz in the version of 26.10.2009 (Germany: General Administrative Provisions on the Residence Act)
BeckOK	Beck Onlinekommentar
BeschV	Beschäftigungsverordnung in the version of 20.7.2022 (BGBl I 1325) (Germany: Order on the Employment of Foreigners)
BFA	Bundesamt für Fremdenwesen und Asyl (Austria: Federal Office for Immigration and Asylum)

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BFA-G	Bundesamt für Fremdenwesen und Asyl-Einrichtungsgesetz in the version BGBl I 56/2018 (Austria: Act establishing the Federal Office for Immigration and Asylum)
BFA-VG	Bundesamt für Fremdenwesen und Asyl-Verfahrensgesetz in the version BGBl I 83/2022 (Austria: Act on the Proceedings of the Federal Office for Immigration and Asylum)
BGBl	Bundesgesetzblatt (Austria and Germany: Federal Gazette)
BVerfGG	Bundesverfassungsgerichtsgesetz in the version of 20.11.2019 (BGBl I 1724) (Germany: Act on the Federal Constitutional Court)
B-VG	Bundes-Verfassungsgesetz in the version BGBl I 141/2022 (Austria: Federal Constitutional Law)
BlgNR	Beilage zu den Stenographischen Protokollen des Nationalrates (Austria: supplement to the stenographic records of the National Council)
BOE	Boletín Oficial del Estado (Spain: Official State Gazette)
BR-Drs	Bundesratsdrucksache (Germany: Official Document of the Federal Council)
BVerwG	Bundesverwaltungsgericht (Germany: Federal Administrative Court)
CE	Constitución Española, BOE 311 of 29.12.1978 in the version of 27.9.2011 (Spanish Constitution)
Cf.	Confer
CFR	Charter of Fundamental Rights of the European Union, OJ 2012 C 326/391
CMLRev	Common Market Law Review
CP	Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal, BOE 281 of 24.11.1995 in the version of 29.7.2022 (Spanish Criminal Code)
DÖV	Die Öffentliche Verwaltung
DRdA	Das Recht der Arbeit
e.g.	for example
ECJ	European Court of Justice
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
edn	edition
ed(s)	editor(s)
EEA	European Economic Area
EJML	European Journal of Migration and Law

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ELR	European Law Review
EMN	European Migration Network
Employers Sanctions Directive	Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, OJ 2009 L 168/24
ErläutRV	Erläuterungen zur Regierungsvorlage (Austria: Explanatory remarks to a government bill)
etc.	et cetera
EU	European Union
EuR	Zeitschrift Europarecht
EuZW	Europäische Zeitschrift für Wirtschaftsrecht
f(f)	and the following page(s)
FABL	Die fremden- und asylrechtlichen Blätter
Family Reunification Directive	Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ 2003 L 251/12
FJ	fundamento jurídico (legal basis for the decision)
Fn	Footnote
FRA	European Union Agency for Fundamental Rights
FPG	Fremdenpolizeigesetz in the version BGBl I 206/2021 (Austria: Aliens' Police Act)
FrG	Fremdengesetz 1997, BGBl I 75/1997 (Austria: Aliens' Act)
FS	Festschrift (liber amicorum)
GC	Grand Chamber
GG	Grundgesetz für die Bundesrepublik Deutschland in the version of 28.6.2022 (BGBl I 968) (Basic Law of the Federal Republic of Germany)
GP	Gesetzgebungsperiode (legislative period)
GVV	Grundversorgungsvereinbarung, BGBl I 80/2004 (Austria: Basic Welfare Agreement)
HRLR	Human Rights Law Review
Human Trafficking Directive	Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, OJ 2004 L 261/19
ICLQ	International & Comparative Law Quarterly
ICON	International Journal of Constitutional Law

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i.e.	that is
IJRL	International Journal of Refugee Law
InfAuslR	Informationsbrief Ausländerrecht
IntG	Integrationsgesetz (Austria: Integration Act)
IOM	International Organization for Migration
JRP	Journal für Rechtspolitik
JZ	Juristenzeitung
LEVD	Ley 4/2015, de 27 de abril, del Estatuto de la víctima del delito, BOE 101 of 28.4.2015 in the version of 23.2.2021 (Spain: Law 4/2015 on the standing of victims of crime)
LJCA	Ley 29/1998, de 13 de julio, reguladora de la Jurisdicción Contencioso-administrativa, BOE 167 of 14.7.1998 in the version of 5.5.2021 (Spain: Law 29/1998 governing the jurisdiction of the administrative courts)
LODYLE	Ley Orgánica 4/2000 sobre derechos y libertades de los extranjeros en España y su integración social, BOE 10 of 12.1.2000 in the version of 23.2.2021 (Organic Law 4/2000 on the rights and freedoms of foreigners in Spain and their social integration)
LOE	Ley Orgánica 7/1985, de 1 de julio, sobre derechos y libertades de los extranjeros en España, BOE 158 of 3.7.1985 (Organic Law 7/1985 on the rights and freedoms of foreigners in Spain)
LOMPIVG	Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género, BOE 313 of 29.12.2004 in the version of 5.6.2021 (Spain: Organic Law 1/2004 on comprehensive measures concerning the protection against gender-based violence)
Long Term Residence Directive	Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ 2004 L 16/44
LOTC	Ley Orgánica 2/1979, de 3 de octubre, del Tribunal Constitucional, BOE 239 of 5.10.1979 in the version of 17.10.2015 (Spain: Organic Law 2/1979 on the Constitutional Court)
LPAC	Ley 39/2015, de 1 de octubre, de Procedimiento Administrativo Común de las Administraciones Públicas, BOE 236 of 2.10.2015 in the version of 13.7.2022 (Spain: Law 39/2015 on the Common Administrative Procedure for Public Administration)
mn(s)	marginal number(s)

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NAG	Niederlassungs- und Aufenthaltsgesetz in the version of BGBl I 83/2022 (Austria: Settlement and Residence Act)
NJW	Neue Juristische Wochenschrift
NN	unknown author
No(s).	Number(s)
NS-Ausländer-polizeiverordnung	Nationalsozialistische Ausländerpolizeiverordnung of 11.5.1938, Imperial Law Gazette I 1053/1938 (Austria and Germany: National Socialist Police Order on Foreigners)
NVwZ	Neue Zeitschrift für Verwaltungsrecht
NVwZ-RR	Neue Zeitschrift für Verwaltungsrecht-Rechtsprechungs-Report
NZS	Neue Zeitschrift für Sozialrecht
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal of the European Union
ÖJT	Österreichischer Juristentag
ÖJZ	Österreichische Juristen-Zeitung
ÖZPR	Österreichische Zeitschrift für Pflegerecht
PERCO	Platform for European Red Cross Cooperation on Refugees, Asylum Seekers and Migrants
Qualification Directive	Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ 2011 L 337/9
Recommendation (EU) 2017/432	Commission Recommendation (EU) 2017/432 of 7 March 2017 on making returns more effective when implementing the Directive 2008/115/EC of the European Parliament and of the Council, OJ 2017 L 66/15
REDYLE	Real Decreto 557/2011, de 20 de abril, por el que se aprueba el Reglamento de la Ley Orgánica 4/2000, sobre derechos y libertades de los extranjeros en España y su integración social, tras su reforma por Ley Orgánica 2/2009, BOE 103 of 30.4.2011 in the version of 27.7.2022 (Royal Decree 557/2011 approving the Regulation implementing Organic Law 4/2000 on the rights and freedoms of foreign nationals in Spain and their social integration, as recast by Organic Law 2/2009)
Refugee Convention	United Nations Convention of 28 July 1951 relating to the status of refugees and its New York Protocol of 31 January 1967

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Residence Permit Regulation	Council Regulation (EC) No. 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third-country nationals, OJ 2002 L 157/1
Return Directive	Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ 2008 L 348/98
Return Handbook 2017	Commission Recommendation (EU) 2017/2338 of 16 November 2017 establishing a common 'Return Handbook' to be used by Member States' competent authorities when carrying out return-related tasks, OJ 2017 L 339/83
Royal Decree 2393/2004	Real Decreto 2393/2004, de 30 de diciembre, por el que se aprueba el Reglamento de la Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social, BOE 6 of 7.1.2005 in the version of 15.3.2014 (Royal Decree 2393/2004 approving the regulations of Organic Law 4/2000 on the rights and freedoms of foreigners in Spain and their social integration)
SBC	Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ 2016 L 77/1
Schengen Agreement	Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ 2000 L 239/19
Sent.	Sentence
SGB II	Sozialgesetzbuch Zweites Buch in the version of 19.6.2022 (BGBl I 921) (Germany: Social Insurance Code II)
SGB V	Sozialgesetzbuch Fünftes Buch in the version of 28.6.2022 (BGBl I 969) (Germany: Social Insurance Code V)
SGB XII	Sozialgesetzbuch Zwölftes Buch in the version of 23.5.2022 (BGBl I 760) (Germany: Social Insurance Code XII)
Single Permit Directive	Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, OJ 2011 L 343/1
SIS	Schengen Information System

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STC	Sentencia del Tribunal Constitucional (Decision of the Spanish Constitutional Court)
StGB (A)	Strafgesetzbuch in the version BGBl I 242/2021 (Austria: Criminal Code)
STS	Sentencia del Tribunal Supremo (Decision of the Spanish Supreme Court)
STSJ	Sentencia del Tribunal Superior de Justicia (Spain: Decision of the High Court of an Autonomous Community)
Students and Researchers Directive	Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing, OJ 2016 L 132/21
TEC	Treaty Establishing the European Community, OJ 1992 C 191/1
Temporary Protection Directive	Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ 2001 L 212/12
TEU	Treaty on European Union, OJ 2008 C 115/15
TFEU	Treaty on the Functioning of the European Union, OJ 2012 C 326/01
Travel Document Regulation	Regulation (EU) 2016/1953 of the European Parliament and of the Council of 26 October 2016 on the establishment of a European travel document for the return of illegally staying third-country nationals, and repealing the Council Recommendation of 30 November 1994, OJ 2016 L 311/13
VfGG	Verfassungsgerichtshofgesetz in the version BGBl I 125/2022 (Austria: Constitutional Court Act)
VfGH	Verfassungsgerichtshof (Austria: Constitutional Court)
VGH	Verwaltungsgerichtshof (Germany: Higher Administrative Court)
Visa Regulation	Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, OJ 2018 L 303/39
Vol	Volume

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VVDStRL	Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer
VwGG	Verwaltungsgerichtshofgesetz in the version BGBl I 109/2021 (Austria: Administrative Court Act)
VwGH	Verwaltungsgerichtshof (Austria: Supreme Administrative Court)
VwGO	Verwaltungsgerichtsordnung in the version of 20.7.2022 (BGBl I 1325) (Germany: Administrative Court Code of Procedure)
VwGVG	Verwaltungsgerichtsverfahrensgesetz in the version BGBl I 109/2021 (Austria: Administrative Court Procedure Act)
VwVfG	Verwaltungsverfahrensgesetz in the version of 25.6.2021 (BGBl I 2154) (Germany: Administrative Procedure Act)
WP	Working Paper
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
ZAR	Zeitschrift für Ausländerrecht und Ausländerpolitik
ZEuP	Zeitschrift für Europäisches Privatrecht
ZEuS	Zeitschrift für europarechtliche Studien
ZfV	Zeitschrift für Verwaltung
ZVglRWiss	Zeitschrift für vergleichende Rechtswissenschaft

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