

of the law on foreigners.¹¹⁸⁹ For the first time, the legal status of foreigners was clearly and conclusively regulated by the LODYLE with reference to the previous case law of the Spanish Constitutional Court.¹¹⁹⁰ Overall, the LODYLE is designed around the residence permit.¹¹⁹¹ This Organic Law recognised foreigners as a structural part of Spanish society, as is apparent from the use of the term ‘integration’ (*integración*) in the title.¹¹⁹² *Pico Lorenzo* is, however, more critical in her assessment that the law on foreigners does not have any clear objectives, even describing it as ‘muddled’.¹¹⁹³ Where irregularly staying foreigners are concerned, the LODYLE states several basic rights, such as the access to healthcare and education. Unlike the regularisation programmes, regularisation mechanisms were also introduced that could be accessed at any time.¹¹⁹⁴ The regularisations based on a foreigner’s roots (*arraigo*) are still in force today.¹¹⁹⁵

The law on foreigners was reformed a short time after the LODYLE was passed, with the victory of the conservative *Partido Popular* in the 2000 parliamentary elections considered one of the main reasons.¹¹⁹⁶ Closer analysis of the reform shows that the basic structure of the Organic Law 8/2000 was maintained and only some aspects were fully reformed.¹¹⁹⁷ Most of the provisions were tightened to provide adequate legal instruments to ‘combat’ irregular migration, which was increasing at the time.¹¹⁹⁸

1189 See just *Moreno Rebato*, Circulares, instrucciones y órdenes de servicio: naturaleza y régimen jurídico, *Revista de Administración Pública* 1998/147, 159.

1190 *Aja* in *Aja/Arango* 27 and *Solanes Corella*, *Revista del Ministerio de Trabajo e Inmigración* 2010, 82–85.

1191 Cf. *Triguero Martínez*, *Migraciones* 2014, 438f.

1192 On the development of the notion of integration in the Organic Law 2/2009 see Art 2ter LODYLE; cf. *Solanes Corella*, *Revista del Ministerio de Trabajo e Inmigración* 2010, 93f and *Cerdán/Maas*, *ZAR* 2010, 106.

1193 *Pico Lorenzo*, *Jueces para la democracia* 2002, 63f.

1194 Cf. *Triguero Martínez*, *Migraciones* 2014, 438f.

1195 Cf. *Triguero Martínez*, *Migraciones* 2014, 439 as well as *Pérez/Leraul*, *El arraigo en España* (11–13.4.2012) 3f and *Pico Lorenzo*, *Jueces para la democracia* 2002, 68f.

1196 Cf. *Solanes Corella*, *Revista del Ministerio de Trabajo e Inmigración* 2010, 84 and *Aja* in *Aja/Arango* 29f.

1197 Cf. *Aja* in *Aja/Arango* 30f.

1198 Cf. *Ruiz Paredes*, *La regulación de la extranjería. Enfoque mercantil. Aproximación al empresario inmigrante en España* in *Balado Ruiz-Gallegos* (ed), *Inmigración, Estado y Derecho: Perspectivas desde el siglo XXI* (2008) 631 (633–635).

The last extraordinary regularisation programme¹¹⁹⁹ was undertaken in 2005 and was also the most extensive.¹²⁰⁰ Irregularly staying foreigners could apply for a residence permit from February to March 2005, with the main requirements being continuous residence and registration in a Spanish municipality since August 2004.¹²⁰¹ An employment contract was also required as a means to suppress the employment of undocumented foreign workers.¹²⁰² A person could acquire not only a residence permit but also an employment permit if there was a future employment relationship of at least six months. The validity of both permits was linked to the registration for social security;¹²⁰³ this is still required for a regularisation based on ‘roots’.¹²⁰⁴ This approach avoided the submission of pseudo employment contracts for the sole purpose of acquiring a residence permit. Altogether there were approx. 700,000 applications during this time, of which approx. 578,000 (83%) were successful.¹²⁰⁵

One notable aspect is the fact that the application was to be made by the future employer, not the foreigner.¹²⁰⁶ As with the registration for social security, this requirement was to also ensure the existence of an actual employment relationship. The 2005 regularisation programme was considered a success in tackling the employment of undocumented workers.¹²⁰⁷

1199 Cf. the heading of the transitional provision 3 REDYLE in the version of the Royal Decree 2393/2004.

1200 REDYLE in the version of the Royal Decree 2393/2004; cf. *Arango/Finotelli in Baldwin-Edwards/Kraler* 85ff.

1201 Cf. for an overview *Aguilera Izquierdo*, El acceso de los inmigrantes irregulares al mercado de trabajo: Los procesos de regularización extraordinaria y el arraigo social y laboral, *Revista del Ministerio de Trabajo y Asuntos Sociales* 2006, 175 or *Gómez Díaz in Balado Ruiz-Gallegos* 887ff.

1202 *Gómez Díaz in Balado Ruiz-Gallegos* 888, even claims in this context that it is still the largest measure undertaken against the employment of undocumented workers in Spain.

1203 Cf. *Gómez Díaz in Balado Ruiz-Gallegos* 895ff.

1204 See Chapter 4.E.I.

1205 Cf. on the statistics *Gómez Díaz in Balado Ruiz-Gallegos* 891ff and *Cerezo Mariscal*, La gestión de los procesos de la irregularidad estructural y sobrevenida en España. Análisis maquetado del arraigo, *Revista de Derecho* 2015, 657 (672).

1206 Cf. *Gómez Díaz in Balado Ruiz-Gallegos* 887.

1207 Cf. *Gómez Díaz in Balado Ruiz-Gallegos* 887f; more generally *González Calvet*, El arraigo como instrumento de regularización individual y permanente del trabajador inmigrante indocumentado en el reglamento de extranjería aprobado por el RD 2393/2004, de 30 de diciembre, *Revista de Derecho Social* 2007/37, 105 (107).

Regularised foreigners would now pay social security contributions from their regular and documented employment. Furthermore, the return to irregularity and undocumented employment should also be prevented by the possibility to extend the residence permit.¹²⁰⁸ However, the political rejection of these regularisation programmes by other EU Member States ultimately resulted in the statement in the European Pact on Immigration and Asylum that Member States should now only use ‘case-by-case regularisation’.¹²⁰⁹ The Pact is not legally binding, but Spain has since followed this ‘case-by-case’ approach and not undertaken any further regularisation programmes.¹²¹⁰

The aforementioned importance of foreign workers for the Spanish economy is worth highlighting.¹²¹¹ According to Gómez Díaz, the extraordinary regularisation programmes are closely linked to efforts to regulate the labour market and find solutions to its realities and needs.¹²¹² Camas Roda and Triguero Martínez go further in stating that the immigration policy not only depends on but is also guided by the labour market.¹²¹³ This is shown, for instance, by the fact that under Prime Minister Zapatero the main responsibility for the development of migration policy was transferred from the Ministry of the Interior to the (then) Ministry of Labour (*Ministerio de Trabajo*).¹²¹⁴ The responsibility currently lies with the Secretary of State for Migration (*Secretaría de Estado de Migraciones*) in the Ministry of Inclusion, Social Security and Migration (*Ministerio de Inclusión, Seguridad Social y Migraciones*).

The Organic Law 10/2011 introduced improvements to the ‘temporary residence permit and employment permit for extraordinary circumstances for foreign victims of human trafficking’ and the ‘temporary residence

1208 See on this development, which originated in the 1991 regularisation programme, Gortázar in de Bruycker 335.

1209 Council of the European Union, European Pact on Immigration and Asylum (24.9.2008), 13440/08, 7.

1210 Also in this sense Sabater/Domingo, *International Migration Review* 2012/46, 214f.

1211 Cf. Fernández Bessa/Brandariz García, Transformaciones de la penalidad migratoria en el contexto de la crisis económica: El giro gerencial del dispositivo de deportación, *Revista para el Análisis del Derecho* 2016/4, 1 (4 with further references).

1212 Cf. Gómez Díaz in Balado Ruiz-Gallegos 887.

1213 Cf. Camas Roda, Trabajo decente 82 with further references; for the development see Triguero Martínez, *Migraciones* 2014, 441–447.

1214 Cf. Donaire Villa/Moya Malapeira in Boza Martínez/Donaire Villa/Moya Malapeira 545f.

permit and employment permit for extraordinary circumstances for foreign women who are victims of gender based violence'.¹²¹⁵ In comparison to Austrian and German laws, it is notable that since 2009 there have been hardly any reforms to the Spanish law on foreigners.¹²¹⁶ One exception was in July 2022, when the Spanish government passed the Royal Decree (*Real Decreto*) 629/2022 and reformed the 'roots' (*arraigo*) regularisations.¹²¹⁷ Like in past reforms, the situation of the Spanish labour market was the decisive reason for this reform, in particular to be able to respond swiftly to the growing imbalances of the labour market.¹²¹⁸ These have been partly caused by the COVID-19 pandemic. One major novelty is the introduction of a new type of 'roots' regularisation, the so-called training roots (*arraigo para la formación*) that is inspired by the German 'toleration for the purpose of training'.¹²¹⁹ In this way, the Spanish government wants to incorporate into the labour market foreigners who are living in Spain and work precariously and/or undocumented. Hence, the Spanish government explicitly addresses and tries to tackle this situation.

Currently (31 July 2022) there is a popular legislative initiative for an extraordinary regularisation of foreigners (*Iniciativa Legislativa Popular para una Regularización Extraordinaria de Personas Extranjeras*) running to regularise between 390,000 and 470,000 irregularly staying foreigners in Spain.¹²²⁰ This initiative is called *esenciales* (essentials) and is led by migrant organisations and supported by numerous actors of civil society. 500,000 signatures are necessary to ensure that the proposed legislation is addressed.¹²²¹

II. Legal status of foreigners

Before detailing the current law on 'temporary residence permits for exceptional circumstances', I will first describe the legal status of foreigners, focusing on the general aspects regarding residency law, employment, social benefits, and healthcare.

1215 BOE 180 of 28.7.2011. See Chapter 4.D.I.4.–5.

1216 See Chapter 3.A.I. and Chapter 3.B.I.

1217 See Chapter 3.C.III.1.

1218 Royal Decree 629/2022, BOE 179 of 27.7.2022, 107697.

1219 Royal Decree 629/2022, BOE 179 of 27.7.2022, 107698 and see Chapter 4.E.III. and Chapter 4.E.IV.1.

1220 For more information see <https://esenciales.info/> (31.7.2022).

1221 Art 87(3) CE.

1. (Un)lawful residence

The Spanish law on foreigners distinguishes in principle between minor, serious, and very serious offences (*infracciones leves, graves y muy graves*).¹²²² Under Spanish law, an irregular stay is – with one exception¹²²³ – a serious offence.¹²²⁴ Foreigners who do not meet the requirements for entry and/or residence are required to leave the country.¹²²⁵ As a rule, a separate deportation procedure is initiated against a foreigner who has been caught without a valid right to stay.¹²²⁶ This can result in deportation or a fine.¹²²⁷ The decision regarding deportation takes legal effect and is enforceable at the moment it is rendered.¹²²⁸

In comparison to Austrian and German law, a negative decision regarding residency does not automatically result in a removal measure.¹²²⁹ There is merely the aforementioned obligation to leave the country,¹²³⁰ with the

1222 Arts 52, 53 and 54 LODYLE; cf. *Solanes Corella*, Revista del Ministerio de Trabajo e Inmigración 2010, 81 and *Palomar Olmeda*, La potestad sancionadora pública en materia de extranjería in *Palomar Olmeda* (ed), Tratado de Extranjería⁶ (2020) 455 (459ff).

1223 According to Arts 52(b) and 55(1)(a) LODYLE, failing to renew the residence permit within the first three months after it has expired is only a minor offence punishable with a fine; cf. *Arrese Iriondo*, La problemática jurídica de las situaciones irregulares: la expulsión como sanción a la situación irregular, Revista de Derecho Migratorio y Extranjería 2010/25, 73 (74 and 83–86).

1224 Art 53(1)(a) LODYLE; cf. *Boza Martínez*, El procedimiento sancionador en general y, particularmente, los procedimientos de expulsión in *Boza Martínez/Donaire Villa/Moya Malapeira* (ed), Comentario a la reforma de la ley de extranjería (LO 2/2009) (2011) 261 (263ff); *Castanedo García*, Examen de la jurisprudencia existente relativa a los artículos 57 y 58 de la ley orgánica 4/2000, de 11 de enero y su desarrollo reglamentario, y las sentencias de distintos tribunales superiores de justicia sobre la materia, Revista de Derecho Migratorio y Extranjería 2014/36, 261 (262); *Lorenzo Jiménez*, La expulsión de extranjeros que se encuentran en trámite de regularización, Revista de Derecho Migratorio y Extranjería 2015/38, 13 (24f).

1225 Art 28(3)(c) LODYLE and Art 24 REDYLE.

1226 On the distinction between ordinary (*ordinario*) and preferential (*preferente*) procedure see Arts 226–233 and 234–237 REDYLE; for detail *Arrese Iriondo*, Revista de Derecho Migratorio y Extranjería 2010/25, 80–82.

1227 See Chapter 4.A.I.1.

1228 Arts 21(2) and 63(7) LODYLE; cf. *Lorenzo Jiménez*, Revista de Derecho Migratorio y Extranjería 2015/38, 32.

1229 For Austria, see Chapter 3.A.II.1. and for Germany Chapter 3.B.II.1.

1230 Art 24 REDYLE.

decision on deportation subject to the outcome of a separate deportation process.

2. Employment

According to the heading to Article 10 LODYLE, foreigners have a right to work and to social security.¹²³¹ However, it is not an unrestricted right as the wording suggests:¹²³² the right to work depends on a work permit.¹²³³ The requirements set in the LODYLE therefore need to be met in order to receive a work permit that allows the holder to engage in remunerated activities, be this through self-employment or otherwise.¹²³⁴ According to Article 36(1) LODYLE, this requires a work permit as well as a residence permit,¹²³⁵ which are usually issued together.¹²³⁶ The holder must register with the social security authorities in order for the permits to be valid.¹²³⁷ As mentioned above, this serves to tackle fraud and abuse in relation to employment contracts, and to ensure the legality of the employment relationships.¹²³⁸ Undocumented employment is therefore to be prevented and ‘fought’ as best as possible.

The ‘temporary residence permit for exceptional circumstances’ system requires the application for a work permit to be made simultaneously with the application for a residence permit or during the period in which the application is valid.¹²³⁹ This does not apply to residence permits granted

1231 Cf. *Camas Roda*, Trabajo decente 79–82.

1232 Art 35 CE; cf. *Monereo Pérez/Triguero Martínez*, Art 10 LODYLE in *Monereo Pérez/Fernández Avilés/Triguero Martínez*, Comentario a la ley y al reglamento de Extranjería, Inmigración e Integración Social² (2013) 203.

1233 Cf. *Barcelón Cobedo*, Autorización de Residencia por motivos laborales. Régimen general in *Boza Martínez/Donaire Villa/Moya Malapeira* (eds), *La nueva regulación de la inmigración y la extranjería en España* (2012) 364 (365ff).

1234 Cf. *Monereo Pérez/Triguero Martínez* in *Monereo Pérez/Fernández Avilés/Triguero Martínez* 203 and *Nieves Moreno Vida*, Art 36 LODYLE in *Monereo Pérez/Fernández Avilés/Triguero Martínez* (eds), *Comentario a la ley y al reglamento de Extranjería, Inmigración e Integración Social²* (2013) 614 (614).

1235 Cf. *Nieves Moreno Vida* in *Monereo Pérez/Fernández Avilés/Triguero Martínez* 614, 618ff.

1236 Apart from exceptional cases such as foreigners convicted of criminal offences; cf. *Nieves Moreno Vida* in *Monereo Pérez/Fernández Avilés/Triguero Martínez* 619.

1237 Arts 36(2) and 67(7) REDYLE, as well as Art 128(6) REDYLE.

1238 Cf. *Nieves Moreno Vida* in *Monereo Pérez/Fernández Avilés/Triguero Martínez* 620.

1239 Art 129(2) REDYLE: cf. *Serrano Villamanta* in *Balado Ruiz-Gallegos* 575 and *Esteban de la Rosa*, Art 31 LODYLE in *Monereo Pérez/Fernández Avilés/Triguero*

on the basis of 'roots', as in such instances the residence permit and work permit are granted together.¹²⁴⁰ Consequently, the general requirements for issuing a work permit must also be met,¹²⁴¹ such as an employment contract with the future employer.¹²⁴² If an application is made for a work permit concerning employment as an employee (*por cuenta ajena*), there is no test of the Spanish labour market.¹²⁴³ This differs greatly from the ordinary residency system.¹²⁴⁴ As in Austria and Germany, the national labour-market test is a measure used to manage migration inflow on the basis of economic criteria and by favouring the national (and equivalent) population.¹²⁴⁵

As the work permit is tied to a right to stay, persons residing irregularly in Spain cannot lawfully engage in employed activities;¹²⁴⁶ any employment is therefore undocumented.¹²⁴⁷ However, at the same time this does not mean that they do not have the same rights as lawfully employed foreigners.¹²⁴⁸

3. Social benefits

Irregularly staying foreigners are entitled to basic social services and benefits.¹²⁴⁹ The extent of the services and benefits provided varies consider-

Martínez (eds), *Comentario a la ley y al reglamento de Extranjería, Inmigración e Integración Social*² (2013) 491 (508f).

1240 Art 129(1) REDYLE and see Chapter 3.C.III.2.

1241 Art 129(2) REDYLE, which refers to Arts 64(3) and 105(3) REDYLE; cf. *García Vitoria*, *Residencia por Circunstancias Excepcionales. El Arraigo in Boza Martínez/Donaire Villa/Moya Malapeira* (eds), *La nueva regulación de la inmigración y la extranjería en España* (2012) 287 (304).

1242 Art 64(3)(b) REDYLE; see Chapter 4.E.1. on social roots.

1243 Cf. *Serrano Villamanta* in *Balado Ruiz-Gallegos* 556 and *Carbajal García*, *Revista de Derecho Migratorio y Extranjería* 2012/29, 57.

1244 In detail, *Camas Roda*, *Trabajo decente* 86ff.

1245 See Chapter 3.A.II.2. and Chapter 3.B.II.2.

1246 Cf. *Pérez Milla*, *De un status laboral mínima para situaciones de migración irregular*, *Revista de Derecho Migratorio y Extranjería* 2004/5, 9 (20ff).

1247 On the effects of undocumented employment on the employment relationship itself see Art 36(3) LODYLE and *Nieves Moreno Vida* in *Monereo Pérez/Fernández Avilés/Triguero Martínez* 625, and *González Calvet*, *Revista de Derecho Social* 2007/37, 108–112.

1248 Cf. *Camas Roda*, *Trabajo decente* 143ff.

1249 Art 14(3) LODYLE; cf. *Mimentza Martin*, *Die sozialrechtliche Stellung* 245 with further references and *Vázquez Garranzo*, *Los servicios sociales y*

ably across Spain as the responsibility lies with the autonomous communities.¹²⁵⁰ Basic benefits include, for example, the minimum income for integration (*renta mínima de inserción*),¹²⁵¹ which serves to ease the pressing needs of particular groups.¹²⁵² Furthermore, a top-up housing allowance (*prestación complementaria de vivienda*) and assistance to overcome particular social challenges or integration assistance (*ayudas a la inserción*) are further benefits.¹²⁵³

Foreigners who are residing regularly in Spain will be included¹²⁵⁴ in the contribution-based social security system and are entitled to social services and benefits under the same conditions as Spaniards.¹²⁵⁵ This includes a basic pension, a basic income in the event of reduced income, benefits for disabled children as well as medical treatment for persons in need.¹²⁵⁶

4. Healthcare

Prior to the Royal Decree 16/2012¹²⁵⁷, all foreigners registered in the municipal register were guaranteed access to healthcare, irrespective of their residence status.¹²⁵⁸ For *González-Enríquez*, this was a reason why migrants

la dependencia in *Palomar Olmeda* (ed), *Tratado de Extranjería*⁶ (2020) 1145 (1163ff).

1250 Cf. *Vázquez Garranzo* in *Palomar Olmeda* 1158–1163, 1171f and *Mimentza Martin*, *Die sozialrechtliche Stellung* 243ff with further references.

1251 Cf. *Vázquez Garranzo* in *Palomar Olmeda* 1181ff.

1252 STC 239/2002, ECLI:ES:TC:2002:239.

1253 Cf. *Mimentza Martin*, *Die sozialrechtliche Stellung* 243–257 with a detailed description of the situation in the Basque Country.

1254 Art 7(1) Real Decreto Legislativo 8/2015, de 30 de octubre, por el que se aprueba el texto refundido de la Ley General de la Seguridad Social, BOE 261 of 31.10.2015 in the version of 27.7.2022; cf. *Pajuelo*, *La protección social de los extranjeros en España* in *Palomar Olmeda* (ed), *Tratado de Extranjería*⁶ (2020) 991 and *Mimentza Martin*, *Die sozialrechtliche Stellung* 214 and 257ff.

1255 Art 14(1) LODYLE; cf. *Camas Roda*, *Trabajo decente* 140f and *Mimentza Martin*, *Die sozialrechtliche Stellung* 242f and 245ff.

1256 *Mimentza Martin*, *Die sozialrechtliche Stellung* 242f.

1257 Real Decreto-ley 16/2012, de 20 de abril, de medidas urgentes para garantizar la sostenibilidad del Sistema Nacional de Salud y mejorar la calidad y seguridad de sus prestaciones, BOE 98 of 24.4.2012 in the version of 1.7.2017.

1258 Cf. *Sangüesa Ruiz*, *El derecho a la salud de los extranjeros residentes en situación irregular: sobre la legitimidad constitucional del RD-Ley 16/2012*, *Revista Electrónica del Departamento de Derecho de la Universidad de la*

found Spain to be particularly 'attractive'.¹²⁵⁹ However, since the Royal Decree 16/2012, distinctions are to be drawn between third-country nationals:¹²⁶⁰ minors continue to have the same access as Spanish nationals. In addition, irregularly staying foreigners of full age only have access to healthcare services in cases of pregnancy and emergencies due to serious illness or accidents. A residence permit is otherwise required for access to healthcare services.¹²⁶¹ Despite the limitations by the central government, the autonomous communities have almost entirely reintroduced the access to healthcare services for irregularly staying foreigners.¹²⁶²

The Royal Decree 27/2018¹²⁶³ was passed in July 2018, reversing considerable parts of the reforms via Royal Decree 16/2012,¹²⁶⁴ including the reintroduction at the level of the central government of unrestricted healthcare for irregularly staying foreigners.¹²⁶⁵ Now (as before), proof of registration in the municipal register must be furnished. In addition, proof of identity such as a passport or similar document must be presented, though the person concerned still has access to healthcare services even if such document does not exist.¹²⁶⁶

Rioja 2015, 233 (234f) and *Mimentza Martin*, Die sozialrechtliche Stellung 306f.

1259 *González-Enríquez*, Clandestino Project (January 2009) 7.

1260 Cf. *Fernández Pérez*, Derechos fundamentales 101f.

1261 Cf. *Sangüesa Ruiz*, Revista Electrónica del Departamento de Derecho de la Universidad de la Rioja 2015, 234f; for criticism *Fernández Pérez*, Derechos fundamentales 243ff and *Red Acoge*, Los efectos de la exclusión sanitaria en las personas inmigrantes más vulnerables (July 2015).

1262 Cf. *Sangüesa Ruiz*, Revista Electrónica del Departamento de Derecho de la Universidad de la Rioja 2015, 237f; *Ramírez de Castro*, Los «sin papeles» deberán estar 6 meses empadronados para tener asistencia sanitaria, abc.es (2.9.2015), <https://www.abc.es/sociedad/20150902/abci-interior-sanidad-irregulares-201509012119.html> (31.7.2022); *Mouzo Quintans*, El Parlamento blindo hoy la sanidad universal, elpais.com (15.7.2017), https://elpais.com/ccaa/2017/06/14/catalunya/1497459112_092105.html (31.7.2022).

1263 Real Decreto-ley 7/2018, de 27 de julio, sobre el acceso universal al Sistema Nacional de Salud, BOE 183 of 30.7.2018.

1264 *Gómez Zamora*, Comentario al Real Decreto-ley 7/2018, de 27 de julio, sobre el acceso universal al Sistema Nacional de Salud, Gabilex 2018, 281 (281ff).

1265 NN, Sanidad establece tres requisitos para atender gratuitamente a los «sin papeles», abc.es (10.7.2019), https://www.abc.es/sociedad/abci-sanidad-establece-tres-requisitos-para-atender-gratuitamente-sin-papeles-201907101948_noticia.html (31.7.2022).

1266 *De Benito*, Los migrantes tendrán sanidad desde el primer día sin necesidad de padrón, elpais.com (17.7.2018), https://elpais.com/politica/2018/07/16/actualidad/1531764444_944908.html (31.7.2022).

III. General remarks on ‘temporary residence permits for exceptional circumstances’

The Spanish regularisations to be compared belong to the category *residencias temporales por circunstancias excepcionales*¹²⁶⁷ – ‘temporary residence permits for exceptional circumstances’.¹²⁶⁸ One exception concerns the residence permit for children not born in Spain, which will be analysed in more detail in Chapter 4.C.I.

The ‘temporary residence permits for exceptional circumstances’ are extraordinary because certain requirements, which would otherwise need to be met in the course of an ordinary residence permit, do not apply.¹²⁶⁹ In this respect, the most important exemption is by far the exclusion of the visa requirement at the time of application,¹²⁷⁰ though it is also significant that the applicant does not need to have sufficient financial means.¹²⁷¹ The decisions on residence permits relevant to this study are usually issued in the form of a decision (*resolución* or *decisión*),¹²⁷² which exhausts the administrative procedure.¹²⁷³

1. Overview

At the latest since the last regularisation programme in 2005, regularisation mechanisms have become an established approach in Spanish law to

1267 On exceptional circumstances see Peña Pérez, Arraigo, *circunstancias excepcionales y razones humanitarias: Evolución histórica dentro del derecho de extranjería*, *Revista de Derecho Migratorio y Extranjería* 2012/30, 35 (43f).

1268 Art 31(3) LODYLE and Arts 123ff REDYLE; cf. Esteban de la Rosa, Art 31 LODYLE in Monereo Pérez/Fernández Avilés/Triguero Martínez 503–509.

1269 Serrano Villamanta in Balado Ruiz-Gallegos 553; cf. also Triguero Martínez, *Migraciones* 2014, 439f.

1270 Art 31(3) LODYLE; cf. Serrano Villamanta in Balado Ruiz-Gallegos 553f and García Vitoria in Boza Martínez/Donaire Villa/Moya Malapeira 287.

1271 Cf. Serrano Villamanta in Balado Ruiz-Gallegos 572.

1272 Cf. Boza Martínez/Donaire Villa/Moya Malapeira in Boza Martínez/Donaire Villa/Moya Malapeira 19.

1273 Disposición adicional 14 REDYLE; cf. Conde Antequera, Art 21 LODYLE in Monereo Pérez/Fernández Avilés/Triguero Martínez (eds), *Comentario a la ley y al reglamento de Extranjería, Inmigración e Integración Social*² (2013) 337 (339).

offering a permanent path out of irregularity.¹²⁷⁴ These were introduced, inter alia, due to changes surrounding migration,¹²⁷⁵ especially the rising numbers of foreigners residing in Spain.¹²⁷⁶ Strictly speaking, there have already been ‘hidden’ regularisation possibilities since the first Organic Law of 1985, which were extended¹²⁷⁷ foremost by the LODYLE and ultimately defined and reconceptualised as ‘roots’ (*arraigo*) by the Organic Law 8/2000.¹²⁷⁸ *Heredia Fernández* welcomes this codification as there is no longer the need to use regularisation programmes to lower the number of irregularly staying foreigners.¹²⁷⁹ The Organic Law 14/2003 introduced Article 31(3) LODYLE in the form that is mostly still in force today.¹²⁸⁰ In terms of the numbers issued, the ‘temporary residence permits for exceptional circumstances’ have first gained in relevance since the end of the last regularisation programme in 2005.¹²⁸¹

Current Spanish law affords foreigners the possibility to apply at any time (i.e. without needing to wait for an extraordinary regularisation programme) to apply for a ‘temporary residence permit for exceptional circumstances’. In some circumstances they may even be legally entitled to such a residence permit as the competent authorities have very limited discretion.¹²⁸² *Cerezo Mariscal* even goes so far to state that, broadly speaking, these types of residence permits have since become ‘ordinary’ in na-

1274 Cf. *Cerezo Mariscal*, *Revista de Derecho* 2015, 659, 668; *Serrano Villamanta* in *Balado Ruiz-Gallegos* 554 and *Pérez/Leraul*, *El arraigo en España* (11–13.4.2012) 5.

1275 Cf. *González Calvet*, *Revista de Derecho Social* 2007/37, 105ff.

1276 See above Chapter 3.C.I.

1277 Art 29(3) LODYLE; cf. *Trinidad García*, *Revista de Derecho Migratorio y Extranjería* 2002/1, 105ff and *Peña Pérez*, *Revista de Derecho Migratorio y Extranjería* 2012/30, 46ff.

1278 Art 31 LODYLE and Art 45 REDYLE in the version of the Royal Decree 2393/2004 and see Chapter 3.C.I.

1279 *Heredia Fernández*, *Las situaciones de los extranjeros en España* in *Moya Escudero* (ed), *Comentario sistemático a la ley de extranjería* (2001) 53 (67); see however also Chapter 3.C.I.

1280 Cf. *Fernández Collados*, *Régimen de entrada, permanencia y salida de los extranjeros en España* in *Palomar Olmeda* (ed), *Tratado de Extranjería*⁶ (2020) 373 (423f) and *González Calvet*, *Revista de Derecho Social* 2007/37, 119ff.

1281 See also *González Calvet*, *Revista de Derecho Social* 2007/37, 119 and see the statistics in *Pérez/Leraul*, *El arraigo en España* (11–13.4.2012) 7.

1282 Cf. *Esteban de la Rosa*, Art 31 LODYLE in *Monereo Pérez/Fernández Avilés/Triguero Martínez* 503 and *Triguero Martínez*, *Migraciones* 2014, 448f.

ture.¹²⁸³ For instance, on 31 December 2019 approx. 83,800 foreigners held a ‘temporary residence permit for exceptional circumstances’¹²⁸⁴ – a total of 29.3% of all temporary residence permits (*autorizaciones de residencia temporal*). However, it is to be noted that (as in Austria¹²⁸⁵) there is no precise data to determine how many permits were issued and under which circumstances.¹²⁸⁶

2. Roots

The vast majority of foreigners who hold a ‘temporary residence permit for exceptional circumstances’ acquired such permit on the basis of ‘roots’. For instance, in 2019 there were 40,005 foreigners with a residence permit issued on the grounds of ‘roots’, with 43,861 issued for other reasons. In 2018, approx. 88.2% of all foreigners were in possession of a ‘temporary residence permit for exceptional circumstances’ issued on the grounds of ‘roots’.¹²⁸⁷ The increase in permits for other grounds arises primarily from

1283 Cf. *Cerezo Mariscal*, *Revista de Derecho* 2015, 682. See also *Triguero Martínez*, *Migraciones* 2014, 440, 450.

1284 Cf. *Ministerio de Trabajo, Migraciones y Seguridad Social*, *Flujo de autorizaciones de residencia concedidos a extranjeros 2019: Principales resultados* (November 2020) 14 and 16. This is more than double compared to the previous year (31.12.2018 – 41,653); cf. *Ministerio de Trabajo, Migraciones y Seguridad Social*, *Flujo de autorizaciones de residencia concedidos a extranjeros 2018: Principales resultados* (26.11.2019), https://extranjeros.inclusion.gob.es/ficheros/estadisticas/operaciones/flujos/2018/Residentes_PRFlujo2018.pdf (31.7.2022) 14. The increase results in particular from the ‘*residencia temporales por protección internacional*’ granted to Venezuelans.

1285 See Chapter 3.A.III.1.

1286 The statistics distinguish between the requirements for ‘roots’ and those for humanitarian and other reasons (*razones humanitarias y otras*). The latter are defined as: ‘La categoría “Razones humanitarias y otras” incluye las autorizaciones que se conceden por circunstancias excepcionales por: Razones de Protección internacional, Razones humanitarias, Colaboración con autoridades, Seguridad nacional o interés público, Mujeres víctimas de violencia de género, Colaboración contra redes organizadas y Víctimas de trata de seres humanos’; *Ministerio de Trabajo, Migraciones y Seguridad Social*, *Flujo de autorizaciones de residencia concedidos a extranjeros 2019: Principales resultados* (November 2020) 20.

1287 Cf. *Ministerio de Trabajo, Migraciones y Seguridad Social*, *Flujo de autorizaciones de residencia concedidos a extranjeros 2018: Resultados detallados* (15.11.2019), https://extranjeros.inclusion.gob.es/ficheros/estadisticas/operaciones/flujos/2018/Detallados_flujonacional2018.xlsx (31.7.2022) Table 6.

the ‘residence permit for international protection’ (*residencia temporal por protección internacional*) issued to Venezuelans.¹²⁸⁸ The official statistics may no longer distinguish between the different types of roots, yet it is clear from the literature that ‘social roots’ play – quantitatively speaking – the most important role, followed by ‘family roots’, with ‘employment roots’ being of least importance. For instance, of the 747,685 applications for a ‘temporary residence permit for exceptional circumstances’ between 2006 and 2014, only 6.44% and 1.65% were granted on the basis of family roots and employment roots, respectively.¹²⁸⁹ In this regard, ‘roots’ is the most important path away from an irregular status, both in practice and in terms of scale.¹²⁹⁰ This is clear not only from the aforementioned statistics but also from the list in the legislation. Since the REDYLE, the ‘roots’ requirements belong to the ‘temporary residence permit for exceptional circumstances’¹²⁹¹ and are even listed within this category before the ‘temporary residence permit for international protection’.¹²⁹²

With the reform in 2022, apart from the social, employment and family roots, a new type of roots was introduced, the so-called training roots (*arraigo para la formación*). However, as the law has only recently come into force, there are no statistics available as yet.

The term ‘roots’ used in the Spanish law on foreigners described three different types of ‘residence permits’,¹²⁹³ for which the LODYLE,¹²⁹⁴ the Organic Law 8/2000,¹²⁹⁵ the Organic Law 14/2003 as well as the Royal

See also the statistics on the regularisations issued between 2002 and 2012 in Pérez/Leraul, *El arraigo en España* (11–13.4.2012) 6–9, and more generally in Carbajal García, *Revista de Derecho Migratorio y Extranjería* 2012/29, 56f.

1288 Cf. *Ministerio de Trabajo, Migraciones y Seguridad Social*, *Flujo de autorizaciones de residencia concedidos a extranjeros 2019: Principales resultados* (November 2020) 11 and 16.

1289 Cf. Cerezo Mariscal, *Revista de Derecho* 2015, 673, 676f and 680.

1290 Cf. Serrano Villamanta in Balado Ruiz-Gallegos 561 and García Vitoria in Boza Martínez/Donaire Villa/Moya Malapeira 287. Cf. on the development Triguero Martínez, *Migraciones* 2014, 440 and 450.

1291 Art 123(1) REDYLE and cf. Triguero Martínez, *Migraciones* 2014, 449.

1292 Cf. Goizueta Vértiz, *La entrada a España, los visados y las situaciones de los extranjeros en España: estancia y residencia e irregularidad y arraigo* in Boza Martínez/Donaire Villa/Moya Malapeira (eds), *Comentario a la reforma de la ley de extranjería* (LO 2/2009) (2011) 157 (160).

1293 Art 124 REDYLE.

1294 Art 29(3) LODYLE; cf. González Calvet, *Revista de Derecho Social* 2007/37, 116–118.

1295 Art 31(3) LODYLE; cf. González Calvet, *Revista de Derecho Social* 2007/37, 118f.

Decree 2393/2004¹²⁹⁶ played an important role.¹²⁹⁷ Before this legislative development, however, the term was already used by the courts from the mid-1990s and influenced the legislative development.¹²⁹⁸ For instance, deportation decisions based on the ‘rootedness’ of foreigners in Spain were described as disproportionate if they violated Article 8 ECHR.¹²⁹⁹ In this respect, the Spanish Constitutional Court determined several criteria that are to be observed.¹³⁰⁰ This may be compared with the development of the ‘right to remain’ in Austria, which is now anchored in law as the ‘residence permit for reasons of Article 8 ECHR’.¹³⁰¹

The term ‘roots’ is therefore an undefined legal term,¹³⁰² influenced by the courts¹³⁰³ and now forming a part of the legislation itself.¹³⁰⁴ The three – since 2022 four – types are all based on the foreigner’s roots and settlement in Spain,¹³⁰⁵ which is why it may be referred to as an instrument to consolidate the integration into Spanish society.¹³⁰⁶ Nonetheless, *García Vitoria* uses the example of the right to respect one’s private life to criticise that there are gaps between the judicial interpretation and the

1296 Art 45 REDYLE in the version Real Decreto 2393/2004.

1297 On the legislative development of the term ‘rootedness’ in Spanish law see *Triguero Martínez*, *Migraciones* 2014, 437–440; *Massó Garrote*, *El nuevo reglamento de extranjería* (2002) 40f; *Carbajal García*, *Revista de Derecho Migratorio y Extranjería* 2012/29, 62–65. Cf. also *Serrano Villamanta* in *Balado Ruiz-Gallegos* 561ff with further references. The author shows that continuous residence is the most important criterion (563).

1298 Cf. *González Calvet*, *Revista de Derecho Social* 2007/37, 116–119 and *Ques Mena*, *El arraigo, social, económico y familiar en el Derecho de extranjería. Tratamiento legal y jurisprudencial*, *Diario la Ley* 2008/7067, 1 (2 with further references).

1299 Cf. *García Vitoria*, *El impacto de la jurisprudencia del Tribunal Europeo de Derechos Humanos en la expulsión de inmigrantes*, *Revista General de Derecho Constitucional* 2015/20, 1 (14–16) and *González Calvet*, *Revista de Derecho Social* 2007/37, 116–118.

1300 *Cerezo Mariscal*, *Revista de Derecho* 2015, 670f.

1301 See Chapter 4.B.III. and Chapter 4.C.III.

1302 Cf. more detail *Peña Pérez*, *Revista de Derecho Migratorio y Extranjería* 2012/30, 37–43 and on the origin of the term *Carbajal García*, *Revista de Derecho Migratorio y Extranjería* 2012/29, 58ff.

1303 *Triguero Martínez*, *Migraciones* 2014, 436f with further references.

1304 Art 124 REDYLE; on the development of the term in the law on foreigners see Chapter 3.C.I.

1305 Cf. *Cerezo Mariscal*, *Revista de Derecho* 2015, 670f and *Ques Mena*, *Diario la Ley* 2008/7067, 1–5. For instance ATC 54/2010, ECLI:ES:TC:2010:90A, FJ 4f.

1306 Cf. *Triguero Martínez*, *Migraciones* 2014, 449.

types covered by the legislation, which are not compatible with Article 8 ECHR.¹³⁰⁷

Viewed overall, I consider the regularisations based on ‘roots’ to have contributed to solving and removing systematic and structural weaknesses in the Spanish law on foreigners.¹³⁰⁸ They have become an established solution to reduce the ever-increasing number of irregularly staying foreigners. *Sabater/Domingo* are therefore entirely correct in referring to a ‘New Immigration Regularisation Policy’.¹³⁰⁹ In contrast to the regularisation programmes, they have not resulted in a media and political uproar,¹³¹⁰ and – from the rule of law perspective – offer an appropriate solution.

3. Administrative procedure

a) Application

Foreigners are free to apply for a ‘temporary residence permit for exceptional circumstances’ or apply for several different types of residence permits at the same time.¹³¹¹ This is notable in so far as it opens the possibility to apply for two residence permits (e.g. on the basis of social roots and on the basis of humanitarian reasons), with the chance that one of the two applications may be successful. In principle Article 128 REDYLE regulates the procedure, though there are some exceptions for particular permits.¹³¹²

The foreigner is to apply in person for a ‘temporary residence permit for exceptional circumstances’.¹³¹³ This does not reflect the general approach in Spanish administrative law,¹³¹⁴ thus attracting criticism as being unconstitutional.¹³¹⁵ Depending on the type of permit, different documents are

1307 Cf. *García Vitoria*, *Revista General de Derecho Constitucional* 2015/20, 15ff and see Chapter 4.C.V.1. on family roots.

1308 Cf. *Cerezo Mariscal*, *Revista de Derecho* 2015, 669f and 673ff; see also *Sabater/Domingo*, *International Migration Review* 2012/46, 213 and also *González Calvet*, *Revista de Derecho Social* 2007/37, 126f.

1309 Cf. *Sabater/Domingo*, *International Migration Review* 2012/46, 191.

1310 Cf. *González-Enríquez*, *EJML* 2009, 149.

1311 STSJ Castilla-La Mancha 225/2016, ECLI:ES:TSJCLM:2016:225.

1312 Cf. *Fernández Collados* in *Palomar Olmeda* 430f. See especially Arts 132–134 REDYLE, Arts 136–137 REDYLE and Art 144 REDYLE as well as Art 186 REDYLE.

1313 Art 128(5) REDYLE; cf. *Fernández Collados* in *Palomar Olmeda* 431.

1314 Cf. *García Vitoria* in *Boza Martínez/Donaire Villa/Moya Malapeira* 300f.

1315 Cf. *Fernández Pérez*, *Derechos fundamentales* 258–264.

to be presented at the time of the application, though a passport is generally required.¹³¹⁶ It therefore follows that the requirements for issuing the permit must be met both at the time of the application and also at the time of the decision.¹³¹⁷

Unlike Austrian law, Spanish law generally does not provide for the *ex officio* grant of residence permits.¹³¹⁸ However, certain authorities may encourage the grant of a temporary residence permit for exceptional circumstances due to the ‘collaboration with public authorities, or for reasons of national security or public interest’.¹³¹⁹

If the requirements for a ‘temporary residence permit for exceptional circumstances’ are met, the permit is valid for one year.¹³²⁰

b) Grounds for refusal and rejection

The grant of a residence permit is subject to the (negative) requirement that the foreigner must not have a criminal record (*antecedentes penales*) in Spain or in any of the countries in which the foreigner has previously resided over the past five years.¹³²¹ The Spanish Constitutional Court has determined that this requirement conforms to the constitution as it serves to protect public order.¹³²² A further reason for refusal is that the foreigner is not listed in SIS for refusal of entry.¹³²³

An ongoing deportation procedure or the existence of a valid deportation generally constitute reasons to reject an application for a ‘temporary residence permit for exceptional circumstances’ made after the procedure

1316 Art 128(1)(a) REDYLE; cf. *García Vitoria* in *Boza Martínez/Donaire Villa/Moya Malapeira* 301 and *Fernández Collados* in *Palomar Olmeda* 431f.

1317 Art 128(1) REDYLE.

1318 See Chapter 3.A.III.2.a.

1319 See Chapter 4.F.I.

1320 Art 130(1) REDYLE.

1321 Art 31(5) LODYLE; cf. Instrucción DGI/SGJR/06/2008, 2f; *Esteban de la Rosa*, Art 31 LODYLE in *Monereo Pérez/Fernández Avilés/Triguero Martínez* 494f and *Triguero Martínez*, *Migraciones* 2014, 451, and *Ques Mena*, *Diario la Ley* 2008/7067, 7f with further references regarding ‘roots’.

1322 ATC 54/2010, ECLI:ES:TC:2010:90A, FJ 4; for criticism see *Fernández Pérez*, *Derechos fundamentales* 287.

1323 Art 31(5) LODYLE; cf. *Esteban de la Rosa*, Art 31 LODYLE in *Monereo Pérez/Fernández Avilés/Triguero Martínez* 495.

is initiated or the deportation decision is given.¹³²⁴ Article 214(2) and (3) REDYLE provide an exception, whereby the application is admissible and, at the same time, the legally binding deportation is to be revoked *ex officio*.¹³²⁵ The exception applies if the deportation has not been enforced and the deportation is not merely for reasons of irregularity and/or undocumented employment.¹³²⁶ Furthermore, the authority must come to the initial conclusion that the requirements for the permit applied for are met.¹³²⁷ This means that every foreigner who has not yet been deported may apply for a 'temporary residence permit for exceptional circumstances' and can thus undergo a process of regularisation.¹³²⁸ Moreover, the grant of the residence permit also revokes the removal measure.

If the foreigner has applied for a 'temporary residence permit for exceptional circumstances' before the deportation proceedings are initiated, and if such proceedings are pending after the application, the latter are to be suspended until a decision on the residence permit has been taken.¹³²⁹ This transposes Article 6(5) Return Directive.¹³³⁰ The deportation proceedings end if the residence permit is granted,¹³³¹ but the proceedings will continue if the requirements for the residence permit are not met.

1324 Disposición adicional 4(1) LODYLE; see also Art 241 REDYLE; cf. *García Vitoria* in *Boza Martínez/Donaire Villa/Moya Malapeira* 301f and *Lorenzo Jiménez*, *Revista de Derecho Migratorio y Extranjería* 2015/38, 24, 27–29.

1325 Cf. *García Vitoria* in *Boza Martínez/Donaire Villa/Moya Malapeira* 302 and *Boza Martínez* in *Boza Martínez/Donaire Villa/Moya Malapeira* 274. For court decisions, see e.g. STSJ Andalucía 3694/2016, ECLI:ES:TSJAND:2016:3694.

1326 Art 53(a) and (b) LODYLE.

1327 Cf. *Defensor del Pueblo*, Sugerencia (20.5.2016), Queja 15004478.

1328 Here one may merely note the social roots; *Defensor del Pueblo*, Sugerencia (20.5.2016), Queja 15004478 and see Chapter 4.E.I.

1329 Art 63(6) LODYLE and Art 241(1) REDYLE; cf. *Lorenzo Jiménez*, *Revista de Derecho Migratorio y Extranjería* 2015/38, 25–30 and *Boza Martínez* in *Boza Martínez/Donaire Villa/Moya Malapeira* 273f.

1330 In this sense *Lorenzo Jiménez*, *Revista de Derecho Migratorio y Extranjería* 2015/38, 26 and 28.

1331 Cf. *Luján Alcaraz*, Art 63 LODYLE in *Monereo Pérez/Fernández Avilés/Triguero Martínez* (eds), *Comentario a la ley y al reglamento de Extranjería, Inmigración e Integración Social*² (2013) 1019 (1024).

4. Consolidation of residence

Articles 130 and 202 REDYLE regulate the transition from a ‘temporary residence permit for exceptional circumstances’ to a different type of residence permit.¹³³² The basic notion underpinning the Spanish legislation is that the ‘exceptional circumstances’ regarding the residence status should not be extended. The foreigners concerned should rather (be able to) change to the ordinary residency system.¹³³³ Accordingly, foreigners entitled to stay for at least one year due to the ‘temporary residence permit for exceptional circumstances’ may acquire a residence permit under the ‘ordinary’ system, though the visa requirement does not apply.¹³³⁴ For instance, it is possible to acquire a ‘residence permit and work permit (employed or self-employed)’, which is limited to two years.¹³³⁵ Whether the foreigner meets the requirements of this type of residence permit varies depending on whether the foreigner had a work permit.¹³³⁶ If this is the case, the foreigner may apply for the ‘residence permit and work permit’ subject to the requirements in Article 71 REDYLE. In comparison, if the foreigner has not had a work permit, the employer may apply for the ‘residence permit and work permit’, though in this case Article 202(3) REDYLE provides that the requirements under Article 64 REDYLE are to be met.

The application for such ‘residence permit and work permit’ may be made up to 60 days prior to the expiry of the period of validity.¹³³⁷ This therefore extends the residence permit to the conclusion of the procedure. The same applies in the cases in which the application is submitted within 90 days after the date on which the period of validity expires. However, the delayed application initiates the proceedings for an administrative penalty.¹³³⁸

1332 Cf. *Fernández Collados in Palomar Olmeda* 452f and *Abarca Junco/Alonso-Olea García/Lacruz López/Martín Dégano/Vargas Gómez-Urrutia*, *Inmigración y Extranjería: Régimen jurídico básico*⁵ (2011) 219f.

1333 Cf. *Serrano Villamanta in Balado Ruiz-Gallegos* 556.

1334 Art 201(1) REDYLE.

1335 Art 202(2)–(4) REDYLE and *García Vitoria in Boza Martínez/Donaire Villa/Moya Malapeira* 306.

1336 Cf. *García Vitoria in Boza Martínez/Donaire Villa/Moya Malapeira* 306 and *Fernández Collados in Palomar Olmeda* 452f.

1337 Art 130(5) REDYLE.

1338 See the last sentence of Art 130(5) REDYLE and Art 52(b) LODYLE, which concerns such offence to be minor; cf. *García Vitoria in Boza Martínez/Donaire Villa/Moya Malapeira* 305f.

A renewal (*renovación*) or extension (*prórroga*) of a 'temporary residence permit for exceptional circumstances' is only possible in certain situations.¹³³⁹ This creates problems in cases in which a person does not meet the requirements for an ordinary residence permit, as such person would fall back into irregularity.¹³⁴⁰ In this respect, the REDYLE does not provide an answer to the question whether, in such cases, it is possible to apply once again for the same 'temporary residence permit for exceptional circumstances'. Regarding the Regularisation Programme 2005 and the post-2006 'roots' requirements, *Sabater/Domingo* have analysed how many individuals continued to be legally resident after one year or fell back into an irregular status.¹³⁴¹ For employment roots and social roots, after one year approx. 24% and 29.2% of the regularised foreigners were once again staying irregularly as they could not acquire any other type of residence permit. Both authors therefore favour a modification of the 'roots' requirements to accord with the new economic conditions, especially those stemming from the 'economic crisis'.¹³⁴²

5. Drawing distinctions

The LODYLE provides a temporary residence permit and/or work permit in non-regulated cases of special relevance (*autorización temporal y/o trabajo en supuestos no reguladas de especial relevancia*),¹³⁴³ whereby there is a distinction between two circumstances.

On the one hand, the Secretary of State for Migration (*Secretaría de Estado de Migraciones*) may grant a temporary residence permit in exceptional circumstances that are not covered by the REDYLE. The decision is based on a report by the Secretary of State for Security (*Secretaría de Estado de Seguridad*). As there are no further details about the minimum

1339 Art 130(2) REDYLE and see Chapter 4.F.I.

1340 For criticism *García Vitoria* in *Boza Martínez/Donaire Villa/Moya Malapeira* 305 and *Defensor del Pueblo*, Recomendación (20.1.2014), Queja 12276555.

1341 *Sabater/Domingo*, International Migration Review 2012/46, 206f and 213. See also *Baldwin-Edwards*, Regularisations and Employment in Spain. REGANE Assessment Report (February 2014), https://mpr.a.ub.uni-muenchen.de/59812/1/MPRA_paper_59812.pdf (31.7.2022) 15f.

1342 *Sabater/Domingo*, International Migration Review 2012/46, 215.

1343 Art 123(2) 2nd Sent. REDYLE; Disposición adicional 1(4) REDYLE. Cf. *García Vitoria* in *Boza Martínez/Donaire Villa/Moya Malapeira* 299f and *Ques Mena*, Diario la Ley 2008/7067, 10f.

requirements that are to be met, an analysis here would not be appropriate and is therefore not undertaken.

On the other hand, such residence permits may be granted based on an order from the Council of Ministers (*Consejo de Ministros*), which details the precise requirements.¹³⁴⁴ As above, this process will also not be analysed as it is not clear whether such orders have already been made or exist, their content, and accordingly the minimum requirements.

Finally, it should be pointed out that the courts can expand upon the ‘temporary residence permits for exceptional circumstances’ regulated by the LODYLE and REDYLE.¹³⁴⁵ Furthermore, two other residence permits are discussed in connection with the ‘residence permit for a child not born in Spain’, though these will not be analysed in this study for reasons to be explained below.¹³⁴⁶

IV. Competences and authorities regarding the law on foreigners

In principle the competence concerning immigration and the status of foreigners lies exclusively with the federal state.¹³⁴⁷ However, this prevailing doctrine has changed over the past decades, with limited competences now held by the autonomous communities¹³⁴⁸ as a result of the reform of various statutes of autonomy (*Estatuto de Autonomía*), the Organic Law 2/2009 and the (conciliatory) decisions of the Spanish Constitutional Court.¹³⁴⁹ In this respect, the reports (*Informe*) to be compiled by the autonomous com-

1344 Cf. for detail Disposición adicional 1(4) REDYLE.

1345 Cf. *Giménez Bachmann*, La situación jurídica de los inmigrantes irregulares en España, Dissertation 2014, Universitat Abat Oliba CEU, <https://www.tdx.cat/handle/10803/295836#page=1> (31.7.2022) 175.

1346 See Chapter 4.C.I.

1347 Art 149(1) No. 2 CE; cf. *Roig*, Autonomía e inmigración: competencias y participación de las Comunidades Autónomas y los Entes locales en materia de inmigración in *Revenga Sánchez* (ed), Problemas constitucionales de la inmigración: una visión desde Italia y España (2005) 359.

1348 Cf. on the development *Donaire Villa/Moya Malapeira*, Marco competencial y organización administrativa de la inmigración in *Boza Martínez/Donaire Villa/Moya Malapeira* (eds), La nueva regulación de la inmigración y la extranjería en España (2012) 521 (521ff).

1349 STC 31/2010, ECLI:ES:TC:2010:31.

munities in relation to the ‘temporary residence permit’ on the grounds of ‘social roots’ are an example of their limited competences.¹³⁵⁰

The foreigners’ offices (*Oficina de Extranjería*) are typically responsible for matters concerning foreigners,¹³⁵¹ such as granting residence permits or conducting the proceedings concerning administrative penalties.¹³⁵² These offices are subordinate to the government delegations or sub-delegations (*Delegaciones y Subdelegaciones del Gobierno*), which in turn are subordinate to the Ministry for Territorial Policy and Public Function (*Ministerio de la Política Territorial y Función Pública*).

The municipal register (*Padrón*) also plays a key role, as the entry serves as evidence of the time spent in Spain,¹³⁵³ which is significant to demonstrate ‘social roots’, for example.¹³⁵⁴ As noted above, registration in the municipal register is also necessary in order to access healthcare services.¹³⁵⁵ Entry in the register requires only an official document, such as a passport, as proof of one’s identity; irregularly staying foreigners may in principle therefore also be registered.¹³⁵⁶ Registration is even encouraged by the state.¹³⁵⁷ Even the possibility for the foreigner’s offices or the Civil Guard (*Guardia Civil*) to access the register (e.g. to determine a foreigner’s place of residence) has not reduced the number of registrations.¹³⁵⁸

1350 Cf. *Donaire Villa/Moya Malapeira* in *Boza Martínez/Donaire Villa/Moya Malapeira* 536f and see Chapter 4.E.I.

1351 Arts 259–263 REDYLE and cf. *Donaire Villa/Moya Malapeira* in *Boza Martínez/Donaire Villa/Moya Malapeira* 549ff.

1352 Art 261 REDYLE and Disposición adicional 1 REDYLE; cf. *García Vitoria* in *Boza Martínez/Donaire Villa/Moya Malapeira* 300 and *Donaire Villa/Moya Malapeira* in *Boza Martínez/Donaire Villa/Moya Malapeira* 549f.

1353 Cf. *Cerdán/Maas*, ZAR 2010, 109.

1354 See Chapter 4.E.I.

1355 See Chapter 3.C.II.4.

1356 Cf. *González-Enríquez* in *Triandafyllidou* 250.

1357 Along these lines, *González-Enríquez*, *Clandestino Project* (January 2009) 20ff.

1358 Disposición adicional 5(2) LODYLE; for criticism *Fernández Pérez*, *Derechos fundamentales* 265–270 with further references.

V. Judicial protection

The constitutional right to effective judicial protection (*Tutela Judicial Efectiva*¹³⁵⁹) applies to regularly and irregularly staying foreigners.¹³⁶⁰ They may access the administrative courts as well as the constitutional court to safeguard their rights.

1. Administrative jurisdiction

The jurisdiction of the administrative courts (*Jurisdicción Contencioso-Administrativa*) is well established in Spain and allows the full control of any administrative act, particularly those of the executive.¹³⁶¹ The administrative courts (*Juzgados de lo Contencioso-Administrativo*) are part of the ordinary jurisdiction.¹³⁶²

Before addressing this topic in more detail, it is first necessary to briefly discuss the administrative remedies available.¹³⁶³ It is possible to lodge an appeal for reversal (*Recurso de Reposición*)¹³⁶⁴ against a decision on residence that usually exhausts the administrative channels.¹³⁶⁵ The appeal for reversal is directed against the foreigners' office issuing the order¹³⁶⁶ – an ordinary appeal (*Recurso Ordinario de Alzada*) addressed to a higher-ranking administrative body would not be admissible.¹³⁶⁷ The appeal does not have a suspensive effect.¹³⁶⁸ This remedy is optional, i.e. it may, but

1359 Art 24 CE and Art 20(1) LODYLE; cf. *González García*, Algunas cuestiones sobre el derecho a la tutela judicial efectiva de los extranjeros a la luz de la jurisprudencia constitucional y de la Ley Orgánica 2/2009, *Teoría y Realidad Constitucional* 2010, 515 (518ff).

1360 Cf. *González García*, *Teoría y Realidad Constitucional* 2010, 521.

1361 LJCA and cf. *Parejo Alfonso*, *Derecho Administrativo* 1185ff.

1362 Arts 3 and 24 Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial, BOE 157 of 2.7.1985 in the version of 27.7.2022; cf. *Parejo Alfonso*, *Derecho Administrativo* 1190f.

1363 Cf. on the previous law *Conde Antequera* in *Monereo Pérez/Fernández Avilés/Triguero* 337–339.

1364 Arts 123f LPAC.

1365 Disposición adicional 14 REDYLE and see Fn 1273.

1366 On the responsibilities of the foreigners' office, see Chapter 3.C.IV.

1367 Arts 121f LPAC; cf. On the 'Recurso Ordinario de Alzada' *Parejo Alfonso*, *Derecho Administrativo* 1152f.

1368 See just Art 117 LPAC; cf. *Parejo Alfonso*, *Derecho Administrativo* 1151 and 1157ff as well as *García Vitoria*, *Revista General de Derecho Constitucional* 2015/20, 9f with regard to deportation decisions.

does not have to be pursued in order to subsequently proceed down the route of the administrative courts. A one-month period applies for lodging the appeal.¹³⁶⁹

If the foreigner resorts to an appeal for reversal, the foreigners' office examines whether or not the arguments raised are valid. An appeal to the administrative courts is not possible until a decision on the appeal for reversal,¹³⁷⁰ which – unlike in the administrative courts – is to be made within one month.¹³⁷¹ If there is no decision in this period, the 'silence' is viewed as a rejection.¹³⁷²

A 'contentious administrative appeal' (*Recurso Contencioso-Administrativo*) may be lodged following the optional appeal for reversal or directly after receiving the rejection of the application.¹³⁷³ In principle this has no suspensive effect. However, according to Articles 129ff LJCA it is possible at any stage of the proceeding before the administrative courts to apply for a temporary injunction, which has suspensive effect.¹³⁷⁴ The administrative courts then decide by means of a judgment (*Sentencia*) and can revoke the administrative act if it is unlawful and/or on the merits of the case.¹³⁷⁵ A two-month period applies for lodging the appeal in relation to ordinary procedures,¹³⁷⁶ though a ten-day period applies in special procedures concerning the protection of fundamental rights.¹³⁷⁷ In contrast to administrative proceedings, the complainant must be represented by legal counsel in proceedings before the administrative court.¹³⁷⁸ The complainant may

1369 Art 124(1) LPAC.

1370 Art 123(2) LPAC; cf. *Parejo Alfonso*, *Derecho Administrativo* 1153f.

1371 Cf. *Parejo Alfonso*, *Derecho Administrativo* 1154 with reference to STC 40/2007, ECLI:ES:TC:2007:40.

1372 Cf. on the previous law *Conde Antequera* in *Monereo Pérez/Fernández Avilés/Triguero Martínez* 339.

1373 Art 25 LJCA; cf. on the procedure before the administrative courts *Parejo Alfonso*, *Derecho Administrativo* 1229ff and *Conde Antequera* in *Monereo Pérez/Fernández Avilés/Triguero Martínez* 340 regarding the law on foreigners.

1374 For detail *Parejo Alfonso*, *Derecho Administrativo* 1240ff; *Conde Antequera* in *Monereo Pérez/Fernández Avilés/Triguero Martínez* 346–350 on the ordinary procedure and *Mercader Uguina/Tolosa Tibiño*, Art 24 LODYLE in *Monereo Pérez/Fernández Avilés/Triguero Martínez* (eds), *Comentario a la ley y al reglamento de Extranjería, Inmigración e Integración Social*² (2013) 371 (376) on the special procedure.

1375 Arts 67 and 71(1) LJCA.

1376 Art 46(1) LJCA.

1377 Art 115(1) LJCA.

1378 Art 23 LJCA.

apply for free legal representation if he or she does not have sufficient funds.¹³⁷⁹

At first, a single judge decides upon the appeal brought before the administrative court.¹³⁸⁰ If the decision by the administrative court is again insufficient, an appeal (*Recurso de Apelación*) may be brought before the High Court (*Tribunal Superior de Justicia*) of an autonomous community.¹³⁸¹ An extraordinary appeal (*Recurso de Casación*) may be brought thereafter before the Supreme Court (*Tribunal Supremo*).¹³⁸²

The jurisdiction of the administrative courts features ordinary and special procedures, though in each case it is possible to bring the aforementioned legal remedies or to lodge an appeal against the decision. The foreigner may have recourse to both procedures simultaneously or to only one of the two.¹³⁸³ The ordinary procedure is conducted for foreigners as a so-called fast-track procedure (*Procedimiento Abreviado*).¹³⁸⁴ The special procedure may be conducted on the grounds of protection of fundamental rights (*Procedimiento para la Protección de los Derechos Fundamentales*).¹³⁸⁵ This requires the allegation that a fundamental right has been violated through a discriminatory act.¹³⁸⁶ As will be explained below, a constitutional complaint may only be lodged on grounds of the violation of

1379 Ley 1/1996, de 10 de enero, de asistencia jurídica gratuita, BOE 11 of 12.1.1996 in the version of 5.6.2021, and Art 22(3) LODYLE; cf. Colomer Hernández, Los extranjeros y los tribunales españoles in Palomar Olmeda (ed), Tratado de Extranjería⁶ (2020) 653 (664ff) and with regard to deportation decisions Arrese Iriondo, Revista de Derecho Migratorio y Extranjería 2010/25, 90f.

1380 Art 8(4) LJCA; cf. Conde Antequera in Monereo Pérez/Fernández Avilés/Triguero Martínez 341f.

1381 Arts 81ff LJCA.

1382 Art 88 LJCA; cf. Huelin Martínez de Velasco, La nueva casación contencioso-administrativa (primeros pasos), Revista General de Derecho Constitucional 2017/24, 1.

1383 Cf. Mercader Uguina/Tolosa Tibiño in Monereo Pérez/Fernández Avilés/Triguero Martínez 375 with further references.

1384 Art 78(1) LJCA; cf. Parejo Alfonso, Derecho Administrativo 1259ff and Conde Antequera in Monereo Pérez/Fernández Avilés/Triguero Martínez 343.

1385 Art 53(2) CE in conjunction with Art 24 LODYLE and Arts 114–122 LJCA; cf. Conde Antequera in Monereo Pérez/Fernández Avilés/Triguero Martínez 343–345 and Mercader Uguina/Tolosa Tibiño in Monereo Pérez/Fernández Avilés/Triguero Martínez 371.

1386 Cf. Conde Antequera in Monereo Pérez/Fernández Avilés/Triguero Martínez 344.

particular fundamental rights.¹³⁸⁷ The special procedure has preferential status.¹³⁸⁸ A ten-day period applies to claims lodged under the special procedure.¹³⁸⁹

2. Constitutional jurisdiction

The Spanish Constitutional Court (*Tribunal Constitucional*) also plays a key role in the judicial protection of foreigners.¹³⁹⁰ This court does not belong to the jurisdiction of ordinary courts, but is described as an independent, special jurisdiction.¹³⁹¹

According to the Spanish Constitution, any citizen may submit an appeal for constitutional protection (*Recurso de Amparo Constitucional*) against the violation of his or her fundamental rights and liberties protected by the constitution.¹³⁹² A 20 or 30-day period applies, depending on whether the appeal is against an administrative act or court decision.¹³⁹³ The appeal may be made against every act by a public body which violates a fundamental right or freedom.¹³⁹⁴ The appeal for constitutional protection is both quantitatively and qualitatively the most important and most frequently invoked instrument of the Constitutional Court.¹³⁹⁵ Legal representation is necessary, though some exceptions apply.¹³⁹⁶ Any natural or legal person with a legitimate interest may lodge an appeal for constitutional protection,¹³⁹⁷ including foreigners.¹³⁹⁸ From the perspective of

1387 Cf. *Mercader Uguina/Tolosa Tibiño* in *Monereo Pérez/Fernández Avilés/Triguero Martínez* 372 and *Conde Antequera* in *Monereo Pérez/Fernández Avilés/Triguero Martínez* 343.

1388 Art 114(3) LJCA.

1389 Art 115(1) LJCA.

1390 Art 53(2) in conjunction with Art 21(1) LODYLE and *Fernández Pérez* Art 57 LODYLE in *Monereo Pérez/Fernández Avilés/Triguero Martínez*, *Comentario a la ley y al reglamento de Extranjería, Inmigración e Integración Social*² (2013) 900 (921).

1391 *Carrillo*, *La jurisdicción constitucional española y el caso chileno*, *Revista de Derecho* 2001, 75 (75).

1392 Arts 53(2) and 161(1)(b) CE; cf. *Pérez Tremps*, *Sistema de Justicia Constitucional*³ (2019) 121ff and 21ff on the court in general.

1393 Arts 43(2) and 44(2) LOTC; cf. *Pérez Tremps*, *Justicia Constitucional* 143.

1394 Art 41(2) LOTC.

1395 Cf. *Pérez Tremps*, *Justicia Constitucional* 123.

1396 Art 81(1) LOTC.

1397 Art 162(b) CE.

1398 Cf. *Pérez Tremps*, *Justicia Constitucional* 133f.

those affected, the constitutional complaint is the last legal remedy that serves to protect fundamental rights due to its subsidiary nature.¹³⁹⁹ In other words, the claim concerning the violation of the fundamental rights has been unsuccessful in the ordinary legal process and no further appeals are possible thereunder.¹⁴⁰⁰ For foreigners, the administrative court procedure discussed above is available as an ordinary legal process.¹⁴⁰¹

The extraordinary nature of the constitutional appeal is to be emphasised as it may only be lodged with regard to the fundamental rights and freedoms anchored in the Spanish Constitution,¹⁴⁰² e.g. the traditional rights and freedoms such as the right to life (Article 15 CE) or the freedom of expression (Article 20 CE). Nonetheless, the distinction between the protection of the family (Article 39 CE) and the right to family privacy (Article 18 CE) has been criticised as the appeal for constitutional protection only applies to the latter.¹⁴⁰³

VI. Summary – The special status of regularisations in the laws concerning residency and foreigners

The above description shows the particular status held by regularisations in the laws on residency, and foreigners in the Member States. The similarities and distinctions in the historical development have allowed a special category of decisions granting the right to stay to emerge in all three Member States. Where the comparison is concerned, it is especially worthwhile to present the (structural) differences and similarities once more in greater depth and to consolidate these to gain a more complete impression of the topic.

Generally, the regularisations in all three Member States have a privileged status in comparison to the decisions which grant the right to stay under the ‘ordinary’ system. It means therefore that the requirements do not necessarily need to be met or that certain legislative grounds for

1399 Cf. *Pérez Tremps*, *Justicia Constitucional* 125.

1400 STC 186/1997, ECLI:ES:TC:1997:186, FJ 2; cf. *Pérez Tremps*, *Justicia Constitucional* 135ff.

1401 See Chapter 3.C.V.1.

1402 Arts 14–29 and 30(2) CE and cf. *Pérez Tremps*, *Justicia Constitucional* 126f with further references.

1403 Cf. *Díaz Crego/García Vitoria*, *Los derechos de los migrantes* in *García Roca* (ed), *¿Hacia una globalización de los derechos? El impacto de las sentencias del Tribunal Europeo y de la Corte Interamericana* (2017) 363 (394–398).

denying the right do not apply. One such example is the visa requirement, which does not apply to the analysed regularisations in any of the three Member States.

Although there are some exceptions, set terminology applies at national level to summarise the regularisations: *Aufenthaltstitel aus berücksichtigungswürdigen Gründen* (residence permits for exceptional circumstances) in Austria, *Aufenthaltserlaubnisse aus humanitären Gründen* (residence permits for humanitarian reasons) in Germany and *residencias temporales por circunstancias excepcionales* (temporary residence permits for exceptional circumstances) in Spain.

One may cautiously state that the ‘temporary residence permits for exceptional circumstances’ in Spain are no longer ‘exceptional’ as they constitute 30% of all temporary residence permits, with the regularisation based on ‘roots’ (especially ‘social roots’) being particularly relevant. The statistics for Austria show that regularisations do not play an important role, though one must bear in mind that the statistics lack detail in some areas and thus their actual relevance is debatable. For Germany, it is clear from the figures that a notable number of foreigners hold a ‘residence permit for humanitarian grounds’.

It must be possible in all three Member States for an irregularly staying migrant to apply for the decisions granting a right to stay, as otherwise they would not satisfy the definition of a regularisation. The *ex officio* consideration of the ‘special protection residence permit’ and of the ‘residence permits for reasons of Article 8 ECHR’ in the asylum process in Austria also plays an important role and shows the close links between these two ‘residence permits for exceptional circumstances’ and asylum law. This is shown for Germany with the restrictions on granting a residence title after the asylum process has been completed, but also that (similar to Austria) the national bans on deportation are to be examined. To satisfy the regularisation definition,¹⁴⁰⁴ these will only constitute regularisations in those cases in which the application may be made whilst residing irregularly and not when examined in the asylum process.¹⁴⁰⁵ Asylum law is not analysed in this study, but remarks concerning asylum law give context since the development of regularisations in Austria and Germany is closely related to the (in part) high number of asylum applications and the related political debates.¹⁴⁰⁶ This is one of the reasons why reforms of residence and asylum

1404 See Chapter 1.A.

1405 See Chapter 4.A.I.2.a.

1406 For Germany see *Kraler*, *Journal of Immigrant and Refugee Studies* 2019, 102.

laws have been made on a near annual basis over the past two decades. The picture in Spain is different, however, as the regularisations have developed on a broader scale and are especially one of the consequences of the rapid increase in foreigners until 2005. This development is not closely related to the number of asylum applications and as such there was not a constant stream of reforms.

Regularisation programmes were implemented in Spain in the early 1990s to offer foreigners a path out of irregularity. This instrument was used almost annually, with regularisation mechanisms first established in 2005. Unlike Austria and Germany, regularisations in Spain have always been very closely dependent on the economy and the labour market or are linked more closely to economic considerations. Regularisation programmes were never used in Austria due to the regularisation mechanisms introduced at the end of the 1990s. Germany, however, adopted a hybrid approach, with the use of regularisation mechanisms from the start of the 1990s and regularisation programmes from the mid-1990s. Nowadays, the same type of regularisations (i.e. regularisation mechanisms) features in all three Member States, which will subject to the comparative analysis in Chapter 4.

The legal status of foreigners also plays an important role in the development of regularisations, whereby considerable differences between the legislative provisions may be observed. One notable feature of the Spanish system is the access to social benefits and healthcare that is afforded to irregularly staying foreigners. This is a marked difference to the situation in Austria and Germany, as the irregular status is therefore less precarious.¹⁴⁰⁷ Access to employment, however, is similar in the three Member States as a specific permit is required, which is linked to the lawful residence or the decision granting a right to stay. In Germany, the Skilled Immigration Act (*Fachkräfteeinwanderungsgesetz*) also brought a change in approach as the right to engage in an economic activity was granted with each residence title unless prohibited by law. However, this shift from ‘reserving permis-

1407 This has become an even greater problem during the COVID-19 pandemic: the effect of not affording such groups access to healthcare can ‘harm’ the general population; cf. *Kohlenberger*, Fehrender Gesundheitszugang von Migranten schadet allen, *Falter.at* (13.5.2020), <https://cms.falter.at/blogs/thinktank/2020/05/13/warum-gefluechtete-besonders-corona-gefaehrdert-sind/> (31.7.2022); for detail *Raposo/Violante*, Human Rights Review 2021 and *Desmond*, The European Approach to Irregular Migration in Pandemic Times: The More Things Change, the More They Stay the Same? in *Czech/Heschl/Lukas/Nowak/Oberleitner* (eds), *European Yearbook on Human Rights* (2021) 285 (302ff).

sion' to 'reserving prohibition' will have hardly any effect in practice as it still must be ascertainable from each residence title whether economic activity is permitted and whether it is subject to any limitations. Several authors note that in this respect the employment of undocumented workers is or has become 'tolerated' in Spain.

The analysis of the national laws shows further that administrative or judicial penalties may apply to (un)lawful residence. In Austria, the negative outcome in a procedure to grant a 'residence permit for exceptional circumstances' automatically results in a removal measure, which may be subsequently enforced. In Germany, the rejection of an application for a 'residence permits for humanitarian reasons' leads to a deportation order, which may be subsequently enforced. Spanish law, however, takes an entirely different approach: the rejection of an application for a residence permit does not automatically result in a removal measure. There is indeed an obligation to leave the country, but is only enforceable following a separate decision on deportation.

All three Member States provide that an existing removal measure may – to varying degrees – constitute a ground for refusal to grant a residence permit. In Austria, a valid return decision including a ban on entry constitutes a reason to refuse a 'residence permit for exceptional circumstances'. An application for a 'residence permit for humanitarian reasons' is denied in Germany if there is a particularly serious interest in expulsion within the meaning of § 51(1) Nos. 2 or 4 AufenthG. An ongoing deportation procedure or a pending deportation constitutes a ground for rejection under Spanish law, provided that the application for a 'temporary residence permit for exceptional circumstances' is only made after the deportation procedure has been initiated or the deportation order has been issued. However, the application is admissible (and the deportation is to be revoked) if the deportation order was issued merely because of the irregular stay or undocumented employment as the competent authority draws the initial conclusion that the requirements for the permit are met.

The respective authorities responsible for matters concerning residency and foreigners do not exhibit any distinctive characteristics. Furthermore, different legal instruments are available in each case to foreigners in proceedings before the administrative as well as before the constitutional courts. Differences exist, however, with regard to whether the legal instrument has suspensive effect. This is especially relevant for rejections/dismissals in Austria and Germany because these types of decisions give rise to a removal measure.

Chapter 4 – The purpose-based integrated comparison of regularisations

The context provided in Chapter 3 now allows for the focus to shift to the comparative analysis of regularisations. The critical-contextual method is used,¹⁴⁰⁸ whereby instead of a ‘traditional’ comparison via national reports, the regularisations are categorised, compared and assessed in an integrated approach based on their purpose.¹⁴⁰⁹ They will be reviewed in light of their compatibility with the relevant provisions of international and EU law, though for the former only the ECHR will be examined in detail.¹⁴¹⁰

The regularisations are not categorised from a formal perspective. For example, the Austrian ‘special protection residence permit’ in § 57 AsylG (A) unites three sets of circumstances, whereby each is valid as a separate regularisation as the grounds for granting the permit vary in each case.¹⁴¹¹ In principle separate sets of circumstances fall under separate regularisation purposes or sub-categories if they specify different grounds for granting the regularisation.

Regularisations may also serve more than one purpose and thus fall under more than one sub-category. The most relevant purpose will be determined by balancing the interests surrounding the regularisation, thereby allowing for a clean methodological approach. The State’s main interest in approving the right to stay serves as the main argument as, unlike the migrant’s own interest, the State’s interest is at the forefront on the understanding of a contractualistic understanding of the decisions granting the right to stay.¹⁴¹²

Within each purpose the regularisations are structured by the extent of their scope, for which I refer to the minimum duration. The order is alphabetical (Austria, Germany, Spain) where two or more regularisations have the exact same minimum duration.

The definition of a regularisation given in Chapter 1 is used for the comparative analysis, but narrowed down even further.¹⁴¹³ Only those rights to stay are examined where lawful residence is granted for at least 12 months – this minimum duration is used as the distinguishing criterion. However, with regard to some regularisations under German law, the

1408 See Introduction D.I.

1409 See Introduction D.II.2. and Chapter 1.B.II.

1410 See Introduction D.II.1.

1411 See Chapter 4.A.II.1. and Chapter 4.D.I.1.

1412 See above, Chapter 1.B.II.

1413 See Chapter 1.A.II.

stay can be limited from six months to two or three years.¹⁴¹⁴ These are nevertheless included in the analysis as the statutory minimum period may be exceeded.

I adopt an uniform approach to the comparison and begin with a discussion of the conditions for granting the right to stay and then the nature of the right to stay itself, in so far as this has not already been presented in Chapter 3.¹⁴¹⁵ Acquiring a full picture of each regularisation therefore requires the corresponding explanations in Chapter 3 for context. The general requirements for the grant or refusal are thus not repeated. Access to the labour market, access to social benefits, and judicial protection are only presented in more detail if these differ from the general comments in Chapter 3. Again, the terms appropriate to the respective legal system are used: foreigners (Germany and Spain) and aliens (Austria).¹⁴¹⁶

A. Non-returnability

I. Toleration

Toleration¹⁴¹⁷ comprises a legislative mechanism and non-statutory toleration, whereby in the following toleration as a legislative mechanism describes the statutory rules in Austria and Germany that qualify as a postponement of removal according to Article 9 Return Directive.¹⁴¹⁸ ‘Non-statutory toleration’ refers to the (legal) situation in Spain.

The order of the regularisations is based on the extent of the entitlements. As there is no minimum duration without a right to stay, the order is as follows: the statutory and non-statutory situation is first analysed for Spain, where there is no legal instrument comparable to toleration, just situations of *de facto* toleration. This non-statutory toleration is thus another means to express an irregular stay. In contrast, both Austrian and German law feature a legal instrument known as toleration (*Duldung*), which may under the circumstances be described as a qualified irregular

1414 See Chapter 4.B.I.2., Chapter 4.C.II.2. and Chapter 4.D.I.2.

1415 See for example the ‘residence permits for exceptional circumstances’ in Chapter 3.A.III.2.d.

1416 See the introductory remarks in Part II.

1417 See Chapter 1.B.III.1.a.

1418 See Chapter 2.B.I.

stay or as a step towards a right to stay.¹⁴¹⁹ As the minimum duration determines the order, Germany is analysed before Austria.

1. Spain: non-statutory toleration and irregularity

Unlike in Austria and Germany, Spanish law does not feature a legal instrument comparable with toleration. There is, however, a type of ‘factual’ toleration, i.e. situations in which an irregular stay is tolerated (*situación tolerada de la estancia irregular*).¹⁴²⁰ *Sagarra Trias* has expressed this as situations in which the foreigners may live irregularly on a legal basis: ‘*el extranjero “legalmente” podrá vivir irregularmente*’.¹⁴²¹ Despite criticisms, the Spanish legislator (knowingly) still does not regulate this situation,¹⁴²² but this issue was addressed implicitly through the introduction of the ‘residence permit for reasons of training roots’ in 2022.¹⁴²³

As noted above in Chapter 3, an irregular stay constitutes a serious offence under Spanish law¹⁴²⁴ and usually initiates a separate deportation process, in which the principle of proportionality must be respected.¹⁴²⁵ In comparison to Austria and Germany, the rejection of an application for a residence permit does not automatically lead to a removal measure.¹⁴²⁶ Spanish law instead provides for two different procedural options for an irregularly staying foreigner: a fine or deportation.¹⁴²⁷

1419 See Chapter 1.B.III.1.a.

1420 Cf. *García Vitoria* in *Boza Martínez/Donaire Villa/Moya Malapeira* 289; *Sainz de la Maza Quintanal*, *Ultima ratio*. El proceso de expulsión de inmigrantes en situación irregular en España, Dissertation 2015, Universidad Complutense de Madrid, <https://eprints.ucm.es/34472/> (31.7.2022) 41.

1421 *Sagarra Trias*, Un nuevo ‘status’ de extranjero en España (El inmigrante, irregular, empadronado, residente trabajando y con orden de expulsión), *Revista de Derecho Migratorio y Extranjería* 2002/1, 89 (96).

1422 *Arrese Iriondo*, *Revista de Derecho Migratorio y Extranjería* 2010/25, 94f.

1423 See Chapter 4.E.III.

1424 Art 53(1)(a) LODYLE and see Chapter 3.C.II.1.

1425 Arts 55(3) and 57(1) LODYLE as well as Arts 222(3) and 242(1) 1st Sent. REDYLE; cf. *Arrese Iriondo*, *Revista de Derecho Migratorio y Extranjería* 2010/25, 77f.

1426 See Chapter 3.C.II.1.

1427 *Arrese Iriondo*, *Revista de Derecho Migratorio y Extranjería* 2010/25, 75–82.

Prior to the ECJ's decision in *Zaizoune* in 2015, foreigners subject to a deportation process because of an irregular stay were usually fined.¹⁴²⁸ This was justified on the basis of Article 57(1) LODYLE, which stipulates that a specific reason is required for deportation.¹⁴²⁹ By imposing a fine, foreigners were 'factually' tolerated and staying irregularly as the obligation to leave the country was not enforced.¹⁴³⁰ The Spanish law on foreigners does not allow a fine and deportation to be imposed simultaneously.¹⁴³¹

However, in *Zaizoune* the ECJ criticised the Spanish law, deeming it incompatible with the Return Directive:¹⁴³² imposing a fine would not constitute an efficient removal of irregularly staying foreigners due to the lack of enforcement. The Spanish government sought to argue that an obligation to leave the country would always follow even where only a fine is imposed,¹⁴³³ but this was rejected by the ECJ. This decision was followed by the Spanish courts, which determined that deportation is to be ordered for an irregularly staying foreigner, not a fine.¹⁴³⁴

The ECJ case law seemed quite robust in this regard, yet the *UN* decision made clear that it is still in progress and sometimes an unexpected U-turn is necessary. The ECJ held – in contrast to *Zaizoune* – that imposing a fine is actually compatible with the Return Directive as it entails an obligation

1428 On the tense relationship with the Return Directive prior to *Zaizoune* see *Boza Martínez in Boza Martínez/Donaire Villa/Moya Malapeira* 270 and *González Saquero*, La Directiva 'retorno' y el alcance de la armonización del procedimiento de expulsión de extranjeros. WP on European Law and Regional Integration No. 6 (2011), <https://ucm.es/data/cont/docs/595-2013-11-07-la%20directiva%20retorno.pdf> (31.7.2022) 12–15.

1429 Cf. *Castanedo García*, *Revista de Derecho Migratorio y Extranjería* 2014/36, 263f. See however Art 242(1) REDYLE.

1430 *Arrese Iriondo*, *Revista de Derecho Migratorio y Extranjería* 2010/25, 94f with further references.

1431 Art 57(3) LODYLE:

1432 ECJ *Zaizoune*, paras 32ff; cf. *Gortázar Rotaèche*, Return Decisions and Domestic Judicial Practices: Is Spain Different? in *de Bruycker/Cornelisse/Moraru* (eds), Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union (2020) 63 (70ff). *Acosta Arcarazo/Romano*, The Returns Directive and the Expulsion of Migrants in an Irregular Situation in Spain, EU Law Analysis Blog (2.5.2015), www.eulawanalysis.blogspot.co.uk/2015/05/the-returns-directive-and-expulsion-of.html (31.7.2022); *Fernández Rojo*, La detención de extranjeros en situación irregular: impacto de la directiva 2008/115/CE y la jurisprudencia del TJUE en la legislación española, *Revista de Derecho Comunitario Europeo* 2016, 233 (242ff).

1433 Art 28(3)(c) LODYLE and Art 24 REDYLE.

1434 STSJ Galicia 6738/2016, ECLI:ES:TSJGAL:2016:6738, FJ 4; STSJ Aragón 1005/2016, ECLI:ES:TSJAR:2016:1005.

to leave within a prescribed period of time, ‘unless, before that period expires, that third-country national’s stay is regularised by a national authority. It is only where, on expiry of that period, that [the third-country] national has neither regularised his/her situation nor departed voluntarily, that the competent authority must adopt a removal decision’.¹⁴³⁵ This has been elaborated above in Chapter 2.B.II.2.

The Spanish legislation and practice, which still allows a fine to be imposed for irregularity, is therefore now (finally) in line with EU law. There is a factual toleration in these circumstances as the obligation to leave the country cannot be enforced.

This status may arise in two additional circumstances. *Boza Martínez* refers here to the distinction between the impossibility to order deportation and to enforce it.¹⁴³⁶ The impossibility to order deportation concerns each of the criteria listed in Article 57(5) LODYLE. According to Article 57(5)(d) LODYLE, this applies in cases in which a person was lawfully resident and employed, but cannot be deported due to the unemployment benefits (*prestación de desempleo*) received after the residence permit expires.¹⁴³⁷ Where applicable, the criteria in Article 57(5) LODYLE are to be considered, thus rendering a deportation order unlawful and thus impossible. However, it is not clear how the authorities are to proceed in such situations (e.g. whether a fine may be imposed) due to the lack of corresponding provisions in procedural law.¹⁴³⁸

The impossibility to enforce the deportation extends to all cases in which deportation has become impossible since it was ordered, for instance due to pregnancy or because it would violate the non-refoulement principle.¹⁴³⁹ Again, procedural law does not provide the authorities with rules on how to proceed in such circumstances. In principle Article 57(4) LODYLE allows for the revocation of a decision on deportation, though

1435 ECJ *UN*, para 46 and see also para 49.

1436 See Art 57(5) and (6) LODYLE and *Boza Martínez* in *Boza Martínez/Donaire Villa/Moya Malapeira* 271.

1437 STS 1864/2008 – ECLI:ES:TS:2008:1864, FJ 7; cf. *Nieves Moreno Vida* in *Monereo Pérez/Fernández Avilés/Triguero Martínez* 627f. The Supreme Court further states that this can in no way concern cases of undocumented employment, as otherwise it would be a kind of hidden regularisation, because the persons could not be deported due to receiving unemployment benefits (despite undocumented employment).

1438 Cf. *Boza Martínez* in *Boza Martínez/Donaire Villa/Moya Malapeira* 270f.

1439 Art 57(6) LODYLE and Art 246(7) REDYLE; cf. *Consejo de Estado*, Dictamen 320/2016 (12.5.2016). The deportation may not present a risk to the health or the pregnancy of the woman and unborn child.

there is no specific provision which allows for revocation under these particular circumstances.¹⁴⁴⁰ Likewise, there are no rules where the impossibility of deportation has been ascertained.¹⁴⁴¹ From a procedural perspective, it is only possible to tackle the deportation in the administrative courts, whereby the competent court could decide to suspend the deportation,¹⁴⁴² though this is only possible where a complaint against the deportation has been filed.¹⁴⁴³

It can therefore be maintained that the non-statutory toleration of an irregularly staying foreigner can arise in three different cases.¹⁴⁴⁴ Such foreigners languish in this state of limbo until they meet the requirements for a 'temporary residence permit for exceptional circumstances'. The decision to deport will be revoked in such cases.¹⁴⁴⁵ In a broader sense, it is thus possible to claim factual toleration of irregularly staying foreigners in Spain.¹⁴⁴⁶ This also means that the Spanish state accepts all the resulting effects, such as the precarious living situations. However, there is a balance in this respect due to the access to social benefits, even during the irregular stay and the less onerous (at least in comparison to Austria and Germany) requirements to acquire a residence permit, as the example of 'social rootedness' shows.¹⁴⁴⁷ Overall, irregularly staying foreigners have many possibilities for regularisation at their disposal, irrespective whether they are tolerated 'outside of the law'.

2. Germany: statutory toleration

Foreigners are generally to be deported where they are obliged under § 50(1) *AufenthG* to leave the country and this obligation is enforce-

1440 Cf. *Boza Martínez* in *Boza Martínez/Donaire Villa/Moya Malapeira* 270f.

1441 *Boza Martínez* in *Boza Martínez/Donaire Villa/Moya Malapeira* 271f makes this suggestion.

1442 Art 129 *LJCA*.

1443 See Chapter 3.C.V.1.

1444 Cf. *Fernández Bessa/Brandariz García*, *Revista para el Análisis del Derecho* 2016/4, 8f.

1445 For detail see Chapter 3.C.III.3.b.

1446 Cf. *Sagarra Trias*, *Revista de Derecho Migratorio y Extranjería* 2002/1, 96; *González-Enríquez*, *Clandestino Project* (January 2009) 7, 17f; *Arrese Iriondo*, *Revista de Derecho Migratorio y Extranjería* 2010/25, 94f; *Sabater/Domingo*, *International Migration Review* 2012/46, 215f.

1447 Chapter 4.E.I.

able.¹⁴⁴⁸ However, toleration (*Duldung*) was introduced as an instrument in Germany via § 60a AufenthG as it is often not possible to enforce deportation directly. Toleration therefore concerns the temporary suspension of deportation; it does not remove the obligation to leave the country or the enforceability thereof.¹⁴⁴⁹ In Germany, as in Austria, toleration does not result in lawful residence.¹⁴⁵⁰ According to the statistics, approx. 243,656 foreigners were tolerated in mid-2021,¹⁴⁵¹ a considerable number in comparison to Austria and a reflection of the important role this instrument plays in German residence law.¹⁴⁵²

a) Requirements

The number of requirements for toleration under § 60a AufenthG is so extensive that a thorough explanation would simply breach the boundaries of this study.¹⁴⁵³ For instance, the 2017 Act to Improve the Enforcement of the Obligation to Leave (*Gesetz zur besseren Durchsetzung der Ausreisepflicht*) introduced toleration to examine an acknowledgement of paternity, which is now anchored in § 60(2) 4th Sent. AufenthG.¹⁴⁵⁴ Toleration ‘for the purpose of training’ is found in § 60c AufenthG and is discussed in relation to the ‘temporary residence permit for the purpose of employment for qualified foreigners whose deportation has been suspended’.¹⁴⁵⁵ The same applies for ‘toleration for the purpose of employment’, which will be discussed in relation to the ‘residence in the case of permanent integration’ and the ‘residence permit for the purpose of employment for qualified foreigners’.¹⁴⁵⁶ Furthermore, the Orderly Return Act (*Geordnete-Rückkehr-Gesetz*), which entered into force on 21 August 2019, introduced toleration ‘for persons whose identity is not yet verified’ in § 60b AufenthG – also

1448 § 58(2) AufenthG and see Chapter 4.A.I.2.

1449 Gordzielik/Huber in Huber/Mantel § 60a AufenthG mn 63.

1450 § 60a(3) AufenthG and see Chapter 4.A.I.3.

1451 BT-Drs 19/32579, 31ff.

1452 See Chapter 4.A.I.3.

1453 For a historical overview, Wittmann, Vom migrationspolitischen Mindeststandard zum „Bleiberecht im Duldungsgewand“ – Entwicklungslinien der deutschen Migrations- und Integrationsgesetzgebung im Bereich der Duldung, ZAR 2020, 183.

1454 Cf. Hörich/Tewocht, NVwZ 2017, 1156.

1455 See Chapter 4.E.IV.1.

1456 See Chapter 4.B.I. and Chapter 4.E.IV.1.

known as ‘*Duldung light*’ or ‘*Duldung minus*’.¹⁴⁵⁷ This basis for toleration will be covered below as part of the discussion on the factual obstacles to deportation.

Toleration is characterised by the legal and factual impossibility surrounding deportation, and thus why only the ‘basic’ elements are presented. For this study, the separate grounds for toleration pursuant to § 60a(2) 1st Sent. AufenthG (the obstacles to deportation) are relevant.¹⁴⁵⁸ They will be divided into legal and factual obstacles.¹⁴⁵⁹ § 60a(2) AufenthG states that deportation is to be suspended for as long as deportation is impossible in fact or in law and no residence permit is granted.¹⁴⁶⁰ Impossibility in this context refers to the question whether deportation can be effected in a timely manner or whether it is excluded due to legal or factual obstacles.¹⁴⁶¹ According to the Federal Administrative Court, this is to be judged irrespective of whether the foreigner could leave the country voluntarily.¹⁴⁶² § 60a(2) 1st Sent. AufenthG provides a legal entitlement to temporary suspension of deportation, i.e. to toleration, in such cases.¹⁴⁶³

Deportation may be legally impossible due to reasons stemming from statute, constitutional law, EU law or customary international law,¹⁴⁶⁴ though the relationship between the individual concerned and the State is decisive.¹⁴⁶⁵ The ‘national deportation bans’ pursuant to § 60(5) or (7) AufenthG are especially relevant to this study as both extend beyond the international protection under the Qualification Directive and – procedurally speaking – are subordinate to it.¹⁴⁶⁶ These are therefore viewed as

1457 Cf. *Eichler*, Das Sanktionsregime der „Duldung light“. Die neue „Duldung für Personen mit ungeklärter Identität“ nach § 60b AufenthG, Das Migrationspaket – Beilage zum Asylmagazin 8–9/2019, 64; *Thym*, ZAR 2019, 354f and *Hruschka*, Verfassungsblog (21.5.2019).

1458 Cf. *Hoffmann*, Asylmagazin 2010, 369f.

1459 See just *Marx*, Aufenthalts-, Asyl- und Flüchtlingsrecht § 7 mns 342–347.

1460 Cf. *Hörich*, Abschiebungen 122.

1461 *Gordzielik/Huber* in *Huber/Mantel* § 60a AufenthG mn 15.

1462 *Huber/Eichenhofer/Endres de Oliveira*, Aufenthaltsrecht mn 1202 with further references. This is only relevant once a permit has been granted according to § 25(5) AufenthG; see Chapter 4.C.II.

1463 Cf. *Gordzielik/Huber* in *Huber/Mantel* § 60a AufenthG mn 14 with further references.

1464 Cf. *Funke-Kaiser* in *Berlit* (ed), Gemeinschaftskommentar zum Aufenthaltsgesetz (110th edn, March 2021) § 60a AufenthG mn 168.

1465 Cf. *Gordzielik/Huber* in *Huber/Mantel* § 60a AufenthG mn 21.

1466 Cf. *Hruschka* in *Huber/Mantel* (eds), Kommentar Aufenthaltsgesetz/Asylgesetz³ (2021) Vorbemerkung vor Abschnitt 2. Schutzgewährung mn 21 and *Hruschka/Mantel* in *Huber/Mantel* (eds), Kommentar Aufenthaltsgesetz/Asylgesetz³

a ‘third category of protection’¹⁴⁶⁷ after the protection of refugees and subsidiary protection. The ‘national deportation bans’ are relevant to this study both as grounds for toleration as well as requirements for granting residence permits under § 25(3) and (5) AufenthG,¹⁴⁶⁸ thus exhibiting a dual character. Decisions on toleration generally rest with the foreigners authority, though the Federal Office for Migration and Refugees is to be included in decisions on both ‘national deportation bans’ and determines if these requirements are met.¹⁴⁶⁹ Furthermore, one must also bear in mind that the ‘national deportation bans’ are also examined in the asylum process. The ‘national deportation bans’ are now distinguished by ‘internal’ (i.e. domestic) and ‘external’ (i.e. in the state of destination) bans on deportation.¹⁴⁷⁰

A deportation ban is characterised as ‘internal’ where the deportation would violate a right that is legally protected in Germany. The ‘national deportation bans’ are examined under § 60(5) and (7) AufenthG.¹⁴⁷¹ A ‘residence permit for persons who are enforceably required to leave the country, but whose departure is legally or factually impossible’, may be granted where the deportation is permanently impossible.¹⁴⁷² Such an ‘internal obstacle’ for health reasons may also be derived from Article 2(2) 1st Sent. GG – the right to life and physical integrity.¹⁴⁷³ Distinctions may also be drawn between an inability to travel in a narrow and a broader sense. The narrow meaning describes cases in which a serious deterioration in health or a risk to life or health arises in connection with the deportation procedure. In a broad sense, the inability to travel also refers to the deportation itself, but here the associated serious risk of a substantial or even life-threatening deterioration in health is decisive. This may be shown by, for example, terminating vital medical treatment, a high-risk pregnancy, an acute and serious risk of suicide, or an impending birth.¹⁴⁷⁴

(2021) § 60 AufenthG mn 17 as well as *Koch* in *Kluth/Heusch* (eds), BeckOK Ausländerrecht (30th edn, 1.7.2020) § 60 AufenthG mn 2.

1467 *Marx*, Aufenthalts-, Asyl- und Flüchtlingsrecht § 5 mn 36.

1468 See Chapter 4.A.II.2. and Chapter 4.C.II.

1469 § 72(2) AufenthG; cf. *Marx*, Aufenthalts-, Asyl- und Flüchtlingsrecht § 5 mns 36f.

1470 Cf. *Marx*, Aufenthalts-, Asyl- und Flüchtlingsrecht § 7 mn 342.

1471 *Hoffmann*, Asylmagazin 2010, 369f.

1472 See Chapter 4.C.II.

1473 Cf. *Gordzielik/Huber* in *Huber/Mantel* § 60a AufenthG mn 24.

1474 Cf. *Gordzielik/Huber* in *Huber/Mantel* § 60a AufenthG mns 25f.

The ban on deportation is ‘external’ in nature where there are risks related to the state of destination which may arise through the deportation.¹⁴⁷⁵ This means that the deportation may not violate the obstacles anchored in the ECHR,¹⁴⁷⁶ which are again examined according to § 60(5) and (7) AufenthG. A residence permit may be granted in instances in which the deportation to the state of destination is banned and subsidiarily for persons who are enforceably required to leave the country, but whose departure is legally or factually impossible – in other words where the deportation is permanently impossible.¹⁴⁷⁷ The grounds for exclusion are also to be considered since, in some circumstances, only toleration is possible despite the impossibility surrounding the deportation.¹⁴⁷⁸ Additionally, numerous legal grounds for toleration also exist (such as the protection against deportation under Article 6 GG and Article 8 ECHR), though only a brief reference will be made here.¹⁴⁷⁹

Factual obstacles to deportation concern the type and manner in which the statutory obligation to leave the country is enforced.¹⁴⁸⁰ For instance, the deportation may not be factually enforceable or is only possible with disproportionate effort or considerable delays because,¹⁴⁸¹ for example, travel documents are missing or because the state of destination refuses to take the person concerned.¹⁴⁸² Statelessness may also be a factual obstacle.¹⁴⁸³ An illness may also prevent deportation as travel or transport are not possible.¹⁴⁸⁴ In contrast to the factual reasons in Austria, there is no examination of whether the impossibility has been caused by the foreigner him- or herself.¹⁴⁸⁵ Whether the deportation could not be enforced because of the foreigner’s own fault is in principle ‘only’ relevant with regard to social benefits and access to the labour market, as this allows

1475 Cf. *Hoffmann*, Asylmagazin 2010, 369f.

1476 Cf. *Hruschka/Mantel* in *Huber/Mantel* § 60 AufenthG mns 26–28.

1477 See Chapter 4.A.II.2. and Chapter 4.C.II.

1478 See Chapter 4.A.II.2.b.

1479 Cf. *Huber/Eichenhofer/Endres de Oliveira*, Aufenthaltsrecht mns 1204–1206 with further references and see also Chapter 4.C.II.1.

1480 *Gordzielik/Huber* in *Huber/Mantel* § 60a AufenthG mn 16.

1481 BT-Drs 11/6321, 76 on the previous version of § 55 AuslG 1990.

1482 *Huber/Eichenhofer/Endres de Oliveira*, Aufenthaltsrecht mn 1203 with further references.

1483 Cf. *Marx*, Aufenthalts-, Asyl- und Flüchtlingsrecht § 7 mns 348–351.

1484 See VGH Kassel, Judgment of 11.5.1992, 13 UE 1608/91, Entscheidungssammlung zum Ausländer- und Asylrecht 045 No. 2, on the case of a life-threatening illness (specifically a confirmed suicide risk).

1485 See Chapter 4.A.I.3.a.

to refuse to grant an employment permit.¹⁴⁸⁶ The examination on this second level appears more expedient as it determines the suspension of deportation (which in fact cannot be enforced anyway) even if it is the fault of the foreigner and he or she is only subsequently ‘punished’ for his or her behaviour in accessing employment or social benefits. Furthermore, fault on the part of the foreigner plays a role in subsequently obtaining a residence permit.¹⁴⁸⁷

A reference to § 60b AufenthG, introduced via the Orderly Return Act, is also necessary when discussing the factual obstacles to deportation.¹⁴⁸⁸ Tolerated status according to § 60a(4) AufenthG is granted to foreigners who are enforceably required to leave the country where there is reason to suspect that they cannot be deported for reasons for which they themselves are responsible.¹⁴⁸⁹ The corresponding certificate confirming the suspension of deportation in such cases features the additional wording ‘for persons whose identity is not verified’. This therefore constitutes a ‘sub-category’¹⁴⁹⁰ under toleration. According to § 60b(1) 1st Sent. AufenthG, the authorities have no discretion with regard to the question whether the foreigner is responsible for the obstacle to deportation.¹⁴⁹¹ ‘Specific’ obligations to acquire a passport also exist in § 60(3) AufenthG alongside the already existing obligation to acquire a passport.¹⁴⁹² The toleration of ‘persons whose identity is not verified’ applies not only to every foreigner who first acquired such status after the law entered into force on 21 August 2019 but also to all who were tolerated beforehand and whose tolerated status was extended or granted for another reason.¹⁴⁹³ § 60b AufenthG does not apply to foreigners who are tolerated for the purpose of training or employment.¹⁴⁹⁴

Extensive sanctions accompany the toleration of ‘persons whose identity is not verified’, which impact primarily on the status (prohibition of em-

1486 § 60a(6) No. 2 AufenthG and see Chapter 4.A.I.2.b.

1487 See Chapter 4.C.II.1.

1488 Cf. *Wittmann/Röder*, Aktuelle Rechtsfragen der Duldung für Personen mit ungeklärter Identität gem. § 60b AufenthG, ZAR 2019, 362.

1489 § 60b(1) 2nd Sent. AufenthG.

1490 *Eichler*, Das Migrationspaket – Beilage zum Asylmagazin 8–9/2019, 64.

1491 This is apparent from the wording ‘is granted’. In this sense, see *Eichler*, Das Migrationspaket – Beilage zum Asylmagazin 8–9/2019, 65.

1492 For criticism see *Eichler*, Das Migrationspaket – Beilage zum Asylmagazin 8–9/2019, 65–68.

1493 § 105(1) AufenthG.

1494 § 105(3) AufenthG and see Chapter 4.E.IV.1.

ployment and reduction of social benefits).¹⁴⁹⁵ Furthermore, the length of time of such toleration does not count towards the future toleration of persons in vocational training or employment (the so-called *Vorduldungszeit-en*).¹⁴⁹⁶ This will have notable effects on acquiring a residence permit according to §§ 25a and 25b AufenthG and a toleration for vocational training and employment, which is why it greatly worsens the prospects under residence law.¹⁴⁹⁷ According to *Eichler*, it implements a long intended stigmatism and disenfranchisement of an entire group.¹⁴⁹⁸ However, it should be noted that it is possible at a later time to undertake the reasonable efforts to acquire a passport and thus ‘cure’ the failure to perform this obligation.¹⁴⁹⁹ In this case the obligation to cooperate will be regarded as performed and the foreigner will be issued with a certificate confirming the tolerated status under § 60a(4) AufenthG without the additional wording for ‘persons whose identity is not verified’.¹⁵⁰⁰ The cure therefore allows the duration of toleration prior to the issuance of toleration for ‘persons whose identity is not verified’ to again have effect under residence law and can be subsequently credited to the previous periods of residence for §§ 25a and 25b AufenthG.¹⁵⁰¹ Overall, the toleration of ‘persons whose identity is not verified’ is to be regarded as a qualified irregular stay for the purposes of this study.¹⁵⁰²

By introducing the toleration of ‘persons whose identity is not verified’, the law in Germany begins to resemble the existing law in Austria.¹⁵⁰³ For instance, it is examined whether the foreigner is responsible for rendering deportation impossible and accordingly receives tolerated status only as a ‘person whose identity is not verified’. It is for these reasons that the legal situation prior to the Orderly Return Act is preferable. According to the

1495 See Chapter 4.A.I.2.b.

1496 § 60b(5) 1st Sent. AufenthG; cf. BT-Drs 19/10047, 39.

1497 Cf. *Eichler*, Das Migrationspaket – Beilage zum Asylmagazin 8–9/2019, 71 and see Chapter 4.B.I.1.–2. and Chapter 4.E.IV.1.

1498 *Eichler*, Das Migrationspaket – Beilage zum Asylmagazin 8–9/2019, 64: ‘*die seit langem beabsichtigte Stigmatisierung und Entrechtung einer ganzen Personen-Gruppe*’.

1499 § 60b(4) AufenthG and see Chapter 4.E.IV.1.

1500 § 60b(4) 4th Sent. AufenthG.

1501 *Eichler*, Das Migrationspaket – Beilage zum Asylmagazin 8–9/2019, 71 with reference to BT-Drs 19/10047, 39.

1502 See Chapter 1.B.I.a.

1503 See Chapter 4.A.I.3.a.

statistics, by mid-2021 8.9% of all tolerated persons were tolerated on the basis of an ‘unverified identity’.¹⁵⁰⁴

b) Status

Tolerated status is to be issued in writing in the form of a certificate.¹⁵⁰⁵ It is a beneficial administrative act (*begünstigender Verwaltungsakt*) under German administrative law.¹⁵⁰⁶ Such type of act gives rise to or confirms a right or legal advantage.¹⁵⁰⁷ According to *Gordzielik/Huber*, toleration qualifies as an ‘other authorisation offering a right to stay’ under the Return Directive,¹⁵⁰⁸ though this opinion is not watertight as toleration under the Residence Act does not establish a lawful stay.¹⁵⁰⁹ It is rather to be understood as a ‘postponement of removal’ pursuant to Article 9 Return Directive, as is also expressed by the use of ‘temporary suspension’ in the English translation of the Residence Act.¹⁵¹⁰

The toleration period varies roughly between three months and one year,¹⁵¹¹ though in principle the duration is determined by ‘how long an obstacle to deportation is likely to prevent the enforcement of the obligation to leave the country’.¹⁵¹² Nonetheless, it is disputed whether the requirements to cooperate during the deportation procedure may lead to a shorter period.¹⁵¹³ According to § 95(1) No. 2(c) AufenthG, it is not punishable to reside in Germany without a necessary residence title if the deportation has been suspended (i.e. the person is tolerated);¹⁵¹⁴ this also applies even if the certificate was not issued, but the statutory require-

1504 BT-Drs 19/32579, 31.

1505 § 60a(4) AufenthG. See § 78(7) AufenthG with regard to the content of such a certificate.

1506 Cf. *Gordzielik/Huber in Huber/Mantel* § 60a AufenthG mn 72.

1507 § 48(1) 2nd Sent. VwVfG.

1508 *Gordzielik/Huber in Huber/Mantel* § 60a AufenthG mn 64 with further references. See also *Huber/Eichenhofer/Endres de Oliveira*, Aufenthaltsrecht mn 1194.

1509 § 60a(3) AufenthG.

1510 See Chapter 2.B.I.

1511 For details see § 60a(1) and (2) AufenthG.

1512 *Marx*, Aufenthalts-, Asyl- und Flüchtlingsrecht § 7 mn 410.

1513 In this sense, *Marx*, Aufenthalts-, Asyl- und Flüchtlingsrecht § 7 mn 410; for criticism see *Gordzielik/Huber in Huber/Mantel* § 60a AufenthG mn 66.

1514 Cf. *Hörich/Bergmann in Huber/Mantel* § 95 AufenthG mns 44–49 and see also Chapter 3.B.II.1.

ments are met.¹⁵¹⁵ § 60a(5) 4th Sent. AufenthG provides that there is to be notification of deportation if a persons was tolerated for more than one year and this has been revoked.¹⁵¹⁶ This obligation to notify was repealed by the Act to Improve the Enforcement of the Obligation to Leave in so far as the person concerned did not cooperate in the procedure.¹⁵¹⁷

Pursuant to § 61(1) 1st Sent. AufenthG, the stay of a foreigner who is enforceably required to leave the country is restricted in geographic terms to the territory of the *Land* concerned.¹⁵¹⁸ This geographic restriction expires automatically after three months of uninterrupted residence in the respective *Land*.¹⁵¹⁹

The tolerated person may not be employed during the first three months, though the foreigners authority may grant the approval to engage in employment after three months.¹⁵²⁰ This therefore constitutes a general prohibition unless permission is granted.¹⁵²¹ This was not changed by the Skilled Immigration Act in 2020. According to *Schuster/Voigt*, the foreigners authority should exercise its discretion under § 4(4) AufenthG regarding the grant of an employment permit positively provided that the requirements for prohibiting employment are not met.¹⁵²² However, tolerated persons may be generally prohibited from engaging in employed activities if they have entered Germany to obtain benefits under the Act on Benefits for Asylum Seekers, if measures to terminate their stay cannot be carried out for reasons for which they are responsible, or they are nationals of a safe country of origin¹⁵²³ under § 29a Asylum Act (G) and

1515 *Hörich/Bergmann* in *Huber/Mantel* § 95 AufenthG mn 45 with further references.

1516 § 60a(5) 4th Sent. AufenthG.

1517 For criticism, *Hörich/Tewocht*, NVwZ 2017, 1156.

1518 Cf. *Gordzielik* in *Huber/Mantel* (eds), *Kommentar Aufenthaltsgesetz/Asylgesetz*³ (2021) § 61 AufenthG mn 7.

1519 § 61(1)b AufenthG. Critical, *Hörich/Tewocht*, NVwZ 2017, 1156 on the extended possibility to order a geographic restriction introduced in 2017 by the Act to Improve the Enforcement of the Obligation to Leave.

1520 § 32 BeschV.

1521 Cf. *Mimentza Martin*, *Die sozialrechtliche Stellung* 170ff.

1522 *Schuster/Voigt*, *Neuerungen beim Arbeitsmarktzugang – Die Schere geht auseinander*, *Asylmagazin* 2020, 64 (69).

1523 For criticism on the use of the notion of a safe country of origin, *Werdermann*, *Die Vereinbarkeit von Sonderrecht für Asylsuchende und Geduldete aus sicheren Herkunftsstaaten mit Art. 3 GG*, ZAR 2018, 11.

the application for asylum was filed after 31 August 2015 and has been denied.¹⁵²⁴

Kluth/Breidenbach consider the mandatory requirements to be especially relevant in practice if the tolerated person has brought about the obstacle to deportation with his or her own deceit concerning his or her identity or nationality or by furnishing false information.¹⁵²⁵ In contrast to Austrian law, this ‘only’ leads to a general ban on employment, whereas in Austria this is a reason for refusing to issue the card for tolerated persons (*Karte für Geduldete*) and, hence, not acquiring a tolerated status.¹⁵²⁶ Self-employment was prohibited until the Skilled Immigration Act entered into force on 1 March 2020, since then it may be approved.¹⁵²⁷

Tolerated persons are entitled to claim benefits under the Act on Benefits for Asylum Seekers during the first 18 months.¹⁵²⁸ However, various reasons can apply to limit these benefits to a six-month period,¹⁵²⁹ for example if the person has entered the country for the purpose of claiming benefits or is responsible for rendering the deportation impossible.¹⁵³⁰ The Third Act to amend the AsylbLG, which entered into force on 1 September 2019, restructured and extended the restrictions under § 1a AsylbLG.¹⁵³¹ Following the first 18 months, tolerated persons are entitled to analogous benefits under the Social Insurance Code XII if they have not abused their rights to influence the length of their stay.¹⁵³² This legislation extended the duration of the previous stay from 15 to 18 months.¹⁵³³

1524 § 60a(6) AufenthG; cf. *Kluth/Breidenbach* in *Kluth/Heusch* § 60a AufenthG mns 49–59 and *Gordzielik/Huber* in *Huber/Mantel* § 60a AufenthG mns 70f; *Schuster/Voigt*, Asylmagazin 2020, 70ff.

1525 *Kluth/Breidenbach* in *Kluth/Heusch* § 60a AufenthG mn 53. For detail, *Hörich/Putzar-Sattler*, Mitwirkungspflichten im Ausländerrecht: Rechtsgutachten zu den Voraussetzungen von Sanktionen bei Nichtmitwirkung (November 2017), https://www.fluechtlingsrat-lsa.de/wp-content/uploads/2017/11/fluera_lsa_gutachten_2017_Mitwirkungspflichten_im_Auslaenderrecht.pdf (31.7.2022) 11f.

1526 See Chapter 4.A.I.3.a.

1527 Cf. *Schuster/Voigt*, Asylmagazin 2020, 72 with reference to § 4a(4) AufenthG.

1528 § 1(1) No. 4 AsylbLG; cf. *Korff* in *Rolfs/Giesen/Keikebohm/Udsching* § 1 AsylbLG mns 15–17.

1529 See §§ 1a(1)–(3) and 14(1) AsylbLG; cf. *Schneider*, NZS 2018, 561f.

1530 Cf. *Korff* in *Rolfs/Giesen/Keikebohm/Udsching* § 1a AsylbLG mns 10–15 and 16–22.

1531 Cf. *Genge*, Das Migrationspaket – Beilage zum Asylmagazin 8–9/2019, 20f.

1532 § 2 AsylbLG; see Fn 1014.

1533 § 2(1) AsylbLG. For criticism see *Genge*, Das Migrationspaket – Beilage zum Asylmagazin 8–9/2019, 18f.

Tolerated persons are excluded from receiving benefits under the Social Insurance Code II and standard welfare benefits.¹⁵³⁴

Finally, it should be pointed out that the toleration of ‘persons whose identity is not verified’ has brought about more severe legal consequences.¹⁵³⁵ Such tolerated foreigners are subject to an employment ban and benefit reductions according to § 1a(3) AsylbLG.¹⁵³⁶ Furthermore, they are subject to the residence requirement pursuant to § 61(1d) AufenthG, i.e. the geographic restriction.¹⁵³⁷

c) Legal protection

The refusal to suspend deportation (i.e. closing the door to toleration) is not contestable,¹⁵³⁸ though an action for enforcement (*Verpflichtungsklage*) may be brought.¹⁵³⁹ Such action does not have a suspensive effect as toleration is merely a measure of administrative enforcement.¹⁵⁴⁰ An application for provisional relief under § 123(1) 1st Sent. VwGO may be submitted to temporarily suspend the enforcement of the deportation.¹⁵⁴¹

d) Regularisation prospects

‘Chain tolerations’ (*Kettenduldungen*) are a considerable problem in practice.¹⁵⁴² The term is used to describe the situation in which a foreigner is tolerated over several years, though the essence of the toleration is only to temporarily suspend deportation.¹⁵⁴³ In my opinion, such long-term toler-

1534 § 7(1) 2nd Sent. No. 3 SGB II and § 23(2) SGB XII; cf. *Groth in Rolfs/Giesen/Keikebohm/Udsching* § 23 SGB XII mn 15.

1535 See Chapter 4.A.I.2.a.

1536 § 60b(5) 2nd Sent. AufenthG. Cf. *Eichler*, Das Migrationspaket – Beilage zum Asylmagazin 8–9/2019, 70f.

1537 § 60b(5) 3rd Sent. AufenthG.

1538 § 83(2) AufenthG. In general on the procedure, see §§ 68ff VwGO and *Maurer/Waldhoff*, Verwaltungsrecht § 10 mn 77.

1539 § 42(1) VwGO; cf. *Marx*, Aufenthalts-, Asyl- und Flüchtlingsrecht § 7 mn 423.

1540 § 80(2) VwGO; cf. *Kluth/Breidenbach in Kluth/Heusch* § 60a AufenthG mn 63.

1541 Cf. *Hailbronner*, Asyl- und Ausländerrecht mn 1158.

1542 See Chapter 2.B.I., Chapter 2.B.II.2.b. and Chapter 3.B.III.2.c.

1543 See specifically the tables in *Wendel*, Kettenduldung. Bleiberechtsregelungen und parlamentarische Initiativen 2000 – 2014 (August 2014), <http://www.flue>

ation is not compatible with the Return Directive as there is an obligation to award a residence permit in cases of permanent non-returnability.¹⁵⁴⁴

Overall, the ‘chain tolerations’ show that many tolerated persons remain as such, with a number of high hurdles to jump to acquire residence permit. In the meanwhile, German law features some statutory possibilities for tolerated persons to become regularised.¹⁵⁴⁵ Some even offer a possible solution to the problem of ‘chain tolerations’. Nonetheless, *Marx* remains correct in his assessment that the phenomenon still remains in practice.¹⁵⁴⁶ In this respect, toleration in Germany is generally to be understood as a preliminary step towards acquiring a right to stay as many of the residence permits for humanitarian reasons may be acquired for different reasons.¹⁵⁴⁷

3. Austria: statutory toleration

Aliens residing unlawfully in Austrian territory do not face the prospect of automatic deportation: an enforceable legislative basis is necessary, which is provided by a return decision.¹⁵⁴⁸ Deportation must be legally admissible and factually possible. However, it is often rendered impossible by a legal or factual obstacle. The Austrian legislator therefore created ‘toleration’ as a legal instrument to apply in such cases.¹⁵⁴⁹ The low issue rate¹⁵⁵⁰ of the card for tolerated persons (*Karte für Geduldete*) underlines that ‘toleration’ merely has a shadowy existence in Austria, especially when compared with the statistics for Germany.¹⁵⁵¹ One reason for this trend appears to be the considerable discretion held by the Federal Office for

chtlingsrat-brandenburg.de/wp-content/uploads/2014/08/Kettenduldung.pdf (31.7.2022) 5–7.

1544 See Chapter 2.B.II.2.b.

1545 On § 25(5) AufenthG see Chapter 4.C.II. On § 25a AufenthG see Chapter 4.B.II. On § 25b AufenthG see Chapter 4.B.I. On § 19d AufenthG see Chapter 4.E.IV. On § 23a AufenthG see Chapter 4.D.II.1.

1546 *Marx*, Aufenthalts-, Asyl- und Flüchtlingsrecht § 7 mn 341.

1547 See Chapter 1.B.III.1.a.

1548 §§ 46 and 52 FPG.

1549 On the historical development of toleration in Austria see *Hinterberger/Klammer*, *migraLex* 2015, 77f.

1550 According to the statistics provided by the Austrian Federal Ministry for the Interior, only 215 cards were issued in the year 2020, see 4901/AB 27. GP, 29.

1551 See Chapter 4.A.I.2.

Immigration and Asylum (as well its rather restrictive interpretation) with regard to the grounds for toleration.¹⁵⁵²

Temporary inadmissibility is to be distinguished from the inadmissibility of a return decisions due to Article 8 ECHR, which results in a 'residence permit for reasons of Article 8 ECHR'.¹⁵⁵³

a) Requirements

In contrast to German law, Austrian law distinguishes merely between legal and factual grounds for toleration, which will be analysed in detail below. Legal obstacles to deportation arise in cases in which the deportation would violate a constitutionally-protected right under the ECHR, specifically Articles 2, 3 or 8.¹⁵⁵⁴ The principle of non-refoulement plays a particularly important role:¹⁵⁵⁵ if there are non-refoulement reasons that exclude a return to a third-country, a return decision must (since 2017) be issued in accordance with § 52(9) FPG, and at the same time the inadmissibility of the deportation must be declared and the person must be tolerated.¹⁵⁵⁶

The FPG provides three groups of legal obstacles to deportation. The first group (§ 46(1) No. 1 FPG) concerns the non-refoulement principle. This can only concern countries other than the country of origin as the FPG explicitly states that an application related to the country of origin constitutes an application for international protection.¹⁵⁵⁷

The second group (§ 46a(1) No. 2 FPG) concerns those cases in which the asylum status or the subsidiary protection is withdrawn due to a criminal offence,¹⁵⁵⁸ yet the non-refoulement principle excludes the return to the country of origin.¹⁵⁵⁹ The Federal Office for Immigration and Asylum

1552 Cf. *Frahm*, *juridikum* 2013, 469f; *Hinterberger/Klammer*, *migraLex* 2015, 79f; *Peyrl*, *Arbeitsmarkt* 323 and *Geiger*, *migraLex* 2019, 5–7.

1553 See Chapter 4.B.III. and Chapter 4.C.III.

1554 § 46a(1) Nos. 1, 2 and 4 FPG. See Fn 891 and 892.

1555 See Chapter 1.B.III.1.b. and Chapter 2.B.II.2.a.

1556 See also VwGH 21.12.2017, Ra 2017/21/0125.

1557 § 51(2) FPG, cf. VwGH 28.8.2014, 2013/21/0218 and 20.12.2016, Ra 2016/21/0109.

1558 For refugees, the offence must be particularly serious (§ 6(1) No. 4 AsylG (A)). Subsidiary protection will be withdrawn for crimes under § 17 StGB (A) (§ 9(2) No. 3 AsylG (A)).

1559 A further scenario also comes into consideration: a person commits a crime during the asylum process and meets the necessary requirements to be entitled

has to pronounce this in the order at the same time as the withdrawal and has to tolerate the person concerned.¹⁵⁶⁰ Following the reforms in 2017 the Federal Office for Immigration and Asylum also has to issue a return decision.¹⁵⁶¹ The legislator's intention was that delinquency goes hand in hand with the loss of status rights and that the legal position of these persons is therefore massively restricted.¹⁵⁶²

The third group (§ 46a(1) No. 4 FPG) comprises the cases in which the deportation would constitute a violation of the right to respect one's private and family life, i.e. Article 8 ECHR. § 9(1)–(3) BFA-VG contain the interests to be balanced.¹⁵⁶³ The return decision is temporarily inadmissible in such instances, as is shown by the example of an advanced (high risk) pregnancy.¹⁵⁶⁴ In contrast to the temporary inadmissibility, the Federal Office for Immigration and Asylum or Federal Administrative Court may also determine that the return decision is permanently inadmissible due to the private and family life of the person concerned.¹⁵⁶⁵ Specifically, this concerns cases in which the threatened Article 8 ECHR violation is based on circumstances that are not merely temporary in nature; a 'residence permit for reasons of Article 8 ECHR' is to be granted in such cases.¹⁵⁶⁶

Toleration, however, also acknowledges the circumstances in which deportation is factually impossible for reasons for which the person concerned is not responsible. The Federal Office for Immigration and Asylum requires the authorisation from the country of origin (a so-called certificate of return or travel document) in order to perform the deportation. If such authorisation is not issued by the respective representative authority abroad (*Vertretungsbehörde*), the alien cannot be deported and there is a factual obstacle to deportation.

to asylum or subsidiary protection. Such person will be granted the relevant status, which will then be immediately withdrawn due to the criminal offence.

1560 There is thus an exception from the constitutive effect of issuing the card; see Fn 1576.

1561 § 52(9) FPG.

1562 ErläutRV 330 BlgNR 24. GP, 9.

1563 See Chapter 4.B.III.1.

1564 VwGH 28.4.2015, Ra 2014/18/0146. The fact that medical treatment is carried out in Austria is also relevant as in the case in question it may significantly increase the person's interest in remaining in Austria. The rules on maternity protection are also applicable, for example §§ 3ff Mutterschutzgesetz in the version BGBl I 87/2022 (Maternity Protection Act), according to which women in the pre- and postpartum period require rest.

1565 § 9(3) BFA-VG.

1566 See Chapter 4.B.III. and Chapter 4.C.III.

The decisive aspect is whether the deportation is impossible due to acts by the alien concerned. § 46a(3) FPG therefore provides that reasons attributable to the alien shall in all cases exist if: the alien conceals his or her identity, fails to comply with a summons for the purpose of clarifying his or her identity or procuring a replacement travel document, or the alien does not cooperate in the steps necessary to obtain a replacement travel document or frustrates the taking of such steps. Furthermore, there must be a causal link between the acts or omissions listed in § 46a(3) FPG and the reasons for the impossibility of deportation.¹⁵⁶⁷ The authorities have broad discretion in this respect,¹⁵⁶⁸ though this has been limited by the courts on several occasions. For instance, the notification by the Austrian representative authority that the identity and/or nationality cannot be determined does not allow for the conclusion that the person concerned has made an inaccurate declaration about his or her identity.¹⁵⁶⁹ Since 2017, every alien is expressly required to obtain a travel document from the competent foreign authority (embassy or consulate) and to take all necessary actions that are necessary for this.¹⁵⁷⁰ This especially concerns the application for the document by the alien him- or herself and providing accurate information on his or her identity (name, date of birth, nationality and address).¹⁵⁷¹ The alien has to prove that he or she has performed this obligation to cooperate. Where necessary,¹⁵⁷² the Federal Office for Immigration and Asylum may summon the alien to the competent foreign representative authority to acquire a travel document (or similar).¹⁵⁷³

1567 VwGH 30.6.2016, Ra 2016/21/0078 para 17 with reference to ErläutRV 1078 BlgNR 24, 27.

1568 In Austrian terminology, discretion (*Ermessen*) means that the authority is not bound to a particular decision, but has a number of different options to choose from; cf. *Raschauer*, Verwaltungsrecht mn 573. In turn, the scope of the discretion may not be so broad that the rule becomes indeterminate and thus unconstitutional pursuant to Art 18(1) B-VG. On the different types of discretion, *Raschauer*, Verwaltungsrecht mns 574–580.

1569 VwGH 30.6.2015, Ra 2014/21/0040.

1570 § 46(2) FPG; for criticism see *Klammer*, Beugehaft nach dem FPG in *Filzwieser/Taucher* (eds), Asyl- und Fremdenrecht. Jahrbuch 2018 (2018) 147 (150–154) and *Geiger*, Die Beugehaft zur Durchsetzbarkeit von Mitwirkungspflichten im Rahmen des Fremdenpolizeigesetzes, *migraLex* 2019, 2 (4–7).

1571 § 36(2) BFA-VG.

1572 § 46(2b) FPG.

1573 § 46(2a) FPG; for criticism see *Klammer* in *Filzwieser/Taucher* 150–154.

b) Status

The Federal Office for Immigration and Asylum has to issue a card for tolerated persons (*Karte für Geduldete*; hereinafter just ‘card’) if the relevant requirements are met.¹⁵⁷⁴ In principle a person first acquires tolerated status once the card is issued,¹⁵⁷⁵ and thus this is why this act has constitutive effect.¹⁵⁷⁶ As the name indicates, the stay is not lawful and the obligation to leave the country still remains.¹⁵⁷⁷ In other words, the stay in Austria is merely temporary.¹⁵⁷⁸ The card may be withdrawn if the requirements are no longer met.¹⁵⁷⁹ There is no constitutive effect of issuing the card if the toleration was finally determined at an earlier point in time pursuant to § 46a(6) FPG – this primarily concerns the cases in which the Federal Office for Immigration and Asylum or Federal Administrative Court have held that the deportation is inadmissible due to a criminal conviction.

From a legal standpoint, issuing the card and the corresponding status gives rise to particular rights which allow the tolerated person to be distinguished from other irregularly staying aliens. The card is valid for one year from its date of issue.¹⁵⁸⁰ In principle the unlawful stay is punishable with a fine,¹⁵⁸¹ but no such offence is committed where there is tolerated status.¹⁵⁸² An application for a card under § 46a FPG has no procedural effects on the threat of deportation, which is enforceable despite such application.

Generally, persons staying irregularly – including those who are tolerated – are denied access to the labour market, though there is an exception for those individuals whose asylum or subsidiary protection status has been withdrawn (or not granted), but whose deportation is inadmissible due to the principle of non-refoulement.¹⁵⁸³ Such persons have the possibility to engage in employment after receiving the relevant employment

1574 For example, VwGH 31.8.2017, Ro 2016/21/0019, paras 29ff. See VwGH 16.5.2012, 2012/21/0053 on extending ‘toleration’.

1575 § 46a(4) and (5) FPG.

1576 VfGH 29.11.2016, E 847/2016. An exception exists if the toleration was finally determined at an earlier point in time. See Fn 1560.

1577 §§ 31(1a) No. 3 and 46(1) FPG.

1578 § 46a(4) and (5) FPG.

1579 VwGH 31.8.2017, Ro 2016/21/0019, para 30.

1580 § 46a(5) 1st Sent. FPG.

1581 § 120(1)(a) FPG.

1582 § 120(5) No. 2 FPG.

1583 § 46a(1) No. 2 FPG.

permit.¹⁵⁸⁴ I have already discussed elsewhere that such unequal treatment is unconstitutional in so far as it violates the fundamental requirement of decent living conditions.¹⁵⁸⁵

As already outlined in Chapter 3, a claim to basic welfare benefits is only available to those irregularly staying aliens who cannot be deported due to legal or factual reasons.¹⁵⁸⁶ There is thus no right to basic welfare benefits until the impossibility of deportation and thus tolerated status has been determined.¹⁵⁸⁷

c) Legal protection

The appeals described in Chapter 3.A.V. may be lodged if an application for tolerated status is rejected or dismissed.¹⁵⁸⁸

d) Regularisation prospects

Regularisation is possible for persons who are tolerated pursuant to § 46a(1) Nos. 1 or 3 FPG. Both of these sets of circumstances are therefore considered a preliminary step towards acquiring a right to stay.¹⁵⁸⁹ Tolerated persons may apply for a ‘special protection residence permit’ after one year, thereby regularising their stay.¹⁵⁹⁰ The other sets of circumstances (i.e. § 46a(1) Nos. 2 or 4 FPG) are consequently just considered a qualified irregular stay. In addition, it is also conceivable that one may apply for a ‘residence permit for reasons of Article 8 ECHR’.¹⁵⁹¹ This type of residence permit is available to irregularly staying persons irrespective of whether they have tolerated status. Where tolerated persons are concerned, this regularisation is not considered a chance for regularisation as the tolerated stay is not a requirement for this type of residence permit.

1584 § 4(1) No. 1 AuslBG; see Chapter 3.A.II.2.

1585 *Hinterberger*, DRdA 2018, 106–109.

1586 Art 2(1) No. 4 GVV.

1587 See Chapter 3.A.II.4. For criticisms with regard to Art 1 CFR *Hinterberger/Klammer* in *Salomon* 349 and *Hinterberger/Klammer*, University of Vienna Law Review 2020, 74.

1588 § 7(1) No. 1 BFA-VG.

1589 See Chapter 1.B.III.1.a.

1590 See Chapter 4.A.II.1.

1591 See Chapter 4.B.III. and Chapter 4.C.III.

II. Non-refoulement under the ECHR and CFR or factual reasons¹⁵⁹²

The following describes the Austrian ‘special protection residence permit’ (*Aufenthaltsberechtigung besonderer Schutz*) before the German ‘residence permit for banned deportation to a specific state’ (*Aufenthaltserlaubnis bei zielstaatsbezogenen Abschiebungsverboten*) and the Spanish ‘temporary residence permit for humanitarian reasons’ (*autorización de residencia temporal por razones humanitarias*) as each are granted for (at least) one year. As there is no difference in duration, the national jurisdictions are therefore presented in alphabetical order.

1. Austria: ‘special protection residence permit’

A special protection residence permit may be granted based upon the circumstances listed in § 57(1) AsylG (A).¹⁵⁹³ § 57(1) No. 1 AsylG (A) will be analysed here, with Nos. 2 and 3 discussed in the context of vulnerability, specifically victim protection.¹⁵⁹⁴

§ 57(1) No. 1 AsylG (A) applies to tolerated persons. Its legal grounds are derived from Article 3 ECHR, with the Return Directive providing the basis for its factual grounds. The last official statistics were published in 2013, according to which only 27 ‘special protection residence permits’ were granted.¹⁵⁹⁵ Despite the lack of recent statistics, it can be assumed from the low number of cards issued to tolerated persons that a low number of ‘special protection residence permits’ have been issued.¹⁵⁹⁶ Such permits therefore have almost no relevance in practice.

a) Requirements

The main requirement according to § 57(1) No. 1 AsylG (A) is for the tolerated person to have been tolerated pursuant to § 46a(1) Nos. 1 or 3 FPG

1592 See Chapter 1.B.III.1.b.

1593 § 57(1) AsylG (A) and ErläutRV 1803 BlgNR 24. GP, 47.

1594 See Chapter 4.D.I.1.

1595 *Bundesministerium für Inneres*, Niederlassungs- und Aufenthaltsstatistik 2013 (2013), https://www.bmi.gv.at/302/Statistik/files/Niederlassungs_und_Aufenthaltsstatistik_Jahresstatistik_2013.pdf (31.7.2022) 37. There were only 15 extensions.

1596 See Chapter 4.A.I.3.

since at least one year and the requirements ‘continue to be met’. It is for the Federal Office for Immigration and Asylum to examine whether the requirements ‘continue to be met’, though the Supreme Administrative Court has ruled that the Federal Office for Immigration and Asylum is bound by the fact that the alien possesses a card for tolerated persons.¹⁵⁹⁷ Furthermore, the alien may not constitute a danger to the Republic of Austria or have been convicted of a crime¹⁵⁹⁸. An alien may not receive a ‘special protection residence permit’ if international protection (asylum or subsidiary protection) has been withdrawn.¹⁵⁹⁹

b) Right to stay

See the discussion in Chapter 3.A.III.2.d.

2. Germany: ‘residence permit for banned deportation to a specific state’

The residence permit because of the banned deportation to a specific state under § 25(3) AufenthG may be issued if the departure from the country is impossible for legal reasons and it is not expected that the obstacles to departure will cease in the foreseeable future.¹⁶⁰⁰ The ‘national deportation bans’ according to § 60(5) and (7) AufenthG¹⁶⁰¹ are to be understood as derivatives of Article 3 ECHR and the Return Directive, despite being a purely national means to protection against deportation, which fall within the regulatory competences at national level.¹⁶⁰²

The ‘national deportation bans’ are also relevant in relation to the ‘residence permits for persons who are enforceably required to leave the country, but whose departure is legally or factually impossible’. By

1597 VwGH 31.8.2017, Ro 2016/21/0019, para 32.

1598 See § 17 StGB (A). In some circumstances the final judgment of a foreign court may be considered equivalent to a judgment of an Austrian court; § 73 StGB (A).

1599 §§ 7 and 9 AsylG (A). § 57(1) No. 1 AsylG (A) makes no express reference to § 46(1) No. 2 FPG. See Chapter 4.A.I.3.a.

1600 See Chapter 4.C.II.

1601 See Chapter 4.A.I.2.a.

1602 *Hruschka/Mantel* in *Huber/Mantel* § 60 AufenthG mn 18; agreeing *Koch* in *Kluth/Heusch* § 60 AufenthG mns 39f.

mid-2021, 127,261 foreigners held a residence permit pursuant to § 25(3) AufenthG.¹⁶⁰³

a) Requirements

§ 60(5) and (7) AufenthG refer to the ban of deportation to a specific state, though § 60(5) AufenthG is derived primarily from the ECHR.¹⁶⁰⁴ Article 3 ECHR may be mentioned here, but there are other ‘deportation bans’ under the ECHR that are to be guaranteed – such as the exclusion from subsidiary protection.¹⁶⁰⁵ § 60(7) AufenthG can be derived above all from the German Basic Law – the *Grundgesetz*.¹⁶⁰⁶ If there is a ban on deportation to a specific state, the grant of the residence permit under § 25(3) takes priority over the residence permit under § 25(5) AufenthG due to the more extensive rights it affords.¹⁶⁰⁷

A further case may be given in the event an illness cannot be treated in the specific state of destination.¹⁶⁰⁸ There is only a ‘concrete threat’ if the foreigner’s health would significantly worsen if he or she is deported.¹⁶⁰⁹ Determining a threat requires consideration of all the circumstances related to the state of destination, especially those that can worsen the foreigner’s conditions.¹⁶¹⁰ § 60(2) 2nd Sent. AufenthG stipulates that it must be a life-threatening or serious illness which would significantly worsen if the foreigner is deported.¹⁶¹¹ It is not necessary for medical care in the state of destination to be equivalent to medical care in Germany.¹⁶¹² Furthermore, sufficient medical care generally also exists where it is guaranteed only in part of the state of destination.¹⁶¹³ The person concerned can therefore be

1603 BT-Drs 19/32579, 6.

1604 *Hruschka/Mantel* in *Huber/Mantel* § 60 AufenthG mns 26ff.

1605 Cf. *Hruschka/Mantel* in *Huber/Mantel* § 60 AufenthG mn 32.

1606 Cf. *Hruschka/Mantel* in *Huber/Mantel* § 60 AufenthG mn 18.

1607 See Chapter 4.C.II.1.

1608 See also *Koch* in *Kluth/Heusch* § 60 AufenthG mn 28.

1609 NVwZ-RR 2012, 529 mn 34 with further references.

1610 Cf. *Hager*, Abschiebung trotz schwerer Krankheit? Die gesetzlichen Neuregelungen zu Abschiebungshindernissen aus gesundheitlichen Gründen, *Asylmagazin* 2016, 160 (161).

1611 *Hager*, *Asylmagazin* 2016, 162. Cf. NVwZ-RR 2012, 529 mn 34 with further references. For criticism see *Hager*, *Asylmagazin* 2016, 161.

1612 § 60(7) 3rd Sent. AufenthG; cf. *Thym*, Die Auswirkungen des Asylpakets II, NVwZ 2016, 409 (412).

1613 § 60(7) 4th Sent. AufenthG.

expected to go to a certain part of the country in order to make use of the sufficient healthcare available there.¹⁶¹⁴ The German legislator introduced this rule to reduce the obstacles to deportation on alleged health grounds, as the authorities are faced with major challenges in both quantitative and qualitative terms.¹⁶¹⁵ The residence permit has been viewed as being compatible in principle with ECtHR case law.¹⁶¹⁶

b) Right to stay

As has been noted above, the ‘national deportation bans’ under § 60(5) and (7) AufenthG serve as a third category of protection after the protection of asylum seekers and refugees, and subsidiary protection.¹⁶¹⁷ This study has already considered that these bans serve as a basis for toleration, though here they serve as requirements for granting a residence permit. The foreigners authority is responsible for deciding upon an application under § 25(3) AufenthG, though only after consulting the Federal Office for Migration and Refugees.¹⁶¹⁸

As in relation to § 25(5) AufenthG, it is relevant that the Federal Office for Migration and Refugees carries out the examination of the ‘national deportation bans’ during the deportation procedure.¹⁶¹⁹ In these cases, which can be described as national subsidiary protection, the residence permit discussed here is again not to be qualified as regularisation. It is more important for this study that the application for the residence permit can be made during the status as a tolerated person,¹⁶²⁰ as this fulfils the notion of a regularisation.

A residence permit is to be granted for at least one year where the ban on deportation to a specific state is formally acknowledged.¹⁶²¹ An exception exists, however, if the grounds for exclusion apply.¹⁶²² On the one hand, this concerns cases in which it is apparent from the foreigner’s

1614 For criticism, see *Hager*, *Asylmagazin* 2016, 162.

1615 Cf. BT-Drs 18/7538, 11.

1616 For detail on two points contrary to international and EU law, see *Hinterberger/Klammer* in *Filzwieser/Taucher* 139.

1617 See Chapter 4.A.I.2.a.

1618 § 72(2) AufenthG.

1619 See just § 42 1st Sent. AsylG (G).

1620 See Chapter 4.A.I.2.a.

1621 § 25(3) AufenthG; cf. *Maaßen/Kluth* in *Kluth/Heusch* § 25 AufenthG mns 55–57.

1622 § 25(3) 1st and 2nd Sent. AufenthG.

file or statements that deportation to another state is possible and reasonable.¹⁶²³ On the other hand, this exception concerns cases in which the foreigner has repeatedly or grossly breached the obligation to cooperate, thereby making the deportation to another state impossible or unreasonable,¹⁶²⁴ for instance by furnishing falsified documents.¹⁶²⁵ Furthermore, there is a list of mandatory grounds for denying the application, with the commission of a serious criminal offence playing an especially significant role.¹⁶²⁶ If such a ground for exclusion applies, the person concerned is only tolerated and not to be granted a residence permit.¹⁶²⁷

Prior to the Skilled Immigration Act in 2020, the residence permit under § 25(3) AufenthG did not directly allow the foreigner to work, but instead required permission from the foreigners authority.¹⁶²⁸ § 4a(1) 1st Sent. AufenthG has since greatly improved the situation by providing that foreigners holding a residence title may pursue an ‘economic activity’ (i.e. employment and self-employment).¹⁶²⁹ Where a residence permit is issued due to the ban on deportation to a specific state, the foreigner is also entitled to benefits under the Social Insurance Code II or social assistance under the Social Insurance Code XII.¹⁶³⁰

1623 For detail see Göbel-Zimmermann/Hupke in Huber/Mantel (eds), Kommentar Aufenthaltsgesetz/Asylgesetz³ (2021) § 25 AufenthG mns 15–20.

1624 See BVerwG, Judgment of 22.11.2005, 1 C 18/04, NVwZ 2006, 711.

1625 VGH München Beck Rechtssache 2005, 16071. However, the stated grounds for exclusion may not be applied when interpreting the law in accordance with the Directive if a ‘deportation ban’ is established according to § 60(7) AufenthG when implementing the Qualification Directive; see Maaßen/Kluth in Kluth/Heusch § 25 AufenthG mn 32.

1626 See § 25(3) 3rd Sent. AufenthG; for detail see Göbel-Zimmermann/Hupke in Huber/Mantel § 25 AufenthG mns 23–28. These were introduced when transposing Art 17 Qualification Directive.

1627 Cf. Marx, Aufenthalts-, Asyl- und Flüchtlingsrecht § 5 mn 41 and see Chapter 4.A.I.2.a.

1628 § 31 BeschV and on the previous law cf. Maor in Kluth/Heusch (eds), BeckOK Ausländerrecht (18th edn, 1.5.2018) § 4 AufenthG mn 30.

1629 Cf. Schuster/Voigt, Asylmagazin 2020, 65f.

1630 Cf. Frings/Janda/Keßler/Steffen, Sozialrecht mn 756 and Huber/Eichenhofer/En-dres de Oliveira, Aufenthaltsrecht mn 546.

3. Spain: 'temporary residence permit for humanitarian reasons' where the visa application in the state of origin is impossible

Article 126(3) REDYLE allows the grant of a 'temporary residence permit for exceptional circumstances' to foreigners who meet the requirements for a temporary residence permit or a residence permit and employment permit, but who cannot go to the country of origin to apply for a visa due to the threat to their own safety or of their family (*autorización temporal por razones humanitarias – imposibilidad de trasladarse al país de origen para solicitar el visado*).¹⁶³¹ This type of residence permit falls under 'humanitarian reasons' within the category 'temporary residence permit for exceptional circumstances', which also includes two other grounds.¹⁶³²

According to *García Vitoria*, this is the final part of the 'international protection' (*protección internacional*) under Spanish law as it concerns every person who does not receive either asylum or subsidiary protection.¹⁶³³ This type of residence permit is relevant to this study as it may be understood as an expression of the non-refoulement principle in the sense of Article 3 ECHR, which attempts to close the gap in protection between international protection per the Qualification Directive and the non-refoulement principle.¹⁶³⁴ However, it is to be noted here that the application is subject to the irregular status, thus satisfying the definition of regularisation. There is no provision for *ex officio* consideration in the asylum process.

a) Requirements

It must be impossible for the foreigner to go to the country of origin to apply for a visa. Unlike the requirements for international protection, this could cover all cases in which the journey would constitute a violation of the non-refoulement principle. This is apparent from the wording '*imposibilidad de trasladarse*',¹⁶³⁵ though the risk must be specified in a report. Article 35(7) LODYLE and Article 196(1) REDYLE each contain a similar

1631 Cf. *Peña Pérez*, *Revista de Derecho Migratorio y Extranjería* 2012/30, 44–46.

1632 Art 126 REDYLE and see Chapter 4.D.I.3. and Chapter 4.D.II.1.

1633 Cf. *García Vitoria* in *Boza Martínez/Donaire Villa/Moya Malapeira* 298.

1634 See Chapter 1.B.III.1.b.

1635 In this sense see *Trinidad García*, *Residencia temporal por circunstancias excepcionales: el arraigo laboral y social*, *Revista de Derecho Migratorio y Extranjería* 2005/9, 133 (153).

expression with regard to unaccompanied minors who cannot be returned (*imposibilidad de retorno* and *repatriación*).¹⁶³⁶ However, the precise meaning is not clear,¹⁶³⁷ thus giving rise to considerable uncertainty.¹⁶³⁸

The High Court of Justice of Castilla-La Mancha (*Tribunal Superior de Justicia de Castilla-La Mancha*) held that this requirement was met in the following circumstances: a Colombian national had contributed as a protected witness to uncovering a drug network.¹⁶³⁹ However, this network subsequently became aware of the witness' statements, which thus would have placed him and his family in great danger if they were to return to Colombia. A statement by the local *Guardia Civil* confirmed the witness' contribution as well as the risks of returning to Colombia. The Court therefore affirmed the requirement as returning to Colombia to apply for a visa would have endangered the safety of the witness and of his family.

b) Right to stay

The residence permit is usually granted for one year, though an application for an employment permit may be made together with this residence permit.¹⁶⁴⁰

III. Interim conclusion

The non-refoulement principle and the Return Directive form the standard against which the purpose 'non-returnability' underpinning the regularisation is measured. The latter obliges the Member States to end the irregular stay either by return or by granting a right to stay. The view advocated here maintains that two regularisation obligations result from the

1636 Cf. Ruiz Legazpi, Los problemas jurídicos de la inmigración infantil in *Balado Ruiz-Gallegos* (ed), *Inmigración, Estado y Derecho: Perspectivas desde el siglo XXI* (2008) 507 (527f) and Cobas Cobiella, *Menores y Extranjería: Situaciones de regularización*, *Revista Boliviana de Derecho* 2015/20, 100 (113f).

1637 See Heredia Fernández in Moya Escudero 60 on the previous law.

1638 Lázaro González/Benlloch Sanz, *Ciudadanía e integración: menores no acompañados, trata de seres humanos y víctimas de violencia de género* in Palomar Olmeda (ed), *Tratado de Extranjería*⁶ (2020) 881 (899f) referring to the wording in Art 196(1) REDYLE.

1639 STSJ Castilla-La Mancha 225/2016, ECLI:ES:TSJCLM:2016:225.

1640 Arts 129(2) and 130(1) REDYLE; see Chapter 3.C.II.2.

Return Directive. On the one hand, an obligation applies when the return would violate the non-refoulement principle. If one does not follow this view, there is merely special protection against deportation for migrants on the basis of the non-refoulement principle, but no obligation to grant a right to stay. On the other hand, according to the view advocated here, there is a regularisation obligation under the Return Directive in cases of permanent non-returnability, i.e. if a person cannot be deported by the respective Member State within 18 months.

Where the comparative analysis of the ‘non-returnability’ purpose is concerned, it can be stated at the outset that Austria and Germany, on the one hand, and Spain, on the other, have found different ways of dealing with irregularly staying foreigners (aliens) who are non-returnable. This already became clear in Chapter 3 during the discussion of the different ways of accessing social benefits and healthcare.¹⁶⁴¹

Spanish law does not regulate the situation of irregularly staying migrants who cannot be deported.¹⁶⁴² One can speak of a factual or non-statutory toleration of irregularly staying foreigners in the circumstances identified as either no regulations exist or it is unclear how the authorities are to proceed in these situations. Contrastingly, the system of toleration was created in Austria and Germany, which represents a temporary solution for legal and factual obstacles to deportation and is intended to increase the level of legal certainty. In view of the assessment criterion, this solution is to be assessed as the most effective solution as it does not leave the persons in an even greater state of limbo and the Member States have such more control. The removal measure can thereby be enforced if the obstacle to deportation ceases, or if this is not the case, the migrant can be granted a residence permit. It should be emphasised that irregularly staying foreigners are only entitled to social benefits, access to healthcare and, under certain circumstances, access to employment once they have tolerated status. Many cases of toleration can be qualified as a preliminary step to a right to stay. Furthermore, a distinction must be made between factual and legal obstacles to deportation.

Two problems exist in Austria with regard to the *de facto* obstacles to deportation. On the one hand, the alien must not have caused the obstacles to deportation him- or herself, otherwise no card for tolerated persons and consequently no ‘special protection residence permit’ may be granted. On the other hand, the Federal Office for Immigration and

1641 See Chapter 3.D.

1642 With the exception of those residence permits still to be discussed.

Asylum has too much discretion in assessing whether the obstacles to deportation are attributable to the alien. This has the effect that the aliens are *de facto* not deportable, but (for the reasons explained) are also not tolerated. They thus find themselves in a similar situation as in Spain, although under Spanish law there is at least access to social benefits and healthcare for irregularly staying foreigners. Whether the departure is self-inflicted has so far been examined in Germany ‘only’ with regard to the entitlement to social benefits and access to employment, but not with regard to the decision whether the person is tolerated. This seems to be the most appropriate solution for the factual obstacles to deportation. Since the Orderly Return Act, however, the legal situation in Germany has come closer to that of Austria through the introduction of a special ground for toleration: ‘persons whose identity is not verified’. The grant of such a toleration entails far-reaching sanctions compared to other grounds for toleration. Those periods in which one is a ‘person whose identity is not verified’ do not count as periods preceding the toleration. Since 21 August 2019, the legal situation for such tolerated persons thus leads to a serious deterioration of their prospects under residence law, especially with regard to obtaining the residence permits pursuant to §§ 25a and 25b AufenthG.¹⁶⁴³ Furthermore, a closer look reveals that the ‘residence permit for persons who are enforceably required to leave the country, but whose departure is legally or factually impossible’,¹⁶⁴⁴ cannot be issued if the departure could not be enforced due to the actions of the foreigner. The problem of ‘self-infliction’ is therefore only shifted to another level. The German solution still seems to be the more expedient in comparison to the Austrian, even if the Orderly Return Act has worsened the situation. Those affected at least have a legally secured status and, depending on the reason for toleration, access to social benefits and access to the labour market, albeit limited. The German solution, however, involves a different problem. Since it is not possible to obtain a right to stay in these cases, many foreigners remain ‘stuck’ in toleration for several years. The term ‘chain toleration’ describes this phenomenon.

With regard to the legal obstacles to deportation, specifically Article 3 ECHR, it is evident that foreigners can be granted tolerated status in Austria as well as in Germany. When measured against the opinion expressed here that in such cases there is an obligation to regularise, these persons should immediately receive a right to stay. Neither the Austrian nor the

1643 See Chapter 4.B.I.–II.

1644 See Chapter 4.C.II.

German ‘toleration’ meets this requirement. If one takes the opposite view, that in the case of a threatened violation of the non-refoulement principle there is special protection against deportation, but no obligation to regularise, toleration is then an effective mechanism in so far as a right to stay can actually be obtained afterwards.

In Spain, the foreigners concerned are either *de facto* tolerated or they can obtain a ‘temporary residence permit for humanitarian reasons’ due to the impossibility of going to the country of origin to apply for a visa. However, due to the very open wording, this type of residence permit does not seem to cover very many cases in practice and contributes to great legal uncertainty. The legal situation in Spain is thus hardly compatible with the requirements of Article 3 ECHR in the circumstances in which the persons are only *de facto* tolerated, as the status is so precarious and uncertain. If one includes the obtaining of the temporary residence permit, one could possibly come to the conclusion that the protection against deportation required by Article 3 ECHR is fulfilled. In addition, the view expressed in this study that there is an obligation to regularise in these cases is also followed.

As a first step it should be noted that the creation of a separate legal institution is an effective solution to prevent irregularly staying migrants who cannot be deported due to legal and factual obstacles to deportation from remaining in a state of limbo. For reasons of legal certainty, granting tolerated status for one year (as in Austrian law) is an appropriate approach. Austria and Germany provide different prospects for regularisation based on the tolerated status, which accord in essence with the obligation to regularise in the case of permanent non-returnability or the imminent violation of the non-refoulement principle.

In addition to toleration, a total of three regularisations were analysed in the three Member States, which enable the acquisition of a right to stay because of legal or factual obstacles to deportation. German law provides for a ‘residence permit for banned deportation to a specific state’ which, for example, covers circumstances in which subsidiary protection has been withdrawn or the person is excluded from subsidiary protection altogether. The ‘banned deportation to a specific state’ offers foreigners the possibility of obtaining a residence permit if they suffer from an illness that cannot be treated in the state of destination. The residence permit is granted for one year if such ‘deportation ban’ has been formally established and there are no grounds for exclusion. This is relevant in practice because the foreigners are only tolerated should grounds for exclusion exist. A residence permit for banned deportation to a specific state can

be derived, *inter alia*, from Article 3 ECHR and offers protection against deportation by granting a right to stay. However, if there is a ground for exclusion, the person is only to be tolerated. An obligation to regularise is thus not followed in these cases.

The ‘special protection residence permit’ in Austrian law stipulates that aliens can obtain a one-year residence title if they have been tolerated for one year. Nonetheless, it is a problem that not all persons tolerated due to the imminent violation of the non-refoulement principle may obtain this residence permit. This applies foremost to the situations in which the person was entitled to asylum or subsidiary protection, but this was withdrawn because the person concerned committed a crime. The exclusion of this group of persons may be one of the reasons for the limited practical significance of this particular residence permit. Persons who were entitled to asylum or subsidiary protection thus remain in a tolerated status unless another residence permit can be obtained, with the ‘residence permit for reasons of Article 8 ECHR’ being the most prominent. For the remaining tolerated persons, however, this residence permit represents the decisive prospect for regularisation. In accordance with the standard of assessment, it can thus be stated that it is indeed possible to obtain a residence permit in accordance with the obligation to regularise set out here, but impossible for a significant group of persons. All of the discussed circumstances under Austrian law fulfil the special protection against deportation. If one assumes that an obligation to regularise exists, however, it must be pointed out that this obligation is contradicted by those cases that are excluded from the prospect of regularisation.

As already indicated, Spanish law contains a residence permit for those situations that go beyond international protection within the meaning of the Qualification Directive. As the provisions are broadly worded, there is great legal uncertainty as to whether and in which cases the requirements are met.

Thus, in a second step, it should be noted that three different regularisations exist in the three Member States analysed here. This already shows the distinctions present in this field of law. All three Member States have created regulations that prevent imminent non-refoulement violations pursuant to Article 3 ECHR. Nonetheless, they differ in their requirements for granting the permit and the grounds for exclusion, with considerable differences in whether deportation is temporarily suspended or whether a right to stay can be obtained immediately.

B. Social ties

The German ‘residence permit in the case of permanent integration’ (*Aufenthaltserlaubnis bei nachhaltiger Integration*) will be analysed first as it can be granted from six months to a maximum of two years. This is followed by a description of the ‘residence permit for well-integrated juveniles and young adults’ (*Aufenthaltserlaubnis für gut integrierte Jugendliche und Heranwachsende*), which allows a stay from six months to a maximum of three years. The Austrian ‘residence permit for reasons of Article 8 ECHR’ (*Aufenthaltstitel aus Gründen des Artikel 8 EMRK*) is then presented in relation to the right to respect one’s private life as it may be granted for a minimum period of one year.

I. Germany: ‘residence permit in the case of permanent integration’

The ‘residence permit in the case of permanent integration’ under § 25b AufenthG was introduced in 2011 together with the ‘residence permit for well-integrated juveniles and young adults’ in § 25a AufenthG. Both entered into force on 1 August 2015 and are derived from Article 8 ECHR.¹⁶⁴⁵ Where tolerated persons are concerned, § 25b AufenthG created for the first time the prospect of residence independent of age and a specific date.¹⁶⁴⁶ According to recent statistics, since mid-2021 there are 7,841 foreigners with a residence permit pursuant to § 25b AufenthG.¹⁶⁴⁷

Furthermore, it is to be noted that the so-called Toleration Act (*Duldungsgesetz*), which entered into force on 1 January 2020, created a ‘toleration for the purpose of employment’ (*Beschäftigungsduldung*).¹⁶⁴⁸ This is relevant as foreigners (and their immediate family) who have had such tolerated status for 30 months, may acquire a residence permit in the case

1645 Marx, Aufenthalts-, Asyl- und Flüchtlingsrecht § 5 mn 138.

1646 Act of 23.6.2011 (BGBl I 1266). See Röder, §§ 25a und b AufenthG – Hiergeblieben!? Die neuen Bleiberechte bei gelungener Integration, Asylmagazin 2016, 108.

1647 BT-Drs 19/32579, 23.

1648 Cf. Röder/Wittmann, Spurwechsel leicht gemacht? Überlegungen zur neuen Ausbildungs- und Beschäftigungsduldung, Das Migrationspaket – Beilage zum Asylmagazin 8–9/2019, 23 (31ff); Rosenstein/Koehler, Beschäftigungsduldung – eine Bewertung der Neuregelung aus Sicht der Praxis, ZAR 2019, 223.

of permanent integration provided other criteria are met.¹⁶⁴⁹ This will be discussed in more detail in Chapter 4.E.IV.1.

1. Requirements

The main requirement for granting a ‘residence permit in the case of permanent integration’ is that the person concerned has a tolerated status pursuant to § 60(2) AufenthG, or a ‘permission to remain’ pursuant to § 55 AsylG (G), or holds a temporary residence or permanent settlement permit. For the purposes of this study and the definition of a regularisation, it is imperative that the applicant has tolerated status when applying for the residence permit.¹⁶⁵⁰ This requires particular consideration of the new rules introduced by the Orderly Return Act, especially those concerning the toleration of ‘persons whose identity is not verified’.¹⁶⁵¹ § 105(3) AufenthG stipulates that the duration of such tolerated status does not count towards the future ‘toleration for the purpose of employment’.¹⁶⁵² This drastically worsens the prospects under residence law for tolerated ‘persons whose identity is not verified’. However, one must not forget that it is possible at a later time to undertake the reasonable efforts to acquire a passport and thus ‘cure’ the failure to perform this obligation.¹⁶⁵³ In this case the obligation be regarded as met and the certificate issued to the tolerated person will not contain the additional wording for ‘persons whose identity is not verified’.¹⁶⁵⁴ The cure therefore allows the duration of toleration prior to the issuance of toleration for ‘persons whose identity is not verified’ to again have effect under residence law and can be subsequently credited to the previous periods of residence for §§ 25a and 25b AufenthG.¹⁶⁵⁵

‘Permanent integration’ is also required. § 25b(1) 2nd Sent. AufenthG lists a series of requirements that are to be met, though the explanations accompanying the legislation state that comparable efforts at integration

1649 § 25b(6) AufenthG; cf. BT-Drs 19/8286, 13f.

1650 See Chapter 1.A.II.1.

1651 § 60b AufenthG.

1652 See Chapter 4.A.I.2.a.

1653 § 60b(4) AufenthG and see Chapter 4.E.IV.1.

1654 § 60b(4) 4th Sent. AufenthG.

1655 Eichler, Das Migrationspaket – Beilage zum Asylmagazin 8–9/2019, 71 with reference to BT-Drs 19/10047, 39.

may allow the grant of residence permit under § 25b AufenthG even if not all of the requirements under § 25b(1) 2nd Sent. AufenthG are met.¹⁶⁵⁶

Another requirement is eight years uninterrupted residence in Germany because the deportation was suspended (i.e. the stay was tolerated), on the basis of permission to remain pending the asylum decision or by holding a temporary residence or permanent settlement permit. Here Röder is correct in arguing that six years residence will also suffice if there are further efforts at integration.¹⁶⁵⁷ A minimum six-year period applies if the foreigner is living with a minor, unmarried child¹⁶⁵⁸ as a family unit, for at least six years.¹⁶⁵⁹ The residence must be ‘without interruption’, though short interruptions up to three months are harmless.¹⁶⁶⁰

Further requirements include the condition that the foreigner is committed to the free democratic basic order¹⁶⁶¹ and possesses a basic knowledge of the legal and social system and the prevailing way of life in Germany.¹⁶⁶²

The foreigner must also be integrated economically.¹⁶⁶³ On the one hand, this may be achieved by having a secure subsistence.¹⁶⁶⁴ In this respect it suffices if the foreigner can cover from his or her own resources more than half of the amount required,¹⁶⁶⁵ though the temporary receipt of benefits is not detrimental to his or her application.¹⁶⁶⁶ On the other hand, the explanations accompanying the legislation correctly highlight the difficulty in finding employment due to the uncertain residence status.¹⁶⁶⁷ It therefore suffices to consider the foreigner’s previous education, training, income and family situation to determine whether ‘it is to be ex-

1656 BT-Drs 18/4097, 42.

1657 Röder, Asylmagazin 2016, 109f with reference to BT-Drs 18/4097, 23.

1658 The legislation refers to a ‘child’, though it does not have to be the applicant’s child; see Röder, Asylmagazin 2016, 109.

1659 Depending on the circumstances, a shorter period may also suffice.

1660 Cf. BT-Drs 18/4097, 43 and Röder, Asylmagazin 2016, 110.

1661 § 25b(1) No. 2 AufenthG. For criticism see Röder, Asylmagazin 2016, 111. This is more extensive than as required under § 25a(1) No. 5 AufenthG; see Chapter 4.B.II.1.

1662 As for the permanent settlement permit, these may be proven through participation in an orientation course; cf. No. 9.2.1.8 AVV-AufenthG. According to Röder, Asylmagazin 2016, 111 it is not clear why the exception under § 25b(3) AufenthG does not apply.

1663 § 25(1) No. 3 AufenthG.

1664 § 2(3) 1st Sent. AufenthG.

1665 Röder, Asylmagazin 2016, 111.

1666 § 25b(1) 3rd Sent. AufenthG; for detail see Röder, Asylmagazin 2016, 112.

1667 Cf. BT-Drs 18/4097, 43.

pected' that the foreigner will be able to ensure his or her subsistence. An elementary oral command of the German language equivalent to A2 level is also required and may be met in a pragmatic manner by being able to communicate with the foreigners authority without an interpreter.¹⁶⁶⁸ Pursuant to § 25b(3) AufenthG, these two requirements (economic integration and oral command of German) are waived if they cannot be fulfilled due to a physical or mental illness or disability or old age.

Finally, school-age children must be able to furnish proof that they are 'actually' attending school.¹⁶⁶⁹ Unlike for the residence permit under § 25a AufenthG, the attendance need not be 'successful'.¹⁶⁷⁰

§ 25b(2) AufenthG contains two express grounds for exclusion: firstly, where deportation has been prevented or delayed due to intentionally providing false information or deceit with regard to identity or nationality. *Hörich/Putzar-Sattler* draw attention to the fact that the wording is much narrower than under § 25(5) 3rd Sent. AufenthG, thus the foreigner must have acted knowingly and intentionally.¹⁶⁷¹ Secondly, a residence permit may not be granted if there is an especially serious or serious public interest in expelling the foreigner within the meaning of § 54(1) or (2) Nos. 1 and 2 AufenthG.¹⁶⁷² Such interest arises if, for example, the foreigner has links to an extremist or terrorist organisation or has intentionally committed a criminal offence.¹⁶⁷³ Furthermore, § 25b(5) 2nd Sent. AufenthG provides that residence permit may be granted in derogation from the aforementioned block on issuing a residence title in certain cases in which an application for asylum has been rejected.¹⁶⁷⁴

1668 § 25b(1) No. 4 AufenthG; cf. BT-Drs 18/4097, 44.

1669 § 25b(1) No. 5 AufenthG.

1670 See Chapter 4.B.II.1.

1671 *Hörich/Putzar-Sattler*, Mitwirkungspflichten im Ausländerrecht: Rechtsgutachten zu den Voraussetzungen von Sanktionen bei Nichtmitwirkung (November 2017), 9 refer to the identical wording under § 25a(2) 1st Sent. No. 1 AufenthG; see Chapter 4.B.II.1. The wording is almost identical besides that in § 25b(2) 1st Sent. No. 1 AufenthG the word 'intentionally' is used in comparison to § 25a(2) 1st Sent. No. 1 AufenthG.

1672 For detail see *Bergmann/Putzar-Sattler* in *Huber/Mantel* (eds), Kommentar Aufenthaltsgesetz/Asylgesetz³ (2021) § 54 AufenthG.

1673 BT-Drs 18/4097, 44.

1674 See Chapter 3.B.III.2.c.

2. Right to stay

The residence permit is to be granted and extended for no more than two years,¹⁶⁷⁵ though as for § 25a AufenthG there is a degree of discretion.¹⁶⁷⁶ The residence permit allows the holder to pursue an economic activity according to § 4a(1) 1st St AufenthG.¹⁶⁷⁷ In principle a residence permit under § 25b AufenthG allows the holder to claim the Unemployment Benefits II (*Arbeitslosengeld II*) under the Social Security Code II or social assistance under the Social Security Code XII.¹⁶⁷⁸

An extension is possible pursuant to § 8(1) AufenthG. The requirement of tolerated status does not need to be met again, the economic integration does, however.¹⁶⁷⁹ In addition to an application for a residence permit pursuant to § 25b AufenthG, a secondary application for a residence permit pursuant to § 25(5) AufenthG may also be submitted.¹⁶⁸⁰

3. Family members: derivative right to stay

§ 25b(4) AufenthG states that a residence permit is to be granted to the spouse, civil partner and minor, unmarried children living with the foreigner who has become permanently integrated into the way of life in Germany. In other words, the family members have a derivative right to a residence permit under § 25b AufenthG. With the exception of the period of uninterrupted residence, the family member must satisfy the other requirements as described above.¹⁶⁸¹ The legal status is comparable to that of the respective beneficiary of a residence permit under § 25b(1) AufenthG.¹⁶⁸²

1675 § 25b(5) 1st Sent. and 26(1) 1st Sent. AufenthG.

1676 Röcker in Bergmann/Dienelt (eds), Kommentar Ausländerrecht¹³ (2020) § 25b AufenthG mns 4f and Röder, Asylmagazin 2016, 114 and 116.

1677 This is no longer expressly regulated in § 25b(5) 2nd Sent. AufenthG following the Skilled Immigration Act; cf. BT-Drs 19/8285, 32.

1678 Frings/Janda/Keßler/Steffen, Sozialrecht mn 869.

1679 Röder, Asylmagazin 2016, 108 and 114.

1680 Along this line, see Röcker in Bergmann/Dienelt § 25b AufenthG mn 8 and see Chapter 4.C.II.

1681 See Chapter 4.B.I.1.

1682 Röder, Asylmagazin 2016, 114f.

II. Germany: ‘residence permit for well-integrated juveniles and young adults’

The ‘residence permit for well-integrated juveniles and young adults’ refers to the integration in Germany and – just as for the ‘residence permit in the case of permanent integration’ – may be derived from Article 8 ECHR.¹⁶⁸³ According to the explanatory documents, it shall offer well-integrated, tolerated juveniles and young adults their own opportunity to acquire a right to stay,¹⁶⁸⁴ especially because it is independent of the cut-off date, unlike the earlier regulations in §§ 104a and 104b AufenthG governing old cases.¹⁶⁸⁵ In mid-2021, 12,819 foreigners had a residence permit pursuant to § 25a AufenthG.¹⁶⁸⁶

1. Requirements

According to § 25a(1) AufenthG, a juvenile or young adult is to be granted a residence permit if he or she has successfully attended school in Germany for at least four years without interruption. The terms ‘juvenile’ (*Jugendliche*) and ‘young adult’ (*Heranwachsende*) are defined in accordance with the Youth Court Act (*Jugendgerichtsgesetz*; JGG):¹⁶⁸⁷ a ‘juvenile’ means anyone who has reached the age of 14 but not yet 18 years; ‘young adult’ means anyone who has reached the age of 18 but not yet 21 years (§ 1 JGG). An application is admissible if it is filed before the foreigner reaches the age of 14 or 21.¹⁶⁸⁸ These age limits are now less restrictive following the Act to Amend the Right to Remain (*Bleiberechtsänderungsgesetz*).¹⁶⁸⁹ This legislation also lowered the period of prior residence from six to four years, giving the provision a much broader scope of application. As for the ‘residence permit in the case of permanent integration’,¹⁶⁹⁰ this period must also be ‘without interruption’, though short trips abroad do

1683 Marx, Aufenthalts-, Asyl- und Flüchtlingsrecht § 5 mn 138.

1684 BR-Drs 704/1/10, 4.

1685 See Chapter 3.B.III.4.

1686 BT-Drs 19/32579, 23.

1687 Jugendgerichtsgesetz in the version of 25.6.2021 (BGBl I 2099); cf. BT-Drs 18/4097, 42.

1688 § 25a(1) No. 3 AufenthG. For detail see Röder, Asylmagazin 2016, 115 and Röcker in Bergmann/Dienelt § 25a AufenthG mns 10 and 14.

1689 Röder, Asylmagazin 2016, 115.

1690 See Chapter 4.B.I.1.

not have a detrimental effect.¹⁶⁹¹ The integration is shown primarily by the successful attendance at school, though the wording refers both to the actual four-year attendance as well as the acquisition of a recognised qualification.¹⁶⁹²

The ‘residence permit for well-integrated juveniles and young adults’ also requires the foreigner to be tolerated in the sense of § 60a(2) AufenthG, or to have a permission to remain pending an asylum decision or to hold a temporary residence or permanent settlement permit. Again, the new rules introduced by the Orderly Return Act in 2019 must be taken into consideration, especially those concerning the toleration of ‘persons whose identity is not verified’.¹⁶⁹³

Furthermore, there may not be any concrete evidence to suggest a lack of commitment to the German free democratic basic order, i.e. this requirement is met if there is no evidence to the contrary.¹⁶⁹⁴ It also needs to be apparent in consideration of the foreigner’s efforts at integration and way of life that the foreigner will be able to integrate into the German way of life.¹⁶⁹⁵

According to § 25a(1) 3rd Sent. AufenthG, the residence permit is to be denied if deportation has been suspended on the basis of false information furnished by the foreigner or on the grounds of deception by the foreigner as to his or her identity or nationality. This corresponds basically with the exclusion for a ‘residence permit in the case of permanent integration’ and thus the explanations above apply.¹⁶⁹⁶

2. Right to stay

The residence permit is to be granted, though as for § 25b AufenthG there is a degree of discretion.¹⁶⁹⁷ The permit may be issued and extended in each instance for a maximum of three years.¹⁶⁹⁸ It allows the holder to

1691 Röcker in *Bergmann/Dienelt* § 25a AufenthG mn 11.

1692 Röcker in *Bergmann/Dienelt* § 25a AufenthG mns 12f; contrast with Röder, *Asylmagazin* 2016, 116.

1693 § 60b AufenthG and see Chapter 4.B.I.1. for detail.

1694 § 25a(1) No. 5 AufenthG. Röder, *Asylmagazin* 2016, 116.

1695 Röcker in *Bergmann/Dienelt* § 25a AufenthG mn 15.

1696 See Chapter 4.B.I.1.

1697 Röder, *Asylmagazin* 2016, 116.

1698 § 26(1) 1st Sent. AufenthG.

pursue an economic activity according to § 4a(1) 1st Sent. AufenthG.¹⁶⁹⁹ An extension is possible pursuant to § 8(1) AufenthG, though the requirements concerning the maximum age and tolerated status do not need to be met again.¹⁷⁰⁰ In principle a residence permit under § 25a AufenthG allows the holder to claim the Unemployment Benefits II under the Social Insurance Code II or social assistance under the Social Insurance Code XII.¹⁷⁰¹

In addition to an application for a residence permit pursuant to § 25a AufenthG, a secondary application for a residence permit pursuant to § 25(5) AufenthG may also be submitted.¹⁷⁰²

3. Family members: derivative right to stay

§ 25a(2) AufenthG allows the grant of a residence not only to parents or a parent having the right of care and custody of a foreign minor who holds a residence permit under § 25a AufenthG but also to minor children, a spouse or civil partner. This takes into account the protection of family life as understood by Article 6 GG and Article 8 ECHR.¹⁷⁰³ In principle the spouse and civil partner must live with the permit holder as a family unit and must satisfy all requirements already listed in relation to § 25a(1) AufenthG.¹⁷⁰⁴ Particular reference is to be made here to the independent means of subsistence, for which stricter requirements apply than for a 'residence permit in the case of permanent integration'.¹⁷⁰⁵ Minor, unmarried children merely have to be living with the permit holder as a family unit.¹⁷⁰⁶

1699 This is no longer expressly regulated in § 25a(4) AufenthG since the Skilled Immigration Act; cf. BT-Drs 19/8285, 32.

1700 Röder, Asylmagazin 2016, 116.

1701 Frings/Janda/Keßler/Steffen, Sozialrecht mn 853.

1702 In this sense, Röcker in Bergmann/Dienelt § 25a AufenthG mn 6 and see Chapter 4.C.II.

1703 Röcker in Bergmann/Dienelt § 25a AufenthG mn 21.

1704 § 25a(2) 3rd Sent. AufenthG and see Chapter 4.B.II.1.

1705 See Chapter 4.B.I.3.

1706 § 25a(2) 5th Sent. AufenthG.

III. Austria: ‘residence permits for reasons of Article 8 ECHR’

It is readily apparent from the name ‘residence permits for reasons of Article 8 ECHR’ that such permits are based on the right to respect for one’s private and family life under Article 8 ECHR.¹⁷⁰⁷ It is also referred to as a *Bleiberecht* – a right to remain.¹⁷⁰⁸ This type of residence permit has two elements. The following will focus on the general requirements and the right to respect for private life; the right to respect for family life is discussed in relation to ‘family unity’. As described above,¹⁷⁰⁹ there are no reliable statistics for the category of ‘residence permits for exceptional circumstances’ in Austria and therefore it is not clear how many of these permits are granted annually.

1. Requirements

The return decision has to be permanently inadmissible for reasons of private and family life.¹⁷¹⁰ The Federal Office for Immigration and Asylum is to balance the alien’s interests in remaining in Austria for reasons of private (and family) life against the interests of the Austrian state in removing the alien.¹⁷¹¹ Austrian law has codified the balance of interests required by the ECtHR in statute law.¹⁷¹² According to § 9(2) BFA-VG, consideration is due to the type, duration and legality of the stay,¹⁷¹³ an actual family life,¹⁷¹⁴ the degree to which the private life is worthy of protection,¹⁷¹⁵ the degree of integration, the ties to the country of origin,¹⁷¹⁶ and the lack of a

1707 See just VwGH 4.8.2016, Ra 2015/21/0249.

1708 See *Oswald*, *Bleiberecht*.

1709 See Chapter 3.A.III.1.

1710 § 9(2) BFA-VG.

1711 VfGH 29.9.2007, B 1150/07 and VwGH 12.11.2015, Ra 2015/21/0101; in detail *Oswald*, *Bleiberecht*; *Hinterberger*, *Asyl- und Fremdenpolizeirecht* 66–69; *Rössl*, *Staatsangehörige zweiter Klasse?*, *FABL* 2/2017-I, 37 (38).

1712 A comparable balance of interests has developed in Germany in relation to § 25(5) *AufenthG*; see Chapter 4.C.II.1. However, one difference is that the various criteria are not anchored in law. Several criteria that have been developed in the case law on Art 8 ECHR are, however, anchored in §§ 25a and 25b *AufenthG*; see Chapter 4.B.I.–II.

1713 VwGH 23.6.2015, Ra 2015/22/0026.

1714 VfGH 28.6.2003, G 78/00.

1715 VwGH 28.4.2015, Ra 2014/18/0146.

1716 VfGH 10.3.2011, B 1565/10 ua.

criminal record. A case-by-case assessment of all of the facts is necessary in order to determine whether the return decision constitutes an inadmissible violation of the areas protected by Article 8 ECHR.¹⁷¹⁷

With regard to private life and the degree of integration, the Federal Office for Immigration and Asylum has to take into account in particular whether the alien has undergone education or training during his or her stay in Austria, activity and memberships in associations, and whether he or she has taken steps towards integration into the labour market.¹⁷¹⁸ All facts that have come to the attention of the Federal Office for Immigration and Asylum during its investigation must be taken into account with regard to the substantive assessment of integration and private and family life. In practice, it is therefore recommended to submit a statement informing the Federal Office for Immigration and Asylum of all relevant facts.

According to case law, where the stay in Austria is more than ten years, the personal interest in remaining prevails over Austria's interest in deportation, provided that the alien has integrated him- or herself professionally and socially and his or her behaviour does not pose a threat to public order and security.¹⁷¹⁹ However, it must also be taken into account whether the private life was created at a time when the persons concerned were aware of their insecure residence status.¹⁷²⁰ Furthermore, according to case law, the length of stay can depend on the alien's actions, such as not presenting a passport.¹⁷²¹ It therefore follows from the above that the Austrian 'right to remain' refers to 'roots' that have already taken hold, whereas it will be shown that in comparison the 'social roots' in Spain refer in principle to future roots.¹⁷²² An application for a 'residence permit for reasons of Article 8 ECHR' is to be rejected if there are no altered circumstances which necessitate a further evaluation or a re-evaluation of the return decision (*res iudicata*).¹⁷²³

1717 VwGH 6.9.2018, Ra 2018/18/0026 with further references.

1718 See only for past employment VwGH 15.3.2018, Ra 2017/21/0203.

1719 VwGH 10.9.2018, Ra 2018/19/0169 with further references.

1720 § 9(2) No. 8 BFA-VG; VwGH 15.3.2018, Ra 2018/21/0034.

1721 VwGH 29.8.2018, Ra 2018/22/0180 with further references.

1722 See Chapter 4.E.I.

1723 § 58(10) AsylG (A) and VwGH 16.12.2015, Ro 2015/21/0037 for detail.

2. Right to stay

The general explanations in Chapter 3.A.III.2.d. apply here. The Federal Office for Immigration and Asylum has to grant a ‘standard residence permit’ if it comes to the conclusion that the return decision is permanently inadmissible due to the need to protect private and family life. A ‘residence permit plus’ is to be granted if the alien also meets the additional requirements. It should be emphasised that the alien – in comparison to the other ‘residence permits for exceptional circumstances’ – is legally entitled to a residence permit if he or she satisfies the requirements.¹⁷²⁴ The authorities have no discretionary powers in this regard.¹⁷²⁵

Furthermore, it is to be noted that in the case of a rejection of an application for a ‘residence permit for reasons of Article 8 ECHR’, the law does not provide for an examination of the requirements of § 57 AsylG (A), i.e. the ‘special protection residence permit’.¹⁷²⁶

IV. Interim conclusion

The analysis has shown that the three Member States recognise humanitarian considerations as a legitimate reason for granting a right to stay due to ‘social ties’. Here, the right to respect one’s private life anchored in Article 8 ECHR serves as the legal standard. According to ECtHR case law, there is no general obligation to grant a right to stay, though such right may be granted in exceptional circumstances. It instead suffices that States protect the migrants concerned from possible expulsion.

The German ‘residence permit in the case of permanent integration’ and the German ‘residence permit for well-integrated juveniles and young adults’ overlap in several respects. ‘Integration’ is at the heart of both, despite the differences regarding the respective personal scope of application: the ‘residence permit for well-integrated juveniles and young adults’ aims at persons between the ages of 14 and 21, a much narrower scope of application than the ‘residence permit in the case of permanent integration’,

1724 In this sense, *Filzwieser/Frank/Kloibmüller/Raschhofer*, Asyl- und Fremdenrecht § 55 AsylG mn 2.

1725 Since 2015, the Federal Administrative Court may also decide on the grant of a ‘residence permit for reasons of Article 8 ECHR’; see *Filzwieser/Frank/Kloibmüller/Raschhofer*, Asyl- und Fremdenrecht § 55 AsylG mn 5.

1726 VwGH 12.11.2015, Ra 2015/21/0101 and 16.12.2016, Ra 2015/21/0166.

which applies in principle to all tolerated foreigners.¹⁷²⁷ Furthermore, the ‘residence permit for well-integrated juveniles and young adults’ also requires four years of successful school attendance in Germany, which serves to demonstrate that integration has been ‘achieved’. In contrast, the ‘residence permit in the case of permanent integration’ requires the person to have been residing in Germany for eight years on the basis of tolerated status or through permission to remain. Economic integration is also a requirement for the ‘residence permit in the case of permanent integration’, whereby the foreigner shows that he or she is able to sustain him- or herself. However, it is possible to determine that this ability is ‘to be expected’ on the basis of certain criteria. This is particularly relevant for tolerated persons due to their insecure residence status and the resulting difficulty in finding employment. In addition, oral German language skills at A2 level are required and can be demonstrated when appearing before the authorities. A reason for refusal that applies to both residence permits is that deportation may not be suspended on the basis of false information provided by the person concerned. Both are to be granted for two (‘residence permit in the case of permanent integration’) or three (‘residence permit for well-integrated juveniles and young adults’) years if the requirements are met and grant entitlement to social benefits and access to employment. The statistics show that the ‘residence permit for well-integrated juveniles and young adults’ is granted to about twice as many foreigners as the ‘residence permit in the case of permanent integration’. This can probably be explained by the – relatively – simpler requirements.

Both residence permits have the special feature of a derivative residence permit for family members. The custodial parent or the minor siblings of a well-integrated juvenile or young adult can thus acquire a right to stay, provided that they live in a family unit with him or her. Although this takes into account the protection of the family within the meaning of Article 6 GG and Article 8 ECHR, it would be more appropriate for the family members to be granted an independent right to stay and, put simply, not be ‘dependent’ on the original beneficiary.

The Austrian ‘residence permit for reasons of Article 8 ECHR’ is the third and final right to stay falling under the regularisation purpose ‘social ties’. In contrast to the two German residence permits, this particular Austrian residence permit has an entirely different structure and is strongly

¹⁷²⁷ However, one must also consider the provisions introduced by the Orderly Return Act in 2019, specifically those concerning ‘persons whose identity is not verified’; see Chapter 4.A.I.2.a. and Chapter 4.B.I.1.–2.

oriented towards the ECtHR case law on Article 8 ECHR. Despite a lack of statistics, it may be assumed that this is the most important regularisation in Austrian law because the requirements are easier to meet when compared to the requirements for the other regularisations. A list of criteria is thus anchored in statute law, according to which a balancing of interests is to be carried out between the private (or family) interests of the foreigner in remaining in Austria and the Austrian interests in removal. Overall, the Austrian ‘right to remain’ therefore refers to a person who is firmly rooted. Compared to the German residence permits, the Austrian variant appears to be more ‘flexible’, but it is also more difficult to ‘know’ in which cases a right to stay will be granted. From the perspective of legal certainty, therefore, clearly defined conditions for granting residence permits seem to be preferable, though they have the disadvantage that they generally do not take into account all the reasons that speak for or against the alien’s remaining in the country.

In short, both Austria and Germany comply in principle with the protection against expulsion according to Article 8 ECHR (private life). Spanish law does not provide a residence permit on grounds of ‘social ties’ and thus one may be forgiven for thinking that Spain is not meeting its obligations under international law. A closer look shows the protection against expulsion under Article 8 ECHR is provided by other residence permits, especially the temporary residence permit on grounds of ‘social roots’.¹⁷²⁸ This type of permit is primarily granted on the basis of an employment contract and therefore falls under ‘employment and training’ discussed below.

C. Family unity

The first regularisation discussed in relation to the purpose of ‘family unity’¹⁷²⁹ is the Spanish ‘residence permit for a child not born in Spain’ (*residencia del hijo no nacido en España de residente*) as the duration of the residence permit is usually derived from a parent or guardian and is generally not granted for a minimum period. This is followed by the residence permit granted in Germany to persons who are enforceably required to leave the country, but whose departure is legally or factually impossible (*Aufenthaltserlaubnis für vollziehbar Ausreisepflichtige, wenn die Ausreise aus*

1728 See Chapter 4.E.I.

1729 See already Chapter 1.B.III.3.

rechtlichen oder tatsächlichen Gründen unmöglich ist), as such permit can be granted for a period of six months up to a maximum of three years. The Austrian ‘residence permits for reasons of Article 8 ECHR’ (*Aufenthaltstitel aus Gründen des Artikel 8 EMRK*) is then presented, which is limited to one year. The analysis turns to the Austrian ‘Red-White-Red – Card plus’ for unaccompanied minor aliens in the care of foster parents or the child and youth service (*‘Rot-Weiß-Rot – Karte plus’ für unbegleitete minderjährige Fremde in Obhut von Pflegeeltern oder des Kinder- und Jugendhilfeträgers*), which is granted for two years and, finally, to the Spanish ‘temporary residence permit on grounds of family roots’ (*autorización de residencia temporal por razones de arraigo familiar*), which in certain cases is granted for five years.

I. Spain: ‘residence permit for a child not born in Spain’

Article 186 REDYLE stipulates that minors,¹⁷³⁰ who are not born in Spain, may be granted a residence permit. According to *Fernández Collados*, the features of this type of permit allow for its classification as ‘residence for reasons of roots’ even though it is not listed in Article 124 REDYLE.¹⁷³¹ It is also commonly referred in Spain to as ‘rooted minors’ (*arraigo menores*). The statistics do not contain precise information on how many residence permits were granted for this reason.¹⁷³² There are many arguments for the assertion that the ‘residence permit for a child not born in Spain’ is derived in principle from Article 8 ECHR, especially with regard to the respect for the best interests of the child.¹⁷³³

According to Article 185 REDYLE, children born in Spain to foreigners lawfully residing in Spain will automatically acquire the same residence permit to which any of their parents are entitled.¹⁷³⁴ This is not a regularisation as understood by this study and therefore this provision will not be discussed.¹⁷³⁵ Furthermore, Article 35(7) LODYLE provides that

1730 See on the legal status of minors in the Spanish law on foreigners *Cobas Cobiella*, *Revista Boliviana de Derecho* 2015/20, 105ff.

1731 Cf. *Fernández Collados* in *Palomar Olmeda* 424f.

1732 See Chapter 3.C.III.1. See however *Lázaro González/Benlloch Sanz* in *Palomar Olmeda* 902f, who assumes that very few have been granted.

1733 Art 3(1) UN Convention on the Rights of the Child.

1734 Cf. *Cobas Cobiella*, *Revista Boliviana de Derecho* 2015/20, 108.

1735 See Chapter 1.A.II.

an unaccompanied minor¹⁷³⁶ will be staying lawfully from the moment the public administration assumes guardianship.¹⁷³⁷ In a broad sense, the assumption of guardianship could constitute a regularisation, but will not be analysed as it is not a separate, individual decision that grants a right to stay.¹⁷³⁸ The guardian may subsequently apply for a residence permit,¹⁷³⁹ but this only has a declarative effect in this case. A considerable problem in practice is posed by the situation where minors reach the age of majority and the guardian has not applied for a residence permit, which is why the minor's stay becomes irregular.¹⁷⁴⁰ In this case, an application for a separate 'temporary residence permit for exceptional circumstances' can be made according to Article 198 REDYLE.¹⁷⁴¹

1. Requirements

The child must be a minor¹⁷⁴² who has resided in Spain for a continuous two-year period. Where minors are of compulsory school age (6–17), they must also show that they have regularly attended school.¹⁷⁴³ This resem-

1736 Cf. in general on unaccompanied minors *Pérez Rey*, Art 35 LODYLE in *Monereo Pérez/Fernández Avilés/Triguero Martínez* (eds), *Comentario a la ley y al reglamento de Extranjería, Inmigración e Integración Social*² (2013) 584 and *Asín Cabrera*, *La residencia y protección de los menores inmigrantes no acompañados* in *Boza Martínez/Donaire Villa/Moya Malapeira* (eds), *La nueva regulación de la inmigración y la extranjería en España* (2012) 307 (308ff).

1737 Cf. *Lázaro González/Benlloch Sanz* in *Palomar Olmeda* 901–904.

1738 See Chapter 1.A.II.3.a.

1739 Art 196 REDYLE; cf. on the procedure and the requirements *Asín Cabrera* in *Boza Martínez/Donaire Villa/Moya Malapeira* 315–317 and *Pérez Rey* in *Monereo Pérez/Fernández Avilés/Triguero Martínez* 609–611.

1740 On the problems when reaching the age of majority, see *Pérez Rey* in *Monereo Pérez/Fernández Avilés/Triguero Martínez* 611; *Asín Cabrera* in *Boza Martínez/Donaire Villa/Moya Malapeira* 317ff and *Gimeno Monterde*, *Menores extranjeros no acompañados. Una cuestión compleja para las políticas públicas y sociales*, *Revista de Derecho Migratorio y Extranjería* 2010/25, 55 (58–61).

1741 Cf. *Pérez Rey* in *Monereo Pérez/Fernández Avilés/Triguero Martínez* 611f and *Asín Cabrera* in *Boza Martínez/Donaire Villa/Moya Malapeira* 319f.

1742 On the problems in proving minority *Defensor del Pueblo*, *¿Menores o Adultos? Procedimientos para la determinación de la edad* (2012), <https://www.defensordelpueblo.es/wp-content/uploads/2015/05/2011-09-Menores-o-Adultos-Procedimientos-para-la-determinaci%C3%B3n-de-la-edad1.pdf> (31.7.2022) and *Ruiz Legazpi* in *Balado Ruiz-Gallegos* 511ff.

1743 Art 186(2) REDYLE; cf. *Fernández Collados* in *Palomar Olmeda* 424f.

bles the requirement for the German ‘residence permit in the case of permanent integration’.¹⁷⁴⁴

Furthermore, at least one parent of the child concerned must be residing lawfully. This is also provided for by law for children whose guardian is a lawfully residing foreigner or Spaniard, or if the guardian is an institution established in Spain.¹⁷⁴⁵ In any case the parent or guardian must prove that they have adequate accommodation¹⁷⁴⁶ and the necessary financial resources.¹⁷⁴⁷ In 2022, an adult with one child had to prove an income of more than 868 euro.¹⁷⁴⁸

2. Right to stay

The application may only be made by a parent or the guardian. The ‘residence permit for a child not born in Spain’ constitutes one of the ‘temporary residence permits for exceptional circumstances’, though some procedural provisions as well as the extension procedure are based on the family reunification provisions.¹⁷⁴⁹

The duration of the residence permit is determined by the duration of the residence permit of the parent or guardian.¹⁷⁵⁰ If the parent or guardian is an EU citizen, the residence permit is limited to five years. When the minor reaches working age (16), the residence permit also entitles him to take up any gainful employment.¹⁷⁵¹ *Cobas Cobiella* rightly points out that this provision is of particular relevance, as it automatically enables entry into the labour market when the minor reaches working age.¹⁷⁵²

1744 See Chapter 4.B.I.1.

1745 Art 186(1) REDYLE.

1746 Cf. for detail Instrucción DGI/SGRJ/2011.

1747 Art 186(1) REDYLE in conjunction with Art 18(2) LODYLE.

1748 According to Art 54 REDYLE, the necessary financial resources represent more than 150% of the monthly public revenue index (*Indicador Público de Renta de Efectos Múltiples*; IPREM). In 2022, the IPREM was set at 579,02 euro; www.iprem.com.es/ (31.7.2022).

1749 Art 186(4) REDYLE; cf. *Fernández Collados* in *Palomar Olmeda* 425 and *Cobas Cobiella*, *Revista Boliviana de Derecho* 2015/20, 109.

1750 Art 186(3) REDYLE.

1751 Art 186(5) REDYLE; cf. *Cobas Cobiella*, *Revista Boliviana de Derecho* 2015/20, 110.

1752 *Cobas Cobiella*, *Revista Boliviana de Derecho* 2015/20, 109.

II. Germany: ‘residence permit for persons who are enforceably required to leave the country, but whose departure is legally or factually impossible’

Pursuant to § 25(5) AufenthG, a foreigner who is enforceably required to leave Germany may be granted a residence permit if departure is legally or factually impossible and the obstacle to deportation is not likely to be removed in the foreseeable future.¹⁷⁵³ The same also applies for the ‘residence permit for banned deportation to a specific state’.¹⁷⁵⁴ It is essential that the obstacle to deportation must not be ‘temporary’¹⁷⁵⁵ and that the person cannot leave the country, though the term ‘departure’ (*Ausreise*) covers both the compulsory return as well as the voluntary departure.¹⁷⁵⁶

The protection against deportation in § 60(5) and (7) AufenthG is pure German law in origin and falls under the remaining national competence,¹⁷⁵⁷ though one must not forget that the provision can also be derived from international and EU law, more precisely Article 3 ECHR and the Return Directive.¹⁷⁵⁸ This type of residence permit also requires an assessment of Article 8 ECHR and therefore falls under the purpose ‘family unity’. The factual obstacles to deportation indeed make it possible to grant a residence permit, which in turn suggest that the residence permit may fall under the sub-category ‘non-refoulement under the ECHR and CFR or factual reasons’ under ‘non-returnability’, though this is not the decisive reason for granting the permit and therefore it would be inappropriate to discuss this permit in that context.

The residence permit was introduced in order to solve the aforementioned problem of ‘chain tolerations’ (*Kettenduldungen*),¹⁷⁵⁹ though this has only been partially successful.¹⁷⁶⁰ One reason is that it is incredibly difficult to acquire a residence permit where there are factual obstacles

1753 Cf. Göbel-Zimmermann/Hupke in Huber/Mantel § 25 AufenthG mn 53 and Maaßen/Kluth in Kluth/Heusch § 25 AufenthG mn 127.

1754 See Chapter 4.A.II.2.

1755 Göbel-Zimmermann/Hupke in Huber/Mantel § 25 AufenthG mn 58.

1756 Cf. Maaßen/Kluth in Kluth/Heusch § 25 AufenthG mn 128 with further references.

1757 Hruschka/Mantel in Huber/Mantel § 60 AufenthG mn 18; in agreement Koch in Kluth/Heusch § 60 AufenthG mns 39f.

1758 See Chapter 1.B.III.1.b.

1759 Cf. Marx, Aufenthalts-, Asyl- und Flüchtlingsrecht § 5 mn 73 with further references.

1760 Cf. Maaßen/Kluth in Kluth/Heusch § 25 AufenthG mns 123f and see Chapter 4.A.I.2.d.

to deportation as certain acts by the foreigner, which prevent the departure, are grounds for denying the application.¹⁷⁶¹ By mid-2021 over 51,000 foreigners held a residence permit under § 25(5) AufenthG,¹⁷⁶² thereby making it the most important regularisation in German law.

1. Requirements

According to case law from the Federal Administrative Court, ‘internal obstacles to deportation’ according to § 60(5) and (7) AufenthG are primarily taken into consideration in relation to § 25(5) AufenthG,¹⁷⁶³ though the right to respect for family life under Article 8 ECHR is afforded a special status.¹⁷⁶⁴ However, the ‘residence permit for well-integrated juveniles and young adults’ (§ 25a AufenthG) and the ‘residence permit in the case of permanent integration’ (§ 25b AufenthG) have greatly narrowed the scope of § 25(5) AufenthG.¹⁷⁶⁵ The examination of whether there is a right to respect for private or family life under Article 8 ECHR follows the usual rules, whereby there is first an examination of whether there is an infringement of the protected right and whether this is proportional.¹⁷⁶⁶ Unlike Austrian law, German law does not codify the required balance of interests.¹⁷⁶⁷ However, the protection of one’s private life applies especially to foreigners who have resided in Germany for several years and are accordingly ‘rooted’.¹⁷⁶⁸ The tolerated stay is also to be taken into account.¹⁷⁶⁹ The protection of one’s family life applies between spouses or

1761 See Chapter 4.C.II.1.

1762 BT-Drs 19/32579, 22.

1763 See Chapter 4.A.I.2.a.

1764 Cf. Göbel-Zimmermann/Hupke in Huber/Mantel § 25 AufenthG mns 67ff; Marx, Aufenthalts-, Asyl- und Flüchtlingsrecht § 5 mn 75 with further references.

1765 See Chapter 4.B.I. –II.

1766 Cf. Welte, Die Wahrung des Grundsatzes der Verhältnismäßigkeit im Ausweisungsrecht, InfAuslR 2019, 176.

1767 See Chapter 4.B.III.1.

1768 Cf. Marx, Aufenthalts-, Asyl- und Flüchtlingsrecht § 5 mns 79f and 83–85; Eckertz-Höfer, Neuere Entwicklungen in Gesetzgebung und Rechtsprechung zum Schutze des Privatlebens, ZAR 2008, 41; Eckertz-Höfer, Neuere Entwicklungen in Gesetzgebung und Rechtsprechung zum Schutze des Privatlebens: Fortsetzung des Beitrags aus Heft 2/2008, ZAR 2008, 93.

1769 Cf. Marx, Aufenthalts-, Asyl- und Flüchtlingsrecht § 5 mns 90f.

in the parent-child relationship, which requires consideration of the actual family life.¹⁷⁷⁰

Furthermore, the “national deportation bans” under § 60(5) and (7) AufenthG may also lead to the grant of the residence permit discussed here. This requires, however, consideration of the relationship to the ‘residence permit for banned deportation to a specific state’ under § 25(3) AufenthG.¹⁷⁷¹ Where such a ban exists, the permit pursuant to § 25(3) AufenthG takes ‘priority’¹⁷⁷² as it affords better access to the labour market and social benefits. However, if there are grounds for exclusion under § 25(3) 2nd Sent. AufenthG, the grant of a residence permit according to § 25(5) AufenthG can be considered subsidiarily.

A residence permit may only be issued if the foreigner is prevented from leaving the country through no fault of his or her own.¹⁷⁷³ According to § 25(5) 4th Sent. AufenthG, fault is deemed to exist in particular if the foreigner furnishes false information, deceives the authorities with regard to his or her identity or nationality or fails to meet reasonable demands to eliminate the obstacles to departure. *Hörich/Putzar-Sattler* aptly state that a residence permit cannot be issued if departure has been prevented or substantially delayed due to an act or omission attributable to the foreigner – there must be a causal link between the foreigner’s behaviour and the existence of an obstacle to departure.¹⁷⁷⁴ At the same time, however, the two authors emphasise that the foreigners authority has a ‘duty to inform and instigate’ the possible removal of these obstacles. The overall conclusion is that the behaviour of the person concerned plays a central role in the issuance of this residence permit and that it is difficult in practice to issue it due to factual obstacles since voluntary entry into the country of origin will often be possible.¹⁷⁷⁵ This is probably one of the reasons why the prevention of the ‘chain toleration’ phenomenon intended by the legislator has not been fully successful.¹⁷⁷⁶ The law may provide a prospect of regularisation, but this is illusory as it often cannot be achieved.

1770 Cf. *Marx*, Aufenthalts-, Asyl- und Flüchtlingsrecht § 5 mns 79, 81–85.

1771 See Chapter 4.A.II.2.

1772 *Huber/Eichenhofer/Endres de Oliveira*, Aufenthaltsrecht mn 590: ‘vorrangig’.

1773 § 25(5) 3rd Sent. AufenthG.

1774 *Hörich/Putzar-Sattler*, Mitwirkungspflichten im Ausländerrecht: Rechtsgutachten zu den Voraussetzungen von Sanktionen bei Nichtmitwirkung (November 2017), 8.

1775 In this sense, *Marx*, Aufenthalts-, Asyl- und Flüchtlingsrecht § 5 mn 78.

1776 See Chapter 4.I.2.d and Chapter 4.C.II.

2. Right to stay

The statements made on the residence permit pursuant to § 25(3) AufenthG are also relevant for the residence permit under § 25(5) AufenthG.¹⁷⁷⁷ As already explained, the foreigners authority (after consulting the Federal Office for Migration and Refugees¹⁷⁷⁸) decides whether there is a ‘national deportation ban’ at its own discretion.¹⁷⁷⁹ However, if a person has already been tolerated for 18 months, the discretionary rule becomes a mandatory rule.¹⁷⁸⁰ The residence permit can be issued for a maximum of three years, but under certain circumstances for a maximum of six months, as long as ‘the foreigner has not been legally resident in the federal territory for at least 18 months’.¹⁷⁸¹

As a side note, the ‘national deportation bans’ are also examined in the asylum process and determined by the Federal Office for Migration and Refugees if the requirements are met.¹⁷⁸² The residence permit can be applied for subsequently, whereby the foreigners authority is bound by the decision of the Federal Office for Migration and Refugees.¹⁷⁸³ However, this case does not qualify as a regularisation and is therefore not dealt with in more detail.

Until the Skilled Immigration Act, the residence permit under § 25(5) AufenthG did not directly entitle the holder to engage in employed activities; rather, a permit from the foreigners authority was required. Now, access to employment, which also includes self-employment, results directly from § 4a(1) 1st Sent. AufenthG.¹⁷⁸⁴ This represents a significant improvement.

The residence permit is accompanied by a claim to social benefits according to the Act on Benefits for Asylum Seekers if the decision on the suspension of deportation (i.e. toleration) was made less than 18

¹⁷⁷⁷ See Chapter 4.A.II.2.b.

¹⁷⁷⁸ § 72(2) AufenthG.

¹⁷⁷⁹ Cf. *Maaßen/Kluth* in *Kluth/Heusch* § 25 AufenthG mn 151.

¹⁷⁸⁰ § 25(5) 2nd Sent. AufenthG; cf. *Maaßen/Kluth* in *Kluth/Heusch* § 25 AufenthG mns 152–154.

¹⁷⁸¹ § 26(1) 1st Sent. AufenthG.

¹⁷⁸² § 31(1) 4th Sent. AsylG (G) and see Chapter 4.A.I.2.a.

¹⁷⁸³ § 42 1st Sent. AsylG (G); cf. however *Marx*, Aufenthalts-, Asyl- und Flüchtlingsrecht § 5 mns 36f.

¹⁷⁸⁴ Cf. *Schuster/Voigt*, Asylmagazin 2020, 65f.

months beforehand.¹⁷⁸⁵ Holders of a residence permit pursuant to § 25(5) AufenthG receive benefits pursuant to § 1(1) No. 3(c) AsylbLG until this point in time (18-month suspension of deportation).¹⁷⁸⁶ After receiving benefits for a period of at least 18 months under the Act on Benefits for Asylum Seekers, they are entitled to analogous benefits under the Social Insurance Code XII if they have not abusively influenced the duration of their stay themselves and have resided in Germany without significant interruption.¹⁷⁸⁷ The required period of prior residence was extended from 15 to 18 months following the Third Act to amend the Act on Benefits for Asylum Seekers.¹⁷⁸⁸

III. Austria: ‘residence permits for reasons of Article 8 ECHR’

As is clear from the name, the ‘residence permits for reasons of Article 8 ECHR’ are based on the right to respect for one’s private and family life under Article 8 ECHR.¹⁷⁸⁹ It is also referred to as a *Bleiberecht* – a right to remain.¹⁷⁹⁰ This type of residence permit has two elements. The following will focus on the right to family life.¹⁷⁹¹ As already noted,¹⁷⁹² there are no reliable statistics for the category of ‘residence permits for exceptional circumstances’ in Austria, and therefore it is not clear how many of these permits are granted annually.

1. Requirements

As already described in Chapter 4.B.III., the granting of a ‘residence permit for reasons of Article 8 ECHR’ requires a balancing of the (private and) family interests of the alien to remain in Austria and the public interest of the Austrian state in the removal. According to case law, the separation of

1785 Cf. Voigt, Die wundersame Welt des § 25(5) AufenthG, Asylmagazin 2015, 152 and Frings/Janda/Keßler/Steffen, Sozialrecht mn 836.

1786 Cf. Korff in Rolfs/Giesen/Keikebohm/Udsching § 1 AsylbLG mns 11–14.

1787 § 2(1) AsylbLG; see Fn 1014.

1788 For criticism see Genge, Das Migrationspaket – Beilage zum Asylmagazin 8–9/2019, 18f.

1789 See just VwGH 4.8.2016, Ra 2015/21/0249.

1790 See Oswald, Bleiberecht.

1791 See Chapter 4.B.III.

1792 See Chapter 3.A.III.1.

spouses, for example, is only admissible if great weight is to be attached to the public interest in the removal, e.g. if the alien commits a criminal offence or has always intended to circumvent the regulations in the law regarding aliens.¹⁷⁹³ The commitment of the alien to his or her spouse is of particular importance in the relation to the balance of interests. According to the Supreme Administrative Court, in such a case more detailed findings must be made on the living conditions of the alien and his or her spouse, in particular on the living conditions, the nature of their occupations and the income earned, but also, for example, on the question of the command of the German language as well as on the ties to the country of origin and the possibility and reasonableness of leading a family life outside Austria.¹⁷⁹⁴ For a family life to exist within the meaning of Article 8 ECHR, however, it is not a matter of a formal marriage, but rather of close personal and factual family ties expressed in a number of circumstances, such as living together, the length of the relationship or having children together.¹⁷⁹⁵

The best interests of the child are at the centre of the consideration of interests concerning children and minors.¹⁷⁹⁶ The Supreme Administrative Court attaches particular importance to the ties to the home country, especially where the children were born, in which country and in which cultural and linguistic environment they lived, where they completed their schooling, whether they speak the language of the home country, and especially whether they are of an adaptable age.¹⁷⁹⁷

1793 VwGH 6.9.2018, Ra 2018/18/0026 with further references.

1794 VwGH 2.5.2018, Ra 2018/18/0159.

1795 VwGH 29.11.2017, Ra 2017/18/0425 with reference to ECtHR case law.

1796 See just VwGH 30.8.2017, Ra 2017/18/0070–0072 with further references and Art 3(1) UN Convention on the Rights of the Child; cf. see also Bericht der unabhängigen Kommission für den Schutz der Kinderrechte und des Kindeswohls im Asyl- und Fremdenrecht (13.7.2021), [https://www.bmj.gv.at/dam/jcr:0a8466e4-c24a-4fd2-bfbc-c8b11facba2f/Bericht%20der%20Kindeswohlskommission_13.%20Juli%202021%20\(Langfassung\).pdf](https://www.bmj.gv.at/dam/jcr:0a8466e4-c24a-4fd2-bfbc-c8b11facba2f/Bericht%20der%20Kindeswohlskommission_13.%20Juli%202021%20(Langfassung).pdf) (31.7.2022) and Leitfaden „Kindeswohl im Asyl- und Fremdenrecht“, https://www.bvwg.gv.at/Kindeswohl_-_Leitfaden_Fassung_02_2022.pdf?8mk1yf (31.7.2022).

1797 VwGH 21.3.2018, Ra 2017/18/0333 and see § 9(2) No. 5 BFA-VG.

2. Right to stay

Reference is made to the explanations in Chapter 3.A.III.2.d. and Chapter 4.B.III.2.

IV. Austria: ‘Red-White-Red – Card plus’ for unaccompanied minor aliens in the care of foster parents or the child and youth service’

§ 41a(10) NAG contains a regularisation according to which a ‘Red-White-Red – Card plus’ (*Rot-Weiß-Rot – Karte plus*) is to be issued to unaccompanied minor aliens in the care of foster parents or the child and youth service. It is the only regularisation in Austrian law that does not fall under the category of ‘residence permits for exceptional circumstances’.¹⁷⁹⁸

This residence permit was previously regulated by § 69(1) No. 4 NAG until the amendments via BGBl I 87/2012. Although it was the only one of the four sets of circumstances covered by that provision which fell under the category ‘special protection’, it was not subsequently included as a ‘special protection residence permit’.¹⁷⁹⁹ According to statistics, only 68 minors held a ‘Red-White-Red – Card plus’ in January 2021, which indicates that the residence title is not very significant in practice.¹⁸⁰⁰ The ‘Red-White-Red – Card plus’ is in principle derived from Article 8 ECHR, as it primarily serves to protect the best interests of the child.¹⁸⁰¹ Without being able to go into detail, however, it likely exceeds the obligation under human rights law.

1798 However, § 30a NAG is also to be taken into consideration; see Chapter 4.D.I.1.a. and Fn 1847 especially.

1799 ErläutRV 1803 BlgNR 24. GP, 46. On § 69a(1) No. 4 NAG see *Kutscher/Völker/Witt*, *Niederlassungs- und Aufenthaltsrecht*² (2010) 182.

1800 *Bundesministerium für Inneres*, *Niederlassungs- und Aufenthaltsstatistik* (January 2021), https://www.bmi.gv.at/312/statistiken/files/NAG_2021/Niederlassungs_und_Aufenthaltsstatistik_Jaenner_2021.pdf (31.7.2022) 47.

1801 See also Art 3(1) UN Convention on the Rights of the Child and in this sense *Peyrl* in *Abermann/Czech/Kind/Peyrl* § 41a NAG mn 18.

1. Requirements

The only requirement to obtain such a residence permit stipulates that the person has to be an unaccompanied minor alien.¹⁸⁰² This term is legally defined as an alien under the age of 18 who is not accompanied by an adult¹⁸⁰³ responsible for him or her by law.¹⁸⁰⁴

Furthermore, the minors must be in the care of foster parents or the child and youth service on a more than temporary basis on the basis of a court order, by virtue of the law or an agreement between the natural parents and the child and youth service. The foster parents are deemed to be ‘legal representatives’ within the meaning of § 19 NAG.¹⁸⁰⁵

It appears from the wording of the legislation that only § 11(1) Nos. 1–3 NAG may constitute obstacles to issuing the card as § 11(1) Nos. 4–6 NAG and § 11(2) NAG do not apply. Accordingly, an existing ban on entry or residence may be an obstacle. It is nonetheless unclear whether § 11(1) No. 3 NAG actually applies: an enforceable return decision is a reason for refusal if 18 months have not passed since the person left the country.¹⁸⁰⁶ § 11(3) NAG provides that the residence permits covered thereunder may also be granted despite an obstacle to issuance if this is necessary to respect the right to respect for private and family life within the meaning of Article 8 ECHR.¹⁸⁰⁷ The criteria listed in § 11(3) NAG correspond to the criteria in § 9(2) BFA-VG, which applies to ‘residence permits for reasons of Article 8 ECHR’.¹⁸⁰⁸

1802 However, a second requirement existed prior to the 2017 Act amending the Law on Aliens. This was repealed as it was no longer appropriate; Er-läutRV 1523 BlgNR 25. GP, 9.

1803 § 2(1) No. 17 NAG.

1804 § 2(4) No. 1 NAG in conjunction with § 21(2) Allgemeines Bürgerliches Gesetzbuch in the version BGBl I 145/2022 (Austrian Civil Code).

1805 According to VwGH 21.3.2017, Ra 2015/22/0160 the relevant provisions of the Austrian Civil Code (§§ 184–185) are used to interpret the term ‘foster parents’.

1806 *Peyrl in Abermann/Czech/Kind/Peyrl* § 41a NAG mn 18 assumes that the gap was not intended and therefore argues that the existence of a valid return decision is not detrimental to the claim.

1807 Cf. *Peyrl/Czech in Abermann/Czech/Kind/Peyrl* (eds), NAG Kommentar² (2019) § 11 NAG mns 30ff.

1808 See Chapter 4.B.III. and Chapter 4.C.III.

2. Right to stay

The ‘Red-White-Red – Card plus’ may be granted *ex officio* or upon a well-founded application.¹⁸⁰⁹ § 3(1) NAG stipulates that the Governor (*Landeshauptmann*) is the competent authority. With the exception of Vienna, the district administration authorities have been empowered via an order (*Verordnung*).¹⁸¹⁰

Pursuant to § 41(5) 1st Sent. NAG, the ‘Red-White-Red – Card plus’ is valid for two years and allows unrestricted access to the labour market.¹⁸¹¹ The explanations in Chapter 3.A.II.3. apply vis-à-vis social benefits.

V. Spain: ‘temporary residence permit for reasons of family roots’

Article 124(3) REDYLE concerns the ‘temporary residence permit for reasons of family roots’ (*autorización de residencia temporal por razones de arraigo familiar*).¹⁸¹² As discussed above, the ‘roots’ are one of the main paths out of irregularity in the Spanish law on foreigners.¹⁸¹³ Be that as it may, family roots are, quantitatively speaking, not as important as social roots. This type of regularisation is derived in principle from Article 8 ECHR.¹⁸¹⁴

1. Requirements

The REDYLE draw a distinction between two sets of circumstances,¹⁸¹⁵ however the Royal Decree 629/2022 reformed Article 124(3) REDYLE and now three sets of circumstances are stated. In this respect, *Carbajal García*’s

1809 Cf. *Peyrl* in *Abermann/Czech/Kind/Peyrl* § 41a NAG mn 18 concerning the cases in which one is entitled to receive the card.

1810 Cf. *Czech* in *Abermann/Czech/Kind/Peyrl* (eds), NAG Kommentar² (2019) § 3 NAG mns 6f.

1811 § 3(1) AuslBG and § 8(1) No. 2 NAG and see the references in Fn 842.

1812 On the development of ‘family roots’ *Cerezo Mariscal*, *Revista de Derecho* 2015, 680 and on the previous law *Iglesias Sánchez*, *La regularización de la situación administrativa de los padres de menores españoles en situación irregular*, *Revista de Derecho Migratorio y Extranjería* 2010/3, 35.

1813 See Chapter 3.C.III.2.

1814 See Chapter 3.C.III.2.

1815 Cf. *Cerezo Mariscal*, *Revista de Derecho* 2015, 680f.

observation with regard to the previous law is still valid. The author considers the regularisation to be easily achievable in privileged cases as ‘only’ one set of circumstances has to be met alongside the general requirements.¹⁸¹⁶

Article 124(3)(a) REDYLE, introduced in 2011 and reformed in 2022, concerns the minor’s parents or guardian. The minor has to be a Spanish citizen. According to Article 17(1)(a) Código Civil¹⁸¹⁷, those born of a Spanish mother or father are Spaniards by birth.¹⁸¹⁸ Article 124(3)(a) REDYLE further requires the parent or guardian to be responsible for the minor and living with him or her or must comply with the parental obligations in respect of the minor;¹⁸¹⁹ this provision also includes family members of EU citizens.¹⁸²⁰ The Royal Decree 629/2022 supplemented the wording of this provision. It further stipulates that a foreigner might obtain this residence permit if he or she provides support to a Spaniard with a disability for the exercise of their legal capacity, provided that the foreigner who provides this support is in charge of the person with a disability and lives with him or her. Hence, this reform contributed to the fact that Article 124(3)(a) REDYLE now falls within the scope of this study.¹⁸²¹

The Royal Decree 629/2022 also reformulated and (newly) introduced Article 124(3)(b) REDYLE which is now available to the spouse or registered partner of a Spanish citizen (*cónyuge o pareja de hecho acreditada de ciudadano o ciudadana de nacionalidad española*). Furthermore, ascendants over 65 years of age, or dependents under 65 years of age, descendants under 21 years of age, or dependents over 21 years of age, of a Spanish citizen, or of their spouse or registered partner, fall within the ambit of said permit.

1816 *Carbajal García*, *Revista de Derecho Migratorio y Extranjería* 2012/29, 68.

1817 Real Decreto de 24 de julio de 1889 por el que se publica el Código Civil, BOE 206 of 25.7.1889 in the version of 16.12.2021.

1818 Cf. *Boza Martínez*, *La regularización de los progenitores de menores de nacionalidad española y la necesidad de una solución reglamentaria a la cuestión*. WP 1/2011 (9.2.2011), <http://idpbarcelona.net/docs/public/wp/workingpaper5.pdf> (31.7.2022) 4 and *Álvarez Rodríguez/Marrero González*, *Attribution of Spanish Nationality to Children Born in Spain with the Purpose of Avoiding Situations of Statelessness at Birth in Carrera Nuñez/de Groot* (eds), *European Citizenship at the Crossroads: The Role of the European Union on Loss and Acquisition of Nationality* (2015) 267.

1819 Cf. *Cerezo Mariscal*, *Revista de Derecho* 2015, 681.

1820 See TSJ País Vasco 170/2017, ECLI:ES:TSJPV:2017:1252, FJ 4.

1821 See Chapter 1.B.IV.2.

The requirement in Article 124(3)(c) REDYLE, which actually existed prior to the Royal Decree 629/2022, applies to those children whose mother or father was originally a Spanish citizen.¹⁸²² This can be proven by referring to the entry of the birth in the civil register, which contains information on the parents' nationality.¹⁸²³

The term 'family' – within the whole *arraigo* system – is limited to the immediate family, i.e. the spouse, registered partner and lineal relatives in the first degree.¹⁸²⁴ *García Vitoria* criticises this narrow definition as being incompatible with Article 8 ECHR as it excludes siblings who live together¹⁸²⁵ or couples who are neither married nor registered partners.¹⁸²⁶

2. Right to stay

The residence permit according to Article 124(3)(c) REDYLE is valid for one year.¹⁸²⁷ The permits issued for reasons of 'rootedness' share the common feature that they also encompass a work permit.¹⁸²⁸ This privileges 'rootedness' within the 'temporary residence permits for exceptional circumstances'. It does not apply to minors who have not yet reached working age (16 years).¹⁸²⁹

The residence permits according to Article 124(3)(a) and (b) REDYLE are granted for five years and entitle the holder to work as an employee or self-employed person.

1822 Before the Royal Decree 629/2022, this was set out in Article 124(3)(b) REDYLE.

1823 Cf. Instrucción DGI/SGJR/10/2008, 3f. For criticism, see *Cerezo Mariscal*, *Revista de Derecho* 2015, 680f, who notes that there are considerable problems in recognising former citizens of the Spanish Sahara – a Spanish colony until 1975.

1824 Cf. *Triguero Martínez*, *Migraciones* 2014, 453f.

1825 See however the case law cited in *Esteban de la Rosa*, Art 31 LODYLE in *Monereo Pérez/Fernández Avilés/Triguero Martínez* 505.

1826 Cf. *García Vitoria*, *Revista General de Derecho Constitucional* 2015/20, 14ff.

1827 Art 130(1) REDYLE. However, see Art 124(3)(a) REDYLE.

1828 Art 129(1) REDYLE; cf. *Serrano Villamanta* in *Balado Ruiz-Gallegos* 564 and see Chapter 3.C.II.2.

1829 Art 129(1) REDYLE; cf. *Fernández Collados* in *Palomar Olmeda* 434.

VI. Interim conclusion

The right to respect for family life under Article 8 ECHR serves as the legal standard with regard to the purpose of the regularisation ‘family unity’. It is generally not necessary to grant a right to stay in order to comply with the protection against expulsion pursuant to Article 8 ECHR.

The Spanish ‘residence permit for a child not born in Spain’ covers minors who have been residing in Spain for at least two years and, where applicable, attending school. This is complicated by the requirements that one parent or guardian must be residing lawfully and have sufficient financial resources. As a result, the length of the right to stay is derived from the duration of the residence permit of the parent or guardian.

At the same time, the Austrian ‘Red-White-Red – Card plus’ for unaccompanied minor aliens in the care of foster parents or child and youth service is to be understood as an expression of Article 8 ECHR, especially with regard to the best interests of the child, which is also stipulated in the UN Convention on the Rights of the Child. Similar to the Spanish residence permit, the person concerned must be a minor, but the main difference is that only ‘unaccompanied’ minors are eligible under Austrian law. There is a parallel in that minors who are in the care of the child and youth service fall within the personal scope of application. The Spanish law on foreigners stipulates that an institution established in Spain must be the guardian. The Austrian ‘Red-White-Red – Card plus’ is valid for two years and thus one year longer than the Spanish residence permit.

The Austrian ‘residence permits for reasons of Article 8 ECHR’ requires an examination of the proportionality of a removal measure with regard to the impact on one’s (private) and family life, which is to be undertaken during the asylum procedure or upon application. Despite a lack of statistics, it may be assumed that this is the most important regularisation in Austrian law because the requirements are easier to meet when compared to the requirements for the other regularisations. In principle, Austrian law accords with the protection against expulsion under Article 8 ECHR as it has codified the required balance of interests in statute law.

The German ‘residence permit for persons who are enforceably required to leave the country, but whose departure is legally or factually impossible’ targets internal obstacles to deportation, though gives special consideration to Article 8 ECHR and the associated balance between interests of private/family life and the public interest in expulsion. German law therefore meets the obligation under Article 8 ECHR to guarantee foreigners special protection against expulsion where there is an existing private/family life.

At the same time, Article 3 ECHR has left its mark as the German law also covers cases falling under this provision.¹⁸³⁰ Furthermore, as already explained in Chapter 4.A.III., it is extremely difficult in practice to obtain this residence permit if there are factual obstacles to deportation ('chain toleration' being the key phrase here), as it is a ground for refusal if the foreigner is at fault for the obstacle. The residence permit is granted on the basis of an application. It is contextually significant that it is also examined *ex officio* in the asylum procedure, subsequently after the asylum, refugee and subsidiary protection status. It is a particular feature of German law that the wording is open regarding the grant of the permit 'for a maximum of three years', but under certain circumstances 'for no longer than six months', as long as the foreigner 'has not been legally resident in the federal territory for at least 18 months'. Quantitatively speaking, the 'residence permit for persons who are enforceably required to leave the country, but whose departure is legally or factually impossible' is the most important regularisation in German law.

The Spanish 'temporary residence permit for reasons of family roots' may be understood as implementing Article 8 ECHR. In contrast to the Austrian 'residence permits for reasons of Article 8 ECHR' or the German 'residence permit for persons who are enforceably required to leave the country, but whose departure is legally or factually impossible', the Spanish law on this residence permit does not mandate a balance of interests. It instead stipulates three specific sets of circumstances which were reformed by the Royal Decree 629/2022. Interestingly, Article 124(3)(a) REDYLE now stipulates that a foreigner might obtain this residence permit if he or she provides support to a Spaniard with a disability for the exercise of their legal capacity, provided that the foreigner who provides this support is in charge of the person with a disability and lives with him or her. Additionally, the residence permit is granted for an exceptionally long period, five years, and entitles the holder to work both employed and self-employed. The scope of family members is however very narrow and thus not all cases protected by Article 8 ECHR are covered. Several of these cases are covered by other regularisations in Spanish law, though 'social roots' merit particular attention.

1830 However, the relationship to the 'residence permit for banned deportation to a specific state' under § 25(3) AufenthG is also to be considered. If such a ban exists, the residence permit under § 25(3) AufenthG takes priority as it offers better access to the labour market and social benefits.

Overall, the balance of interests established in ECtHR case law on Article 8 ECHR has had an effect on the regularisations. This is especially clear in Austria and Germany. Austria has even created a regularisation particular to unaccompanied minors. For Germany, regularisations that fall under other regularisation purposes should not be disregarded, as these are partly granted for family reasons – for instance the ‘residence permit in the case of permanent integration’ and the ‘residence permit for well-integrated juveniles and young adults’ both feature a derivative right to stay for family members. Spain has taken the opposite path by anchoring three specific sets of circumstances in law. This solution appears to be too rigid and does not appear to fully reconcile with all aspects of Article 8 ECHR, even though the reform via the Royal Decree 629/2022 has expanded the scope of application of this regularisation. Be that as it may, one must bear in mind that several types of cases are covered by other regularisations, such as ‘social roots’.

D. Vulnerability¹⁸³¹

I. Victim protection¹⁸³²

This section begins with a description of the Austrian ‘special protection residence permit’ for victims of crimes (*Aufenthaltsberechtigung besonderer Schutz für Opfer von Straftaten*) and the German ‘residence permit for prosecution of criminal offences’ (*Aufenthaltserlaubnis zur Strafverfolgung*) as both are granted for one year, though in some circumstances the latter may be granted for two years. The three Spanish residence permits are then analysed in order to present the particularly victim-friendly Spanish protection regime in the best possible way. The Spanish ‘temporary residence permit for humanitarian reasons’ for victims of a crime (*autorización temporal por razones humanitarias – víctimas de delitos*) is valid for one year; the Spanish ‘temporary residence permit and work permit for exceptional circumstances for foreign victims of human trafficking’ (*autorización de residencia y trabajo por circunstancias excepcionales de extranjeros víctimas de trata de seres humanos*) and the ‘temporary residence permit and work permit for exceptional circumstances for foreign women who are victims

1831 See Chapter 1.B.III.4.

1832 See Chapter 1.B.III.4.a.

of gender-based violence' (*autorización de residencia temporal y trabajo de mujeres extranjeras víctimas de violencia de género*) are granted for five years.

1. Austria: 'special protection residence permit' for victims of a crime

In addition to tolerated persons,¹⁸³³ the 'special protection residence permit' may also be granted to witnesses and victims of human trafficking or cross-border trade in prostitution, and victims of violence. The provision therefore serves to protect witnesses and victims.¹⁸³⁴ Accordingly, it is more appropriate to subsume this residence permit under the purpose of the regularisation 'victim protection' and not under 'other national interests'.¹⁸³⁵

The protection relating to victims of human trafficking is based on obligations under international and EU law, in particular Article 8 Human Trafficking Directive.¹⁸³⁶ It is an autonomous mechanism under national law to protect victims of violence from further violence.¹⁸³⁷ The most recent official statistics date from 2013, when 'special protection residence permits' were granted to six victims of human trafficking and three victims of violence.¹⁸³⁸ As noted above, there are no current statistics, but it is reasonable to assume from the 2013 statistics that this part of Austrian law is of no particular relevance in practice.

a) Requirements

According to § 57(1) No. 2 AsylG (A), granting a 'special protection residence permit' requires the purpose of guaranteeing the prosecution of acts punishable by the courts or of asserting and enforcing civil-law claims in connection with such punishable acts, in particular to witnesses or

1833 See Chapter 4.A.II.1.

1834 *Peyrl/Neugschwendtner/Schmaus*, *Fremdenrecht* 194 and see also *ErläutRV* 1803 BlgNR 24. GP, 47f.

1835 See Chapter 4.F.

1836 *ErläutRV* 1803 BlgNR 24. GP, 47.

1837 *ErläutRV* 1803 BlgNR 24. GP, 47. See also *VwGH* 30.8.2017, Ra 2017/18/0119 and 12.11.2015, Ra 2015/21/0023.

1838 *Bundesministerium für Inneres*, *Niederlassungs- und Aufenthaltsstatistik* 2013 (2013) 37. There were only 6 (victims of human trafficking) and 16 (victims of violence) extensions.

victims of human trafficking or cross-border trade in prostitution. The explanations accompanying the legislation state that victim cooperation is not an objective requirement.¹⁸³⁹ Such objective requirement instead exists if criminal proceedings have already been initiated or civil claims have been asserted.¹⁸⁴⁰ The corresponding application shall be rejected as inadmissible if no criminal proceedings have been initiated or no civil-law claims have been asserted.¹⁸⁴¹ The Federal Office for Immigration and Asylum has to decide on an application under § 57(1) No. 2 AsylG (A) within six weeks. The explanations accompanying the legislation justify this accelerated procedure for reasons of victim protection, according to which a quick reaction by the authority is facilitated to a considerable extent by legal certainty.¹⁸⁴² The ‘low threshold’ takes account of the protection afforded to the victim.

§ 57(1) No. 3 AsylG (A) stipulates that victims of violence may receive a residence permit if it is necessary to protect them against further violence.¹⁸⁴³ It will suffice if criminal proceedings have been initiated or an interim injunction¹⁸⁴⁴ has or could have been issued. The application shall be rejected if this requirement is not met.¹⁸⁴⁵ According to the explanations to the Aliens Law Package of 2005, the provision is addressed foremost to victims of domestic violence.¹⁸⁴⁶ In addition, victims of forced marriages or partnerships may under certain circumstances receive a ‘special protection residence permit’ under § 57(1) No. 3 AsylG (A).¹⁸⁴⁷

1839 However, see in this regard *Stiller*, Trafficked Third-Country Nationals: Detection, Identification and Protection in Austria (October 2021), <https://www.emn.at/wp-content/uploads/2022/06/emn-study-2022-trafficked-third-country-nationals-detection-identification-and-protection-in-at.pdf> (31.7.2022) 28 referring to *Schlintl/Sorrentino*, Residence permits, international protection and victims of human trafficking: Durable Solutions Grounded in International Law. Final Report (February 2021), <https://lefoe.at/wp-content/uploads/2021/05/REST-Final-Report-2.pdf> (31.7.2022) 25.

1840 Cf. ErläutRV 1803 BlgNR 24. GP, 47.

1841 § 59(3) 1st Sent. (A) and cf. ErläutRV 1803 BlgNR 24. GP, 47.

1842 ErläutRV 1803 BlgNR 24. GP, 48.

1843 § 57(1) No. 3 AsylG (A) and VwGH 5.5.2015, Ra 2014/22/0162.

1844 §§ 382b or 382c Exekutionsordnung in the version BGBl I 86/2021 (Enforcement Code).

1845 § 57(4) AsylG (A); ErläutRV 1803 BlgNR 24. GP, 48. But see also VwGH 5.5.2015, Ra 2014/22/0162.

1846 ErläutRV 1803 BlgNR 24. GP, 47. Along these lines ErläutRV 1077 BlgNR 24. GP, 10.

1847 § 30a NAG; ErläutRV 1803 BlgNR 24. GP, 76. It is somewhat unusual that the provision is stipulated in the NAG. This also applies to the ‘Red-White-Red –

Before issuing the special residence permit according to § 57(1) Nos. 2 and 3 AsylG (A), the Federal Office for Immigration and Asylum shall obtain a substantiated opinion from the competent *Land* police directorate.¹⁸⁴⁸ This allows the police directorate to become aware of the applications under § 57 AsylG (A) and to report to the Federal Office for Immigration and Asylum without being restricted in the performance of its duties.¹⁸⁴⁹

b) Right to stay

The explanations in Chapter 3.A.III.2.d. and Chapter 4.A.II.1.b. apply accordingly.

2. Germany: ‘residence permit for prosecution of criminal offences’

The German ‘residence permit for humanitarian reasons’ contains two sets of circumstances aimed at the prosecution of specific criminal offences. The name indeed first suggests that it falls under the purpose ‘other national interests’,¹⁸⁵⁰ but the main purpose of the two sets of circumstances is to protect victims.¹⁸⁵¹ This is also supported by the fact that the stay may be extended beyond the conclusion of criminal proceedings.¹⁸⁵² Here the importance of the cooperation with the competent prosecution and court authorities is not overlooked.¹⁸⁵³

According to § 25(4a) AufenthG, there is a ‘residence permit for the victims of human trafficking’, which was introduced when transposing Article 8 Human Trafficking Directive.¹⁸⁵⁴ The focus is on securing the

Card plus’ for unaccompanied minor aliens in the care of foster parents or the child and youth service; see above Chapter 4.C.IV.

1848 § 57(2) AsylG (A).

1849 ErläutRV 1803 BlgNR 24. GP, 47.

1850 See Chapter 4.F.

1851 See Recital 9 Human Trafficking Directive and *Röcker in Bergmann/Dienelt* § 25 AufenthG mns 79ff. For a contrasting view see *Koch in Kluth/Hornung/Koch* (eds), *Handbuch Zuwanderungsrecht*³ (2020) § 4 mns 965 and 982.

1852 See Chapter 4.D.I.2.b.

1853 In this sense, *Marx*, *Aufenthalts-, Asyl- und Flüchtlingsrecht* § 5 mn 60 with further references and 66.

1854 No. 25.4a.0.1 AVV-AufenthG and *Marx*, *Aufenthalts-, Asyl- und Flüchtlingsrecht* § 5 mn 60.

safety of the victims of human trafficking as well as providing suitable support in order to successfully prosecute the offenders.¹⁸⁵⁵ § 25(4b) AufenthG contains a ‘residence permit for victims of undocumented employment’, which was introduced when transposing Article 13(4) Employers Sanctions Directive.¹⁸⁵⁶ The ‘residence permit for victims of undocumented employment’ was modelled on the ‘residence permit for the victims of human trafficking’,¹⁸⁵⁷ thus it is appropriate to analyse the provisions together. Only 77 foreigners held a residence permit under § 25(4a) or (4b) AufenthG in mid-2021,¹⁸⁵⁸ therefore highlighting that this type of permit is almost irrelevant in practice.

a) Requirements

The foreigner has to have been a victim of a criminal offence under §§ 232–233a German Criminal Code (*Strafgesetzbuch*):¹⁸⁵⁹ human trafficking, forced prostitution, forced labour, exploitation of labour, and exploitation involving deprivation of liberty. It suffices that the public prosecutor’s office is investigating on the basis of concrete facts.¹⁸⁶⁰ The presence of the victim must be necessary for the criminal proceedings and be considered appropriate, whereby his or her expected statements are of particular relevance.¹⁸⁶¹ The consideration by the public prosecutor’s office or the criminal court that the foreigner’s presence in Germany is appropriate is binding on the foreigners authority.¹⁸⁶²

It follows that the person concerned must have agreed to testify as a witness in order to fall within the scope of the residence permit.¹⁸⁶³ The Human Trafficking Directive grants the person concerned a ‘reflection period’ to take an informed decision as to whether to cooperate with the

1855 No. 25.4a.0.1 AVV-AufenthG.

1856 Cf. *Maaßen/Kluth* in *Kluth/Heusch* § 25 AufenthG mn 116.

1857 Cf. *Maaßen/Kluth* in *Kluth/Heusch* § 25 AufenthG mn 116.

1858 BT-Drs 19/32579, 21.

1859 *Strafgesetzbuch* in the version of 11.7.2022 (BGBl I 1082); *Herker*, Bleiberecht für Opfer von Hasskriminalität (2022) 318ff, advocates for a legal change and inclusion of victims of hate crimes.

1860 No. 25.4a.1.1 AVV-AufenthG.

1861 *Maaßen/Kluth* in *Kluth/Heusch* § 25 AufenthG mns 102f.

1862 *Maaßen/Kluth* in *Kluth/Heusch* § 25 AufenthG mn 107.

1863 See Art 5 Human Trafficking Directive and *Maaßen/Kluth* in *Kluth/Heusch* § 25 AufenthG mn 105.

authorities.¹⁸⁶⁴ If the foreigners authority has concrete indications that a person who is obliged to leave the country is a victim of human trafficking or undocumented employment,¹⁸⁶⁵ it must set a deadline for leaving the country that allows the victim to make a decision, again by granting a suitable reflection period.¹⁸⁶⁶ The foreigners authority or the criminal prosecution authority must inform the victim of the reflection period.¹⁸⁶⁷ The Human Trafficking Directive does not require lawful residence during the reflection period,¹⁸⁶⁸ which is why German law only grants tolerated status in such cases.¹⁸⁶⁹

It is also important that the victim no longer has any ties to the defendant.¹⁸⁷⁰ Finally, it should be pointed out that an existing entry and residence ban does not prevent the issuance of a 'residence permit for victims of human trafficking'.¹⁸⁷¹

The 'residence permit for victims of undocumented employment' is aimed at foreigners who were engaged in undocumented employment under particularly exploitative conditions or as minors. The only difference to the 'residence permit for the victims of human trafficking' is that they must be victims of a criminal offence under the Act to Combat Undocumented Employment (*Schwarzarbeitsbekämpfungsgesetz*) or the Act on Temporary Employment Businesses (*Arbeitsnehmerüberlassungsgesetz*).¹⁸⁷²

Other provisions of the Residence Act may apply to the victims of other offences, i.e. neither human trafficking nor undocumented employment,¹⁸⁷³ such as § 25(4) 1st Sent. AufenthG ('residence permit for urgent humanitarian or personal reasons or substantial public interests').¹⁸⁷⁴ Furthermore, a toleration pursuant to § 60a(2) 2nd Sent. AufenthG may be

1864 Art 6 Human Trafficking Directive .

1865 See the introductory remarks in Chapter 3.

1866 See Art 6(2) Human Trafficking Directive .

1867 See Art 5 Human Trafficking Directive and in this sense *Maaßen/Kluth* in *Kluth/Heusch* § 25 AufenthG mn 109.

1868 Art 6(3) Human Trafficking Directive .

1869 § 60a(5) AufenthG; cf. *Marx*, Aufenthalts-, Asyl- und Flüchtlingsrecht § 5 mn 61.

1870 Cf. No. 25.4a.2.2 AVV-AufenthG.

1871 Cf. *Maaßen/Kluth* in *Kluth/Heusch* § 25 AufenthG mn 106.

1872 §§ 10(1) and 11(1) No. 3 Schwarzarbeitsbekämpfungsgesetz in the version of 25.6.2021 (BGBl I 2099) and § 15a Arbeitsnehmerüberlassungsgesetz in the version of 18.3.2022 (BGBl I 466).

1873 *Maaßen/Kluth* in *Kluth/Heusch* § 25 AufenthG mn 100.

1874 Cf. *Marx*, Aufenthalts-, Asyl- und Flüchtlingsrecht § 5 mns 49–54.

granted if the foreigner is needed as a witness in criminal proceedings.¹⁸⁷⁵ However, the examination of the so-called *Prozessduldung*, i.e. toleration due to criminal proceedings, is subordinate to the residence permit discussed here.¹⁸⁷⁶

b) Right to stay

The residence permits pursuant to § 25(4a) and (4b) are in principle issued and extended for one year.¹⁸⁷⁷ The foreigners authority is to consult the competent authority, namely the public prosecutor's office or the criminal court.¹⁸⁷⁸ The residence permits generally only ensure a temporary stay and therefore the foreigners authority has to decide whether the person concerned will have to leave the country following the proceedings.¹⁸⁷⁹ Only toleration pursuant to § 60a(2) 2nd Sent. AufenthG comes into consideration if this is not the case.¹⁸⁸⁰

The one-year period does not apply if humanitarian or personal reasons or public interests require the foreigner's further presence in Germany, as the residence permit is granted for two years in these cases.¹⁸⁸¹

The residence permit can also be issued for longer than one or two years where there are justified reasons. According to the General Administrative Provisions on the Residence Act (AVV-AufenthG), such a case exists if it is needed for the foreigner to remain due to the investigations by the public prosecutor's office and/or the trial exists for longer than the one or two-year period. § 25(4a) 3rd Sent. and (4b) 3rd Sent. AufenthG provide the circumstances in which the period may be extended.

Holders of a residence permit pursuant to § 25(4a) or (4b) AufenthG are generally entitled to Unemployment Benefit II under the Social Insurance Code II or social assistance under Social Insurance Code XII.¹⁸⁸² The Skilled Immigration Act did not make any changes with regard to employment. Although employment is not allowed by law, it can be ap-

1875 Cf. BT-Drs 16/5065, 187.

1876 Kluth/Breidenbach in Kluth/Heusch § 60a AufenthG mn 22.

1877 § 26(1) 5th Sent. AufenthG; cf. Maaßen/Kluth in Kluth/Heusch § 25 AufenthG mn 110.

1878 § 72(6) AufenthG; cf. Maaßen/Kluth in Kluth/Heusch § 25 AufenthG mn 112.

1879 Maaßen/Kluth in Kluth/Heusch § 25 AufenthG mn 101.

1880 See Chapter 4.A.I.2.a.

1881 § 26(1) 5th Sent. AufenthG.

1882 Frings/Janda/Keßler/Steffen, Sozialrecht mns 806 and 824.

proved by the foreigners authority,¹⁸⁸³ whereby the approval of the Federal Employment Agency (*Bundesagentur für Arbeit*) is not required according to § 31 BeschV.

3. Spain: ‘temporary residence permit for humanitarian reasons’ for victims of crimes

The ‘temporary residence permit for humanitarian reasons’ for victims of crimes (*autorización temporal por razones humanitarias – víctimas de delitos*) is one of the ‘temporary residence permits for exceptional circumstances’, more specifically it is one of three types of humanitarian reasons.¹⁸⁸⁴ The residence permit is rooted in national law as there are no indications for inspirations from international or EU law. The statistics do not shed light on just how many of these residence permits have been granted.¹⁸⁸⁵

a) Requirements

The permit may only be granted to foreigners who are victims of certain offences.¹⁸⁸⁶ The Law 4/2015 (LEVD) grants further rights to the victims.¹⁸⁸⁷ The offences are characterised by their links to situations of particular vulnerability:¹⁸⁸⁸

- Crimes against employee rights;¹⁸⁸⁹
- Crimes motivated by racist, anti-Semitic or other discriminatory reasons; and
- Violent crimes carried out in the family environment, i.e. domestic violence (*en el entorno familiar*).¹⁸⁹⁰

1883 § 25(4a) 3rd Sent. and § 25(4b) 4th Sent. AufenthG.

1884 Art 126(1) REDYLE and see Chapter 4.A.II.3. and Chapter 4.D.II.1.

1885 See Chapter 3.C.III.1.

1886 Art 126(1) REDYLE.

1887 Cf. *Gutiérrez Sanz*, El anteproyecto de ley orgánica del estatuto de la víctima del delito y la víctima adulta del delito de trata de seres humanos con fines de explotación sexual, *Revista de Derecho Migratorio y Extranjería* 2014/37, 13.

1888 Cf. *García Vitoria* in *Boza Martínez/Donaire Villa/Moya Malapeira* 296f.

1889 Arts 311–315 CP.

1890 Cf. Ley 27/2003, de 31 de julio, reguladora de la Orden de protección de las víctimas de la violencia doméstica, BOE 183 of 1.8.2003, and in general on domestic violence against women *Defensor del Pueblo*, La violencia domestica contra las mujeres (1998), <https://www.defensordelpueblo.es/wp-content/upl>

This latter group will probably apply in circumstances that are not covered by the ‘temporary residence permit and work permit for exceptional circumstances for foreign women who are victims of gender-based violence’ discussed below.¹⁸⁹¹

In order to prove that one has been the victim of such a crime, Article 126 (1) REDYLE requires a final court decision (*resolución judicial finalizadora*). The Spanish Supreme Court has interpreted this requirement as constitutional, though in a different context.¹⁸⁹² However, *Serrano Villamanta* criticises this requirement as severely restricting the scope of the application because of the lengthy wait for a court decision.¹⁸⁹³ A regularisation on the basis of social roots will therefore often come into question before a ‘temporary residence permit for humanitarian reasons’ for victims of crimes.¹⁸⁹⁴

According to *Esteban de la Rosa* and other authors, the application for the ‘residence permit for humanitarian reasons’ for victims of crimes can already be made where there is a court order for the protection of the victim of domestic violence.¹⁸⁹⁵ However, the residence permit can only be granted after the conclusion of the court proceedings. This is why it would be more appropriate to extend the protection regime for foreign women who have been victims of gender-related violence to the residence permit discussed here.¹⁸⁹⁶ This would mean better protection as the application for the residence permit may be made at the moment of the court order, thus allowing the victim to receive a provisional ‘temporary residence permit and work permit’ at an earlier stage.¹⁸⁹⁷

oads/2015/05/1998-01-La-violencia-dom%C3%A9stica-contra-las-mujeres.pdf (31.7.2022).

1891 Cf. *García Vitoria* in *Boza Martínez/Donaire Villa/Moya Malapeira* 296 and see Chapter 4.D.I.5.

1892 STS 782/2007, ECLI:ES:TS:2007:782, FJ 11.

1893 *Serrano Villamanta* in *Balado Ruiz-Gallegos* 559; agreeing *García Vitoria* in *Boza Martínez/Donaire Villa/Moya Malapeira* 297.

1894 See Chapter 4.E.I.

1895 In this sense, *Esteban de la Rosa*, Art 31 LODYLE in *Monereo Pérez/Fernández Avilés/Triguero Martínez* 506 and *Lázaro González/Benlloch Sanz* in *Palomar Olmeda* 941f as well as *Trinidad García*, *Revista de Derecho Migratorio y Extranjería* 2005/9, 151.

1896 Cf. *Lázaro González/Benlloch Sanz* in *Palomar Olmeda* 941f.

1897 See Chapter 4.D.I.5.b.

b) Right to stay

The residence permit is usually granted for one year.¹⁸⁹⁸ An application for a work permit is to be submitted separately.¹⁸⁹⁹

4. Spain: ‘temporary residence permit and work permit for exceptional circumstances for foreign victims of human trafficking’

Article 59bis LODYLE and Articles 140–146 REDYLE contain the main provisions on the ‘temporary residence permit and work permit for exceptional circumstances for foreign victims of human trafficking’ (*autorización de residencia y trabajo por circunstancias excepcionales de extranjeros víctimas de trata de seres humanos*),¹⁹⁰⁰ with Article 177bis CP containing the corresponding provision in criminal law.¹⁹⁰¹

Article 59bis LODYLE was introduced by the Organic Law 2/2009,¹⁹⁰² which transposed the provisions of the 2004 Human Trafficking Directive.¹⁹⁰³ On the national level, the Framework protocol for the protection of victims of human trafficking (*Protocolo Marco de Protección de las Víctimas de Trata de Seres Humanos*) was passed on 28 October 2010, with additional rights for victims of crime provided via the Law 4/2015 (LEVD).¹⁹⁰⁴ Furthermore, the aforementioned provisions are significantly influenced by international documents such as the Council of Europe Convention on Action against Trafficking in Human Beings of 16 May 2005¹⁹⁰⁵ or

1898 Art 130(1) REDYLE.

1899 Art 129(2) REDYLE; see Chapter 3.C.II.2.

1900 Minors are subject to special rules, which are not analysed here; cf. *Vicente Palacio*, Art 59bis LODYLE in *Monereo Pérez/Fernández Avilés/Triguero Martínez* (eds), *Comentario a la ley y al reglamento de Extranjería, Inmigración e Integración Social*² (2013) 957 (969f).

1901 STS 4668/2016, ECLI:ES:TS:2016:4668 and cf. *Vicente Palacio*, Art 59bis LODYLE in *Monereo Pérez/Fernández Avilés/Triguero Martínez* 958–961.

1902 Cf. *Vicente Palacio*, Art 59bis LODYLE in *Monereo Pérez/Fernández Avilés/Triguero Martínez* 957f and *Díaz Morgado*, *La residencia de víctimas de trata de personas y la residencia por colaboración contra redes organizadas in Boza Martínez/Donaire Villa/Moya Malapeira* (eds), *La nueva regulación de la inmigración y la extranjería en España* (2012) 340f and 351f.

1903 Cf. *Vicente Palacio*, Art 59bis LODYLE in *Monereo Pérez/Fernández Avilés/Triguero Martínez* 957f.

1904 Cf. *Gutiérrez Sanz*, *Revista de Derecho Migratorio y Extranjería* 2014/37, 13ff.

1905 Art 59bis(1) LODYLE refers to Art 10 of said Convention.

the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime of 2000.

The protection of victims of human trafficking is at the core¹⁹⁰⁶ of this regularisation and thus it is not discussed in the context of ‘other national interests’.¹⁹⁰⁷ Due to the lack of precise detail in the statistics, it is unclear how many residence permits of this kind have been issued.¹⁹⁰⁸

a) Identification of potential victims

The identification of the potential victims is the first key step in granting this type of residence permit.¹⁹⁰⁹ Any person or authority who is aware of the existence of a potential victim of human trafficking is to immediately inform the competent police authority for the investigation of the offence or the delegate or subdelegate of government.¹⁹¹⁰ This may occur, for example, in relation to a control by the Labour and Social Security Inspectorate (*Inspección de Trabajo y Seguridad Social*), in the course of a deportation process or at any other time.¹⁹¹¹

The competent authorities are subject to a duty to inform once there are reasonable indications (*indicios razonables*) that there is a potential victim of human trafficking.¹⁹¹² They must inform these foreigners in writing and

1906 Along this line, *Vicente Palacio*, Art 59bis LODYLE in *Monereo Pérez/Fernández Avilés/Triguero Martínez* 960f; *Díaz Morgado*, La residencia de víctimas de trata de personas y la residencia por colaboración contra redes organizadas in *Boza Martínez/Donaire Villa/Moya Malapeira* 342f. According to *Lázaro González/Benlloch Sanz* in *Palomar Olmeda* 927 the main focus is to ease the prosecution of offences.

1907 See Chapter 4.F.

1908 See Chapter 3.C.III.1.

1909 Cf. *Díaz Morgado*, La residencia de víctimas de trata de personas y la residencia por colaboración contra redes organizadas in *Boza Martínez/Donaire Villa/Moya Malapeira* 353.

1910 Art 141(1) REDYLE and Instrucción DGI/SGRJ/6/2011, 3; cf. *Lázaro González/Benlloch Sanz* in *Palomar Olmeda* 928f.

1911 Instrucción DGI/SGRJ/6/2011, 3; cf. also *Díaz Morgado*, La residencia de víctimas de trata de personas y la residencia por colaboración contra redes organizadas in *Boza Martínez/Donaire Villa/Moya Malapeira* 354 and *Vicente Palacio*, Art 59bis LODYLE in *Monereo Pérez/Fernández Avilés/Triguero Martínez* 962.

1912 Cf. *Díaz Morgado*, La residencia de víctimas de trata de personas y la residencia por colaboración contra redes organizadas in *Boza Martínez/Donaire Villa/Moya Malapeira* 354f.

in a language that they understand of the protections available to them, and in particular about the residence permit.¹⁹¹³ Furthermore, they must also provide information on the social and health benefits to which the foreigner is entitled.¹⁹¹⁴

The competent police units, i.e. those trained in human trafficking investigation,¹⁹¹⁵ examine and, if necessary, establish whether the person concerned is a victim of human trafficking.¹⁹¹⁶ Victim identification is a particularly delicate and important phase.¹⁹¹⁷ The great vulnerability of the victims must be observed.¹⁹¹⁸

During the identification phase and the recovery and reflection period, no deportation proceedings may be initiated because the victim is staying irregularly.¹⁹¹⁹ A deportation procedure that has already been initiated or a pending deportation must be suspended. The new rule introduced by the Organic Law 10/2011 is very welcome from the victim's perspective, as the victims now do not have to fear that deportation proceedings will be initiated when they approach the authorities with their concerns.¹⁹²⁰

b) Recovery and reflection period

Following the identification of potential victims, the competent police unit will send within 48 hours an opinion on the granting of a recovery and reflection period to the competent delegate or subdelegate of govern-

1913 Art 59bis(2) LODYLE and Art 141(1) REDYLE; cf. Instrucción DGI/SGRJ/6/2011, 2.

1914 Cf. *Lázaro González/Benlloch Sanz* in *Palomar Olmeda* 929.

1915 Cf. *Díaz Morgado*, La residencia de víctimas de trata de personas y la residencia por colaboración contra redes organizadas in *Boza Martínez/Donaire Villa/Moya Malapeira* 353 and *Defensor del Pueblo*, Recomendación (23.5.2016), Queja 16002509.

1916 Arts 141(2) and 142 REDYLE; cf. Instrucción DGI/SGRJ/6/2011, 2.

1917 Cf. *Díaz Morgado*, La residencia de víctimas de trata de personas y la residencia por colaboración contra redes organizadas in *Boza Martínez/Donaire Villa/Moya Malapeira* 353–355.

1918 Cf. Instrucción DGI/SGRJ/6/2011, 1.

1919 Art 59bis(2) LODYLE and Art 141(2) REDYLE and Instrucción DGI/SGRJ/6/2011, 3.

1920 In this sense, *Díaz Morgado*, La residencia de víctimas de trata de personas y la residencia por colaboración contra redes organizadas in *Boza Martínez/Donaire Villa/Moya Malapeira* 355.

ment,¹⁹²¹ which makes a final decision within five days.¹⁹²² If the five-day period expires without a response, the silence is considered as approval.¹⁹²³ If there are reasonable indications that the person is a trafficking victim, a recovery and reflection period is granted. This phase is granted for at least 90 days and must continue until the victim is ready to decide on a possible cooperation with the prosecution authorities with regard to the offences.¹⁹²⁴

In addition to the aforementioned suspension of a possible deportation or deportation proceedings, the victim's stay is regularised during the recovery and reflection period.¹⁹²⁵ According to Article 59bis(2) LODYLE, this also applies to the victim's children if they are in Spain at the time the parent is deemed a victim of human trafficking.¹⁹²⁶ This includes both underage and disabled adult children.¹⁹²⁷ Theoretically, other persons are also eligible if they have a special relationship with the victim and the grant of the right to stay is necessary for the victim's cooperation with the authorities.¹⁹²⁸ The extension of protection to all these persons serves to remove all possible obstacles that could prevent the victim from cooperating with the authorities.¹⁹²⁹

1921 Cf. *Lázaro González/Benlloch Sanz* in *Palomar Olmeda* 930 and *Díaz Morgado*, La residencia de víctimas de trata de personas y la residencia por colaboración contra redes organizadas in *Boza Martínez/Donaire Villa/Moya Malapeira* 356.

1922 Art 142(3) REDYLE; cf. *Vicente Palacio*, Art 59bis LODYLE in *Monereo Pérez/Fernández Avilés/Triguero Martínez* 963.

1923 In this cases the recovery and reflection period is granted for a minimum of 90 days; Art 59bis(2) LODYLE.

1924 Art 59bis(2) LODYLE; for detail see *Lázaro González/Benlloch Sanz* in *Palomar Olmeda* 929f.

1925 Art 59(2) LODYLE; cf. for detail Art 142(6) REDYLE; Instrucción DGI/SGRJ/6/2011, 4. *Vicente Palacio*, Art 59bis LODYLE in *Monereo Pérez/Fernández Avilés/Triguero Martínez* 964 who considers that a 'provisional residence permit and work permit' is to be granted from the recovery and reflection phase onwards. However, this does not result either from the legislation or from the cited guidelines on the law on foreigners, as such permit is granted only at a later time; see Chapter 4.D.I.4.b.

1926 Cf. *Vicente Palacio*, Art 59bis LODYLE in *Monereo Pérez/Fernández Avilés/Triguero Martínez* 966f.

1927 For detail see Instrucción DGI/SGRJ/6/2011, 3f.

1928 Cf. *Fernández Pérez*, Derechos fundamentales 237 and *Díaz Morgado*, La residencia de víctimas de trata de personas y la residencia por colaboración contra redes organizadas in *Boza Martínez/Donaire Villa/Moya Malapeira* 357f.

1929 In this sense *Díaz Morgado*, La residencia de víctimas de trata de personas y la residencia por colaboración contra redes organizadas in *Boza Martínez/Donaire*

During the recovery and reflection period, the competent police unit has to ensure the safety and protection of the victims and, if applicable, the children.¹⁹³⁰ The relevant guidelines on the law on foreigners states that the authorities have to provide for the subsistence of the persons concerned,¹⁹³¹ which is probably understood to mean social benefits.¹⁹³²

At the end of the recovery and reflection period, the competent authority evaluates the victim's situation to order a possible extension of this period.¹⁹³³ If the period is extended, the time limit of the 'provisional residence permit and work permit' for the victim and, if applicable, for the children is also extended.

If, after providing the necessary information by means of an opinion, the delegate or subdelegate of government comes to the conclusion that the conditions for granting the recovery and reflection period are not met, the application can be rejected or subsequently revoked.¹⁹³⁴ Reasons for rejection may include the protection of public order and the fact that the victim's status was wrongly invoked.¹⁹³⁵ The law stipulates that the dismissal must be justified and contestable.¹⁹³⁶

c) Exemption from administrative penalties and 'provisional residence permit and work permit'

Article 59bis(4) LODYLE allows the delegate or subdelegate of government to exempt the victim from the administrative penalties because of

Villa/Moya Malapeira 358 and *Vicente Palacio*, Art 59bis LODYLE in *Monereo Pérez/Fernández Avilés/Triguero Martínez* 965.

1930 Cf. *Vicente Palacio*, Art 59bis LODYLE in *Monereo Pérez/Fernández Avilés/Triguero Martínez* 964f and *Díaz Morgado*, La residencia de víctimas de trata de personas y la residencia por colaboración contra redes organizadas in *Boza Martínez/Donaire Villa/Moya Malapeira* 357.

1931 Cf. Instrucción DGI/SGRJ/6/2011, 5.

1932 Cf. *Vicente Palacio*, Art 59bis LODYLE in *Monereo Pérez/Fernández Avilés/Triguero Martínez* 964 with further references.

1933 Art 59bis(2) LODYLE; cf. Instrucción DGI/SGRJ/6/2011, 5f.

1934 Art 59bis(3) LODYLE; cf. *Díaz Morgado*, La residencia de víctimas de trata de personas y la residencia por colaboración contra redes organizadas in *Boza Martínez/Donaire Villa/Moya Malapeira* 358f.

1935 Cf. *Lázaro González/Benlloch Sanz* in *Palomar Olmeda* 931.

1936 Cf. *Fernández Pérez*, Derechos fundamentales 237 and in general the remarks on judicial protection in Chapter 3.C.V.

the irregular stay and from the resulting deportation.¹⁹³⁷ Moreover, Article 59bis(4) LODYLE also suggests that the foreigner may be exempted from all other administrative penalties.¹⁹³⁸ On the one hand, the prosecution authorities can request the exemption from the delegate or subdelegate of government based on the victim's cooperation. On the other hand, the delegate or subdelegate of government may exempt victims in light of their 'personal situation'.^{1939, 1940}

The exemption has an important legal effect,¹⁹⁴¹ as the person concerned must subsequently be informed of the possibility to apply for a 'temporary residence permit and work permit' or of assisted voluntary return.¹⁹⁴² The application is submitted to the delegate or subdelegate of government,¹⁹⁴³ who in turn forwards it to the competent office. In principle the application must include a copy of the passport, although this may be waived if obtaining it poses a risk to the victim.¹⁹⁴⁴ Depending on whether the application is based on cooperation in criminal proceedings or on the victim's personal situation, the Secretary of State for Security (*Secretaría de Estado de Seguridad*) or the Secretary of State for Migration (*Secretaría de Estado de Migraciones*) is responsible.¹⁹⁴⁵ The competent delegate or subdelegate of government attaches two opinions to the application, one relating to the administrative and personal situation of the for-

1937 Art 143(1) REDYLE makes express reference to Art 53(1)(a) LODYLE.

1938 In this sense *Díaz Morgado*, La residencia de víctimas de trata de personas y la residencia por colaboración contra redes organizadas in *Boza Martínez/Donaire Villa/Moya Malapeira* 347 referring to the near-identical wording in Art 59(3) LODYLE; see Chapter 4.F.II.2.

1939 According to the legislative materials, there is a lack of clarity surrounding the meaning of the victim's personal situation; cf. *Díaz Morgado*, La residencia de víctimas de trata de personas y la residencia por colaboración contra redes organizadas in *Boza Martínez/Donaire Villa/Moya Malapeira* 361 Fn 473.

1940 Cf. *Vicente Palacio*, Art 59bis LODYLE in *Monereo Pérez/Fernández Avilés/Triguero Martínez*, 966 and *Díaz Morgado*, La residencia de víctimas de trata de personas y la residencia por colaboración contra redes organizadas in *Boza Martínez/Donaire Villa/Moya Malapeira* 359f.

1941 Cf. *Vicente Palacio*, Art 59bis LODYLE in *Monereo Pérez/Fernández Avilés/Triguero Martínez* 966.

1942 Art 144 REDYLE.

1943 Art 144(2) REDYLE.

1944 Art 59bis(4) LODYLE.

1945 Furthermore, it is also possible to make two applications at the same time: one regarding cooperation and the other regarding the victim's personal situation; Art 144(1) REDYLE; cf. *Lázaro González/Benlloch Sanz* in *Palomar Olmeda* 932.

eigner and the other to the substantive assessment of the proceedings.¹⁹⁴⁶ If latter opinion is favourable, the foreigner is immediately granted a ‘provisional residence permit and work permit’.¹⁹⁴⁷ It should be emphasised here that the residence is therefore lawful until the procedure is concluded. Moreover, the foreigner is entitled to engage in employment.¹⁹⁴⁸ The ‘provisional residence permit and work permit’ can also be granted to the victim’s children upon application.¹⁹⁴⁹

If the foreigner or his or her children, as the case may be, are not exempt from the administrative criminal liability, the suspension of the administrative criminal proceedings or the enforceability of the expulsion will be lifted.¹⁹⁵⁰ In these cases it is not possible to apply for a ‘temporary residence permit and work permit for exceptional circumstances for foreign victims of human trafficking’. However, it is still possible to apply for another ‘temporary residence permit for exceptional circumstances’ and, as a result, the deportation proceedings will remain suspended.¹⁹⁵¹

d) Right to stay

The ‘temporary residence permit and work permit’ granted is valid for five years and does not have any territorial restrictions or limitations on the work that may be undertaken.¹⁹⁵² Just as with the ‘provisional residence permit and work permit’, a residence permit can again be applied for the victim’s children and, if the victim meets the requirements, can also be granted to the children.¹⁹⁵³ One must also emphasise here that Article 144(5) REDYLE refers to the fact that after the five years there may be an application for a long term residence permit (*residencia de larga*

1946 Art 144(3); cf. *Díaz Morgado*, La residencia de víctimas de trata de personas y la residencia por colaboración contra redes organizadas in *Boza Martínez/Donaire Villa/Moya Malapeira* 361f.

1947 Art 144(4) REDYLE.

1948 Art 144(4) REDYLE.

1949 Cf. Instrucción DGI/SGRJ/6/2011, 4f.

1950 Art 143(2) REDYLE.

1951 Art 143(3) REDYLE and see Chapter 3.C.III.3.b.

1952 Art 144(5) REDYLE.

1953 Cf. Instrucción DGI/SGRJ/6/2011, 4f.

duración),¹⁹⁵⁴ whereby the periods under the ‘provisional residence and work permit’ count towards the required five years.¹⁹⁵⁵

If the application for a ‘temporary residence permit and work permit’ is unsuccessful, no such permit is granted and the ‘provisional residence permit and work permit’ is no longer valid.¹⁹⁵⁶ The person concerned will therefore be staying irregularly, but may apply for a different ‘temporary residence permit for exceptional circumstances’ to become regularised once again. The application is taken into account in the (resumed) deportation procedure and in any case the deportation procedure will be discontinued if the permit is granted.¹⁹⁵⁷

5. Spain: ‘temporary residence permit and work permit for exceptional circumstances for foreign women who are victims of gender-based violence’

Article 31bis LODYLE and Articles 131–134 REDYLE stipulate the requirements for the ‘temporary residence permit and work permit for exceptional circumstances for foreign women who are victims of gender-based violence’ (*autorización de residencia temporal y trabajo de mujeres extranjeras víctimas de violencia de género*).¹⁹⁵⁸ On a broader level, the Organic Law 1/2004 (LOMPIVG) created general provisions concerning the protection against gender-based violence.¹⁹⁵⁹ The Organic Law 10/2011

1954 Art 32 LODYLE. See also the Long Term Residence Directive.

1955 Cf. Vicente Palacio, Art 59bis LODYLE in Monereo Pérez/Fernández Avilés/Triguero Martínez 968.

1956 Art 144(6) REDYLE.

1957 Arts 144(7) and 241(2) REDYLE; in this sense Lázaro González/Benlloch Sanz in Palomar Olmeda 931f and see Chapter 3.C.III.3.b. on Art 241(2) REDYLE.

1958 Cf. on the women who were victims of gender-based violence Toledo Larrea, *Análisis de la situación jurídico-social de las mujeres extranjeras víctimas de violencia de género acogidas en los recursos integrales para víctimas de violencia de género de la administración autonómica andaluza*, *Revista de Derecho Migratorio y Extranjería* 2014/37, 53 (54–56).

1959 On the notion of gender-based violence see Art 1(3) LOMPIVG; for detail see Acale Sánchez, *La Residencia de mujeres víctimas de violencia de género* in Boza Martínez/Donaire Villa/Moya Malapeira (eds), *Comentario a la reforma de la ley de extranjería* (LO 2/2009) (2011) 321 (322ff); Lázaro González/Benlloch Sanz in Palomar Olmeda 935ff as well as Esteban de la Rosa, Art 31bis LODYLE in Monereo Pérez/Fernández Avilés/Triguero Martínez (eds), *Comentario a la ley y al reglamento de Extranjería, Inmigración e Integración Social*² (2013) 519 (524–527).

amended Article 31bis LODYLE, which has not been amended since.¹⁹⁶⁰ Furthermore, since 2015 the LEVD provides specific rights to victims of gender-based violence.

Like the victims of human trafficking,¹⁹⁶¹ the victims of gender-based violence receive particular protection due to their vulnerability.¹⁹⁶² The introduction of this purely domestic residence permit is justified by the fact that in 2013 and 2014 alone, 37% of those killed by domestic violence were foreign women.¹⁹⁶³ If one considers that approx. 11.4% of the Spanish population are foreigners, the scale of the problem becomes clear.¹⁹⁶⁴ However, as precise statistics are lacking, it is not possible to determine how many residence permits were granted to protect victims of domestic violence.¹⁹⁶⁵

a) Report

Article 131 REDYLE stipulates that a report implying gender-based violence will suspend any deportation proceedings, which were initiated due to the irregular stay, until the criminal proceedings have ended.¹⁹⁶⁶ However, no deportation proceedings will be opened if the authorities first learn of the irregularity through said report.¹⁹⁶⁷ It is clear from this provi-

1960 Cf. *Fernández Pérez*, *Derechos fundamentales* 235ff. On the previous law see *Díaz Morgado*, *La residencia de mujeres víctimas de violencia de género* in *Boza Martínez/Donaire Villa/Moya Malapeira* (eds), *La nueva regulación de la inmigración y la extranjería en España* (2012) 223 and *Acale Sánchez* in *Boza Martínez/Donaire Villa/Moya Malapeira* 329–332.

1961 See Chapter 4.D.I.4.

1962 Cf. Instrucción DGI/SGRJ/6/2011, 1; see further *Acale Sánchez* in *Boza Martínez/Donaire Villa/Moya Malapeira* 338f.

1963 *Consejo General del Poder Judicial*, *Informe sobre víctimas mortales de la violencia de género y de la violencia doméstica en el ámbito de la pareja o ex pareja en el año 2015* (2015) 17. Along this line, *Acale Sánchez* in *Boza Martínez/Donaire Villa/Moya Malapeira* 321f and *Lázaro González/Benlloch Sanz* in *Palomar Olmeda* 935.

1964 See Chapter 3.C.

1965 See Chapter 3.C.III.1.

1966 See also Art 31bis LODYLE; cf. *Esteban de la Rosa*, Art 31bis LODYLE in *Monereo Pérez/Fernández Avilés/Triguero Martínez* 529ff.

1967 Cf. *Acale Sánchez* in *Boza Martínez/Donaire Villa/Moya Malapeira* 333 and *Lázaro González/Benlloch Sanz* in *Palomar Olmeda* 942f.

sion that the residence situation is subordinate to the protection against further violence.¹⁹⁶⁸

Where a report is made, the authority is to inform the person concerned of the rights under the LOMPIVG and LODYLE.¹⁹⁶⁹ In particular, Article 27 LOMPIVG concerns the special social benefits for women who have little financial means and have difficulty to access the labour market due to their personal situation.¹⁹⁷⁰

b) Court protection order and ‘provisional residence permit and work permit’

Article 31bis(3) LODYLE and Article 132(1) REDYLE both provide that a foreign woman, who is staying irregularly,¹⁹⁷¹ may apply for a ‘temporary residence permit for exceptional circumstances’ from the time a court protection order (*orden de protección*)¹⁹⁷² has been issued.¹⁹⁷³ However, where there is no order, the possibility to apply will depend on whether there is a report by the public prosecutor on indications of gender-based violence.¹⁹⁷⁴ An application for residence may also be made vis-à-vis the victim’s children. The children must be minors or, if they are of full age, have a disability and are not objectively capable of providing for their needs.¹⁹⁷⁵

1968 Also Esteban de la Rosa, Art 31bis LODYLE in Monereo Pérez/Fernández Avilés/Triguero Martínez 529–531.

1969 Cf. on the interplay between this legislation Esteban de la Rosa, Art 31bis LODYLE in Monereo Pérez/Fernández Avilés/Triguero Martínez 528ff.

1970 Cf. Esteban de la Rosa, Art 31bis LODYLE in Monereo Pérez/Fernández Avilés/Triguero Martínez 525ff. On the rights under the LOMPIVG see Toledo Larrea, *Revista de Derecho Migratorio y Extranjería* 2014/37, 57ff.

1971 Lázaro González/Benlloch Sanz in Palomar Olmeda 941 favour analogous application to women staying regular, whose stay is only temporarily lawful, e.g. due to a visa.

1972 Dalli Almiñana, La violencia de género y el acceso de las víctimas extranjeras en situación administrativa irregular a los servicios sanitarios: consecuencias del real decreto-ley 16/2012, *Revista de Derecho Migratorio y Extranjería* 2014/36, 39 (48f with further references) notes that it is often difficult in practice to obtain a court order.

1973 The application is possible until the criminal proceedings have been concluded or at the latest until six months after the proceedings; see Art 134(1)(b) REDYLE and Lázaro González/Benlloch Sanz in Palomar Olmeda 943.

1974 Cf. Lázaro González/Benlloch Sanz in Palomar Olmeda 940f, 944.

1975 Arts 133(1) and 134(1)(a) REDYLE.

The competent delegate or subdelegation of government shall submit *ex officio*¹⁹⁷⁶ a ‘provisional residence permit and work permit’ to the victim and, if necessary, to her children, provided there is a court protection order or report from the public prosecutor’s office.¹⁹⁷⁷

c) Right to stay

The public prosecutor’s office is to inform the competent foreigners office and the competent police station¹⁹⁷⁸ of the content of the court decision.¹⁹⁷⁹ The key aspect is whether the criminal proceedings conclude with a conviction or judgment that the woman has been a victim of gender-based violence.¹⁹⁸⁰ If this is the case, the woman is to be granted a ‘temporary residence permit and work permit for exceptional circumstances for foreign women who are victims of gender-based violence’ within 20 days.¹⁹⁸¹ The ‘provisional residence permit and work permit’ thus automatically becomes a temporary permit.¹⁹⁸² Any deportation proceedings that have been suspended will be finally discontinued and no penalty will be issued on the basis of the irregular stay.¹⁹⁸³ Furthermore, it should be pointed out that, in contrast to other ‘temporary residence permits for exceptional circumstances’, a criminal record does not exclude the grant of the residence permit.¹⁹⁸⁴ The same goes for the requirement for being listed in the SIS for refusal of entry.

1976 Cf. *Acale Sánchez* in *Boza Martínez/Donaire Villa/Moya Malapeira* 336 and *Dalli Almiñana*, *Revista de Derecho Migratorio y Extranjería* 2014/36, 49.

1977 Art 31bis(3) LODYLE and Art 133 REDYLE.

1978 Cf. *Esteban de la Rosa*, Art 31bis LODYLE in *Monereo Pérez/Fernández Avilés/Triguero Martínez* 532f.

1979 Art 134 REDYLE.

1980 Art 31bis(4) LODYLE and Art 134 REDYLE. According to the guidelines regarding the law on foreigners, this is not an exhaustive list, which is why any (court) decision can be used if it can be used to derive the woman’s status as a victim; Instrucción DGI/SGRJ/6/2011, 2.

1981 Art 134(1)(a) REDYLE; cf. *Acale Sánchez* in *Boza Martínez/Donaire Villa/Moya Malapeira* 337.

1982 Cf. *Esteban de la Rosa*, Art 31bis LODYLE in *Monereo Pérez/Fernández Avilés/Triguero Martínez* 527.

1983 Art 134(1)(c) REDYLE; cf. *Esteban de la Rosa*, Art 31bis LODYLE in *Monereo Pérez/Fernández Avilés/Triguero Martínez* 530.

1984 As per *Acale Sánchez* in *Boza Martínez/Donaire Villa/Moya Malapeira* 333 and *Lázaro González/Benlloch Sanz* in *Palomar Olmeda* 943ff. For a contrasting view,

The residence permit is valid for five years¹⁹⁸⁵ and is accompanied by a work permit.¹⁹⁸⁶ If the person concerned has also applied for a residence permit for her underage children who were also residing in Spain at the time the violence was reported, these children will receive a residence permit of the same duration. Minors are only granted a work permit when they reach the age of 16.¹⁹⁸⁷ If such a residence permit has not yet been applied for, the women concerned must be informed of this possibility.¹⁹⁸⁸

If there is no court decision that establishes the status as a victim, the ‘provisional residence permit and work permit’ automatically loses its validity and the application for a ‘temporary residence permit and residence authorisation’ is refused.¹⁹⁸⁹ The woman concerned may, however, apply for another ‘temporary residence permit for exceptional circumstances’.¹⁹⁹⁰ For example, the aforementioned ‘residence permit for humanitarian reasons’ for victims of crimes comes into consideration if they are victims of domestic violence.¹⁹⁹¹ After a refusal, the deportation procedure is generally resumed, whereby the application for another ‘temporary residence permit for exceptional circumstances’ must be taken into account.¹⁹⁹² If the requirements for a residence permit are met, the deportation proceedings are discontinued.¹⁹⁹³

see *Esteban de la Rosa*, Art 31bis LODYLE in *Monereo Pérez/Fernández Avilés/Triguero Martínez* 530f.

1985 Art 134(1)(a) REDYLE; cf. *Acale Sánchez* in *Boza Martínez/Donaire Villa/Moya Malapeira* 333.

1986 Art 134(1)(a) REDYLE. The national labour market situation is not taken into consideration; cf. *Lázaro González/Benlloch Sanz* in *Palomar Olmeda* 942.

1987 Cf. *Lázaro González/Benlloch Sanz* in *Palomar Olmeda* 944.

1988 See Fn 1973.

1989 Art 134(2)(a) REDYLE; cf. *Acale Sánchez* in *Boza Martínez/Donaire Villa/Moya Malapeira* 337.

1990 Cf. *Acale Sánchez* in *Boza Martínez/Donaire Villa/Moya Malapeira* 337f.

1991 Cf. *Acale Sánchez* in *Boza Martínez/Donaire Villa/Moya Malapeira* 334 and see Chapter 4.D.I.3.

1992 Art 134(2)(c) REDYLE; cf. *Esteban de la Rosa*, Art 31bis LODYLE in *Monereo Pérez/Fernández Avilés/Triguero Martínez* 531.

1993 Art 241(2) REDYLE. See Chapter 3.C.III.3.b.

II. Other cases of hardship

This section on other cases of hardship¹⁹⁹⁴ begins with the German ‘granting residence in case of hardship’, as this is not subject to a minimum period, but rather a maximum three-year period. This is followed by the Austrian ‘residence permit in particularly exceptional cases’ and the Spanish ‘temporary residence permit for humanitarian reasons’ due to sudden serious illness, as these are both limited to one year.

1. Germany: ‘granting residence in cases of hardship’

The German ‘granting residence in cases of hardship’ is a regularisation applicable in especially difficult cases of hardship in order to find a humanitarian solution based on the foreigner’s vulnerability.¹⁹⁹⁵ It is the last ‘residence permit for humanitarian reasons’ under the German system.¹⁹⁹⁶ The permit is rooted in domestic law and to be interpreted accordingly as it is not derived from any higher-ranking sources. By the end of 2020, 9,093 foreigners held a residence permit pursuant to § 23a AufenthG.¹⁹⁹⁷

a) Requirements

§ 23a AufenthG applies to a foreigner who is enforceably required to leave Germany.¹⁹⁹⁸ A hardship commission (*Härtefallkommission*) established by the *Land* government by virtue of a statutory instrument may deal with particular cases of hardship.¹⁹⁹⁹ However, the foreigner is not legally entitled to this.²⁰⁰⁰

1994 See Chapter 1.B.III.4.b.

1995 No. 23a.0.1 AVV-AufenthG.

1996 See also Röcker in *Bergmann/Dienelt* § 23a AufenthG mn 5, according to whom the wording ‘in derogation from’ (*abweichend von*) means that § 23a AufenthG is subsidiary in its relationship to the other ‘residence permits for humanitarian reasons’.

1997 BT-Drs 19/32579, 13.

1998 § 23a(1) 1st Sent. AufenthG.

1999 Cf. Röcker in *Bergmann/Dienelt* § 23a AufenthG mns 3f.

2000 § 23a(2) 2nd and 3rd Sent. AufenthG; cf. Röcker in *Bergmann/Dienelt* § 23a AufenthG mn 9.

The provision determines a specific multi-stage procedure,²⁰⁰¹ according to which the hardship commission can file a ‘hardship petition’ to the supreme *Land* authority. This is not an obstacle to deportation and does not have a suspensive effect.²⁰⁰² If the supreme *Land* authority concludes that there is in fact a case of hardship, it issues an order to the competent foreigners authority to grant a residence permit.²⁰⁰³ *Maaßen/Kluth* are succinct in their description of the hardship process as one that is designed in a purely humanitarian manner, not subject to judicial review and, in comparison to all other provisions of the Residence Act, extra-judicial.²⁰⁰⁴ The residence permit may be granted even if it deviates from the requirements for issuing and extending a residence permit under the *AufenthG*.²⁰⁰⁵

Whether the hardship petition is filed will depend on whether there are urgent humanitarian or personal grounds that have been established and justify the foreigner’s continued presence in the federal territory.²⁰⁰⁶ This includes, for example, serious health problems, extreme circumstances, permanent participation in working life or long periods of residence, though these will depend on the rules under *Land* law.²⁰⁰⁷ *Schwantner* concludes, however, that secured subsistence is of particular significance.²⁰⁰⁸ In any case, the grant of a residence permit must be necessary to especially urgent circumstances in the individual case.²⁰⁰⁹ A case of hardship will generally not be considered if the foreigner has committed a ‘serious

2001 *Maaßen/Kluth* in *Kluth/Heusch* § 23a *AufenthG* mn 2.

2002 *Maaßen/Kluth* in *Kluth/Heusch* § 23a *AufenthG* mn 12.

2003 The supreme *Land* authority is not bound by the hardship petition; cf. *Röcker* in *Bergmann/Dienelt* § 23a *AufenthG* mn 20.

2004 *Maaßen/Kluth* in *Kluth/Heusch* § 23a *AufenthG* mn 3. For criticism see *Schönebroicher*, *Rechtsstaat auf Abwegen? – Die neue „Härtefallklausel“ des Ausländerrechts*, ZAR 2004, 351 (355ff) and from the perspective of constitutional law *Kluth*, *Die Beurteilung der Härtefallkommission nach § 23a AufenthG aus dem Blickwinkel des Verfassungsrechts*, ZAR 2022, 204.

2005 See Chapter 3.B.III.2.b.

2006 § 23a(2) 4th Sent. *AufenthG*.

2007 Cf. *Schwantner*, *Zur Arbeit der Härtefallkommissionen*, *Asylmagazin* 2016, 63 (63f).

2008 *Schwantner*, *Asylmagazin* 2016, 64.

2009 Cf. *Röcker* in *Bergmann/Dienelt* § 23a *AufenthG* mns 11f.

offence'²⁰¹⁰ or if a concrete date has already been set for the foreigner's removal.²⁰¹¹

b) Right to stay

According to the general rule in § 26(1) 1st Sent. AufenthG, the residence permit may be granted for a maximum of three years. The hardship procedure gives rise to differences vis-à-vis the means of legal protection.²⁰¹² The residence permit entitles the foreigner to engage in employment pursuant to § 4a(1) 1st Sent. AufenthG.²⁰¹³ Holders of a residence permit pursuant to § 23a AufenthG are generally entitled to the Unemployment Benefits II pursuant to the Social Insurance Code II or social assistance pursuant to the Social Insurance Code XII.²⁰¹⁴

2. Austria: 'residence permit in particularly exceptional cases'

The 'residence permit in particularly exceptional cases' is a purely national means of protection and extends beyond the international obligations under Article 8 ECHR. As noted above,²⁰¹⁵ there are generally no Austrian statistics for 'residence permits for exceptional circumstances', though statistics from a study published in 2019 show that 169 residence permits were issued between 2014 and 2018.²⁰¹⁶ It is therefore reasonable to state that the 'residence permits in particularly exceptional cases' are of little relevance in practice.

2010 Cf. Röcker in *Bergmann/Dienelt* § 23a AufenthG mn 13 and *Maafßen/Kluth* in *Kluth/Heusch* § 23a AufenthG mn 8.

2011 § 23a(1) 3rd Sent. AufenthG. For criticism see *Schwantner*, *Asylmagazin* 2016, 63, referring to the possibility in § 59(1) 3rd Sent. AufenthG to waive the warning of an intention to deport.

2012 For detail see Röcker in *Bergmann/Dienelt* § 23a AufenthG mns 23–26.

2013 This used to be expressly regulated in § 23a(2) 5th Sent. AufenthG; cf. BT-Drs 19/8285, 31 and *Schuster/Voigt*, *Asylmagazin* 2020, 65.

2014 *Frings/Janda/Keßler/Steffen*, *Sozialrecht* mn 935.

2015 See Chapter 3.A.III.1.

2016 *Bassermann*, *Überblick über nationale Schutzstatus in Österreich* (May 2019) 24–26.

a) Requirements

A ‘residence permit in particularly exceptional cases’ requires proof that the alien has been resident in Austria for a continuous period of five years, whereby the alien must have been lawfully resident for three years of this period. The residence permit also applies to aliens residing unlawfully, and is thus relevant to this study. According to *Fouchs/Schweda*, ‘resident in the federal territory for a continuous period’ (*durchgängiger Aufenthalt im Bundesgebiet*) is to be understood as according to the law until 1 January 2014.²⁰¹⁷ Following the Supreme Administrative Court’s case law of the time, therefore, short stays in Austria and abroad, especially for visiting purposes, do not interrupt the continuous period necessary for the permit.²⁰¹⁸ A stay abroad would only interrupt this period if accompanied by a change in the centre of the alien’s life. The corresponding Spanish law is much more specific in this respect and allows stays abroad up to a total of 120 days in relation to ‘temporary residence permits for reasons of social roots’.²⁰¹⁹

Pursuant to § 56(3) AsylG (A), the Federal Office for Immigration and Asylum shall also take into account the ‘degree of integration, in particular the ability to earn his or her living, education, vocational training, employment and knowledge of the German language’.²⁰²⁰ Unlike the ‘residence permit for reasons of Article 8 ECHR’, the very high threshold of private or family life does not have to be met.²⁰²¹ According to the Supreme Administrative Court, the residence permit aims to settle particularly exceptional ‘old cases’.²⁰²²

Further key requirements include the legal entitlement to accommodation deemed in conformity with local accommodation, adequate health insurance as well as fixed and regular income.²⁰²³ As a guideline, the income for an unmarried person in 2022 is set at approx. 1000 euro/month

2017 *Fouchs/Schweda*, *migraLex* 2014, 61 with further references; concurring *Kind* in *Abermann/Czech/Kind/Peyrl* § 43 NAG mns 17f.

2018 VwGH 20.8.2013, 2012/22/0122.

2019 See Chapter 4.E.I.a.

2020 See also VwGH 11.6.2014, 2013/22/0356.

2021 See just VwGH 19.12.2019, Ra 2019/21/0308. See Chapter 4.B.III. and Chapter 4.C.III.

2022 On the provision under the previous law VwGH 29.4.2010, 2009/21/0255.

2023 § 60(2) AsylG (A). Cf. on the provision under the previous law VwGH 25.3.2010, 2010/21/0088.

and approx. 1600 euro/month for a married couple,²⁰²⁴ though the Federal Office for Immigration and Asylum does have to make a prediction in this respect.²⁰²⁵ In principle this means that the alien must be self-sufficient. According to the Supreme Administrative Court, however, it suffices if there are sufficiently concrete prospects, such as an employment contract.²⁰²⁶ Prior to a decision of the Austrian Constitutional Court in 2021, asylum seekers could access the labour market only in theory and not in practice, which is why rejected asylum seekers could not satisfy the self-sufficiency requirement.²⁰²⁷ However, since June 2021 the access to the labour market is legally and factually open to asylum seekers.²⁰²⁸ Irregularly staying aliens have (still) no access to the labour market.²⁰²⁹ In this respect, it is to be noted that these requirements may be met by a sponsorship declaration.²⁰³⁰ As a final requirement, the residence permit may only be granted if it does not significantly harm Austrian relations with another state or another subject of international law.

In practice this residence permit should probably be aimed at cases of lengthy asylum procedures (rejected asylum seekers), since the stay is lawful during the ongoing procedure.²⁰³¹ If an asylum procedure neither leads to the grant of asylum nor the status as a beneficiary of subsidiary protection and if it has lasted longer than three years, it is therefore possible to apply for this type of residence permit. The very high hurdles and the requirement of self-sufficiency seem to make it impossible to obtain this type of permit.²⁰³² However, the regained access to the labour market for asylum seekers, which exists again in fact since June 2021, could lead to a higher number of residence permits in the future.

2024 § 11(5) NAG in conjunction with § 293 ASVG.

2025 VwGH 18.3.2010, 2008/22/0637; 21.6.2011, 2009/22/0060 and 23.11.2017, Ra 2017/22/0144.

2026 VwGH 15.12.2011, 2008/21/0002.

2027 On the access to the labour market for asylum seekers prior to the VfGH ruling see *Peyrl*, Arbeitsmarkt 302ff.

2028 VfGH 23.6.2021, V 95-96/2021-12. See also the decree 14.7.2021, 2021-0.502.591 and *Deutsch/Nowotny/Seitz*, Ausländerbeschäftigungsrecht Vorwort.

2029 See Chapter 3.A.II.2.

2030 § 2(1) No. 26 AsylG (A); VwGH 11.6.2014, 2013/22/0356 and in this sense *Filzwieser/Frank/Kloibmüller/Raschhofer*, Asyl- und Fremdenrecht § 56 AsylG mn 2.

2031 § 13(1) AsylG (A).

2032 See *Bassermann*, Überblick über nationale Schutzstatus in Österreich (May 2019) 49, who takes a similar direction.

b) Right to stay

Reference is made here to the explanations in Chapter 3.A.III.2.d. Furthermore, it is to be noted that there is no provision allowing an *ex officio* grant and therefore the ‘residence permit in particularly exceptional cases’ is only granted upon application.²⁰³³ An ongoing procedure to impose a removal measure does not prevent a well-founded application.²⁰³⁴ If the requirements are met, there is protection against deportation until there is a final decision, if the procedure for rendering a return decision was initiated only after the application was filed.²⁰³⁵

3. Spain: ‘temporary residence permit for humanitarian reasons’ – sudden serious illness

The Spanish law on foreigners provides a ‘temporary residence permit for humanitarian reasons’ in cases in which the foreigner suddenly suffers a serious illness (*autorización temporal por razones humanitarias – enfermedad sobrevenida grave*). The other two residence permits issued for humanitarian reasons have been discussed above.²⁰³⁶ Although here the term ‘humanitarian reasons’ suggests that the analysis would be better placed under ‘social ties’,²⁰³⁷ the argument for a discussion in the context of ‘vulnerability’ carries greater weight: the most significant reason for granting the permit is the link to a vulnerable situation, namely a sudden, serious illness. In principle this regularisation qualifies as purely domestic, but may be derived from Article 3 ECHR as recent ECtHR case law suggests.²⁰³⁸ One could therefore consider an analysis under ‘non-returnability’ (under ‘non-refoulement under the ECHR and CFR or factual reasons’), but this would not give sufficient heed to the domestic nature of this particular right to stay. The number of residence permits granted on the basis of a sudden, serious illness cannot be ascertained from the statistics.²⁰³⁹

In addition, a separate residence permit exists for minors who have travelled to Spain under a temporary programme for the purposes of medical

2033 VwGH 15.3.2018, Ra 2018/21/0034.

2034 § 56(1) AsylG (A).

2035 § 58(13) 4th Sent. AsylG (A); see Chapter 3.A.III.2.a.

2036 See Chapter 4.A.II.3. and Chapter 4.D.I.3.

2037 See Chapter 4.B.

2038 For detail see *Hinterberger/Klammer in Filzwieser/Taucher*.

2039 See Chapter 3.C.III.1.

treatment.²⁰⁴⁰ In contrast to the ‘temporary residence permit for humanitarian reasons’, the minors do not have to prove a sudden illness – they are travelling lawfully to Spain to receive medical treatment, for which a clinical report must be presented.²⁰⁴¹ This is therefore not a regularisation for the purposes of this study and is not subject to analysis.²⁰⁴²

a) Requirements

A ‘temporary residence permit for humanitarian reasons’ may be granted to foreigners who can prove that they are suffering from a sudden, serious illness.²⁰⁴³ ‘Sudden’ means that the illness was first diagnosed after entry into Spain,²⁰⁴⁴ thereby avoiding the situation in which a serious illness was diagnosed just for the purposes of travelling to Spain for treatment.²⁰⁴⁵ The proof of a ‘sudden’ illness does not appear to be compatible with the recent ECtHR case law concerning Article 3 ECHR,²⁰⁴⁶ as the person concerned cannot acquire the ‘temporary residence permit for humanitarian reasons’, is therefore staying irregularly and in effect merely tolerated.²⁰⁴⁷

The proof of a serious illness and sudden onset is to be furnished via a clinical report – this is central to the decision on granting the type of residence permit discussed here.²⁰⁴⁸ Furthermore, it is to be proven that treatment in Spain is adequate and not available in the country of origin.²⁰⁴⁹ There must also be evidence that an interruption to or non-receipt of the medical treatment would seriously endanger the person’s health or life.²⁰⁵⁰ From a procedural perspective, Article 246(7) REDYLE is relevant

2040 Arts 126(2) and 187 REDYLE.

2041 Cf. *Giménez Bachmann*, Dissertation 2014, 299.

2042 See Chapter 1.A.II.1.

2043 Art 126(2) REDYLE.

2044 STS 782/2007, ECLI:ES:TS:2009:782, FJ 9; *Defensor del Pueblo*, Sugerencia (14.7.2017), Queja 17012408; *Defensor del Pueblo*, Sugerencia (24.2.2015), Queja 12009749; for criticism see *Giménez Bachmann*, Dissertation 2014, 295f with further references.

2045 STSJ Madrid 6102/2009, ECLI:ES:TSJM:2009:6102 and see *Giménez Bachmann*, Dissertation 2014, 295.

2046 ECtHR 13.12.2016, *Paposhvili/Belgium*, 41738/10 and *Hinterberger/Klammer* in *Filzwieser/Taucher* for detail.

2047 See Chapter 4.A.I.1.

2048 STSJ Madrid 628/2015, ECLI:ES:TSJM:2015:628.

2049 Cf. STSJ Madrid 11645/2009, ECLI:ES:TSJM:2009:11645.

2050 Cf. *García Vitoria* in *Boza Martínez/Donaire Villa/Moya Malapeira* 297.

here, whereby an expulsion (i.e. the deportation) is to be suspended if the measure poses a risk to the health of a sick person.

b) Right to stay

The residence permit is usually valid for one year²⁰⁵¹ and is in principle not accompanied by an employment permit.²⁰⁵² However, an application for an employment permit may be submitted in parallel.²⁰⁵³

III. Interim conclusion

The fourth category of the purpose of the regularisation is characterised by targeting vulnerable persons or situations and is divided into two sub-categories. Whereas ‘victim protection’ is measured against the standards in EU law (above all the Human Trafficking Directive and the Employers Sanctions Directive), ‘other hardships’ are not derived from international or EU law and are thus purely domestic in nature.

According to the Human Trafficking Directive and the Employers Sanctions Directive, the Member States must grant the victims of certain criminal offences the possibility of obtaining a residence permit, though the Member States have the discretion regarding the definition of the conditions and the decision to grant the residence permit.

Spanish law contains separate provisions concerning the regularisation of victims of human trafficking and for women who are victims of gender-based violence. The former represents an exemplary implementation of the Human Trafficking Directive. The latter creates an effective protection regime for the problem of violence against foreign women. The very similar temporary residence permits and work permits are characterised by particularly detailed regulations that are very much guided by the needs of the victims. The procedure is divided into several ‘phases’. First of all, the focus is on the identification of the victims and a recovery and reflection phase, each of which is prescribed by law. Subsequently, the foreigner may

2051 Cf. *García Vitoria* in *Boza Martínez/Donaire Villa/Moya Malapeira* 304.

2052 Art 129(1) REDYLE.

2053 Art 129(2) REDYLE; cf. *García Vitoria* in *Boza Martínez/Donaire Villa/Moya Malapeira* 304. On the requirements see Arts 63(4) and 105(3) REDYLE. Cf. also *Giménez Bachmann*, Dissertation 2014, 297.

be exempted from any administrative penalties, for example in relation to an irregular stay. The exemption triggers an important legal consequence, as the person concerned must then be informed of the possibility to apply for a 'temporary residence permit and work permit'. A 'provisional residence permit and work permit' may be granted after the application, which underlines the extraordinarily victim-friendly approach, as the residence is therefore lawful until the conclusion of the proceedings. It should also be emphasised that the two Spanish residence permits are issued for a period of five years, which is by far the longest time limit in comparison to the Austrian and German law and thus enables the acquisition of a long-term residence permit. Furthermore, the residence permit granted is accompanied by a work permit.

At the risk of jumping the gun, 'other national interests' concerns a further regularisation that is structurally similar to the Spanish residence permits falling under 'vulnerability': the 'temporary residence permit for exceptional circumstances due to collaboration in the fight against organised networks'. However, this additional regularisation, which transposes the Employers Sanctions Directive, requires cooperation with the authorities and is thus discussed in the context of 'other national interests'.²⁰⁵⁴

Spanish law also features a third type of regularisation, namely the 'temporary residence permit for humanitarian reasons' for victims of crime, which is linked to situations of particular vulnerability, such as crimes against employee rights or crimes whose motive is based on racist, anti-Semitic or other discriminatory grounds. This residence permit is problematic in so far as it requires the submission of a final court decision, which could take several years. Nevertheless, it might be often the case that a 'temporary residence permit for reasons of social roots' can be applied for and granted beforehand.

The Austrian 'special protection residence permit' for victims of crime follows a similar direction. It merely determines that victims of violence shall be protected against further violence by receiving a residence permit and covers the victims of human trafficking or cross-border trade in prostitution, or victims of domestic violence or of forced marriage/partnership. In contrast to its Spanish counterparts, there is no sophisticated procedure that protects the victim's interests. Furthermore, granting the residence permit requires the purpose of guaranteeing the prosecution of acts punishable by the courts or of asserting and enforcing civil-law claims in connection with such punishable acts. This requirement greatly narrows

2054 See Chapter 4.F.II.

the scope of application. The ‘special protection residence permit’ is valid for one year and, depending on the circumstances, offers restricted or unrestricted access to the labour market.

The spotlight was then directed towards the German ‘residence permit for prosecution of criminal offences’. This may be granted to the victims of human trafficking or undocumented employment, which requires an assessment of the relevant provisions of criminal law. As under Austrian law, German law requires the victim’s presence in Germany to be necessary and considered appropriate with regard to the criminal proceedings. In comparison to the Spanish provisions concerning victims of human trafficking or gender-based violence, the German residence permit is worse or just as poor as the Austrian ‘special protection residence permit’. This is also shown in practice, where the German ‘residence permit for prosecution of criminal offences’ plays practically no role due to the extensive requirements.

One may therefore observe that all three Member States comply with the requirements under EU law and provide regularisations for victims of human trafficking or exploitative working conditions. Be that as it may, there are notable differences in how the protection is designed. In contrast to the victim-friendly system in Spain, Austrian and German law appear to be very minimalist and, in addition to the interests of the victim, focus primarily on the purpose of criminal justice.

The category ‘vulnerability’ also features the sub-category ‘other cases of hardship’. This sub-category is purely domestic in nature. As it is derived just from the national legal systems, there are no obligations under international or EU law that are to be met or observed.

‘Granting residence in cases of hardship’ under German law is the last possibility for irregularly staying foreigners, and was introduced for precisely this reason. The foreigner cannot apply for this type of regularisation, instead there is an extra-judicial process designed on a purely humanitarian basis. It covers all types of particularly urgent circumstances in an individual case and is a ‘catch-all’ solution for cases that do not fall into other categories of residence permits. Nonetheless, it is to be criticised from the perspective of an individual’s rights as it is not issued upon application by the person concerned and is subject to a distinct procedure in which the principles under the Residence Act do not apply.

The ‘residence permits in particularly exceptional cases’ are a peculiar feature of Austrian law. It was introduced to allow for the prospect of regularisation in instances of lengthy asylum procedures in which no residence status was granted. In principle it targets those (ir)regularly staying

aliens who do not reach the high threshold of private and family life in the sense of Article 8 ECHR. The statistics highlight that the permit has a near-irrelevant role in practice due to the extensive hurdles that have to be overcome. In addition to five years' continuous residence, the alien must have the ability to be self-sufficient – a criterion that is nearly impossible to fulfil where there is a lack of access to the labour market. Nonetheless, the regained access to the labour market for asylum seekers since June 2021 could lead to a higher number of residence permits in the future.

The Spanish 'temporary residence permit for humanitarian reasons' due to sudden serious illness is a purely domestic instrument, but in light of recent ECtHR case law could be understood as an expression of Article 3 ECHR. The requirement that adults must prove the sudden onset of the illness does not seem to be compatible with international law; this requirement does not apply to minors. Overall, however, it is positive that Spanish law features an independent right to stay for seriously ill persons.

The sub-category 'other cases of hardship' shows that each of the three Member States has developed a regularisation that is to be viewed as a distinctly national instrument aimed at the protection of vulnerable individuals or situations where there is no other possibility to acquire a right to stay.

E. Employment and training

The purpose 'employment and training'²⁰⁵⁵ comprises four regularisations identified from the comparison of the national laws. I will first present the Spanish 'temporary residence permit for reasons of social roots', the 'temporary residence permit for reasons of employment roots' and the 'temporary residence permit for reasons of training roots' as these are each valid for one year/twelve months. The attention is then directed to the German 'residence permit for the purpose of qualified foreigners whose deportation has been suspended', as this is issued for a period of two years.

I. Spain: 'temporary residence permit for reasons of social roots'

The 'temporary residence permit for reasons of social roots' (*autorización de residencia temporal por razones de arraigo social*) is the most common in

2055 See Chapter 1.B.III.5.

practice and the most important regularisation in Spain.²⁰⁵⁶ Even though it already worked quite well in practice, it was reformed by the Royal Decree 629/2022 – with the words of the Spanish legislator – to even better address the needs of the Spanish labour market.²⁰⁵⁷

This type of residence permit could fall under ‘social ties’ as well as ‘employment and training’. For the former, the name alone offers justification as well as the fact that in certain circumstances any form of integration has to be proven.²⁰⁵⁸ Nonetheless, the focus lies on the submission of an employment contract and thus the discussion under the purpose ‘employment and training’. The previous law also referred expressly to the ‘foreign employee’.²⁰⁵⁹

Similar to the Austrian ‘right to remain’,²⁰⁶⁰ the social roots have developed from the case law on disproportionate expulsion decisions according to Article 8 ECHR.²⁰⁶¹ Initially, the case law took a similar path, but ultimately both regularisations were anchored in a different manner in law. In principle the social roots under Spanish law refer to future roots,²⁰⁶² whereas the Austrian ‘right to remain’ refers to established roots.²⁰⁶³ ‘Social roots’ under Spanish law is now perhaps most comparable with the Austrian ‘residence permit in particularly exceptional cases’ under § 56 AsylG (A), especially with respect to the proof of continuous residency.²⁰⁶⁴ It can thus be stated that the regularisation may in principle be derived from Article 8 ECHR, but due to its codification in national law, it takes a step beyond this human rights obligation and is to be understood as a provision of purely national law.

2056 See Chapter 3.C.III.2.

2057 Royal Decree 629/2022, BOE 179 of 27.7.2022, 107698.

2058 Cf. *Triguero Martínez*, *Migraciones* 2014, 455 and *Cerezo Mariscal*, *Revista de Derecho* 2015, 676.

2059 Art 45(2)(b) REDYLE in the version Royal Decree 2393/2004 and the accompanying Instrucción del 22 de junio de 2005 de la Dirección General de Inmigración, http://fmmurcia.info/UPLOAD/DOCUMENTO/instruccion%20arraigo%20definitiva_%20_1_.pdf (31.7.2022) 1.

2060 See Chapter 4.B.III.1. and Chapter 4.C.III.1.

2061 See Chapter 3.C.III.2.

2062 *Carbajal García*, *Revista de Derecho Migratorio y Extranjería* 2012/29, 82. *González Calvet*, *Revista de Derecho Social* 2007/37, 108 who is correct in noting that a minimum residence period is required as otherwise the ‘social roots’ do not come into consideration.

2063 See Chapter 4.B.III. and Chapter 4.C.III.

2064 See Chapter 4.F.I.

1. Requirements

The ‘temporary residence permit for reasons of social roots’ requires continuous residence in Spain for three years.²⁰⁶⁵ According to the accompanying guidelines, the entry in the municipal register (*Padrón*) serves as the most important evidence for continuous residence,²⁰⁶⁶ though in principle any evidence accepted by law will suffice,²⁰⁶⁷ such as health insurance statements, bank statements, the transfer of funds to a bank account abroad, or certificates from language or integration courses. A period of continuous residence is necessary, though stays abroad do not have any detrimental effect if the total duration is less than 120 days.²⁰⁶⁸

As for employment roots,²⁰⁶⁹ evidence of employment relationships is also to be furnished.²⁰⁷⁰ Prior to the Royal Decree 629/2022 this required a signed employment contract for at least one year. In principle the applicant only needed to present one employment contract of the required duration, even though it was possible in certain sectors to fulfil the one-year period by furnishing multiple employment contracts.²⁰⁷¹ The agricultural sector, which is a key source of income for foreigners in Spain, was one such example.²⁰⁷²

According to the newly formulated Article 124(2)(b) REDYLE, the foreigner must present an employment contract signed by the worker and employer, which guarantees at least the minimum interprofessional wage (*salario mínimo interprofesional*), or that established by the applicable collective bargaining agreement. The contract must stipulate a minimum of 30 working hours per week.²⁰⁷³ In the agricultural sector, two or more contracts with different employers may still be presented, each of them

2065 Cf. Triguero Martínez, *Migraciones* 2014, 453; Ques Mena, *Diario la Ley* 2008/7067, 6.

2066 Cf. Instrucción del 22 de junio de 2005 de la Dirección General de Inmigración, 2.

2067 Cf. Instrucción DGI/SGRJ/3/2011, 3.

2068 Cf. Instrucción del 22 de junio de 2005 de la Dirección General de Inmigración, 2.

2069 See Chapter 4.E.II.

2070 Camas Roda, *Trabajo decente* 96.

2071 Cf. Carbajal García, *Revista de Derecho Migratorio y Extranjería* 2012/29, 67, who welcomed its introduction as it offered greater flexibility to the applicant.

2072 Cf. Iglesias Martínez, *Estudios Empresariales* 2015/2 No. 148, 3ff.

2073 The contract may have a duration of at least 20 hours in cases where it is accredited that the worker is in charge of minors or persons who require support measures for the exercise of their legal capacity.

linked together. The presentation of several contracts in the same or different occupations, working partially and simultaneously for more than one employer, is also permitted.

The competent foreigners office may acquire an opinion on the employment contract from the Labour and Social Security Inspectorate (*Inspección de Trabajo y Seguridad Social*).²⁰⁷⁴ It must be possible for the employment relationship to begin upon receiving the residence permit,²⁰⁷⁵ which highlights how Spanish immigration policies fall under the policy objectives concerning the labour market.²⁰⁷⁶

An exception of the requisite to provide an employment contract applies in cases in which the foreigner has sufficient financial resources (currently 491.63 euro/month).²⁰⁷⁷ This is a significant reduction in comparison to the applicable rules before the Royal Decree 629/2022. The competent autonomous community may propose an exception to this requirement in its report to the foreigners office if there is such evidence.²⁰⁷⁸

Furthermore, either social integration into Spanish society or a family relationship must be proven.²⁰⁷⁹ Evidence of social integration is made in the form of a report submitted by the foreigner.²⁰⁸⁰ This is issued by the competent autonomous community or the town hall,²⁰⁸¹ for which the authority has 30 days commencing from the submission of the application.²⁰⁸² The report should address, inter alia, the previous duration

2074 Cf. Carbajal García, *Revista de Derecho Migratorio y Extranjería* 2012/29, 71ff.

2075 Cf. Carbajal García, *Revista de Derecho Migratorio y Extranjería* 2012/29, 71ff. The employment relationship is conditional on receiving the residence permit. On the control of the actual start of employment see Chapter 4.E.I.2.

2076 Cf. Nieves Moreno Vida in Monereo Pérez/Fernández Avilés/Triguero Martínez 624; along these lines regarding the Royal Decree 2393/2004 Gómez Díaz in Balado Ruiz-Gallegos 887. For a different view see Triguero Martínez, *Migraciones* 2014, 455, who notes that there is no need to present an employment contract if the foreigner proves that he or she has sufficient financial resources.

2077 Art 124(2)(c) REDYLE refers to the Minimum Vital Income (*Ingreso Mínimo Vital*); see <https://www.seg-social.es/wps/portal/wss/internet/Trabajadores/Prestaciones/PensionesTrabajadores/65850d68-8d06-4645-bde7-05374ee42ac7> (31.7.2022).

2078 Cf. Belgrano Ledesma, *Solicitar una autorización de residencia temporal por arraigo social*, *Iuris* 2010/151, 59 (61f).

2079 Art 124(2)(c) REDYLE and Instrucción DGI/SGRJ/3/2011.

2080 Art 128(2)(b) REDYLE; cf. for detail Instrucción del 22 de junio de 2005 de la Dirección General de Inmigración, 4 and 8–10, which specifies the submission of a report.

2081 Art 68(3) LODYLE; cf. Cerezo Mariscal, *Revista de Derecho* 2015, 679 and Camas Roda, *Trabajo decente* 96f.

2082 Art 124(2)(c) REDYLE.

of stay at the address of registration, the foreigner's financial resources, the relations with legally resident family members and the integration efforts on the basis of the professional-social and cultural integration programmes.²⁰⁸³

If the report is not issued within the 30-day period, the integration can also be proven otherwise.²⁰⁸⁴ The foreigner can independently present any certificates of professional-social or cultural integration programmes.²⁰⁸⁵ In addition, proof can be furnished that the foreigner has adequate housing and sufficient financial resources.²⁰⁸⁶ The report of the autonomous community or the respective town hall is not binding on the foreigners authority.²⁰⁸⁷ However, the competent foreigners authority must give reasons for deviating from a positive report by the competent autonomous community or town hall.²⁰⁸⁸

Family relationships with regularly residing foreigners must be presented as an alternative to providing evidence of social integration.²⁰⁸⁹ Only spouses or registered partners and first-degree relatives (children and parents) fall under the narrow definition of family.²⁰⁹⁰ The family relationship must be proven by means of a document recognised in Spain.²⁰⁹¹

Finally, it is to be pointed out that social roots could be linked to another condition for granting a residence permit by issuing an instruction under the law on foreigners: the examination of the national labour market situation.²⁰⁹² The introduction of this condition would severely limit the scope of application of social roots and its effectiveness in practice.²⁰⁹³

2083 Art 124(2) REDYLE as well as Art 68(3) LODYLE. Cf. Instrucción DGI/SGRJ/3/2011 and the example of Madrid given in *Pérez/Leraul*, *El arraigo en España* (11–13.4.2012) 12f.

2084 Art 124(2) REDYLE; cf. *Triguero Martínez*, *Migraciones* 2014, 454.

2085 Cf. *Camas Roda*, *Trabajo decente* 97.

2086 Cf. *Camas Roda*, *Trabajo decente* 97f and *Triguero Martínez*, *Migraciones* 2014, 455. In so far as the resources are from self-employed activities, this will be viewed positively, see STSJ Castilla y León 2957/2015, ECLI:ES:TSJ-CL:2015:2957.

2087 Cf. *Belgrano Ledesma*, *Iuris* 2010/151, 61.

2088 Cf. Instrucción DGI/SGRJ/3/2011, 6.

2089 Art 124(2) REDYLE.

2090 Cf. *Triguero Martínez*, *Migraciones* 2014, 453f.

2091 Art 128(2)(b) REDYLE and cf. Instrucción del 22 de junio de 2005 de la Dirección General de Inmigración, 3.

2092 Art 124(5) REDYLE and see further Art 65 REDYLE.

2093 Cf. *Triguero Martínez*, *Migraciones* 2014, 445f with further references.

However, this requirement has not been introduced in any corresponding instruction yet.

2. Right to stay

In general, the permit is issued for one year.²⁰⁹⁴ Further details are provided in Chapter 4.C.V.2. To determine the actual start of employment, the person concerned must be registered for social security within one month of the procedure;²⁰⁹⁵ the validity of the residence permit is suspended until registration.²⁰⁹⁶ This prevents recourse to false employment contracts.²⁰⁹⁷ Said requirement does not have to be met in cases where the foreigner has been exempted from presenting an employment contract.²⁰⁹⁸

If the person takes up employment without being registered for social security by the employer, registration can be requested directly from the Social Security Treasury General (*Tesorería General de la Seguridad Social*) so that the residence permit comes into effect.²⁰⁹⁹

II. Spain: ‘temporary residence permit for reasons of employment roots’

Article 124(1) REDYLE offers a further regularisation: the ‘temporary residence permit for reasons of employment roots’ (*arraigo laboral*).²¹⁰⁰ This type of residence permit is subsumed under ‘employment and training’ as employment relationships are the main requirement.²¹⁰¹ The ‘roots’ have indeed sprouted from the case law concerning Article 8 ECHR, but this

2094 Art 130(1) REDYLE.

2095 Art 128(6) REDYLE; cf. *García Vitoria* in *Boza Martínez/Donaire Villa/Moya Malapeira* 303.

2096 Art 67(7) REDYLE.

2097 For detail on this problem see *Carbajal García*, *Revista de Derecho Migratorio y Extranjería* 2012/29, 57 and 78–80 and *Nieves Moreno Vida* in *Monereo Pérez/Fernández Avilés/Triguero Martínez* 624f.

2098 Art 128(6) REDYLE; cf. *Fernández Collados* in *Palomar Olmeda* 433.

2099 Cf. *Instrucciones Provisionales sobre Arraigo Laboral* del Ministerio de Trabajo y Asuntos Sociales (3.8.2005), <http://www.intermigra.info/archivos/legislacion/ARRAIGOLABORAL.pdf> (31.7.2022).

2100 Art 124(1) REDYLE.

2101 Cf. *Triguero Martínez*, *Migraciones* 2014, 451f.

residence permit is to be understood as purely national in nature as it extends beyond the obligations under the ECHR.²¹⁰²

1. Requirements

A continuous stay in Spain for a period of two years is required.²¹⁰³ An absence for up to 90 days will not have a detrimental effect on the application.²¹⁰⁴ The Royal Decree 629/2022 has supplemented the provision with the wording that the foreigner has to be irregularly staying at the time of application. The Spanish legislator attempted to further clarify that the residence permit is not only open to undocumented working foreigners – like before – but also to foreigners who work in a documented manner.²¹⁰⁵

In addition, the applicant must demonstrate the existence of employment relationships of no less than six months in duration. The term ‘employment relationship’ is interpreted broadly.²¹⁰⁶ It covers all types of employee-employer relationships with one or more employers.²¹⁰⁷ The provision is therefore directed specifically at undocumented foreign workers.²¹⁰⁸ *Triguero Martínez* welcomes the fact that the period to be proven is now only six months – half the time as was required under the previous law (before the Royal Decree 557/2011).²¹⁰⁹

One key problem in practice is, however, the documentation concerning the employment relationship. Usually, the employee is to notify the Labour and Social Security Inspectorate.²¹¹⁰ However, this strikes fear into many foreigners:²¹¹¹ their undocumented employment and irregular resi-

2102 See Chapter 3.C.III.2. and Chapter 4.E.I.

2103 Art 124(1) REDYLE.

2104 Cf. Instrucciones Provisionales sobre Arraigo Laboral del Ministerio de Trabajo y Asuntos Sociales (3.8.2005).

2105 Royal Decree 629/2022, BOE 179 of 27.7.2022, 107698.

2106 Cf. Instrucciones Provisionales sobre Arraigo Laboral del Ministerio de Trabajo y Asuntos Sociales (3.8.2005).

2107 Cf. *González Calvet*, *Revista de Derecho Social* 2007/37, 124f and *García Vitoria* in *Boza Martínez/Donaire Villa/Moya Malapeira* 290.

2108 See only Royal Decree 629/2022, BOE 179 of 27.7.2022, 107698.

2109 *Triguero Martínez*, *Migraciones* 2014, 453; cf. *Carbajal García*, *Revista de Derecho Migratorio y Extranjería* 2012/29, 65.

2110 Cf. *Fernández Collados* in *Palomar Olmeda* 432f; *Camas Roda*, *Trabajo decente* 96 and *García Vitoria* in *Boza Martínez/Donaire Villa/Moya Malapeira* 290.

2111 Cf. *Cerezo Mariscal*, *Revista de Derecho* 2015, 675.

dence status are unlawful²¹¹² and thus there is the risk of deportation.²¹¹³ Furthermore, the employer receives a fine²¹¹⁴ in cases of undocumented employment and must also pay the outstanding social security contributions.²¹¹⁵

Before the Royal Decree 629/2022, the employment relationship may have been also demonstrated via a court decision (*resolución judicial*)²¹¹⁶ or by any other means.²¹¹⁷ The burden of proving the employment relationship therefore rested with the undocumented employee,²¹¹⁸ if the Labour and Social Security Inspectorate did not coincidentally ‘uncover’ the undocumented employment in the course of a routine inspection.²¹¹⁹ The reform in 2022 brought changes in this regard. The employment relationship and its duration may still be proven by any means. However, Article 124(1) REDYLE now specifies that proof shall be provided of the performance, in the last two years, of an employment activity involving, in the case of employed work, at least 30 hours per week over a period of 6 months or 15 hours per week over a period of 12 months, and in the case of self-employment, a continuous activity of at least 6 months.

Despite the intention to ‘combat’ irregular stays as well as undocumented employment, the aforementioned problem of proving employment relations meant – before the Royal Decree 629/2022 – that the numbers of this type of residence permit were low. Only 1.65% of all applications made (12,406) on the basis of ‘roots’ between 2006 and 2014 (747,685) and 1.54% of all ‘temporary residence permits for reasons of roots’ granted during this period, concerned employment roots.²¹²⁰ *Fernández Collados* even goes so far as to claim that, due to the difficulty of meeting the

2112 Art 53(1)(a) and (b) LODYLE; cf. *Camas Roda*, Trabajo decente 96.

2113 See Chapter 3.C.II.1.

2114 Art 54(1)(d) in conjunction with Art 55(1)(c) LODYLE; the minimum fine for undocumented employment is 10,000 euro.

2115 Cf. *González Calvet*, Revista de Derecho Social 2007/37, 124f.

2116 Cf. Instrucciones Provisionales sobre Arraigo Laboral del Ministerio de Trabajo y Asuntos Sociales (3.8.2005).

2117 Instrucción DGI/SGRJ/3/2011. For a contrasting view see *Carbajal García*, Revista de Derecho Migratorio y Extranjería 2012/29, 66 and *González Calvet*, Revista de Derecho Social 2007/37, 120. On the problems in practice see *Defensor del Pueblo*, Sugerencia (12.7.2017), Queja 16004439.

2118 Cf. *Solanes Corella*, Combatiendo la inmigración irregular: la insuficiencia de las regularizaciones y las sanciones in *Alberdi Bidaguren/Goizueta Vértiz* (eds), Algunos retos de la inmigración en el siglo XXI (2008) 201 (215f).

2119 Cf. *Triguero Martínez*, Migraciones 2014, 452.

2120 Cf. *Cerezo Mariscal*, Revista de Derecho 2015, 675.

requirements, the ‘temporary residence permits for reasons of employment roots’ deter employers from undocumented employment of foreigners rather than serving as an effective regularisation for foreigners staying irregularly and engaging in undocumented employment.²¹²¹ However, it remains to be seen if the Royal Decree 629/2022 solves this problem with the reform of Article 124(1) REDYLE and the establishment of a new residence permit in Article 127(2) REDYLE.²¹²²

2. Right to stay

The residence permit is granted for one year.²¹²³ Further information may be found in Chapter 4.C.V.2.

III. Spain: ‘temporary residence permit for reasons of training roots’

The Royal Decree 629/2022 introduced a new type of *arraigo*, the so-called ‘temporary residence permit for reasons of training roots’ (*arraigo para la formación*) which is set out in Article 124(4) REDYLE. The role model is the German ‘toleration for the purpose of training’.²¹²⁴ However, in contrast to the German toleration, the Spanish model is more generous as it grants irregularly staying foreigners an immediate right to stay. Nevertheless, the main idea was borrowed from the German approach: foreigners might ‘earn’ their right to residency.²¹²⁵

1. Requirements

The foreigner has to prove that he or she has been in Spain for a continuous period of at least two years.²¹²⁶ The stay might be regular or irregular

2121 *Fernández Collados* in *Palomar Olmeda* 432f.

2122 See Chapter 4.F.I.

2123 Art 130(1) REDYLE.

2124 Royal Decree 629/2022, BOE 179 of 27.7.2022, 107698 and see Chapter 4.E.IV.1.

2125 See Chapter 4.E.IV.1.

2126 See already the remarks on how to prove the continuous residency in Chapter 4.E.I.1. on social roots.

during this time.²¹²⁷ The main requirement to obtain this residence permit is, however, that the foreigner is willing

- to undertake training for employment that is regulated (*formación reglada para el empleo*);
- to obtain a certificate of professionalism (*certificado de profesionalidad*), i.e. an official accreditation of a professional qualification;
- to undertake a training leading to the award of a certificate of technical competence (*una formación conducente a la obtención de la certificación de aptitud técnica*); or
- to complete a professional qualification required to practice a specific occupation (*habilitación profesional necesaria para el ejercicio de una ocupación específica*).²¹²⁸

Hence, the foreigner obtains the residence permit before even starting the training as the foreigner must provide proof of enrolment within three months of notification of the decision granting the residence permit.²¹²⁹ If the proof of enrolment is not submitted within this period, the foreigners office may terminate the residence permit. This seems a suitable solution to check if the foreigner is actually willing to undertake training.

Even though this is a general requirement for all ‘temporary residence permits for exceptional circumstances’,²¹³⁰ Article 124(4)(a) REDYLE explicitly mentions that the grant of said residence permit is subject to the (negative) requirement that the foreigner must not have a criminal record (*antecedentes penales*) in Spain or in any of the countries in which the foreigner has previously resided over the past five years.

2. Right to stay

The residence permit is granted for 12 months. This residence permit may be extended only once for another 12-month period in cases where the training lasts longer than 12 months or its duration exceeds the duration of the first permit granted.²¹³¹

Once the training has been completed, and for the duration of the residence permit, the foreigner may submit an application for a ‘residence and

2127 Royal Decree 629/2022, BOE 179 of 27.7.2022, 107698.

2128 Art 124(4)(b) REDYLE.

2129 Art 124(4)(b) REDYLE.

2130 Art 31(5) LODYLE.

2131 Art 124(4)(b) REDYLE.

work permit as an employed person' (*autorización de residencia temporal y trabajo por cuenta ajena*).²¹³² This is an explicit way to consolidate his or her residence. The application must include an employment contract signed by the worker and the employer that guarantees at least the minimum interprofessional wage, or that established by the applicable collective bargaining agreement, at the time of the application, and proof of having completed the training provided for in the residence application. The 'residence and work permit as an employed person' will be valid for two years.

IV. Germany: 'residence permit for the purpose of employment for qualified tolerated foreigners'

The Skilled Immigration Act reformed all of Chapter 2, Part 4 AufenthG, i.e. the provisions on 'residence for the purpose of economic activity' (*Aufenthalt zum Zweck der Erwerbstätigkeit*).²¹³³ Following the reform the 'residence permit for the purpose of employment for qualified tolerated foreigners' (*Aufenthaltserlaubnis für qualifizierte Geduldete zum Zweck der Beschäftigung*) was moved as of the 1 March 2020 from § 18a AufenthG to § 19d AufenthG, though the content generally remained the same.²¹³⁴ In addition, the Toleration Act changed the rules surrounding the 'toleration for the purpose of training' (*Ausbildungsduldung*) and created a 'toleration for the purpose of employment' (*Beschäftigungsduldung*).²¹³⁵

The 'residence permit for the purpose of employment for qualified tolerated foreigners' under § 19d AufenthG is the only regularisation in this study which does not fall under the 'residence permits for humanitarian reasons'.²¹³⁶ It was introduced as a response to the shortage of skilled workers²¹³⁷ and is closely linked to the residence granted in cases of 'hardship'.²¹³⁸ In the words of *Groß/Tryjanowski*, one may refer to 'utilitarian'

2132 Art 38 LODYLE and Arts 62ff REDYLE.

2133 Cf. *Kluth*, NVwZ 2019, 1306–1308 and *Klaus/Hammer*, ZAR 2019, 137ff.

2134 BT-Drs 19/8285, 102.

2135 See Chapter 4.B.I. and Chapter 4.E.IV.1.

2136 § 19d AufenthG falls under Chapter 2, Part 4 AufenthG: residence for the purpose of economic activity; cf. also No. 18a.0 AVV-AufenthG.

2137 In general on this term from an economic perspective, *Rahner*, Fachkräftemangel und falscher Fatalismus (2018).

2138 Cf. *Dienelt/Dollinger* in *Bergmann/Dienelt* (eds), *Kommentar Ausländerrecht*¹³ (2020) § 19d AufenthG mn 1 and see Chapter 4.D.II.1.

motivations for granting a permit of this type.²¹³⁹ The ‘residence permit for the purpose of employment for qualified tolerated foreigners’ is to be understood as a purely national regularisation.

At the end of 2018 there were only 410 foreigners in possession of such a residence permit,²¹⁴⁰ which is probably due to the difficulty of meeting the requirements for issue.²¹⁴¹ The numbers have risen sharply in recent years, showing an increase in importance. One reason might be the three-year ‘toleration for the purpose of training’ and the fact that this can be followed by the two-year residence permit described below (the ‘3 + 2 regulation’).²¹⁴² Hence, by mid-2021 already 4,220 migrants held a ‘residence permit for the purpose of employment for qualified tolerated foreigners’.²¹⁴³

1. Requirements

The residence permit is only available to tolerated persons.²¹⁴⁴ According to the General Administrative Provisions on the Residence Act, the permit is granted on the basis of the vocational qualification and the integration into the labour market.²¹⁴⁵ As such, the most important requirement is the completion of formal vocational training, which includes training of at least two years.²¹⁴⁶ In the same vein, a course of study at a higher education institution or vocational training to become a skilled worker in Germany can be completed.²¹⁴⁷ If the foreigner has acquired a foreign qualification, proof that skilled work was performed continuously for three years in

2139 *Groß/Tryjanowski*, Der Status von Drittstaatsangehörigen im Migrationsrecht der EU – eine kritische Analyse, Der Staat 2009, 259 (261, 272).

2140 BT-Drs 19/17236, 12–14.

2141 Cf. *Dienelt/Dollinger* in *Bergmann/Dienelt* § 19d AufenthG mn 4; *Stiegeler*, Geduldete Fachkräfte – Wem hilft § 18a AufenthG?, Asylmagazin 2009, 11.

2142 See Chapter 4.E.IV.1.

2143 BT-Drs 19/32579, 10.

2144 In this sense *Dienelt/Dollinger* in *Bergmann/Dienelt* § 19d AufenthG mn 3 and see Chapter 4.A.I.2.

2145 No. 18a.0 AVV-AufenthG.

2146 § 19d(1) No. 1(a) AufenthG and § 6(1) 2nd Sent. BeschV; cf. No. 18a.1.1.1 AVV-AufenthG.

2147 § 19d(1) No. 1(a) and (b) AufenthG; cf. No. 18a.1.1.1 and 18a.1.1.2 AVV-AufenthG and for detail *Dienelt/Dollinger* in *Bergmann/Dienelt* § 19d AufenthG mns 6–8.

Germany will suffice,²¹⁴⁸ though the foreigner and his or her family members must not have relied on benefits during this period.²¹⁴⁹ The residence permit requires the approval from the Federal Employment Agency, which assesses the foreigner's qualifications,²¹⁵⁰ though no labour-market test is undertaken.

The tolerated person must also have a concrete offer of employment that corresponds to the professional qualification.²¹⁵¹ This is comparable to the 'social roots' requirement in Spain.²¹⁵² The residence permit intends to enable the persons concerned to actually exercise the acquired professional qualification by acquiring lawful residence and a work permit.²¹⁵³ Such link between employment and exercise has been described as giving German 'refugee policy' a new structural framework: rejected asylum seekers may now earn their 'right to remain' by demonstrating their success on the labour market.²¹⁵⁴ The 'paradigm shift' already indicated by the introduction of the residence permit is continued also by the Skilled Immigration Act and the Toleration Act.²¹⁵⁵

Furthermore, the foreigner must also satisfy the following additional requirements. The foreigner

- has sufficient living space and sufficient command of the German language (B1);
- has not intentionally deceived the foreigners authority as to the circumstances of relevance and has not intentionally delayed or obstructed official measures to the end the residence;
- has no links to extremist or terrorist organisations and has not been convicted of an offence intentionally committed.²¹⁵⁶

2148 § 19d(1) No. 1(c) AufenthG; cf. No. 18a.1.1.3 AVV-AufenthG.

2149 Cf. No. 18a.1.1.3 AVV-AufenthG.

2150 § 19d(2) 1st Sent. AufenthG; cf. No. 18a.1.0 and 18a.2.1 AVV-AufenthG.

2151 Cf. BT-Drs 16/10288, 9 and *Dienelt/Dollinger* in *Bergmann/Dienelt* § 19d AufenthG mns 3 and 32.

2152 See Chapter 4.E.I.

2153 Cf. BT-Drs 16/10288, 9 and No. 18a.0 AVV-AufenthG.

2154 *Schammann*, Eine meritokratische Wende? Arbeit und Leistung als neue Strukturprinzipien der deutschen Flüchtlingspolitik, *Sozialer Fortschritt* 2017/66, 741 (750).

2155 *Schuler*, Ein Paradigmenwechsel, trotz allem, *zeit.de* (19.12.2018), <https://www.zeit.de/politik/deutschland/2018-12/fachkraefteeinwanderungsgesetz-bundes-kabinett-arbeitsmigration> (31.7.2022) and in this sense *Wittmann*, ZAR 2020, 187.

2156 § 19d(1) Nos. 2–7 AufenthG; for detail see *Dienelt/Dollinger* in *Bergmann/Dienelt* § 19d AufenthG mns 17–31.

The block on issuing a residence title following the asylum procedure does not apply to the ‘residence permit for the purpose of employment for qualified tolerated foreigners’.²¹⁵⁷

Reference should also be made here to the ‘toleration for the purpose of training’.²¹⁵⁸ The 2015 Act to Amend the Right to Remain introduced training as grounds for tolerating foreigners under the age of 21 who do not come from safe countries of origin. This was reformed in 2016 by the Integration Act (*Integrationsgesetz*²¹⁵⁹). The ‘toleration for the purpose of training’ serves to provide tolerated persons and companies with greater legal certainty during the training period and for a limited period thereafter as well as simplifying the procedural aspects.²¹⁶⁰ Although problems exist with regard to the different implementations and interpretations of the *Länder*, which leads to very restrictive outcomes,²¹⁶¹ there are the prospects for permanent residence and thus the description as a ‘right to stay dressed as toleration’.²¹⁶² The ‘toleration for the purpose of training’ is therefore to be considered an initial step in acquiring a right to stay,²¹⁶³ which is also expressed by the description as a ‘3 + 2 regulation’ (three years toleration + two years right to stay). In mid-2021, 6,393 foreigners held a ‘toleration for the purpose of training’ and 3,251 were in possession of a ‘toleration for the purpose of employment’.²¹⁶⁴

The Toleration Act entered into force on 1 January 2020, thereby repealing § 60a(2) 4th–12th Sent. AufenthG, providing new rules on the ‘toleration for the purpose of training’²¹⁶⁵ in § 60c AufenthG and introducing the

2157 § 19d(3) AufenthG and see Chapter 3.B.III.2.c.

2158 For information on the requirements see *Dollinger in Bergmann/Dienelt* (eds), *Kommentar Ausländerrecht*¹³ (2020) § 60c AufenthG mns 10ff.

2159 Act of 31.7.2016 (BGBl I 1939).

2160 BT-Drs 18/8615, 48.

2161 Cf. *Eichler*, Die „neue“ Ausbildungsduldung: Möglichkeiten und Hindernisse in der Umsetzung des § 60a Abs. 2 S. 4 ff., *Asylmagazin* 2017, 177.

2162 *Röder/Wittmann*, Aktuelle Rechtsfragen der Ausbildungsduldung, *ZAR* 2017, 345 (352); *Wittmann*, *ZAR* 2020, 187.

2163 See Chapter 1.B.III.1.a.

2164 BT-Drs 19/32579, 31.

2165 For detail see *Rosenstein/Koehler*, Die neue Ausbildungsduldung – eine notwendige Überarbeitung, *InfAuslR* 2019, 266; *Wittmann/Röder*, Aktuelle Rechtsfragen der Ausbildungsduldung gem. § 60c AufenthG, *ZAR* 2019, 412.

‘toleration for the purpose of employment’²¹⁶⁶ in § 60d AufenthG.²¹⁶⁷ This sought to provide an initial response to the shortage of skilled workers in Germany by drawing on domestic workers.²¹⁶⁸ The ‘toleration for the purpose of training’ is aimed primarily at qualified vocational training,²¹⁶⁹ whereas the ‘toleration for the purpose of employment’ targets lesser qualifications.²¹⁷⁰ The aforementioned ‘paradigm shift’ is highlighted by the fact that both tolerations serve as a ‘bridge’ to a fully-fledged right to stay.²¹⁷¹ As before, the newly regulated ‘toleration for the purpose of training’ makes it possible to obtain the ‘residence permit for the purpose of employment for qualified tolerated foreigners’ discussed here, whereby § 19d(1a) AufenthG stipulates that the foreigner is entitled to a residence permit after successfully concluding the vocational training.²¹⁷² This perhaps explains why there has been a continuous increase in the number of such permits.²¹⁷³ The foreigner is entitled to a ‘toleration for

2166 For detail see Röder/Wittmann, Das Migrationspaket – Beilage zum Asylmagazin 8–9/2019, 23; Rosenstein/Koehler, ZAR 2019, 223; Funke-Kaiser, § 60d AufenthG als abschließende Regelung für die Ermöglichung einer Beschäftigung von geduldeten Ausländern und Ausländerinnen, ZAR 2020, 90.

2167 See also BT-Drs 19/8286, 14ff and Anwendungshinweise des Bundesministeriums des Innern, für Bau und Heimat zum Gesetz über Duldung bei Ausbildung und Beschäftigung (20.12.2019), https://www.bmi.bund.de/SharedDocs/downloads/DE/veroeffentlichungen/themen/migration/anwendungshinweise-zum-gesetz-ueber-duldung-bei-ausbildung.pdf?__blob=publicationFile&v=2 (31.7.2022).

2168 Along this line, Kluth, NVwZ 2019, 1308f and Rosenstein/Koehler, InfAuslR 2019, 266.

2169 According to § 2(12a) AufenthG, vocational training is only qualified if it lasts for at least two years; cf. also Anwendungshinweise des Bundesministeriums des Innern, für Bau und Heimat zum Gesetz über Duldung bei Ausbildung und Beschäftigung (20.12.2019) mn 60c.1.0.2.

2170 Kluth, NVwZ 2019, 1309.

2171 Röder/Wittmann, Das Migrationspaket – Beilage zum Asylmagazin 8–9/2019, 24. Cf. on ‘toleration for the purpose of employment’ Welte, Beschäftigungsmöglichkeiten für geduldete Ausländer, InfAuslR 2020, 225 (228).

2172 Cf. Anwendungshinweise des Bundesministeriums des Innern, für Bau und Heimat zum Fachkräfteeinwanderungsgesetz (6.8.2021), https://www.bmi.bund.de/SharedDocs/downloads/DE/veroeffentlichungen/themen/migration/anwendungshinweise-fachkraefteeinwanderungsgesetz.pdf?__blob=publicationFile&v=5 (31.7.2022) mn 19d.1a.1.

2173 See Chapter 4.E.IV.

the purpose of training’, if the requirements are met.²¹⁷⁴ Asylum seekers are ‘privileged’ where the ‘toleration for the purpose of training’ is concerned.²¹⁷⁵ There is also an entitlement to receive ‘toleration for the purpose of employment’.²¹⁷⁶ The newly created ‘toleration for the purpose of employment’ may be used to obtain a ‘residence in the case of permanent integration’.²¹⁷⁷

Finally, the question remains whether the ‘toleration for the purpose of employment’ is compatible with the Return Directive. According to *Roß*,²¹⁷⁸ an incompatibility arises due to the case law in *TQ* in which the ECJ – drawing on the requirement of effectiveness²¹⁷⁹ – again emphasised that Member States must either deport irregularly staying migrants or grant a right to stay in order to satisfy their obligations under EU secondary law.²¹⁸⁰ The decision in *TQ* concerns an unaccompanied minor, whose application for asylum was unsuccessful. Following the decision, his or her stay was therefore irregular but ‘tolerated’ until he or she reached the age of majority.²¹⁸¹ However, the Dutch authorities did not carry out an adequate investigation to ensure that adequate reception facilities exist in the country of return. The facts of the case in *TQ* are somewhat different, yet it provides valid arguments for the view that the three-year ‘toleration for the purpose of employment’ violates EU law.

The decision in *TQ* is the first time the ECJ has commented upon a lengthy ‘toleration’ period in a Member State, whereby the period in *TQ* was a maximum of three years.²¹⁸² From a dogmatic standpoint, there are two possible consequences for German residency law:

It could be argued that Germany would have to deport persons ‘tolerated for the purpose of employment’ as the toleration cannot be applied due

2174 Cf. Anwendungshinweise des Bundesministeriums des Innern, für Bau und Heimat zum Gesetz über Duldung bei Ausbildung und Beschäftigung (20.12.2019) mn 60c.1.0.

2175 Cf. Röder/Wittmann, Aktuelle Rechtsfragen der Ausbildungsduldung gem. § 60c AufenthG, ZAR 2019, 412 (414).

2176 Cf. Rosenstein/Koehler, ZAR 2019, 228; concurring Welte, Die Wahrung des Prinzips der abschließenden Normierung im Aufenthaltsgesetz am Beispiel der Beschäftigungsduldung, ZAR 2020, 87 (87).

2177 See § 25b(6) AufenthG and Chapter 4.B.I.

2178 *Roß*, NVwZ 2021, 552.

2179 ECJ *TQ*, paras 79f.

2180 For detail see Chapter 2.B.II.2.b.

2181 ECJ *TQ*, para 31.

2182 ECJ *TQ*, para 63.

to the primacy of EU law. However, this is contradicted by the fact that Germany ‘deliberately’ suspends the deportation for three years.

In my opinion, there are better reasons why a claim to regularisation under EU law arises at the time when a ‘toleration for the purpose of training’ is granted or when the requirements are met: the discretion of the Member State in Article 6(4) Return Directive is reduced to zero. I would thus classify this regularisation obligation under the category ‘permanently non-returnable’.²¹⁸³

Spain took a similar path to Germany and introduced a new regularisation that explicitly mentions this kind of toleration as its role model.²¹⁸⁴ In contrast, Austria has followed the opposite path and will, where the decision is final, deport asylum seekers without making an exception for those undergoing an apprenticeship.²¹⁸⁵ Until the 2019 reform, an apprenticeship ended automatically as soon as an asylum process was completed and final.²¹⁸⁶ Such approach was criticised, inter alia, due to the supposed shortage of skilled workers in Austria.²¹⁸⁷ However, a decision by the Supreme Administrative Court precludes the consideration of apprenticeship in a shortage occupation as a public interest in favour of the alien,²¹⁸⁸ and thus the interests of the domestic labour market are not covered by Article 8 ECHR.²¹⁸⁹ There have also been further developments and heated political debates surrounding the question of how Austria should deal with rejected asylum seekers who have started an apprenticeship. In September 2019, a resolution was adopted in the National Council, according to which a pragmatic solution for asylum and apprenticeship

2183 For detail see Chapter 2.B.II.2.b.

2184 See Chapter 4.E.III.

2185 See NN, *Abgelehnte Asyl-Lehrlinge werden nun doch abgeschoben*, diepresse.com (12.9.2018), <https://diepresse.com/home/innenpolitik/5494875/Abgelehnte-Asyl-Lehrlinge-werden-nun-doch-abgeschoben> (31.7.2022).

2186 § 14(2)(f) Berufsausbildungsgesetz in the version BGBl I 86/2022 (Act on Vocational Education), and *Peyrl*, *Arbeitsmarkt* 306.

2187 See NN, *WKÖ-Studie: In Österreich fehlen 162.000 Fachkräfte*, sn.at (31.8.2018), <https://www.sn.at/wirtschaft/oesterreich/wkoe-studie-in-oesterreich-fehlen-162-000-fachkraefte-39460492> (31.7.2022); *Fink/Titelbach/Vogtenhuber/Hofer*, *Gibt es in Österreich einen Fachkräftemangel? Analyse anhand von ökonomischen Knappheitsindikatoren* (December 2015), https://irihs.ihs.ac.at/id/eprint/3891/1/IHS_Fachkräftemangel_Endbericht_09122015_final.pdf (31.7.2022).

2188 VwGH 28.2.2019, Ro 2019/01/0003-3 and 15.7.2019, Ra 2019/18/0108. For criticism see *Reyhani/Nowak*, *Beschäftigung von Asylsuchenden* (4.7.2018).

2189 VwGH 28.2.2019, Ro 2019/01/0003-3, para 47 with further references.

should be found.²¹⁹⁰ Specifically, the Federal Minister of the Interior was asked to ensure that the approx. 900 asylum seekers complete their apprenticeship and cannot be deported during this time.

The National Council finally passed an amendment to the Alien Act (the *Fremdenrechtsänderungsgesetz* 2019) at the beginning of December 2019. § 55a FPG now stipulates that the time limit for voluntary departure is suspended for the purpose of completing an apprenticeship programme that has already commenced.²¹⁹¹ The obligation to leave the country thus does not arise until the apprenticeship has been completed. In effect, the provision ‘discretely postpones’²¹⁹² forced deportation, but which is designed differently than the previously existing toleration.²¹⁹³ From the perspective of EU law, § 55a FPG is to be considered as compatible following the recent ECJ decision in *UN*.²¹⁹⁴

The provision only applies to those asylum seekers who started their apprenticeship before the law came into force and whose proceedings have not yet been finally concluded.²¹⁹⁵ It is significant from a contextual perspective that – similar to Germany – economic interests were decisive for this amendment.²¹⁹⁶ However, this is only a temporary solution and it is unclear what the permanent solution will be.²¹⁹⁷ Since a ruling of the

2190 109/E 26. GP (19.9.2019).

2191 Cf. *Peyrl*, Neuregelung der Möglichkeit zur Beendigung einer Lehre von AsylwerberInnen nach negativem Abschluss des Asylverfahrens, DRdA-InfAS 2020, 121 and *Hinterberger*, Die Beendigung der Lehre von abgewiesenen AsylwerberInnen gem § 55a FPG, ÖJZ 2020, 640. See also VwGH 8.3.2021, Ra 2020/14/0291.

2192 NN, Keine Abschiebung: Asylwerber können Lehre abschließen, diepresse.com (11.12.2019), <https://www.diepresse.com/5736996/keine-abschiebung-asylwerber-können-lehre-abschliessen> (31.7.2022), using the expression *ein schlichter Aufschub*. See also § 125(31)–(34) FPG.

2193 See Chapter 4.A.I.3.

2194 See Chapter 2.B.II.2.

2195 10267/BR 27. GP and NN, AsylwerberInnen in Lehre: Vier-Fraktionen-Einigung im Nationalrat, Parlamentskorrespondenz No. 1183 (11.12.2019), https://www.parlament.gv.at/PAKT/PR/JAHR_2019/PK1183/#XXVII_A_00087 (31.7.2022). Those who have committed a criminal offence or have attempted to deceive the authorities about their identity during the asylum procedure are also excluded; § 55a(2) FPG.

2196 NN, Asylwerbende in Lehre: Einigung im Budgetausschuss, Parlamentskorrespondenz No. 1156 (3.12.2019), https://www.parlament.gv.at/PAKT/PR/JAHR_2019/PK1156/index.shtml (31.7.2022).

2197 According to § 126(23) FPG the rule is only effective for four years since its entry into force on 28.12.2019. See also *Konrad*, Modernes Bleiberecht: Wir brauchen sehr schnell eine Lösung, diepresse.com (7.12.2019), <https://www.die>

Austrian Constitutional Court in 2021, asylum seekers have at least (again) generally access to the labour market.²¹⁹⁸

2. Right to stay

The residence permit is valid for two years.²¹⁹⁹ As is clear from its nature, it entitles the holder to engage in employment during this period. Unrestricted access to the labour market is allowed only after the two-year period of residence, provided that the foreigner has been employed in a position commensurate with the vocational qualification throughout this time.²²⁰⁰ During the period of employment, foreigners are entitled to benefits under the basic security scheme for job-seekers and, after termination of the employment relationship, to social benefits under the Social Insurance Code II.²²⁰¹

V. Interim conclusion

The purpose ‘employment and training’ is not influenced by international and EU law, but is purely national in nature. In principle there are no specific provisions of international and EU law that are to be observed.

This purpose engages first with ‘social roots’, which have the most significance in Spanish law. These have developed from the court decisions concerning disproportionate expulsion, but have been codified quite differently from the regularisations in Austria or Germany. Social roots basically refers to future roots, whereas the Austrian ‘right to remain’ refers to roots that have already taken hold. Spanish law sets specific requirements for granting the right to stay, which the foreigners can actually meet, as the statistics show. Even though it already worked quite well in practice, it was reformed with the Royal Decree 629/2022 to even better address the needs of the Spanish labour market. For instance, the relevant Spanish law requires three years’ residence and since the Royal Decree 629/2022

presse.com/5734477/modernes-bleiberecht-wir-brauchen-sehr-schnell-eine-lösung (31.7.2022).

2198 See Chapter 4.D.II.2.

2199 § 19d(1a) AufenthG.

2200 § 19d(2) 3rd Sent. AufenthG and § 9 BeschV; cf. *Dienelt/Dollinger in Bergmann/Dienelt* § 19d AufenthG mn 34 with further references.

2201 Cf. *Frings/Janda/Keßler/Steffen*, Sozialrecht mns 635f.

an employment contract for 30 hours per week signed by the worker and employer, which guarantees at least the minimum interprofessional wage or that established by the applicable collective bargaining agreement. An exception of this requisite applies in cases in which the foreigner has sufficient financial resources. Contextually speaking, this regularisation may be explained by the relationship between the Spanish migration policy and the interests of labour market policy. Here one can speak of utilitarian motivations. The examination of the beginning of the employment relationship is an especially effective rule, since this is made dependent on registration for social security. Until that time, the validity of the residence permit remains suspended. In addition to the employment contract and the duration of residence, social integration or a family relationship must be proven. In this respect, social integration has elements of both the purposes ‘social ties’ and ‘family unity’ and therefore, as already indicated, also covers factual circumstances falling under Article 8 ECHR.

From a quantitative perspective, ‘employment roots’ are not relevant in Spanish law, especially when compared to ‘social roots’. Nonetheless, the basic idea behind offering undocumented foreign workers the prospect of regularisation appears praiseworthy. The two-year residence period is usually not the problem in obtaining this residence permit, but rather the fact that past employment relationships have to be proven. The required notification to the Labour and Social Security Inspectorate deters too many foreigners due to the consequences. Interestingly, one author considers that the regularisation misses its actual purpose and instead serves as a deterrent for employers. It will be seen if the reform via the Royal Decree 629/2022 solves this problem and gives greater relevance to this residence permit.

Additionally, the Royal Decree 629/2022 introduced a new type of roots, the so-called ‘temporary residence permit for reasons of training’ whereby the German ‘toleration for the purpose of training’ was the role model. However, in contrast to the German toleration, the Spanish model is more generous as it grants irregularly staying foreigners right away a right to stay. In this case, the foreigner has to prove that he or she has been in Spain for a continuous period of at least two years and is willing to enter into a training. Practically relevant and an appropriate solution seems the approach that the foreigner obtains the residence permit before even starting the training as the foreigner must provide proof of enrolment within three months of notification of the decision granting the residence permit.

The ‘residence permit for the purpose of employment for qualified tolerated foreigners’ is a peculiar feature of German residency law which was enacted due to the shortage of skilled workers. Interestingly, its role in practice has been limited because – just like employment roots in Spain – it is hardly possible to meet the very high requirements, however, showing an increase in importance. This is probably due to the introduction of the three-year ‘toleration for the purpose of training’ and the fact that this can be followed by the two-year residence permit (the ‘3 + 2 regulation’). The residence permit shall offer the prospect of regularisation to tolerated persons who have completed qualified vocational training. In addition, a concrete job offer must be available – this requirement is similar to the relevant requirement of social roots. Furthermore, the foreigner must also have a command of the German language at B1 level and sufficient living space at his or her disposal. The statement that foreigners residing unlawfully can earn their ‘right to remain’ holds water. The ‘paradigm shift’ already indicated by the introduction of the residence permit is also continued by the Skilled Immigration Act and the Toleration Act.

It is also to be noted that German law has created a basis for toleration for young foreigners who complete vocational training in Germany. Despite the practical problems, the basic idea underpinning the ‘toleration for the purpose of training’ under § 60c AufenthG seems to be an approach that is capable of meeting the presupposed requirements of the German economy. The Toleration Act continued this approach by creating a ‘toleration for the purpose of employment’ in § 60d AufenthG. Austria has taken the opposite direction, since an apprenticeship undertaken by an asylum seeker will automatically end when the asylum application is unsuccessful and he or she can consequently be deported. However, following further intense political debates, an amendment to the Aliens’ Police Act was passed in the National Council in December 2019. This amendment provides that the time limit for voluntary departure is suspended for the purpose of completing vocational training. Accordingly, the obligation to leave the country does arise until the apprenticeship has been completed. It is significant that – similar to Germany – economic interests were decisive for this amendment. However, the solution is only temporary and it is not clear what the permanent solution will be.

Before concluding this section it is necessary to refer to another finding: there is no Austrian regularisation falling within the category ‘employment and training’, which is why the question of a functional equivalent

arises.²²⁰² Austrian legislation seems to have deliberately refrained from creating regularisations for those cases that are linked to employment or training in the broader sense. This was already indicated above, as rejected asylum seekers can only continue their apprenticeship under certain conditions. This underlines another result of the analysis, which I will discuss further in the summary. Compared to Germany and Spain, Austrian law is the most restrictive with regard to regularisations.²²⁰³

F. Other national interests

‘Other national interests’²²⁰⁴ concerns two residence permits under Spanish law: the ‘temporary residence permit for exceptional circumstances due to the collaboration with public authorities, or for reasons of national security or public interest’ (*autorización de residencia temporal por circunstancias excepcionales de colaboración con autoridades públicas, razones de seguridad nacional o interés público*), which is granted for one year, and the ‘temporary residence permit for exceptional circumstances due to collaboration in the fight against organised networks’ (*autorización de residencia temporal por circunstancias excepcionales por colaboración contra redes organizadas*), which is granted for five years.

I. Spain: ‘temporary residence permit for exceptional circumstances due to the collaboration with public authorities, or for reasons of national security or public interest’

Article 127 REDYLE provides that a temporary residence permit may be granted ‘for exceptional circumstances due to the collaboration with public authorities, or for reasons of national security or public interest’. This provision was reformed via the Royal Decree 629/2022, which introduced Article 127(2) REDYLE as a new provision. The former content of Article 127 REDYLE simply became Article 127(1) REDYLE. This type of permit extends beyond the obligations under international and EU law. The lack

2202 Cf. *Piek*, ZEuP 2013, 66, 70 and 73f; in general on the functional method see Introduction D.I.1.

2203 See Chapter 4.G.

2204 See Chapter 1.B.III.6.

of precise information in the statistics means that it is not possible to state how many permits of this kind have been issued.²²⁰⁵

1. Requirements

Pursuant to Article 127(1) REDYLE, a residence permit may be granted to persons who collaborate with the administrative, police, tax or judicial authorities on matters outside the fight against organised networks. The two residence permits in relation to the fight against organised networks will be discussed separately.²²⁰⁶

It is possible to obtain a residence permit on the grounds of ‘collaboration’ or ‘national security’ or ‘public interest’, if justified by one of these grounds. ‘National security’ and ‘public interest’ are undefined terms whose meaning can neither be determined from the relevant literature²²⁰⁷ nor from the case law²²⁰⁸. Here it is important to note the decision of the High Court of Justice of Castilla-La Mancha in a case discussed under the ‘temporary residence permit for humanitarian reasons’ for victims of crimes:²²⁰⁹ the person concerned was a protected witness who contributed to uncovering a drug network, resulting in the arrest of several individuals and confiscation of various laboratories, which would have satisfied the requirement of ‘collaboration’ with the public authorities.²²¹⁰ However, it is not clear why the circumstances of this case did not fall under the ‘temporary residence permit for exceptional circumstances due to collaboration in the fight against organised networks’.²²¹¹

It is therefore apparent from the above that it is not clear in all three cases which factual circumstances will actually lead to a right to stay, which is why a corresponding legal clarification would be desirable.²²¹²

2205 See Chapter 3.C.III.1.

2206 Cf. *García Vitoria* in *Boza Martínez/Donaire Villa/Moya Malapeira* 298 and see Chapter 4.F.II.

2207 Cf. for instance *García Vitoria* in *Boza Martínez/Donaire Villa/Moya Malapeira* 298f or *Fernández Collados* in *Palomar Olmeda* 426f.

2208 Cf. for instance STS 5515/2016, ECLI:ES:TS:2016:5515 and STSJ Castilla-La Mancha 225/2016, ECLI:ES:TSJCLM:2016:225.

2209 STSJ Castilla-La Mancha 225/2016, ECLI:ES:TSJCLM:2016:225, FJ 3 and see Chapter 4.D.I.4.a.

2210 On the term collaboration see also Chapter 4.F.II.

2211 See Chapter 4.F.II.

2212 For a similar analysis see Chapter 4.F.II.1.

A step into this direction seems to be the Royal Decree 629/2022 which lays down in the new Article 127(2) REDYLE that a residence permit may be granted to persons who collaborate with the relevant labour authority. Collaboration in this case is specified as demonstrating the existence of the person working in an undocumented situation of no less than six months in duration in the last year. Said employment relationship has to be proven to the Labour and Social Security Inspectorate by any means. Furthermore, if the Labour and Social Security Inspectorate or subsequently a court has established a violation of the committed offence (undocumented work), the person must also submit the respective administrative or court decision. Article 127(2) REDYLE appears to resemble the ‘temporary residence permit for reasons of employment roots’ and, hence, it is probable that some of the same problems arise, such as foreigners being too afraid of the consequences – like deportation – to actually contact the Labour and Social Security Inspectorate.²²¹³

2. Right to stay

The residence permit pursuant to Article 127(1) REDYLE is issued for one year.²²¹⁴ Article 128(5) REDYLE determines which authority is responsible for issuing the permit.²²¹⁵ The Secretary of State for Security has jurisdiction in matters concerning collaboration with the police, tax or judicial authorities or in cases of national security. The applications are to be accompanied by a report from the appropriate headquarters of the law enforcement authorities (*Jefatura de las Fuerzas y Cuerpos de Seguridad*) or the tax or judicial authority that has conducted the respective procedure with regard to cooperation, giving the reasons for granting the permit.²²¹⁶ In these cases, the residence permit may – in contrast to the other ‘temporary residence permits for exceptional circumstances’²²¹⁷ – be extended if the Secretary of State for Security concludes that the reasons for granting the permit still remain.²²¹⁸

2213 See Chapter 4.E.II.1.

2214 Art 130(1) REDYLE.

2215 Cf. *García Vitoria* in *Boza Martínez/Donaire Villa/Moya Malapeira* 300.

2216 Art 128(5) REDYLE and cf. *García Vitoria* in *Boza Martínez/Donaire Villa/Moya Malapeira* 299.

2217 See Chapter 3.C.III.4.

2218 Cf. *García Vitoria* in *Boza Martínez/Donaire Villa/Moya Malapeira* 305.

The Secretary of State for Migration is responsible in cases concerning the collaboration with other administrative authorities and for reasons of public interest.²²¹⁹ Alongside the application to the competent authority, Article 127(1) 2nd Sent. REDYLE also indicates that the responsible authorities may urge (*instar*) the grant of a residence permit. For instance, the competent tax administration authority can urge the issuance of a residence permit at the Office of the Secretary of State for Security, provided there is sufficient collaboration from the person concerned.

The responsible authority for the newly established residence permit according to Article 127(2) REDYLE is the Directorate-General for Migration (*Dirección General de Migraciones*). The residence permit is valid for one year and enables the persons concerned to work (employed or self-employed). The residence may be applied by the foreigner or may be granted *ex officio* by the competent labour authority.

II. Spain: ‘temporary residence permit for exceptional circumstances due to collaboration in the fight against organised networks’

Article 59 LODYLE and Articles 135–139 REDYLE feature two ‘temporary residence permit for exceptional circumstances which may be granted to foreigners due to collaboration in the fight against organised networks’. The two residence permits differ only in terms of the authority with which the foreigner collaborates. In terms of the necessary collaboration in the fight against organised networks, they also differ from the residence permit according to Article 127 REDYLE.²²²⁰ It is not clear from the statistics how many residence permits were granted on the basis of this provision.²²²¹

Introducing this residence permit created a legal incentive for victims, witnesses or other injured parties in contributing to the prosecution of

2219 Art 128(5)(b) REDYLE

2220 Cf. *Esteban de la Rosa*, Art 31 LODYLE in *Monereo Pérez/Fernández Avilés/Triguero Martínez* 506 and see Chapter 4.F.I.1.

2221 See Chapter 3.C.III.1.

the perpetrators²²²² of certain (administrative) offences.²²²³ This not only strengthens the collaboration between irregularly staying foreigners and the authorities but also improves the prosecution and conviction of criminals.²²²⁴ At first blush it appears that these two residence permits go beyond the provisions of international and EU law and offer better protection for those foreigners who collaborate with the authorities. However, closer analysis reveals that victims of exploitative employment may also obtain the residence permit discussed here. Since this can be derived from Article 13(4) Employers Sanctions Directive, as has already been explained in relation to ‘vulnerability’ and ‘victim protection’,²²²⁵ this also represents an implementation of EU law.

1. Requirements

Article 59(1) LODYLE stipulates that the foreigner must be residing irregularly.²²²⁶ Furthermore, the foreigner must be a victim, witness or have been injured in relation to one of the following (administrative) offences:²²²⁷ smuggling of human beings, irregular immigration,²²²⁸ labour

2222 Or participants; cf. *Vicente Palacio*, Art 59 LODYLE in *Monereo Pérez/Fernández Avilés/Triguero Martínez* (eds), *Comentario a la ley y al reglamento de Extranjería, Inmigración e Integración Social*² (2013) 942 (942).

2223 Cf. *Díaz Morgado*, La residencia de víctimas de trata de personas y la residencia por colaboración contra redes organizadas in *Boza Martínez/Donaire Villa/Moya Malapeira* 343f.

2224 See also *Vicente Palacio*, Art 59 LODYLE in *Monereo Pérez/Fernández Avilés/Triguero Martínez* 943.

2225 See Chapter 1.B.III.4.a. and Chapter 4.D.I.

2226 Cf. *Díaz Morgado*, La residencia de víctimas de trata de personas y la residencia por colaboración contra redes organizadas in *Boza Martínez/Donaire Villa/Moya Malapeira* 344f and *Vicente Palacio*, Art 59 LODYLE in *Monereo Pérez/Fernández Avilés/Triguero Martínez* 946.

2227 Cf. *Díaz Morgado*, La residencia de víctimas de trata de personas y la residencia por colaboración contra redes organizadas in *Boza Martínez/Donaire Villa/Moya Malapeira* 345f; *Vicente Palacio*, Art 59 LODYLE in *Monereo Pérez/Fernández Avilés/Triguero Martínez* 943f and 946, and especially Instrucción DGI/SGRJ/06/2006, 2.

2228 Art 318bis CP and Art 54(1)(b) LODYLE; cf. *Vicente Palacio*, Art 59 LODYLE in *Monereo Pérez/Fernández Avilés/Triguero Martínez* 946–948.

exploitation,²²²⁹ smuggling of workers (*tráfico ilícito de mano de obra*),²²³⁰ or exploitation in relation to prostitution.²²³¹ The smuggling of human beings differs from human trafficking in so far as the person concerned consents to the unlawful transportation,²²³² whereas force or intimidation is used in relation to human trafficking.²²³³ Furthermore, with regard to each act committed, the emergency situation of the persons concerned must have been exploited²²³⁴ and the act must have been carried out by organised groups or gangs.²²³⁵

‘Collaboration’ is understood to mean both the reporting of one of the aforementioned (administrative) offences, providing essential information or materials for the proceedings and making relevant statements.²²³⁶ According to the Spanish Supreme Court, an act does not meet the definition of collaboration if it results – so to speak – only by abiding the law.²²³⁷ Conversely, it is not necessary that the collaboration endangers the life, freedom or property of the person concerned.²²³⁸ According to case law, however, collaboration can be assumed if a foreigner files a complaint and makes relevant statements that lead to the identification and conviction of the offenders.²²³⁹ Nonetheless, it remains unclear whether, for example,

2229 Arts 311 and 312(2) CP; cf. *Vicente Palacio*, Art 59 LODYLE in *Monereo Pérez/Fernández Avilés/Triguero Martínez* 946 and 948.

2230 Art 312(1) CP.

2231 Art 188(1) CP.

2232 Art 318bis CP and cf. STS 4668/2016, ECLI:ES:TS:2016:4668

2233 Cf. *Vicente Palacio*, Art 59 LODYLE in *Monereo Pérez/Fernández Avilés/Triguero Martínez* 947.

2234 As is the wording of Art 59(1) LODYLE; cf. *Vicente Palacio*, Art 59 LODYLE in *Monereo Pérez/Fernández Avilés/Triguero Martínez* 944.

2235 For detail see *Vicente Palacio*, Art 59 LODYLE in *Monereo Pérez/Fernández Avilés/Triguero Martínez* 944f.

2236 Cf. *Vicente Palacio*, Art 59 LODYLE in *Monereo Pérez/Fernández Avilés/Triguero Martínez* 946 and *Vicente Palacio*, Art 59bis LODYLE in *Monereo Pérez/Fernández Avilés/Triguero Martínez* 966; for detail see STSJ Castilla-La Mancha 225/2016, ECLI:ES:TSJCLM:2016:225.

2237 STS 3389/2016, ECLI:ES:TS:2016:3389 and STS 3800/2016, ECLI:ES:TS:2016:3800; in these cases the person concerned merely complied with a court order.

2238 STSJ Castilla-La Mancha 225/2016.

2239 In this sense STSJ Castilla-La Mancha 225/2016, ECLI:ES:TSJCLM:2016:225; cf. *Vicente Palacio*, Art 59 LODYLE in *Monereo Pérez/Fernández Avilés/Triguero Martínez* 948f with further references.

filing a complaint would suffice in order for a permit to be granted.²²⁴⁰ The authorities' (broad) discretion leads to great legal uncertainty and increases the vulnerability of victims, witnesses, etc., who collaborate with them.²²⁴¹ It would therefore be appropriate to legally define the acts that satisfy the notion of collaboration.

In contrast to the 'temporary residence permit and work permit for exceptional circumstances for foreign victims of human trafficking', collaboration is a necessary requirement. This is also why the 'temporary residence permit for exceptional circumstances due to collaboration in the fight against organised networks' was analysed under 'other national interests'. The scope of application is therefore much narrower because the victim's personal circumstances are not taken into consideration.²²⁴²

2. Exemption from administrative penalties

The focus now turns to the question of the authorities with which collaboration is possible. On the one hand, Article 136 REDYLE stipulates the collaboration with non-police administrative authorities (*autoridades administrativas no policiales*), whereby a guideline concerning the law on foreigners states that the Labour and Social Security Inspectorate is one such authority.²²⁴³ On the other hand, Article 137 REDYLE concerns the collaboration with the law enforcement, tax or judicial authorities (*autoridades administrativas policiales, fiscales o judiciales*).

The authority with which a foreigner is collaborating must submit a statement to the authority responsible for the administrative penal procedure, which indicates the collaboration provided.²²⁴⁴ A central point here is that the collaborating foreigners can benefit from an exemption

2240 Along this line *Díaz Morgado*, La residencia de víctimas de trata de personas y la residencia por colaboración contra redes organizadas in *Boza Martínez/Donaire Villa/Moya Malapeira* 346f with further references.

2241 In this sense *Díaz Morgado*, La residencia de víctimas de trata de personas y la residencia por colaboración contra redes organizadas in *Boza Martínez/Donaire Villa/Moya Malapeira* 346f and *Defensor del Pueblo*, Recomendación (23.5.2016), Queja 16002509.

2242 Cf. *Vicente Palacio*, Art 59bis LODYLE in *Monereo Pérez/Fernández Avilés/Triguero Martínez* 960f and see Chapter 4.D.I.4.c.

2243 Instrucción DGI/SGRJ/06/2006, 1.

2244 Art 135(1) REDYLE; cf. *Díaz Morgado*, La residencia de víctimas de trata de personas y la residencia por colaboración contra redes organizadas in *Boza Martínez/Donaire Villa/Moya Malapeira* 347f.

from administrative penalties, as this should serve as a further incentive for collaboration.²²⁴⁵ They can be exempted from criminal liability due to irregular residency in an expulsion procedure²²⁴⁶ already initiated or also in relation to any other administrative criminal procedure.²²⁴⁷ The authority responsible for the administrative criminal proceedings has a duty to provide information on the exemption from administrative penalties.²²⁴⁸ Conversely, if the public prosecutor's office obtains knowledge of foreigners who meet the conditions for exemption and are vital for criminal proceedings, the public prosecutor's office can request the competent authority not to enforce the expulsion order.²²⁴⁹

Based on the report outlining the collaboration, the authority responsible for the administrative penal procedure then sends a proposal to the competent delegate or subdelegate of government²²⁵⁰ suggesting the exemption from criminal liability. The competent delegate or subdelegate shall then decide on the exemption and at the same time on the temporary suspension of the administrative penalty proceedings or the expulsion.²²⁵¹ The design of the exemption from administrative penalties bears resemblance to the 'temporary residence permit and work permit for exceptional circumstances for foreign victims of human trafficking'.²²⁵²

If liability is exempted, the foreigner is to be informed of the possibility to apply for a 'temporary residence permit for exceptional circumstances due to collaboration in the fight against organised networks'.²²⁵³ The authority is to support the person concerned in making the application. In-

2245 Cf. *Vicente Palacio*, Art 59 LODYLE in *Monereo Pérez/Fernández Avilés/Triguero Martínez* 943.

2246 Art 135(1) REDYLE in conjunction with Art 53(1)(a) LODYLE; cf. *Vicente Palacio*, Art 59 LODYLE in *Monereo Pérez/Fernández Avilés/Triguero Martínez* 942f.

2247 See *Díaz Morgado*, La residencia de víctimas de trata de personas y la residencia por colaboración contra redes organizadas in *Boza Martínez/Donaire Villa/Moya Malapeira* 346f with further references.

2248 Art 59(2) LODYLE; cf. *Díaz Morgado*, La residencia de víctimas de trata de personas y la residencia por colaboración contra redes organizadas in *Boza Martínez/Donaire Villa/Moya Malapeira* 347.

2249 Art 59(4) LODYLE.

2250 See Art 135(2) REDYLE.

2251 Art 135(3) REDYLE; cf. Instrucción DGI/SGRJ/06/2006, 4.

2252 Arts 59(3) and 59bis(4) LODYLE, as well as Arts 135 and 143 REDYLE. Cf. *Vicente Palacio*, Art 59bis LODYLE in *Monereo Pérez/Fernández Avilés/Triguero Martínez* 965 and see Chapter 4.D.I.4.

2253 Arts 136(1) and 137(1) REDYLE.

stead of such an application, the person concerned also has the possibility of assisted return to the country of origin.²²⁵⁴

3. ‘Provisional residence permit and work permit’

It is necessary in this context to draw a distinction between the different authorities. If the person concerned has collaborated with non-police administrative authorities, the application for a ‘residence permit and work permit’ is to be made to the delegate or subdelegate of government who issued the exemption. However, the Office of the Secretary of State for Migration is responsible for the decision.²²⁵⁵ If there has been collaboration with the police, tax or judicial authorities, the Office of the Secretary of State for Security is responsible for issuing the permit, but the application must be submitted to the competent police unit of the foreigners office.²²⁵⁶ The application is then forwarded with the aforementioned report on collaboration and a further report assessing the content of the procedure.

If the report is favourable, the person concerned is automatically granted a ‘provisional residence permit and work permit’, of which he or she must be informed immediately.²²⁵⁷ No new application is required, which is why the report is of such great importance.²²⁵⁸ The ‘provisional residence permit and work permit’ allows the holder to take up any employment.²²⁵⁹ The ‘provisional residence permit and work permit’ is characterised by the fact that it is valid from the time of notification until the decision on the final ‘residence permit and work permit’.²²⁶⁰ However, if the report is not favourable, no ‘provisional residence permit and work permit’ is granted.

2254 Cf. for detail Art 138 REDYLE.

2255 Art 136 REDYLE.

2256 Art 137 REDYLE.

2257 Arts 136(3) and (4) as well as 137(3) and (4) REDYLE.

2258 Cf. *Vicente Palacio*, Art 59 LODYLE in *Monereo Pérez/Fernández Avilés/Triguero Martínez* 951.

2259 Arts 136(6) and 137(6) REDYLE.

2260 Cf. *Díaz Morgado*, La residencia de víctimas de trata de personas y la residencia por colaboración contra redes organizadas in *Boza Martínez/Donaire Villa/Moya Malapeira* 349f.

4. Right to stay

If the outcome of the final decision on the ‘residence permit and work permit’ is positive, the permit is issued and is valid for five years; again it entitles the holder to engage in any employment.²²⁶¹ In any case, the extension of the duration from one to five years through the REDYLE is to be emphasised²²⁶² as it allows for a subsequent application for a permanent residence permit.²²⁶³ The required five years also include the period during which the person concerned held a ‘provisional residence permit and work permit’.²²⁶⁴

By comparison, in the event of an unfavourable outcome, the ‘provisional residence permit and work permit’ is automatically invalid. The deportation process will resume, whereby a deportation will usually be ordered unless there are reasons for just imposing a fine.²²⁶⁵ Where the deportation process is resumed, there must be consideration of the fact that the person concerned could apply for another ‘temporary residence permit for exceptional circumstances’ or may be eligible for such permit under certain circumstances.²²⁶⁶ If the requirements for one of the residence permits are met, the deportation proceedings are to be discontinued.²²⁶⁷

III. Interim conclusion

‘Other national interests’ is a distinctly national category of regularisations as it is derived almost entirely from provisions of domestic law. As these types of regularisations have not been influenced by international or EU law (with the exception of Article 13(4) Employers Sanctions Directive),

2261 Arts 136(7) and 137(7) REDYLE.

2262 In this sense *Díaz Morgado*, La residencia de víctimas de trata de personas y la residencia por colaboración contra redes organizadas in *Boza Martínez/Donaire Villa/Moya Malapeira* 350.

2263 Art 32 LODYLE.

2264 Arts 136(7) and 137(7) REDYLE.

2265 Instrucción DGI/SGRJ/06/2006, 4; cf. *Vicente Palacio*, Art 59 LODYLE in *Monereo Pérez/Fernández Avilés/Triguero Martínez* 953.

2266 Arts 136(9) and 137(9) REDYLE; see also *Lázaro González/Benlloch Sanz in Palomar Olmeda* 931f concerning the ‘temporary residence permit and work permit for exceptional circumstances for foreign victims of human trafficking’ and the parallel provision under Art 144(7) REDYLE; see Chapter 4.D.I.4.

2267 Art 241(2) REDYLE. See Chapter 3.C.III.3.b.

the residence permit extends beyond such higher-ranking laws, which in principle do not need to be observed in this context.

The comparison has shown that only two Spanish residence permits may fall under the purpose ‘other national interests’. Both regularisations grant certain public authorities the possibility to issue a residence permit to foreigners who collaborate with the authorities. Although not explicitly defined by law, ‘collaboration’ may be understood as reporting certain criminal offences, providing essential information or making relevant statements. Furthermore, it is also possible that the residence permit is granted on the grounds of national security or public interest, though it is not possible to determine from the literature or the case law what these notions actually mean. A clarifying step seems to be the reform via the Royal Decree 629/2022 that lays down that a residence permit may be granted to persons who collaborate with the relevant labour authority, whereby collaboration is specified as demonstrating the existence of him or her working in an undocumented situation of no less than six months in duration in the last year. However, it will be seen how this residence permit will prove itself in practice and if the same problems will arise as regarding the ‘temporary residence permit for reasons of employment roots’.

The procedural aspects of these permits feature key differences. The ‘temporary residence permit for exceptional circumstances for exceptional circumstances due to the collaboration with public authorities, or for reasons of national security or public interest’ is only granted for one year and corresponds in essence to the procedure laid down for ‘temporary residence permits for exceptional circumstances’.

In contrast, the ‘temporary residence permit for exceptional circumstances due to collaboration in the fight against organised networks’ is entirely different both with regard to the procedural aspects and the protection offered. For the most part, it corresponds to the residence permits granted to victims of human trafficking or foreign women who are victims of gender-based violence.²²⁶⁸ Such overlaps exist because the ‘temporary residence permit for exceptional circumstances due to collaboration in the fight against organised networks’ serves, *inter alia*, to transpose Article 13(4) Employers Sanctions Directive, thus allowing victims or other parties injured by ‘labour exploitation’ to apply for this type of permit. Unlike the residence permit that may be granted to victims of human trafficking, the ‘collaboration’ with the authorities is essential. As discussed

2268 See Chapter 4.D.I.4.–5.

above, the meaning of ‘collaboration’ is shrouded in uncertainty. The exemption from administrative sanctions, the possibility to receive a five-year ‘provisional residence permit and work permit’ and the fact that the residence and work permit is issued for five years show that the rule is capable of providing legal incentives to victims, witnesses or other injured parties in the prosecution of perpetrators of the stated offences.

As in the interim conclusion regarding ‘employment and training’, it is necessary to highlight another result from the comparison: neither Austria nor Germany has a regularisation that falls under the purpose ‘other national interests’. With regard to Austrian law, this can be explained by the generally restrictive and cautious attitude towards regularisations.²²⁶⁹ For Germany, however, it can be assumed that from a contextual perspective there is no need for regularisations that serve to protect other national interests.

G. Summary – The differentiated regularisation systems

Each of the three Member States features a differentiated system of regularisations. On the one hand, the Member States grant irregularly staying migrants a right to stay based on higher-ranking laws.²²⁷⁰ However, it is necessary to distinguish between the rights to stay that are mandatory to meet these obligations and those rights that go beyond the international and EU obligations. Put somewhat bluntly: the national rights to stay have been soaked in international and EU law. On the other hand, certain regularisations refer to different domestic contexts and the rights to stay are then granted on such basis. The categorisation forms a stable foundation for a future Regularisation Directive, since both the international and EU influences and the reference to contextual circumstances in the Member States have been shown.²²⁷¹

The breakdown of all regularisations in Austria, Germany and Spain has further shown just how differentiated each individual regularisation system is. Austria is certainly at the lower end of the spectrum, since in contrast to German and Spanish law there are quantitatively fewer regularisations and these are therefore not as effective in practice, at least according to the assumptions made here. From the perspective of irregu-

2269 See Chapter 4.G.

2270 See Table 1 in Chapter 1.B.III.

2271 See the hypothesis in Chapter 1.B.V.

larly staying migrants, the situation is aggravated by the fact that due to their status they do not have access to social benefits or health and that it is very difficult to meet most of the requirements set by the legislation. The most important regularisation is probably the ‘residence permit for reasons of Article 8 ECHR’, whereby respect for private and family life is relevant. The ‘residence permit in particularly exceptional cases’ targets those (ir)regularly staying aliens who do not reach the high threshold of private and family life in the sense of Article 8 ECHR, in particular rejected asylum seekers. The statistics highlight that the permit has a near-irrelevant role in practice due to the extensive hurdles that have to be overcome. In addition to five years’ continuous residence, the alien must have the ability to be self-sufficient – a criterion that is nearly impossible to fulfil where there is a lack of access to the labour market. Nonetheless, the regained access to the labour market for asylum seekers since June 2021 could lead to a higher number of residence permits in the future.

Spanish law features a wealth of regularisations. Three points are particularly noteworthy here. First, social roots, which – quantitatively speaking – is by far the most important regularisation. From the perspective of the individual, the requirements for granting a residence permit offer a pragmatic and effective way out of irregularity. Even though it already worked quite well in practice, it was reformed with the Royal Decree 629/2022 to even better address the needs of the Spanish labour market. Second, said Royal Decree additionally introduced a new type of roots, the so-called ‘temporary residence permit for reasons of training’ that used the German ‘toleration for the purpose of training’ as a role model. However, in contrast to the German toleration, the Spanish model is more generous as it grants irregularly staying foreigners an immediate right to stay. In this case, the foreigner has to prove that he or she has been in Spain for a continuous period of at least two years and is willing to take up a training. Third, Spanish law provides for regularisation for victims of human trafficking and for women who have been victims of gender-based violence. The first implements the Human Trafficking Directive in an exemplary manner and the second offers an effective system of protection for the problem of violence against foreign women. The temporary residence permits and work permits, which are very similarly structured, have a particularly sophisticated procedure that is very much framed around the needs of the victims. This procedure is divided into several ‘phases’, which enable the identification of the victims and to grant a ‘provisional residence permit and work permit’, as well as providing for an exemption from administrative penalties under certain circumstances.

German law is just as differentiated as Spanish law and features numerous regularisations. Special mention is due here to the ‘residence permit in the case of permanent integration’ and the ‘residence permit for well-integrated juveniles and young adults’, both of which can be derived from Article 8 ECHR and can be granted to tolerated persons. In this way, the German legislator has for the first time introduced a prospect of residency for this group, irrespective of age and a cut-off date, which is an expedient approach in light of the ongoing problem of ‘chain tolerations’. The ‘residence permit for persons who are enforceably required to leave the country, but whose departure is legally or factually impossible’ is quantitatively the most important regularisation in German law. The main case of application here is again the implementation of Article 8 ECHR. Last but not least, the ‘residence permit for the purpose of employment for qualified tolerated foreigners’ is a peculiar feature of German residency law, enacted due to the shortage of skilled workers. Interestingly, its role in practice has been limited, however, showing an increase in importance. This is probably due to the three-year ‘toleration for the purpose of training’ and the fact that this can be followed by the two-year residence permit (the ‘3 + 2 regulation’). The statement that foreigners residing unlawfully can earn their ‘right to remain’ holds water.

